

NO. 36233-3-II  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

DEMOND L. ROBERTS,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF MASON COUNTY

Before the Honorable Toni A. Sheldon, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The State presented insufficient evidence to establish possession, an essential element of unlawful possession of a firearm.

2. The State failed to present sufficient evidence to establish knowledge, an essential element of unlawful possession of a firearm.

3. The trial court judge erred by improperly commenting on the evidence by asking a police officer in the presence of the jury, whether both handguns “currently are inoperable,” implying the court’s belief that the handguns were previously operable, thereby constituting a “firearm” as defined by RCW 9.41.010(1).

4. The trial court abused its discretion by failing to determine whether the two current convictions for unlawful possession of a firearm in the first degree encompassed the same criminal conduct for purposes of calculating Roberts’ offender score?

5. The trial court erred in permitting Roberts to be represented by counsel who provided ineffective assistance by failing to properly preserve the issue relating to the trial court’s improper comment on the evidence.

6. The trial court erred in permitting Roberts to be represented by counsel who provided ineffective assistance at sentencing.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was there sufficient evidence to establish that Roberts possessed two handguns, where the State presented no evidence that Roberts was seen in actual possession of the handguns and where the State presented insufficient evidence that Roberts was ever in constructive possession of the handguns? Assignment of Error No. 1.

2. Was there sufficient evidence to convict Roberts of unlawful possession of a firearm where the State presented insufficient evidence to establish that Roberts had dominion and control over the trailer in which the handguns were found and where Roberts was never seen in physical possession of the handguns? Assignment of Error No. 1.

3. Where the evidence does not establish that Roberts exercised dominion and control over the trailer where police found the handguns, where both handguns were found in the living room of the trailer and where Roberts was located by police in the master bedroom, and where no witnesses testified conclusively to having seen Roberts with the handguns, did the State fail to present sufficient evidence to establish the essential element of knowledge? Assignment of Error No. 2.

4. Does the failure of the State to prove, beyond a reasonable doubt, each and every element of the crime of unlawful possession of a firearm require reversal and dismissal of Roberts' convictions? Assignments of Error No. 1 and 2.

5. Whether the trial court judge improperly commented on the evidence, where the judge asked a police officer in the presence of the jury whether both handguns “currently are inoperable”? Assignment of Error No. 3.

6. A trial court is required to determine whether multiple current offenses encompass the same criminal conduct for purposes of calculating an offender score. Multiple current convictions for unlawful possession of a handgun that occur at the same time and place encompass the same criminal conduct as a matter of law. Did the trial court abuse its discretion when it separately counted two convictions for unlawful possession of a firearm for purposes of calculating Roberts’ offender score? Assignment of Error No. 4.

7. A criminal defendant’s constitutional right to the effective assistance of counsel is violated when counsel’s performance is deficient and the deficiency is prejudicial to the defense. Here, defense counsel failed to properly preserve the issue regarding the court’s comment on the evidence and failed to argue the two convictions for unlawful possession of a firearm encompassed the same criminal conduct for purposes of calculating Roberts’ offender score. Was counsel’s performance deficient and prejudicial so as to deprive Roberts of his right to effective assistance of counsel? Assignments of Error No. 5 and 6.

**C. STATEMENT OF THE CASE**

**1. Procedural history:**

By amended information filed April 5, 2007, the Mason County Prosecutor charged Appellant Demond Roberts with two counts of unlawful possession of a firearm in the first degree.<sup>1</sup> Clerk's Papers [CP] at 69-70. The State alleged that Roberts possessed a Browning 9 mm handgun and a silver Colt .22 caliber target pistol on December 11, 2006. CP at 69-70.

No pre-trial motion was filed nor heard regarding a CrR 3.6 hearing. The matter was tried to a jury on April 5, 6 and 10, 2007, the Honorable Toni A. Sheldon presiding.

**2. Jury instructions:**

Defense counsel did not take exceptions to requested instructions not given nor objected to instructions given. 1RP at 154.

**3. Verdict:**

The jury found Roberts guilty of two counts of unlawful possession of a firearm in the first degree as charged in the amended information. CP at 26, 27. 1RP at 183-84.

**4. Sentencing:**

The matter came on for sentencing on April 19, 2007. 2RP at 187-

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<sup>1</sup> RCW 9.41.040(1)(a).

204. Roberts was given an opportunity for allocution. 2RP at 198-199. Roberts initially requested to be sentenced under the Special Drug Offender Sentencing Alternative<sup>2</sup> [DOSA]. The court found that Roberts was precluded from consideration for DOSA due to a Thurston County conviction in cause number 03-1-401-8. 1RP at 191. The court calculated his offender score at 10 and imposed a standard range sentence of 116 months. 2RP at 198. CP at 16.

Timely notice of this appeal followed. CP at 8.

**5. Substantive facts:**

Demond Roberts testified that he was driven to Sherry Southmayd's trailer early on the morning of December 11, 2006. 1Report of Proceedings [RP] at 124.<sup>3</sup> Southmayd lives in a singlewide, two bedroom trailer located at 261 Southeast Craig Road, No. 4, in Shelton, Washington 1RP at 13, 14. Roberts testified that a friend—Donny Asbach—drove him to Southmayd's trailer in a pickup truck, followed by Asbach's girlfriend in a separate vehicle. 1RP at 109-110, 124. Roberts stated that after they left him at the trailer, they both left in her car and went "back to Olympia." 1RP at 125.

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<sup>2</sup> RCW 9.94A.660.

<sup>3</sup> The Verbatim Report of Proceedings consists of two volumes of transcripts [RP], which are referred to in this Brief as follows:  
1RP April 5, 6, and 10, 2007, jury trial  
2RP April 19, 2007, sentencing hearing

Roberts testified that a few days earlier Southmayd had called him to ask him to work on her car. 1RP at 108. Roberts was using methamphetamine, and had been awake for eleven days by December 11. 1RP at 109. It was too dark to work on her car when he arrived, so Southmayd and Roberts took her son to school using her car, and then returned to her trailer. 1RP at 110. Southmayd left for work and Roberts took a shower at her trailer and then went into the back bedroom where there was a heater to get warm. 1RP at 111-12. Roberts testified that he went to sleep in the bedroom and did not wake up until police entered the bedroom and placed him under arrest. 1RP at 112, 113.

Southmayd testified that Roberts arrived at her trailer at 4:00 a.m. 1RP at 15. She said that he brought “a duffle bag, a handbag, a couple of different kinds of bags” into the trailer when he arrived. 1RP at 21. She did not see what, if anything, was in either of the bags. 1RP at 31. She testified that Roberts brought a camera with him, but did not see how he carried it or whether he got it from either of the bags. 1RP at 31-32.

Southmayd stated that Roberts was trying to contact his former girlfriend Julia Santamaria-Schwartz, who is Southmayd’s friend. 1RP at 16. He asked Southmayd to contact Santamaria-Schwartz on his behalf. 1RP at 17. She attempted to call Santamaria-Schwartz several times before taking her son to school, and attempted again after she and Roberts

returned, but was not able to reach her. 1RP at 20. She testified that she and Roberts took her son to school at 8:45 a.m., and that that they used the pickup truck, not her car. 1RP at 18, 19.

Southmayd left for work at 10:30 a.m. 1RP at 21. Southmayd stated that she moved the pickup truck out of the way, then drove her own car to work. 1RPat 32.

Law enforcement was called to Southmayd's trailer regarding Roberts, who "had several DOC warrants for his arrest." 1RP at 36, 43, 44. Police were unable to receive a response after phoning the trailer and yelling into the trailer. 1RP at 45. After several hours, police fired tear gas canisters into the trailer, waited twenty minutes and then entered. 1RP at 45-46. Blankets covered the rooms leading from the hallway, including a spare bedroom, bathroom, and master bedroom. 1RP at 46, 47. Police entered the master bedroom and found Roberts underneath a mattress, which had been partially moved off a set of box springs. 1RP at 47. Roberts was taken into custody. 1RP at 48. An officer who placed Roberts under arrest on rebuttal that Roberts was awake when they entered the trailer, and that he was argumentative, telling them that he had been asleep. 1RP at 128-29.

In the living room, Deputy William Reed found a black 9 mm handgun on the couch and a silver .22 caliber handgun located between a

television set and a couch. 1RP at 46, 49. On the floor in front of the couch police found a pair of blue jeans with a belt and an attached knife scabbard. 1RP at 49. Inside the scabbard police found a loaded clip for a 9 mm handgun. 1RP at 49. Ammunition was found in the back of the pickup truck. 1RP at 39. Southmayd testified that she does not own any firearms and does not keep firearms in her house. 1RP at 22. Roberts denied owning the handguns, bringing them into the trailer, or knowing that they were in the trailer. 1RP at 114. Roberts testified that he had a black duffle bag and a hard shell fold up camera and that he brought to the trailer. 1RP at 117.

Southmayd told Deputy Reed that the blankets were put up in the hallways because the trailer was cold and she wanted to keep it warmer. 1RP at 63.

At the conclusion of Deputy Reed's testimony, the State moved to introduce exhibits 1 through 15, including the handguns, marked as Exhibits 20 and 21. 1RP at 61. The following exchange took place in the presence of the jury:

THE COURT: And I would just verify with the officer that both of the guns currently are inoperable, correct?

MR. SCHUETZ: They've been made safe.

THE COURT: Alright.

MR. SCHUETZ: That's not to say they're not working firearms.

THE COURT: That was the wrong word. They are made safe and are in safe condition right now.

DEPUTY REED: Yes. This one is locked open. The other one is completely locked open.

THE COURT: Thank you.

1RP at 61-62.

Renee Robinson testified that that she was at a friend's house and a person at the house was selling the handguns police found in the trailer. 1RP at 77, 90. She bought the guns for \$200.00 early on the morning of December 11 and took them to Southmayd's trailer to show Roberts. 1RP at 76-77, 91. She stated that she had always wanted a gun, so she bought the guns and ammunition. 1RP at 77. She wanted to show them to Roberts—her boyfriend—and she went to Southmayd's house at approximately 10:45 a.m. on the morning of December 11 in order to find him. 1RP at 79. She called first, but no one answered, so she drove there. She stated that the front door was locked, so she went into the trailer through the back door. 1RP at 79. She stated that she heard Roberts snoring in the bedroom. 1RP at 80. She kicked him but he did not wake up. 1RP at 80. Robinson testified that she was high on methamphetamine and that she got the guns out to “mess around with them.” 1RP at 81. She

put one clip into the knife sheath “where he keeps his knife.” 1RP at 83. She stated that the jeans, belt and knife sheath belonged to Roberts. 1RP at 96. Robinson then “had an emergency” and “went to the mall[,]” leaving the handguns at the trailer. 1RP at 81. She returned a few hours later but the police would not let her in, so she left. 1RP at 82.

Roberts stated that he did not think the jeans found in the trailer were his, and that his clothing should have been in the bathroom where he took a shower. 1RP at 115-16.

Julia Santamaria-Schwartz testified during rebuttal that she had seen Roberts with guns between August and December 11. 1RP at 138. She thought Exhibit 21 had the “same general shape as the one I saw, but the one I saw, I don’t recall it having silver and I don’t recall it as being as long.” 1RP at 139. She stated that Exhibit 20 “looks very similar to one[,]” but could not say if it was the same gun or not. 1RP at 139.

Mason County Detective Brett Rutherford testified that Robinson, in her statement to police, first said that she bought the handguns because “he would like to have some guns[,]” but that in a second statement to police she said that she had bought the weapons for herself. 1RP at 146.

Prior to trial Roberts stipulated that he was convicted in 1992 of felony defined as a serious offense and was convicted in 2003 of a felony designated as a serious offense. The jury was notified of the stipulation.

1RP at 12. CP at 72.

On the second day of trial, Deputy Reed was re-called to the stand. 1RP at 70. He stated that the night before he had taken the guns, both having been previously admitted into evidence, to his home and fired one round through each gun. 1RP at 71- 72. Exhibit 22. He stated that both weapons fired correctly and were operational. 1RP at 72.

**D. ARGUMENT**

**1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH CONSTRUCTIVE POSSESSION.**

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

The State charged Roberts with two counts of first degree unlawful possession of a firearm, in violation of RCW 9.41.040(1)(a). CP 69-70.

RCW 9.41.040 (1)(a) provides:

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

To convict Roberts of these two crimes, the State had to prove both that Roberts possessed the firearms and that such possession was knowing. RCW 9.41.040(1)(a). *State v. Anderson*, 141 Wn.2d 357, 360, 5 P.3d 1247 (2000); *State v. Warfield*, 119 Wn. App. 871, 878, 80 P.3d 625 (2003). The State failed to meet its burden.

Possession may be actual or constructive. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). Actual possession means that the person charged had personal custody of the item. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession means that the item is not in the defendant's actual, physical possession, but that the defendant has dominion and control over it. *Callahan*, 77 Wn.2d at 29. In this case, the firearms were not actually found on Roberts' person. 1RP at 46, 51-52.

The State can establish constructive possession of a firearm by showing the defendant had dominion and control over either the gun or the premises where the gun was found. *State v. Partin*, 88 Wn.2d 899, 908,

567 P.2d 1136 (1977); *State v. Potts*, 93 Wn. App. 82, 88, 969 P.2d 494 (1998). A court considers the totality of circumstances when determining whether a defendant has dominion and control over the portion of the premises where contraband is found, sufficient to prove constructive possession. *Partin*, 88 Wn.2d at 908.

Merely proximity is not enough to establish constructive possession. *Potts*, 93 Wn. App at 88. Temporary residence, personal possessions on the premises, or knowledge of the presence of the contraband, without more, are also insufficient to establish dominion and control. *State v. Hystad*, 36 Wn. App. 42, 671 P.2d 793 (1983).

For example, in *State v. Callahan*, the Court found insufficient evidence to support a finding of constructive possession, noting:

Although there was evidence that the defendant had been staying on the houseboat for a few days there was not evidence that he participated in paying the rent or maintained it as his residence. Further, there was no showing that the defendant had dominion or control over the houseboat. The single fact that he had personal possessions, not of the clothing or personal toilet article type, on the premises is insufficient to support such a conclusion.

77 Wn.2d at 31.

In *State v. Hagen*, 55 Wn. App. 494, 781 P.2d 892 (1989), the court found that a jury instruction incorrectly defining “dominion and control” was not harmless and required reversal of the conviction. 55 Wn.

App at 500. The court found that there was “no actual proof of [defendant’s] ownership interest in the premises.” *Id.*

Conversely, in *State v. Bradford*, 60 Wn. App. 857, 808 P.2d 174 (1991), the court found sufficient evidence of dominion and control. In that case, police officers found Bradford alone at the residence with two small children on one occasion, and on a second occasion they found him on the bed “in a state of undress[.]” Officers found several receipts and a utility bill in Bradford’s name addressed to him at the residence being searched, and billing him for service at that address. They also found two envelopes addressed to Bradford, as well as the telephone bill for the residence in his name, sent to him at the residence address. 60 Wn. App. at 864.

In affirming the convictions, the court noted:

a visitor or temporary resident of a house does not receive the premises’ utility bills in his name. Likewise, while Bradford’s presence in the home in a state of undress, and even his reception of mail at the address might not necessarily be sufficient to show dominion and control, a casual visitor has no responsibility for the payment of the telephone bill, as evidenced by the bill in Bradford’s name. Dominion and control was established here.

*Bradford*, 60 Wn. App. at 864-65.

In *State v. Dobyys*, 55 Wn. App. 609, 616, 779 P.2d 746 (1989), proof of dominion and control over a residence was also found to be

sufficient. In that case, an informant told police about a marijuana grow at a residence occupied by Ted Dobyms. Prior to the search, Dobyms' car was seen parked near the house. In the house, police found a bill that had been mailed to Dobyms as the residence address. They also found one of Dobyms' business cards, which listed the residence address as well as two phone numbers. Phone company records showed that one of the phone numbers was for the residence and was billed to Dobyms at the residence address. 55 Wn. App. at 612-13.

In this case, in order to prove actual or constructive possession the State relied primarily on the testimony of Southmayd that she did not have firearms in the trailer and that she saw Roberts bring two bags into her residence. The State also relied on Roberts' presence in the trailer when police arrived. But as the cases above make clear, this is not sufficient to prove dominion and control over either the residence or the firearms.

Roberts was a visitor at Southmayd's trailer. The fact that Roberts arrived early in the morning and later was found in a bedroom is not sufficient to establish dominion and control over the residence. The State failed to meet its burden of establishing this element beyond a reasonable doubt, and Roberts' convictions must be reversed.

2. **THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE THE ELEMENT OF KNOWLEDGE.**

Knowledge may be inferred when the defendant's conduct indicates the requisite knowledge as 'a matter of logical probability.'" *Warfield*, 80 P.3d at 632 (quoting *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991)).

For example, in *Warfield*, the defendant appealed his conviction for possession of a sawed-off shotgun, which police found in a closet in the master bedroom of Warfield's apartment. The State presented evidence that Warfield leased the apartment where the shotgun was found, and Warfield's mother, who was also the apartment manager, testified that Warfield occupied the master bedroom. Police found a great deal of Warfield's personal effects in the apartment. The bedroom closet where police found the shotgun was also filled with Warfield's personal effects. *Warfield*, 80 P.3d at 632. The court found sufficient evidence to establish that Warfield had knowledge of the presence of the shotgun. *Warfield*, 80 P.3d at 632.

As discussed in detail above, there was insufficient evidence in this case to establish that Roberts had dominion and control over the trailer. One of the weapons was not located in a place where it was easily observable; Deputy Reed testified that he had to move a piece of plastic aside to photograph the .22 caliber gun. He stated:

I moved the plastic just slightly because in the previous overall photos, the plastic is a little bit more over it, so it

makes it hard to see what it is. If you're looking at the top and you know what you're looking at, you can actually see the sight-rail fits in with the barrel.

1RP at 53.

There was no other evidence conclusively linking Roberts to those specific firearms. There was no testimony that anyone ever saw Roberts handle those specific firearms or that he was even aware of their presence—only that Southmayd had seen him bring two bags into the trailer and that the guns had not been there previously. There simply was not enough evidence to establish that Roberts knew the firearms were in the living room. The State failed to present sufficient evidence to establish beyond a reasonable doubt the element of knowledge, and Roberts' convictions must be reversed.

3. **THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE.**

a. **The Washington Constitution Prohibits Judges from Commenting on the Evidence.**

Article 4, § 16 of the Washington Constitution provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses. *State v. Crotts*, 22 Wash. 245, 250-51, 60 P. 403 (1900); *see also State v. Lane*, 125 Wn.2d 815, 838, 889 P.2d 929 (1995) (quoting

*Crotts*). The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). When a statement by the court directly or implicitly conveys the court's attitudes toward the merits of the case or the weight to be afforded certain evidence, the statement is an impermissible comment on the evidence. *See Lane*, 125 Wn.2d at 838 (citing *Hansen*, 46 Wn. App. at 300; *State v. Trickel*, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977)); *State v. Jacobsen*, 78 Wn.2d 491, 494, 477 P.2d 1 (1970) (improper comment on the evidence where words or actions of court convey opinion as to credibility, weight, or sufficiency).

Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *Lane*, 125 Wn.2d at 838. The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court has been communicated to the jury. *Trickel*, 16 Wn. App. at 25.

**b. Reversal is Mandated Because the Trial Court Implicitly Commented on the Perceived "Operability" of the Handguns.**

Where the trial court violates Article 4, § 16 of the Constitution, "a reviewing court will presume the comments were prejudicial and the

burden is on the State to demonstrate that no prejudice resulted.” *State v. Eaker*, 113 Wn. App. 111, 119, 53 P.3d 37 (2002, *review denied*, 149 Wn.2d 1003 (2003) (citing *Lane*, 125 Wn.2d 838).

Even if the evidence commented upon is undisputed, or ‘overwhelming,’ a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

*State v. Bogner*, 62 Wn.2d 247, 252, 283 P.2d 254 (1963).

Here, Judge Sheldon commented on the evidence by asking Deputy Reed “[a]nd I would just verify with the officer that both of the guns currently are inoperable, correct?” 1RP at 61. The deputy prosecutor told the judge that they had been “made safe[,]” and also added the comment “[t]hat’s not to say they’re not working firearms.” Judge Sheldon responded “[t]hat was the wrong word. They are made safe and are in safe condition right now[,]” and the deputy responded that the guns were “locked open.” 1RP at 61.

The question of whether the guns constituted “firearms” under RCW 9.41.010(1) is an issue to be determined by the jury. The statute provides:

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

Whether the handguns constituted firearms was an issue of fact for the jury to decide. Instruction 11. CP at 41. Detective Reed testified on April 6, that he had taken the guns home and had fired a shot using each weapon. He presented two spent rounds and casings. 1RP at 71-72. Exhibit 22. The State asked the jury to determine the credibility of the deputy regarding his testimony as to whether the guns were in fact operable.

A judge comments on the evidence if statements or conduct convey the judge's attitude toward the merits of the case or the judge's evaluation relative to the disputed issue. *State v. Zimmerman*, 130 Wn. App. 170, 174, 180, 121 P.3d 1216 (2005).

"A statement by the court constitutes a comment on the evidence if the court's attitude towards the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (citing *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986)).

Here, the State cannot establish there was no prejudice. Rather, Judge Sheldon's question clearly expressed her opinion regarding the operability of both guns and their status as firearms. Based on the foregoing, reversal of both counts is merited.

4. **ROBERTS' SENTENCE WAS BASED ON AN IMPROPERLY CALCULATED OFFENDER SCORE.**

a. **The Miscalculation of Roberts' Offender Score May be Raised for the First Time on Appeal.**

The trial court miscalculated Roberts' offender score when it separately counted the two current convictions for unlawful possession of a firearm, even though the convictions encompassed the same criminal conduct. A court acts without authority when it imposes a sentence based on a miscalculated offender score. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). The prohibition against an appeal of a standard range sentence, RCW 9.94A.210(1), does not extend to legal errors, abuse of discretion, to exercise discretion. *State v. Kinneman*, 155 Wn.2d 272, 283, 119 P.3d 350 (2005); *State v. Williams*, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003); *State v. McGill*, 122 Wn. App. 95, 99-100, 47 P.3d 173 (2002). Thus, Roberts' challenge to his sentence based on an improperly calculated offender score is properly before this Court.

b. **The Trial Court Abused its Discretion in Failing to Find the Two Convictions for Unlawful Possession of a Firearm Encompassed the Same Criminal Conduct for Purposes of Calculating Roberts' Offender Score.**

Although a trial court has considerable discretion when imposing a

sentence pursuant to the Sentencing Reform Act (SRA), the court must act within the strictures of the SRA. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). The SRA directs a trial court to determine whether multiple current offenses encompass the “same criminal conduct” for purposes of calculating a defendant’s offender score. RCW 9.94A.589(1)(a); *State v. Murphy*, 98 Wn.2d 42, 51, 988 P.2d 1018 (1999). *Accord State v. Reinhart*, 77 Wn. App. 454, 459, 891 P.2d 735 (1995) (“clear and unambiguous” language of the SRA mandates determination of whether prior offenses encompass the same criminal conduct). “Same criminal conduct” is defined 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.* The general public is the victim of the crime of unlawful possession of a firearm. *State v. Haddock*, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000). Thus, multiple current convictions for unlawful possession of a firearm at the same time and place constitute the same criminal conduct as a matter of law. *State v. Simonson*, 91 Wn. App. 874, 886, 960 P.2d 955 (1998).

Here, contrary to the mandate of the SRA, the trial court failed to consider whether the two firearm convictions encompassed the same criminal conduct. Rather, the trial court calculated Roberts’ offender score as ‘10’ based in part on the two current offenses. The court did not

find that the offenses constituted the same criminal conduct. CP at 12. In section 2.1 of the Judgment and Sentence, the court has left blank the provision that provides:

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589).

CP at 12.

The court's failure to exercise discretion was tantamount to an abuse of discretion. *See, State v. Pettitt*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980); *State v. Fliieger*, 91 Wn. App. 236, 242, 955 P.2d 872 (1988).

5. **ROBERTS' TRIAL COUNSEL FAILED HIM IN A VARIETY OF WAYS.**

a. **A criminal defendant is guaranteed the effective assistance of counsel.**

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the Right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. Similarly, Article I, § 22 of the Washington State Constitution declares that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..." Wash. Const. art. I, § 22.

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)).

Under *Strickland*, a defendant must satisfy a two-pronged test to sustain a claim of ineffective assistance of counsel: first, a defendant must show that counsel's performance was deficient, and second, a defendant must show that the deficient performance prejudiced the defense. *Id.*

Defense counsel must employ "such skill and knowledge as will render the trial a reliable adversarial testing process." *State v. Lopez*, 107 Wn. App. 270, 275, 27 P.2d 237 (2001). Counsel's performance is evaluated against the entire record. *Lopez*, 107 Wn. App. at 275.

- b. **Roberts was prejudiced as a result of his trial counsel's failure to properly preserve the issue relating to the trial court's improper comment on the evidence.**

The record does not reveal any tactical or strategic reason why trial counsel would have failed to present the argument set forth in Section 3, *supra* at 17.

As previously noted, to establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). The prejudice here is self evident: but for counsel's failure to properly argue his objection to the court's impermissible comment on the evidence or to make a motion relating to the objection

when questioned by the court, the motion would have been granted for the reasons articulated in the preceding section.

Counsel's performance was thus deficient, which was highly prejudicial to Roberts, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions.

c. **Defense Counsel Was Ineffective for Failing to Argue the Two Firearm Convictions Encompassed the Same Criminal Conduct.**

Defense counsel's performance was deficient and prejudicial for failure to argue the two convictions for unlawful possession of a firearm constituted the same criminal conduct for purposes of calculation of Roberts' offender score. As discussed above, multiple current convictions for unlawful possession of a firearm at the same time and place are the "same criminal conduct" as a matter of law. No conceivable tactical strategy could justify counsel's failure to advocate for a lower offender score, especially where as here, the law supporting the lower score is well-settled. Accordingly, Roberts' trial counsel provided deficient assistance and Roberts was prejudiced by being sentenced pursuant to an erroneous offender score.

d. **The Proper Remedy is Reversal of the Sentence of Remand for Sentencing Based on a Properly Calculated Offender Score.**

A sentence based on an improperly calculated offender score must be reversed and remanded for sentencing. *See In re Personal Restraint of LaChapelle*, 152 Wn.2d 1, 14 100 P.3d 805 (2004). Here, the trial court erroneously calculated Roberts' offender score as '10,' by separately counting the two current convictions for unlawful possession of a firearm which occurred at the same time and place. His sentence score must be reversed and remanded for sentencing based on a correctly calculated offender score.

**E. CONCLUSION**

The State did not meet its burden of establishing that Demond Roberts had actual or constructive possession of the firearms found in the living room of the trailer, or that he had any knowledge of their presence. The evidence only established that Roberts was in the trailer and that Southmayd saw him bring two bags into the trailer earlier that morning. There was no evidence that Roberts was aware of the presence of the weapons. The evidence is insufficient to support the two convictions, and must be reversed.

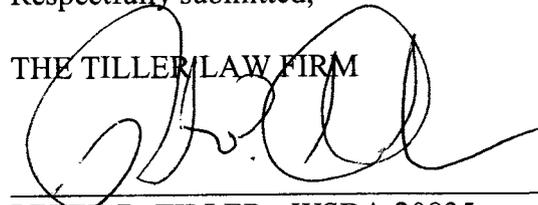
In the alternative, Roberts requests this Court revise his sentence and remand for sentencing based on an offender score properly calculated by considering the two firearms convictions as the “same criminal conduct.”

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

DATED: September 10, 2007.

Respectfully submitted,

THE TILLER/LAW FIRM

A handwritten signature in black ink, appearing to read 'P. Tiller', written over a horizontal line.

PETER B. TILLER - WSBA 20835  
Of Attorneys for Demond Roberts

SEP 11 2007  
STATE OF WASHINGTON  
BY: *Ln*

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
DERMOND L. ROBERTS,  
  
Appellant.

COURT OF APPEALS NO.  
36233-3-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Appellant's Opening Brief were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Demond L. Roberts, Appellant, and Monty D. Cobb, Mason County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on Monday, September 10, 2007, at the Centralia, Washington post office addressed as follows:

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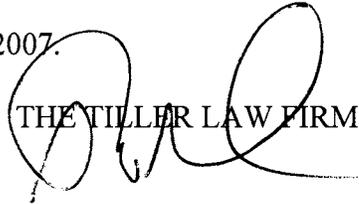
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