

NO. 44596-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

GREG LEE HALE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00985-4

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the charged offense beyond a reasonable doubt?

2. Whether the Defendant's claim that the trial court incorrectly calculated his offender score is without merit when the trial court correctly determined that the offender score was an "8" based upon the Defendant's seven prior felony convictions and the fact that the Defendant was on community custody (which adds a point to the offender score pursuant to RCW 9.94A.525(19)) ?

3. Whether the Defendant's claim that some of his prior offenses constituted the same criminal conduct was not properly preserved when the Defendant failed to raise this claim in the trial court and thereby waived his right to raise this issue in the present appeal?

4. Whether the Defendant's claim that his trial counsel was ineffective must fail when the Defendant has failed to show either deficient performance or prejudice?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Greg Lee Hale, was charged by an amended

information filed in Kitsap County Superior Court with one count of possession of a controlled substance (methamphetamine) and one count of reckless endangerment. CP 1. Following a jury trial, the Defendant was found guilty of the charged offenses. CP 50. The trial court later imposed a standard range sentence. CP 4. This appeal followed.

B. FACTS

On August 21, 2012 Bremerton Police Department Officer Lawrence Green was on duty and was finishing up a detail in the parking lot of a Walgreen's store in Bremerton when he saw the Defendant and a small child walking down a sidewalk. RP 44. Officer Green recognized the Defendant from a previous incident and recalled that there was warrant for the Defendant's arrest. RP 44. Officer Green then contacted his dispatchers to confirm that the warrant was active. RP 44-45. After receiving confirmation that the warrant was still active, Officer Green pulled his patrol car into the street in front of the Defendant, exited his car, and contacted the Defendant. RP 45. The Defendant was walking hand in hand with the small child, on the sidewalk next to a rock wall. RP 45. Officer Green had his Taser in his hand at this point, but kept it behind him and out of the Defendant's sight. RP 46.

Officer Green called out the Defendant's name and told him that he had a warrant for his arrest. RP 46. The Defendant responded by first

stating “No, that’s not me,” and he next stated, “At least let me get my wife.” RP 46, 48, 52. The Defendant also picked up the child and was holding it in front of him with the child facing the officer and with the Defendant’s arms under the armpits of the child. RP 66. The child had not been crying before, but it began to cry when the Defendant picked her up. RP 66.

Officer Green responded by stating, “That’s fine. We’ll give your child to your wife.” Officer Green explained that at this point he was being completely professional and calm with the Defendant. RP 48. The Defendant, however, then tried to walk past the officer. RP 48-49. Officer Green told the Defendant that he was not free to go and told him to stop where he was. RP 48, 51-52. Officer Green told the Defendant to “Please put the child down” and again explained that they would get the child to the Defendant’s wife. RP 51-52. Officer Green also displayed the Taser at this point, but had it pointing down towards the ground. RP 48-49.

Officer Green explained that at this point the Defendant became “excited” and appeared desperate to leave. RP 49. The Defendant again tried to walk past the officer, and Officer Green again told the Defendant that he was not free to leave and asked him to put the child down. RP 49. The Defendant (who had initially been holding the child with his right

arm) also moved the child into his left arm, again placing the child directly between the Defendant and the officer, and it appeared to Officer Green that the Defendant was attempting to use the child to protect himself. RP 49, 70. Officer Green pointed the Taser at the Defendant and again asked him to put the child down and told him he was not free to go. RP 72. The Defendant, however, continued to try to walk past the officer. RP 72.

At this point Officer Green “closed the distance” and pinned the Defendant against the rock wall with his arm and tried to maintain the child in the Defendant’s arm at the same time. RP 50, 72. Officer Green did this by using his own forearm to pin the child against the Defendant and thereby also pinning the Defendant against the rock wall. RP 51. Officer Green observed that the Defendant started to reach into his pocket with his free hand, and Officer Green was concerned the Defendant was reaching for a weapon. RP 50. Officer Green told the Defendant to show him his hands, but he did not comply. RP 50.

At this point Officer Green felt he had no other choice but to use his Taser. RP 50. At trial, Officer Green explained that a Taser fires “probes” and that he did not want the child to be injured in any way and that if he fired the Taser that there was a risk that the probes could accidentally hit the child. RP 50. Officer Green therefore chose to fire the probes into the rocks behind the Defendant, and once this was done he was

able to use the “dry stun” or “direct contact” by placing the Taser against the Defendant’s body. RP 50. This allowed Officer Green to control exactly where the “stun” was applied, and the officer applied the stun to the Defendant’s shoulder. RP 50.

As Officer Green was in the process of applying the “stun” to the Defendant’s shoulder, he was able to see that the Defendant was removing a pipe from his pocket and was attempting to crush the pipe at the same time that the officer was applying the dry stun to his shoulder. RP 51. Once the stun was applied, the Defendant started to slump down and he began to comply with the officer’s commands. RP 51. Officer Green grabbed the child and placed her on the ground and he then pinned the Defendant on the ground and placed him into restraints. RP 51. The child was sitting safely on the ground and was not crying, and the child’s mother came running up and was allowed to take the child. RP 56.

Officer Green recovered the pipe that the Defendant had attempted to destroy. RP 54. During a subsequent search incident to arrest a folded up paper bag containing a white crystalline substance was also found on the Defendant. RP 56-57, 80. The substance was later tested and found to contain methamphetamine. RP 97-99.

During cross examination at trial, defense counsel asked Officer Green if a Taser was a relatively safe weapon that caused no lasting

damage. RP 60-61. Officer Green acknowledged that this was true. RP 60-61. Defense counsel also asked if Officer Green was going to do anything himself that would have placed the child in serious danger of death or serious physical injury, and Officer Green answered that he was not. RP 68-69.

On redirect examination, however, Officer Green explained that the Defendant's actions placed the child in danger. RP 69-70. Officer Green further explained that things might have turned out differently if he had not stopped the Defendant and if the Defendant had taken off running with child. RP 71. Furthermore, Officer Green explained that things could have escalated into a worse situation. RP 71.

When defense counsel asked Officer Green on re-cross examination to explain how the child was actually in danger, Officer Green succinctly explained that he was an armed officer who considered the fact the Defendant may have himself been armed and that despite this fact the Defendant placed the child in front of him as a shield in order to prevent the officer access to his person. RP 75.

After closing arguments concluded, the trial court instructed the Defendant that he needed to be available (with 15 minutes notice) to appear for a verdict. RP 141. At 1:55 p.m. court was convened as the jury had notified the bailiff that they had reached a verdict. RP 142. Defense

counsel appeared, but the Defendant did not. RP 142. Defense counsel informed the court that he had asked the Defendant to stay close to the courthouse, but that he had not been able to find the Defendant. RP 142-43. The court then took a recess to allow defense counsel some additional time to locate the Defendant. RP 143. Court reconvened 15 minutes later, but defense counsel had still not been able to locate the Defendant. RP 143-44. The court then issued a bench warrant and took another recess. RP 146-47. Court reconvened again at 2:30 (which was an hour and 10 minutes after defense counsel had first learned that the jury had reached a verdict). RP 147-48. Defense counsel was still unable to locate the Defendant. RP 148. After hearing some brief argument on how to proceed, the trial court again took a recess to allow defense counsel (and the police) some more time to locate the Defendant. RP 149-54. Court then reconvened at 3:15 and the trial court made a record that the Superior Court and the Clerk's Office had not received any contact from the Defendant. RP 154-55. Defense counsel also explained that he (and his office) had not heard from the Defendant. RP 155. The trial court then noted that it had been one hour and 55 minutes since the jury had indicated that it had reached a verdict, and the court (after making detailed findings on the record) ultimately found that the Defendant's absence was voluntary. RP 157-58. The verdict was then taken. RP 159-64. The jury

found the Defendant guilty of the two charged offenses. RP 160. A “no bail” bench warrant was issued for the Defendant’s arrest. RP 164.

A sentencing hearing was subsequently held several weeks later. RP 165. At the beginning of the hearing defense counsel explained that due to the fact that the Defendant had failed to appear for the verdict the parties had reached an agreement on a recommended sentence. RP 166. The prosecutor then explained that because the Defendant had failed to appear for the verdict, the State could have filed a charge of bail jumping that would have carried a sentence of 51 to 60 months. RP 168. The parties, however, had agreed that in exchange for the State’s agreement to not file the bail jumping charge the Defendant would agree to a joint sentencing recommendation of three years. RP 167. The specific recommendation was for a 24 months sentence on the felony possession charge and a consecutive 364 day sentence on the gross misdemeanor reckless endangerment charge. RP 167-68. The State also explained that at the time of the current offense the Defendant was on a prison based DOSA sentence. RP 169.

Furthermore, the State explained that the Defendant had agreed to sign a written stipulation regarding his criminal history. RP 168. Defense counsel then stated,

Your Honor, we're agreeing to that recommendation, based on the fact that the State's agreed not to file the bail jump. We believe that's in Mr. Hale's best interests.

RP 170.

The Defendant also signed the written stipulation which was filed with the court, and that stipulation included the following language and chart:

(2) The defendant stipulates that as of this date, in determining an accurate criminal history, offender score and standard range, that the following accurately describes my criminal history and I agree that the sentencing court may rely upon the following:

2.2 CRIMINAL HISTORY (RCW 9.94A.525) <i>Asterisk (*) denotes prior convictions that were same criminal conduct.</i>	Date of Crime	Date of Sentence	Sentencing Court	Juv (x)
Residential Burglary; PSP 2; Theft 2	8/14/10	5/25/11 – Prison- Based DOSA	Kitsap County	
Assault 2 Conspiracy ¹	9/12/07	10/1/07	Kitsap County	
Forgery	10/25/05	11/9/06	Kitsap County	
Theft 2	1/6/04	12/2/04	Kitsap County	
VUCSA	8/7/03	8/20/03	Kitsap County	
On community custody/prison-based DOSA				

CP 51-52.

The trial court ultimately imposed 24 months on the possession charge, but rather than impose the recommended 364 days on the gross

¹ The word "Conspiracy" was a handwritten addition to the stipulation. CP 51.

misdemeanor count, the trial court imposed only 180 days on that count, consecutive to the felony (for a grand total of 30 months). RP 174; CP 4-7.² This appeal followed.

III. ARGUMENT

A. THE DEFENDANT'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.

The Defendant argues that the evidence presented below was insufficient to support the guilty verdict on the charge of Reckless Endangerment. App.'s Br. at 5. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the crimes beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of

² The trial court explained that it was imposing only 180 days because that would allow the Defendant to be supervised for two years instead of for only one year. RP 174-75.

the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn.App. 461, 465, 123 P.3d 132 (2005), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, 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). Accordingly, a reviewing court defers 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). The relevant inquiry, therefore, 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.” *State v. Soby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), citing *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

In the present case, the Defendant was charged with Reckless Endangerment. CP 2. In order to prove this charge the State was required to show that the Defendant recklessly engaged in conduct that created a substantial risk of death or serious physical injury to another person. RCW 9A.36.050(1); CP 2.

As outlined above, the evidence at trial, viewed in a light most favorable to the State, showed that when the Defendant was approached by an armed police officer and advised that he was being detained due to an arrest warrant, the Defendant responded by picking up a small child and essentially using the child as a shield. RP 46, 66, 75. The Defendant refused numerous commands from the officer and continued to hold the small child between himself also the officer, even when the officer displayed his Taser. RP 49, 50-52, 72. The Defendant also tried to walk past the officer in an apparent attempt to flee; again while holding the small child between himself also the officer. RP 48-49. When the officer eventually was forced to physically contact the Defendant and the child in order to restrain the Defendant, the Defendant continued to disobey commands and refused to stop reaching into his pocket. RP 50-52, 72. This created an extraordinarily dangerous situation, as the officer was reasonably concerned that the Defendant was reaching for a weapon. RP 50. This escalation of events caused the officer to believe he had no choice but to use his Taser to apply a “dry stun” to the Defendant despite the fact that he was still holding the small child. RP 50. Luckily the officer was able to apply the stun and escort the Defendant and the child to the ground without any harm coming to the child. RP 51. This result, however, does not change the fact that the Defendant created an

extraordinarily dangerous and tense situation that could have resulted in serious injury to the child.

In short, viewing the evidence in a light most favorable to the State and drawing all reasonable all reasonable inferences from that evidence, the evidence was sufficient to permits a rational jury to find each element of the crime of Reckless Endangerment beyond a reasonable doubt. Nothing more is required. The Defendant's claim regarding the sufficient of the evidence, therefore, should be rejected.

B. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT INCORRECTLY CALCULATED HIS OFFENDER SCORE IS WITHOUT MERIT BECAUSE THE TRIAL COURT CORRECTLY DETERMINED THAT THE OFFENDER SCORE WAS AN "8" BASED UPON THE DEFENDANT'S SEVEN PRIOR FELONY CONVICTIONS AND THE FACT THAT THE DEFENDANT WAS ON COMMUNITY CUSTODY (WHICH ADDS A POINT TO THE OFFENDER SCORE PURSUANT TO RCW 9.94A.525(19)).

The Defendant next claims that the trail court incorrectly calculated his offender score. App.'s Br. at 6-7. This claim is without merit, as the trial court correctly calculated the Defendant's offender score.

The Defendant first claims is that the trial court's judgment and sentence includes a prior conviction for "Assault 2" but the Defendant's stipulation only contains a stipulation to a prior conviction for "Assault 2

Conspiracy.” App.’s Br. at 7.

While it is true that the stipulation does contain a handwritten notation denoting that the prior Assault 2 conviction was for a “Conspiracy,” for purposes of the present case this is a distinction without a difference and the “conspiracy” notation was irrelevant to the offender score calculation, as explained below

For the Defendant’s present conviction of Possession of a Controlled Substance (Methamphetamine), the statutes provide that the offender score is calculated by counting one point for each adult prior felony conviction. RCW 9.94A.525(7). In addition, RCW 9.94A.525(19) provides that “If the present conviction is for an offense committed while the offender was under community custody, add one point.”

Furthermore, Assault in the Second Degree, whether committed as a conspiracy or not, is a felony under Washington law. First, Assault in the Second Degree is a Class B felony. RCW 9A.36.021. While the addition of the “conspiracy” designation does reduce the class of the crime from a “Class B” to a “Class C” felony, the addition of the “conspiracy” designation does not in any way alter the fact that the crime remains a felony. *See* RCW 9A.28.040(3). Thus, the Defendant’s prior conviction, whether designated as a conspiracy or not, counts as one point. While the Court arguably committed a clerical error by failing to denote the prior

“Assault 2” conviction as an “assault 2 conspiracy,” this clerical error was completely irrelevant and a remand to correct this de minimis clerical error would be pointless.

Turning then the actual offender score calculation, the judgment and sentence in the present case indicates that the trial court found the Defendant’s offender score to be an “8.” CP 5. The trial court reached this calculation based on the prior criminal history outlined in the judgment and sentence as follows:

2.2 CRIMINAL HISTORY (RCW 9.94A.525) <i>Asterisk (*) denotes prior convictions that were same criminal conduct.</i>	Date of Crime	Date of Sentence	Sentencing Court	Juv (x)
Residential Burglary; PSP 2; Theft 2	8/14/10	5/25/11 – Prison- Based DOSA	Kitsap County	
Assault 2	9/12/07	10/1/07	Kitsap County	
Forgery	10/25/05	11/9/06	Kitsap County	
Theft 2	1/6/04	12/2/04	Kitsap County	
VUCSA	8/7/03	8/20/03	Kitsap County	
On community custody/prison-based DOSA				

CP 4-5.

As the Criminal History table shows, the Defendant has seven prior felonies which each count as one point. RCW 9.94A.525(7). In addition, the Defendant received one extra point since he committed his offense while on community custody. RCW 9.94A.525(19); RP 168-71.

The trial court thus correctly calculated the offender score as an “8.”³

For all of these, reasons, the Defendant’s claim that the trial court incorrectly calculated his offender score is without merit.

C. THE DEFENDANT’S CLAIM THAT SOME OF HIS PRIOR OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT WAS NOT PROPERLY PRESERVED BECAUSE THE DEFENDANT FAILED TO RAISE THIS CLAIM IN THE TRIAL COURT AND THEREBY WAIVED HIS RIGHT TO RAISE THIS ISSUE IN THE PRESENT APPEAL.

The Defendant next claims that several of his prior convictions constituted the “same criminal conduct” and should not have been included in his offender score calculation. App.’s Br. at 8. This claim is without merit because the Defendant waived this issue by failing to raise this issue below.

In determining a standard sentence range, the trial court counts other prior and current offenses separately to determine the offender score unless one or more of the current offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). Offenses constituting the same criminal conduct are counted as one crime when calculating the offender score.

³ The Defendant claims on appeal that the trial court’s calculation incorrectly lists the offender score as an eight and further claims that “This is inexplicable, given that the court only found seven prior felony convictions total.” App.’s Br. at 10, n. 5. The Defendant’s confusion, however, is readily explained by his failure to account for the additional point that was added due to the fact that he was on community custody. This fact was noted on both the stipulation and the judgment and sentence, and the statute clearly provides that this fact adds a point to the offender score. The trial court’s calculation, therefore, was not “inexplicable.”

RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Separate offenses constitute the same criminal conduct if three elements are present: (1) the same criminal intent, (2) the same time and place, and (3) the same victim. RCW 9.94A.589(1)(a); *State v. Haddock*, 141 Wn.2d 103, 109–10, 3 P.3d 733 (2000).

Washington courts, however, have held that a defendant waives a challenge to a miscalculated offender score based on a claim of “same criminal conduct” when the defendant failed to raise that argument in the trial court. For example, in the case of *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002), the Washington Supreme Court noted that waiver occurs “where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.” *Goodwin*, 146 Wn.2d at 874. Furthermore, in *Goodwin*, the Supreme Court specifically approved of the Court of Appeal’s analysis in *State v. Nitsch*, 100 Wn.App. 512, 997 P.2d 1000 (2000), where the Court had held that the defendant could not raise a “same criminal conduct” argument for the first time on appeal, noting that,

Only an illegal or erroneous sentence is reviewable for the first time on appeal. Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion....This is not an allegation of pure calculation error.... Nor is it a case of mutual mistake regarding the calculation mathematics. Rather, it is a failure to identify a factual dispute for the court's resolution and a

failure to request an exercise of the court's discretion.

Nitsch, 100 Wn.App. 520–23.

Later, in the case of *In re Shale*, 160 Wn.2d 489, 158 P.3d 588 (2007), the Supreme Court again explained that in *Goodwin* it had cited and approved of the analysis in *Nitsch*. *Shale*, 160 Wn.2d at 494-95 (“In fact, the rule we applied in *Goodwin* established that waiver may be found under certain circumstances, and we adopted an analogy from *State v. Nitsch*[.]”) The *Shale* court then again went through the *Nitsch* court’s reasoning at some length and ultimately stated, “We again adopt that reasoning and conclude that it controls in this case.” *Shale*, 160 Wn.2d at 495. The Court thus rejected the defendant’s “same criminal conduct” claim that had been raised for the first time on appeal. *Id* at 495-96.

Numerous other opinions from the Court of Appeals include holdings that a defendant waives a “same criminal conduct” claim by failing to raise in in the trial court. *See, e.g., State v. Phuong*, 174 Wn.App. 494, 547, 299 P.3d 37 (2013)(“Because Phuong's counsel did not argue at sentencing that the offenses constituted the same criminal conduct, that argument is waived on appeal.”); *State v. Brown*, 159 Wn.App. 1, 16–17, 248 P.3d 518 (2010) (“Because Brown's trial counsel did not argue same criminal conduct at sentencing, that argument is waived.”); *State v. Jackson*, 150 Wn.App. 877, 892, 209 P.3d 553 (2009)

(same).

In short, as the Defendant failed to argue that any of his prior convictions constituted the “same criminal conduct” in the court below, he has waived that issue and may not raise it for the first time on appeal.⁴

D. THE DEFENDANT’S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE MUST FAIL BECAUSE THE DEFENDANT HAS FAILED TO SHOW EITHER DEFICIENT PERFORMANCE OR PREJUDICE.

The Defendant next claims that he received ineffective assistance of counsel. App.’s Br. at 10-11. This claim is without merit because the Defendant can show neither deficient performance of counsel or prejudice.

To demonstrate ineffective assistance of counsel, a defendant must

⁴ The Defendant’s “same criminal conduct” argument must also fail because the record does not show that Hale’s 2010 convictions for Residential Burglary, Possession of Stolen Property, and Theft would meet the statutory requirements for “same criminal conduct.” For example, although the record shows that the sentence for these convictions were imposed on the same date, the record does not demonstrate that the victims were the same in these three crimes, as required by RCW 9.94A.589(1)(a). As the Defendant acknowledges, a defendant has the burden of establishing “same criminal conduct” under Washington law. App.’s Br. at 9; *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013) (“The scheme—and the burden—could not be more straightforward: each of a defendant’s convictions counts toward his offender score unless he convinces the court that they involved the same criminal intent, time, place, and victim. The decision to grant or deny this modification is within the sound discretion of the trial court and, like other circumstances in which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion.”). Thus, even if this issue had been properly preserved, the Defendant has failed to show that his three prior would have met the “same criminal conduct” test outlined in RCW 9.94A.589. Furthermore, even if the Defendant could have shown that these offenses were the “same criminal conduct,” this fact would not have changed his standard range (as discussed below in the ineffective assistance section), and thus any error in this respect would have been irrelevant and, therefore, harmless.

show: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Courts engage in a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

In the present case, the Defendant's specific claim is that his trial counsel was ineffective for failing to raise a "same criminal conduct" argument below. App.'s Br. at 11. He also claims that counsel's error prejudiced him "by increasing his standard range." App.'s Br at 11. These claims are without merit for several reasons.

First, the record in the present case does not reveal the factual basis for the Defendant's three 2010 convictions. As mentioned previously, it is thus impossible to tell based on the record whether the three 2010 convictions all involved the same victim – a prerequisite to a finding of "same criminal conduct." *See* RCW 9.94A.589(1)(a). As mentioned previously, when a defendant raises a "same criminal conduct" claim, the Washington Supreme Court has made it clear that the defendant has the

burden of production and persuasion on this issue. *Graciano*, 176 Wn.2d at 540.⁵ In any event, the record does not support a finding that defense counsel's performance was deficient or that the trial court would have found that the three 2010 crimes constituted the "same criminal conduct," even if defense counsel had raised this claim. The Defendant, therefore, has failed to meet his burden of demonstrating either deficient performance or prejudice.

In addition, the record does demonstrate that defense counsel had several valid reasons for not raising this issue below, even if there had been some colorable basis for the claim. First, as the Defendant had failed to appear for the verdict (and was thus facing a potential holdback charge of bail jumping that carried a standard range of 51 to 60 months), he had a strong incentive to reach an agreement with the prosecutor regarding sentencing. Defense counsel, therefore, could have reasonably concluded that securing the prosecutor's agreement to not file the bail jumping charge was more important than quibbling over a "same criminal conduct" argument. RP 168. In short, Defense counsel may well have decided (as a matter of strategy or tactics) that the best course was to withhold the same criminal conduct argument in order to secure the State's agreement to not

⁵ Given the absence of facts in the record in the present case, it is entirely possible, for instance, that defense counsel investigated the 2010 convictions and found that they did not meet the statutory requirements for "same criminal conduct."

file the more serious bail jumping charge.

This conclusion is further bolstered by the fact that even if counsel had raised a “same criminal conduct” argument (and if the court had agreed with his argument) this fact would not have changed the Defendant’s standard range (as explained below). Stated another way, given the Defendant’s offender score the “same criminal conduct” argument was essentially irrelevant and counsel may well have decided that there was no strategic or tactical benefit to raising this irrelevant point.

In order to understand the potential relevance of a “same criminal conduct” argument in the present case, it is important to first note that the only convictions that the Defendant claims could be the “same criminal conduct” are the three 2010 convictions (for residential burglary, possession of stolen property in the second degree, and theft in the second degree). App.’s Br. at 10. The Defendant claims that these three convictions should have counted as only one point, thereby reducing the offender score by two points. App.’s Br. at 10.

Furthermore, the Defendant’s conviction in the present case was for Possession of a Controlled Substance (Methamphetamine), which is a “seriousness level 1” drug offense (the lowest seriousness level). RCW

9.94A.518.⁶ The sentencing grid for drug offenses is set forth in RCW 9.94A.517 as follows:

DRUG OFFENSE SENTENCING GRID			
Seriousness Level	Offender Score	Offender Score	Offender Score
	0 to 2	3 to 5	6 to 9 or more
III	51 to 68 months	68+ to 100 months	100+ to 120 months
II	12+ to 20 months	20+ to 60 months	60+ to 120 months
I	0 to 6 months	6+ to 12 months	12+ to 24 months

As RCW 9.94A.517 and the above grid demonstrates, the offender score for drug offenses maxes out at an offender score of “6.” Any score above a “6” does not increase the standard range.

In the present case the trial court calculated the Defendant’s offender score as an “8.” CP 5. Thus, even if defense counsel had raised the “same criminal conduct” argument at sentencing, and even if the trial court had found that argument convincing, the net effect would not have changed the Defendant’s standard range. Rather, if the Defendant’s three 2010 offenses were found to have been the “same criminal conduct” this would have meant that those three 2010 crimes would have counted as one point instead of three points. Hale’s offender score thus would have been

⁶ The crime of possession of methamphetamine (and possession of all other narcotics from schedules III, IV, or v. except phencyclidine or flunitrazepam) is classified as a “seriousness level 1” drug offense. RCW 9.94A.518

a “6” instead of an “8,” but his standard range would have remained at “12+ to 24 months.” The “same criminal conduct” issue, therefore, was essentially irrelevant as it would not have changed the standard range in any way.

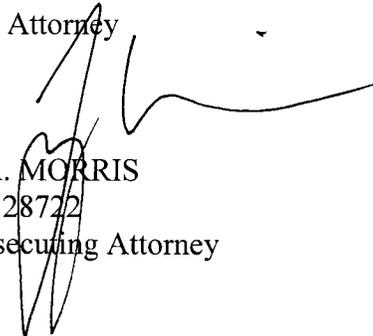
Given this fact, the Defendant simply cannot show that his counsel’s performance was deficient or that he suffered any prejudice. Rather, the Defendant’s standard range would have been “12+ to 24 months” even with a finding of “same criminal conduct.” Defense counsel can hardly be faulted for raising an irrelevant issue, especially in light of the fact that by reaching an agreement with the prosecutor defense counsel was able to ensure that the Defendant would not face an additional prosecution for a felony charge that carried a much larger standard range sentence. In addition, because the “same criminal conduct” claim would have had no effect on his standard range, the Defendant cannot show prejudice. For all of these reasons, the Defendant’s claim of ineffective assistance of counsel must fail.

IV. CONCLUSION

For the foregoing reasons, the Defendant’s conviction and sentence should be affirmed.

DATED December 31, 2013.

Respectfully submitted,
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