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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY K. [Signature]
DEPUTY

No. 36860-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GLENN R. YORK,

Appellant.

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

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

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. Appellant’s Assignments of Error.....1

B. Issues Pertaining to Assignments of Error.....1

C. Evidence Relied Upon.....1

D. Statement of the Case.....2

 1 & 2. Procedural History & Statement of Facts.....2

 3. Summary of Argument.....2

E. Argument.....3-11

 1. THE TRIAL COURT DID NOT ERR BY NOT TAKING
 COUNTS 4 AND 5, UNLAWFUL POSSESSION OF A
 FIREARM IN THE FIRST DEGREE, FROM THE JURY
 BECAUSE:

 (a) THE TWO 30.06 RIFLES WERE STOLEN FROM
 HASELWOOD’S RESIDENCE THAT YORK HAD
 RECENTLY VISITED;

 (b) THESE GUNS WERE FOUND UNDER A BED IN A
 LOCKED ROOM THAT YORK HAD LIVED-IN
 WHILE AT THE PHILLIPS’ HOUSE; ALONG WITH

 (c) NUMEROUS OTHER ITEMS THAT HAD BEEN
 STOLEN FROM HASELWOOD.....3-7

 2. NO ERROR OCCURRED WHEN YORK WAS
 SENTENCED BECAUSE HIS OFFENDER SCORE
 WAS 9+.....7-9

 3. YORK DID NOT RECEIVE INEFFECTIVE ASSISTANCE
 OF COUNSEL BECAUSE ADDITIONAL ARGUMENT ON
 AN OFFENDER SCORE OF 9+ WOULD HAVE BEEN
 IRRELEVANT.....9-11

F. Conclusion.....11

TABLE OF AUTHORITIES

1. Table of Cases

<u>State v. Alvarez</u> , 128 Wash.2d 1, 904 P.2d 754 (1995).....	4
<u>State v. Callahan</u> , 77 Wn.2d 27, 459 P.2d 400 (1969).....	4, 5, 6
<u>State v. Delmarter</u> , 94 Wash.2d 634, 618 P.2d 99 (1980).....	4
<u>State v. Eichelberger</u> , 180 P.3d 880 (Div. 2, April 15, 2008).....	3
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	10
<u>State v. Joy</u> , 121 Wash. 2d 333, 851 P.2d 654 (1993).....	3
<u>State v. Keend</u> , 140 Wash.App. 858, 166 P.3d 1268 (Div. 2, September 18, 2007).....	10
<u>State v. McFarland</u> , 127 Wash.2d 322, 899 P.2d 1251 (1995).....	10
<u>State v. O’Neal</u> , 159 Wash.2d 500, 150 P.3d 1121 (2007).....	4
<u>State v. Partin</u> , 88 Wash.2d 899, 567 P.2d 1136 (1977).....	4
<u>State v. Rodriguez</u> , 121 Wash.App. 180, 87 P.3d 1201 (2004).....	9, 10
<u>State v. Rooth</u> , 129 Wash.App. 761, 121 P.3d 755 (2005).....	4
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	3, 4
<u>State v. Schwab</u> , 141 Wash.App. 85, 167 P.3d 1225 (Div. 2, October 2, 2007).....	9
<u>State v. Studd</u> , 137 Wash.2d 533, 973 P.2d 1049 (1999).....	9
<u>State v. Walker</u> , 181 P.3d 31 (Div. 2, April 8, 2008).....	10

State v. Walton, 64 Wash.App. 410, 824 P.2d 533 (1992).....4
State v. Ware, 111 Wash.App. 738, 46 P. 3d.280 (2002).....3
State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972).....10

2. Other Jurisdictions

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984).....10

3. Court Rules

RAP 10.3(b).....2

4. Statutes

RCW 9.9A.525(2)(b).....7
RCW 9.94A.525(2)(c).....7, 8

A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking Counts IV and V (unlawful possession of 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. Did the trial court err by not taking Counts 4 and 5 from the jury when: (a) the two 30.06 rifles were stolen from Haselwood's residence that York had recently visited; (b) these guns were found under a bed in a locked room that York had lived in while at the Phillips' house; along with (c) numerous other items that had been stolen from Haselwood?
2. Did the trial err in sentencing York when his offender score, by any calculation, exceeded 9+?
3. Did York receive ineffective assistance of counsel at sentencing when additional argument on an offender score of 9+ would have been irrelevant?

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 & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts York's recitation of the procedural history and facts.

3. Summary of Argument

The trial court did not err by not taking Counts 4 and 5, unlawful possession of a firearm in the first degree, from the jury when: (a) the two 30.06 rifles were stolen from Haselwood's residence that York had recently visited; (b) these guns were found under a bed in a locked room that York had lived in while at the Phillips' house; along with (c) numerous other items that had been stolen from Haselwood. Additionally, no error occurred when York was sentenced, as his offender score exceeded 9+. Lastly, York did not receive ineffective assistance of counsel at sentencing when additional argument on an offender score of 9+ would have been irrelevant. The State respectfully requests that the Court affirm York's judgment and sentence.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY NOT TAKING COUNTS 4 AND 5, UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, FROM THE JURY BECAUSE:
 - (a) THE TWO 30.06 RIFLES WERE STOLEN FROM HASELWOOD'S RESIDENCE THAT YORK HAD RECENTLY VISITED;
 - (b) THESE GUNS WERE FOUND UNDER A BED IN A LOCKED ROOM THAT YORK HAD LIVED-IN WHILE AT THE PHILLIPS' HOUSE; ALONG WITH
 - (c) NUMEROUS OTHER ITEMS THAT HAD BEEN STOLEN FROM HASELWOOD.

The trial court did not err by not taking Counts 4 and 5, unlawful possession of a firearm in the first degree, from the jury when: (a) the two 30.06 rifles were stolen from Haselwood's residence that York had recently visited; (b) these guns were found under a bed in a locked room that York had lived in while at the Phillips' house; along with (c) numerous other items that had been stolen from Haselwood.

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. Eichelberger, 180 P.3d 880, ¶ 17 (Div. 2, April 15, 2008); see State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Joy, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993). 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); see: 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).

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.

The facts of Callahan are partially analogous to York's case because even though firearms 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.

York's case can be distinguished from Callahan in that the record shows he had more than a passing control, or constructive possession, of the two 30.06 rifles. These two firearms were found "under a mattress" in a locked room at Ms. Phillips' residence that was "his '[York's] room'" when "he lived at our house." RP 68: 15-17; 23-25; 63: 1. Haselwood had recently shown York around his residence, and York had "acted pretty excited" about possibly working for Haselwood on his property. RP 109: 1-8; 19-24.

When Haselwood confronted York after his property had been burglarized, York said, "I might know who has your guns." RP 131: 13. After Haselwood went with York to his room at Ms. Phillips' house, Haselwood recovered "a duffel bag with my clothes and the walky-talkies, the radio; all that stuff was in there," along with "the keys to my Mazda truck" RP 138: 23-24; 139: 1. Haselwood also found one key that was for the "new lock" on the door to York's room on this key chain. 140:1-5.

The difference between Callahan and York's case is that the evidence is sufficient to show that York not only stole the guns from Haselwood's residence, but also secreted them in his locked room. To

steal the guns, York had to have actual possession of them at some point. By secreting them in his locked room, he also had constructive possession of them. Viewed in the light most favorable to the State, York unlawfully possessed both these firearms, and the trial court did not err by not taking Counts 4 and 5 from the jury.

2. NO ERROR OCCURRED WHEN YORK WAS SENTENCED BECAUSE HIS OFFENDER SCORE WAS 9+.

No error occurred when York was sentenced, as his offender score exceeded 9+.

Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.9A.525(2)(b).

Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing

any crime that subsequently results in a conviction. RCW

9.94A.525(2)(c).

As the jury found by special verdict, York had the following criminal history prior to being sentenced under this cause number:

Has the defendant previously been convicted of, burglary in the second degree, Mason County Cause No. 99-8-00249-6? Answer is yes. Two, theft in the first degree, Mason County Cause No. 03-1-00318-2, Count I, answer yes. Number two-looks like two number twos? Okay. Taking a motor vehicle without owners permission, Mason County Cause No. 03-1-00318-2, Count II, answer is yes. Number three, taking a motor vehicle without owner's permission, Mason County Cause No. 03-1-00318-2, Count III, answer is yes. Number four, taking a motor vehicle without owner's permission, Mason County Cause No. 03-1-00318-2, Count IV, yes.

Number five, taking a motor vehicle without owner's permission, Mason County Cause No. 03-1-00318-2, Count V, answer yes. Number six, taking a motor vehicle without owner's permission, Mason County Cause No. 03-1-00318-2, Count VI, yes.

Number seven, possession of stolen property in the second degree, Mason County Cause No. 03-1-00318-2, Count VII, answer yes. And number eight, taking a motor vehicle without owner's permission, Thurston County Cause No. 04-1-01615-4, answer yes. RP 266: 13-25; 14: 1-13.

In reviewing York's offender score in conjunction with his convictions under this cause number, it found that:

As to Count I, the burglary count, that Mr. York's offender score is seventeen. As to Counts II and III, theft of a firearm, the offender score is thirteen. As to unlawful possession of a firearm in Counts...IV and V, the offender score is thirteen. And the theft in the second degree on

Counts VI and VII, I wrote down sixteen...RP 276: 22-25;
277: 1-2.

No matter how York's offender score is calculated, he was a 9+ at the time of his sentencing under this cause number. Whether Counts II-VII constituted the same criminal conduct is irrelevant, as York was already at the top of the range, given his prior criminal history. No error occurred.

3. YORK DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE ADDITIONAL ARGUMENT ON AN OFFENDER SCORE OF 9+ WOULD HAVE BEEN IRRELEVANT.

York did not receive ineffective assistance of counsel at sentencing because additional argument on an offender score of 9+ would have been irrelevant.

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, 141 Wash.App. 85, 95, 167 P.3d 1225 (Div. 2, October 2, 2007). 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. State v. Walker, 181 P.3d 31, ¶ 20-22, 2008 WL 933443 (Div. 2, April 8); see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McFarland, 127 Wash.2d at 334-335; State v. Keend, 140 Wash.App. 858, 864-865, 166 P.3d 1268 (Div. 2, September 18, 2007).

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).

The record shows that counsel for York presented both case law and argument on York's behalf at sentencing and asked for an exceptional sentence downward, "given the age of the defendant and the circumstances of the crime." RP 271: 15-16. That York's offender score reached as high as 17 points on one count under this cause number did not

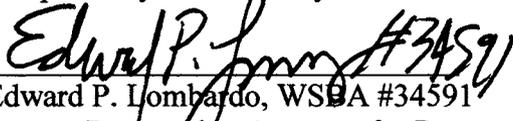
give his attorney much to work with in convincing the trial court to provide anything but a top of the range sentence. Because York's offender score was 9+, any additional argument on sentencing would have been irrelevant. York was provided with effective assistance of counsel and no error occurred.

F. CONCLUSION

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

Dated this 9TH day of JUNE, 2008

Respectfully submitted by:


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

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 GLENN R. YORK,)
)
 Appellant,)
 _____)

No. 36860-9-II

DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

08 JUN 10 AM 10:41
STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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

On MONDAY, JUNE 9, 2008, 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:

Patricia A. Pethick
PO Box 7269
Tacoma, WA 98417

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 9TH day of JUNE, 2008, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591

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