68809-0

68809-0

No. 68809-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JORELL AVERY HICKS,

Appellant.

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

The Honorable Bruce I. Weiss

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 5

1. IMPOSITION OF CONVICTIONS FOR FIRST DEGREE ASSAULT AND DRIVE-BY SHOOTING, AS WELL AS FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY, AS CHARGED AND PROVEN, VIOLATED DOUBLE JEOPARDY 5

a. Multiple convictions for the same act violate double jeopardy. 5

b. Imposition of the assault and drive-by shooting convictions violated double jeopardy. 7

d. The remedy for a double jeopardy violation where two or more offenses arise from the same conduct is to unconditionally vacate the felony murder conviction. .. 10

2. MR. HICKS'S TRIAL ATTORNEY RENDERED CONSTITUTIONALLY DEFICIENT REPRESENTATION WHEN HE FAILED TO MOVE THE COURT TO FIND THAT FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY CONSTITUTE THE SAME CRIMINAL CONDUCT 12

a. Mr. Hicks had the right to the effective assistance of counsel. 12

b. Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense. 14

c. The two offenses shared the same intent, were committed at the same time, and involved the same victims. 15

d. Mr. Hicks is entitled to remand for resentencing. 16

E. CONCLUSION 17

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 5

U.S. Const. amend. VI 2, 12, 13

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 22 ..... 2, 12

Article I, section 9 5

FEDERAL CASES

Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942) 12

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) 6, 8

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 12

McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) 12

Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) 6, 7

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) 5

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) 12

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 12, 13

WASHINGTON CASES

In re Personal Restraint of Borrero, 161 Wn.2d 532, 167 P.3d 1106 (2007) 5

In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) 8

State v. Adame, 56 Wn.App. 803, 785 P.2d 1144 (1990) 15

State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) 7, 8

State v. Calvert, 79 Wn.App. 569, 903 P.2d 1003 (1995) 15

State v. Deharo, 136 Wn.2d 856, 966 P.2d 1269 (1998) 15

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005) 7, 8

State v. Grantham, 84 Wn.App. 854, 932 P.2d 657 (1997) 14

State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979), *cert. dismissed,* 446 U.S. 948 (1980) 8

State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008) 7

State v. League, 167 Wn.2d 671, 223 P.3d 93 (2009) 10

State v. Manchester , 57 Wn.App. 765, 790 P.2d 217, *review denied,* 115 Wn.2d 1019 (1990) 10

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 13

State v. Nitsch, 100 Wn.App. 512, 997 P.2d 1000 (2000) 13

State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997) 14

State v. S.S.Y., 170 Wn.2d 322, 241 P.3d 781 (2010) 10

State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009) 13

State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010) 11

State v. Walden, 69 Wn.App. 183, 847 P.2d 956 (1983) 14

State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006) 5

State v. Williams, 135 Wn.2d 365, 957 P.2d 216 (1998) 16

State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007)..... 10

STATUTES

RCW 9.94A.589 14

RCW 9A.36.011 8

RCW 9A.36.045 8

RCW 9A.56.190 9

RCW 9A.56.200 9

A. ASSIGNMENTS OF ERROR

1. The imposition of convictions for first degree assault and drive-by shooting violated double jeopardy.

2. The imposition of convictions for first degree assault and first degree robbery violated double jeopardy.

3. Defense counsel's failure to move the trial court to find the first degree robbery and first degree assault convictions to be same criminal conduct constituted constitutionally deficient performance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has the constitutional right to be free from being placed twice in jeopardy. Multiple punishments for the same act where the Legislature has not authorized such multiple punishment violates double jeopardy. Imposition of convictions for first degree robbery and drive-by shooting where the same facts establish both offenses violates double jeopardy. Did the trial court violate double jeopardy when it entered convictions for first degree assault and drive-by shooting where the evidence establishing both offenses was the same?

2. Where the same evidence proved first degree assault and first degree robbery because force was used to take and retain the property,

did the trial court violate double jeopardy when it imposed convictions for both offenses?

3. A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant who is denied the effective assistance of counsel and is prejudiced by that failure at sentencing is entitled to a new sentencing hearing. Here, counsel failed to argue the first degree robbery and the first degree assault convictions were the same criminal conduct. Was Mr. Hicks prejudiced by his attorney's deficient representation thus requiring reversal of his sentence and remand for resentencing?

C. STATEMENT OF THE CASE

Coletin Kittleson was short of money and concocted a plan to rob someone to obtain money. RP 279. Kittleson was Erin Gunder's supplier of illegal Oxycontin. RP 24. Kittleson knew Ms. Gunder also used heroin, so he decided to ask Ms. Gunder to obtain two ounces of heroin, then forcibly take it from her and sell it to obtain the cash. RP 279-80. Upon Kittleson's request, Ms. Gunder agreed to obtain the amount of heroin Kittleson sought. RP 280.

Kittleson contacted his friend, Devan Bermodes, who had a car, to give him a ride to the meeting with Ms. Gunder. RP 93, 281.

Kittleson did not tell Bermodes about his plan. RP 281. Jorell Hicks, another friend of Kittleson's, was aware of the plan, and accompanied Kittleson. RP 279.

The trio arrived at the predetermined location and saw several police cars. RP 282. They decided to change the location of the transfer and contacted Ms. Gunder and told her of the change. RP 283. The trio arrived at this location and parked some distance away from Ms. Gunder's car. RP 283. Kittleson described Ms. Gunder to Mr. Hicks and directed him to her car. RP 285. Kittleson returned to Bermodes's car to await Mr. Hicks. RP 285.

While awaiting Kittleson, Ms. Gunder got out of her car and went to the trunk to retrieve some different shoes. RP 31. According to Ms. Gunder, Mr. Hicks approached her from behind and, while brandishing a firearm, demanded the heroin, which she handed to him. RP 31. Mr. Hicks also demanded Ms. Gunder's wallet and purse, as well as anything in Ms. Gunder's boyfriend, Edward Straw's possession. RP 32. Mr. Hicks instructed Ms. Gunder to get into the car, then ran back to Bermodes's car where Bermodes and Kittleson were waiting. RP 33, 285.

Bermodes drove away, but Ms. Gunder began to follow. RP 34, 68, 285. Bermodes unsuccessfully attempted to elude Ms. Gunder. RP 103. The trio in Bermodes's car discussed ways to lose Ms. Gunder. RP 286. Mr. Hicks leaned out of the window of Bermodes's car and fired two rounds, one that struck Ms. Gunder's car, which caused Ms. Gunder to stop. RP 287-88.

Police investigation led to the arrest of Kittleson, Bermodes and Mr. Hicks. Mr. Hicks was charged with first degree robbery, first degree assault, drive-by shooting, unlawful possession of a firearm in the first degree, and possession of heroin with the intent to deliver. CP 147-48. The robbery, assault, and possession of heroin counts also contained sentence enhancements for being armed with a firearm at the time of the commission of the offense. CP 147-48.[1] Following a jury trial, Mr. Hicks was convicted as charged. CP 91-96, 98-99; 3/1/2012RP 1-2. Upon Mr. Hicks's request, the trial court ruled the assault and drive-by shooting convictions to be the same criminal conduct, finding Mr. Hicks's intent was to dissuade Ms. Gunder and

[1] Kittleson and Bermodes pleaded guilty prior to trial. Kittleson pleaded guilty to second degree robbery with a firearm enhancement and Bermodes pleaded guilty to second degree robbery. RP 108, 296.

Mr. Straw from continuing their pursuit of Kittleson, Bermodes, and Mr. Hicks. 5/3/2012RP 10.

D. ARGUMENT

1. IMPOSITION OF CONVICTIONS FOR FIRST DEGREE ASSAULT AND DRIVE-BY SHOOTING, AS WELL AS FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY, AS CHARGED AND PROVEN, VIOLATED DOUBLE JEOPARDY

a. Multiple convictions for the same act violate double jeopardy. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington State Constitution provides that "[n]o person shall ... be twice put in jeopardy for the same offense." The two clauses provide the same protection. *In re Personal Restraint of Borrero,* 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber,* 159 Wn.2d 252, 265, 149 P.3d 646 (2006). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The Legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. "With

respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the Legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then the *Blockburger* test applies. *Id.; see Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing multiple punishments is a double jeopardy violation. The assumption underlying the *Blockburger* rule is that the Legislature ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of*

clear indications of contrary legislative intent. Hunter, 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed. *Id.; State v. Kier,* 164 Wn.2d 798, 804, 194 P.3d 212 (2008). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the *Blockburger* "same evidence" test to determine whether the crimes are the same in fact and law. *State v. Calle,* 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

Double jeopardy challenges are reviewed *de novo. State v. Freeman,* 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

b. Imposition of the assault and drive-by shooting convictions violated double jeopardy. The same evidence was used to establish Mr. Hicks was guilty of drive-by shooting and first degree assault, thus imposition of convictions for the two convictions offenses

violated double jeopardy.[2] This Court should reverse and strike the drive-by shooting conviction.

In assessing whether two offenses violate double jeopardy, this Court does not consider the elements of the offenses on an abstract level. "'[W]here *the same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires proof of a fact* which the other does not.'" *In re Personal Restraint of Orange,* 152 Wn.2d 795, 817, 100 P.3d 291 (2004), *quoting Blockburger,* 284 U.S. at 304 (emphasis added). In this analysis, the elements of the crime are considered *as charged and proven. Freeman,* 153 Wn.2d at 777.

First degree assault requires an assault with a firearm with the additional intent to inflict great bodily harm. RCW 9A.36.011(1)(a). Drive-by shooting requires the discharge of a firearm from a moving vehicle. RCW 9A.36.045(1).

The State's evidence establishing the assaults of Ms. Gunder and Mr. Straw consisted of Mr. Hicks firing two shots from a firearm

---

[2] The fact that the trial court found the two offenses to constitute the same criminal conduct does not foreclose a double jeopardy challenge, because a "'[c]onviction in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect.'" *Calle,* 125 Wn.2d at 774, *quoting State v. Johnson,* 92 Wn.2d 671, 679, 600 P.2d 1249 (1979), *cert. dismissed,* 446 U.S. 948 (1980).

from inside Mr. Bermodes's car, where at least one of the bullets struck Ms. Gunder's car. The State's evidence establishing that Mr. Hicks committed drive-by shooting was precisely the same, shooting a firearm at Mr. Straw and Ms. Gunder from inside Mr. Bermodes's car.

Because the proof of the crime of drive-by shooting was that Mr. Hicks committed a first degree assault from a car, the Double Jeopardy Clause requires vacation of the drive-by shooting conviction.

c. Imposition of convictions for first degree assault and first degree robbery violated double jeopardy. The same evidence was used by the State to prove first degree assault and first degree robbery and imposition of convictions for both violated double jeopardy. This Court should reverse and order the first degree robbery conviction stricken.

Robbery is proven by the unlawful taking of personal property from another "by the use or threatened use of immediate force, violence, or fear of injury" or effected "to obtain or retain possession." RCW 9A.56.190. First degree robbery applies if, in commission or immediate flight from the robbery, the defendant "[i]s armed with a deadly weapon," or "[d]isplays what appears to be a firearm or other deadly weapon." RCW 9A.56.200(1)(a). Thus force or fear used to

retain property and effectuate escape establishes robbery. *State v. Manchester* , 57 Wn.App. 765, 770, 790 P.2d 217, *review denied,* 115 Wn.2d 1019 (1990).[3]

Here, the evidence establishing both the assault and the robbery was Mr. Hicks's firing of the handgun at Ms. Gunder's car in an attempt to retain the property taken from her. Since robbery includes not only the use of force in the taking but also use of force in the retaining, imposition of convictions for the assault and robbery based upon the same evidence violated double jeopardy.

d. The remedy for a double jeopardy violation where two or more offenses arise from the same conduct is to unconditionally vacate the felony murder conviction. In *State v. Womac,* the Washington Supreme Court ruled that the proper remedy for a violation of double jeopardy based upon imposition of two or more convictions founded upon the same evidence is to vacate the lesser conviction. 160 Wn.2d 643, 659-60, 160 P.3d 40 (2007). *Accord State v. League*, 167 Wn.2d 671, 223 P.3d 93 (2009) ("When two convictions violate double

[3] The decision in *State v. S.S.Y.,* 170 Wn.2d 322, 241 P.3d 781 (2010), seemingly undercuts Mr. Hicks's double jeopardy argument. But, the Supreme Court in *S.S.Y.* based its decision primarily on the intent of the Legislature as found in the juvenile sentencing statute, RCW 13.40.180, to conclude separate punishment was intended. *Id.* at 330-31. In addition, the Court in *S.S.Y.* failed to analyze the first degree assault and first degree robbery convictions as they were charged and proven. In light of this, this Court should decline to blindly follow *S.S.Y.*

jeopardy principles, the proper remedy is to vacate the lesser conviction and remand for resentencing on the remaining conviction."). In *Womac,* the convictions involved were homicide by abuse, second degree felony murder, and first degree assault, all based upon the same act. The trial court ruled the convictions violated double jeopardy but conditionally dismissed them, allowing for reinstatement if the greater verdict and sentence were later set aside. The Supreme Court ruled that only the homicide by abuse conviction could stand and the other two convictions *must* be dismissed. *Id.*

Imposition of a sentence for first degree assault and drive-by shooting violated double jeopardy and the drive-by shooting conviction should have been dismissed. In addition, imposition of convictions for first degree assault and first degree robbery violated double jeopardy and the robbery should have been dismissed. This Court should order that the drive-by shooting and robbery convictions be stricken. *State v. Turner*, 169 Wn.2d 448, 466, 238 P.3d 461 (2010).

2. MR. HICKS'S TRIAL ATTORNEY RENDERED CONSTITUTIONALLY DEFICIENT REPRESENTATION WHEN HE FAILED TO MOVE THE COURT TO FIND THAT FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY CONSTITUTE THE SAME CRIMINAL CONDUCT

a. Mr. Hicks had the right to the effective assistance of counsel. A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective lawyer. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When

raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

> First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed *de novo*." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

While a challenge to the failure to find counts to be the same criminal conduct cannot be raised for the first time on appeal, *State v. Nitsch,* 100 Wn.App. 512, 523-25, 997 P.2d 1000 (2000), the issue can be raised for the first time on appeal where such a failure is due to the deficient representation of defense counsel and a sufficient record exists for the court to determine whether the counts are the same criminal conduct. *State v. McFarland,* 127 Wn.2d 322, 337-38 n.5, 899 P.2d 1251 (1995).

b. Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense. A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

The "same criminal intent" element is determined by looking at whether the defendant's objective intent changed from one act to the next. *State v. Dolen,* 83 Wn.App. 361, 364-65, 921 P.2d 590 (1996). The mere fact that distinct methods are used to accomplish sequential crimes does not prove a different criminal intent. *State v. Grantham,* 84 Wn.App. 854, 859, 932 P.2d 657 (1997). The "same time" element does not require that the crimes occur simultaneously. *State v. Porter,* 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); *Dolen,* 83 Wn.App. at 365. Individual crimes may be considered same criminal conduct if they occur during an uninterrupted incident. *Porter,* 133 Wn.2d at 185-86; *Dolen,* 83 Wn.App. at 365, *citing State v. Walden,* 69 Wn.App. 183, 188, 847 P.2d 956 (1983) (court found a defendant's convictions for second degree rape and attempted second degree rape, committed

by forcing the victim to submit to oral and attempted anal intercourse during one continuous incident, to be same criminal conduct).

c. The two offenses shared the same intent, were committed at the same time, and involved the same victims. The robbery and assaults occurred at the same time and involved the same victims, Ms. Gunder and Mr. Straw. Thus, the only issue is whether the two offenses shared the same intent. Mr. Hicks submits they do.

In the same criminal conduct context, intent is the offender's objective criminal purpose in committing the crime. *State v. Adame,* 56 Wn.App. 803, 811, 785 P.2d 1144 (1990). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. *State v. Deharo,* 136 Wn.2d 856, 858-59, 966 P.2d 1269 (1998). "This analysis may include, but is not limited to, the extent to which one crime furthered the other, whether they were part of the same scheme or plan and whether the criminal objectives changed." *State v. Calvert,* 79 Wn.App. 569, 578, 903 P.2d 1003 (1995).

The intent of Mr. Hicks was to retain the items taken from Ms. Gunder. The robbery was a continuing crime which included the force needed to retain the items, thus the assault was merely the force used in

retention. As such, the two offenses constituted the same criminal conduct.

Further, defense counsel's failure to move the trial court to find the offenses to be the same criminal conduct constituted constitutionally deficient performance. There was no legitimate strategic or tactical reason not to have requested the court to find the two offenses were the same criminal conduct. Mr. Hicks would only have benefited from such a request, and would not have suffered adverse consequences. In addition, counsel's performance was prejudicial where the sentencing court would likely have found the offenses were the same criminal conduct because it would have reduced Mr. Hicks's offender score and resulted in a substantial reduction in his standard sentencing range.

d. Mr. Hicks is entitled to remand for resentencing. The remedy for an incorrect offender score is reversal of the sentence and remand to the trial court for resentencing with a corrected offender score. *State v. Williams*, 135 Wn.2d 365, 366-67, 957 P.2d 216 (1998).

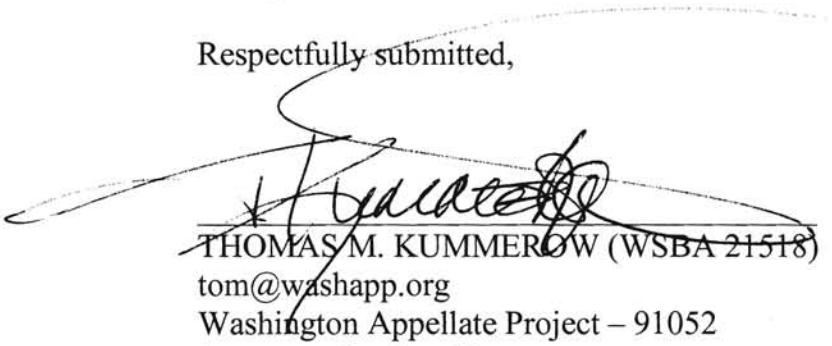
In the instant matter, counsel's deficient performance resulted in prejudice to Mr. Hicks: an incorrect offender score. As a result, this Court must reverse his sentence and remand for resentencing.

E. CONCLUSION

For the reasons stated, Mr. Hicks submits this Court must reverse his sentence and remand for resentencing.

DATED this 19th day of December 2012.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68809-0-I
	)	
	)	
JORELL HICKS,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	JORELL HCKS 310596 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 20TH DAY OF DECEMBER, 2012.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711