NO. 30166-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

NIKOLAS FRANCIS GLENN CAMPBELL,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court's instructions to the jury varied from the charging language of the last Amended Information as follows (CP 72):

a. Instruction 8 (CP 87), the definition of first degree robbery, includes a firearm;

b. Instruction 9 (CP 88), the to-convict instruction on first degree robbery, only includes a deadly weapon;

c. Instruction 13 (CP 94), the definition of deadly weapon, does not include a firearm;

d. Instruction 18 (CP 99), the definition of first degree burglary, only includes a deadly weapon;

e. Instruction 19 (CP 100), the to-convict instruction on first degree burglary, only includes a deadly weapon;

f. Instruction 27 (CP 110), the special verdict instruction, includes both a deadly weapon and a firearm;

g. and

h. The charging language references a pipe as the deadly weapon for enhancement purposes. (CP 72)

(Appendices "A;" "B;" "C;" "D;" "E;" "F")

2. The State failed to prove, beyond a reasonable doubt, that the pipe was used as deadly weapon.

3. Defense counsel's failure to

a. request a lesser included instruction on second degree robbery constitutes ineffective assistance of counsel; and/or

b. object to the erroneous/confusing instructions constitutes ineffective assistance of counsel.

4. The trial court's sentencing determinations are in error as to:

a. Finding of Fact 2 pertaining to "same criminal conduct";

b. Finding of Fact 5 and the calculation of Nikolas Campbell's offender score;

c. Finding of Fact 6.b. because of the miscalculation of the offender score; and

d. Conclusion of Law 1 imposing consecutive sentences on the first degree robbery and first degree burglary convictions.

(CP 139; CP 170; Appendix "G")

5. The Judgment and Sentence

a. contains a scrivener's error at paragraph 2.4; and

b. fails to set forth sufficient facts supporting the imposition of legal financial obligations (LFOs) and/or Mr. Campbell's ability to pay them.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did a variance between the charging language and the instruction on first degree robbery violate the essential elements rule under the Sixth Amendment to the United States Constitution and Const. art. I, § 22?

2. Was inclusion of firearm language in the special verdict instruction contrary to the deadly weapon language in the enhancements set out in the last Amended Information?

3. Did the trial court's instructions misstate the law and/or were they so confusing as to call into question the jury's verdicts?

4. Did the State fail to prove, beyond a reasonable doubt, that a deadly weapon was used in the first degree robbery and/or as to the enhancements?

5. Did Mr. Campbell receive effective assistance of counsel as required by the Sixth Amendment and Const. art. I, § 22?

6. Were the trial court's sentencing determinations in compliance with existing statutory and case law?

7. Does the Judgment and Sentence need to be corrected due to scrivener's errors and the trial court's failure to determine on the record Mr. Campbell's financial ability to pay LFO's?

STATEMENT OF CASE

Debra Vargas and Christina Morales lived in separate apartments in a complex located at 1500 West 14th Avenue in Kennewick, Washington. Roy Cochlin is their landlord. Ms. Morales is Ms. Vargas's niece. (RP 108, l. 24 to RP 109, l. 2; RP 200, ll. 9-19)

James Stethem lived with his mother, Ms. Vargas, in Apartment B. On April 7, 2010 the apartment door was kicked in. Mr. Stethem saw one (1) individual with what appeared to be a gun. He saw another individual taking a DVD. A laptop computer was also taken. Their faces were covered. They told him to turn over and he did. (RP 123, ll. 9-12; RP 124, ll. 8-18; RP 124, l. 20 to RP 125, l. 1; RP 125, ll. 22-23)

Ms. Morales collects Chucky dolls. She claims she was not home on April 7, 2010. When she returned her Chucky dolls were missing and the apartment had been ransacked. Her aunt's camper van was also missing. (RP 109, l. 20 to RP 110, l. 2; RP 112, l. 14 to RP 113, l. 3; RP 114, l. 17 to RP 115, l. 1)

Mr. Cochlin, the landlord, claims that he saw Ms. Morales at her apartment on April 7. He also saw Mr. Campbell and Michael Rice going between the Morales and Vargas apartments. (RP 203, ll. 13-18; RP 204, ll. 10-12; RP 204, l. 22 to RP 205, l. 1)

Jerami Wilson is Ms. Morales's boyfriend. He was at the apartment on April 7. Also present were Mr. Campbell, Mr. Rice and Cecilia Circo. (RP 133, ll. 3-11; RP 135, ll. 3-13; RP 135, l. 23 to RP 136, l. 1)

Ms. Circo is acquainted with both Mr. Campbell and Mr. Rice. They use drugs together. She saw Mr. Campbell with a Chucky doll. She remembers them talking about a robbery in general. She could not recall any details. Her tape recorded statement was introduced at trial as a past recollection recorded. (RP 169, ll. 20-21; RP 169, l. 25 to RP 170, l. 4; RP 170, ll. 7-21; RP 173, l. 2 to RP 174, l. 17; RP 179, ll. 6-10; RP 180, ll. 10-14)

Mr. Wilson recalls seeing a pipe in Mr. Rice's back pocket. He never saw a gun, but remembers Mr. Campbell admitting that he had a gun. (RP 136, ll. 21-22; RP 137, ll. 6-10; RP 146, ll. 9-14)

Officer Kelly of the Kennewick Police Department responded to a 9-1-1 call from Ms. Vargas. He observed that the door had been kicked open and that the lock was broken. There was a footprint on the door. He

found a pipe on the floor. (RP 214, ll. 22-23; RP 216, ll. 6-13; RP 219, ll. 1-5)

Ms. Vargas's van was recovered by the Portland, Oregon Police Department. It was searched on April 21, 2010. Two (2) Chucky dolls were found inside it. There was also a computer belonging to Ms. Vargas. (RP 157, ll. 3-5; RP 158, ll. 4-6; RP 160, ll. 15-16; RP 161, ll. 9-10; RP 162, ll. 3-5)

Detective Davis of the Kennewick Police Department interviewed Mr. Campbell on April 19, 2010. Mr. Campbell originally claimed that he had been in Portland for approximately two (2) to three (3) weeks prior to April 7. He finally admitted that he was with Mr. Wilson, Ms. Circo and Mr. Rice at Ms. Morales's apartment on April 7. (RP 234, ll. 24-25; RP 240, l. 23 to RP 241, l. 14; RP 241, ll. 22-23; RP 242, ll. 8-9)

Ms. Vargas was unable to identify Mr. Campbell's photo from a photo montage. She said it doesn't seem to be him. Ms. Vargas died prior to trial and a limited portion of her 9-1-1 call was admitted following a CrR 3.6 motion. (RP 270, l. 15 to RP 271, l. 8; CP 6; CP 18; CP 159)

An Information was filed on April 22, 2010 charging Mr. Campbell with first degree robbery and motor vehicle theft. An Amended Information was filed on May 13, 2010 adding a deadly weapon enhancement to Count I. (CP 1; CP 4)

On February 10, 2011 another Amended Information was filed which added a count of first degree burglary with a deadly weapon enhancement as well as an enhancement under RCW 9.94A.535(3)(u). (CP 63)

A final Amended Information was filed on February 16, 2011. Count I stated that the alleged victim was Ms. Vargas. Count III stated that the alleged victims were Ms. Vargas and Mr. Stethem. The deadly weapon enhancement on Counts I and III was limited to the pipe.

The trial court granted the State's motion to consolidate Mr. Campbell's and Mr. Rice's cases for trial. (CP 174)

Defense counsel did not object to any of the jury instructions. The jury instructions did not conform to the language of the last Amended Information. (RP 300, ll. 1-5; CP 76)

The jury found Mr. Campbell guilty of all counts and entered a special verdict on both of the deadly weapon/firearm enhancements. (CP 115; CP 116; CP 117; CP 118; CP 119)

Judgment and Sentence was entered on July 22, 2011. The reason for the delay was a motion for new trial filed by Mr. Campbell's new attorney. The motion for new trial was denied. (7/22/11 RP 10, ll. 2-7; CP 176; CP 181; CP 193; CP 196)

At the sentencing hearing the prosecuting attorney agreed an error had occurred with regard to the special verdict as it relates to first degree burglary. It was agreed the deadly weapon enhancement did not apply. (RP 355, l. 5 to RP 356, l. 18)

The trial court imposed consecutive sentences on Counts I and III. Findings of Fact and Conclusions of Law relating to the exceptional sentence were not entered until September 30, 2011. A cost bill in the amount of $4,435.50 is attached to the Judgment and Sentence. (CP 147; CP 170)

Mr. Campbell filed his Notice of Appeal on August 15, 2011. (CP 148).

A Court of Appeals Commissioner's Ruling determined that Mr. Campbell had abandoned his appeal on June 25, 2012. (CP 201)

A Mandate was issued on August 3, 2012. (CP 203)

The Supreme Court reinstated Mr. Campbell's appeal after he filed a Personal Restraint Petition. The reinstatement order was entered on February 6, 2013. (Appendix "H")

SUMMARY OF ARGUMENT

A variance between the charging language of the last Amended Information and the jury instructions violated the essential elements rule. The variance also was misleading and constituted a misstatement of the law in relation to the offense of first degree robbery and/or the deadly weapon enhancement.

The State failed to prove, beyond a reasonable doubt, that any deadly weapon was used, attempted to be used or threatened to be used.

Mr. Campbell was denied effective assistance of counsel when his attorney failed to request an instruction on the lesser degree offense of second degree robbery and/or failed to object to erroneous, misleading and confusing instructions.

The trial court's conclusion that the first degree robbery and first degree burglary are not the "same criminal conduct" is in error. The weight of authority dictates that there is a significant difference between the merger doctrine and "same criminal conduct."

No record was made of Mr. Campbell's ability to pay LFOs. The record is insufficient to support the trial court's imposition of "special cost reimbursement."

ARGUMENT

I. DEADLY WEAPON

The State specifically elected a pipe as the deadly weapon for enhancement purposes. A pipe is not a deadly weapon *per se.*

> An item is a deadly weapon if, under the circumstances in which it is used, it is readily capable of causing death or substantial bodily harm. RCW 9A.04.110(6). Weapons can be *per se* deadly (*i.e.*, explosives and firearms), or deadly because capable of causing death or substantial bodily harm under the circumstances. *State v. Carlson,* 65 Wn. App. 153, 158, 828 P.2d 30, *review denied,* 119 Wn.2d 1022 (1992). … [T]he inherent capacity **and** "the circumstances in which it is used" determine whether the weapon is deadly. … "**Circumstances" include "the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted**." *State v. Sorenson,* 6 Wn. App. 269, 273, 492 P.2d 233 (1972) (construing RCW 9.95.040) (quoting *People v. Fisher,* 234 Cal. App. 2d 189, 193, 44 Cal. Rptr. 302 (1965)). Ready capability is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm. … *State v. Cobb,* 22 Wn. App. 221, 223, 589 P.2d 297 (1978), *review denied,* 92 Wn.2d 1011 (1979) ….

State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). (Emphasis supplied.)

There is no testimony in the record as to how the pipe was used. The only references to the pipe are that it was in Mr. Rice's pocket and it was found on the kitchen floor in the Vargas apartment.

No testimony was presented as to how the pipe may have been used.

No testimony was presented that the pipe caused any physical injuries.

No testimony was presented that any force or threat of force was used in connection with the pipe.

RCW 9A.04.100(1) states:

> Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.

The State failed to prove, beyond a reasonable doubt, that the pipe was used as a deadly weapon. The State's failure impacts both the elements of first degree robbery and the weapon enhancement.

This is particularly true with regard to the offense of first degree robbery. The definitional instruction of first degree robbery (Instruction 8) included the word "firearm." However, the to-convict instruction (Instruction 9) only included the term "deadly weapon."

Moreover, Instructions 18 and 19, pertaining to the offense of first degree burglary, only used the phrase "deadly weapon."

Insofar as the definition of "deadly weapon" is concerned, Instruction 13 did not include the word "firearm."

Since no to-convict instruction included the word "firearm" the phrase "deadly weapon" as used in those instructions became the law of the case.

> The law of the case is an established doctrine with roots reaching back to the earliest days of statehood. Under the doctrine jury instructions not objected to become the law of the case.

State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998).

Since no use of a "deadly weapon" was established by the State, an essential element of first degree robbery is lacking. This failure by the State means that, at most, the crime of second degree robbery occurred. *See:* RCW 9A.56.210(1).

Further support for Mr. Campbell's position is found in *Personal Restraint of Martinez*, 171 Wn.2d 354, 366, 256 P.2d 277 (2011):

> … [W]e 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**.

(Emphasis supplied.)

Again, no evidence was presented as to the use, attempted use, or threatened use of the pipe.

In the absence of such proof, RCW 9A.04.100(2) applies. The statute states: "When a crime has been proven against a person, and there exists a reasonable doubt of which two or more degrees he is guilty, he shall be convicted only of the lowest degree."

The State only established the commission of the offense of second degree robbery.

Moreover, as to the weapon enhancement, Mr. Campbell asserts that *State v. Tongate*, 93 Wn.2d 751, 755, 613 P.2d 121 (1980) controls. The *Tongate* Court held:

> [The statute] … appears to require the appearance of a deadly weapon *in fact* in order for the sentence enhancement provision to operate.

This will be addressed in more detail as it pertains to the special verdict instruction (Instruction 27).

II. INSTRUCTIONS

A. Special Verdict

The trial court's instructions were not only confusing, but also er-

roneous. They varied significantly from the charging language of the last Amended Information.

The last Amended Information references deadly weapon allegations as to Counts I and III. It relies upon RCW 9.94A.533(4). RCW 9.94A.533(4) provides, in part:

> The following additional times shall be added to the standard sentence range for felony crimes … if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 ….

Instruction 27, the special verdict instruction dealing with the deadly weapon enhancement, included as its last sentence "A pistol, revolver or any other firearm is also a deadly weapon whether loaded or unloaded."

Inclusion of that sentence constitutes a substantial variance from the enhancement language of the last Amended Information. Furthermore, it misinformed Mr. Campbell of a critical aspect of the case.

Since the State elected to rely upon the pipe as the "deadly weapon," Instruction 27 should have been confined to the first two (2) paragraphs and the first two (2) sentences of the last paragraph.

Additionally, as Instruction 27 pertains to the use of a deadly weapon, the jury's verdict is contrary to the evidence presented in Court.

The State did not present any evidence that the pipe was used, intended to be used or threatened to be used as a club or otherwise.

B. Other Instructions

Instructions 8 and 9 deal with the offense of first degree robbery. Instruction 8 includes the word "firearm." Instruction 9 does not include the word "firearm."

Instruction 9 varies from the language of the last Amended Information. Paragraph (5) of that instruction states: "That in the commission of these acts or in immediate flight therefrom the defendant, or an accomplice, was armed with a deadly weapon …."

The last Amended Information under Count I states, in part:

> … In the commission of or in immediate flight therefrom, **the accused displayed what appeared to be a firearm or other deadly weapon**, to wit: a pipe and/or a firearm ….

(Emphasis supplied.)

In *State v. Eckenrode,* 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) the Court determined what is meant by the word "armed."

> The statutes relating to weapons enhancements do not define what it means to be armed. ….
>
> … "[A] person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive pur-

> poses." *State v. Valdovinos,* 122 Wn.2d 270, 282, 858 P.2d 199 (1993) …. But a person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime. [Citations omitted.]

It is easy to see that being "armed with a deadly weapon" is significantly different than displaying what appears to be "a firearm or other deadly weapon."

The instructional error violates the "essential elements rule." *See:* Sixth Amendment to the United States Constitution and Const. art. I, § 22.

Mr. Campbell asserts that even more confusion arose based upon the instructions dealing with first degree burglary. Instruction 18 uses the term "armed with a deadly weapon." Instruction 19 parallels Instruction 18 in paragraph (3).

Count III of the last Amended Information states, in part: "… while in such building and/or in immediate flight therefrom the accused was armed with a pipe or firearm, a deadly weapon …."

No violation of the essential elements rule appears to exist insofar as Count III and Instructions 18 and 19.

Nevertheless, when Instructions 13 and 27 are read together it is readily apparent that the State failed to establish, beyond a reasonable doubt, that the pipe was used as a deadly weapon.

The overall impact of these confusing and misleading instructions cannot be overemphasized.

Mr. Campbell contends that substituting the phrase "deadly weapon" for the word "firearm" in the following excerpt from *State v. Williams,* 147 Wn. App. 479, 484, 195 P.3d 578 (2008) substantiates his argument:

> A sentencing court may impose a firearm sentence enhancement only when the Information alleges the firearm enhancement, the State produces evidence supporting the firearm enhancement, and the fact finder returns a firearm enhancement special verdict.

There is no way to tell whether the jury relied on the pipe or the firearm in support of its verdicts. This uncertainty cannot be countenanced and requires reversal and dismissal of the enhancements.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Mr. Campbell contends that defense counsel was ineffective when he failed to request a lesser included offense instruction on second degree robbery and failed to object to the erroneous and misleading instructions as discussed in the preceding portion of this brief.

A. Inferior Degree Offense

> An instruction on an inferior degree offense is warranted if "'(1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior degree offense.'" *State v. Fernandez-Medina,* 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). A defense counsel's decision not to request an instruction on a lesser offense, however, may constitute a legitimate trial strategy. *State v. Hassan,* 151 Wn. App. 209, 218, 211 P.3d 441 (2009).

State v. McKague, 159 Wn. App. 489, 511, 246 P.3d 558 (2011).

RCW 9A.56.200(1)(a) and RCW 9A.56.210(1), respectively defining first degree robbery and second degree robbery, constitute a single offense as defined in RCW 9A.56.190 (robbery definition).

The last Amended Information charges first degree robbery. Second degree robbery is an inferior degree of that offense.

As argued in the foregoing portion of this brief Mr. Campbell only committed second degree robbery. Thus, the question becomes whether or not defense counsel's decision constituted a legitimate trial strategy.

Defense counsel's failure to recognize that the pipe was not used as a "deadly weapon" reflects an unreasonable analysis of the evidence.

Mr. Cochlin, Mr. Wilson, co-defendant Rice, and Cecelia Circo all place Mr. Campbell at the apartment complex on April 7, 2010. Mr. Campbell himself eventually admitted to the officers that he was present.

Defense counsel's attack on Ms. Circo's credibility, when considered with the lack of other evidence on the use or nonuse of the pipe, clearly indicates that there was no strategic reason not to request the lesser included offense instruction.

B. Erroneous/Misleading Instructions

Mr. Campbell has fully addressed his perception of the trial court's instructions to the jury. Defense counsel did not object to those instructions.

> A counsel's failure to notice and except to an erroneous jury instruction may demonstrate a lack of effective assistance of counsel if the defendant can show that the inaccurate jury instruction prejudiced him or her. Jury instructions are not erroneous if, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and

> permit the defendant to argue his or her theory of the case.

State v. Wilson, 117 Wn. App. 1, 17, 75 P.3d 573 (2003).

The jury instructions, as given to the jury, and as argued in a preceding portion of his brief, obviously prejudiced Mr. Campbell.

The instructions allowed the jury to consider a "firearm" as a basis for convicting him of first degree robbery.

The special verdict instruction allowed the jury to find an enhancement based upon the inclusion of language referencing firearms.

The deadly weapon enhancements did not pertain to a firearm.

The to-convict instruction on first degree robbery did not include a firearm.

Mr. Campbell argues that there is no way to single out whether or not the jury followed the "deadly weapon" instruction or relied upon the instructions including the word "firearm."

IV. SAME CRIMINAL CONDUCT

The trial court determined that first degree robbery and first degree burglary did not constitute the "same criminal conduct." The basis for the determination is differing intent, different victims and the anti-merger statute (RCW 9A.52.050).

Initially, the trial court is wrong that there are differing victims. It was Ms. Vargas's apartment. Ms. Vargas was in the apartment at the time of the burglary. She was the alleged victim of the robbery.

Mr. Stethem was also in the apartment at the time of the burglary. He lived with his mother in the apartment. The State did not allege that he was a victim of the robbery.

The State did allege that both Ms. Vargas and Mr. Stethem were the victims of the burglary. The State alleged that Ms. Vargas and/or Mr. Stethem had an interest in the apartment. Mr. Campbell contends that the conjunctive/disjunctive charging language precludes a finding of different victims in Counts I and III.

The State did not produce a lease to indicate that Mr. Stethem had any leasehold interest in the apartment.

RCW 9A.52.020(1) defines first degree burglary, in part, as follows:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building ….

Mr. Campbell relies upon *State v. Wilson*, 136 Wn. App. 596, 609, 150 P.3d 144 (2007) to support his position. The *Wilson* Court held:

> It is the consent, or lack of consent, of **the residence possessor**, not the State's or court's consent or lack of consent, that drives the burglary statute's definition of a person who "is not then licensed, invited, or otherwise privileged to so enter or remain" in a building. RCW 9A.52.010(3); *see, e.g.*, *State v. Hagedorn,* 679 N.W.2d 666, 670-71 (Iowa 2004).

(Emphasis supplied.)

The trial court is also in error when it states that the intent for the two (2) crimes differed. The intent as presented at trial was to break into the apartment to steal property. The fact that individuals were in the apartment does not change that intent. The intent in taking property from, or in the presence of another person, does not detract from the intent to steal.

Mr. Campbell contends that *State v. Wilson*, *supra,* 614 can be analogized to his case. There, the *Wilson* Court held:

> The State argues, and we agree, that the record shows (1) Wilson entered the home with the intent to assault Sanders - he broke down the door, went immediately to the bedroom, pulled Sanders out of bed by her hair, and kicked her in the stomach ….

RCW 9.94A.589(1)(a) defines the phrase "same criminal conduct" as meaning

> … 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.

The burglary and robbery occurred at the same time and place. The fact that two (2) individuals were in the apartment cannot be differentiated from two (2) victims being inside a vehicle as set forth in the statute.

The underlying intent was theft as to both the burglary and the robbery.

Thus, the trial court's attempt to nitpick the facts of the case fails. The robbery and burglary constitute the "same criminal conduct."

RCW 9A.52.050 states: "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."

The statute is referred to as the burglary anti-merger statute.

> The plain language of RCW 9A.52.050 expresses the intent of the Legislature that "any other crime" committed in the commission of a burglary would not merge with the offense of first-degree burglary when a defendant is convicted of both.

State v. Sweet, 138 Wn.2d 466, 478, 980 P.2d 1223 (1990).

Mr. Campbell maintains that "same criminal conduct" is not the same thing as "merger."

The State and trial court appear to rely upon *State v. Lessley,* 118 Wn.2d 773, 827 P.2d 996 (1992) to support a disavowal of the "same criminal conduct" analysis. The *Lessley* Court held, in *dictum,* that

> … the better approach is to hold the antimerger statute gives the sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct.

State v. Lessley, supra, 781.

The reason that the above holding is *dicta* is that the Court had already determined that Mr. Lessley's underlying offenses did not constitute the same criminal conduct.

> … [T]he merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.,* first degree rape) the State must prove not only that a defendant committed that crime (*e.g.,* rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.,* assault or kidnapping).

State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983).

Neither first degree burglary nor first degree robbery elevate one another to a higher degree offense. Neither is an element of the other.

As opposed to the merger doctrine, the "same criminal conduct" analysis pertains to calculation of an offender score, as opposed to double-jeopardy.

Mr. Campbell argues that the correct interpretation of RCW 9A.52.050 is contained in *State v. Dunbar*, 59 Wn. App. 447, 457, 798 P.2d 306 (1990): "… [T]he antimerger statute does not preclude a finding that the burglary and [robbery] constitute the same criminal conduct." *See also: State v. Tresenriter*, 101 Wn. App. 486, 496-97, 4 P.3d 145 (2000) (firearm theft and second degree possession of stolen property constitute the same criminal conduct); and *State v. Collins*, 110 Wn.2d 253, 262-63, 751 P.2d 1165 (1988) (rape and assault during a burglary are same criminal conduct).

V. SENTENCING

A. Scrivener's Errors

Paragraph 2.4 of the Judgment and Sentence contains a scrivener's error. Mr. Campbell did not waive jury trial.

Additionally, the trial court entered an exceptional sentence over and above what the prosecuting attorney recommended. Thus, the box checked as to that aspect of an exceptional sentence is also in error.

B. Legal Financial Obligations (LFOs)

The trial court did not make any record concerning Mr. Campbell's ability to pay legal financial obligations.

The trial court did not enter any findings of fact concerning Mr. Campbell's ability to make payment of legal financial obligations.

The cost bill attached to the Judgment and Sentence (CP 147) lists certain invoices totaling $2,185.50. The cost bill references these invoices as "special cost reimbursement."

In the absence of knowing what the invoices represent there is no way to determine if they meet the statutory predicates for special cost reimbursement.

It may be that the trial court relied upon RCW 10.01.160(2) which provides, in part:

> **Costs shall be limited to expenses specially incurred** by the state in prosecuting the defendant … They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. …

(Emphasis supplied.)

In the absence of further elucidation from the Court at the time of sentencing, it is impossible to determine whether or not any of the so-called special reimbursement costs are recoverable.

Furthermore, the trial court failed to comply with RCW 10.01.160(3) which states:

> The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Finally, as noted by the Court in *State v. Bertrand,* 165 Wn. App. 393, 404, 267 P.3d 511 (2011):

> Although *Baldwin* [*State v. Baldwin,* 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991)] does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for us to review whether "the trial court judge took into account the financial resources of the defendant and the nature of the burden" imposed by LFOs under the clearly erroneous standard.

The trial court's failure to comply with statutory requirements is clearly erroneous. The "special reimbursement cost" should be removed from the cost bill and the Judgment and Sentence. The other LFO's need to be readdressed by the trial court in accord with RCW 10.01.160(3).

VI. CONSECUTIVE SENTENCES

RCW 9.94A.589(3) gives a trial court discretionary authority to impose consecutive sentences. *See: State v. Champion,* 134 Wn. App. 483, 140 P.3d 633 (2006), *review denied* 160 Wn.2d 1006, 158 P.3d 615, *cert. denied* 552 U.S. 1000, 128 S. Ct. 510, 169 L. Ed.2d 356.

If Mr. Campbell's "same criminal conduct" argument prevails, then no consecutive sentence can be imposed asto the first degree robbery and first degree burglary convictions. He would have to be resentenced.

CONCLUSION

Mr. Campbell's first degree robbery conviction and the deadly weapon enhancement must be reversed due to instructional error. The appellate court has authority to direct that second degree robbery is a lesser degree offense. *See: State v. A.M.,* 163 Wn. App. 414, 421-22, 260 P.3d 229 (2011).

The deadly weapon enhancement must be dismissed since the State failed to prove, beyond a reasonable doubt, that a deadly weapon was used, attempted to be used or threatened to be used.

If the first degree robbery conviction is not reversed then Mr. Campbell is entitled to be resentenced under a "same criminal conduct" analysis for the first degree robbery and first degree burglary convictions.

The imposition of LFOs is not supported by the record which lacks any determination of financial ability to pay. The non-mandatory LFO's should be removed from the Judgment and Sentence.

DATED this 2nd day of July, 2013.

Respectfully submitted,

s/ Dennis W. Morgan
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APPENDIX “A”

INSTRUCTION NO. 8

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she displays what appears to be a firearm or other deadly weapon.

APPENDIX "B"

INSTRUCTION NO. 9

To convict the defendant, Nikolas Francis Glenn Campbell, of the crime of robbery in the first degree, as charged in Count I, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2010 the defendant unlawfully took personal property from the other person or in the presence of another, or was an accomplice to one who unlawfully took personal property from the person or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person, or the defendant was an accomplice to one who took property from another by use or threatened use of immediate force, violence or fear of injury;

(4) That force or fear was used by the defendant, or the defendant was an accomplice to one who used force or fear, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant, or an accomplice, was armed with a deadly weapon, and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “C”

INSTRUCTION NO. 13

Deadly weapon also means any weapon, device, instrument, substance, or article, 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.

APPENDIX “D”

INSTRUCTION NO. 18

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon.

APPENDIX "E"

INSTRUCTION NO. 19

To convict the defendant, Nikolas Francis Glenn Campbell, of the crime of burglary in the first degree, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2010 the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "F"

INSTRUCTION NO. 27

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crimes of Robbery in the First Degree and/or Burglary in the First Degree as charged in Counts I and III.

If one person is armed with a deadly weapon, all accomplices are deemed to be so armed, even if only one deadly weapon is involved.

A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily product death. Any metal pipe or bar used or intended to be used as a club is a deadly weapon. A pistol, revolver or any other firearm is also a deadly weapon whether loaded or unloaded.

APPENDIX "G"

FINDINGS OF FACT

2. The Burglary and Robbery were not committed in the same course of criminal conduct based on:

   a. The differing victims in the two crimes;
   b. The different intent of the two crimes;
   c. The interest in punishing a burglary separately from other crimes as stated in RCW 9A.52.050.

…

5. The defendant's offender score on each offense is as follows:

   a. Robbery in the First Degree: 11.5 points;
   b. Theft of a Motor Vehicle: 19.5 points;
   c. Burglary in the First Degree: 12.5 points.

6. Considering the purpose of the Sentencing Reform Act, there are substantial and compelling reasons justifying an exceptional sentence:

   …
   b. An exceptional sentence is justified based on the defendant's multiple current offenses and high offender score (RCW 9.94A.535(2)(c)

CONCLUSIONS OF LAW

1. The Court will impose a sentence of 153 months on Count I (Robbery in the First Degree) and 87 months on Count III (Burglary in the First Degree) to be served consecutively.

APPENDIX “H”

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of	NO. 87848-9
NICOLAS FRANCIS CAMPBELL,	ORDER
Petitioner.	C/A No. 30166-4-III
	Benton County Superior Court No. 10-1-00475-8

Department I of the Court, composed of Chief Justice Madsen and Justices C. Johnson, Fairhurst, Stephens and González, considered this matter at its February 5, 2013, Motion Calendar and unanimously agreed that, based on the ineffective assistance of Petitioner's counsel in causing Petitioner's criminal appeal to be dismissed, the following order be entered.

IT IS ORDERED:

That the Petitioner's Personal Restraint Petition is granted. The Court of Appeals is directed to recall its mandate, reinstate the appeal, and appoint new appellate counsel to represent Mr. Campbell in the matter.

DATED at Olympia, Washington this 6th day of February, 2013.

For the Court

Madsen C.J.
CHIEF JUSTICE

659/151

NO. 30166-4-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. NIKOLAS FRANCIS GLENN CAMPBELL, Defendant, Appellant.	)	BENTON COUNTY NO. 10 1 00425 8 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 2nd day of July, 2013, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

Court of Appeals, Division III Attn: Renee Townsley, Clerk 500 N Cedar St Spokane, WA 99201	E-FILE
BENTON COUNTY PROSECUTOR'S OFFICE Attention: Andy Miller andy.miller@co.benton.wa.us	E-file (per agreement)

NIKOLAS F. CAMPBELL #871762 U.S. MAIL
Washington State Penitentiary
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s/ Dennis W. Morgan

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CERTIFICATE OF SERVICE