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STATE OF WASHINGTON
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No. 36233-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEMOND L. ROBERTS,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable, Judge Toni A. Sheldon
Cause No. 06-1-00536-8

BRIEF OF RESPONDENT

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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. Did Roberts constructively possess the Browning 9 millimeter handgun and the Colt .22 caliber target pistol when:
 - (a) they were found in close proximity to the two bags that he brought into Southmayd’s trailer;
 - (b) Robinson implied to Santamaria-Schwartz that she should lie and say the guns were Southmayd’s;
 - (c) Detective Rutherford documented that Roberts and Robinson had approximately 380 connected phone calls together while he was in custody

- (d) Santamaria-Schwartz observed Roberts with two handguns that resembled the two in this case;
 - (e) blue jeans that could fit Roberts that had a 9 millimeter ammunition clip attached to them in a knife scabbard he said was his were found on the floor of her trailer near the 9 millimeter handgun; and
 - (f) Roberts was found asleep inside the trailer?
2. Did the trial court judge err and improperly comment on the evidence by inquiring before the jury whether both handguns were “currently...inoperable” and imply that they were previously operable firearms, when:
- (a) detailed testimony was elicited about the handguns including; that
 - (b) Deputy Reed test-fired a round from each weapon himself;
 - (c) both handguns were admitted into evidence and shown to the jury to inspect; and
 - (d) the jury was instructed as to the legal definition of “firearm”?
3. Did the trial court abuse its discretion by not determining whether Roberts’ two current convictions for unlawful possession of a firearm in the first degree encompassed the same criminal conduct in calculating his offender score when:
- (a) Roberts’ offender score was 9 plus and
 - (b) the sentencing grid does not score higher than 9 plus?
4. Did Roberts receive ineffective assistance when the record shows that:
- (a) his court-appointed attorney presented a viable case in his defense;
 - (b) argued vigorously and made timely objections;
 - (c) kept the jury focused on the facts of the case; and
 - (d) at sentencing demanded that Roberts’ offender score be calculated correctly?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as “RP.”

The Clerk’s Papers shall be referred to as “CP.”

D. STATEMENT OF THE CASE

1 & 2. Procedural History and Facts. Pursuant to RAP 10.3(b), the State accepts Roberts’ recitation of the procedural history and facts and adds the following:

On December 14, 2006, Demond L. Roberts, the appellant, was charged with one count of residential burglary, two counts of unlawful possession of a firearm first degree and one count of possession of a stolen firearm in Mason County Superior Court. CP 5. The State filed an amended information on April 5, 2007, that charged Roberts with two counts of unlawful possession of a firearm in the first degree. CP 22.6. Roberts went to trial on these two charges on April 5, 2007, and the jury found him guilty of both counts on April 10, 2007. RP 1: 1-25; 183: 21-25; 184: 1-6.

Julia Santamaria-Schwartz saw Roberts with “guns” between August 22 and December 11, 2006. RP 139: 3-15. In response to the State’s question, Santamaria-Schwartz identified State’s Exhibit #20, a “Browning 9 millimeter” and State’s Exhibit #21, “a Colt .22 caliber

target pistol,” as the two handguns that she saw Roberts “in possession of between August 22 and December 11, 2006.” RP 139: 3-6; 161: 24-25; 162: 18-19. Santamaria-Schwartz described these handguns as follows:

State’s Exhibit 21...has the same general shape as the one I saw, but...I don’t recall it having silver and I don’t recall it being as long...State’s Exhibit 20...looks very similar to one [gun]. I couldn’t tell you if it was the same one or not.
RP 139: 3-15.

Santamaria-Schwartz also identified one of these two handguns in State’s Exhibit #26; a photograph that she had “circled,” “initial[ed]” and agreed was “consistent with one of the [two] weapons that [Roberts] had in the timeframe [she] testified about.” RP 143: 12-25; 144: 1-4; CP 28.

Following Roberts’ arrest on December 11, 2006, Santamaria-Schwartz was aware that he was in custody. RP 139: 20-24.

Renee Robinson, who referred to Roberts as “my boyfriend,” met with Santamaria-Schwartz and “discuss[ed]” these two guns. RP 77: 2; 140: 2-6. Robinson did not say that the guns were hers, and Santamaria-Schwartz “strongly believ[ed]” that she [Robinson] wanted her “to consider testifying in a particular way about those guns.” RP 140: 7-11. Santamaria-Schwartz felt that Robinson implied that she “should lie and say that [the handguns] were [her] best friend’s guns,” namely “[t]he one whose house he got arrested at... Sherry Southmayd.” RP 140: 12-17. Santamaria-Schwartz explained that although Robinson did not suggest

that she should “testify that th[e] guns had been” at Southmayd’s residence “a long time and that they were Sherry’s,” she did state that the implication was:

Just that [she] should figure out some way to get Demond [Roberts] back out and put my best friend in-is all she was implying, I think. RP 140: 19-24.

Santamaria-Schwartz told Robinson “that was ridiculous.” RP 141: 2. In response, Robinson then suggested that Santamaria-Schwartz “could just pick anybody that [she] didn’t like and blame it on them.” RP 141: 3-6.

Detective Rutherford of the Mason County Sheriff’s Department presented a report documenting “24 pages of calls between the cell where Mr. Roberts was located to Ms. Robinson’s telephone.” RP 148: 22-24; CP 25. The report started at “November 1st, 2006” and went “until March 28th, 2007.” RP 149: 7-8. The “total phon[e] calls made” during this timeframe “were 1,039.” RP 149: 19-21. Of the “1,039” calls that were made, “380 total” were “connected.” RP 149: 22-25.

Robinson admitted on cross-examination that she had “very many” visits or “phone calls” with Roberts; possibly “hundreds” between “December 11th [2006]” and “a couple of days before March 14th [2007].” RP 88: 6-10; 17-22. She also asserted that she purchased the two handguns while she was “pretty tweaked” or “high” on “Meth[amphetamine]” from an individual named “Kelly” for “\$200.00” at

around “4:00 AM” on December 11, 2006. RP 90: 5-8, 14-16; 91: 6-10, 15-20. Although Robinson claimed the guns were hers, she never went to the police after Roberts’ arrest and incarceration to inform them that they were in fact her property. RP 77: 2-13; 22-23; 78: 1-11; 81: 12-18; 86: 9-11.

Sherry Southmayd, who lived in the trailer where Roberts was found, denied that either the “blue duffel bag” and/or that “black handbag” were hers when she viewed State’s Exhibit #3. RP 14: 9; 25: 12-19; 26: 10-12. Southmayd agreed when viewing State’s Exhibit #3 that the “blue duffel bag appear[ed] to be on the floor immediately in front of the couch,” and that the “black bag” might be on the floor as well. RP 20-22; 26: 2-5. Southmayd believed that Roberts brought the two bags into her residence. RP 26: 13-14.

Roberts testified at trial that he had “never” seen either of the two handguns. RP 114: 1-15. Roberts did however identify State’s Exhibit #19 as something “to hold a knife,” and that it was his. RP 114: 21-25; 115: 1-2. While Roberts denied placing “a bullet clip inside [his] knife holder” and/or that the holder had a clip in it the last time he wore it, he did state that he used it for his “switchblade.” RP 115: 3-9.

Prior to his arrest on December 11, 2006, Roberts admitted that he had “been using methamphetamine for a while”; about 11 days, which he

claimed might be unusual “for some people” but “not for [him]...at that point and time.” RP 109: 1-12. Roberts stated that not only had he been using methamphetamine for 11 days, but that he had also “been up for 11 days” as well. RP 113: 20. Not only did Roberts relate that he was “really tired,” but that he was “seeing [and]...imagining a lot of things,” and did not “believe that [his] drinking had a whole lot to contribute to the fact that [he] had been up for 11 days.” RP 113: 20; 126: 11-12; 18-23.

Roberts described that “right [before] he went to sleep,” he was:

[S]eeing things, birds singing, hearing the computer play music. I mean there was all kinds of things. I was even talking to the cockroaches, Sir. RP 127: 1-5.

During the search of the trailer where Roberts was, Deputy Reed of the Mason County Sheriff’s Department found:

On the floor in front of the couch where the black colored handgun was-later found to be a 9 millimeter, I believe-was a pair of jeans consistent in size of what Mr. Roberts would wear, based on what I [had] seen...for his body size. On those blue jeans was a belt with a leather, brown leather knife scabbard...I opened that...and found it to contain a fully loaded 9 millimeter clip, black in color, which was consistent with the type of clip needed for the 9 millimeter I located on the couch. RP 49: 7-18.

A “.22 caliber handgun” that was “partially exposed silver in color” was also found by Deputy Reed “between [a] little aisle where [he] was standing and the TV and the couch.” RP 49: 1-5. Deputy Reed noted that: “the 9 millimeter was fully loaded, which I unloaded,” and that the “.22, I

know, had the clip in it,” but could not “recall if [he] took rounds out of that or not.” RP 71: 24-25; 72: 1-4. The blue jeans were photographed, and admitted as State’s Exhibit #12 at trial. RP 53; CP 28. Sherry Southmayd, whose trailer Roberts was found in, did not recognize the blue jeans, and did not have a pair of jeans that had a “knife scabbard on it” that also had an “ammunition clip” affixed to it as well. RP 29: 1-6. Southmayd also did not recognize either of the two handguns in the State’s exhibits. RP 26: 16-25; 27: 1-4. Roberts himself was taken out of the trailer in a “pair of boxer shorts” due to the “contamination level” inside the trailer from the tear-gas canisters. RP 64: 19-25; 65: 1-3.

On April 10, 2007, the jury found Roberts guilty of both charges. RP: 184: 21-25; 185: 1-6. Roberts was sentenced on April 19, 2007, and following a lengthy exchange between all parties regarding the correct calculation his offender score:

The Court will find that his offender score is 10, taking the Thurston County second degree arson, the Thurston County two VUCSAs that are both dated in November of '93, the Grays Harbor County theft of a firearm, the VUCSA in '98, the Grays Harbor unlawful possession of a firearm, the assault in the third degree domestic violence and the vehicular assault...

That would be an 8. Then 9 would be the fact that he’s on supervision at the time of these offenses, and 10 will be the other current offenses as we are sentencing today on more than one count. So that makes his offender score 10. The guidelines simply have 9 plus, and so we’ll use the standard range that is commensurate with 9 plus,

which I am told is 87 to 116 months. RP 197: 14-20, 23-25; 198: 1-4.

The trial court then stated that:

[B]ased upon the overall criminal history, having found that his offender score is 10, we are only going up to a 9 plus on the grid to provide a standard range sentence. RP 201: 2-5.

Roberts was then sentenced to a standard range sentence of “116 months.” RP 201: 9-10.

3. Summary of Argument

The judgment and sentence of the trial court is complete, correct and should be affirmed. Sufficient evidence was presented that Roberts constructively possessed the Browning 9 millimeter and the Colt .22 target pistol when: (a) they were found in close proximity to the two bags that he brought into Southmayd’s trailer; (b) Robinson implied to Santamaria-Schwartz that she should lie and say the guns were Southmayd’s; (c) it was documented that Roberts and Robinson had approximately 380 connected phone calls together while he was in custody; (d) Santamaria-Schwartz observed Roberts with two handguns that resembled the two in this case; (e) blue jeans that could fit Roberts and that had a 9 millimeter ammunition clip attached to them in a knife scabbard which Roberts said was his were found on the floor of the trailer near the 9 millimeter handgun; and (f) Roberts was found asleep in the trailer.

The trial court judge did not err and improperly comment on the evidence before the jury as to whether both handguns were “currently...inoperable” and imply they were previously operable firearms because: (a) detailed testimony was elicited about the handguns themselves including; that (b) Deputy Reed test-fired a round from each weapon himself; (c) both handguns were admitted into evidence and shown to the jury to inspect; and (d) the jury was instructed as to the legal definition of “firearm.”

Additionally, the trial court did not abuse its discretion by not determining whether Roberts’ two current convictions for unlawful possession of a firearm in the first degree encompassed the same criminal conduct in calculating his offender score because: (a) Roberts’ offender score was 9 plus; and (b) The sentencing grid does not score higher than 9 plus.

Lastly, Roberts received effective assistance because the record shows that: (a) his court-appointed attorney presented a viable case in his defense; (b) argued vigorously and made timely objections; (c) kept the jury focused on the facts of the case; and (d) at sentencing demanded that Roberts’ offender score be calculated correctly.

The judgment of the trial court is complete, correct and should be affirmed.

E. ARGUMENT

1. ROBERTS CONSTRUCTIVELY POSSESSED THE BROWNING 9 MILLIMETER AND THE COLT .22 TARGET PISTOL BECAUSE:
 - (a) THEY WERE FOUND IN CLOSE PROXIMITY TO THE TWO BAGS THAT HE BROUGHT INTO SOUTHMAYD'S TRAILER;
 - (b) ROBINSON IMPLIED TO SANTAMARIA-SCHWARTZ THAT SHE SHOULD LIE AND SAY THE GUNS WERE SOUTHMAYD'S;
 - (c) IT WAS DOCUMENTED THAT ROBERTS AND ROBINSON HAD APPROXIMATELY 380 CONNECTED PHONE CALLS TOGETHER WHILE HE WAS IN CUSTODY;
 - (d) SANTAMARIA-SCHWARTZ OBSERVED ROBERTS WITH TWO HANDGUNS THAT RESEMBLED THE TWO IN THIS CASE;
 - (e) BLUE JEANS THAT COULD FIT ROBERTS AND THAT HAD A 9 MILLIMETER AMMUNITION CLIP ATTACHED TO THEM IN A KNIFE SCABBARD THAT ROBERTS SAID WAS HIS WERE FOUND ON THE FLOOR OF THE TRAILER NEAR THE 9 MILLIMETER HANDGUN; AND
 - (f) ROBERTS WAS FOUND ASLEEP INSIDE THE TRAILER.

Roberts constructively possessed the Browning 9 millimeter and the Colt .22 target pistol because: (a) they were found in close proximity to the two bags that he brought into Southmayd's trailer; (b) Robinson implied to Santamaria-Schwartz that she should lie and say the guns were Southmayd's; (c) it was documented that Roberts and Robinson had approximately 380 connected phone calls together while he was in custody; (d) Santamaria-Schwartz observed Roberts with two handguns

that resembled the two in this case; (e) blue jeans that could fit Roberts and that had a 9 millimeter ammunition clip attached to them in a knife scabbard that Roberts said was his were found on the floor of the trailer near the 9 millimeter handgun; and (f) Roberts was found asleep in the trailer.

Possession of property may be either actual or constructive.

Actual possession means that the goods are in the personal custody of the person charged with possession. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); see State v. Partin, 88 Wash.2d 899, 905, 567 P.2d 1136 (1977). Constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over them. Callahan, 77 Wn.2d at 29; see State v. Walcott, 72 Wn.2d 959, 967, 435 P.2d 994 (1967). Whether a person has dominion and control is determined by considering the totality of the situation. Partin, 88 Wash.2d at 906.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993); see State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. State v. Ware,

111 Wash.App. 738, 741, 46 P. 3d.280 (2002); cited by State v. Alvarez, 128 Wash.2d 1, 13, 904 P.2d 754 (1995). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201.

Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. State v. O'Neal, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992); see State v. Rooth, 129 Wash.App. 761, 773, 121 P.3d 755 (2005).

The facts of Callahan are partially analogous to Roberts' case because even though handguns instead of narcotics are at issue, the concept of possession can be distinguished. In Callahan, officers executed a search warrant on Callahan, who lived on a houseboat. Callahan, 77 Wn.2d at 28. When the officers entered the living room of the houseboat, they found the defendant and a co-defendant sitting at a desk on which were various pills and hypodermic syringes. A cigar box filled with

various drugs was on the floor between the two men. Other drugs were found in the kitchen and bedroom of the premises. The defendant admitted that he had handled the drugs that day, and that he had stayed on the houseboat for 2 or 3 days prior to his arrest.

The court in Callahan found that in order for the jury to find the defendant guilty of actual possession of the drugs, they had to find that they were in his personal custody. No evidence was introduced at trial that the defendant was in physical possession of the drugs other than his close proximity to them at the time of his arrest and the fact that the defendant told one of the officers that she had handled the drugs earlier. The Callahan court did not find that the defendant could have constructively possessed the drugs because possession entails actual control, and not a passing control that involves only a momentary handling.

Roberts' case can be distinguished from Callahan in that the record shows that defendant Roberts had far greater dominion and control over the two handguns than the defendant in Callahan ever did over the narcotics. Roberts was found asleep in Southmayd's trailer and had brought the two bags there. RP 21: 13-20. The 9 millimeter handgun was found by Deputy Reed; "on the couch immediately to [his] right [was] a black colored handgun." RP 46: 16-18. The silver-colored Colt .22 was

also found by Deputy Reed after he found Roberts in the master bedroom.

As Deputy Reed described:

As I came back out and I wanted to start documenting the handgun, I noticed to the left of where I was standing in the master or main living room, where the little square is over by the slider is a TV. In front of that was a little TV stand. So between that little aisle where I was standing and the TV and the couch, I noticed that there was a partially exposed silver in color handgun. I checked that out and found it to be a .22 caliber handgun...

On the floor in front of the couch where the black colored handgun was-later found to be a 9 millimeter, I believed,-was a pair of blue jeans consistent in size of what Mr. Roberts would wear, based on what I seen him for body size. RP 48: 21-25; 49: 1-5, 8-12.

These guns were found in close proximity to the blue jeans that had a knife scabbard attached to them; a scabbard that Roberts not only said was his, but also contained a fully loaded 9 millimeter ammunition clip. RP 114: 21-25; 115: 1-2.

Roberts himself was taken out of the trailer in a “pair of boxer shorts” due to the “contamination level” inside the trailer from the tear-gas canisters. RP 64: 19-25; 65: 1-3. That Roberts was found wearing just boxer shorts is important, because the logical conclusion is that he left his jeans in the living room with his knife scabbard containing a fully loaded 9 millimeter ammunition clip attached to them; jeans that were near the 9 millimeter handgun and Colt .22. The jeans were not, according to

Southmayd, hers or her son's, nor likely her husband's because he had "been in jail too, for awhile." RP 28: 9-25.

Southmayd also did not have "a pair of jeans" in her trailer "with a knife scabbard on it that had an ammunition clip" attached to them. RP 29: 4-6. As Southmayd related, her residence is quite small; "a single-wide double bedroom trailer." RP 14: 15. Given this, the facts are clear: The jeans belonged to Roberts, and he left them there with the ammunition clip in his scabbard near the two guns before he went to sleep after an 11 day methamphetamine-fueled binge. Inside the finite area of the trailer, Roberts easily had dominion and control over these firearms, especially since the trailer consisted of only one floor that did not have doors separating the rooms. As Deputy Reed noted:

[T]he spare bedroom and bathroom both had blankets covering their entryways, as did the master bedroom, so we could not see. It was just a blank hall with blankets covering all the entries.

I moved beyond the bathroom, held the position of cover there while the deputies cleared the bathroom real quick. I then ripped down the blanket covering the master bedroom, peered around the corner, and I observed the bed on the floor in the far right corner...I noticed that the top mattress was about three-quarters of the way on top of the bottom box spring. I further noticed that there was a bulge under the top mattress, consistent with the length of a body laying underneath it...RP 47: 5-21.

That the entryways to the rooms in Southmayd's trailer were simply separated by blankets is significant, for it shows that Roberts had the

opportunity to move easily and quickly throughout the single-story trailer and thereby exert dominion and control over the two firearms. This scenario could be far different if Southmayd had lived in a multi-story dwelling with doors that could be used to seal-off the rooms, for one could physically isolate themselves from other areas of the house by simply closing a door. In Southmayd's trailer, however, there was virtually nothing that physically separated Roberts from the two guns.

An additional distinction between the facts of Callahan and Roberts' case is that Robinson and Santamaria-Schwartz met and discussed these two guns. RP 140: 2-6. Robinson suggested that Santamaria-Schwartz "could just pick anybody that [she] didn't like and blame it on them" in an attempt to "figure out some way to get Demond [Roberts] back out and put my best friend [Southmayd] in." RP 140: 19-24; 141: 3-6. Detective Rutherford confirmed that of the "1,039" calls that were made, "380 total" were "connected" between Roberts and Robinson between "November 1st, 2006" and "March 28th, 2007." RP 149: 7-8; 22-25.

Santamaria-Schwartz also saw Roberts with "guns" between August 22 and December 11, 2006, and Southmayd also did not recognize either of the two handguns that were removed from her residence. RP 139: 3-15; 26: 16-25; 27: 1-4. Southmayd also testified that she did not own

any firearms nor kept any in her trailer because she had a “small child” living there. RP 22: 23. Since Southmayd did not recognize these two guns and did not have any in her residence, the logical conclusion is clear: Roberts brought them there.

Roberts’ assertion that the State somehow needed to show dominion and control over the residence is a misstatement of the required elements. Appellant’s Brief at 15. The question is whether Roberts had dominion and control over the firearms, not Southmayd’s residence.

Based on all the evidence and testimony, the jury in Roberts’ case could easily have found beyond a reasonable doubt that he constructively possessed the two handguns. To conclude that Roberts did not knowingly possess the 9 millimeter and/or the Colt .22 would require a stretch of the imagination, especially Robinson suggested to Santamaria-Schwartz that she “could just pick anybody that [she] didn’t like and blame it on them” in an attempt to “figure out some way to get Demond [Roberts] back out and put my best friend [Southmayd] in.” RP 140: 19-24; 141: 3-6.

Considering that statement in conjunction with the 380 connected calls that Roberts and Robinson had between November 1st, 2006 and March 28th, 2007 when he was in custody demonstrates that Roberts, with Robinson’s help, knowingly tried to shift the blame for his crimes onto an innocent party. Given Roberts’ extensive felony history, he knew that he

was prohibited from possessing firearms and also what was at stake in this case, namely a lengthy prison sentence. The trial court did not err by not taking these charges away from the jury. No error occurred.

2. THE TRIAL COURT JUDGE DID NOT ERR AND IMPROPERLY COMMENT ON THE EVIDENCE BEFORE THE JURY AS TO WHETHER BOTH HANDGUNS WERE “CURRENTLY...INOPERABLE” AND IMPLY THEY WERE PREVIOUSLY OPERABLE FIREARMS BECAUSE:
 - (a) DETAILED TESTIMONY WAS ELICITED ABOUT THE HANDGUNS THEMSELVES INCLUDING; THAT
 - (b) DEPUTY REED TEST-FIRED A ROUND FROM EACH WEAPON HIMSELF;
 - (c) BOTH HANDGUNS WERE ADMITTED INTO EVIDENCE AND SHOWN TO THE JURY TO INSPECT; AND
 - (d) THE JURY WAS INSTRUCTED AS TO THE LEGAL DEFINITION OF “FIREARM.”

The trial court judge did not err and improperly comment on the evidence before the jury as to whether both handguns were “currently...inoperable” and imply they were previously operable firearms because: (a) detailed testimony was elicited about the handguns themselves including; that (b) Deputy Reed test-fired a round from each weapon himself; (c) both handguns were admitted into evidence and shown to the jury to inspect; and (d) the jury was instructed as to the legal definition of “firearm.”

Article IV, section 16 states that “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the

law.” State v. Levy, 156 Wash.2d 709, 723, 132 P.3d 1076 (2006); see State v. Baxter, 134 Wash.App. 587, 592-593; 141 P.3d 92 (2006).

Washington courts apply a two-step analysis when deciding whether reversal is required as a result of an impermissible judicial comment on the evidence in violation of article IV, section 16. Levy, 156 Wash.2d at 709. Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.

The facts of Baxter are partially analogous to Roberts’ case because the Court found that an instructional error by the trial court judge did not constitute prejudice. In Baxter, the defendant was charged with second degree assault of a child for attempting to perform a circumcision on his son at home even though he had no medical training. Baxter, 134 Wash.App. at 591. In setting-out the elements in one of the jury instructions, the trial court read the victim’s date of birth; “8/10/96.” One of the elements of this offense is that the jury had to find that the victim was under the age of 13 at the time the incident occurred. The Court found that no prejudice occurred because: (1) the jury heard defendant Baxter, the victim’s biological father, state twice on the 911 recording that the victim, E.N.B., was eight years old, which constituted an admission, and (2) unlike the victims in another case, State v. Jackman, who were

sixteen and seventeen with where the State had to prove they were under eighteen, E.N.B. was only eight when the threshold age was thirteen.

Baxter, 134 Wash.App. at 594-595; see State v. Jackman, 156 Wash.2d 736, 132 P.3d 136 (2006). The Court in Baxter further reasoned that:

Considering this age discrepancy, combined with Baxter's admission and the corroborating evidence, such as a paramedic's testimony that he had noted E.N.B.'s birth date as August 10, 1996, and two other witnesses' testimony that E.N.B. was approximately eight years old, it is not inconceivable that a jury would have found this element unproven absent the inappropriate comment. Accordingly, the record affirmatively shows that no prejudice could have resulted, and the error was harmless.
Baxter, 134 Wash.App. at 595.

This rationale can be applied to the following exchange in Roberts' case, because the record also affirmatively shows that no prejudice could have resulted and that the error, if any, was harmless.

Immediately prior to the comment in question, Deputy Reed gave significant testimony regarding these two guns:

State: Showing you then State's 20...can you identify those items?

Reed: This is the box in which I put the Browning 9 millimeter handgun, along with two clips and 20 rounds of ammunition. What it did was, once clearing the handgun, I locked it open so it could not be fired, with zip-ties. RP 60: 8-13.

Following additional testimony on how the guns were packaged and sealed for evidentiary purposes, the trial court and State engaged in the following exchange:

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

State: They've been made safe.

Court: Alright.

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

Court: That was the wrong word. They are made safe and are in safe condition right now. RP 61: 18-25.

This dialogue ceased immediately, and Deputy Reed then testified:

I took the...firearms to my residence last night and shot one round through each firearm. Both fired as they should. Both ejected rounds and went into a battery for a second round to be chambered, since they're semiautomatic. RP 72: 13-17.

Deputy Reed took care to both save and place into evidence the spent rounds that he test-fired from each gun, which were admitted in State's Exhibit #22. RP 72: 18-25; CP 28.

This scenario is similar to Baxter, in that like the trial court judge reading the victim's date of birth aloud for an age-specific offense, the trial court here commented, clearly out of a safety concern, that the guns were "currently inoperable." RP 61: 18-25. If any error occurred it was not prejudicial, for if the guns were in fact "inoperable," that would

benefit Roberts. The trial court's reference to the two items as "guns" is clearly harmless in light of the testimony of all parties, and the obvious nature of the items being guns.

In addition, the jury had the opportunity to view both the 9 millimeter and the Colt .22 for themselves, as well as the spent cartridges from Deputy Reed's test. The jurors also heard substantial testimony throughout the entire trial from a variety of other witnesses about these two weapons, much like other witnesses also mentioned E.N.B's date of birth in Baxter. Through Instruction No. 11 the jury was instructed as to what a firearm is, and the elements that they needed to consider. RP 161: 14-16. In addition, juries are presumed to follow the court's instructions, and there is no indication that they did not in Roberts' case. If any error occurred it was not prejudicial and the trial court did not err.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT DETERMINING WHETHER ROBERTS' TWO CURRENT CONVICTIONS FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE ENCOMPASSED THE SAME CRIMINAL CONDUCT IN CALCULATING HIS OFFENDER SCORE BECAUSE:
 - (a) ROBERTS' OFFENDER SCORE WAS 9 PLUS; AND
 - (b) THE SENTENCING GRID DOES NOT SCORE HIGHER THAN 9 PLUS.

The trial court did not abuse its discretion by not determining whether Roberts' two current convictions for unlawful possession of a

firearm in the first degree encompassed the same criminal conduct in calculating his offender score because: (a) Roberts' offender score was 9 plus; and (b) The sentencing grid does not score higher than 9 plus.

We review a sentencing court's calculation of an offender score de novo. State v. Bergstrom, ---P.3d---2007 WL 3105095 (WA S.Ct. October 25, 2007). Generally, the trial court calculates an offender score by adding together the current offenses and the prior convictions. RCW 9.94A.589(1)(a); State v. Vike, 125 Wash.2d 407, 410, 885 P.2d 824 (1994). But, if the trial court finds that some of the prior offenses encompass the same criminal conduct, then those offenses count as only one crime. RCW 9.94A.589(1)(a).

Our legislature has provided that: (1) each firearm a defendant possesses is a separate offense, RCW 9.41.040(7), but (2) when separate offenses encompass the 'same criminal conduct,' they count as one crime for offender-score calculation purposes, RCW 9.9A.589(1)(a). State v. Stockmyer, 136 Wash.App. 212, 218, 148 P.3d 1077 (2006). We generally construe this statute narrowly so that most crimes are not considered to be the same criminal conduct. Stockmyer, 136 Wash.App. at 518; see State v. Porter, 133 Wash.2d 177, 181, 942 P.2d 974 (1997). We have previously held that multiple, unlawful firearm possession convictions constitute the same criminal conduct if the possessions

occurred at the same time and place. Stockmyer, 136 Wash.App. at 519; see State v. Simonson, 91 Wash.App. 874, 885-886, 960 P.2d 955 (1998).

As was established in the record, Roberts' offender score was determined to be "9" before his two convictions for unlawful possession of a firearm in the first degree were even considered. RP 197: 23-25. The trial court also specifically noted that his offender score, including the two new convictions, was "9 plus," and that the sentencing guidelines only went up to "9 plus." RP 198: 2; 201: 4. In addition, the trial court did not impose an exceptional sentence, but rather imposed one within the standard range. RP 201: 5-10.

Had the trial court imposed an exceptional sentence without first determining whether Roberts' convictions encompassed the same criminal conduct, then error may well have occurred. Because the sentencing grid only reaches to 9 plus in conjunction with his 9 plus offender score, a finding of whether Roberts' convictions encompassed the same criminal conduct here would have been irrelevant. Hypothetically, should Roberts commit a new felony anytime soon, his sentencing would not be with an offender score of 10 or 11, but would remain at 9 plus. His attorney did not provide ineffective assistance for not unduly pressing an irrelevant point during sentencing, and the trial court did not err.

4. ROBERTS RECEIVED EFFECTIVE ASSISTANCE BECAUSE THE RECORD SHOWS THAT:
- (a) HIS COURT-APPOINTED ATTORNEY PRESENTED A VIABLE CASE IN HIS DEFENSE;
 - (b) ARGUED VIGOROUSLY AND MADE TIMELY OBJECTIONS;
 - (c) KEPT THE JURY FOCUSED ON THE FACTS OF THE CASE; AND
 - (d) AT SENTENCING DEMANDED THAT ROBERTS' OFFENDER SCORE BE CALCULATED CORRECTLY.

Roberts received effective assistance because the record shows that: (a) his court-appointed attorney presented a viable case in his defense; (b) argued vigorously and made timely objections; (c) kept the jury focused on the facts of the case; and (d) at sentencing demanded that Roberts' offender score be calculated correctly.

We start with the strong presumption that counsel's representation was effective. State v. Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004); see State v. Studd, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999); State v. Schwab, 167 P.3d 1225, 1230, 2007 WL 2847556 (Wash.App. Div. 2). This requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. Rodriguez, 121 Wash.App. at 184; see State v. McFarland, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the

deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see McFarland, 127 Wash.2d at 334-335; State v. Keend, 166 P.3d 1268, 1271-1272, 2007 WL 2713926 (Wash.App. Div. 2).

Deficient performance is performance ‘below an objective standard of reasonableness based on consideration of all the circumstances’. Rodriguez, 121 Wash.App. at 184. Prejudice means that there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different. McFarland 127 Wash.2d at 334-335. Effective assistance of counsel does not mean ‘successful assistance of counsel.’ State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. State v. Gilmore, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

In Roberts’ case, the record shows that court-appointed counsel took time and effort to establish a viable defense for his client. That the jury was persuaded beyond a reasonable doubt that Roberts unlawfully possessed both handguns simply means that this defense was unsuccessful, and in no way indicates that ineffective assistance occurred. Similarly, Roberts’ attorney insisted that his client’s correct offender score be calculated prior to sentencing. Neither prong of the Strickland test was

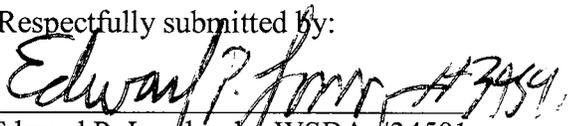
satisfied, Roberts received effective assistance of counsel and the trial court did not err.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 13TH day of November, 2007

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)	
)	No. 36233-3-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
DEMOND L. ROBERTS,)	
)	
Appellant,)	
)	

I, EDWARD P. LOMBARDO, declare and state as follows:

On TUESDAY, NOVEMBER 13, 2007, I deposited in the U.S.

Mail, postage properly prepaid, the documents related to the above cause
number and to which this declaration is attached (BRIEF OF
RESPONDENT), to:

PETER B. TILLER, THE TILLER LAW FIRM.
P.O. BOX 58
CENTRALIA, WA 98531

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 13TH day of NOVEMBER, 2007, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II