

NO. 38011-1

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

QUINCY VALENTINO HAWKINS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 07-1-05102-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant failed to prove ineffective assistance of counsel when he relied on an incomplete record; when the issues defendant raised on appeal go to trial strategy and tactic; and when the evidence of his guilt was so overwhelming that he could not show any prejudice.

2. Whether the sentencing court properly ruled that defendant's prior burglary and custodial interference were separate crimes for the purposes of calculating his offender score when they had different objective intents and occurred in different time and place.

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Quincy Hawkins, hereinafter defendant, with second-degree murder of Dowell "Randy" Thorn (Count I), first-degree assault of Michael Chelly (Count II), and first-degree unlawful possession of a firearm (Count III). CP 1-2.

About a week before the trial date, defendant stated that he was "not ready at this time" and asked for a new counsel. 1RP 4. The court asked defense counsel about whether he had made an effort to talk to

potential witnesses, and counsel responded that he had gotten a statement from a witness crucial to defendant's claim of self defense. 1RP 5.

Finding no basis for the substitution of counsel, the court denied defendant's motion. 1RP 5.

The opening statements were not transcribed. 1RP 34. However, it appears from the record that during the opening statement the defense counsel talked about self defense. 6RP 754-755.

Towards the end of the State's case, defense counsel asked the court's permission to read certain parts of Ms. Levingston's testimony. 5RP 649. The counsel wanted to review the testimony to determine whether he had sufficient basis to ask for a self-defense instruction. 5RP 649. The counsel also asked for an opportunity to advise his client and let him decide whether to testify or not. 5RP 649. The court granted counsel's requests. 5RP 649-650. Defendant chose to testify at trial. 6RP 680-743.

After defense rested, the State argued that defendant's testimony did not support instructions on justifiable homicide. 6RP 744. After reviewing the case law, defense counsel conceded that issue and asked for an instruction on excusable homicide. 6RP 746, 747. The court stated that, "given the testimony that was presented by Mr. Hawkins, I think it would be improper for me to summarily conclude he's not entitled to an excusable homicide instruction. I am not inclined to give a self defense instruction." 6RP 753. The court gave the excusable homicide

instruction. 6RP 775. The State asked the court to give an instruction specifically directing the jury not to consider self defense; however, the court ruled against it. 6RP 776.

The parties stipulated to defendant's prior felony conviction. 6RP 678.

The jury found defendant guilty of second-degree murder, second-degree assault, and first-degree unlawful possession of a firearm. 6RP 830-831; CP 108-113. The jury also found that the crimes were committed while defendant was armed with a firearm. 6RP 831.

At sentencing, the State offered defendant's criminal history for purposes of establishing his offender score. 6RP 837-838. The defense counsel argued that defendant's prior custodial interference and burglary convictions counted as one point because they were crimes against the same victim and took place at the same time. 6RP 842. The court disagreed with defense counsel, and ruled that the crimes involved "distinctly different conducts" and should count as separate points. 6RP 844. Defendant's offender score was determined to be six. 6RP 844.

The court sentenced defendant to 295 months on Count I, plus 60 months for the firearm enhancement; to 43 months on Count II, plus 36 months for the firearm enhancement; and to 75 months on Count III. 6RP 852; CP 114-127.

Defendant filed a timely notice of appeal. CP 128-142.

2. Facts

Although victims Michael Chelly and Dowell Thorn were half brothers, they were as close as twins. 2RP 218, 219, 220, 235. The 19 and 20 year old brothers lived together, worked together, and “[y]ou would never see one without the other.” 2RP 221.

On September 29, 2007, Thorn and Chelly went to the house of Thorn’s girlfriend, Lashae Levingston. 2RP 237-238, 242; 3RP 352. They were going to give Levingston and her daughter a ride to Lacey. 2RP 242; 3RP 370.

Defendant had dated Levingston since ninth grade and was the father of Levingston’s daughter. 2RP 239-240; 3RP 310, 312. She and defendant broke up a few months prior to the incident in question, and defendant went to Tennessee. 3RP 318, 355. While defendant was in Tennessee, Levingston started dating Thorn. 3RP 320. Thorn and Chelly had previously seen defendant around their mom’s friend’s house and knew him by his middle name. 2RP 240. Thorn also knew that defendant was the father of Levingston’s child.

While Thorn knew about defendant and his prior relationship with Levingston, defendant did not know about Thorn. 3RP 327. Levingston did not tell defendant about her relationship with Thorn because “[defendant] might have been mad.” 3RP 327.

Upon his return from Tennessee, defendant started driving by Levingston's house. 3RP 358-359, 367. In subsequently talking about the events to the police, Levingston used the term "hassling" to describe his behavior and explained that defendant had called her continuously from a blocked-out number, and drove by her residence daily. 4RP 503.

On September 29, 2007, defendant showed up at Levingston's residence uninvited and asked to take his daughter. 3RP 376. By the time the two brothers pulled up behind defendant's car, in front of Levingston's house, Levingston and defendant were standing outside the house, arguing. 2RP 243, 245, 247; 3RP 377. According to Levingston, when he saw the two brothers, defendant wanted to know who they were. 3RP 379, 389.

Unsuspecting and minding his own business, Thorn got out of the car and started moving things from the back seat into the trunk to free some space for Levingston and her daughter. 2RP 242-243, 243-244.

Meanwhile, the argument between defendant and Levingston became heated: Levingston ripped a chain off defendant's neck, and defendant spit in her face. 2RP 249; 3RP 391, 435, 449; 4RP 504. At trial, Levingston testified that she did not remember what the argument had been about. 3RP 421. She did, however, remember that she chose not to tell defendant who the two men were as, she felt, it was none of his business. 3RP 423.

Defendant then approached the two brothers and told them “he was cool” with them. 2RP 247; 3RP 426-427. But Levingston was still concerned that defendant might get upset and get into a fight with Thorn. 3RP 386, 419. She was also concerned that defendant might assault her. 3RP 432. After she saw defendant approach Thorn, Levingston took her daughter inside the house. 3RP 441, 442. She came out a minute and a half later, saw Thorn in a struggle with defendant, and walked back into her residence. 3RP 442.

According to Chelly, after talking to them, defendant walked towards his car but returned shortly. 2RP 251. As defendant approached, he pulled out a gun. 2RP 253. Thorn and defendant started wrestling over the gun and a shot went off. 2RP 254. Chelly got out of the car and was swiftly moving toward the two men, when defendant got a hold of the gun, aimed it at his leg, and shot. 2RP 255, 258.

After defendant shot him, Chelly hopped away for a few feet and fell behind a car. 2RP 259, 260. Although Chelly could not see from his vantage point, he heard defendant cuss and then another shot rang in the air. 2RP 259-260.

Levingston admitted that after she had heard the shots, she looked out and saw defendant standing over Thorn. 3RP 447, 450; 4RP 506, 532, 533. Defendant had a gun in his hand. 3RP 451, 455, 477. Levingston went inside the house again. 3RP 454-455. Seconds thereafter, she heard a few more shots. 3RP 455. At trial, Levingston testified that next time

she came out, defendant was running to his car. 3RP 455-456. Detective Ringer, however, testified that Levingston had told him that she saw defendant shoot at Thorn twice. 4RP 507.

Chelly also saw defendant walk to his car. 2RP 268. He also saw that his brother, who was lifting his shirt, appeared to be shot in the stomach area. 2RP 264, 265. Despite the gun shot wound to his stomach, Thorn got in his car and chased after defendant. 2RP 269, 290.

A neighbor who had heard the shots came out and saw Chelly bleeding profusely. RP1 86, 87, 101, 103; 2RP 269. The neighbor, a certified nurse assistant, tightly wrapped his leg and covered him with a blanket. RP1 81, 88.

Just six or seven blocks away, at South 40th and Warner, the police found a multiple-vehicle collision. RP1 128-129; 2RP 155. Thorn was inside his car, slumped over and unresponsive. 2RP 162, 164; 4RP 564-565. He was pronounced dead at Tacoma General Hospital. 2RP 193. The cause of death was a gunshot wound of the abdomen. 4RP 611.

Chelly was taken to St. Joseph Hospital. 2RP 193. Although he already identified the shooter as "Quincy," the police showed him a six-photograph montage, which included a photograph of defendant. 2RP 194-195, 196. From the photo montage, Chelly identified defendant as the shooter. 2RP 200-201.

A warrant was issued for defendant's arrest. 2RP 206. Although defendant fled the state, he was eventually arrested in Chicago. 2RP 181, 208; 5RP 658.

At trial, Levingston testified that the victim, Thorn, had been calm and polite during his contact with defendant and did nothing to aggravate the situation. 3RP 464. On cross-examination, Levingston asserted that she had seen the gun in question in Thorn's possession a few days prior to the shooting. 3RP 470-471. This testimony, however, was inconsistent with her prior statement to the police that she had never seen Thorn with a gun, and inconsistent with her prior statement to the defense investigator that Thorn always carried a gun. 3RP 478, 487; 4RP 508, 534.

According to Chelly, neither he nor his brother owned or carried a gun. 2RP 290-291, 292, 294-295.

Defendant testified at trial. 6RP 680. He asserted that Thorn had had the gun in his car; that the struggle ensued when Thorn reached for it; and that during the struggle, the gun went off several times and both Chelly and Thorn got shot accidentally. 6RP 687-689, 692, 724, 730. According to defendant, the struggle started after Thorn had made a challenging statement directed at defendant, and defendant walked up to Thorn to confront him. 6RP 720, 721.

C. ARGUMENT.

1. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Ineffective assistance of counsel is a mixed question of law and fact and is reviewed by the appellate court de novo. *State v. Thach*, 126 Wn. App. 297, 106 P.3d 782 (2005).

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Cronin*, 466 U.S. 648, 656. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986). “The competence of counsel must be judged from the whole record and not from isolated segments of it.” *State v. Piche*, 71 Wn.2d 583, 591, 430 P.2d 522 (1967).

To show that the counsel’s assistance was so ineffective that a reversal is required, defendant must prove both prongs of the *Strickland* test: (1) that the counsel’s performance was deficient; and (2) that the counsel’s deficient performance prejudiced the defense. *Strickland v.*

Washington, 466 U.S. 668, 686-687, 104 S. Ct. 2052; 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 337, 899 P.2d 1251 (1995). When applying the *Strickland* test, the court must engage in a strong presumption that the counsel's assistance was reasonable and effective and scrutinize the counsel's performance with a high degree of deference. See *Strickland*, 466 U. S. 668, 699; *McFarland*, 127 Wn.2d 322, 335; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

a. Defense counsel's performance was effective

To show that the counsel's performance was deficient, defendant must prove that his counsel made errors so serious that his representation "fell below an objective standard of reasonableness" so as to render it below the level of counsel representation guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 688; *State v. Davis*, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Washington courts have "refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics." *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982); see also *McFarland*, 127 Wn.2d at 334-335; *State v. Doogan*, 82 Wn. App. 185, 189, 917 P.2d 155 (1996). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale

for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

Moreover, criminal defense counsel need not pursue a defense which is not warranted by demonstrable facts, nor raise every conceivable point, however frivolous or inconsequential, that may seem important to the defendant. *Jones v. Barnes*, 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *State v. Piche*, 71 Wn.2d 583, 430 P.2d 522 (1967).

State v. Piche was a seminal case in which the Supreme Court of Washington purposely expounded on the presumption of effective assistance of counsel and on why a counsel's choice of strategy and tactics should not be judged in hindsight. 71 Wn.2d 583, 589-591. The court noted that:

[I]t seems to be standard procedure for the accused to quarrel with court-appointed counsel, or to develop an undertone of studied antagonism and claimed distrust, or to be reluctant to aid or cooperate in preparation of a defense. This appears to be done in order to argue on appeal that the accused was deprived of due process alleging he was represented by incompetent counsel.

...

[T]he law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics. If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off-indeed, in some instances, whether to interview some witnesses before trial or leave them alone-he will lose the very freedom of action so essential to a skillful representation of the accused.

...

Experienced lawyers know that what may appear to be a blunder in tactics at the trial may have been deliberately

undertaken with calculated risk; that out-of-court interviews may open the doors to the admission of damaging evidence not otherwise admissible; that questions on cross-examination may elicit surprisingly damaging answers; that what on paper might read as very favorable testimony to the accused may, in counsel's judgment, when given from the witness stand, appear fabricated and suborned and thus far more damaging than left unsaid.

Piche, 71 Wn.2d at 589, 590, 591 (internal citation omitted).

Subsequently, Washington courts have steadfastly refused to find ineffective assistance of counsel when a counsel's decision could be a legitimate trial strategy or tactic. *See, e.g., State v. Lottie*, 31 Wn. App. 651, 644 P.2d 707 (1982). For example, in *State v. Lottie*, defendant argued that he had been denied effective assistance of trial counsel because the counsel failed to argue, or ask for findings on, the defense of involuntary intoxication. 31 Wn. App. 651, 654. The court rejected defendant's argument, stating that the counsel's decision related to trial strategy and tactics and holding that "counsel acted reasonably in refusing to present a defense not warranted by demonstrable facts." *Lottie*, 31 Wn. App. at 654-655.

Similarly, in this case, defense counsel properly acknowledged that, based on the evidence presented at trial, he did not have sufficient basis to ask for an instruction of justifiable homicide. 6RP 746, 747. He then promptly urged the court to instruct the jury on excusable homicide instead - and won that argument over the State's objection. 6RP 746, 747, 753, 775.

On appeal, defendant argues that because of the change in his defense he was denied effective assistance of counsel. Appellant's Brief, p. 15, 20. However, defendant fails to show how the change in the defense was not a legitimate trial strategy or tactic. In fact, defendant does not even provide sufficient record to support his contention. See *State v. Slemmer*, 48 Wn. App. 48, 738 P.2d 281 (1987) (defendant has obligation of providing reviewing court adequate record to determine claim of ineffective assistance of counsel). Thus, defendant claims that in his opening statement defense counsel argued self-defense to the jury. Appellant's Brief, p. 21. However, defendant did not provide the transcription of the opening statements on appeal, limiting the State's ability to evaluate how extensive the counsel's argument was and what exactly he told the jury, and limiting the State's ability to respond to defendant's contention.

What the record on appeal does show, is that defendant's counsel obtained a statement from Levingston before the trial, and that statement differed from what she had previously told the police. 1RP 5, 11, 13. Based on what Levingston told defendant's investigator, it appears counsel believed Levingston was going to corroborate defendant's claim of self-defense. 1RP 5, 11, 13; 5RP 649. This would be consistent with both defense counsel's representation that he had subpoenaed "[o]ur self

defense witness” and his opening statement that apparently anticipated a self-defense claim. 1RP 5.

Similarly, that defendant was privy to the self-defense strategy can be inferred from the fact that he never voiced his disagreement in court when counsel talked about self defense. Thus, before the trial started, counsel stated, in front of defendant, that “my client would like to proceed with a defense of self defense, I believe. I so indicated on the omnibus form.” 1RP 5. The omnibus form contains a check mark and a word “reserved” next to self defense and is signed by defendant. CP 5-6.

Levingston, however, proved to be a challenging witness for both the State and the defense as she continuously modified, clarified, and supplemented her story while on the stand. For example, at the end of her cross-examination, Levingston stated that the gun belonged to victim Thorn; however, she was subsequently impeached on that point by the prosecutor and also testified that Thorn was not aggressive toward defendant and did nothing to aggravate the situation. 3RP 464, 470-471. In the end, she was unable to give defense sufficient testimony to support a self-defense instruction. However, given the evolving and contradictory nature of Levingston’s testimony, defense counsel could not reasonably have predicted the course it would take.

The record indicates that at that point counsel had a clear understanding of his plight and acted appropriately. Thus, towards the end of the State’s case, defense counsel asked the court’s permission to

read certain parts of Levingston's testimony. 5RP 649. Counsel wanted to review the testimony to determine whether he had sufficient basis to ask for a self-defense instruction. 5RP 649. Counsel also asked for an opportunity to advise his client and let him decide whether to testify or not. 5RP 649. The court granted counsel's requests. 5RP 649-650.

Subsequently, defendant chose to take the stand. *See State v. Rainey*, 107 Wn. App. 129, 28 P.3d 10 (2001) (only the defendant has the authority to decide whether or not to testify). Defendant testified that he had shot Thorn and Chelly by accident when the gun discharged a few times during the struggle – a testimony inconsistent with justifiable homicide, which requires specific intent. 6RP 687-689, 692, 724, 730. *See State v. Brightman*, 155 Wn.2d 506, 526, 122 P.3d 150 (2005).

After defendant's testimony, counsel had only one legitimate strategy available to him: to argue excusable homicide and concede that the evidence was insufficient to support justifiable homicide. That is exactly what counsel did. 6RP 746, 747, 748. In fact, counsel was so effective that he secured the excusable homicide instruction over the State's objection. 6RP 748, 753.

Finally, defendant argues that his counsel was ineffective because he failed to properly cross-examine the medical examiner on the cause of death. Appellant's Brief, p. 17. His argument has no merit. On direct, the medical examiner unequivocally stated that the cause of Thorn's death was a bullet wound of his abdomen. 4RP 611.

The medical examiner explained that the bullet went through the victim's abdominal muscles, perforated through multiple loops of his bowel, injured the part of the body that holds the bowel, and came to rest in one of the muscles that supports the spine. 4RP 602-603. The medical examiner also testified that the bullet injured the part of the body that had a lot of vessels. 4RP 602, 603. The internal examination showed that the victim had two liters of blood in the abdominal cavity. 4RP 602.

When the prosecutor asked about any other diseases or traumas, the medical examiner acknowledged that the victim had swelling of the brain most likely attributable to attempts to resuscitate, a fracture of the right hyoid bone, and obesity. 4RP 610. However, after acknowledging these other medical issues, the medical examiner stated that there was no doubt in his mind that the cause of Thorn's death was a gunshot wound. 4RP 611.

On cross, counsel elicited that the gunshot wound was consistent with two people struggling over a gun when it went off. 4RP 612. Had counsel attempted to elicit another cause of death he would have only emphasized the damaging testimony describing the destructive path of the bullet and the rapid death it had caused. Thus, counsel's decision not to "beat a dead horse" was a text-book trial tactic.

In sum, defendant failed to meet his burden of proof and show that counsel's claimed errors were not legitimate trial strategy or tactic.

b. Defendant was not prejudiced

Even if defendant proves deficient representation, he must also prove that he was prejudiced by the counsel's error. See *Strickland*, 466 U.S. 666, 687. To prove that he was prejudiced, it is not enough for the defendant to show that the error had some effect on the outcome of the proceeding: defendant must show that his counsel's error was so serious that there is a reasonable probability that, absent the error, the result of the proceedings would have been different. *Id.* at 693, 694; *State v. Davis*, 119 Wn.2d 657, 665.

For example, in *State v. Perez-Cervantes*, defendant complained about his counsel's cross-examination of the medical witnesses. 141 Wn.2d 468, 478, 6 P.3d 1160 (2000). The Supreme Court dismissed defendant's argument because defendant has not shown that more questioning by counsel would have proved a delay in treating the stab wound to victim's heart and established an independent cause of death. *Perez-Cervantes*, 141 Wn.2d 468, 478. The court noted that to argue intervening cause of death, evidence must show the victim's "failure to seek medical attention caused a fatal injury independent of the stabbing". *Perez-Cervantes*, 141 Wn.2d at 478.

Similarly, in this case, defendant never even attempted to show that more questioning by his counsel would have proved that Thorn died of a car-accident trauma and not of the bullet wound. Perhaps, that is because the record is devoid of any evidence in support of independent causation as the medical examiner described the bullet wound in great detail and unequivocally concluded that Thorn's death resulted from the bullet wound to the abdomen. *Supra*.

Also, defendant could not show that Thorn's failure to seek immediate medical attention caused a fatal injury independent of the shooting. The evidence shows that the car chase spanned only six or seven blocks, and therefore lasted minutes, if not seconds; waiting for the ambulance at the scene would not have saved Thorn from the devastating wound and internal bleeding. 1RP 128-129; 2RP 155, 162, 164.

Finally, defendant also cannot prove that, but for the change in defense from justifiable to excusable homicide, he would have been acquitted. The State presented significant evidence that defendant did not shoot Thorn and Chelly in self defense or accidentally. Thus, the State showed that defendant was obsessed about Levingston; that he demanded to know who Thorn and Chelly were; that he was so angry that Levingston was concerned about her and her daughter's safety and expected a confrontation between the men; that defendant initiated the physical confrontation with Thorn; that he aimed at Chelly's leg; and that he was

standing over Thorn right before the last shots rang in the air. 2RP 254, 255; 3RP 327, 358-359, 367, 379, 386, 389, 432, 441, 442, 447-455; 4RP 503. The jury would have convicted defendant even if he never changed his defense.

In sum, defendant did not meet his burden and prove that he was prejudiced by counsel's alleged errors.

2. THE SENTENCING COURT PROPERLY RULED THAT DEFENDANT'S PRIOR BURGLARY AND CUSTODIAL INTERFERENCE COUNTED AS TWO SEPARATE POINTS IN HIS OFFENDER SCORE

A sentencing court's decision of whether the two crimes encompass the same criminal conduct for the purposes of calculating defendant's offender score will not be reversed absent a clear abuse of discretion or misapplication of the law. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123, 135 (1994); *State v. Burns*, 114 Wn.2d 314, 317, 788 P.2d 531, 532 (1990).

Generally, all current and prior convictions count towards the offender score. RCW 9.94A.589(1)(a). Only when the sentencing court expressly finds that the offenses "encompass the same criminal conduct," such convictions are counted as one crime. *State v. Worl*, 91 Wn. App. 88, 955 P.2d 814 (1998). Crimes "encompass the same criminal conduct" if (1) they require the same criminal intent, (2) are committed at the same

time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a); *State v. Lessley*, 118 Wn.2d 773,778, 827 P.2d 996 (1992); *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987). The absence of any one of these factors prevents a finding of same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974, 975 (1997); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824, 825 (1994).

For example, in *State v. Lessley*, the Supreme Court had to decide whether first-degree kidnapping and first-degree burglary encompassed the same criminal conduct. 118 Wn.2d 773, 777. Lessley burst into the house of his former girlfriend, demanding to see her, and while “brandishing a .22 caliber revolver,” ordered her and her mother into a car. *Lessley*, 118 Wn.2d at 775. He then drove the two women into different locations. *Id.*

The court held that the two crimes did not encompass the same criminal conduct. *Id.* at 777. It reasoned that “the objective intent of Lessley’s burglary was completed when he broke into the Thomas residence armed with a deadly weapon...then, Lessley’s criminal intent changed when he moved from the burglary to the kidnapping; the former did not further the latter.” *Id.* at 778. The court also held that the “same time and place” element was not met as the burglary occurred in the

Thomas' home, while the kidnapping spanned over a large area and lasted several hours. *Id.*

In the present case, defendant claims his 2006 convictions for custodial interference and burglary constitute the same criminal conduct, and therefore, should only count as one point for purposes of calculating his offender score. Appellant's Brief, p. 23-25. Defendant's argument fails because, like in *Lessley*, the crimes were committed at a different time and place and had different objective intents. Therefore, the two crimes cannot satisfy the requirements of RCW 9.94A.589.

The sentencing court below relied on the probable cause statement for defendant's 2006 convictions and summarized the facts as follows:

[T]he allegations were that the defendant entered the residence, removed the screen and window was opened. The victim, Ms. Levingston, ran out of the room to call the police. When she was on the phone with 911, she saw the defendant leaving the house with the baby running down the street. Later while the police were searching for the child or for the defendant, Ms. Levingston was advised the defendant dropped the baby off with a friend. Baby ultimately was recovered thereafter. 6RP 843-844.

Upon looking at the declaration for probable cause and hearing the arguments of counsel, the sentencing court determined that defendant's 2006 convictions of burglary and custodial interference were not the same criminal conduct. 6RP 844.

This Court should affirm the sentencing court's ruling because *Lessley* controls this case. 118 Wn.2d 773. First, defendant's 2006 convictions for burglary and custodial interference (originally charged as kidnapping) were virtually identical to Lessley's crimes of burglary and kidnapping. 6RP 841, 843.

Second, defendant committed the crimes in a different time and place. Thus, like Lessley, defendant committed burglary when he broke into Levingston's house. *Supra*. But the crime of custodial interference, like the kidnapping in *Lessley*, started when defendant removed Levingston's child from the house and continued in time, for at least several hours, and place, until the child was located. *Supra*; see *Lessley*, 118 Wn.2d at 778.

Third, the two crimes had different *objective* intents: breaking and entering and interfering or taking of the child. Defendant's *subjective* intent is irrelevant here - just like Lessley's subjective intent was irrelevant in that case. See *Id.* at 778. Further, "we would only be speculating to assume" that the subjective intent of this defendant for both crimes was to take the child from Levingston's custody. *Id.* Defendant may have initially only intended to confront Levingston.

While the burglary and the custodial interference involved the same victim, Levingston, they were committed in a different time and place, and had different objective intents. Therefore, the two convictions were properly counted as two separate points in calculating defendant's offender score.

On appeal, defendant concedes that the sentencing court could have counted the burglary and the custodial interference as two separate crimes under the burglary antimerger statute,¹ but argues that it failed to use that legal avenue at the time, and therefore, this Court cannot use the antimerger statute in affirming the sentencing court's ruling. Appellant's Brief, p. 25. Defendant's argument is misplaced and is not supported by the record.

The record shows that, when calculating defendant's offender score, the State specifically argued that both the burglary antimerger statute and the "same criminal conduct" provision applied in this case. R6 843. Thus, the Court was aware that both doctrines were available for consideration. The court then ruled as follows:

¹ RCW 9A.52.050, the burglary antimerger statute, provides that "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately."

I think *not only is there anti-merger issues*, but those would appear to be distinctly different conducts that allegedly occurred on that date, first the entry which is the burglary, and then the removing the child and not returning the child directly to the mother would be the custodial interference charge. I think they are, in fact, separate points...

6RP 844 (emphasis added). In other words, the court relied on both the antimerger statute and the “same criminal conduct” doctrine in ruling that defendant’s 2006 convictions for burglary and custodial interference were two separate crimes for the purposes of calculating defendant’s offender score.

In sum, the sentencing court below did not abuse its discretion when it ruled that defendant’s prior burglary and custodial interference were separate crimes for the purposes of calculating his offender score, because the court properly based its ruling on the burglary antimerger statute and on its determination that the two crimes did not “encompass the same criminal conduct.”

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

DATED: April 27, 2009.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/27/09 Therese Ko
Date Signature

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