

62703-1

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NO. 62703-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

MATTHEW GILBERT,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

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STATE OF WASHINGTON
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TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT	1
II. ISSUES	1
III. STATEMENT OF THE CASE.....	2
1. STATEMENT OF PROCEDURAL HISTORY	2
2. STATEMENT OF FACTS	3
i. Summary of Trial Testimony.....	3
ii. Sentencing Proceedings.....	5
IV. ARGUMENT	6
WHERE THE TRIAL COURT HAD DISCRETION UNDER THE BURGLARY ANTI-MERGER STATUTE TO DETERMINE THE CRIMES WERE NOT SAME CRIMINAL CONDUCT, THE DEFENDANT CANNOT SHOW THAT HE WAS PREJUDICED AND SHOULD BE PERMITTED TO RAISE THE CLAIM FOR THE FIRST TIME ON APPEAL.....	6
V. CONCLUSION	12

TABLE OF AUTHORITIES

Page

WASHINGTON SUPREME COURT CASES

<u>In re Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002)	9
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007)	11
<u>State v. Lessley</u> , 118 Wn.2d 773, 827 P.2d 996 (1992)	7
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995) ..	8, 10, 11
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988)	10
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <i>cert.</i> <i>denied</i> , 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998) ..	8
<u>State v. Townsend</u> , 142 Wn.2d 838, 15 P.3d 145 (2001)	11
<u>State v. WWJ Corp.</u> , 138 Wn.2d 595, 980 P.2d 1257 (1999)	10

WASHINGTON COURT OF APPEALS CASES

<u>State v. Bradford</u> , 95 Wn. App. 935, 978 P.2d 534 (1999)	12
<u>State v. Nitsch</u> , 100 Wn. App. 512, 997 P.2d 1000 (2000)	9
<u>State v. Tresenriter</u> , 101 Wn. App. 486, 4 P.3d 145, 14 P.3d 788 (2000), <i>rev. denied</i> , 143 Wn.2d 1010, 21 P.3d 292 (2001)	11
<u>State v. Walker</u> , 143 Wn. App. 880, 181 P.3d 31 (2008)	8

UNITED STATES SUPREME COURT CASES

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	8
--	---

WASHINGTON STATUTES

RCW 9.94A.535	7
RCW 9A.52.050	7, 8

WASHINGTON COURT RULES

RAP 2.5	10
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I. SUMMARY OF ARGUMENT

Matthew Gilbert was convicted of Burglary in the First Degree and five counts of Theft of a Firearm for being an accomplice to theft of five firearms from a gun cabinet in the residence. Gilbert claims for the first time on appeal that his counsel was ineffective for failing to request that the trial court find that the burglary and theft be considered same criminal conduct.

Because Gilbert failed to raise the issue at the trial court and because Gilbert cannot establish with a reasonable probability that the trial court would have exercised its discretion differently, the appeal must be denied.

II. ISSUES

Should a defendant be precluded from arguing that his case should be remanded for re-sentencing where his trial counsel did not request that the trial court find that a burglary charge and theft of five firearms be considered same criminal conduct?

Has the defendant established that the trial court would have exercised its discretion differently so as to establish that he was prejudiced and his counsel was ineffective?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On February 4, 2008, Matthew Gilbert was initially charged with Burglary in the First Degree and Theft of a Firearm alleged to have occurred on January 30, 2008. CP 1-2.

Gilbert was tried on counts of Burglary in the First Degree with a Firearm Enhancement, five counts of Theft of a Firearm and Possession with Intent to Deliver Marijuana alleged to have occurred on January 30, 2008. CP 7-9, 71-3.

On October 27, 2008, the trial began. 8/27/08 RP 2. ¹

On October 29, 2008, the jury found Gilbert guilty of the charges of Burglary in the First Degree and the five counts of Theft of a Firearm. CP 81-2. The jury did not find Gilbert guilty of Possession with Intent to Deliver Marijuana or find the existence of the firearm enhancement. CP 82, 83.

On November 21, 2008, the trial court sentenced Gilbert to the middle of the standard range of 24 months on the Burglary in the First Degree and 20 months on the charge of Theft of a Firearm. 11/21/08 RP 4, CP 81,

On November 21, 2008, Gilbert timely filed a notice of appeal.

2. Statement of Facts

i. Summary of Trial Testimony

On January 30, 2008, William Mitchell noticed an unfamiliar blue car drive by his house several times. 10/27/08 RP 22-3, 26. Mitchell identified the driver as Matthew Gilbert. 10/27/08 RP 28, 32. Mitchell saw a man get out of the car and walk to the back of the house of Brad Dellinger directly across the street. 10/27/08 RP 23-4, 28. Mitchell saw the same man leave Dellinger's house with an armful of rifles. 10/27/08 RP 28-9. The car Gilbert was driving was sitting about 100 yards away. 10/27/08 RP 30. Mitchell confronted the person and said he was calling the police. 10/27/08 RP 30-1. The man tossed the weapons down, jogged to the car, got in the passenger side, and the car drove off. 10/27/08 RP 31. Mitchell called police and gave the license number of the vehicle. 10/27/08 RP 31, 33, 36.

Mitchell's thirteen year old neighbor, Garrett Green, was outside when he saw someone come from the back of a neighbor's house and signaled to a blue car to pick him up. 10/27/08 RP 54-7. Green saw Mitchell outside. 10/27/08 RP 57. Green saw the person get in the blue car which drove off. 10/27/08 RP 58.

¹ The State will refer to the verbatim report of proceedings by using the date

Officers went to the Dellinger house and saw footprints in the snow leading from the road to the back of the Dellinger house. 10/28/08 RP 4, 6-7. The back door had been kicked in and there were pry marks on the gun case that had been locked. 10/27/08 RP 77, 79, 10/28/08 RP 10-11. A screwdriver was found on the floor near the gun case. 10/27/08 RP 76. Officers located and retrieved five guns under a bush outside the residence. 10/28/08 RP 11-3, 16. Bradley Dellinger identified the five working guns that had been stolen from his house in the possession of the officers. 10/27/08 RP 80-2, 10/28/08 RP 16.

William Mitchell was taken to where the car was stopped that day in Sedro Wooley about 26 miles away and identified Matthew Gilbert, as the driver, Casey Wilson as the person he confronted in the car and Bryce Spangler who he knew from before. 10/27/08 RP 32, 34-5, 10/28/08 RP 16-18.

Spangler had been a visitor at the Dellinger house and knew Dellinger's stepson. 10/27/08 RP 64, 70. Spangler had called the stepson that day and left a message at 1:52 in the afternoon. 10/27/08 RP 73. The stepson called Spangler back at 2:05 and had a conversation with Spangler and let him know that he and his sister

followed by "RP" and the page number.

were not home. 10/27/08 RP 74. Bradley and Annette Dellinger testified that Wilson, Spangler and Gilbert did not have permission to be in their residence. 10/27/08 RP 65-6, 75-6.

Matthew Gilbert did not testify. 10/29/08 RP 11.

In closing argument, Gilbert's counsel argued that he did not knowingly aid the burglary of the residence and theft of firearms. 10/29/08 RP 46, 49-51.

ii. Sentencing Proceedings

On November 21, 2008, the trial court held the sentencing hearing. 11/21/08 RP 2-11.

At the hearing, the prosecutor noted that defense had filed a sentencing brief arguing that the counts of Theft of a Firearm should be considered same criminal conduct and that Gilbert's offender score was a 1. CP 84-5, 11/21/08 RP 2. The prosecutor agreed that the five Theft of Firearm counts be considered same criminal conduct. 11/21/08 RP 2. The prosecutor sought the high-end of the standard range of 21 to 27 months on the Burglary in the First Degree charge based upon the theft of multiple firearms. 11/21/08 RP 2.

Gilbert's counsel sought bottom of the range of 21 months on the Burglary in the First Degree charge and 15 months on the Theft of Firearm charges. 11/21/08 RP 3. Gilbert's counsel stated at

sentencing that Gilbert maintained his position that he was not aware that the guns were being stolen. 11/21/08 RP 3. Gilbert's counsel indicated he investigated a basis for an exceptional sentence downward but could not find one. 11/21/08 RP 3.

The trial court sentenced Gilbert to the middle of the standard range of 24 months on the Burglary in the First Degree and 20 months on the charge of Theft of a Firearm. 11/21/08 RP 4, CP 81.

Defense counsel went on to ask for release of Gilbert pending appeal which was denied. 11/21/08 RP 5-7.

IV. ARGUMENT

Where the trial court had discretion under the burglary anti-merger statute to determine the crimes were not same criminal conduct, the defendant cannot show that he was prejudiced and should be permitted to raise the claim for the first time on appeal.

The State contends that trial counsel was not ineffective for failing to argue same criminal conduct and Gilbert cannot establish that he was prejudiced because the trial court has discretion to forgo a same criminal conduct analysis under the burglary anti-merger statute.

The general rule of RCW 9.94A.589(1)(a) applies.

RCW 9.94A.589. Consecutive or concurrent sentences

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

RCW 9.94A.589(1)(a) (emphasis added).

However, when one of the current offenses is burglary, the burglary anti-merger statute applies, allowing the "sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). The burglary anti-merger statute provides:

RCW 9A.52.050. Other crime in committing burglary punishable

Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.

RCW 9A.52.050,

In a recent case of State v. Walker, the Court of Appeals evaluated an ineffective assistance claim for a failure of trial counsel to argue that a conviction for theft in the first degree and trafficking in stolen property in the first degree were same criminal conduct.

Walker argues that he was denied effective assistance of counsel when his counsel failed to argue that his convictions for first degree theft and first degree trafficking in stolen property were the same criminal conduct for purposes of calculating his offender score. We disagree.

To establish ineffective assistance of counsel, Walker must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Walker must overcome a strong presumption that his counsel's representation was adequate and effective. McFarland, 127 Wn.2d at 335, 899 P.2d 1251. Counsel's performance is deficient when it 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, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). To show prejudice, Walker must establish "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wash.2d at 335, 899 P.2d 1251.

State v. Walker, 143 Wn. App. 880, 890, 181 P.3d 31 (2008)

(footnote omitted).

A defendant may waive a challenge to a miscalculated offender score “where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.” In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). In Goodwin, the Supreme Court approved of the Court of Appeal analysis in State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000). After agreeing to his offender score at the sentencing hearing, Nitsch argued on appeal that his offender score was incorrect and that the sentencing court “should have, sua sponte, found his two crimes to be the same criminal conduct.” State v. Nitsch, 100 Wn. App. at 520, 997 P.2d 1000. The Court of Appeals held that Nitsch could not raise this argument for the first time on appeal.

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. It is not merely a calculation problem, or a question of whether the record contains sufficient evidence to support the inclusion of out-of-state convictions in the offender score.

State v. Nitsch, 100 Wn. App. at 523, 997 P.2d 1000

As stated in Nitsch, because the determination of whether two crimes constitute the same criminal conduct involves both

determinations of fact and an exercise of judicial discretion, a defendant may waive the argument. Likewise here Gilbert waived his argument regarding same criminal conduct by not raising it at sentencing.

RAP 2.5(a) provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

RAP 2.5(a).

Gilbert may attempt to argue that the present situation is a manifest error because it flows from the constitutional right to effective assistance of counsel. However, the error must be manifest.

Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be “manifest” and truly of constitutional dimension. State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. **It is this showing of actual prejudice** that makes the error “manifest,” allowing appellate review. McFarland, 127 Wn.2d at 333, 899 P.2d 1251; Scott, 110 Wn.2d at 688, 757 P.2d 492.

State v. Kirkman, 159 Wn.2d 918, 926-927, 155 P.3d 125 (2007).

To demonstrate that his counsel provided ineffective assistance by failing to bring a motion to count certain crimes as the same criminal conduct, Gilbert must demonstrate that the trial court probably would have granted the motion. State v. McFarland, 127 Wn.2d 322, 334-35, 337, n4, 899 P.2d 1251 (1995) (“Absent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice.”). To show prejudice, Gilbert must establish that there is a reasonable probability the result would have been different but for the deficient performance. See State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001).

Here there is nothing to indicate that the trial court would have exercised its discretion differently by counting both convictions toward Gilbert’s offender score. See State v. Tresenriter, 101 Wn. App. 486, 495-96, 4 P.3d 145, 14 P.3d 788 (2000), *rev. denied*, 143 Wn.2d 1010, 21 P.3d 292 (2001). While the permissive language in the anti-merger statute provides the trial court with the discretion to treat burglary and the other offense as one crime if the offenses in fact constitute the same criminal

conduct, Gilbert does not explain why the trial court would have exercised its discretion in his favor had his lawyer presented a different argument or disagreed with the State's calculation. See *also State v. Bradford*, 95 Wn. App. 935, 950-951, 978 P.2d 534 (1999) (trial counsel's failure to request trial court to exercise discretion and determine that first degree rape and first degree burglary charges were same criminal conduct was not ineffective assistance).

In addition, because the decision to also punish for burglary within the standard range rests solely with the trial court, Gilbert would have no basis for appeal absent an abuse of discretion or misapplication of the law, neither of which were alleged here.

V. CONCLUSION

For the foregoing reasons, the sentence must be affirmed.

DATED this 16th day of September, 2009.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Casey Grannis, addressed as Nielsen, Broman & Koch, PLLC, 1908 East Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 10th day of September, 2009.


KAREN R. WALLACE, DECLARANT