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NO. 63243-4-I

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

REC'D

AUG 31 2009

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

GARY STREITLER,

Appellant.

2009 AUG 31 PM 4:25  
CLERK OF COURT  
STATE OF WASHINGTON  
FILED

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

The Honorable Michael J. Fox, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied effective representation when his attorney failed to argue two of his convictions involved the “same criminal conduct” for sentencing purposes.

Issue Pertaining to Assignment of Error

Appellant was convicted of burglary and robbery based on acts that involved the same time and place, the same victim, and the same intent. His attorney failed to request that the court treat these offenses as the same criminal conduct for sentencing purposes, which would have significantly reduced his standard sentencing range. Was appellant denied effective representation?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged Gary Streitler with first-degree burglary, first-degree robbery, and third-degree assault. CP 7-8. The jury found Streitler guilty. CP 17-19. Streitler’s offender score was calculated as nine for the burglary, seven for the robbery, and six for the assault. CP 78. Current offenses accounted for three points on the burglary and robbery counts and two points on the assault count. CP 78, 83. The court imposed concurrent standard range sentences of 87 months on the robbery and

burglary counts and 29 months on the assault count. CP 80. Streitler timely filed notice of appeal. CP 86.

2. Substantive Facts

Streitler did not testify at trial, but police testified he said he was homeless and came to the University of Washington on July 9, 2008, looking for things to steal to pay for basic necessities. 1RP<sup>1</sup> 40. He told police he had no weapons and never intended to hurt anyone. 3RP 98-100.

Polina Zayko testified she left her laptop and purse (containing her I-pod and identification) on her desk in her office before going briefly next-door. 3RP 29. The hallway is open to the public, and she left the office door open. 3RP 63, 80. When she returned minutes later, her laptop and purse were missing. 3RP 31-33. She immediately went looking for her things; around the corner from her office, she saw a man crouched down unzipping her laptop. 3RP 37. She grabbed the laptop, as well as her purse, away from the man. 3RP 38-39. Knowing by its weight that the I-pod was no longer in her purse, Zayko demanded to know if the man had anything else of hers. 3RP 39-40. The man shook his head and fled, with Zayko in pursuit. 3RP 40-41.

As she started to catch up to him, the man shoved Zayko against some lockers. 3RP 41-42. Calling for help, Zayko continued to give chase.

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<sup>1</sup> There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 18, 2009; 2RP – Mar. 19, 2009; 3RP – Mar. 23, 2009; 4RP – Apr. 1, 2009.

When she saw a student she knew at the end of the hall, Zayko called to her to stop the man. 3RP 47.

Micayla Hinds testified she stood in the middle of the hallway with her arms outstretched to stop the man. 2RP 19-20. The man ran into her, pushing her up and backwards. 2RP 20. She flew through the air, landing first on her bottom, then on her backpack. 2RP 21. She was treated and released that day, but continued to be treated for headaches and pain in her neck, tailbone, and back for several months. 2RP 36-41. She identified Streitler as the man who pushed her. 2RP 21-22.

Zayko was then able to catch up to Streitler, and the two struggled over the backpack. 3RP 51-52. Hinds and Zayko both testified that, during the struggle, Streitler's hands were on Zayko's throat. 2RP 23; 3RP 52-53. Scott Weissman testified he saw the struggle and came to help. 2RP 67. After Streitler again tried to flee, Scott Weissman testified he and another man chased Streitler and held him until police arrived. 2RP 69-71.

At sentencing, Streitler stipulated to his criminal history and offender score. 4RP 2-3. Defense counsel requested the low end of the standard range, concurrent sentences, and waiver of non-mandatory legal financial obligations. 4RP 5. There was no discussion of whether any of Streitler's three convictions constituted the same criminal conduct.

C. ARGUMENT

STREITLER WAS DENIED EFFECTIVE REPRESENTATION WHEN HIS ATTORNEY FAILED TO ARGUE HIS BURGLARY AND ROBBERY OFFENSES CONSTITUTED THE “SAME CRIMINAL CONDUCT” FOR SENTENCING.

Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Defense counsel is ineffective where (1) the attorney’s performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). “A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Streitler received ineffective assistance of counsel because his attorney failed to argue his burglary and robbery offenses should be counted as the same criminal conduct in determining his offender score. Counsel mistakenly maintained Streitler’s offender score was nine (on the burglary

count) when the trial court had the discretion to calculate the offender score as seven. 4RP 2-3. Counsel's erroneous stipulation prevented the court from exercising its discretion on the issue.

a. The Court Had Discretion to Find the Burglary and Robbery Were the Same Criminal Conduct.

RCW 9.94A.589(1)(a) provides:

[W]henever 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.

“Same criminal conduct” is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). The test is an objective one that considers “how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective.” State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). “The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). “[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant’s criminal purpose or intent did not change and the

offenses encompass the same criminal conduct.” State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Streitler’s burglary and robbery convictions constitute the same criminal conduct because they involve the same time and place, the same victim, and the same criminal intent. Incidents occur at the same time when they are “part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time.” State v. Young, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999) “[T]here is one clear category of cases where two crimes will encompass the same criminal conduct – ‘the repeated commission of the same crime against the same victim over a short period of time.’” State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997) (quoting 13A Seth Aaron Fine, Washington Practice § 2810, at 112 (Supp. 1996)). Here, both crimes occurred over a matter of minutes on July 9, 2008, at the University of Washington Health Sciences Building. 3RP 21, 27, 31, 60. Polina Zayko was the victim of both offenses. 3RP 32, 41, 52. The burglary and robbery involved the same criminal intent, namely, to steal Zayko’s property.

The State may argue the robbery is separate criminal conduct because it involved two victims, Zayko and Hinds. This argument should be rejected. Although Streitler also assaulted Hinds during the robbery, the “bodily injury” element of first-degree robbery was also satisfied based on

injuries to Zayko alone. 3RP 61 (bruise and scratches), 132-33 (State's closing argument). To the extent the jury's verdicts are unclear on this point, Streitler receives the benefit of the doubt. See State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996) (where two crimes may or may not have stemmed from same incident, it is assumed they did for same criminal conduct analysis), review denied, 131 Wn.2d 1006 (1997). See also State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), aff'd 149 Wn.2d 906 (2003) (for merger analysis, ambiguous verdict as to whether first degree rape was predicated on kidnapping or display of a deadly weapon must be interpreted in defendant's favor under rule of lenity).

b. Counsel's Failure to Raise a Same Criminal Conduct Argument Was Unreasonably Deficient Performance.

Because Streitler's burglary and robbery offenses involve the same time, place, victim, and intent, defense counsel performed deficiently in failing to ask the sentencing court to make a "same criminal conduct" finding that would have reduced Streitler's offender score on the burglary count to seven. Instead, counsel stipulated Streitler's offender score was nine, thus waiving the issue. State v. Nitsch, 100 Wn. App. 512, 514, 997 P.2d 1000 (2000). But the failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300,

316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). No legitimate tactical decision justified stipulating to an offender score that increased Streitler’s term of confinement when there was a possibility the court would have determined a lesser offender score had such a request been made. Streitler had nothing to lose and everything to gain by making the request.

“Reasonable attorney conduct includes a duty to investigate the relevant law.” State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). A cursory review of the relevant cases would have revealed the same criminal conduct arguments made above. Defense counsel was deficient in failing to ask the trial court to exercise its discretion in Streitler’s favor.

c. Streitler Was Prejudiced by Counsel's Failure to Ensure the Court Exercised Its Discretion.

To show prejudice, Streitler need only show a reasonable probability the outcome would have been different without counsel's mistake. Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 694). Reversal is required if the mistake undermines confidence in the reliability of the outcome. Id. Here, it is reasonable probable the court would have imposed a shorter sentence had counsel requested a same criminal conduct finding.

Despite the burglary anti-merger statute,<sup>2</sup> the court's discretion to treat burglary and other offenses as the same criminal conduct is well established. Lessley, 118 Wn.2d at 781; State v. Davis, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998). Separate punishment is not mandatory.

Had the court exercised its discretion in Streitler's favor, his offender score on the burglary count would have been seven instead of nine, resulting in a standard range of 67 to 89 months rather than 87 to 116 months. See RCW 9.94A.510 (seriousness level 7 for burglary and offender score of 7). His range for the robbery would have been 77 to 102 months rather than 87 to 116 months. Id. (seriousness level 9 and offender score of 6). His offender score on the assault would have been reduced from six to five, resulting in a standard range of 17-22 months.

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<sup>2</sup> RCW 9A.52.050 provides in relevant part, "[e]very 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."

It is likely the court would have exercised its discretion in Streitler's favor because the court was inclined to be lenient. 4RP 6. The court first explained, "The facts in this case are somewhat less serious than we find in most robbery in the first degree cases." Id. The court continued, "I think a low end sentence of this very high range is appropriate." Id.

Whether current offenses encompass the same criminal conduct is a question within the sentencing court's discretion. State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). But defense counsel must request that the court exercise its discretion. In State v. McGill, defense counsel was ineffective in failing to cite authority showing the court had discretion to impose an exceptional sentence downward and in failing to request the court to exercise that discretion. State v. McGill, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002). In so holding, this Court rejected Division Three's decision in State v. Hernandez-Hernandez,<sup>3</sup> which held the failure to make the argument was not ineffective because the trial court was free to reject it. McGill, 112 Wn. App. at 102. This Court recognized "[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." Id.

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<sup>3</sup> State v. Hernandez-Hernandez, 104 Wn. App. 263, 266, 15 P.3d 719 (2001).

The same rationale applies here. Defense counsel did not cite authority showing the court had discretion to treat Streitler's burglary and robbery offenses as the same criminal conduct and did not request the court exercise that discretion. Streitler was prejudiced because his offenses satisfy the same criminal conduct test and the court was inclined to be lenient. Thus, counsel's failing constitutes ineffective assistance.

D. CONCLUSION

Streitler's convictions for first-degree burglary and first-degree robbery involve the same criminal conduct. His case should be remanded for a new sentencing hearing so the court may exercise its discretion.

DATED this 31<sup>st</sup> day of August, 2009.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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v.	)	COA NO. 63243-4-I
	)	
GARY STREITLER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GARY STREITLER  
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FILED  
STATE OF WASHINGTON  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF AUGUST, 2009.

x Patrick Mayovsky