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I. ASSIGNMENT OF ERROR

In its calculation of the Appellant's criminal history, the sentencing court failed to include one point for his previous conviction for attempted second degree arson. (RP 132-52).

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Pursuant to RCW 9.94A.525(4), does the sentencing court fail to properly calculate Appellant's offender score as a matter of law, when it rules that the Appellant's conviction for attempted second degree arson has a five-year wash out period instead of a ten-year wash out period?

III. STATEMENT OF FACTS

The State substantially agrees with the statement of facts as set forth by the Appellant. Where additional information or clarification is needed, it will be provided in the argument section of the brief.

IV. ARGUMENT

A. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

Because a rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt, this Court should affirm the Appellant's convictions.

The Appellant argues that the State did not present sufficient evidence to support his convictions for first degree theft and second degree burglary. Specifically, he contends that the State has only one piece of evidence connecting the Appellant to the crimes charge: “the existence of a single cigarette butt with the [D]efendant’s DNA on it.” (Br. of Appellant at 12). He argues that this evidence is insufficient to prove him guilty because such evidence shows only that “the Defendant had been the person who had smoked the cigarette.” *Id.* Because a rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt based upon the above mentioned DNA evidence in combination with other relevant circumstantial evidence presented at trial, this Court should affirm his convictions.

When challenging the sufficiency of the evidence, the appellant admits the truth of the State’s evidence. State v. Jones, 63 Wn. App. 703, 707-08, 821 P.2d 543 (1992). In making such a determination, the reviewing court must examine “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Myles, 127 Wn.2d 807, 816, 903 P.2d 979 (1995) (quoting State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993)). Further, the reviewing court

also must draw all reasonable inferences in favor of the State and most strongly against the defendant. Joy, 121 Wn.2d at 339.

The Appellant relies on State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982), but that reliance is misplaced. That case held that proof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not *prima facie* evidence of burglary. In the present case, the Appellant was not found in possession of any stolen property. The State's case was based on other evidence, as addressed below.

Circumstantial evidence alone may be sufficient if it permits a jury to find beyond a reasonable doubt that the defendant committed the elements of the crime charged. State v. Israel, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002). In the present case, the evidence presented was a combination of direct and circumstantial evidence.

First, Mr. Rude testified that his trailer was parked on a remote piece of land in Clark County between March 26, 2008, and April 8, 2008. (RP 14). He was unable to access this area between those dates because of severe snow conditions that made the roads impassible. (RP 15). His trailer was locked on March 26, 2008. (RP 16). Upon return to the trailer on April 8, 2008, he found the two doors of the trailer on the ground and over \$30,000 of equipment stolen from the trailer. (RP 16). He testified

that he does not know the Appellant and that he had never seen him before. (RP 13).

Second, Deputy Guadan testified that the Appellant's residence was extremely close to the crime scene. (RP 34-35). The Appellant even admitted to Deputy Guadan to being on the property and standing behind the burglarized trailer between the dates of March 26, 2008, and April 8, 2008. (RP 46). In addition, Deputy Guadan testified that he found a cigarette in the trailer that subsequently was found to have the Defendant's DNA on it. (RP 27, 85). The same brand of cigarette was found with the Appellant when he was contacted by Deputy Guadan on June 2, 2008. (RP 27, 41). Further, when told that there was something found inside the trailer, the Appellant blurted out, "[m]y cigarette butt." (RP 47).

The present case is analogous to State v. King, 113 Wn. App. 243, 54 P.3d 1218 (2002). Here, the defendant was convicted of conspiracy to commit first degree robbery based upon a note with the defendant's fingerprints found at the scene, together with the testimony of Brian Vance that asserted that the defendant was worried about a note he left at the scene. Id. at 269. Further, the victim gave a description of the two robbers who held her down and assaulted her permitted the jury to conclude that King was the shorter robber who subjected her to indecent liberties. Id. at 269-70. Finally, the note was found in the area

where the victim was being held down, indicated that is was dropped by one of the two men. The court held that “[a]lthough this evidence may not have compelled the jury’s finding of guilt, permissible inferences from the evidence could convince a rational juror beyond a reasonable doubt that King was guilty of the crimes charged.” Id. at 270.

As in King, the evidence was a combination of direct and circumstantial evidence. There was direct evidence that the Appellant was inside the trailer during the time period that the crimes occurred, the crime scene was inaccessible to most of the public, including the victim, the Appellant lived right next to the crime scene, the Appellant expressed concern about the cigarette butt found in the trailer, and admitted that he was on the property in question. Taking the evidence in the light most favorable to the State, a rational trier of fact could find, based on this evidence, that there was sufficient evidence that the Appellant committed the crimes of second degree burglary and first degree theft.

B. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

Because the Appellant fails to demonstrate that defense counsel’s performance was deficient and because he fails to demonstrate that the performance resulted in prejudice, the Appellant has failed to meet his burden of demonstrating ineffective assistance of counsel.

The Appellant argues that his trial counsel denied him effective assistance of counsel by failing to object to Deputy Guadan’s testimony

that the Appellant was arrested and taken to jail. (Br. of Appellant at 17). To establish ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Deficient performance is that which falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). This court strongly presumes that trial counsel performed reasonably. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant shows prejudice when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

In State v. Woodring, 37 Wn.2d 281, 285-86, 223 P.2d 459 (1950), the Washington Supreme Court addressed whether evidence of arrest concerning the current charge was relevant and admissible. The Court summarized its answer as follows: "Evidence touching arrest of a defendant on the instant charge neither puts his reputation in issue nor shows the commission of crimes *other than the one charged*. Such evidence connected with the arrest as has probative value concerning the crime charged, is admissible." Id. at 285. Therefore, contrary to the

Appellant's theory, evidence of arrest is not improper and inadmissible opinion evidence, but has probative value.

Further, "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony."

City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

Deputy Guadan's testimony of arresting the Appellant and taking him to jail was also relevant to establish context for other relevant evidence.

First, evidence of the Appellant's arrest at his house was necessary and relevant to establish the context of the Appellant's statement that Deputy Guadan was obtaining evidence against him by picking up his cigarette.

(RP 39). Second, evidence of Appellant's arrest and transportation to jail from the police precinct was necessary and relevant to establish the context by which Deputy Guadan obtained oral swabs from the Appellant that were subsequently used to establish a DNA match to the DNA found at the crime scene. Because the Appellant's claim that his trial counsel's choice to not object was based upon admissible evidence, he cannot show that trial counsel's performance was deficient.

Finally, even if the Appellant's trial counsel performed deficiently in not objecting to Deputy Guadan's statements of arrest and transportation to jail, the Appellant makes no showing that the outcome of

his trial would have been different had his counsel objected to these statements. As summarized in the preceding section, there was ample evidence to convict the Appellant without the evidence of arrest and transport to jail. As a result, the Appellant has failed to show that he was denied effective assistance of counsel.

C. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

Because the trial court was properly instructed that the only way to score separately both the Appellant's two prior offenses and two concurrent offenses was through the burglary anti-merger statute in RCW 9A.52.050, it did not abuse its discretion by scoring both sets of offenses separately.

The Appellant argues that because the trial court did not expressly articulate that it was applying RCW 9A.52.050 to both the current offenses and prior offenses, it abused its discretion. (Br. of Appellant at 21). Pursuant to RCW 9.94A.525(5)(a)(i) and RCW 9.94A.589(1)(a), the sentencing court must conduct an independent analysis to determine whether current offenses and/or prior offenses involve the same criminal conduct. In this case, the prosecutor stipulated that the Appellant's two prior offenses for first degree malicious mischief and second degree burglary were the same criminal conduct under a RCW 9.94A.589(1)(a) analysis. (RP 134). Further, the prosecutor explained that the only way that the sentencing court could score the Appellant's two prior convictions separately was to apply the anti-merger statute in RCW 9A.52.050.

(RP 134-38). Having that knowledge, the sentencing court scored the prior offenses separately. (RP 143, 148). The sentencing court then scored the Appellant's current offenses under the same rationale based and the facts presented at trial. (RP 143-44, 148).

The present case is analogous to State v. Channon, 105 Wn. App. 869, 20 P.3d 476 (2001)¹ where “[t]he trial court did not articulate its reason for counting Channon’s prior, concurrently served convictions as separate offenses.” Id. at 878. Here, Division Two of the Court of Appeals ruled that because the prior offenses occurred on different dates, there was an “implicit determination” of separate conduct. Id. Likewise, even though the sentencing court did not specifically articulate a reason on the record to justify scoring both the Appellant’s prior and current offenses separately, the record demonstrates that the sentencing court was fully informed that the only way to score them separately was through the anti-merger statute in RCW 9A.52.050. Thus, there was an “implicit determination” conducted by the trial court which does not require re-sentencing.

¹ See also State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998) (declining to remand because, even though the trial court had not made an express determination that the defendant’s current convictions should be counted separately, the record showed a different objective criminal intent for each prior conviction (and thus that the trial court had properly scored each conviction separately under RCW 9.94A.589).

V. CROSS APPEAL

Because the sentencing court failed to include the Appellant's conviction for attempted second degree arson in his offender core pursuant to RCW 9.94A.525(4), this Court should remand for re-sentencing.

The sentencing court calculates a defendant's offender score according to RCW 9.94A.525. Under this statute, Class B felony convictions are not included in the offender score if the defendant has spent ten consecutive years in the community without committing a crime that subsequently results in a conviction while a prior Class C felony is not included if the offender has spent five consecutive years in the community without committing a crime that results in a conviction. RCW 9.94A.525(2).

In the present case, the Appellant was convicted of attempted second degree arson on January 24, 2002. (CP 51-52); (RP 138). The crime dates for the present case were between March 26, 2008, and April 8, 2008. (CP 27). Second degree arson is a Class B felony while attempted second degree arson is a Class C felony. RCW 9A.48.030; RCW 9A.28.020. The sentencing court ruled that because the Appellant had spent five consecutive years in the community without committing a crime that resulted in conviction, the Appellant's conviction for attempted

second degree arson (Class C felony) should not be included in the Appellant's offender score. (RP 138-143).

While the sentencing court is correct that under RCW 9A.28.020, attempt to commit a Class B felony is a Class C felony, and that RCW 9.94A.525(2) has a five year wash-out provision for Class C felony convictions, RCW 9.94A.525(4) requires “[s]cor[ing] prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) *the same as if they were convictions for completed offenses.*” (Emphasis added.) Thus, contrary the sentencing court's ruling, because second degree arson is a Class B felony (RCW 9A.48.030), RCW 9.94A.525(4) requires that the Appellant's prior attempted second degree arson conviction count as a Class B felony for offender score purposes.²

As we note above, RCW 9.94A.525(2) establishes a ten-year wash-out period for Class B felonies, thus requiring the Appellant to have spent ten consecutive years in the community without another conviction before his prior attempted second degree arson conviction could wash out

² Washington appellate courts have consistently applied this reasoning in their interpretation of RCW 9.94A.525(4) as applied to other subsections of RCW 9.94A.525. See e.g., State v. Knight, 134 Wn. App. 103, 138 P.3d 1114 (2006) (holding that RCW 9.94A.525(4) required that the defendant's prior conviction for conspiracy to commit second degree robbery must be treated the same as the completed crime. Therefore, the trial court properly applied the doubling provision); State v. Becker, 59 Wn. App. 848, 801 P.2d 1015 (1990) (holding that former RCW 9.94A.525(4) required that the defendant's prior conviction for attempt to commit second degree robbery must be treated the same as the completed crime. Therefore, the trial court properly applied the doubling provision).

and be excluded from his current offender score calculation. Because the Appellant committed the present crimes before the required ten consecutive year period had concluded, his attempted second degree arson conviction did not “wash out.” As a result, the sentencing court improperly sentenced the Appellant within the standard range based upon an offender score of four instead of five.³

VI. CONCLUSION

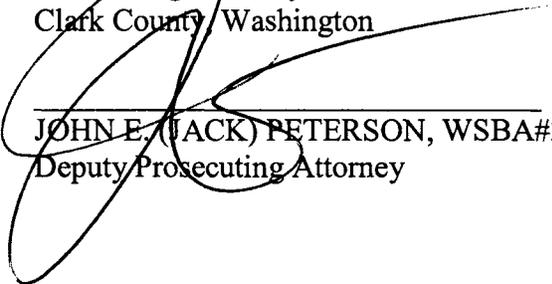
For each of the foregoing reasons, the State respectfully requests this court deny the Appellant’s appeal in all respects and remand for sentencing.

DATED this 13th day of October, 2009.

Respectfully submitted:

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³ This Court ruled on this exact issue in State v. Moeurn, 148 Wn. App. 1030 (2009) (unpublished opinion). The Washington Supreme Court just accepted review of Moeurn on September 9, 2009 (No. 82995-1).

