NO. 44642-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JESSE JAMES CLARK,

Appellant.

SUPPLEMENTAL BRIEF

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A. ANSWERS TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Mr. Clark was not deprived of his Sixth or Fourteenth Amendment right to the effective assistance of counsel.

2. Defense counsel`s decision to not argue that Mr. Clark's convictions for extortion and possession of stolen property comprised the same criminal conduct was not unreasonable.

B. SUPPLEMENTAL STATEMENT OF THE CASE

The State incorporates its Statement of the Case from its Response Brief. Supplemental facts, if any, will be developed in the argument section.

C. ARGUMENT

DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE WHEN HE CHOSE NOT TO ARGUE THAT MR. CLARK'S CONVICTIONS COMPRISED THE SAME CRIMINAL CONDUCT.

1) Same Criminal Conduct

When a defendant is convicted of two or more crimes "the default method of calculating [his] offender score is entirely in the State's favor because it treats all current offenses as distinct criminal conduct." *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). Thus, "each of [the] defendant's convictions counts toward his offender score unless he

convinces the court" that some or all of his current convictions encompass the same criminal conduct. *Id.*; RCW 9.94A.589(1)(a). "The decision to grant or deny this modification is within the sound discretion of the trial court and, like other circumstances in which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion." *Graciano*, 176 Wn.2d at 540. Thus, a "same criminal conduct" determination will be reversed by an appellate court only when there is a clear abuse of discretion or misapplication of the law. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

A court will consider two or more crimes the "same criminal conduct" if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. *Id.* The absence of any one of the prongs prevents a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Courts "must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct." *State v. Price*, 103 Wn.App 845, 855, 14 P.3d 841 (2000); *State v. Wilson*, 136 Wn.App 596, 613, 150 P.3d 144 (2007). If the sentencing court finds that the current crimes do encompass the

same criminal conduct, however, "then those . . . offenses shall be counted as one crime." RCW 9.94A.589(1)(a).

The same time and place prong does not require that crimes happen simultaneously in order for them to be considered to have happened at the same time. *Price*, 103 Wn.App. at 855 *citing State v. Porter*, 133 Wn.2d 177, 183, 185-86, 942 P.2d 974 (1997). That prong does require, however, that the crimes to be part of "a continuing, uninterrupted sequence of conduct" over a very short period of time. *Id.*; *Porter*, 133 Wn.2d at 183 (holding "that immediately sequential drug sales satisfy the 'same time' element of the statute"). Moreover, multiple crimes occurring at one address does not necessarily mean the crimes occurred in the same place. *State v. Stockmyer*, 136 Wn.App. 212, 220, 148 P.3d 1077 (2006) (holding that "guns found in different rooms in the same house are found in different 'places' for purposes of the same criminal conduct test under RCW 9.94A.589(1)(a)"); *State v. Garnier*, 52 Wn.App. 657, 661, 763 P.2d 209 (1988) (holding that the burglary of each suite inside one building "was a complete and final act" in itself and did not constitute the same criminal conduct).

Here, the State concedes that as part of a same criminal conduct analysis that Mr. Clark's convictions for Extortion and Possession of Stolen Property required the same criminal intent and involved the same victim. Those crimes, however, did not occur at the same time or place. While Mr. Clark argues that the State's "theory of Mr. Clark's liability for the extortion charge was that he acted as the hostage-holder in the scheme when he possessed the dog at his him," the State had ample evidence available to it to argue that Mr. Clark was involved in the extortion in numerous ways and in fact did so in its closing and rebuttal. Supp. Br. of App. at 3; RP 500-04, 528-532. For example, evidence suggested that Mr. Clark may have been involved in the extortion as the person sending the text messages to Jennifer, by providing his truck to Mr. Jordan or Ms. Folsom, or utilizing it himself during the attempted exchange at the golf course. RP 500-04, 528-532.

Regardless of the theory, however, Mr. Clark's possession of Jagger at his home was separated by days from the attempted exchange of Jagger. Moreover, attempts to trade the bulldog for money and drugs occurred at a local Dairy Queen and later at the Kelso golf course, and not at Mr. Clark's home where he had possessed Jagger. Thus, Mr. Clark's

convictions for Extortion and Possession of Stolen Property did not comprise the same criminal conduct.

2) Ineffective Assistance

There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, the burden of showing ineffective assistance of counsel is the defendant's. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) counsel provided ineffective representation, and (2) counsel's ineffective representation resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). In order to satisfy the first requirement (deficiency), the defendant must show his or her counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. In order to satisfy the second requirement (resulting prejudice), the defendant must show by a reasonable probability

that, "but for" counsel's errors, the outcome of the case would have been different. *Id.* at 694.

Here, given the above same criminal conduct analysis, Mr. Clark cannot show by a reasonable probability that had his trial counsel made a same criminal conduct argument at sentencing that his convictions would have been scored as one.

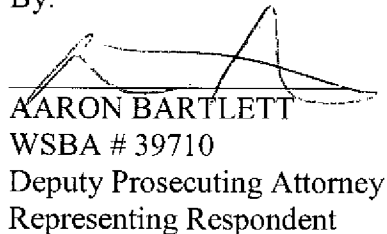
D. CONCLUSION

Because Mr. Clark's crimes did not occur at the same time or place, this court should affirm the trial court's sentence in which the crimes were scored separately.

Respectfully submitted this 13 th day of March, 2014.

SUSAN I. BAUR
Prosecuting Attorney

By:



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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 14th, 2014.

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

March 14, 2014 - 9:54 AM

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