

63243-4

63243-4

NO. 63243-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

Gary Streitler,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

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**BRIEF OF RESPONDENT**

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2009 NOV 19 PM 4:54  
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KING COUNTY  
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A. **ISSUES PRESENTED**

1. To prevail on a claim of ineffective assistance of counsel the defendant must show that his attorney's performance was deficient and that he suffered prejudice as a result. Here, the defendant's attorney did not ask the court to consider whether the defendant's convictions for burglary and robbery constituted the same criminal conduct. Regardless, such a request would have been fruitless because the two offenses did not encompass the same criminal conduct. Has the defendant failed to demonstrate ineffective assistance of counsel?

B. **STATEMENT OF THE CASE**

1. **PROCEDURAL FACTS**

Gary Streitler was originally charged in King County Superior Court with Burglary in the First Degree on August 15, 2008. CP 1-4. On November 17, 2008, the State moved to amend the information to add charges of Robbery in the First Degree and Assault in the Third Degree. CP 7-8. The degree of the burglary was based on an allegation of an assault and the degree of the robbery was based on the degree of bodily injury. CP 7-8; RCW

9A.52.020; RCW 9A.56.200(1)(a)(iii). After a three-day-long trial, Streitler was found guilty of all three counts. CP 17-19.

Streitler's sentencing took place on April 1, 2009. 4RP 1. Streitler's counsel agreed to the State's proposed offender score and sentencing ranges during the sentencing hearing on April 1, 2009. 4RP 1-2. The sentencing court imposed concurrent standard range sentences of 87 months for the burglary and robbery and 29 months for the assault. CP 80.

## **2. SUBSTANTIVE FACTS**

On July 9, 2008, Gary Streitler, entered the University of Washington Health Sciences Building. 3RP 93. The building was open to the public at the time for classes and other activities. 2RP 53. Streitler was in possession of a stolen backpack. 3RP 93-94. He stowed the backpack, took a pair of bolt cutters, and proceeded to cut the locks off of several student lockers. 3RP 03-94. In one of the lockers, he found a backpack and took it. 3RP 93-94. He put the bolt cutters and some cut locks into the newly stolen backpack. 3RP 93-94.

Streitler then proceeded to a different part of the Health Sciences Building. 3RP 93-94. He found his way to the inner corridor of the T-wing of the building, which opens into classrooms,

laboratories, and offices. 3RP 94-96. One of those offices, T-382, was dedicated to the use of Polina Zayko and two other teaching assistants. 3RP 29. The office had a lock on the door; it locked automatically when the door was closed. 3RP 30. Polina Zayko was about to hold office hours on the afternoon of July 9, 2008, and had come into her office and placed her backpack on the floor and her laptop and purse, which contained an iPod, onto the desk. 3RP 29. Ms. Zayko then turned off the light and stepped next door to the adjacent laboratory to consult with a professor. 3RP 30.

While Ms. Zayko was in the next room, the defendant entered Ms. Zayko's office and took her laptop and purse from the desk. 3RP 94-96. Ms. Zayko then returned, turned on the light, and immediately noticed her purse and laptop were missing. 3RP 32-33. Ms. Zayko left her office to look for who might have taken her possessions. 3RP 33. Just a few feet away she discovered Streitler, kneeling down, and unzipping her laptop case. 3RP 37. She shouted that that was her laptop, and grabbed it away from him. 3RP 37-39. As the defendant got to his feet, Ms. Zayko could see her purse in his opened backpack. 3RP 37-39. Ms. Zayko removed her purse. 3RP 39. She immediately recognized that her iPod was not longer in her purse, and asked the defendant if he

had anything else of hers. 3RP 39. The defendant responded by grabbing the backpack and running. 3RP 40.

Ms. Zayko gave chase. 3RP 40-41. As she was about to catch the defendant, he shoved her aside into some nearby lockers. 3RP 42-43. She shouted for help and continued to run after him. 3RP 43. A student of Ms. Zayko's, Ms. Micayla Hinds, was just arriving for Ms. Zayko's office hours. 3RP 47. Ms. Zayko saw her and yelled for help. 3RP 47. Ms. Hinds stood in the middle of the hallway to block Streitler's path and he ran full borne into her, throwing her up in the air. 2RP 26-27. Ms. Hinds landed on her back on her heavy backpack. 2RP 27. As this occurred, Ms. Zayko caught up with the defendant and again tried to grab his backpack to reclaim her iPod. 3RP 51. Streitler resisted, shoving at Ms. Zayko and ultimately pushing her back by the throat. 2RP 69.

Ms. Zayko let go of the bag and screamed for help. 3RP 45-52. Dr. Scott Weissman, whose office was nearby, heard her screams and came to provide help. 2RP 64-65. This gave Ms. Zayko the opportunity to search the backpack the defendant had been carrying. 3RP 54-57. Inside she found her iPod, along with bold cutters and the broken locks. 3RP 54-57. As Dr. Weissman

was checking to see whether Ms. Zayko was unharmed, Streitler broke away and began running again. 2RP 69-70. Dr. Weissman caught him again and held him until police arrived. 2RP 69-70.

Once police officer responded, they confirmed with Ms. Zayko and Ms. Hinds that they had the correct individual in custody. 3RP 62. Ms. Hinds was taken to the hospital for examination of her injuries. 2RP 51. She twisted her back and damaged her tailbone, and continued to have some neck and head pain for almost a year. 2RP 35-44. Ms. Zayko suffered scratches and bruising to her arms, along with some redness to her neck. 2RP 35-44.

Streitler admitted to entering the University Health Sciences Building with the intent to steal property to sell, to breaking into lockers and stealing a backpack, and to stealing Ms. Zayko's property. 3RP 90-97. He also admitted to assaulting both Ms. Zayko and Ms. Hinds though he characterized his assault on Ms. Zayko as an "accident" and his assault on Ms. Hinds as merely "blocking". 3RP 95-96.

C. **ARGUMENT**

1. DEFENSE COUNSEL'S PERFORMANCE WAS NOT INEFFECTIVE BECAUSE THE BURGLARY AND ROBBERY COUNTS DID NOT CONSTITUTE SAME CRIMINAL CONDUCT AND THE JUDGE HAD THE

DISCRETION TO APPLY THE BURGLARY ANTI-MERGER STATUTE IN ANY EVENT.

The sole issue before the court is the effectiveness of Streitler's counsel. Issues not raised in the trial court may not be raised for the first time on appeal. See RAP 2.5(a). One of the exceptions set out in RAP 2.5(a) concerns manifest errors affecting a constitutional right. Here, a defendant's right to a determination of whether multiple offenses constitute the "same criminal conduct" is derived from statutory authority, not a constitutional right.

Further, only an illegal or erroneous sentence is reviewable for the first time on appeal. State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000)(citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Additionally, under the Sentencing Reform Act, the sentencing judge is permitted to rely on unchallenged facts and information introduced for the purposes of sentencing. Ford, 137 Wn.2d at 482-83. Thus, the only possible way for the defendant to prevail is through the ineffectiveness of his counsel.

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 in the trial court. State v. Saunders, 120 Wn.App. 800, 825, 86

P.3d 232 (2004). To establish a claim of ineffective assistance of counsel, a defendant must prove both that the trial attorney's representation was deficient and that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The court must give a strong presumption that the counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Lastly, the Court need not address both prongs of the Strickland test if Streitler fails to make a sufficient showing on either prong. State v. Thompson, 69 Wn.App. 436, 440, 848 P.2d 1317 (1993). In order for the appellant to prevail he must show not only that there was error, but also that he would have prevailed. Here, he cannot possibly show either.

RCW 9.94A.589(1)(a) governs how a defendant's offender score shall be calculated in instances of convictions for multiple current offenses. RCW 9.94A.589(1)(a) states the following:

(1)(a) ...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.

Thus, under the statute a defendant's current offenses must be counted separately in calculating the offender score unless the trial court specifically enters a finding that they encompass the same criminal conduct. State v. Nitsch, 100 Wn. App. 512, 520-21, 997 P.2d 1000 (2000). In order for a sentencing judge to find that two or more current offenses constitute the "same criminal conduct" within the meaning of RCW 9.94A.589(1)(a), he must find that *all* of the following elements are met: (1) the same objective criminal intent, (2) the same time and place, and (3) the same victim. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). If any one of these elements is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score. Id. at 778. The trial court's determination on this issue is reviewed for abuse of discretion. Nitsch, 100 Wn.App. at 521.

Further, because a reviewing court does not make factual findings, a trial court's calculation of a defendant's offender score will be treated as an implicit determination that the current offenses did not constitute the same criminal conduct. State v. Channon,

105 Wn. App. 869, 877, 20 P.3d 476 (2001)(citing State v. Anderson, 92 Wn. App. 54, 960 P.2d 975 (1998)). Just as in cases where the trial court expressly considers the issue of whether current offenses constitute the same criminal conduct, the trial court's implicit determination will not be disturbed absent an abuse of discretion or misapplication of the law. Channon, 105 Wn. App. At 877.

- a. The Sentencing Court Made An Implicit Determination That Streitler's Current Offenses Did Not Constitute The Same Criminal Conduct.

Under the authority and rationale set forth in the Channon, Anderson, and Nitsch decisions cited above, this Court can, and should, presume that the sentencing judge made an implicit determination that Streitler's First Degree Burglary and First Degree Robbery convictions did not constitute the same criminal conduct even though the judge never explicitly made such a finding on the record. This presumption is permissible, and advisable, because the judge imposed a standard range sentence consistent with Streitler having an offender score of nine for the burglary and seven for the robbery. 4RP 6. Furthermore, such a conclusion was not an abuse of discretion because Streitler's intent changed between

the two offenses and the anti-merger statute indicated the crimes should be scored separately.

b. Streitler's Criminal Intent Changed Between The Commission Of The Burglary And The Robbery.

In deciding the issue of a defendant's criminal intent for purposes of making a same criminal conduct determination, the court should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1988). Part of this analysis includes consideration of whether one crime furthered the other. Id.

Streitler's robbery was nothing other than an afterthought to the burglary. Streitler entered the University of Washington with the sole purpose of stealing items for profit and he never intended to be caught. Once he was caught by his victims, however, his intent changed to one of protecting his property and getting away from the school. The burglary did not share the same criminal intent with the robbery and, as noted by the trial judge in sentencing Mr. Streitler, "it was basically a theft gone wrong with an attack *and* assault on two individuals." 4RP 6 (emphasis added).

When Streitler began his day he specifically noted that he was looking for items to take. 4RP 90. When he entered the Health Sciences building his objective intent was to take an item which was not his own, and sell it for profit. 4RP 90. He accomplished his goal by entering Ms. Zayko's office and taking her purse and computer. 4RP 94-95. When confronted by Ms. Zayko he assaulted her with the intention of getting away. 4RP 94-97. Streitler's intent from the moment he began the burglary to the moment he was confronted was simply to enter a building and take property which was not his. During the course of his actions he assaulted the two victims, but his intent remained the same.

Once stopped by Zayko and Hinds, Streitler's intent changed to protecting the property he had taken, specifically an iPod, and getting away from the scene of his crime. Streitler used force to get away from both women, as well as several bystanders who attempted to stop him, but his intent in the second half of his interaction remained unchanged, to protect his property and get away from the scene.

In addition, the portion of the amended information that charges Streitler with Burglary in the First Degree does not refer to robbery or specifically utilize an allegation of robbery to elevate the

degree of the burglary. CP 7-8. Instead, burglary was elevated to the first degree because Streitler assaulted Ms. Zayko and Ms. Hinds. Streitler could have been convicted of First Degree Burglary even if he had been acquitted of the First Degree Robbery and vice versa.

Because Streitler's intent changed from the time he first entered the building on the University of Washington campus to the time he used force to protect stolen property, the two crimes did not encompass the same criminal conduct. Thus, defense counsel was not ineffective by not arguing that the burglary and robbery were the same criminal conduct.

- c. The Burglary Anti-Merger Statute Also Provided The Sentencing Court With Discretion To Sentence Streitler For Separate Crimes.

The burglary anti-merger statute contained in RCW

9A.52.050 states the following:

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

In cases where at least one of the current offenses is a burglary, the court has the discretion to punish the burglary offense separately from any other related offense even though the burglary

and additional related offense(s) would otherwise encompass the same criminal conduct. See State v. Lessley, 118 Wn.2d at 781-82. This Court has recognized that the approach identifies burglary as a specific kind and quality of crime, which involve a breach of privacy and security often deserving of separate consideration for punishment. Id. at 783. Therefore here, as in all cases dealing with burglaries, the court was within its discretion to sentence the current offenses separately.

d. **Streitler Cannot Demonstrate The Requisite Prejudice To Satisfy An Ineffective Assistance Of Counsel Claim.**

Streitler claims that he was prejudiced by his attorney not raising the issue of the same criminal conduct because there is a reasonable probability that the outcome of the proceeding would have been different. However, as has already been shown, the two offenses are not the same criminal conduct. Thus, Streitler cannot show that he was prejudiced by his attorney not raising the motion. See McFarland, 127 Wn. 2d at 337 n.4 (absent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice).

Furthermore, because one of the offenses in this case was a burglary, the court has the discretion to apply the burglary anti-

merger statute to count the crimes as separate offenses for scoring purposes even if the two offenses had encompassed the same criminal conduct. RCW 9A.52.050. Although the sentencing judge never explicitly stated that he was exercising his authority under this statute, Streitler cannot demonstrate that the court would have refused to apply this statute even if he had prevailed on a same criminal conduct argument.

For these several reasons, Streitler's ineffective assistance of counsel claim also fails on the second prong of the Strickland test.

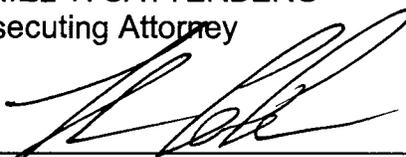
D. **CONCLUSION**

Streitler was provided effective assistance of counsel despite his attorney not arguing that his convictions encompassed the same criminal conduct. Accordingly, this Court should affirm Streitler's sentence.

DATED this 19<sup>th</sup> day of November, 2009.

RESPECTFULLY submitted,

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