

original

No. 35675-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JORGE EDILBERTO GOMEZ,

Appellant.

RECEIVED
APPELLANT'S BRIEF
JAN 11 2011
COURT OF APPEALS
DIVISION TWO

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

The Honorable Frederick W. Fleming, Judge

APPELLANT'S OPENING BRIEF

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PM 9/18/07

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove the essential elements of the crimes of unlawful possession of a firearm and possession of a stolen firearm.

2. Appellant assigns error to the emphasized portion of jury instruction 20:

A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

The State is not required to prove the firearm was operable at the time the defendant possessed it.

CP 100-101 (emphasis added).

3. Mr. Gomez was deprived of his constitutionally guaranteed right to effective assistance of counsel at trial and sentencing.

4. The sentencing court erred in holding that it had no discretion to order the current sentences to run concurrently with sentences imposed in another county.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove that Mr. Gomez was guilty of unlawful possession of a firearm and possession of a stolen firearm as charged, the prosecution was required to prove that the gun was a “firearm” as the term was defined for the relevant statutes. The Legislature chose to define a “firearm” as an object capable of firing a projectile by using an explosive.

Is reversal required where the prosecution failed to present evidence that the gun was capable of firing as required under RCW 9A1.040(1) and Supreme Court precedent?

Further, did the court err in giving an instruction which told the

jury the prosecution was “not required to prove the firearm was operable at the time the defendant possessed it”?

And was counsel ineffective in failing to object to the improper instruction?

2. Under RCW 9.94A.589, there is a mandatory presumption that sentences imposed for current offenses will be ordered to serve concurrently with other sentences if the defendant was not “under sentence” for a felony at the time the current offenses were committed.

Is reversal and remand for resentencing required where the sentencing court mistakenly believed that it did not have any discretion and was required to order the current sentences to run consecutively even though Mr. Gomez was not “under sentence of felony” at the time of the current crimes?

Further, was counsel prejudicially ineffective in failing to know the law applicable to his client’s case?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jorge E. Gomez was charged by second amended information in Pierce County Superior Court with second-degree possession of stolen property, residential burglary, first-degree unlawful possession of a firearm, and possession of a stolen firearm. CP 9-11; RCW 9.41.010(12), RCW 9.41.040(1)(a), RCW 9A.52.025, RCW 9A.56.140(1), RCW 9A.56.160(1)(a), RCW 9A.56.310(1).

After pretrial proceedings on March 20, April 13, May 25, and October 3, 2006, jury trial was held before the Honorable Judge Frederick

Fleming on October 3, 9, 11-12, 17, 2006.¹ The jury acquitted Mr. Gomez of the residential burglary but found him guilty of all other charges. RP 404; CP 105-108. On November 17, 2006, Judge Fleming ordered standard range sentences. CP 109-21.

Mr. Gomez appealed, and this pleading follows. See CP 128-39.

2. Relevant facts

Officer James Borosewicz of the Tacoma Police Department was on duty at about 5:30 in the evening on April 13, 2005, when he saw a vehicle make a right turn at an intersection that was posted “no right turn.” RP 223-25. He followed and “ran” the vehicle license plate and discovered that it was registered to a Honda. RP 225. The officer thought the car he was following was a Toyota, not a Honda. RP 225.

The officer stopped the car, noting that the “name plate” indicating the make of the vehicle was missing. RP 225-27. When the officer asked the driver for identification, he also asked the man to identify the type of vehicle he was driving. RP 226. The man said it was a Honda. RP 226.

The man’s Washington “ID” identified him as Jorge Gomez. RP 226. Upon looking at the identification, the officer realized that the license plates on the car were registered in Mr. Gomez’ name, but for a

¹The verbatim report of proceedings consists of 10 volumes, which will be referred to as follows:

the proceedings of March 20, 2006 (contained in the same volume as April 13, 2006, but separately paginated), as “1RP;”
the proceedings of April 13, 2006 (contained in the same volume as March 20, 2006, but separately paginated) as “2RP;”
the proceedings of May 25, 2006, as “3RP;”
the proceedings of October 3 and 9, 2006, contained in one volume and chronologically paginated, as “4RP;”
the chronologically paginated volumes containing the trial and sentencing proceedings of October 11, 12, and 17, and November 17, 2006, as “RP.”

Honda, not a Toyota. RP 226.

The officer questioned Gomez, who said he had purchased the car in the past few months. RP 227. According to the officer, however, upon further questioning, Mr. Gomez said he had borrowed the car from a guy named Anthony, whose last name and address Mr. Gomez did not know but who lived in Lakewood. RP 227. Mr. Gomez had a key which started the car. RP 229. According to the officer, the key was on a key ring with several other keys, all of which started the car. RP 229.

Officer Borocewicz checked the vehicle identification number ("VIN") of the car prior to writing Mr. Gomez a ticket and discovered that the car associated with that VIN had been reported stolen. RP 227-28. At that point, the officer decided to arrest Mr. Gomez. RP 230, 289.

After the arrest, Borocewicz searched the car with another officer, James Lang, who had arrived in the interim. RP 230, 289. 9 millimeter ammunition and a holster were found under the driver's seat. RP 233, 245. A backpack found on the front seat had paperwork in it for "James R. Powell." RP 240. Lang found "several stones, looked like jewels, loose jewels" in the car, along with "some knives, some coins and some watches." RP 240. Inside the trunk of the car were license plates which matched the Toyota, as well as a "bb gun." RP 241.

A "Steyr 9-millimeter" handgun was found inside a duffle bag inside the car. RP 232. The duffle bag was behind the front passenger seat, on the rear floorboard. RP 245. There were several feet between the driver's seat and the duffle bag, so that anyone trying to access the duffle bag from the driver's seat would have to reach behind the seats to do so.

RP 246.

According to Officer Borosewicz, paperwork found in the duffle bag was associated with Mr. Gomez, including his “paperwork for citizenship.” RP 235. Also in the bag were a bunch of car keys, and, according to the officer, Mr. Gomez’ wallet. RP 236-37.

The officer could not explain where Mr. Gomez had gotten his Washington identification from at the time of the original stop, if indeed Mr. Gomez’ wallet was in the duffle bag in the back seat. RP 249.

Unlike Officer Borosewicz, Officer Lang did not remember a gun ever being found in the car. RP 291. Although Borosewicz believed Lang had found the backpack in the car, Lang did not recall that. RP 239, 291. Lange remembered seeing a packet of papers which included citizenship papers but said he did not know where that packet was when it was found. RP 292. Lang never looked inside the black duffle bag. RP 294.

Officer Lang was asked if he and Officer Borosewicz had pulled everything out of the car and laid it on the trunk or hood in order to see what they had. RP 292. Lang did not answer directly but instead said he remembered seeing and “having property on the trunk.” RP 292. There were a number of bags involved. RP 292. When asked if he and Officer Borosewicz had then loaded all the property on the trunk into bags to make it easier to carry and move, Lang said he did not know “exactly how” the evidence was “moved into property” and did not see Officer Borosewicz take all of the property to the trunk of the car. RP 292. Instead, Lang could not “recall exactly” what he saw, except that Borosewicz was “going back and forth.” RP 292.

Mr. Gomez was not alone in the car when it was stopped. RP 230. There was another man in the car, Marshall Glabe. RP 230, 293. Mr. Glabe was sitting in the back seat, directly behind the driver's seat, when the car was stopped. RP 246, 248.

When he was pulling the car over, Borosewicz did not see any movement indicating that Mr. Gomez was shoving anything under a seat or reaching back towards a duffle bag. RP 247. The officer also could not say if there was a "well" underneath the front seat which would have prevented the driver from being able to push something under the seat. RP 248.

Officer Borocewicz testified that Mr. Gomez said the guns were not his but he thought they belonged to Anthony. RP 250-51.

Brian Finch testified that he had known Mr. Gomez at least six years, because Gomez was his sister-in-law's son. RP 265. Finch first said he thought Gomez had visited his home 20-50 times, and produced pictures of Gomez taken at a birthday party. RP 266. Later, Finch amended his testimony to say Gomez was only at the house for some family gatherings, not every one, and the "real number" of times he had been at Finch's house was actually more like "approximately 20," not up to 50. RP 271.

Finch did not know Gomez well and never visited Gomez although he had visited others at Gomez' home. RP 266-67. The pictures from the birthday party were taken four or five years earlier and, since that time, Finch had not had "much contact" with Gomez. RP 272-73.

Finch reported that, in early April of 2005, his home was

burglarized and a computer, stereo, some "odds and ends" and a "Steyr 9mm pistol" were taken. RP 267. According to Mr. Finch, Mr. Gomez had previously seen that pistol at Finch's home. RP 268. Finch admitted he never pointed out to Gomez anything about the gun which would have specifically identified the gun as belonging to Finch. RP 274.

Mrs. Yet Sok testified that the Toyota which Mr. Gomez was driving was hers and had been stolen on April 7, 2005. RP 277-78.

James Powell testified that his home on Fox Island was burglarized sometime between the morning of April 13 and 9 p.m. on the 14th. RP 281-87. A "bunch of jewelry" and stones such as rubies, emeralds and aquamarines were stolen, along with several other items, including some insurance policies, the title to his car and a bb gun. RP 282-87.

Powell admitted he had seen some people he thought were staking out his home three or four months before the burglary but did not recall what those people looked like. RP 287. He had no idea who burglarized his home. RP 287.

Mr. Gomez testified that, on April 13, 2006, he did not have a functioning car because a friend had let his car overheat on the freeway several days before. RP 303-315. As a result, he took several buses that morning, in order to get to Pierce County Alliance and participate in a drug test required for drug court participation. RP 303-305. Gomez got there a little before 12:30 and spoke to his counselor, Tiffany Smith. RP 306.

Because he had to pay to take a urine test, Mr. Gomez did not have money to get a bus ride home, so he called an acquaintance, Marshall

Glabe, and asked for a ride. RP 306. Glabe arrived downtown driving the Toyota Camry, at about 4:30 p.m. RP 307. Glabe said he needed to go back to his apartment to pick up a few things, and Gomez rode along. RP 307.

The black duffle bag was one of the things Glabe picked up at his home. RP 307-308.

After Glabe brought the bags to the car, he took them and sat in the back seat, saying he had to go through them. RP 309. Mr. Gomez said he needed to go home, but Glabe said that some people wanted to talk to Gomez. RP 309. Gomez told Glabe he did not want to talk to those people, and Glabe said Gomez was “gonna drive the car.” RP 309. Glabe then pulled out a gun and ordered Gomez to get into the driver’s seat. RP 309

Mr. Gomez did what Glabe ordered, taking the car key Glabe provided. RP 310. As he slid over the front seat to the driver’s side, Gomez noticed that the stereo looked like it did not belong and there was a credit card, some keys and a knife sitting next to the “shifter.” RP 310.

Gomez started up the car and asked Glabe where he was supposed to go. RP 310. Glabe ordered him to go “pick up Mike,” so Gomez started driving in the relevant direction. RP 310. Worried and scared, Gomez was sure Glabe would hurt him if Gomez did not comply. RP 311.

After a few blocks, Gomez noticed a police officer behind them. RP 311. Gomez told Glabe about it and said that he was not going to drive towards Mike’s house because he did not want the people there to “get upset about why cops were following” them. RP 311. Gomez then told

Glabe he was going to take a left turn, and Glabe approved. RP 311.

When Gomez turned, however, the officer followed. RP 311. Mr. Gomez then decided to look for a reason to get pulled over, so he made an illegal right-hand turn. RP 312. Gomez was hoping that the officer would give them a ticket and it would scare Glabe enough that he would let Gomez just walk away. RP 312.

When asked for identification, Gomez took it from his backpack in the front passenger seat. RP 313. When the officer said Gomez' plates were on the car, Gomez explained that, when his car had overheated on the freeway, he had gone to it and taken everything from the car, which was no longer "drivable." RP 315. He had taken the license plates off the car and left them at a house where mutual acquaintances of Gomez and Glabe were living. RP 315. Gomez also explained why that he had a number of identifying papers, like his birth certificate, social security card and citizenship papers in his backpack because his counselor had wanted to make copies of them. RP 314, 328.

Mr. Gomez did not give Mr. Glabe permission to put Gomez' plates on the Toyota. RP 315. Gomez had no idea those plates were on the car when he was driving it, until the officer told him. RP 315.

Gomez explained that he gave the officer a convoluted story about why the plates were on the wrong car because he was worried about his safety and that of his girlfriend at the time. RP 316. Mr. Gomez had no control over the people Mr. Glabe could contact and use to make something bad happen. RP 316. Gomez believed Glabe would follow through with his threat, based upon previous experience with Glabe. RP

317. Gomez had been present once when Glabe took an argument “beyond just a regular hand-to-hand fight” by pulling a knife. RP 317.

Gomez obviously knew there was a gun in the car, because Glabe pulled it on him. RP 319. Gomez was not, however, the one with the gun and he had no idea the gun was stolen or that it belonged to Finch. RP 319. He did not recall seeing the gun at Finch’s house, where he had only been a few times. RP 319-25.

Gomez had his papers with him in his backpack. RP 319-38. He thought the officers had accidentally put his papers back in the wrong bags when they carried everything towards the car. RP 328.

After his arrest, Gomez’ girlfriend reported that Glabe had come to her house and they had gotten together to bail Gomez out. RP 322. About two months prior to trial, Gomez was assaulted by two inmates who told him he should not take the case to trial “because it would bring up certain people that did not want any involvement.” RP 323. The assailants were people Gomez knew to be associated with Glabe. RP 323.

Gomez explained that, at the time of trial, he was no longer involved with his girlfriend, something Glabe knew. RP 324. As a result, Gomez was able to testify about what Glabe had done, because Gomez’ girlfriend was no longer a viable “bargaining chip.” RP 324. Gomez was not as worried about his family, which had “already taken steps.” RP 324.

The jury acquitted Gomez of the residential burglary of Powell’s home, but convicted him of possessing the stolen property (the car), unlawful possession of a firearm, and possession of a stolen firearm. RP 404.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE OBJECT MET THE STATUTORY DEFINITION OF “FIREARM” FOR THE GUN OFFENSES, THE JURY INSTRUCTION WAS INCORRECT AND COUNSEL WAS INEFFECTIVE

Under the state and federal due process clauses, the prosecution shoulders the constitutional burden of proving every essential element of a charged crime, beyond a reasonable doubt. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). If the prosecution fails to meet that burden, the conviction must be reversed and dismissed. State v. Smith, 155 Wn.2d 496, 504-505, 120 P.3d 559 (2005).

In this case, this Court should reverse both of the convictions involving the firearm possession, because the prosecution failed to prove the essential elements of each crime by failing to prove that the gun met the statutory definition of a “firearm” as required. Further, the court erred in giving the portion of instruction 20 which told the jury the prosecution was “not required to prove the firearm was operable at the time the defendant possessed it,” and counsel was ineffective in failing to object to that instruction.

- a. Relevant facts

At the time it was stolen, Mr. Finch claimed the gun was in “excellent condition” and “[o]perable.” RP 269-70. At the time of trial, Finch testified that the gun appeared to be operable but he “wouldn’t know” if the firing pin or another necessary part was broken. RP 274. He also admitted he was only guessing that the gun was “operable” but really

had no idea if it was, although he did not see any visible damage to the gun. RP 275-76.

Officer Borosewicz testified that he had looked at the “clip” to see whether it functioned and it fit in the gun. RP 296. He also tested the “slide.” RP 296. While the officer said he did not see anything that would keep the gun from functioning properly, he admitted the gun was never tested. RP 296. The officer also conceded that he could not definitively say the gun was “operable” because he had never fired it. RP 296.

In arguing that Mr. Gomez was guilty of the crimes, the prosecutor told the jury that “the State doesn’t have to prove” the gun was “operable.” RP 355. Instruction 20 similarly told the jury:

A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

The State is not required to prove the firearm was operable at the time the defendant possessed it.

CP 100-101 (emphasis added).

- b. There was insufficient evidence to prove the gun met the statutory definition of a “firearm” as required under *Pam*

RCW 9.41.040(1)(a) defines first-degree unlawful possession of a firearm as follows:

A person, whether adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, or has in his or her possession, or has in his or her control any firearm after having been previously convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense[.]

The Legislature chose to specifically define “firearm” for the purposes of Title 9.41 RCW. In the “definitions” applicable for the title, contained in

RCW 9.41.010, "firearm" is defined as follows:

(1) "Firearm" means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.

In State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983), overruled in part and on other grounds by, State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989), the Washington Supreme court interpreted this language, contained in a previous incarnation of the statute, and declared that, under that statute, it was not enough for the prosecution to prove the presence of an object which appears to be a gun. 98 Wn.2d at 754. Instead, the Court held, "the State must prove the presence of a 'firearm'" as specifically defined in the statute. 98 Wn.2d at 754. Proof that there was a "gun like" object was insufficient without proof that object could be fired. 98 Wn.2d at 754.

Put simply, the Court declared, "a gun-like object which is incapable of being fired is not a 'firearm' under this definition." Id; see also, State v. Mathe, 35 Wn. App. 572, 668 P.2d 599, (1983), affirmed, 102 Wn.2d 537 (1984).

Thus, in order to prove Mr. Gomez guilty of the crime of first-degree unlawful possession of a firearm, the prosecution had to prove that the object possessed was not just "gun-like" but was in fact capable of being fired.

Similarly, to prove guilt for the crime of possession of a stolen firearm, the prosecution had to prove the gun was capable of firing a projectile. RCW 9A.56.310 defines the crime of possessing a stolen firearm. Although the statute is not contained in RCW Title 9.41 and thus

not automatically subject to the statutory definition of “firearm” contained in RCW 9.41.010, the Legislature specifically made it so. RCW 9A.56.310 provides in relevant part:

(1) A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a stolen firearm.

...

(5) *As used in this section, "firearm" means any firearm as defined in RCW 9.41.010.*

(Emphasis added). Thus, to prove the crime of possession of a stolen firearm, the prosecution was required to prove the item possessed was not only stolen but also that it met the statutory definition of “firearm,” i.e., was capable of firing as stated in Pam.

The prosecution failed to meet its burden of proof for both gun offenses, because it presented no evidence the gun was capable of firing a projectile as required under RCW 9.41.010 and Pam. Mr. Finch admitted he “wouldn’t know” if the gun was operable and was only guessing that it was. RP 274-76. And Officer Borosewicz admitted the gun was never tested and he could not say the gun was capable of firing a projectile, because he never fired it. RP 296. Because there was insufficient evidence to prove that the object, however “gun-like,” was a “firearm” as the Legislature chose to define that term, the prosecution failed to meet its burden of proof on both the unlawful possession and possession of a stolen firearm crimes.

In response, the prosecution may argue that it is not required to prove the object was a “firearm” in order to prove unlawful possession of a firearm or possession of a stolen firearm. This Court should reject any

such claim, likely to be based in this Court's decision in State v. Faust, 93 Wn. App. 373, 967 P.2d 1284 (1998), and its progeny. In Faust, the Court addressed whether a firearm sentencing enhancement could be imposed when the gun in question was malfunctioning at the time of the crime. 93 Wn. App. at 376. While admitting that the definition of the statute required that the relevant "device" must be capable of being fired at some point, the Court found the statute "ambiguous" on when that capability must be shown to exist. Id.

Rather than applying the "rule of lenity" to the ambiguity, however, the Court looked at "other sources" regarding the imposition of firearm sentencing enhancements. Id. The Court concluded that the issue was not whether the gun was capable of firing, but was a gun "in fact." 93 Wn. App. at 380-81. In reaching this conclusion, the Court relied on the reasons underlying imposition of weapons enhancements, including that an unloaded or non-functioning gun could still create a reasonable apprehension of harm in another. 93 Wn. App. at 381.

The problems with applying Faust and its progeny here are numerous.

First, Faust dealt with the different situation of a sentencing enhancement for firearms. The reasons underlying the decision in Faust included that the use of a gun-like object could cause the same apprehension in another as an actual gun. It makes little sense, when a defendant uses a "gun-like" object in a "gun-like" way, to require proof that the gun was actually "operable." Regardless whether it can actually fire, the object in that situation has been used as if it were capable of

firing, thus causing the same fear in the victim, who has no way of knowing she does not face an actual “firearm.” That is not the situation here.

Further, Faust is simply wrong. Faust declared that, under RCW 9.41.010, an object “need not be loaded or even capable of being fired to be a firearm.” 93 Wn. App. at 379. But RCW 9.41.010(1) specifically requires that an object, however “gun-like,” is only a firearm if it is “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” RCW 9.41.010. While Faust is correct that the statute is ambiguous about exactly *when* the object must be so capable, there is no ambiguity in the statute about *whether* that capability must exist.

Faust ignored the plain language of the statute and involved a different context than that present here. This Court should not follow Faust or its progeny and instead should follow the plain language of the statute, which requires proof the prosecution did not provide here.

Reversal is required. Where, as here, the prosecution fails to present sufficient evidence to prove its case, the double jeopardy clauses of the state and federal constitutions prohibit retrial. See State v. Devries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003); State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982), cert. denied, 459 U.S. 842 (1982). Because the state failed to present sufficient evidence to prove the gun met the statutory definition of a “firearm,” required for both offenses, this Court should reverse and dismiss the convictions for possession of a stolen firearm and first-degree unlawful possession of a firearm.

c. The instruction was in error and counsel was ineffective

Because the prosecution was required to prove the object in question was a “firearm,” it had to prove that the object was capable of firing a projectile. See Pam, 98 Wn.2d at 754. Instruction 20 told the jurors otherwise. With that instruction, the prosecution told the jury that the prosecution was “not required to prove the firearm was operable at the time” of the crimes. CP 99-100.

Reversal is also required based upon the court’s error in giving this instruction and counsel’s ineffectiveness in failing to object. Jury instructions must accurately state the law and not mislead the jury. State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002), cert. denied, 538 U.S. 945 (2003).

Further, the accused are entitled to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel’s representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). This is determined by showing that, but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Here, had the jury been properly instructed, it would not have found Mr. Gomez guilty of the firearm possession offenses, because the

prosecution failed to prove the item in question met the statutory definition of a “firearm.” Jury instruction 20 told the jury that the prosecution did not truly have to meet the statutory requirements, an incorrect statement of the law despite this Court’s holding in Faust. Counsel’s failure to object to the instruction allowed it to go to the jury unchecked. Had counsel objected and provided the relevant statute, the instruction would likely not have been given, and the jury so misled. This Court should also reverse based upon the error in giving the instruction and counsel’s ineffectiveness, as well as the insufficiency of the evidence.

2. THE SENTENCING COURT ERRED IN HOLDING THAT IT DID NOT HAVE DISCRETION TO ORDER THE SENTENCES TO RUN CONCURRENTLY AND COUNSEL WAS INEFFECTIVE

Even if reversal was not required based upon the insufficiency of the evidence, Mr. Gomez would still be entitled to relief, because the sentencing court erred in holding that it did not have discretion to order the sentences to run concurrently with sentences previously imposed in Lewis County.

a. Relevant facts

At sentencing, the prosecutor noted that Mr. Gomez was already serving 68 months in custody for several convictions from Lewis County. RP 415. The prosecutor argued that the court should impose the sentences on the current cases to run consecutively with the Lewis County counts. RP 415. Without submitting evidence of the judgments and sentences or other documents regarding those counts, the prosecutor declared that the convictions were

entered on October 5th of last year and were for residential burglary, two counts - - this is on three different cause numbers - - residential burglary, two counts; theft one, two counts, and a burglary in the second degree, one count.

RP 415.

The prosecutor argued that the court should not run the current sentences concurrently with those in Lewis County, claiming that doing so “would essentially mean the defendant had walked on five prior felonies, including a burglary in the first degree, which was reduced to a residential burglary.” RP 416.

In addressing the prosecutor’s sentencing recommendations, the court first said that it had “to follow the law.” RP 417. Regarding whether the sentences should run concurrently or consecutively to the Lewis County cause numbers, the court stated:

the State also is telling me that they are going to be asking that the sentence here today in this cause number run consecutive to any other matters that Mr. Gomez may be facing, and I think that that’s the law. I think that any other cause numbers, that this cause number is obviously a different cause number and must run consecutive to any other Judgment and Sentence that has previously been entered.

RP 417-18 (emphasis added). When the court asked counsel, “Do you disagree with that,” counsel responded, “No, I don’t, Your Honor.” RP 418.

The Judgment and Sentence listed five adult convictions which appear to be from Lewis County in 2005, as follows.

<u>Crime</u>	<u>Sentence date</u>	<u>Jurisd.</u>	<u>Date of crime</u>
Res. Burglary	10/27/05	Lewis	04/08/05
Res. Burglary	10/27/05	Lewis	04/10/05

Theft 1	10/27/[05] ²	Lewis	04/10/05
Burglary 2	10/27/05	Lewis	04/20/05
Theft 1	10/27/05	Lewis	04/20/05

CP 119-21.

b. The court erred and counsel was again ineffective

The superior court erred in believing that it had no discretion and was required to order the current sentences to run consecutively with the sentences imposed in Lewis County. This issue is governed by RCW 9.94A.589. See State v. Mulholland, ___ Wn.2d ___, ___ P.3d ___ (2007 Wash. LEXIS 578). Under that statute, if a person is “not under sentence for conviction of a felony” when they commit the current felony, there is a presumption that the current sentences will run concurrently to any other felony sentences. RCW 9.94A.589(3). The sentencing court has the discretion to override the presumption, but must expressly so order. State v. Klump, 80 Wn. App. 391, 396, 909 P.2d 317 (1996); State v. Linderman, 54 Wn. App. 137, 139, 772 P.2d 1025, review denied, 113 Wn.2d 1004 (1989).

Here, Mr. Gomez was not “under sentence for conviction of a felony” at the time of the current offenses. A person is not “under sentence” under the statute if they have not yet been sentenced for the other crimes at the time the current crimes were committed. See, e.g., State v. Jones, 137 Wn. App. 119, 125, 151 P.3d 1056 (2007). The current crimes were alleged to have been committed on April 13, 2005. CP 9-11.

²The document lists the Theft 1 with a crime date of 04/10/05 as being sentenced on 10/27/06, not 2005, but it appears clear from the context that was a typographical error and the correct year was 2005.

The Lewis County crimes were alleged to have been committed on April 8, 10 and 20, 2005, and were not sentenced until October 27, 2005. CP 109-21.

Mr. Gomez was thus not under “sentence” for the Lewis County felonies on April 13, 2005, the date of the current crimes - he had not even committed some of them.

Under RCW 9.94A.589(3), the sentencing court was vested with the discretion to decide whether to override the statutory presumption of concurrent sentences and order consecutive sentences. It was *not* prohibited from imposing concurrent sentences, as the court believed. Instead, it was required to impose concurrent sentences but had the discretion to depart from that requirement in an appropriate case. The court erred in holding that it had no discretion to order the sentences to run concurrently to the Lewis County convictions.

Counsel was again ineffective in representing Mr. Gomez on this point. Counsel has a duty to, “at a minimum,” to conduct a “reasonable investigation” of all reasonable lines of defense in order to make “informed decisions” about how to represent his client effectively. In re Davis, 152 Wn.2d 647, 721-22, 10 P.3d 1 (2004). Yet here counsel apparently failed to even look at the relevant law. Had he done so, he would have seen that the requirement of consecutive sentences was not applicable, because that requirement only applies if a person commits another felony “while under sentence for conviction of a felony.” RCW 9.94A.589(1). No reasonable attorney would so fail to know the law and be prepared to argue and present it on his client’s behalf. See, e.g., State v.

Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (ineffectiveness which allowed error of law and prejudiced client).

Further, even if Mr. Gomez *had* been “under sentence” at the time of the current offenses, the court still would have had discretion to order the sentences to run concurrently, if it so chose. See Mulholland, ___ Wn.2d at ___ (2007 Wash. LEXIS 578).

The sentencing court erred in holding that it did not have discretion to order the sentences to run concurrently with those previously ordered in Lewis County. Further, counsel failed to even know the law relevant to his client’s case. Had counsel looked at the statute, he could have provided it to the court as authority. Had the court been provided with that authority, it would not have erroneously believed it had no discretion to order the sentences to run concurrently. Reversal and remand for resentencing is required. And on remand, new counsel should be appointed, as counsel’s ineffectiveness prejudiced his client and resulted in a far longer sentence than should have been imposed.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the convictions. In the alternative, this Court should reverse and remand with instructions for new counsel to be appointed for sentencing and for the sentencing court to exercise the discretion it did not think it had, regarding ordering the sentences to run concurrently rather than consecutively.

DATED this 18th day of September, 2007.

Respectfully submitted,



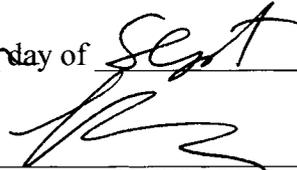
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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Jorge Gomez, 888423, WCC, P.O. Box 900, Shelton,
Washington 98584.

DATED this 18th day of Sept, 2007.


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