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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when it entered judgment against him for burglary and theft because substantial evidence does not support these charges. RP 1-129.

2. Trial counsel's failure to object when the state repeatedly elicited evidence that Deputy Guadan believed the defendant was guilty violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and under United States Constitution, Sixth Amendment. RP 37-41, 49.

3. The trial court abused its discretion when it failed to determine whether or not two prior convictions and the two concurrent convictions constituted the same criminal conduct. RP 130-151; CP 56-70.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when it enters judgment against him for crimes unsupported by substantial evidence?

2. Does a trial counsel's failure to object when the state repeatedly elicits evidence that a deputy sheriff believed the defendant was guilty violate a defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and under United States Constitution, Sixth Amendment, when but for that evidence, the jury would have returned a verdict of acquittal?

3. Does a trial court abuse its discretion if it fails to determine whether or not two prior convictions and two concurrent convictions constitute the same criminal conduct upon a defendant's argument at sentencing that they are?

STATEMENT OF THE CASE

Factual History

On April 8, 2008, Timothy Rude of Junction City, Oregon, drove up to a logging site he was working at Road 1100 outside Yacolt in rural Clark County. RP 11-17¹. His logging company had been working in the area since the fall of 2007, and had numerous pieces of equipment at the site, along with a trailer that he used to store small equipment, spare parts, and tools. *Id.* The ground had been very wet for a few weeks preventing any work, and neither he nor any of his employees had been on site since March 26th. *Id.* When he and his employees had left on that date, all of the equipment was secure, and the trailer was closed. *Id.*

As Mr. Rude drove up to the site on April 8th, he immediately noted that someone had moved the Cat. RP 15-22. Upon getting out of his vehicle, he saw that someone had torn the door off of the trailer. *Id.* Further inspection revealed that almost all of the equipment, spare parts, and tools had been stolen out of the trailer. *Id.* A number of these items were very heavy, such as a generator, and would be difficult for one person alone to move. *Id.* When he saw this, he immediately called the Clark County Sheriff's Office, who sent Deputy Sheriff Guadan out to meet with Mr. Rude.

¹The record on appeal in this case includes two volumes of continuously number verbatim reports, referred to herein as "RP [page #]."

RP 23-27.

Once Deputy Guadan arrived on the site, he inspected the trailer along with Mr. Rude. RP 23-27. As they were doing this, Deputy Guadan saw and pointed out a cigarette butt on the floor. *Id.* Mr. Rude responded that only one of his employees smoked, and then never in the trailer. *Id.* Given this response, Deputy Rude took the cigarette butt, placed it into an evidence bag, and later sent it to the Washington State Crime Lab for possible testing. *Id.* Subsequent analysis showed that the DNA on the cigarette butt matched that of a sample of the DNA the state had on file for the defendant Mark Johnson. RP 4-10, 67-89.

On June 2, 2008, deputy Guadan went to the home the defendant shared with his girlfriend at 24009 Dole Valley Road, which is in rural Clark County outside Yacolt in the same general area as Mr. Rude's logging operation. RP 37-41. When the defendant came out of the home, he was smoking a cigarette and had a pack of cigarettes in his possession. *Id.* Deputy Guadan ordered the defendant to place the items down, and then handcuffed the defendant and placed him under arrest. RP 39-41. As they were walking to the patrol car, Deputy Guadan gave the defendant a cigarette to smoke. *Id.* When the defendant threw it down, Deputy Guadan picked it up and placed it in an evidence bag, which action angered the defendant. *Id.* Later analysis showed that the DNA on this cigarette was the same as the

cigarette Deputy Guadan had picked up in the trailer at Mr. Rude's logging site. RP 67-89

Once at the precinct building in Vancouver, Deputy Guadan interviewed the defendant. RP 43-49. During this interview, the defendant admitted gathering firewood with a number of other people in the area of Mr. Rude's logging operation, and to being on the site. *Id.* However, he denied entering the trailer or stealing anything out of it, although he did state that he had heard that Jimmy Smith had been involved in the crime. *Id.* When asked how his cigarette butt got into the trailer, the defendant indicated that he did not know. *Id.*

Deputy Guadan did not follow up to his investigation of the theft and burglary at Mr. Rude's logging site other than, arrest the defendant, interview him, and take DNA samples from the defendant for testing. RP 53-62. Deputy Guadan did not try to find and interview Jimmy Smith, although this individual was known to law enforcement as a person involved in criminal activity. *Id.* Neither did Deputy Guadan seek a warrant to search the defendant's home or vehicle for any of the hundreds of stolen items. *Id.* In fact, none of these items were ever recovered. *Id.* Finally, although there were tire tracks in the mud at Mr. Rude's job site, Deputy Guadan took no steps to secure photos or casts of them for future analysis. *Id.*

Procedural History

By information filed June 9, 2008, the Clark County Prosecutor charged the defendant, Mark Johnson, with one count of second degree burglary and one count of first degree theft. CP 1. The court later allowed the state to amend this information to change the dates upon which the state alleged the defendant committed these offenses. CP 27. The case later came on for trial before a jury with the state calling three witnesses: Timothy Rude, Deputy Guadan, and James Currie, a forensic scientist who works for the Washington State Patrol. RP 11, 23, 67. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History.

In addition, during his testimony, the state elicited the following facts from Deputy Guadan: (1) that after he asked the defendant to come out of his home on June 2nd, he placed the defendant in handcuffs and placed him under arrest, (2) that after interviewing the defendant at the precinct house, he told the defendant that he was under arrest for burglary and theft, and (3) that after he told the defendant he was under arrest for burglary and theft, he took him to jail. RP 37-41, 49. When eliciting these facts, the state presented no argument to the court of how they were relevant to any fact at issue before the jury, and the defendant's attorney failed to object that the only relevance these facts held was that they showed that in Deputy Guadan's opinion, the defendant was guilty. *Id.*

Following the presentation of the state's evidence, the defense rested without calling any witnesses. RP 90. The court then instructed the jury without objection or exception from either party. RP 91-97. After argument by counsel, the jury retired for deliberation, later returning verdicts of guilty on both counts. CP 51-52.

The parties later appeared for sentencing, during which time both parties admitted that the defendant had prior convictions out of Clark County for first degree malicious mischief and second degree burglary, both occurring on July 5, 1999, and both sentenced on August 25, 1999. RP 133-138. The defendant argued that these two crimes constituted the same criminal conduct and should be counted as one offense, thus yielding a standard range of from 9 to 12 months. *Id.* However, the judge refused to consider this argument on the basis that since the original sentencing court had not ruled that they constituted the same criminal conduct, he could not make a new determination on this point. *Id.* As a result, the court assigned one point for the prior malicious mischief and 2 points for the prior burglary and imposed a sentence of 15 months in prison on a standard range of from 12 to 16 months. RP 133-152; CP 70. The defendant thereafter filed timely notice of appeal. CP 99-100.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT AGAINST HIM FOR BURGLARY AND THEFT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THESE CHARGES.

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact

to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that the defendant’s fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar the state charged the defendant with first degree theft and second degree burglary, alleging that he had entered Mr. Rude's trailer and stolen items out of it. At trial, the defense did not dispute the state's claim that there had been a burglary and a theft, as there was overwhelming evidence of the existence of the crimes. However, the defense did argue before the trial court, and the defense again argues before this court, that there is insufficient evidence that the defendant was either the person or one of the people who committed this crime.

The sole piece of evidence that the state had connecting the defendant to the crime was the existence of a single cigarette butt with the defendant's DNA on it. Although this constituted compelling evidence that the defendant had been the person who had smoked the cigarette, it was insufficient evidence that the defendant had done so in Mr. Rude's trailer, much less that the defendant had been the person or one of the people who had committed the theft and burglary. As the defendant pointed out to the court at sentencing, it would have been easy for another person to have placed the cigarette butt in the trailer, having obtained it from his home, vehicle, or some other location where the defendant left it. As in *Mace*, this evidence only leads to a suspicion that the defendant had been involved with the crime. It does not constitute substantial evidence. As a result, this court should reverse the defendant's convictions and remand with instructions to dismiss the charges with prejudice.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE REPEATEDLY ELICITED EVIDENCE THAT DEPUTY GUADAN BELIEVED THE DEFENDANT WAS GUILTY VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for

judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based

upon trial counsel's failure to object when the state called upon a police officer to give the jury his opinion on the guilt or innocence of the defendant. The defendant sets out this argument.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial the prosecutor must refrain from any statements or conduct that express his/her personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a "substantial likelihood" that any such conduct, comment, or questioning has affected the jury's verdict, then the defendant's right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

The reason that no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially is "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec.

309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. “Personal opinions on the guilt ... of a party are obvious examples” of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant’s guilt is an improper lay or expert opinion because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant’s guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; See also *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state’s expert to testify in a rape case that the alleged victim suffered from “rape trauma syndrome” or “post-traumatic stress disorder” because it inferentially constituted a statement of opinion as to the defendant’s guilt or innocence).

For example, in *State v. Carlin*, *supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the

bench). The Court of Appeals agreed noting that “[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Under this rule, the fact of an arrest is not evidence because it constitutes the arresting officer’s opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967) the plaintiff sued the defendant for injuries that occurred when the defendant’s vehicle hit the plaintiff’s vehicle. Following a defense verdict the plaintiff appealed arguing that defendant’s argument in closing that the attending officers’ failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent’s negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury. The question of whether respondent was negligent in driving in too close proximity to appellant’s vehicle falls into this category. Therefore, the witness’ opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he issued, would not be acceptable as opinion evidence.

Warren v. Hart, 71 Wn.2d at 514.

Although *Warren* was a civil case the same principle applies in

criminal cases: the fact of an arrest is not admissible evidence because it constitutes the opinion of the arresting officer on guilt which is the very fact the jury and only the jury must decide.

In the case at bar, the state elicited the following facts from Deputy Guadan: (1) that after he asked the defendant to come out of his home on June 2nd, he placed the defendant in handcuffs and placed him under arrest, (2) that after interviewing the defendant at the precinct house, he told the defendant that he was under arrest for burglary and theft, and (3) that after he told the defendant he was under arrest for burglary and theft, he took him to jail. RP 37-41, 49. There is only one reason a police officer arrests a person, places him in handcuffs, tells him he is under arrest for theft and burglary, and then takes the defendant to jail. That reason is that the officer believes that the defendant is guilty. While there might be some unusual circumstances in which this evidence has relevance in a criminal trial, no such unusual circumstances existed in this case. The sole purpose for their admission was to seal in the mind of the jurors that the deputy believed the defendant was guilty.

In addition, there was absolutely no tactical reason for a defense attorney to sit mute while the state repeatedly elicited evidence that is on the one hand irrelevant and inadmissible, and on the other hand highly prejudicial. Thus, in the case at bar, trial counsel's failure to object to this

evidence fell below the standard of a reasonable prudent attorney. In addition, this failure to object also caused prejudice. Given the dearth of evidence indicating that the defendant was the person or one of the persons who committed the crimes before the jury, the repeated admission of the deputy's opinion on guilt was what made the difference between an acquittal and a conviction. Thus, trial counsel's failure denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should reverse the defendant's conviction and remand for a new trial.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO DETERMINE WHETHER OR NOT TWO PRIOR CONVICTIONS AND THE TWO CONCURRENT CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT.

Under RCW 9.94A.589(1)(a), at sentencing on two or more offenses, if "some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994). Under this statute, the term "same criminal intent" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). The term "same criminal intent" as used in this definition does not mean the same "specific intent." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Rather, it means the same “objective intent.” *Id.* The only exception to this rule is found in burglary convictions where the burglary anti-merger statute acts to allow the court the discretion in determining whether or not to count burglary convictions as same criminal conduct with other offenses. *State v. Lessley*, 118 Wn.2d 773, 782, 827 P.2d 996 (1992).

For example, in *State v. Deharo*, 136 Wn.2d 856, 966 P.2d 1269 (1998), the trial court convicted the defendant of Delivery of Heroin, and Conspiracy to Deliver Heroin. At sentencing, the trial court found that these two offenses had the same victim and were committed at the same time and place. However, the court ruled that these two offenses did not constitute the “same criminal conduct” for the purpose of sentencing because they had different intent elements. The defendant appealed this ruling.

The Court of Appeals reversed the trial court on the sentencing issue, holding as follows:

[T]he present case, the “objective intent” underlying the two charges is the same - to deliver the heroin in one or both conspirators’ possession. Possessing that heroin was the “substantial step” used to prove the conspiracy. Since both crimes therefore involved the same heroin, it makes no sense to say one crime involved intent to deliver that heroin now and the other involved intent to deliver it in the future. Nor is there any factual basis for distinguishing the two crimes based on objective intent to deliver some now and some later. Under the reasoning in *Porter*, the two crimes should be treated as encompassing the same criminal conduct.

State v. Deharo, 136 Wn.2d at 858.

Similarly, in *State v. Saunders*, 120 Wn.App. 80, 86 P.3d 232 (2004), a defendant convicted of murder, robbery, kidnaping, and rape out of the same incident argued that his trial counsel had been ineffective when he failed to argue that the rape and the kidnaping constituted the “same criminal conduct” for the purpose of determining his offender score. The court agreed, holding as follows:

Under the facts here, it appears that Williams’s primary motivation for raping Grissett by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Further, as the case law provides strong support to this argument, the failure was prejudicial. *See State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *Edwards*, 45 Wn.App. at 382, 725 P.2d 442; *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 526 (1998).

Thus, counsel’s decision not to argue same criminal conduct as to the rape and kidnaping charges constituted ineffective assistance of counsel and requires a remand for a new sentencing hearing where defense counsel can make this argument.

State v. Saunders, 120 Wn.App. at 825.

As is obvious under RCW 9.94A.589(1)(a) and the cases cited, the sentencing court also has the duty to determine whether or not multiple concurrent convictions constitute the “same criminal conduct” for the purposes of determining a defendant’s offender score, at least in a situation in which the defendant claims that some or all of his convictions constitute the “same criminal conduct.” *In re Connick*, 144 Wn.2d 442, 28 P.3d 729

(2001). This, same duty applies when a defendant argues that two or more of his prior convictions included in the calculation of his or her offender score constituted the same criminal conduct, provided the defendant presents some evidence to support his claim. *State v. Torngren*, 147 Wn.App. 546, 563, 196 P.3d 742 (2008) (“A sentencing court, again, must apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct. RCW 9.94A.525(5)(a)(i). The court has no discretion on this.”)

In the case at bar, the trial court failed to make an independent determination whether or not his two prior convictions should be considered as same criminal conduct because the court was laboring under the false belief that it had to defer to the determination of the original sentencing court. In addition, the trial court failed to consider whether or not the defendant’s two concurrent convictions should be considered as same criminal conduct. In so ruling, and in failing to rule, the trial court failed to exercise its discretion in a situation in which the law requires it to exercise discretion. An abuse of discretion occurs when the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001). In addition, the failure to exercise discretion when it exists is itself an abuse of discretion. *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997). Thus, in the

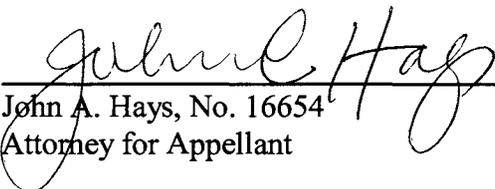
case at bar, the trial court abused its discretion when it refused to make an independent determination whether or not the defendant's prior convictions constituted the same criminal conduct. As a result, the court should remand this case for resentencing.

CONCLUSION

Substantial evidence does not support the defendant's convictions. As a result, this court should reverse the defendant's convictions and remand with instructions to dismiss with prejudice. In the alternative, this court should reverse the defendant's convictions and remand for a new trial based upon the denial of effective assistance of counsel. Also in the alternative, this court should vacate the sentences and remand to the trial court for a new sentencing in which the trial court considers the issue of same criminal conduct.

DATED this 15th day of June, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9.94A.589(1)(a)

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

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

STATE OF WASHINGTON,
Respondent,

NO. 38728-0-II

vs.

AFFIRMATION OF SERVICE

JOHNSON, Mark,
Appellant.

STATE OF WASHINGTON)
County of Clark) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On June 15th, 2009 , I personally placed in the mail the following documents

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

to the following:

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Dated this 15th day of JUNE, 2009 at LONGVIEW, Washington.

Cathy Russell
CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

AFFIRMATION OF SERVICE - 1

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