

No. 39578-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID L. LANDER,

Appellant.

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

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable, Judge Richard D. Hicks
Cause Nos. 09-1-00341-0 and 09-1-00342-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence exists to uphold Lander's conviction for theft in the second degree while armed with a firearm.

2. Whether Lander's convictions for: theft of a firearm and unlawful possession of a firearm in the second degree, theft of a firearm and trafficking in the first degree, theft in the first degree and theft in the second degree, and theft in the second degree and trafficking in the first degree violated double jeopardy.

3. Whether Lander's convictions for: theft of a firearm and theft in the second degree, theft in the second degree and unlawful possession of a firearm in the second degree, and theft in the first degree and theft in the second degree constituted the same criminal conduct for the purpose of calculating his offender score.

4. Whether Lander received ineffective assistance of counsel when his defense counsel did not argue at sentencing that each of the following set of convictions constituted the same criminal conduct: theft of a firearm and theft in the second degree, theft in the second degree and unlawful possession of a firearm in the second degree, and theft in the first degree and theft in the second degree.

B. STATEMENT OF THE CASE.

1. The State accepts the appellant's statement of the case, while noting the following clarifications, corrections, and additions:

Procedural:

The State charged Lander by information under cause number 09-1-00341-0 with theft of a firearm (RCW 9A.56.300(1)), theft in the second degree while armed with a firearm (RCWs

9A.56.040(1)(a),¹ 9A.56.020(1)(a), 9.94A.602 (recodified to 9.94A.825),² and 9.94A.533(3)), trafficking in stolen property in the first degree while armed with a firearm (RCWs 9A.82.050(1), 9A.82.010(19), 9.94A.602, and 9.94A.533(3)), and unlawful possession of a firearm in the second degree (RCW 9.41.040(2)(a) in accordance with the RCW. [CP 2-3]. Lander was not charged under 9A.82.020 (extortionate extension of credit).³ The State then charged Lander by information under cause number 09-1-00342-8, with theft in the first degree (RCW 9A.56.030(1)(a)),⁴ theft in the second degree (RCW 9A.56.040(1)(c)), and trafficking in stolen property in the first degree (RCWs 9A.82.050(1) and 9A.82.010(19)) in accordance with the RCW. [CP2]. Lander was not charged with 9A.52.020 (1)(a) (burglary in the first degree).⁵

At the close of the suppression hearing on 6/22/09, the court, after hearing all the testimony, found it was undisputed that

¹ Effective July 26, 2009, the Legislature increased the threshold in (1)(a) to in excess of “seven hundred fifty dollars” from the previous threshold of in excess of “two hundred fifty dollars.” It also increased the upper limit to “five thousand dollars” from “one thousand five hundred dollars.” Laws of 2009, ch. 431, § 8.

² Recodification was effective as of August 1, 2009. Laws of 2009, ch. 28, § 41.

³ The State assumes this is an unintentional error and Landers meant RCW 9A.82.010(19) (Trafficking definitions).

⁴ Effective July 26, 2009, the Legislature increased the threshold to “in excess of five thousand dollars” from the previous threshold of “in excess of one thousand dollars.” Laws of 2009, ch. 431, § 7.

⁵ The State assumes this is also a typographical error in Appellant’s brief, but is unsure what statute Landers intended to reference.

1) Detective DuPrey said he did not believe either Lander's first or second story of how he acquired the Music 6000 card or the gun, [6/22/09 RP 52], 2) Landers went out on the front porch with Detective Snaza, [6/22/09 RP 52], 3) both Lander and Snaza used obscenities while speaking on the front porch, [6/22/09 RP 53], and 4) after the conversation, Landers walked back inside and got the black powder rifle from behind the refrigerator. [6/22/09 RP 53]. The court then determined the following facts were in dispute: 1) what exactly was said by the officers while in the home, 2) whether Lander was threatened with going to jail, and 3) what the officers said to Lander regarding the defendant's mother and brother. [6/22/09 RP 53].

As to the disputed facts, the hearing court said,

The conclusion to the disputed facts that an officer does not have to accept the first denial to anything. [sic] He can in fact say, "I don't believe you." He can say that you may be going to jail. He may in fact—I believe the officer. The disputed fact is that if your mother ends up having a stolen weapon that's a crime and she could be in trouble. That's an absolute statement of law.

There is nothing that rises to the level of coercion. David in his testimony says, "I felt a little intimidated. He was cussing, he was loud and he was a cop," referring to Mr. Snaza at that occasion. But there is nothing that rises to the level of any type of intimidation. He knew he has the right to remain

silent, he didn't have to talk to them at all, he chose to, and until he—which he never did on this occasion says I don't want to talk to you. [sic] They have the right to say you could go to jail, we could take you to jail right now. This is nothing but an interrogation and doesn't go further.

[6/22/09 RP 53]. Trial testimony will be addressed in the following section.

Substantive:

Other than the black powder rifle Lander turned over to the police, Ware's remaining stolen property was not recovered. [7/30-31/09 RP 17]. Ware testified the remaining missing property included a Nikon 440 rangefinder (valued at approximately \$150-200), a backpack containing binoculars, a hunting knife, accessories for the black powder rifle, and walkie-talkies (valued at approximately \$150), and a chainsaw (valued at approximately \$250). [7/30-31/09 RP 16-17]. He reported this to police at the time of the theft. [7/30-31/09 RP 18]. The police recovered Roden's stolen wallet, with her state identification card, on the side of the road near Chehalis, WA, [7/30-31/09 RP 24, 26-27], but were unable to recover the remainder of her property. This property included one credit card, a checkbook, a Music 6000 card (spent by the defendant's brother and worth \$200), and \$1500 in cash

(remaining from a family trip the week prior). [7/30-31/09 RP 20-21, 23, 28]. She reported these items to the police at the time of the theft. [7/30-31/09 RP 22]. Both Ware and Roden testified that during the night the items were stolen from their vehicles while parked in their driveways. [7/30-31/09 RP 16, 20].

After discovering the Music 6000 card was used by Chris Lander (C. Lander), the defendant's brother, C. Lander, Detective DuPrey contacted him. [7/30-31/09 RP 16, 20]. Following that contact, C. Lander called DuPrey to tell him about the rifle he remembered his brother giving their mother for Christmas. [7/30-31/09 RP 53]. Because there were 50-60 vehicle prowls in the area, DuPrey testified he had to look up the list of stolen items to see if there was a missing rifle matching the description, which there was. [7/30-31/09 RP 53, 63, 73]. DuPrey then testified the defendant called him saying he would like to talk to him about "how he came into possession of the access device and kind of clear some things up." [7/30-31/09 RP 54].

DuPrey then testified, upon arriving at Lander's mother's house where the defendant lived, Lander invited he and Snaza in and denied he had stolen the Music 6000 card (gift card), saying first he bought it from one friend, but then saying he bought it from

another friend who he did not want to name. [7/30-31/09 RP 55]. Both Snaza and Lander confirmed this during their testimony, noting the friend's name was Martin. [7/30-31/09 RP 40-41, 47-48, 76, 79-80]. DuPrey testified that, based on other information he had at the time, he did not believe the defendant, told him so, and then read him his Miranda rights. [7/30-31/09 RP 55-56]. DuPrey testified, and both Snaza and Lander confirmed, that Lander was read his rights, acknowledged them, and still offered to speak with the officers. [7/30-31/09 RP 40-41, 56, 79-80].

Lander finally admitted to DuPrey and Snaza that he did not buy the gift card from "Martin," but instead stole it during a vehicle prowl, one of many he had committed. [7/30-31/09 RP 41, 44, 56, 72-73]. Although he still denied knowing anything about the rifle, he showed them his mother's gun safe which did not contain the stolen rifle. [7/30-31/09 RP 56-57, 80]. The officers had the mother's permission to inspect the gun safe. [7/30-31/09 RP 34]. After stepping outside to speak privately with Snaza at Snaza's request, however, Lander returned, pulled the rifle out from the behind the refrigerator where he had hidden it, and turned it over to the officers, admitting it came from the vehicle prowls. [7/30-31/09 RP 42, 45, 60]. Snaza testified Lander admitted the rifle was behind the

refrigerator instead of in the gun safe where his mother had told the officers it was, [7/30-31/09 RP 34], because he knew “DuPrey was going to be coming out to the residence and so that’s why he put it behind the refrigerator.” [7/30-31/09 RP 45].

Upon discovery of the rifle, the officers asked Lander to accompany them down to the police substation to give a recorded statement, which Lander agreed to do. [7/30-31/09 RP 44]. Lander was not under arrest or in handcuffs at any point during this time. [7/30-31/09 RP 60]. At the substation, Lander was again read his Miranda rights and again waived them, admitting for a second time he had been involved in 50-60 vehicle prowls, which resulted in the theft of the gift card and the rifle, among other items. [7/30-31/09 RP 61-63, 68-73]. Upon being asked to turn over all stolen items still in his possession, Lander returned to his mother’s house with the police and gave the officers a TomTom GPS unit which he said also came from one of the vehicle prowls. [7/30-31/09 RP 63]; [Ex. 2].

At trial, Lander recanted all admissions to the officers, including his recorded statement, alleging instead that he bought the gift card, the TomTom, an iPod, and the rifle from his friend Martin, not knowing the items were stolen. [7/30-31/09 RP 76]. He

then testified he pulled the rifle from behind the refrigerator and gave it to the police because he “didn’t want to get [his mother] in trouble.” [7/30-31/09 RP 82]. He further alleged, at trial, that he was not involved in any of the vehicle prowls and he only admitted to it prior because he “did not want to go to jail,” and because he “did not want [his] brother to get in trouble or [his] mother.” [7/30-31/09 RP 82-83]. Lander is a convicted felon. [7/30-31/09 RP 85].

C. ARGUMENT

1. The evidence was sufficient to convict Lander of theft in the second degree while armed with a firearm.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Citation omitted). This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question 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.*" (Citation omitted, emphasis in original).

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To prove Lander committed theft in the second degree while armed with a deadly weapon, the State was required to show he stole property exceeding a value of \$250 but no more than \$1500, and that he was armed with a deadly weapon at the time of the commission of the crime. RCW 9A.56.040(1)(a); 9A.94A.602; 9.94A.533(3). This means the weapon was easily accessible and readily available to him during the theft. State v. O'Neal, 159 Wn.2d 500, 150 P.3d 1121 (2007); State v. Gurske, 155 Wn.2d 134, 118 P.3d (2005); State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117

(2006). Since Lander does not argue the sufficiency of the evidence regarding the deadly weapon special verdict, the State will not address any related evidence or discussion regarding it.

Lander appears to direct his sufficiency argument toward the theft occurrence and value elements of Ware's missing items, based on the State's introduction of Ware's only recovered item, the rifle (charged separately in Count I). [Appellant's Brief, at 10]; [Ex. 1]. Lacking any authority or substantive analysis to support his claim, the State submits Lander's argument is both conclusory and contrary to the law.

First, "value" is defined in RCW 9A.56.010(18)(a) as "the market value of the property or services at the time and in the approximate area of the criminal act." Market value is "the price a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction." State v. Morley, 119 Wn. App. 939, 943, 83 P.3d 1023 (2004) (internal quotation marks omitted); State v. Longshire, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000); State v. Kleist, 126 Wn. 2d 432, 435, 895 P.2d 398 (1995).

It is a long and well-established rule in the courts of this state that an owner is always qualified to testify as to the value of his or her property. McCurdy v. Union Pac. R.R., 68 Wn.2d 457, 413 P.2d

617 (1966); Cunningham v. Town of Tieton, 60 Wn.2d 434, 436-37, 374 P.2d 375 (1962); State v. Hammond, 6 Wn. App. 459, 493 P.2d 1249 (1972); State v. Tolliver, 5 Wn. App. 321, 328, 487 P.2d 264 (1971).⁶ In adopting the rule, the Supreme Court of Washington quoted the Supreme Court of Idaho's reasoning:

“The general rule that, to qualify a witness to testify as to market value, a proper foundation must be laid showing the witness to have knowledge upon the subject, does not apply to a party who is testifying to the value of property which he owns. The owner of property is presumed in a way, to be familiar with its value by reason of inquiries, comparisons, purchases, and sales. The weight of such testimony is another question, and may be affected by disclosures made upon cross-examination as to the basis for such knowledge, but this will not disqualify the owner as a witness.”

Wicklund v. Allraum, 122 Wash. 546, 547-48, 211 P. 760 (1922) (citation omitted); see McInnis & Co. v. W. Tractor & Equip. Co., 67 Wn.2d 965, 968-69, 410 P.2d 908 (1966); Robinson v. Watts Detective Agency, Inc., 685 F.2d 729, 739 (1st Cir. 1982), *cert. denied*, 459 U.S. 1105, 459 U.S. 1204 (1983); LaCombe v. A.T.O. Inc., 679 F.2d 431, 435 (5th Cir. 1982).

Here, aside from the rifle, Ware testified the following was stolen from him: a Nikon 440 rangefinder that he valued at

⁶ The value of an item is proved the same in a criminal case as it is in a civil case. State v. Riley, 34 Wn. App. 529, 535, 663 P.2d 145 (1983).

approximately \$150-200, a backpack containing binoculars, a hunting knife, accessories for the black powder rifle, and walkie-talkies that he valued at approximately \$150, and a chainsaw that he valued at approximately \$250. [7/30-31/09 RP 16-17]. The State was not required to introduce any further evidence of value exceeding \$250 to prove this element of Count II. The evidence was admissible for the reasons stated in Wicklund above. The valuation of the equipment and witness credibility was then for the jury to weigh as part of their fact-finding duty. Lander had the opportunity to cross-examine Ware as to his knowledge of that valuation, but it appears he chose not to address that specific issue, thus he waives it on appeal. RAP 2.5(a).

Second, as stated in Salinas, Lander admits the truth of the State's evidence and gives it all the reasonable inferences in favor of the State. The evidence the jury here heard was as follows: 1) Lander admitted on at least two separate occasions to being involved in 50-60 vehicle prowls in the area, [7/30-31/09 RP 61, 73]; 2) Lander admitted on at least two separate occasions to taking several items from several vehicles, to include the gift card from Roden's vehicle, [7/30-31/09 RP 44, 48, 56, 60, 63, 70, 72]; 3) both Roden and Lander's vehicles were broken into at night while

parked in their driveways, [7/30-31/09 RP 16, 22]; 4) Lander was in possession of other items he admitted stealing during vehicle prowls, namely the TomTom GPS system, [7/30-31/09 RP 63, 76]; 5) Lander admitted on at least two separate occasions to taking Ware's rifle during the vehicle prowl, [7/30-31/09 RP 42, 45, 60, 61-73]; 6) Ware's in-court testimony of missing items was consistent with the list of stolen items he gave to police immediately upon discovery of the theft, [7/30-31/09 RP 16, 18, 53, 66, 74]; 7) the evidence of other stolen items from the other 50-60 vehicle prowls Lander admitted to was not found at his mother's house, [7/30-31/09 RP 63-64, 69-70]; and 8) the gift card Lander admitted stealing in a vehicle prowl was given to a third party (C. Lander) the same day it was stolen, [7/30-31/09 RP 22, 28].

The State's inability at trial to produce stolen items not yet recovered, but whose value and existence are testified to under oath by the property owner, does not somehow equate to dispositive proof of either the nonexistence or non-theft of those items (or their value). This seems to be Lander's argument, though, and the State submits it is illogical. For example, law enforcement's inability to recover all stolen items from Lander's other 50-60 admitted vehicle prowls does not mean the prowls did not occur,

nor that he did not take the items. It is a fallacy to say that because someone has not seen the stolen equipment first hand the equipment either does not exist or was not stolen. The circumstantial evidence is overwhelmingly sufficient to the contrary.

It is undisputed that numerous vehicle prowls occurred in the area. The State submits it is uncontroverted Ware's truck was one of the vehicles involved. It is also undisputed that both a large amount of property was stolen during those prowls and that officers recovered some, but not all, of the stolen property. Finally, it is undisputed Ware's rifle was among the stolen property recovered, while the rest was not, and that the rifle was recovered at Lander's residence along with other property reported stolen in the same set of vehicle prowls.

Ware's actions immediately following discovery of the theft in making a report to the police and his in-court testimony are not only corroborative of each other, but also consistent with Lander's admissions and the events which occurred during DuPrey and Snaza's investigation of Lander. Viewing this evidence in the light most favorable to the State, a rational trier of fact could have reasonably concluded Lander broke into Ware's truck in the middle of the night and stole not only his rifle, but also the rest of the

contemporaneously reported stolen property. The jury could reasonably have determined the officers were unable to recover the other items because Lander had already sold or given them away to third parties, just as he did with the gift card. The jury could have also reasonably found Ware's valuations credible, done the math, and determined the total value of the unrecovered stolen property was in excess of \$250 (approximately \$550 at the low end of the testified range), but no more than \$1500. As a result of these facts, the credibility of Ware, the incredibility of the defendant, and the legal standard directed of Salinas, Lander's claim on this issue fails.

2. Lander's convictions do not result in a violation of the double jeopardy clause of either the Washington State or U.S. Constitutions.

The Fifth Amendment to the United States Constitution provides "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb" Article I, section 9 of the Washington Constitution mirrors the federal constitution stating "[n]o person shall be ... twice put in jeopardy for the same offense." "Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause." In re Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003) (citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)); State v. Womac, 160

Wn.2d 643, 650, 160 P.3d 40 (2007). Both prohibit “(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding.” Percer, 150 Wn.2d at 48-49 (citing State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); Gocken, 127 Wn.2d at 100). Conviction alone comprises punishment under the third element. Womac, 160 Wn.2d at 656-57. Subject to constitutional limits, the Legislature may permit multiple punishments for a single course of conduct. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Thus, this court must first look to whether the Legislature expressly authorized multiple punishments. Id. at 776; State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). If it did not, then the court must next engage in a statutory construction analysis to determine whether the defendant may be convicted of two offenses for a single course of conduct. Calle, 125 Wn.2d 776.

In a statutory construction analysis, Washington follows the “same evidence” rule which this court adopted in 1896. Womac, 160 Wn.2d at 665; Calle, 125 Wn.2d at 777. “[T]he defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law.” Calle, 125 Wn.2d

at 777. The “same evidence” rule is sometimes referred to as the “‘same elements’ test.” Gocken, 127 Wn.2d at 101 (quoting United States v. Dixon, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993)). “Washington’s ‘same evidence’ test is very similar to the rule set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).” Calle, 125 Wn.2d at 777. The same evidence rule controls “unless there is a clear indication that the Legislature did not intend to impose multiple punishment.” State v. Gohl, 109 Wn. App. 817, 821, 37 P.3d 293 (2001).

“[O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other.” State v. Trujillo, 112 Wn. App. 390, 410, 49 P.3d 935 (2002) (citing Calle, 125 Wn.2d at 777-78); Womac, 160 Wn.2d at 652. Washington courts have occasionally “found a violation of double jeopardy despite a determination” the offenses involved clearly contained different legal elements. State v. Schwab, 98 Wn. App. 179, 184-85, 988 P.2d 1045 (1999). Only where the Legislature is unclear in its intent, however, does the court turn to statutory construction, particularly the merger doctrine. State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983).

The merger doctrine is a rule of statutory construction which only applies when the Legislature has clearly indicated that in order to prove a particular degree of a crime, the State must prove not only that a defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes. *Id.* Thus, it does not apply where the Legislature clearly treats statutes as separate offenses.

a. Lander's convictions for theft of a firearm and unlawful possession of a firearm do not violate double jeopardy.

Contrary to Lander's claim, the Legislature expressly intended separate punishments for theft of a firearm and unlawful possession of a firearm. In 1995, the Legislature stated:

Nothing in the chapter [129,] Laws of 1995 . . . shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of *theft of a firearm* or possession of a stolen firearm, or both, *in addition to* being charged and subsequently convicted under this section for *unlawful possession of a firearm in the first or second degree*.

Laws of 1995, ch. 129 (emphasis added). This statement clearly shows the Legislature intended to punish for both theft of a firearm (Count I) and unlawful possession of a firearm in the second degree (Count IV). The State submits this is because unlawful possession of a firearm is one of the rare statutes where a status-

based possession is criminalized. See RCW 9.41.040(6). Possession of the firearm, regardless of how Lander obtained it, is unlawful under 9.41.040. RCW 9.41.040(6) restates the language from Laws of 1995 and demonstrates that dual convictions for both charged offenses are clearly permissible.

Lander's reference to State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753 (2005), is only useful as to an explanation of the doctrine of merger in varying cases of robbery and assault, not the facts unique to the instant case. Presumably the defendant did not intend the citation to either expressly or impliedly support his argument of merger in the instant case since the case focuses on the express relationship between robbery and assault, but the lack of an explanatory parenthetical could potentially cause confusion. Just to be clear, in Freeman, the Washington Supreme Court held that "the Legislature did intend to punish first degree assault and first degree robbery separately, as the "lesser" crime has the greater standard range sentence," and "that a case by case approach is required to determine whether first degree robbery and second degree assault are the same for double jeopardy purposes[, as in the case of Zumwalt]." Id. at 780. The court affirmed Freeman's conviction for assault and robbery in the first degree,

and remanded in Zumwalt's case, noting that it "generally it appears that these two crimes will merge unless they have an independent purpose or effect." Id. Regardless, both a Blockburger and merger analyses are inappropriate where the Legislature has made its intent clear as it did here. Lander's argument to the contrary fails.

- b. Lander's convictions for theft of a firearm and trafficking in the first degree while armed with a deadly weapon in the first degree do not violate double jeopardy.

Lander argues his convictions for theft of a firearm and trafficking in the first degree while armed with a deadly weapon violate double jeopardy because the firearm theft was in furtherance of the first degree trafficking charge and thus the two offenses merge. The State disagrees. The merger doctrine applies when the Legislature has indicated that proof of one crime is necessary to prove an element or the degree of another crime. In the instant case, the State is not required to prove theft of a firearm as a necessary element of first degree trafficking in stolen property.

RCW 9A.82.050(1) states: "A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly

traffics in stolen property, is guilty of trafficking in stolen property in the first degree.” Whereas RCW 9A.56.300 provides, in part:

- (1) A person is guilty of theft of a firearm if he or she commits a theft of any firearm.
- (2) This section applies regardless of the value of the firearm taken in the theft.
- (3) Each firearm taken in the theft under this section is a separate offense. . . .

“[U]nder the plain language of the trafficking statute, one who knowingly sells stolen property can be charged with trafficking, regardless of whether that person is the one who stole the property.” State v. Michielli, 132 Wn.2d 229, 237, 937 P.2d 587 (1997). Although the Michielli case presented the issue of merger specifically as it related to dismissal of charges for theft and trafficking, the statutory analysis is no less applicable in the instant case for theft of a firearm and trafficking.

The trafficking statute only requires the defendant know the property was stolen and attempt to traffic it, not that he committed the crime of theft to be guilty of trafficking. In this case, Lander need only know the rifle was stolen and “meant to . . . transfer . . . or otherwise dispose of [it] to another person” to be convicted of trafficking. RCW 9A.82.010(19). This means Lander’s knowing transfer of the stolen rifle to his mother as a gift satisfied the

trafficking charge, but was not inherently related to his theft charge for stealing the rifle. While the theft likely provided sufficient evidence to establish Lander knew the rifle was stolen at the time of transfer, the theft itself was not otherwise related to his trafficking charge. As in Michielli, the two crimes penalize Lander for two distinctly different actions, not an offense merely incidental to the other, thus the merger doctrine does not apply. State v. Strohm, 75 Wn. App. 301, 879 P.2d 962 (1994), *review denied*, 126 Wn.2d 1002 (1995).

Although Lander does not argue it is so, likewise, the offenses also fail the “same evidence” test because each offense contains at least one element the other does not—in fact, the elements of the two offenses are almost wholly different, only sharing the existence of “stolen property.” Specifically though, theft of a firearm requires an “intent to deprive” while first degree trafficking requires an “intent to dispose” of the property to a third party. RCW 9A.56.300(4); RCW 9A.56.020(1)(a); RCW 9A.82.010(19); *see State v. Walker*, 143 Wn. App. 880, 181 P.3d 31 (2008) (charges of first degree theft and first degree trafficking in stolen property were unique because the intent elements were different and thus, the two offenses did not violate double jeopardy

under the Blockburger test). Put simply, the overlap of one factor (the stolen property) in one element does not result in a finding of the same evidence or elements for both offenses. Thus, the offenses are distinguishable, and permit multiple convictions and punishments.

- c. Lander's convictions for theft in the first degree and theft in the second degree do not violate double jeopardy under the Blockburger test, but the State concedes they may violate the merger doctrine.

The two convictions were not the same in law and fact and thus, they do not fail the "same evidence" test under Blockburger. Blockburger, 284 U.S. at 304. However, the State concedes it may violate the merger doctrine.

Here, the two convictions do not violate the same evidence test because the elements of each charge are different. The elements of first degree theft are: theft of personal property exceeding \$1,500 in value. RCW 9A.56.030(1)(a). The elements of second degree theft, as it applies to the facts of this case, are: theft of an access device (regardless of value). RCW 9A.56.040(c). The second degree theft charge could only be completed upon the theft of the access device, specifically. The two convictions are therefore neither the same in law nor fact. Because the statutory elements

are not identical and the conduct forming the basis for each charge is different, the double jeopardy clause was not violated.

As previously noted, however, the merger doctrine arises when the court finds the Legislature intended the offenses to merge. While the State agrees the access card was stolen from the same victim, in the same place, and at the same time, and one could argue (as Lander does) that the theft of the access card occurred in furtherance of the theft of the wallet, it is unclear whether the Legislature intended the offenses to merge. The State submits it is possible the Legislature chose to recognize the theft of an access card as distinct from the theft of personal property in excess of \$1500, regardless of the circumstance of the theft.

Further supporting the argument it was the Legislature's intent to treat the offenses as separate, is the fact that proof of one is not necessary to prove the other. In fact, the two offenses, as charged in this case, cannot be proven with evidence of the other. The theft of the \$1500 cash, plus a credit card, Roden's identification card, and the wallet itself would not prove the theft of the access device under RCW 9A.56.040(c). Likewise, the theft of the access device, is not necessary to prove the first degree theft charge—indeed, it does not even add to the theft charge in that

case because the value of the gift card was extraneous to the first degree theft charge.

While it seems likely under Carosa that the theft of the wallet occurred in furtherance of the theft of the access device, the State was unable to find any clear authority determining it was the Legislature's intent for the two to merge. 83 Wn. App. 380, 921 P.2d 593 (1996). It is unclear whether theft of an access device, where value is not relevant, is to be considered a separate crime from the theft of the remainder of the wallet's contents, where value was implicitly relevant. If this court decides Counts V and VI do, in fact, merge then it should remand Lander for resentencing as appropriate.

d. Lander's convictions for second degree theft and trafficking in the first degree do not violate double jeopardy.

As previously stated in paragraph 2(b) above, the trafficking statute only requires the defendant know the property was stolen, not that he committed the crime of theft to be guilty of trafficking. As in Michielli and Strohm, the two crimes penalize Lander for two distinctly different actions, not an offense merely incidental to another, thus the merger doctrine does not apply. State v. Michielli, 132 Wn.2d 229, 237, 937 P.2d 587 (1997) ("nothing in the

trafficking statute precludes the statute from applying to the thief who initially stole the property”). In this case, the law penalizes Lander specifically for stealing the access card and then for trafficking it to his brother. For the same reasons stated in 2(b), the “same evidence” test fails here as well—each offense contains at least one element the other does not. Thus, the offenses are separate and distinct, and permit multiple punishments and convictions.

Even if the court deems in the preceding section (2(c)) that the second degree theft charge in Count VI merges with the first degree theft charge in Count V, this argument is unaffected for the reasons stated above. The theft of Ware’s access card, whether it stands alone as a second degree theft or merges with the first degree theft charge, is separate and distinct from his charge of trafficking of that access card. Contrary to Lander’s claims, the two do not merge.

3. The court was not required to find Lander’s convictions constituted the same criminal conduct for purposes of calculating his offender score.

When calculating an offender score, RCW 9.94A.589(1)(a) says all “current and prior convictions [should be treated] as if they were prior convictions for the purpose of the offender score,” but

recognizes the exception 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.”* RCW 9.94A.589(1)(a) (emphasis added).

The “same criminal conduct” “means two or more crimes that require the same criminal intent, involve the same victim, and are committed at the same time and place.” All of these elements must exist in order for a court to make a finding of same criminal conduct. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Courts narrowly construe this analysis and a trial court’s finding on the issue is reviewed under an abuse of discretion standard. Porter, 133 Wn.2d at 181 (1997); State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); Haddock, 141 Wn.2d at 110; State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999). Abuse occurs if the trial court “arbitrarily counted the convictions separately.” Haddock, 141 Wn.2d at 110.

Generally, a defendant does not waive a miscalculated offender score. In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). However, where “the alleged error involves an agreement

to facts, later disputed, or where the alleged error involves a matter of trial court discretion[,]” a waiver may occur. Id.; State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000). (holding the defendant waived review of the same criminal conduct issue by agreeing to the standard range calculation and failing to raise it at sentencing); State v. Wilson, 117 Wn. App. 1, 75 P.3d 573 (2003); *cf.* State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999) (holding the State failed to carry its burden of proof after a specific objection by the defendant to inclusion of his out-of-state convictions (not a same criminal conduct objection) and thus defendant could raise the issue for the first time on appeal); State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) (holding a defendant’s challenge expressly to the classification of out-of-state convictions may be raised for the first time on appeal because his silence did not relieve the State of its evidentiary burden); State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (where a defendant challenged the calculation of his offender score based on the inclusion of his out-of-state convictions, not as a same criminal conduct claim, the court held the defendant could raise the issue for the first time on appeal).

Unlike questions regarding the “inclusion of out-of-state convictions in the offender score,” “[a]pplication of the same criminal conduct statute involves both factual determinations and the exercise of discretion.” Nitsch, 100 Wn. App. at 523. Distinguishable from instances arising from out-of-state convictions, a question of same criminal conduct is “not merely a calculation problem” nor is the statute “mandatory.” Id. “[S]ound reasons exist for the implicit grant of discretion contained in the legislative language[,]” i.e. the Legislature’s use of the permissive “if.” Id.; RCW 9.94A.400(1)(a).

- a. The court was not required to find Lander’s convictions for second degree theft and theft of a firearm constituted the same criminal conduct for the purpose of calculating Lander’s offender score.

The State agrees the two theft offenses at issue here, second degree theft and theft of a firearm, occurred at the same time and place and against the same victim (Ware). Also, it does not appear the intent differs from one offense to the other. The issue is not whether the offenses constituted the same criminal conduct, however, but rather whether the trial court has the discretion to find that the crimes do not constitute the same criminal conduct. The statutory language above states that two or more

offenses are to be counted as one point *if* the court enters a finding that they encompass the same criminal conduct.

[A]n appellate court, when reviewing a sentence under the Sentencing Reform Act of 1981, will generally defer to the discretion of the sentencing court, and will reverse a sentencing court's determination of "same criminal conduct" only on a "clear abuse of discretion or misapplication of the law."

Haddock, 141 Wn.2d at 110, citing to State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990); see State v. McReynolds, 104 Wn. App. 560, 17 P.3d 608 (2000) (addressing the offender score issue and finding that because the victim (the public at large) was the same in each of the possession of firearm charges, the charges "may" constitute the same criminal conduct, and if McReynolds was convicted on remand—for reasons unrelated to this issue, then the sentencing court "may" consider whether to count them as one offense rather than multiple); State v. Hernandez, 95 Wn. App. 480, 483, 976 P.2d 165 (1999).

However, the State also recognizes that reviewing courts have treated the language of RCW 9.94A.589(1)(a) as if it were mandatory. For example, in State v. Tresenriter, 101 Wn. App. 486, 4 P.3d 145 (2000), the defendant was convicted of burglary while armed with a deadly weapon, nine counts of theft of a firearm,

and second degree possession of stolen property. The burglary conviction was reversed, but the convictions for theft and possession of stolen property were affirmed, and on remand the trial court was instructed to find them to be the same criminal conduct and resentence accordingly. The Trensriter court found that RCW 9.94A.400(1)(a) (now 9.94A.589(1)(a)) required them to be counted as one point in the defendant's offender score. Id. at 496-97. State v. Simonson, 91 Wn. App. 874, 960 P.2d 955 (1998); State v. Miller, 92 Wn. App. 693, 964 P.2d 1196 (1998).

In the instant case, no finding of same criminal conduct exists. Indeed, there is no discussion on the record from either counsel or the sentencing court discussing same criminal conduct at all, let alone for this set of offenses. [7/16/2009 RP 1-12]. There is only one reference to the issue, which came from Lander, himself, and was unrelated to these facts. [7/16/2009 RP 7]. Presumably, this was so because defense counsel agreed with the State's calculation of the offender score, and the court did not feel it necessary to do a same criminal conduct analysis. The State submits it was within the sentencing court's discretion not to find the offenses constituted same criminal conduct.

Moreover, in Nitsch, Division One held that a defendant waives the same criminal conduct issue by failing to raise it at sentencing. 100 Wn. App. at 519. Such is the case here. Even if this court finds the trial court does not, in fact, have the discretion to find convictions to be separate offenses for scoring purposes even if they meet the same criminal conduct test, Lander did not raise the issue as to these this set of charges at sentencing and thus he waives it now.

- b. The court was not required to find Lander's convictions for second degree theft and unlawful possession of a firearm constituted the same criminal conduct for the purpose of calculating Lander's offender score.

The State submits the argument previously stated and for the same reasons—that it was within the sentencing court's discretion to find the convictions to be separate offenses. Unlike in the previous set of charges, in this set, the State submits the charges cannot be construed to equal same criminal conduct. First and most importantly, the victim is not the same. As the Washington Supreme Court stated in Haddock, the victim in an unlawful possession of a firearm case is the public. 141 Wn.2d at 111. The court analogized the victim in such a charge to the victim in an unlawful possession of a controlled substance case and said

it is a "crime which . . . victimizes the general public." Id.; see State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Garza-Villarreal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). Contrary to Lander's argument, the owner of the property is not the victim in an unlawful possession of firearm charge. The court elaborated on their finding in Haddock saying,

A holding that the victim of . . . unlawful possession of firearms is the general public is consistent with the definition of "victim" in the Sentencing Reform Act of 1981 (SRA): "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged."

Haddock, 141 Wn.2d at 111; RCW 9.94A.030(40). In contrast, the victim of the second degree theft was Ware, specifically. All prongs of the test must be met for offenses to constitute the same criminal conduct. Since the victims in each crime were different, Lander fails the test entirely.

Second, the State submits Lander's intent also differed between charges. The intent element not only focuses on the intent stated in the RCW, but also on the "extent to which the offender's 'criminal intent, as objectively viewed, changed from one crime to the next.'" Haddock, 141 Wn.2d at 111 (quoting State v. Dunaway,

109 Wn.2d 207, 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988)).

The State submits the concurrence of Justice Madsen in Haddock, while not controlling, is helpful in analyzing the objective intent of unlawful possession:

Unlawful possession of a firearm is a status crime. Possession of a firearm by a felon is a crime whether the firearm is stolen or not. Thus, the objective intent of unlawful possession of firearms is not to possess stolen property, but rather to be in possession of a firearm when in the status of felon.

Haddock, 141 Wn.2d at 118 (Madsen, J., concurring). The majority in Haddock found that unlawful possession of firearms and possession of stolen firearms did not constitute the same criminal conduct because the victims were different, whereas the concurrence believed the objective intents of the two were different. The same is true in the instant case. The intent of second degree threat is “to deprive [the property owner] if such property,” RCW 9A.56.020, while the objective intent for unlawful possession of a firearm, as stated above, is distinctly different. The State’s position is that Lander’s argument for same criminal conduct fails not only on the element of same victims, but also likely on the element of same intent.

Finally, Lander did not raise this argument at sentencing regarding this combination of offenses, and thus Lander now waives it on appeal. Nitsch, 100 Wn. App. at 519.

- c. The court was not required to find Lander's convictions for second degree theft and first degree theft constituted the same criminal conduct for the purpose of calculating Lander's offender score.

Unlike the above charges, Lander's reference to same criminal conduct at sentencing was specific to this set of offenses. While neither defense counsel nor the sentencing court seemed to acknowledge his question when posed, the State acknowledges this court could conclude Lander raised the issue relating to these facts, and thus he preserved it for appeal. [7/16/2009 RP 7].

Again, however, it is the State's position that is within the trial court's discretion to determine if separate offenses are counted as the same for the purpose of calculating the offender score. Even if the court determines a same criminal conduct analysis is mandatory, however, the State submits it is reasonable for a court to find the two offenses were separate because the victim in each can be characterized as different. While the theft of the access card and wallet occurred at the same time and place, the victim of the theft of the access card (gift card), analogous to the theft of ATM or

credit card information, is Music 6000. Although Roden was in possession of the gift card at the time, Music 6000 guarantees the value of the card and it is redeemed directly through the company.

A Ninth Circuit case, U.S. v. Bonallo, provides analogous support for this proposition. 858 F.2d 1427 (9th Cir. 1988). In that case, a jury convicted Bonallo of 12 counts of bank fraud when he used stolen information from the ATM cards of bank customers to withdraw funds from their accounts without their permission. Id. On appeal, Bonallo tried to argue the victims of his actions “were the Bank customers whose accounts were falsely charged” but the Ninth Circuit disagreed, determining instead that the victims could actually be two-fold. Id. at 1434 n.9. First and foremost, the victim was the Bank itself, because it would be responsible for reimbursing the loss to the customers, but the customers could also potentially be victims. Id.

Similarly, in the instant case, the victim of the access card theft was at the very least Music 6000, the honoree of the card upon presentation by C. Lander, if not also Ms. Roden who may or may not be reimbursed by the company for the loss.⁷ Either way,

⁷ The record is clear that Roden returned to the company to get a replacement card, but it is unclear if Music 6000 replaced the card or if she had to spend another \$200 to purchase an additional gift card.

the State submits the company is likely a victim of the theft. If it replaces the card, then it suffers a financial loss. If it does not, then it likely suffers a loss of goodwill from the customer from whom it was stolen.

If this court finds the trial court does not, in fact, have the discretion to find convictions to be separate offenses for scoring purposes even if they meet the same criminal conduct test and further, that the victims in this case were not the same, then this matter should be remanded for resentencing based on an offender score which does not count first and second degree theft separately.

4. Defense counsel's failure to argue same criminal conduct for Lander's convictions of second degree theft and unlawful possession of firearms, and first and second degree theft did not result in ineffective assistance of counsel, but it may have been ineffective regarding Lander's convictions for theft of a firearm and second degree theft.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132

Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

Generally, making a showing of ineffective assistance based on a lack of a same criminal conduct analysis is extremely difficult. This is because same criminal conduct is an issue involving questions of both fact and law and when the issue is not raised,

there is no record as to the underlying facts of the offenses challenged as same criminal conduct for an appellate court to review. Nitsch, 100 Wn. App. at 520-21. Thus, demonstrating prejudice will be, at a minimum, extremely difficult, if not altogether impossible.

In the instant case, defense counsel's failure to raise the issue as it relates to the charges for theft in the second degree (Count II) and unlawful possession of a firearm (Count IV), as well as theft in the first degree (Count V) and theft in the second degree (Count VI), is not objectively unreasonable. An attorney is not required to pursue potentially meritless arguments. Because it is consistent with the position and reasonable belief the two sets of convictions did not constitute the same criminal conduct for the reasons stated in the previous sections of this brief (3(b) and 3(c)), defense counsel was not ineffective for failing to raise arguments he might reasonably believe would not succeed.

Likewise, Lander has not established actual prejudice resulted from defense counsel's lack of argument on these grounds. There is nothing in the record to suggest that "but for" the lack of defense counsel's argument, the defendant's sentencing on this set of convictions would be different. In re Pirtle, 136 Wn.2d

467, 487, 965 P.2d 593 (1996). Lander's argument simply asserting that had the argument been made, it would have succeeded is conclusory and not a demonstration of actual prejudice. There is no guarantee, especially in light of the State's argument the offenses did not constitute the same criminal conduct, the sentencing court would have agreed with defense counsel. Thus, as it relates to Counts II and IV, and Counts V and VI, Lander's argument for ineffective assistance fails.

However, the State concedes that failure to argue same criminal conduct for theft of a firearm (Count I) and theft in the second degree (Count II), could potentially survive a deficient performance and actual prejudice review. It would appear to the State that, even if the court deems the issue waived for failure to raise at sentencing, it is likely a court would deem it objectively unreasonable defense counsel would not argue it for the charges of theft of a firearm and second degree theft, especially in light of Lander mentioning the concept (albeit in reference to other facts). Unlike in Nitsch, the argument raised now by Lander is not factually inconsistent with those presented at trial and the State is unable to determine a tactical reason for defense counsel not arguing the issue at sentencing. Nitsch, 100 Wn. App. 512 at 523.

If this court finds Lander's defense counsel was ineffective for not arguing Counts I and II constituted the same criminal conduct, then it should remand for resentencing based on an appropriate offender score which does not count the charges separately. RCW 9.94A.589(1)(a).

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm this conviction.

Respectfully submitted this 25th of March, 2010.



Heather Stone, WSBA# 42093
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief of Respondent, on all parties or their counsel of record on the date below as follows:

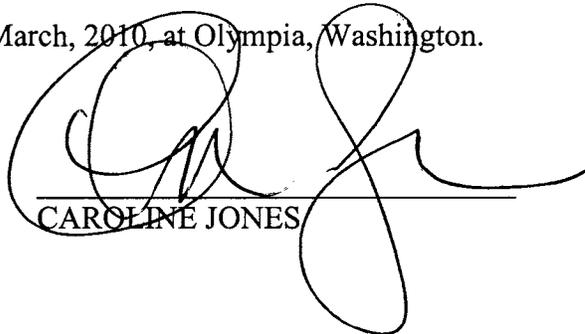
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TO: THOMAS EDWARD DOYLE
ATTORNEY AT LAW
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BY _____
DEPUTY

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 25 day of March, 2010, at Olympia, Washington.



CAROLINE JONES