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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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Clerk

STATE OF WASHINGTON,

Respondent

vs.

KIRT D. JONES,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Paula Casey, Judge

Cause No. 04-1-02311-8

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to dismiss Counts III-V, unlawful possession of a firearm in the first degree, where the State failed to establish the corpus delicti of these crimes independent of Jones's statement to the police.
2. The trial court erred in allowing Jones to be represented by counsel who provided ineffective assistance in failing to raise the issue regarding the lack of corpus delicti for Counts III-V.
3. The trial court erred in counting as part of Jones's offender score his 1986 prior conviction for possession of stolen property in the second degree (a class C felony) where this conviction "washed out" prior to 1995.
4. The trial court erred in counting as part of Jones's offender score his 1986 prior conviction for possession of stolen property in the second degree (a class C felony) and his 1997 prior conviction for forgery (a class C felony) where these convictions "washed out."
5. The trial court erred in counting Jones's current convictions for four counts of unlawful possession of a firearm in the first degree (Counts II-V) as separate offense for purposes of calculating Jones's offender score where these crimes constituted same or similar criminal conduct.
6. The trial court erred in allowing Jones to be represented by counsel who provided ineffective assistance in failing to raise the issues regarding the proper calculation of his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to dismiss Counts III-V, unlawful possession of a firearm in the first degree, where the State failed to establish the corpus delicti of these crimes independent of Jones's statement to the police? [Assignment of Error No. 1].

2. Whether the trial court erred in allowing Jones to be represented by counsel who provided ineffective assistance in failing to raise the issue regarding the lack of corpus delicti for Counts III-V? [Assignment of Error No. 2].
3. Whether the trial court erred in counting as part of Jones's offender score his 1986 prior conviction for possession of stolen property in the second degree (a class C felony) where this conviction "washed out" prior to 1995? [Assignment of Error No. 3].
4. Whether the trial court erred in counting as part of Jones's offender score his 1986 prior conviction for possession of stolen property in the second degree (a class C felony) and his 1997 prior conviction for forgery (a class C felony) where these convictions "washed out?" [Assignment of Error No. 4].
5. Whether the trial court erred in counting Jones's current convictions for four counts of unlawful possession of a firearm in the first degree (Counts II-V) as separate offense for purposes of calculating Jones's offender score where these crimes constituted same or similar criminal conduct? [Assignment of Error No. 5].
6. Whether the trial court erred in allowing Jones to be represented by counsel who provided ineffective assistance in failing to raise the issues regarding the proper calculation of his offender score? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

1. Procedure

Kirt D. Jones (Jones) was charged by second amended information filed in Thurston County Superior Court with one count of residential burglary (Count I), and four counts of unlawful possession of a firearm in the first degree (Counts II-V). [CP 12-13].

Prior to trial, no motions regarding 3.5 or 3.6 were made or heard. Jones was tried by a jury, the Honorable Paula Casey presiding. Jones had no objections or exceptions to the instructions. [Vol. I RP 127]. The jury found Jones guilty as charged in all five counts. [CP 42, 43, 44, 45, 46; 6-30-05 RP 165-167].

The court sentenced Jones on Count I to a DOSA sentence of 30.75-months, and on Counts II-V to DOSA sentences of 44.75-months on each count with all of the sentences running concurrently for a total sentence of 44.75-months based on an offender score of 8.¹ [CP 47, 48, 49, 51-59].

Timely notice of appeal was filed on September 23, 2005. [CP 60-69]. This appeal follows.

2. Facts

On December 19, 2004, police contacted Norman Hutson regarding the possible burglary of his residence. [Vol. I RP 20-28].

¹ Jones has the following prior convictions:

1986	PSP2	class C felony
1989	UPCS (cocaine)	class B felony
1997	Delivery of cocaine	class B felony
1997	Forgery	class C felony

Jones also has the following misdemeanor convictions:

1990	Theft 3
1992	Assault 4
1993	Disorderly Conduct

Hutson confirmed that his residence had been burglarized and that a number of firearms were missing. [Vol. I RP 28-32, 39-40, 44].

The police also located a van allegedly related to the burglary of Hutson's residence and contacted the van's owner, Jones, who was inside the van along with another man, Kelly Anderson. [Vol. I RP 59-61, 69, 88-89]. After Jones refused the officers' request to search his van, the police did in fact search Jones's van after obtaining a search warrant, and found paperwork belonging to Hutson and a .357 magnum. [Vol. I RP 62, 69, 82-83, 91-95, 97].

Hutson testified at trial that he did not know Jones and had never given him permission to enter his residence. [Vol. I RP 50-51]. Hutson testified that he was missing, among other firearms, a 30/30 rifle, a .22 caliber rifle, and a Stevens .12 gauge shotgun. [Vol. I RP 44-47].

Jones did not testify at trial. However, Jones's statement to police after his arrest at a time when he was suffering from drug withdrawal admitting to entering Hutson's residence and taking firearms from the residence was presented to the jury. [Vol. I RP 75, 79-81, 104-106, 114-116]. Hutson's 30/30 rifle, .22 caliber rifle, and .12 gauge shotgun were never found. [Vol. I RP 77]. The State introduced as evidence, Exhibit No. 18, without objection—a certified copy of Jones's prior conviction for delivery of a controlled substance (heroin). [Vol. I RP 100].

D. ARGUMENT

- (1) JONES'S CONVICTIONS FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE IN COUNTS III-V MUST BE REVERSED AS THE STATE FAILED TO ESTABLISH THE CORPUS DELECTI OF THESE CRIMES INDEPENDENT OF JONES'S STATEMENT TO THE POLICE.

The confession or admission of a defendant charged with a crime cannot be used to prove a defendant's guilt in the absence of independent evidence corroborating that confession or admission. State v. Aten, 130 Wn.2d 640,655-656, 927 P.2d 210 (1996). The State has the burden of producing evidence sufficient to satisfy the corpus delecti rule. State v. Riley, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993). If sufficient evidence exists, the confession or admission of a defendant may be considered along with the independent evidence to establish a defendant's guilty. State v. Aten, 130 Wn.2d at 656.

To be sufficient, independent corroborative evidence need not establish the corpus delecti beyond a reasonable doubt, or even by a preponderance of the evidence. State v. Riley, 121 Wn.2d at 32. Rather, independent corroborative evidence is sufficient if it prima facie establishes the corpus delecti. State v. Smith, 115 Wn.2d 775, 781, 901 P.2d 975 (1990). Prima facie in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal

activity. State v. Aten, 130 Wn.2d at 656; State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). In determining whether the State has produced sufficient prima facie evidence, the appellate court assumes the truth of the State's evidence and all reasonable inferences drawn therefrom. Bremerton v. Corbett, 106 Wn.2d 569, 571, 723 P.2d 1135 (1986); State v. Pineda, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000). But the independent evidence must support a logical and reasonable inference of criminal activity only. State v. Aten, 130 Wn.2d at 659-660. If the independent evidence also supports logical and reasonable inferences of non-criminal activity, it is insufficient to establish the corpus delicti. Id.

Here, Jones was charged and convicted in Counts III-V with unlawful possession of a firearm in the first degree. In Count III the State charged Jones with possessing or having control of a 30/30 rifle. [CP 12-13]. In Count IV the State charged Jones with possessing or having control of a .22 caliber rifle. [CP 12-13]. In Count V the State charged Jones with possessing or having control of a .12 gauge shotgun. [CP 12-13]. All of these charges involve possession or control of the firearm at issue in the present tense not the past. At the time of his arrest, Jones was only in possession or control of a single firearm, a .357 magnum—this firearm was the basis of the unlawful possession of a firearm in the first degree charge in Count I. The police never found a 30/30 rifle, a .22

caliber rifle, or a .12 gauge shotgun. [Vol. I RP 77]. However, after his arrest at a time when he seemingly was suffering from drug withdrawal, Jones made a statement to the police that he had possessed a number of rifles. [Vol. I RP 75, 79-81, 104-106, 114-116]. Given these facts, the State bore the burden of establishing sufficient independent corroborative evidence of Counts III-V, absent Jones's statement to the police, to prima facie establish the corpus delicti of these crimes. This is a burden the State cannot satisfy.

The only independent corroborative evidence presented by the record includes the fact that Hutson's home had been burglarized, the fact that Jones told the police that he had entered Hutson's residence, and the fact that a number of firearms were missing from the home. None of these facts establish whether Jones was the only person who had entered Hutson's residence before the burglary was discovered, or whether Jones in fact took any firearms from Hutson's home or whether someone else took the firearms—Hutson testified that the .357 magnum found in Jones possession or control at the time of Jones's arrest was not one of his missing firearms. [Vol. I RP 47, 53]. *See State v. Bernal*, 109 Wn. App. 150, 33 P.3d 1106 (2001). Moreover, Counts III-V as charged by the State do not specify that the firearms at issue were Hutson's missing firearms—leaving open the question that the firearms with which Jones

was charged in Counts III-V could have been any 30/30 rifle, .22 caliber rifle, and .12 gauge shotgun (Jones was not charged with theft of firearms nor was he charged with possession of stolen firearms). Absent the answers to these questions given that no 30/30 rifle, or .22 caliber rifle, or .12 gauge shotgun were ever recovered, i.e. none of these firearms were ever actually found in Jones's possession or control, the State has not satisfied its burden of establishing sufficient independent corroborative evidence, absent Jones's statement to the police, to support a prima facie showing of the corpus delicti for Counts III-V. This court should reverse Jones's convictions for unlawful possession of a firearm in the first degree in Counts III-V.

(2) JONES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE THE LACK OF CORPUS DELECTI FOR COUNTS III-V.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853

P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

It has been held that the corpus delecti rule “is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant must make a proper objection to the trial court to preserve the issue.” State v. Dodgen, 81 Wn. App. 487, 492, 915 P.2d 521 (1996); State v. C.D.W., 76 Wn. App. 761, 763-764, 887 P.2d 911 (1995). Should this court find that counsel waived the error claimed and argued in the preceding section of this brief by failing to raise the corpus delecti as to Counts III-V set forth therein, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to raise the issue presented with regard to the lack of corpus delecti as to Counts III-V when this issue would have resulted in the dismissal of the charges particularly where

Jones's counsel argued in closing argument that the only evidence the State had presented with regard to Counts III-V was Jones's statement:

You know that he [the State] brought up six or seven rifles when, in fact, not that many had been stolen at all. And through clarification on additional questioning from the officers, Mr. Jones was able to correct that and come up with what the officers had advised was the correct number of rifles or guns that were missing from that house. We do not have those rifles themselves. All we have is the .357. So we do not have the physical evidence of the guns themselves. . . . So what you are asked to base your decision upon is the words from the lips of a man going through heroin withdrawal. . . . I'm asking you to review carefully what you've heard on the stand, and I'm asking you to give the statements that come from the lips of a man going through heroin withdrawal the weight that they ought to deserve, because that is what the State's case is built upon. We do not have physical evidence of Mr. Jones ever being in possession of those rifles.

[Emphasis added]. [Vol. I RP 151-153]. The State apparently conceded in closing argument regarding Counts III-V that the evidence on these charges rested on Jones's statement by arguing, "this defendant's acknowledge[ment of] stealing them [the firearms at issue in Counts III-V] in order to sell them—he said he stole [them], and he had [them]." [Vol. I RP 146-148]. This further compounded counsel's error in failing to raise the corpus delicti issue as to Counts III-V.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable

probability” means a probability “sufficient to undermine confidence in the outcome.” Leavitt, 49 Wn. App. at 359. The prejudice here is apparent in that but for counsel’s failure to raise the issue presented with regard to the lack of corpus delicti as to Counts III-V for the reasons set forth in the preceding section, had counsel done so, the outcome would have been different—Counts III-V would have been dismissed.

- (3) THE TRIAL COURT ERRED IN COUNTING AS PART OF JONES’S OFFENDER SCORE HIS 1986 PRIOR CONVICTION FOR POSSESSION OF STOLEN PROPERTY IN THE SCEOND DEGREE (A CLASS C FELONY) WHERE THIS CONVICTION “WASHED OUT” PRIOR TO 1995.

A sentencing court’s calculation of a defendant’s offender score is a question of law and is reviewed de novo. State v. McCraw, 127 Wn. 2d 281, 289, 898 P.2d 838 (1995). A challenge to the calculation of an offender score may be raised for the first time on appeal. Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based on a miscalculated upward offender score, “that a

defendant cannot agree to punishment in excess of that which the Legislature has established,” and that “in general a defendant cannot waive a challenge to a miscalculated offender score.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, *citing* State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Since there was “simply no question that Goodwin’s offender score was miscalculated, and his sentence is as a matter of law in excess of what is statutorily permitted for his crimes given a correct offender score,” the court held that Goodwin “cannot agree to a sentence in excess to that statutorily authorized.” In re Goodwin, 146 Wn.2d at 876.

At sentencing, the trial court included Jones’s 1986 prior conviction for possession of stolen property in the second degree, a class C felony with a maximum term of 5 years under RCW 9A.56.160, to add one point to his offender score without first determining whether the conviction “washed out.” Jones was sentenced for the prior possession of

stolen property conviction on October 14, 1986. And while the Judgment and Sentence indicates that Jones had three misdemeanor convictions between 1990 and 1993, which, though the record is silent, were no doubt considered under the rationale expressed in State v. Watkins, 86 Wn. App. 852, 939 P.2d 1243 (1997) to preclude any claim that the offense at issue may have “washed out” for sentencing purposes, Watkins is no longer good law.

Prior to 1995, class C felony convictions other than sex offenses were not included in the offender score if, since the last date of release from confinement pursuant to a felony conviction or entry of judgment and sentence, the offender had spent five consecutive years in the community without being convicted of any felonies. *See* Laws of 1995, ch. 316, sec.1. The 1995 amendment changed the final clause of former RCW 9.94A.360(2) (1992), currently codified at RCW 9.94A.525, to read “without committing any crime that subsequently results in a conviction.” The amendment, which constitutes a substantive change in the law, only applies prospectively and does not revive previously washed out offenses. *See State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999) (holding 1990 amendments to RCW 9.94A.360(2), which provide that sex crimes do not wash out, did not revive previously washed-out crimes); State v. Smith, 144 Wn.2d 665, 674-75, 30 P.3d 1245 (2001) (holding that 1997

amendment to former RCW 9.94A.030(12), currently codified at RCW 9.94A.030(13), including all prior juvenile adjudications in a defendant's criminal history, may not be applied retrospectively to revive washed-out offenses, with the result that previously washed out juvenile adjudications cannot be revived for purposes of calculating offender scores).

Jones's 1986 possession of stolen property in the second degree conviction "washed out" and should not have been considered in calculating his offender score, given there was a six-year gap between the date of his 1986 theft conviction and the 1995 amendment to former RCW 9.94A.360(2), the result of which reduces Jones's offender score one point.

And although the release date for Jones's 1986 possession of stolen property in the second degree conviction was not part of the record, it clearly appears this is no issue since Jones was felony free for more than six consecutive years from the date of his conviction for possession of stolen property in the second degree in 1986 and the amendment to former RCW 9.94A.360(2), and since a conviction for possession of stolen property in the second degree under RCW 9A.56.160, with a zero offender score, carries a standard range sentence of 0 to 60 days.

Jones's sentence should be vacated and the matter remanded for resentencing.

- (4) THE TRIAL COURT ERRED IN COUNTING AS PART OF JONES'S OFFENDER SCORE HIS 1986 PRIOR CONVICTION FOR POSSESSION OF STOLEN PROPERTY IN THE SCEOND DEGREE (A CLASS C FELONY) AND HIS 1997 PRIOR CONVICTION FOR FORGERY (A CLASS C FELONY) WHERE THESE CONVICTIONS "WASHED OUT."

At sentencing, the trial court included Jones's 1986 prior conviction for possession of stolen property in the second degree (a class C felony) and 1997 prior conviction for forgery (a class C felony) to add 2 points to his offender score without first determining whether these convictions washed out. Release or parole dates for these offenses were also not part of the record. Based on the record, Jones had no other convictions after 1997 until the current offenses occurring in 2004—seven years having elapsed.

RCW 9.94A.360 (now recodified as RCW 9.94A.525) provides in pertinent part:

- (2) ...Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction....

This matter should be reviewed to determine if the trial court misapplied the law. Review for abuse of discretion is a deferential standard; review for misapplication of the law is not. State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998). Review under the abuse of discretion standard is not appropriate where, as here, the facts are not sufficient to support the trial court's offender score calculation. Based on the facts available in the record, the trial court's reasoning cannot be ascertained as to why it included the convictions (his 1986 class C felony conviction for possession of stolen property in the second degree and his 1997 class C felony conviction for forgery where there was 7-years between his last felony conviction and the current offenses) here at issue as part of Jones's offender score. Accordingly, since it is impossible to tell from the record the maximum terms for the offenses here at issue, it cannot be ascertained why the trial court included these prior convictions in determining Jones's offender score where the convictions may have "washed out" thereby reducing Jones's offender score by 2 points.

- (5) JONES'S CONVICTIONS FOR FOUR COUNTS OF UNLAWFUL POSSESSION OF FIREARM IN HE FIRST DEGREE (COUNTS III-V) ENCOMPASSED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass

the same course of criminal conduct for purposes of determining an offender score. State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

“RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant’s offender score.” State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), *reviewed denied*, 143 Wn.2d 1010 (2001) (*quoting State v. Tili*, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “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).

For purposes of RCW 9.94A.589(1)(a), intent is not defined as the specific intent required as an element of the crime charged. Rather, the inquiry focuses on the extent to which criminal intent, as objectively viewed, changed from one crime to the next. Whether one crime furthered the other may be relevant but generally does not apply when the crimes occurred simultaneously. State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). Moreover, our courts have held that separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a

short period of time. *See e.g.*, State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997); State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Here, it cannot be disputed that Counts II-V, all crimes involving unlawful possession of a firearm in the first degree, involved the same victim—the general public. State v. Haddock, 141 Wn.2d 103, 110-111, 3 P.3d 733 (2000) (the victim of unlawful possession of a firearm is the general public). Nor can it be disputed that Counts II-V occurred at the same time and place—Jones allegedly possessed or had control over all four firearms at issue on or before December 19, 2004—and that Jones’s “intent” remained the same, i.e. his intention to possess firearms. Thus, the trial court should have determined that all four of Jones’s convictions (Counts II-V) for unlawful possession of a firearm in the first degree constituted same or similar conduct for purposes of calculating Jones’s offender score. *See State v. Haddock*, 141 Wn.2d at 108-109, 115. Even if this court were to determine that Count II is a separate offense from Counts III-V given that Count II involves a single date of December 19, 2004 and Counts III-V encompass a time period between August 1, 2004 to December 19, 2004 [CP 12-13, 32, 37-39], then remand for resentencing would still be required as Counts III-V constituted the same or similar criminal conduct for the reasons set forth above and were

improperly counted separately in determining Jones's offender score. This court should remand for resentencing.

(6) JONES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE THAT HIS OFFENDER SCORE WAS MISCALCULATED.

Should this court find that trial counsel waived or invited the errors claimed and argued in the preceding sections of this brief (sections 3-5) by failing to properly object to the calculation of Jones's offender score or by agreeing to the miscalculation of his offender score, then both elements of ineffective assistance of counsel have been established.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293,

456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, *See* State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (*citing* State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Here, both prongs of ineffective assistance are met. First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to the calculation of Jones's offender score for the reasons set forth in the preceding sections of this brief, and had counsel done so, the trial court would not have miscalculated Jones's offender score by counting his 1986 possession of stolen property in the second degree conviction, by counting his 1997 forgery conviction, and by counting separately his current offenses for unlawful possession of a firearm in the first degree (Counts II-V) towards his offender score.

Second, the prejudice is self evident. Again, for the reasons set forth in the preceding sections, had counsel properly objected to the

calculation of Jones's offender score, the trial court would not have imposed a sentence in excess of what is statutorily permitted.

E. CONCLUSION

Based on the above, Jones respectfully requests this court to reverse and dismiss his convictions in Counts III-V for the State's failure to establish the corpus delicti of these crimes and/or remand for resentencing.

DATED this 13th day of March 2006.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 13th day of March 2006, I delivered a true and correct copy of the brief of appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 13th day of March 2006.

Patricia A. Pethick
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