

NO. 36860-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

GLENN R. YORK,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY

The Honorable Toni A. Sheldon, Judge
Cause No. 07-1-00107-7

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking Counts IV and V (unlawful possession of a firearm in the first degree) from the jury for lack of sufficient evidence.
2. The trial court erred in sentencing York as his proper offender score cannot be ascertained based on this record and it appears to be lower than that found by the court.
3. The trial court erred in allowing York to be represented by counsel who provided ineffective assistance in failing to properly argue at sentencing that his offender score was miscalculated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to uphold York's convictions in Counts IV and V (unlawful possession of a firearm in the first degree)? [Assignment of Error No. 1].
2. Whether the trial court erred in sentencing York as his proper offender score cannot be ascertained based on this record and it appears to be lower than that found by the court? [Assignment of Error No. 2].
3. Whether the trial court erred in allowing York to be represented by counsel who provided ineffective assistance in failing to properly argue at sentencing that his offender score was miscalculated? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Glenn R. York (York) was charged by information filed in Mason County Superior Court with one count of residential burglary (Count I), two counts of theft of a firearm (Counts II and III), two counts of unlawful possession of a firearm in the first degree (Counts IV and V), and two

counts of theft in the first degree (Counts VI—personal property and VII—a truck). [CP 73-76]. The information also included notice that should York be convicted that the State may seek an exceptional sentence based on multiple current offenses and his prior convictions resulting in a high offender score. [CP 73-76].

Prior to trial, no motions regarding 3.5 or 3.6 were made or heard. York was tried by a jury, the Honorable Toni A. Sheldon presiding. York stipulated to having a prior serious offense for purposes of Counts IV and V (unlawful possession of a firearm in the first degree). [Vol. I RP 195-196]. York had no objections and took no exceptions to the instructions. [Vol. II RP 198]. The jury found York guilty as charged in Counts I-V and VII, and guilty of the lesser included offense of theft in the second degree in Count VI. [CP 25-32; Vol. II RP 241-243]. Thereafter, the State presented evidence regarding eight of York's prior convictions and the court submitted the matter to the jury with a special verdict instruction and form. [CP 20; Vol. II RP 258-263]. The jury entered a special verdict finding York did in fact have eight prior convictions. [CP 18-19; Vol. II RP 265-267].

The court sentenced York to statutory sentence of 436-months (Counts II, III, IV, and V consecutively per RCWs 9.41.040(6) and

9.94A.589(1)(c) with Counts I, VI, and VII running concurrently). [CP 5-17; Vol. II RP 268-282].

Timely notice of appeal was filed on October 15, 2007. [CP 4].

This appeal follows.

2. Facts

In February of 2007, Robert Haselwood (Haselwood) befriended York when he met York while looking for a transmission for his truck. [Vol. I RP 99-101]. On February 26, 2007, York called Haselwood and asked for a ride as he had heard Haselwood was going to Aberdeen. [Vol. I RP 101-107]. Haselwood agreed and York ended up at Haselwood's home where Haselwood showed York around his home and property. [Vol. I RP 101-107, 113-119].

On February 27, 2007, York called Haselwood at approximately 5:30 PM and Haselwood explained he was going to work his night shift. [Vol. I RP 120]. Haselwood returned from working his night shift and discovered his home had been broken into and a number of items including guns and his truck had been taken. [Vol. I RP 121-128]. Haselwood assumed that York was responsible and went to the home of Mary Phillips (Phillips), a woman who was like a mother to York and let York stay at her home. [Vol. I RP 60, 129-132]. At Phillips's home, Haselwood found York and demanded his property back—particularly his

guns, but York denied taking anything. [Vol. I RP 129-132]. York told Haselwood that he had heard of someone attempting to sell guns that could be Haselwood's guns. [Vol. I RP 129-132]. York took Haselwood to the Fairmont Cove Apartments to confront this person, but Haselwood still believed that York was involved and called the police. [Vol. I RP 133]. York was arrested on outstanding warrants and taken away. [Vol.. I RP 133].

Haselwood returned to Phillips's home and confronted her with what he believed York had done including that guns had been taken. [Vol. I RP 70, 135]. Phillips has a rule that no guns are allowed in her home because she has small children around. [Vol. I RP 66]. She then tried to open the door to a room that York used in her home finding it locked; she did not have a key to that lock. [Vol. I RP 60-63, 65]. Using a butter knife, Phillips broke open the door and she and Haselwood found two rifles under the bed, a number of personal items and electronic equipment belonging to Haselwood, the keys to Haselwood's truck, and the key to the lock on the door Phillips had just pried open. [Vol. I RP 68, 70-72, 89, 137-140, 143-153]. Phillips and Haselwood then drove around Phillips's neighborhood looking for Haselwood's truck finding it a couple of blocks away. [Vol. I RP 72-74, 140-142]. The two returned to Haselwood's property and the police were called. [Vol. I RP 75, 140-142].

York did not testify.

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT YORK WAS GUILTY OF TWO COUNTS OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (COUNTS IV AND V).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying

evidence are not strong enough to permit a rational trier of fact to find guilt beyond a reasonable doubt. State v. Bencivinga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (*citing* State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

Here, York was charged and convicted of two counts of unlawful possession of a firearm in the first degree (Counts IV and V). The State failed to elicit sufficient evidence of these crimes beyond a reasonable doubt.

With regard to these counts as instructed by the court in Instructions Nos. 21 and 22, [CP 56, 57], the essential elements of these crimes are as follows:

- 1) That on or about the 27th and or 28th day of February, 2007, the defendant knowingly owned, knowingly had in his possession or knowingly had in his control a firearm, to wit: [a Remington 30.06 Rifle, Serial No. 234465/a 30.06 Rifle with no serial number];
- 2) That the defendant had previously been convicted of a serious offense; and
- 3) That the acts occurred in the State of Washington.

In order to sustain these charges and convictions, the State bore the burden of proving beyond a reasonable doubt that York knowingly owned, had in his possession or his control the two firearms at issue.

The sum of the State's evidence on this element for both crimes consists of the fact that Haselwood's firearms were missing, that the firearms were found in a locked room in Phillips's home that had been used by York in the past. It cannot be disputed that Haselwood never saw York with the firearms, nor for that matter did Phillips; and that York had been arrested on outstanding warrants and was nowhere near Phillips's home when the firearms were found. These latter facts are significant given there was no evidence of York's actual possession of the firearms, particularly given the court's further instruction related to these charges—Instruction No. 20. [CP 55].

Instruction No. 20 states:

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.

[Emphasis added].

Absent any evidence that York could immediately exercise dominion and control over the firearms, which could not be the case given he was not present, the State cannot sustain its burden of proof on these charges—the State cannot prove constructive possession given this definition of the same and there was no evidence of actual possession as

defined. The State's evidence on these counts constitute nothing more than the improper pyramiding of inferences condemned by Bencivinga, supra.

This court should reverse and dismiss York's convictions for unlawful possession of a firearm in the first degree (Counts IV-V).

- (2) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE IT APPEARS BASED ON THE RECORD THAT YORK'S OFFENDER SCORE WAS MISCALCULATED.

A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. State v. McCraw, 127 Wn. 2d 281, 289, 898 P.2d 838 (1995). A challenge to the calculation of an offender score may be raised for the first time on appeal. Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based on a miscalculated upward offender score, "that a defendant cannot agree to punishment in excess of that which the Legislature has established," and that "in general a defendant cannot

waive a challenge to a miscalculated offender score.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, *citing* State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Here, York was convicted of one count of residential burglary (Count I), two counts of theft of a firearm (Counts II and III), two counts of unlawful possession of a firearm in the first degree (Counts IV and V), one count of theft in the second degree (Count VI), and one count of theft in the second degree (Count VII) all occurring at the same time, same place, and involving the same victim. [CP 25-32]. After the jury returned its guilty verdicts, it returned a special verdict finding beyond a reasonable doubt that York had nine prior convictions all from Mason County (one of these convictions included a prior juvenile conviction for burglary). [CP 18-19]. However, when it came to sentencing the judgment and sentence indicated that York had eleven prior convictions—of note beyond the fact that the judgment and sentence contains more prior convictions than that

found by the jury is the fact that the judgment and sentence lists a prior theft in the second degree conviction from Mason County where the jury in its special verdict found beyond a reasonable doubt that York had a prior possession of stolen property in the second degree conviction. [CP 5-17, 18-19]. Based on this record two issues are presented regarding the miscalculation of York's offender score. First, the State has failed to satisfy its burden of properly establishing all of York's alleged prior convictions it State wanted to include the same in his offender score calculation, and second, the record does not reveal why York's current convictions in Counts II-VII were not considered to be the same or similar criminal conduct for purposes of calculating his offender score—Count I involved a residential burglary subject to the burglary anti-merger statute. Given these errors in sentencing a remand for resentencing is required.

With regard to the State's burden as to York's prior convictions, the record reveals that the State has failed in its burden. There is no explanation based on this record as to how the State included two additional prior convictions for purposes of calculating York's offender score where the jury only found nine prior convictions beyond a reasonable doubt. And particularly troubling is how and why the judgment and sentence lists a theft in the second degree as one of York's priors when the jury found that he had a prior for possession of stolen

property in the second degree. York's counsel did not object to the calculation of his offender score at sentence, and even without such an objection, this matter should be remanded for resentencing as this court cannot tell based on this record what York's proper offender score in fact is. *See State v. Mendoza*, 139 Wn. App. 693, 162 P.3d 439 (2007) (State's assertions as to a defendant's criminal history insufficient to meet its burden and a defendant's failure to object does not relieve the State of its burden when calculating an offender score).

With regard to York's current convictions, a remand for resentencing is also necessary in that the court failed to consider whether his current convictions in Counts II-VII encompassed the same or similar criminal conduct.

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an offender score. *State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

"RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant's offender score." *State v. Tresenriter*, 101 Wn. App. 486, 496, 4 P.3d 145

(2000), *reviewed denied*, 143 Wn.2d 1010 (2001) (*quoting State v. Tili*, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “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.” RCW 9.94A.589(1)(a).

For purposes of RCW 9.94A.589(1)(a), intent is not defined as the specific intent required as an element of the crime charged. Rather, the inquiry focuses on the extent to which criminal intent, as objectively viewed, changed from one crime to the next. Whether one crime furthered the other may be relevant but generally does not apply when the crimes occurred simultaneously. *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). Moreover, our courts have held that separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. *See e.g., State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997); *State v. Deharo*, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Here, it cannot be disputed that Counts II-VII, crimes involving the theft of items (firearms, personal property, a truck)/unlawful possession of firearms in the first degree, involved the same victim—all were taken from the home of Haselwood and the general public is always a victim of any

criminal act. *See State v. Haddock*, 141 Wn.2d 103, 110-111, 3 P.3d 733 (2000) (the victim of unlawful possession of a firearm is the general public); *State v. Lee*, 128 Wn.2d 151, 158-159, 904 P.2d 1143 (1995) (identity of the victim is not an element of crimes involving theft). Nor can it be disputed that Counts II-VII occurred at the same time and place—York allegedly unlawfully took/possessed all of the items on or about February 27-28, 2007; and that York’s “intent” remained the same, i.e. his intention to steal all the items including the firearms—unlawful take and possess. Thus, the trial court should have determined that York’s convictions in Counts II-VII constituted same or similar conduct for purposes of calculating his offender score. *See State v. Haddock*, 141 Wn.2d at 108-109, 115. This court should remand for resentencing.

(3) YORK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO ARGUE THAT HIS OFFENDER SCORE WAS MISCALCULATED.

Should this court find that trial counsel waived or invited the errors claimed and argued in the preceding section of this brief (sections 2) by failing to properly object to the calculation of York’s offender score or by agreeing to the miscalculation of his offender score, then both elements of ineffective assistance of counsel have been established.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, *See State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (*citing State v. Gentry*, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Here, both prongs of ineffective assistance are met. First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to the calculation of York's offender score for the reasons set forth in the preceding section of this brief, and had counsel done so, the trial court would not have miscalculated York's offender score by counting all his current convictions sans the residential burglary conviction (Count I) as the same or similar criminal conduct.

Second, the prejudice is self evident. Again, for the reasons set forth in the preceding section, had counsel properly objected to the calculation of York's offender score, the trial court would not have found an improper offender score. *See State v. Mendoza*, 139 Wn. App. 693, 702-704, 162 P.3d 439 (2007).

E. CONCLUSION

Based on the above, York respectfully requests this court to reverse and dismiss his convictions for unlawful possession of a firearm (Counts IV and V) and/or remand for resentencing.

DATED this 24th day of March 2008.

Patricia A. Pethick
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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 24th day of March 2008, I delivered a true and correct copy of the Petition for Review to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 24th day of March 2008.

Patricia A. Pethick
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