

No. 45046-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LONZO WILLIAM LAWSON, II,

Appellant.

On Appeal from the Lewis County Superior Court
Cause No. 13-1-00257-9
The Honorable James Lawler, Judge

OPENING BRIEF OF APPELLANT (CORRECTED)

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I. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Lonzo Lawson was armed with a deadly weapon during the commission of the burglary offense.
2. The State failed to prove beyond a reasonable doubt that Lonzo Lawson used, attempted to use, or threatened to use a knife as a deadly weapon, as required to prove the first degree burglary charge.
3. The trial court erred when it found that Lonzo Lawson's two trafficking in stolen property convictions were not the same criminal conduct for the purpose of calculating Lawson's offender score.
4. Lonzo Lawson was denied his right to effective assistance of counsel when his attorney failed to argue that Lawson's two unlawful possession of a controlled substance convictions were the same criminal conduct for the purpose of calculating Lawson's offender score.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the State's evidence established that Lonzo Lawson entered an uninhabited restaurant unarmed, used a kitchen knife found therein to break through a locked office door, took

cash from a safe within the office, and left the knife on the floor when he exited the restaurant, did the State fail to present any evidence that could prove beyond a reasonable doubt that Lawson used, attempted to use, or threatened to use knife as a deadly weapon, as required to prove the first degree burglary charge? (Assignments of Error 1 & 2)

2. Where Lonzo Lawson's two trafficking in stolen property convictions were based on him giving two individuals a portion of the money that he took during a single burglary, and where the acts occurred in the same place within moments of each other, did the trial court err when it found that Lawson's two trafficking in stolen property convictions were not the same criminal conduct for the purpose of calculating Lawson's offender score? (Assignment of Error 3)
3. Where Lonzo Lawson's possession of the two controlled substances that supported his two convictions for unlawful possession of a controlled substance occurred at the same time and place, and where established case law provides that multiple convictions for simultaneous possession of more than one controlled substance are the same criminal conduct, was Lawson denied his right to effective assistance of counsel

when his attorney failed to argue that Lawson's two unlawful possession of a controlled substance convictions were the same criminal conduct for the purpose of calculating Lawson's offender score? (Assignment of Error 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Lonzo William Lawson by Amended Information with: (1) first degree burglary (RCW 9A.52.020); (2) first degree theft (RCW 9A.56.020(1)(a), .030(1)(a)); (3) first degree trafficking in stolen property to Thomas Pennypacker (RCW 9A.82.050(1)); (4) first degree trafficking in stolen property to Kevin Dawkins (RCW 9A.82.050(1)); (5) unlawful possession of a controlled substance – heroin (RCW 69.50.4013); and (6) unlawful possession of a controlled substance – methamphetamine (RCW 69.50.4013). (CP 77-80) The State alleged that Lawson was armed with a deadly weapon both for the purpose of elevating the burglary from second degree to first degree, and for the purpose of a deadly weapon sentence enhancement. (CP 77)

The trial court denied Lawson's pretrial *Knapstad* motion and half-time motion to dismiss for lack of sufficient evidence. (CP 18-

49; 05/15/13 RP 3-18; TRP 616-19)¹ The jury convicted Lawson as charged, and found that he was armed with a deadly weapon for the purpose of a sentence enhancement when he committed first degree burglary. (CP 132-39; TRP 708-09)

Lawson stipulated to his criminal history, but argued that the two trafficking convictions were the same criminal conduct and only one should be counted in his offender score. (SRP 715-21; CP 140-41) The trial court disagreed, and counted both convictions in his offender score. (SRP 721; CP 143, 144) Based on that score, the trial court imposed a standard range sentence totaling 104 months. (CP 145; SRP 730) This appeal timely follows. (CP 160)

B. SUBSTANTIVE FACTS

Gena Allen owns and operates Frosty's Salon & Grill in Napavine, Washington. (TRP 68) Frosty's had a kitchen and bar and eating area. (TRP 70-71) Common cooking utensils and cooking knives were kept in drawers in the kitchen. (TRP 70-71) The building also had a separate office area. (TRP 71-72) Allen kept a safe in the office, and often kept a large amount of cash in the safe.

¹ The transcript containing pretrial hearings on 05/15/13 and 06/06/13 will be referred to by the date of the proceeding. The trial transcripts, labeled Volumes I thru V and consecutively paginated, will be referred to as "TRP." The transcript of the sentencing hearing will be referred to as "SRP."

(TRP 72) The lock on the safe was broken, and sometimes did not lock correctly. (TRP 155-56) Allen also had written the combination to the lock under a shelf directly above the safe. (TRP 73, 85)

Frosty's did not have a security system. (TRP 79) At closing, an employee would simply place the till full of cash on a desk in the office, close and lock the office door, then lock the various entrance doors. (TRP 79, 122, 123, 124, 125)

Frosty's employee Janice Ham arrived early in the morning of April 9, 2013, to open the establishment. (TRP 129-30) At first everything looked normal, but she noticed a stocking cap on the floor and a knife drawer left open. (TRP 131) Then she noticed broken glass on the floor next to French doors that lead to the outside beer garden. (TRP 131-32, 361) The office door was also open, and she could see papers scattered on the floor. (TRP 132)

A white-handled cooking knife was missing from the kitchen drawer, and was found broken in two pieces on the floor next to the office door. (TRP 81, 82, 142, 143, 366) Damage to the door and doorjamb indicated that the knife was used to break through the door to gain entrance into the office. (TRP 83-84, 143, 144, 362, 368-69; Exh. 10, 12) Allen later determined that \$14,797 in cash had been removed from the safe. (TRP 75-76)

Christopher Carsten is also a Frosty's employee, but he spent several months in the Lewis County Jail in early 2013. (TRP 171, 172) He met another inmate, Lonzo Lawson, when they were housed in the same unit for a few weeks. (TRP 178, 195) Carsten told Lawson about Frosty's, its lack of security, the location of the safe, and the fact that large amounts of cash were kept in the safe. (TRP 179-80) Carsten testified that Lawson seemed interested in this information and asked him additional questions about Frosty's. (TRP 180, 181)

Kevin Dawkins and Thomas Pennypacker are friends with Lawson. (TRP 197, 259) On the night of April 8, the three men were all at Dawkins' house. (TRP 198) According to Dawkins and Pennypacker, Lawson was discussing how easy it would be to get into Frosty's and steal the cash stored in the office. (TRP 200, 261, 263) Pennypacker was "excited" about the idea, and initially offered to go along and act as a lookout. (TRP 262, 263, 281) Pennypacker testified that, even though he had previously committed burglaries to get money, he "chickened out" and decided not to go. (TRP 264, 278)

Dawkins and Pennypacker provided Lawson with a bicycle and headlamp. (TRP 201, 264) The men testified that Lawson

indicated he was going to try to break into Frosty's, and left on the bicycle around 11:00 that night. (TRP 201, 264) Dawkins then went to sleep, but Pennypacker stayed up all night because he was worried that Lawson might get caught. (TRP 201-02, 265) Lawson returned the next morning with a large amount of cash. (TRP 202, 203, 266) Dawkins testified that Lawson said he got the money from the safe at Frosty's, which had been left open. (TRP 203)

Lawson pulled cash out of a bank bag and handed \$2,000 to Dawkins and \$2,000 to Pennypacker. (TRP 203, 266) Lawson kept the rest of the money for himself. (TRP 204, 267) The men then went on a shopping spree, buying food, heroin, clothes, and other items. (TRP 204-05, 267, 268) Lawson and Pennypacker also went gambling at a local casino. (TRP 268)

Eventually the men went to the Chehalis Inn, and Lawson paid cash to rent a room. (TRP 206-07, 293-94) After Lawson became a suspect, law enforcement officers contacted him at the Chehalis Inn and questioned him about the Frosty's burglary. (TRP 380) Lawson denied committing the burglary, and instead blamed Dawkins and Pennypacker. (TRP 382, 490-91, 512)

Officers saw items that appeared to have been recently purchased, including clothing and a laptop computer. (TRP 382,

489, 528) They also found a box with \$1,512 of cash inside. (TRP 382-83, 391-92, 397) During a subsequent search of the room, officers also found drug paraphernalia, and baggies containing methamphetamine and heroin. (TRP 400-01, 490, 566, 569)

Law enforcement tested various items collected from Frosty's for fingerprint and DNA evidence. DNA matching Lawson was located on the white knife handle found on the floor next to the office door, and in the stocking cap found in the kitchen at Frosty's. (TRP 600)

IV. ARGUMENT & AUTHORITIES

- A. THE STATE FAILED TO PROVE THAT LAWSON WAS ARMED WITH A DEADLY WEAPON FOR THE PURPOSES OF THE FIRST DEGREE BURGLARY CHARGE BECAUSE THERE WAS NO EVIDENCE THAT LAWSON USED, ATTEMPTED TO USE, OR THREATENED TO USE THE KNIFE IN A MANNER THAT WAS READILY CAPABLE OF CAUSING DEATH OR SUBSTANTIAL BODILY HARM.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only 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). “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.

The State charged Lawson in count one with first degree burglary. (CP 77) First degree burglary under RCW 9A.52.020 requires the State to prove, among other elements, that the defendant was armed with a deadly weapon or assaulted another person. The State alleged that the knife Lawson took from the Frosty’s kitchen drawer, which was found broken on the floor next to the office door, was a deadly weapon. (TRP 672-73)

The term “deadly weapon” is defined in RCW 9A.04.110(6), and means “any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a ‘vehicle’ as defined in this section, which, *under the circumstances in which it is used, attempted to be used, or threatened to be used*, is readily capable of causing death or substantial bodily harm.” (Emphasis added). Under this statute, a knife is not a deadly weapon per se, so the State must prove that “under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or

substantial bodily harm.” State v. Taylor, 97 Wn. App. 123, 126, 982 P.2d 687 (1999).²

At trial, the State argued that it need not show that Lawson’s actions indicated a willingness to use the knife in a deadly manner, but instead need only show that the weapon he possessed could potentially cause injury or death. (05/15/13 RP 11, 12-13; TRP 672-73; CP 56-58) In support of its position, the State relied on State v. Gamboa, 137 Wn. App. 650, 154 P.3d 312 (2007). (CP 57; 05/15/13 RP 13) In that case, Division 3 held that a machete used to forcibly enter a home was a deadly weapon, despite the lack of evidence that it was used or intended to be used as a weapon. Gamboa, 137 Wn. App. at 651. The court held that “[i]t is the potential as a weapon and not how the machete that was actually used that is important. . . . A machete is readily capable of causing great harm by its very size.” Gamboa, 137 Wn. App. at 653 (citations and footnote omitted).

However, our State Supreme Court specifically disapproved of the Gamboa court’s reasoning and holding in In re Personal

² The definition of “deadly weapon” for the purpose of proving first degree burglary is different from the definition of “deadly weapon” for the purpose of proving the sentencing aggravator. See RCW 9A.04.110(6); RCW 9.94A.825. For the purpose of the aggravator, any knife with a blade longer than three inches is a deadly weapon per se. RCW 9.94A.825. The kitchen knife in this case had a blade approximately 9.5 inches long. (TRP 556)

Restraint of Martinez, stating:

We disapprove Gamboa to the extent that it rejected a totality of circumstances test for determining whether a weapon other than a firearm or explosive is deadly under the first degree burglary statute. By characterizing a machete as a deadly weapon on the sole basis of its dangerousness and without regard to its actual, attempted or threatened use, the Gamboa court essentially read the circumstances provision out of the statute and treated the machete as if it were a deadly weapon per se.

171 Wn.2d 354, 368 fn. 6, 256 P.3d 277 (2011). Instead, the

Martinez Court notes:

The language of RCW 9A.04.110(6) is unambiguous. Under the plain meaning of this statute, mere possession is insufficient to render “deadly” a dangerous weapon other than a firearm or explosive. . . . Thus, we hold that RCW 9A.04.110(6) requires more than mere possession where the weapon in question is neither a firearm nor an explosive. In accordance with the plain meaning of this statute, unless a dangerous weapon falls within the narrow category for deadly weapons per se, its status rests on the manner in which it is used, attempted to be used, or threatened to be used.

Martinez, 171 Wn.2d at 366 (citing RCW 9A.04.110(6)).

For example, in State v. Gotcher, the defendant was apprehended by law enforcement after breaking into a residence. 52 Wn. App. 350, 356, 759 P.2d 1216 (1988). In the defendant’s right coat pocket, police found a partially opened, four-and-a-half inch long switchblade, with the safety removed. The defendant ignored

the officers' commands to place his hands against a wall and instead "fumbled" with something near his right coat pocket. 52 Wn. App. at 356-57. Finding that a knife was not a deadly weapon per se, Division One held that "there must be some manifestation of willingness to use the knife before it can be found to be a deadly weapon under RCW 9A.04.110(6)." 52 Wn. App. at 354. The court found the evidence sufficient to establish such "willingness" in that case because the knife was located in Gotcher's right pocket and he was seen reaching for his right pocket during struggle with law enforcement officers. The court therefore found sufficient evidence to sustain a first degree burglary conviction. 52 Wn. App. at 356.

In State v. Skenandore, the defendant was convicted of second degree assault (assault with a deadly weapon with intent to inflict great bodily harm) after attacking a corrections officer with a homemade spear. 99 Wn. App. 494, 496, 994 P.2d 291 (2000). Division Two looked to the circumstances of the weapon's use to determine whether it was a deadly weapon within the meaning of RCW 9A.04.110(6). 99 Wn. App. at 499. It found that while the spear could have taken out the corrections officer's eye under different circumstances, it did not have the capacity to cause death or substantial bodily harm under the circumstances in which it was

actually used because Skenandore could not reach the officer's eye from where he was standing. 99 Wn. App. at 500. Thus, the court agreed with Skenandore that the evidence was insufficient to prove he was armed with a deadly weapon within the meaning of RCW 9A.04.110(6). 99 Wn. App. at 501.

On the other hand, State v. Shilling involved a bar fight, in which the defendant hit the victim with a glass. 77 Wn. App. 166, 169, 889 P.2d 948 (1995). Division One found sufficient evidence that the glass was a deadly weapon because Shilling threw it at the victim's head, which resulted in lacerations requiring stitches and in pieces of glass being imbedded in the victim's head. 77 Wn. App. at 172.

Finally, in Martinez, a Sheriff's Deputy responded to a burglar alarm at an uninhabited farm shop. 171 Wn.2d at 357. When Martinez opened the door and stepped out of the building, the Deputy drew his gun and commanded Martinez to stop. Martinez fled, but was eventually caught and tackled. During a subsequent pat-down, the Deputy noticed an empty knife sheath on Martinez's belt. Later, law enforcement officers retraced the path on which the chase had occurred and located a knife in the mud, about 15 feet from the farm shop. Martinez was convicted of burglary in the first degree. 171

Wn.2d at 357.

Martinez argued that there was insufficient evidence to prove that he was armed with a deadly weapon. The Court agreed, finding:

No one saw Mr. Martinez with the knife, and he manifested no intent to use it. Furthermore, no one saw Mr. Martinez reach for the knife at any time after he was apprehended. Indeed, when Mr. Martinez was apprehended, he did not reach for his knife, but rather, he fled. By one account, he raised his hands before fleeing, suggesting that he was not holding his knife at that time. . . . Viewed in the light most favorable to the State, the only evidence that Mr. Martinez attempted to use the knife was the unfastened sheath. This evidence is insufficient to lead a rational fact finder to find intent to use the weapon beyond a reasonable doubt.

171 Wn.2d at 368-69.

In this case, the evidence showed that Lawson did not arrive at Frosty's armed with the knife. Instead, he removed the knife from a kitchen drawer once inside the building. (TRP 81, 142, 366) He used the knife to pry open the office door, where he had been told the safe and money were kept. (TRP 82, 83-84, 144, 179, 180, 362) And he did not take the knife with him when he left. (TRP 82, 142, 366) There is simply no evidence whatsoever that Lawson ever used, attempted to use, or threatened to use the knife as a deadly weapon. There is no evidence indicating a willingness to use the knife as anything other than a tool to access the office.

The State therefore failed to prove that Lawson was “armed with a deadly weapon” when he committed the burglary, and his first degree burglary conviction must be reversed.³

B. LAWSON’S CASE SHOULD BE REMANDED FOR RESENTENCING BECAUSE HIS TWO TRAFFICKING CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT, AND HIS TWO POSSESSION OF A CONTROLLED SUBSTANCE CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT.

RCW 9.94A.589(1)(a) of the Sentencing Reform Act states, in relevant part:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

In order for separate offenses to “encompass the same criminal conduct” under the statute, three elements must therefore be

³ The reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Remand for simple resentencing on a “lesser included offense” is appropriate when the jury has been explicitly instructed on the lesser offense. See State v. Green, 94 Wn.2d 216, 234, 616 P.2d 628 (1980); In re Heidari, 174 Wn. 2d 288, 293-94, 274 P.3d 366 (2012). The jury was instructed on the lesser included offense of second degree burglary in this case. (CP 99, 108, 109)

present: (1) same criminal intent, (2) same time and place, and (3) same victim. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589(1)(a). The absence of any one of these prongs prevents a finding of same criminal conduct. Vike, 125 Wn.2d at 410.

1. Lawson's two trafficking in stolen property convictions should have been counted as the same criminal conduct at sentencing.

The State charged two counts of trafficking, one for Lawson's delivery of \$2,000 to Pennypacker and one for Lawson's delivery of \$2,000 to Dawkins. (CP 78-79) At sentencing, the trial court rejected Lawson's argument that the two trafficking convictions constituted the same criminal conduct. (SRP 719-21) The court erred because all three elements of the same criminal conduct test are met.⁴

First, the offenses had the same criminal intent. "[T]he objective criminal purpose of the first degree trafficking in stolen property [offense is] *to sell or dispose* of stolen property to another person." State v. Walker, 143 Wn. App. 880, 891, 181 P.3d 31 (2008) (emphasis added) (citing RCW 9A.56.020(1)(a); RCW 9A.82.010(19)). Thus, Lawson's objective did not change from when

⁴ A trial court's same criminal conduct decision is reviewed for abuse of discretion or misapplication of the law. State v. Burns, 114 Wn.2d 314, 317, 788 P.2d 531 (1990).

he gave money to Pennypacker and when he gave money to Dawkins.

Second, the offenses occurred at the same time and place. It is not necessary that the offenses occur simultaneously in order to occur at the same time, if they occurred sequentially. See State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997) (“immediately sequential drug sales satisfy the ‘same time’ element of the statute”). In this case, Dawkins and Pennypacker testified that Lawson returned in the morning with a large amount of cash, told them where he got it, and gave them each \$2,000. (TRP 203-04, 266) The two deliveries may not have occurred at the exact same moment, but the evidence is clear that they occurred sequentially.

Finally, the victim of the two offenses is also the same. “Victim” is defined under the SRA as “any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” RCW 9.94A.030(53). The crime of first degree trafficking in stolen property occurs when a person “knowingly traffics in stolen property.” RCW 9A.82.050(1). The statute defines “traffic” as: “to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of

stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.” RCW 9A.82.010(19). In this case, Gena Allen (the owner of Frosty’s) was the victim of the trafficking charge because it was her property (the money) that was the subject of the charge, and because she was deprived of its use as a result of Lawson’s act of trafficking.

In arguing that these two convictions were not the same criminal conduct, the State relied on State v. Vanoli, 86 Wn. App. 643, 937 P.2d 1166 (1997). (SRP 716-17) But that case is distinguishable from this case. In Vanoli, the defendant sold liquid LSD to three 17-year olds for \$5 per drop. Each of the sales occurred in Vanoli’s residence over a span of only a few minutes, as each of the teenagers, one after the other, entered Vanoli’s bedroom, received a drop of liquid LSD on his or her tongue in exchange for the \$5 payment, and then returned to the living room of the home. 86 Wn. App. at 650.

Division One rejected Vanoli’s argument that his three convictions for delivery of a controlled substance to a minor were the same criminal conduct, stating:

[T]o the extent that the public at large may be the only victim of any particular illegal drug sale, the fact remains that here, the public was victimized three

separate times—once with each separate transaction. Finally, the purpose of the age enhancement statute, RCW 69.50.406, is to punish not just deliveries but deliveries to *minors*. The enactment of this special statute to separately address deliveries of drugs to minors, and the statute’s provision for enhanced penalties for such deliveries, demonstrates the Legislature’s recognition that minors are indeed victims, as well as participants, when they are given illegal drugs. Because Vanoli delivered to three different persons, thus victimizing the public on three distinct occasions, and for the additional reason that those three persons were all minors, and thus victims in their own right, Vanoli's crimes did not involve the same criminal conduct.

86 Wn. App. at 651-52. The Vanoli court was swayed by the fact that each transaction created a new injury to society as a whole because each provided a different member of society with an illegal substance, and because the purchasers were three different minors and therefore additional victims.

But in this case, no new or distinct injury to the victim or to society was created by each act of trafficking. Whether Lawson gave Allen’s money to one person, two people, or 100 people, Allen’s injury (the loss of her money) remained the same. Allen was not re-victimized, and did not suffer a greater harm, simply because Lawson shared the money with two other people rather than one. And Pennypacker and Dawkins are surely not additional victims.

Vanoli is also not the norm. Instead, “[a]lthough the

sentencing statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act, there is one clear category of cases where two crimes will encompass the same criminal conduct-“the repeated commission of the *same crime* against the same victim over a short period of time.” Porter, 133 Wn.2d 180 (quoting 13A SETH AARON FINE, WASHINGTON PRACTICE § 2810 at 112 (Supp.1996)). For example, courts have held that simultaneous delivery or possession with intent to deliver two different drugs constitutes the same criminal conduct. See State v. Garza-Villarreal, 123 Wn.2d 42, 864 P.2d 1378 (1993); Porter, 133 Wn.2d 185-86.

That is exactly what we have here, the same crime committed against the same victim over a short period of time. The trial court abused its discretion and misapplied the law when it found that Lawson’s two trafficking offenses were not the same criminal conduct for sentencing.

2. Trial counsel provided ineffective assistance of counsel when he failed to argue that Lawson’s two unlawful possession of a controlled substance convictions constituted the same criminal conduct.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland

v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693.

Both prongs of the Strickland test are met here. Lawson's two unlawful possession of a controlled substance offenses meet all three elements of the same criminal conduct test. There is a strong probability that a same criminal conduct argument would have been successful had it been raised, and it was objectively unreasonable

not to raise the argument.⁵

First, the two unlawful possession of a controlled substance offenses occurred at the same time and place. Lawson was contacted and arrested at the Chehalis Inn motel room that he rented the day after the burglary. (TRP 380, 486) During a subsequent search of the room, officers found heroin and methamphetamine. (RP 400-01) Thus, Lawson's constructive possession of the two substances occurred at the same time and place.

Second, statutes prohibiting unlawful controlled substance possession protect the general public. State v. Denny, 173 Wn. App. 805, 809, 294 P.3d 862 (2013) (citing State v. Haddock, 141 Wn.2d 103, 111, 3 P.3d 733 (2000); RCW 69.50.607). Therefore, the general public is the victim of both of Lawson's unlawful possession offenses, and the same victim element is met.

Finally, the same intent element is also met. In a prosecution for simple possession under RCW 69.50.401, there is no intent requirement. The State need not prove either knowledge or intent to possess. Vike, 125 Wn.2d at 412; State v. Staley, 123 Wn.2d 794,

⁵ A defendant may raise the issue of same criminal conduct for the first time on appeal in the context of an ineffective assistance of counsel claim, even if he did not raise the argument at sentencing. See State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

872 P.2d 502 (1994). Aside from the unwitting possession defense, possession is a strict liability crime. Staley, 123 Wn.2d at 798-800. That different controlled substances are involved does not of itself create a difference in intent. Garza-Villarreal, 123 Wn.2d at 49.

Accordingly, “concurrent counts involving simultaneous simple possession of more than one controlled substance encompass the same criminal conduct for sentencing purposes.” Vike, 125 Wn.2d at 412-13.

Because existing case law provides conclusive support for the argument that Lawson’s two unlawful possession of a controlled substance offenses were the same criminal conduct, trial counsel’s failure to make the argument was ineffective and prejudicial. See State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232, 246 (2004) (counsel’s decision not to argue same criminal conduct as to rape and kidnapping charges constituted ineffective assistance of counsel and requires a remand for a new sentencing).

V. CONCLUSION

The State was required to prove beyond a reasonable doubt that Lawson used, attempted to use, or threatened to use the kitchen knife in a manner that could cause death or bodily harm, and that he

evidenced a willingness to use the knife as a deadly weapon. The evidence to support such a finding does not exist.

Furthermore, Lawson's two trafficking offenses meet all three elements of the same criminal conduct test. The trial court therefore abused its discretion when it found that they were not the same criminal conduct when calculating Lawson's offender score.

Additionally, Lawson's two unlawful possession of a controlled substance offenses also meet all three elements of the same criminal conduct test. Lawson therefore received ineffective assistance of counsel when his attorney failed to argue that the two convictions constituted the same criminal conduct.

Therefore, this case should be remanded to the Superior Court for entry of judgment for second degree burglary and for resentencing on all charges.

DATED: January 3, 2014



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Attorney for Lonzo W. Lawson, II

CERTIFICATE OF MAILING

I certify that on 01/03/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Lonzo W. Lawson, DOC# 341337, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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