

**NO. 34451-3 (Consolidated No.)**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAMES DOUGLAS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chushcoff

No. 04-1-03902-1

No. 04-1-05086-5

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**BRIEF OF RESPONDENT**

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Appendix A

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show a manifest abuse of discretion in the court granting a consolidated trial in two of his pending cause numbers?
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B. STATEMENT OF THE CASE.

1. Procedure

On August 10, 2004, the Pierce County Prosecutor's Office ("State") filed an information charging appellant, JAMES P. DOUGLAS, "defendant," with one count of assault in the second degree and one count of assault in the fourth degree in Pierce County Cause No. 04-1-03902-1. CP 1-3. The alleged victims of these crimes were Carroll Pederson and Pauline Pederson respectively and pertained to acts allegedly committed on July 25, 2004. Id. The State filed an amended information on November 18, 2004, adding a count of bail jumping after defendant failed to appear for a court ordered hearing on October 12, 2004. CP 12-13.

On November 1, 2004, the State filed an information charging defendant with one count of arson in the first degree for allegedly setting fire to the home of Carroll and Pauline Pederson on October 10, 2004 in Pierce County Cause No. 04-1-05086-5. CP 350-352.

The State brought a motion to consolidate these two cases for trial. CP 362-366. The Honorable James R. Orlando heard the motion and granted it over the objection of the defendant. 3/9/05 RP 2-9<sup>1</sup>; CP 20, 367. On May 11, 2005, the State filed an amended information in Cause No.

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<sup>1</sup> The State will refer to the 16 volumes of consecutively numbered pages, beginning on June 8, 2005, and covering the trial proceedings, post-verdict motions and sentencing proceedings as "RP." All other volumes of the verbatim report of proceedings will be designated by a date (m/d/yr) followed by "RP."

04-1-05086-5 adding a count of residential burglary and domestic violence court order violation to the charges. RP 370-373.

The two consolidated cases proceeded to jury trial before the Honorable Bryan E. Chushcoff. RP 4. After hearing the evidence, the jury returned verdicts finding the defendant guilty as charged. RP 1102. CP 144, 145, 146, 533, 534, 535. The jury also returned a special verdict finding that the violation of the protection order created a substantial risk of death or serious physical injury to another person. RP 1103; CP 536

On the initial sentencing date, defendant's trial attorney moved to withdraw in light of the pro se pleadings defendant had filed seeking a new trial on the grounds of ineffective assistance of counsel. RP 1114-1119; CP 201-216. The court granted the motion to withdraw and appointed a lawyer to be determined by the local public defender's office ("DAC") to replace him. RP 1120; CP 165-166, 564-565. At the next hearing, which was to continue the motion/sentencing date, defendant's new counsel indicated that he was trying to obtain authorization from DAC for the money to pay for trial transcripts. RP 1134. Two weeks later, defendant's new counsel sought another continuance on the motion for new trial and the sentencing. RP 1140-1142. Defendant's counsel again raised the subject of transcripts indicating that the director of DAC was not willing to authorize payment for the full trial transcripts, but that he might be willing to pay for some of the transcripts, if new counsel could identify the important portions. RP 1142-1144. Defendant

indicated that he wanted to dismiss his attorney and represent himself. RP 1162. After being advised of some of the drawbacks of self representation, defendant decided that he wanted the assistance of counsel. RP 1174. The court granted the defense motion for continuance of the hearing/sentencing date; it also set a date for defendant to bring a motion to compel production of transcripts, should new counsel be unable to negotiate a satisfactory resolution regarding payment for transcripts with the director of DAC. RP 1174-1179.

The defense sought court authorization for payment of transcripts for the opening, closing, motions in limine, and the testimony of Debra Douglas, Carroll Pederson, and Pauline Pederson. 1/13/06 RP 4-5. The court considered the defendant's request and granted it with regard to the transcripts of the pre-trial hearings, including the motions in limine, and of the opening and closing statements. 1/13/06 RP 10-11. The court denied the motion with respect to the testimony of the witnesses because it could not see how this testimony had any bearing on the claims defendant raised. 1/13/06 RP 8-11.

When the case came before the court for the hearing on the motion for new trial, defendant indicated that he was once again dissatisfied with his attorney and wanted to go pro se. RP 1186-1187. The court did not allow defendant to proceed pro se, but did allow defendant the opportunity to make whatever arguments he wished in support of his motion for new

trial. RP 1187-1224. The court denied the motion for new trial. RP 1224-1226.

At sentencing the court imposed standard range sentences of 22 months on the assault in the second degree and 16 months on the bail jumping. CP 225-236. The court imposed a one year suspended sentence on the assault in the fourth degree. CP 240-244. The court imposed a standard range sentence of 61 months on the arson, 20 months on the burglary and 43 months on the domestic violence protection order violation. RP 648-659.

Defendant filed a timely notice of appeal from entry of this judgment. RP 342-343, 758-759.

The jury returned verdicts finding the defendant guilty as charged. RP 1102. The jury also returned a special verdict finding that the violation of the protection order created a substantial risk of death or serious physical injury to another person. RP 1103.

## 2. Facts

Debra Douglas testified that she and her daughter, Alyssa, moved into her parents home at 12109 212<sup>th</sup> Avenue Court East in Bonney Lake in October 2003 due to emotional and verbal abuse she suffered from her husband, the defendant. RP 154-156. Ms. Douglas moved in with her parents shortly after the birth of Alyssa, which was on September 18, 2003. RP 156, 847-848. She was still living with them on October 10,

2004. RP 156. Ms. Douglas had three older daughters from a previous marriage who would also stay at her parent's home every weekend. RP 157.

The defendant had visitation rights with Alyssa. RP 158. Initially Ms. Douglas would handle the transfer of Alyssa to defendant for visitation; she stopped handling the custody exchanges in January of 2004 because she felt defendant was being verbally abusive toward her. RP 160. Her parents handled the exchanges for her after that point. RP 160.

Ms. Douglas testified that after she moved out that defendant would return her property, including collectibles and antiques, to her parents but that 75 percent of what he returned would be broken. RP 161-162. Defendant called Ms. Douglas and told her that he had found a couple of boxes of her things and planned on giving them to her parents during the custody exchange on Sunday, July 25, 2004. RP 162. This exchange was scheduled to occur in the parking lot of the Bonney Lake Police Department. RP 163. Ms. Douglas did not go with her parents to this exchange. RP 163. Later that day Ms. Douglas learned that her father was in the hospital as a result of an assault. RP 163-164.

Pauline Pederson, 72, testified that she is married to Carroll Pederson, is the mother of Debra Douglas, and is the grandmother of Alyssa. RP 657-658. She knows the defendant because he married her daughter in September 2002 and is the father of Alyssa. RP 658. Her daughter is now divorced from defendant. RP 658. Ms. Pederson testified

that in the early part of 2004, she and her husband became involved in the custody exchanges involving Alyssa. RP 658-659. Initially the exchanges went well, with defendant either pickling Alyssa up at the Pedersons' home or with them meeting at a nearby church or market. RP 659. Over time the exchanges became more confrontational with defendant threatening Carroll Pederson with physical violence. RP 660-664, 753-761. On the advice of a police officer, the Pedersons began scheduling custody exchanges at the parking lot of the Bonney Lake Police Department. RP 665-666.

Carroll Pederson, 75, testified that one time when they were exchanging Alyssa in a Safeway parking lot, defendant told the Pedersons that if they ever wanted to see Alyssa again that they should pick her up at the Fred Meyers in Sumner. RP 814-815. When Mr. Pederson addressed defendant about this change in the agreement, the defendant got up close to Mr. Pederson's face and said "I hate you, you son of a bitch. I'd like to knock you on your ass and stomp and kick the living shit out of you." RP 815. While making this statement, defendant jabbed his fist twice at Mr. Pederson. RP 815. Mr. Pederson asked a passer by to call the police. RP 815. On April 4, 2004, the Pedersons made a police report that defendant, during the course of an exchange, had threatened to beat up Mr. Pederson. RP 312. Defendant had made a similar threat one time before. RP 817.

Mr. and Mrs. Pederson testified that on July 25, 2004, the custody exchange was to take place in the parking lot of the Bonney Lake Police

department. RP 667, 812. The Pedersons were also expecting defendant to bring a couple of boxes of their daughter's belongings with him to be returned. RP 668, 812. Because much of what defendant had returned previously had been broken, the Pedersons took a camera with them to photograph the condition of the belongings. RP 668, 812. Mrs. Pederson also brought a tape recorder to record the exchange. RP 668-669.

Mrs. Pederson testified that they arrived at the parking lot at approximately 2:00 p.m.; the defendant was already there and he seemed angry from the outset. RP 669, 761. Mrs. Pederson informed defendant that they were going to photograph the belongings before handing over Alyssa to him. RP 670, 761, 813. Mr. Pederson took the camera and began to photograph the contents of the first boxes; he did not hear the substance of defendant's conversation with his wife. RP 813-814. Upon hearing this defendant began a verbal personal attack on the Pedersons which included profanities. RP 670. When defendant called Mrs. Pederson an "F-ing bitch," she asked her husband to call the police, which he did. RP 670-671. Alyssa began to fuss; Mrs. Pederson took her out of the car and handed her to her husband. RP 671. Her husband was speaking to defendant; Mrs. Pederson saw defendant punch her husband twice and saw her husband fall to the ground. RP 672. Alyssa, who was ten months old at the time, fell to the blacktop landing between Mr. Pederson and the defendant. RP 671-673. Defendant bent over and continued to beat on Mr. Pederson. RP 673. Mrs. Pederson starting

beating on defendant's back and tried to pull him away. RP 673.

Mr. Pederson testified that he was holding Alyssa and speaking with defendant while waiting for a police officer to come out. RP 819. Defendant demanded that Mr. Pederson give him his daughter and when Mr. Pederson refused, defendant punched him several times in the face. RP 819-820. Mr. Pederson remembers falling and trying not to drop Alyssa. RP 820. The next thing he remembers is thinking that he had to get up and feeling a blow to his left kidney. RP 820. He recalls a gentleman coming to help him get up. RP 820. Mr. Pederson testified that his ear was bleeding badly, that he had what felt like a grapefruit-sized lump on the side of his head, and that his eye was swelling badly. RP 821-822. His injuries were treated at a hospital and he was released that night. RP 822. Two days later he was readmitted with inner ear damage that caused vertigo and hearing loss. RP 823.

When the gentleman came up to them, defendant stopped beating on Mr. Pederson; defendant kicked Mr. Pederson in the back then picked up the screaming baby and tried to leave. RP 673-674. Mrs. Pederson tried to stop defendant from leaving by grabbing on to his arm and shirt; defendant pushed her off. RP 674. When Mrs. Pederson tore defendant's shirt in this struggle, he turned and punched Mrs. Pederson in the forehead. RP 674. Mrs. Pederson took photographs, or had photos taken, of her and her husband's injuries showing what they looked like on July 25, 2004, and over the next few days. RP 707-709, 711-719; EX 60-68.

The Pedersons testified that after this she and her husband got a protection order against the defendant; a copy was admitted into evidence. RP 719-721, 784, 929.

By this time the man that had come up to them in the parking lot was calling 911. RP 674. Mrs. Pederson testified that her husband was laying on the black top, not moving, apparently unconscious. RP 674. Defendant had taken Alyssa to his truck; Mrs. Pederson went over and opened both doors on the passenger side. RP 674. Defendant was sitting behind the wheel with Alyssa between him and the steering wheel. RP 674. At this time a policeman arrived and asked defendant to get out of his truck. RP 674.

Preston Peters was at the Bonney Lake Police Department on July 25, 2004. He parked his car, got out and walked to the other side of the building. RP 618. As he did so he noticed the Pedersons with their granddaughter and the defendant talking. RP 618. As he was walking back around the building to his car he heard yelling and screaming. RP 616, 618. He ran to the source of the noise and saw a person that he later learned was Mr. Pederson on the ground, as was the baby. RP 616. He testified that Mr. Pederson was “on all fours” trying to get up but couldn’t because the defendant was hitting and kicking him repeatedly in the face and stomach. RP 616-619. Mr. Peters described that defendant was using his fist to hit Mr. Pederson in the face as well as kicking him in the stomach and ribs. RP 619. Mr. Peters described the assault as “pretty

ferocious” and indicated that it stopped when he shouted out. RP 619. Mr. Peters testified that Mrs. Pederson was screaming and trying to stop the defendant. RP 620. Mr. Peters helped Mr. Pederson get up off the ground and that defendant grabbed the child and began to walk away. RP 620. When Mrs. Pederson tried to stop the defendant from leaving with the baby, defendant turned and hit her in the face, then got into his truck. RP 620. Mr. Peters was calling the police inside the station by that time and asking them to get outside quickly. RP 620.

On July 25, 2004, Detective Byerley was directed to go outside to the parking lot of the Bonney Lake police department for civil standby duty– which is essentially a peacekeeping function- for a child custody exchange. When he got outside he saw Mr. Pederson getting up from the ground with a bloody head and defendant walking toward his car carrying a child. RP 294. Ms. Pederson was screaming that her husband had been assaulted. RP 295. Detective Byerley approached defendant, who was now in his vehicle, and told him to stop. RP 295. When the defendant did not comply, Detective Byerley opened the truck door to prevent him from leaving. RP 295.

Mr. Pederson’s injuries were treated in the emergency room of Good Samaritan Hospital in Puyallup. RP 226-227. He was diagnosed with contusions and abrasions to the left side of his face, head and ear; a fracture to his orbital floor; closed head injuries, and contusions to his chest wall. RP 227. Mr. Pederson returned two days later complaining of

vertigo and nausea as a result of his injuries. RP 228-229.

On August 10, 2004, an information was filed in Pierce County Superior Court charging defendant with assault in the second degree and assault in the fourth degree. RP 642-644. Defendant was ordered to appear for a court hearing on October 12, 2004. RP 651. Defendant's conditions of release restricted his travel to Pierce, King, Thurston, and Kitsap counties. RP 648. Defendant was also ordered to have no contact with victims or witnesses and not to possess any weapons or firearms. RP 648. When defendant failed to appear on that date a bench warrant issued for his arrest. RP 651-655.

As of October 10, 2004, the defendant was no longer allowed visitation with Alyssa. RP 165. Defendant knew where Ms. Douglas and her parents lived. RP 165-166. On the morning of October 10, 2004, Ms. Douglas, her parents, and three of her daughters including Alyssa, went to the 9:30 service at the Calvary Community Church in Sumner. RP 166. They took two cars to transport everyone to the church, but everyone left at essentially the same time. RP 167. Ms. Douglas was the last one out of the house that morning and she was certain that she left the door locked and secure. RP 167-168. The house was clean and in excellent condition when she left; the house was only a year and half old at that time. RP 169. There was no smell of gasoline in the house. RP 169. After the church service, Ms. Douglas took her daughters shopping for some school clothes. RP 176-177. She returned home around 11:30 a.m. to find fire

trucks blocking her access and the home in flames. RP 177-180.

The court admitted a photograph that Ms. Douglas identified as being a picture of the defendant's truck into evidence. RP 174-176; EX 1. Defendant still owned this truck on October 10, 2004. RP 175.

Ms. Pederson testified that she, her husband, daughter and three granddaughters left home around 9:00 a.m. for church the morning of October 10, 2004, taking two cars. RP 722-723. After church she and her husband ran some errands and then drove home to find that they could not get to their house as the road was blocked by emergency vehicles. RP 724, 824-825. The Pedersons soon discovered that it was their home that was on fire. RP 724-725, 825. There was extensive damage done to the home and its contents. RP 728-729, 959-960. The Pedersons were still not able to occupy their home as of June 2005 forcing them to live in a motel and rental. RP 728.

Kyle Bullock lived at 12211 212<sup>th</sup> Avenue East in Sumner, near the Pedersons. RP 450. He was in his back yard talking on the telephone when he heard an explosion and look in the direction of the source of the sound; he saw debris flying through the air in an upward motion. RP 452. He walked over to his fence to get a better view and saw a white trucking taking off out of the driveway and go down a gravel alleyway. RP 453, 460. Mr. Bullock estimates that he was 15-20 feet from the truck. RP 453. He described the truck as a "late model '90s Ford with a white canopy that matched....like a half-ton version." RP 453. He testified that

the canopy matched the truck body in color and height so that the top of the canopy was level with the top of the cab. RP 453. Mr. Bullock got a brief look at the license plate and recalled that: 1) it began with "A2"; 2) it had a 9 in it; 3) it had a 4 or a 7 somewhere in the remaining numbers; and 4) it was a Washington plate. RP 454, 472. After being shown a photograph of the defendant's truck, Mr. Bullock testified:

That very possibly could be it. It is the right shape of the canopy. It is a Ford. That looks like it could be it. It has the right shape and look to it.

RP 454. Mr. Bullock has not seen other trucks like this around the neighborhood and considers the truck style to be unusual. RP 458. After seeing the truck, Mr. Bullock noticed flames coming out the front window of the house and called 911. RP 454.

Jennifer Vaughn lived next door to the Pedersons at 12101 212<sup>th</sup> Avenue Court East, Sumner, Washington. RP 257-258. She was at her home on the morning of October 10, 2004, about to let her dog out into the back yard, when she heard an explosion coming from her neighbors' house. RP 258-259. Just prior to the explosion, Ms. Vaughn noticed a white truck with a canopy going by her home, traveling very fast. RP 262-263. The Vaughn's and the Pedersons live on a dead end street; Ms. Vaughn testified that most of the traffic is from people who live on the street and she does not see outside vehicles very often. RP 264. Ms. Vaughn identified a picture of defendant's truck as looking like the white

truck she saw that day. RP 262, 266-267. She did not see who was driving the truck or get a license number. RP 266-268.

Ms. Vaughn ran to the front yard to see what had caused the explosion and saw fire coming from the front window of the Pederson home. RP 258-259. She called 911 then ran back outside; she and another neighbor, Terry Murphy, used a garden hose to try to put the fire out. RP 260-261. She stopped when the fire department arrived at the scene. RP 264.

Terry Murphy testified that he was a next door neighbor to the Pedersons and was at his home on October 10, 2004. RP 272-276. Around 10:30 in the morning, his two St. Bernards started barking wildly. RP 276. Mr. Murphy noticed a white pickup truck leaving the area going 40 -50 mph. RP 276-279. He then walked over to his window and noticed a fire coming out of the window next door. RP 277. He ran outside to help another neighbor try to contain the fire with a garden hose. RP 279.

Another neighbor was working in his home at the time of the explosion. RP 320-321. He ran to his window and saw the flames coming out of the home and a white SUV or pickup truck driving off. RP 324-325.

Bob Skaggs, a deputy fire marshall and certified fire investigator, testified that he responded to the fire at 12109 212<sup>th</sup> Avenue Ct. East in Sumner on October 10, 2004. RP 40-44. Once the fire was extinguished,

he began his investigation. RP 44-47, 88. Upon entering the house through the laundry room, he noted an overwhelming odor of gasoline. RP 47, 54. He later discovered several empty cans of gasoline inside the residence. RP 48, 56, 73-76. After completing his investigation and getting analysis results back for the crime lab, Mr. Skaggs determined that the origin of the fire was due to a flammable liquid being introduced onto the ground floor level throughout a single family dwelling; the fire was caused by an explosion of the fumes. RP 80. Mr. Skaggs was able to rule out accidental causation and determined that it was “arson caused.” RP 80.

Ms. Hanson -O’Brien, a forensic investigator for the Pierce County Sheriff’s Department was dispatched to the Pederson’s home on October 10, 2004. RP 476-480. She walked through the scene with Deputy Fire Marshall Skaggs before documenting the fire scene with both video and photographs. RP 476-481. Ms. Hanson-O’Brien looked for likely places for the retrieval of latent fingerprints, but was not expecting much success as fingerprints are comprised of approximately 90% water which is evaporated in the heat of a fire. RP 476-486. Despite efforts to recover latents from several objects, she retrieved only one partial print off of a nozzle from the garage but it was of no value for comparison purposes. RP 484-488, 525.

Detective Collier was assigned to assist the arson investigation of the Pederson’s home on October 10, 2004. RP 419-421. He toured the

burned house with the fire marshall and gathered witness statements at the scene. RP 422-430. He noted that there was a disruption in the gravel in the driveway as if a vehicle had left rapidly. RP 424-425. He learned that defendant was a possible suspect for this arson. RP 438. He ascertained that the description of the white truck seen leaving the scene matched the description of the vehicle registered to the defendant. RP 439. Detective Collier considers a White Explorer pick-up with a canopy to be fairly uncommon; he does not see many of them on the roads. RP 445-448. Detective Collier asked the Kent Police department to see if the defendant could be located at an address in Kent, but was unsuccessful in locating him. RP 438-439.

Deputy Page of the Pierce County Sheriff's department testified as to his efforts to locate the defendant and his truck on October 14 and 15, 2004. RP 574-581. His efforts included speaking to defendant's parents at their Maple Valley home on October 15, 2004 and informing them that he was looking for the defendant and his truck. RP 577-579. The defendant's truck was not at that residence on the 15<sup>th</sup> of October. RP 579. Law enforcement located the truck at defendant's parent's house on October 25 but by the time they returned with a search warrant on October 28, 2004, the truck was no longer there. RP 598-600. Defendant's mother indicated that the truck had been repossessed. RP 600.

On October 20, 2004, Officer Marquez of the Pasco Police Department and Deputy Munez of the Franklin County Sheriff's Office arrested defendant on a warrant. RP 335-341, 378-382. Defendant did not pull over immediately in response to the officers' lights, so they used their sirens as well; when this did not work, the two officers used their vehicles to box in the defendant's van. RP 337-338, 378-380. Defendant had two loaded handguns and extra ammunition in the lunge area of the van he was driving. RP 342-343, 362-364, 382. A shoulder holster was shoved under the front driver's seat. RP 362.

On October 26, 2004, David Handschin, a reposessor for the Howe Adjustment Service repossessed a 2001 Ford Explorer pick up truck, license plate number A25206P, from a home at 20052 Southeast 216<sup>th</sup> in Maple Valley. RP 566-567. This is defendant's parents' home. RP 577. The client bank had given the reposessor a phone number and asked him to contact "a third party in possession" for a voluntary surrender. RP 567, 570. Mr. Handschin testified that the truck appeared to have been sitting for a while, but the interior had been cleaned out. RP 568-569.

Defendant called Thomas Richardson, an employee of the Washington State department of licensing to testify that all truck license plates, including SUV trucks, begin with the letter A. RP 862-863. The truck license have an initial letter, then five numbers then a final letter.

RP 863. He confirmed that the vehicle registered to defendant on October 10, 2004 had a license number of “A25206P.” RP 864. On October 10, there were 230,000 plates issued in Washington that began with “A2.” RP 865. At the time of trial, 39,893 vehicles that began with a “A2” license were white. RP 866. He testified that currently 2,654 of these vehicles are registered in Pierce County. RP 866. Only one of these was a 2001 white Ford pick up truck and it was issued to the defendant. RP 867-868.

C. ARGUMENT.

1. THE COURT DID NOT ABUSE ITS DISCRETION IN CONSOLIDATING DEFENDANT’S TWO CASES FOR TRIAL.

Two different provisions govern when separate informations may be joined for trial. RCW 10.37.060; CrR 4.3.1(c). CrR 4.3 is a liberal joinder rule, but did not supersede RCW 10.37.060 and the two are consistent. State v. Thompson, 88 Wn.2d 518, 525, 564 P.2d 315 (1977).

RCW 10.37.060 provides:

When there are several charges against any person, or persons, for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments or informations the whole may be joined in one indictment, or information, in separate counts; and, if two or more indictments are found, or two or more informations filed, in such cases, the court may order such indictments or informations to be consolidated.

RCW 10.37.060. This provision permits consolidation of several charges growing out of (1) same transaction, (2) connected transactions and (3) transactions of same class of crimes. Additionally, CrR 4.3.1(c) allows the court to “order consolidation for trial of two or more indictments or informations if the offenses or defendants could have been joined in a single charging document under rule 4.3.” CrR 4.3 governs both mandatory and permissive joinder. State v. Lee, 132 Wn.2d 498, 939 P.2d 1223 (1997).

Courts have held that when evidence of one crime is admissible to prove an element of a second, then joinder or consolidation of the two crimes for trial cannot be said to be unlawfully prejudicial. State v. Kinsey, 7 Wn. App. 773, 502 P.2d 470 (1972). The use of the word “may” indicates that the legislature gave the trial court considerable discretion in its determination whether two informations should be consolidated for trial. State v. McDonald, 74 Wn.2d 563, 445 P.2d 635 (1968)(consolidating grand larceny and assault informations for trial). The trial court’s power to consolidate cases for trial will not be disturbed unless a manifest abuse of discretion has been demonstrated. State v. Norby, 122 Wn.2d 258, 264-265, 858 P.2d 210 (1993); State v. Orange, 78 Wn.2d 571, 573, 478 P.2d 220 (1970); State v. Mason, 41 Wn.2d 746, 752, 252 P.2d 298 (1953). The defendant bears the burden of demonstrating such abuse. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d

747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

In general when determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. State v. Russell, 125 Wn.2d at 63.

At the time that the State brought a motion to consolidate defendant's two cases, he was charged with assault in the second degree, assault in the fourth degree and bail jumping in Cause No. 04-1-03902-1 and arson in Cause No. 04-1-05086-5. CP 12-13, 350-352. The assaults were alleged to have occurred on July 25, 2004, the bail jumping on October 12, 2004. CP 12-13. The arson was alleged to have occurred on October 10, 2004. CP 350-352. The victims of the assaults were Pauline and Carroll Pederson, who were also the owners of the home that was destroyed by the arson. CP 12-13, 350-352, 362-366. To prove the charge of arson, the State had to prove that the defendant acted knowingly and maliciously in causing a fire or explosion. CP 110-143, Instruction No. 20. Maliciously means with an evil intent, wish or design to vex annoy or injure another person. CP 110-143, Instruction No. 19. Consequently, the evidence that defendant had previously assaulted the Pedersons and the circumstances leading to those assaults showed

defendant's ill will toward them; this was relevant and admissible to show his malicious intent on the arson to the Pederson home. Additionally, the timing of the arson, coming just before a court ordered appearance on the assault case, which defendant missed, is consistent with a retaliatory act towards the Pedersons for involving him in a legal process. The defendant's failure to appear on the assault cases as ordered is suggestive that he was aware that the police might be looking for him in connection with the arson and the violation of his conditions of release. In light of the intertwined nature of the crimes charged in the two informations and the cross admissibility of the evidence of the assaults in the arson case, the trial court did not abuse its discretion in consolidating the two cases for trial.

Defendant argues that the court erred because consolidation is inherently prejudicial citing State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986)(discussing joinder and severance under CrR 4.3). Appellant's brief at p. 59. Ramirez stands for the proposition that when the prosecution files a multiple count information pertaining to more than one alleged victim and evidence of one count would not be admissible in a separate trial for the other, the trial court abuses its discretion if it denies a motion to sever. Although never expressly overruled, this case can no longer be deemed to be controlling since the Supreme Court issued the decisions in State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992)

and State v. Kalakosky, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993).<sup>2</sup> In both these cases the court held that the fact that separate counts would not be cross-admissible in severed proceedings does not constitute a sufficient ground to sever as a matter of law. Thus, in Washington, a defendant cannot show a court abused its discretion in consolidating trials merely by arguing that consolidation is “inherently prejudicial.”

The only other argument defendant makes is that consolidation denied him his right to testify in one case and to refrain from testifying in the other. A defendant’s desire to testify only as to some but not all counts does not, by itself, require severance. State v. Watkins, 53 Wn. App. 264, 270, 766 P.2d 484 (1989). A similar claim to defendant’s was raised in State v. Russell, 125 Wn.2d at 65. That court held that to succeed on this argument a defendant must show that he or she “has important testimony to give concerning one count and a strong need to refrain from testifying about another.” Russell, 125 Wn.2d at 65 (quoting Watkins, 53 Wn. App. at 270). As Russell did not make an offer of proof as to which count he might elect to testify about or any offer of proof as to what he might say, the trial court found that he failed to make a showing that he would be

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<sup>2</sup> Kalakosky is a case involving five counts of rape against five different victims of various ages. Noting that the method of committing the five crimes may not have been sufficiently similar to allow cross-admissibility of the evidence, the court in Kalakosky concluded that the strength of the evidence on each count, the instructions to the jury to decide each count separately, and the fact that the individual crimes were not difficult to compartmentalize supported the trial court’s determination that the potential prejudice did not outweigh concerns for judicial economy. 121 Wn.2d at 539.

prejudiced by any decision he might make regarding his decision to testify on any count or not on another. On review the Supreme Court agreed that “[a]bsent an offer of proof, it is difficult to conclude that joinder affected Russell’s decision not to testify.” The same is true here.

Defendant did not make any offer of proof regarding his desire to testify or the content of his anticipated testimony. Without this showing, defendant has failed to establish prejudice from the consolidation of cases at the trial level regarding his decision not to testify.

Defendant has failed to meet his burden of showing the trial court abused its discretion in consolidating his two criminal cases for trial.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN PARTIALLY GRANTING DEFENDANT’S REQUEST FOR TRANSCRIPTS.

An indigent criminal defendant must be provided with the same basic tools for an adequate defense or appeal that are available for a price to non-indigent defendants. Britt v. North Carolina, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971); Griffin v. Illinois, 351 U.S. 12, 19-20, 76 S. Ct. 585, 100 L. Ed. (1956). There is no requirement, however, that an indigent defendant be given a free transcript in all cases. Griffin, 351 U.S. at 20; State v. Hardy, 37 Wn. App. 463, 468, 681 P.2d 852 (1984) (transcript not required for new trial motion); State v. Cirkovich, 35 Wn. App. 134, 137, 665 P.2d 440 (1983)(not entitled to transcripts from trial of co-defendant); State v. Hunter, 35 Wn. App. 708, 712, 669 P.2d 489

(1983)(not entitled to transcripts where retrial occurred two days after first trial, there was no change in defense counsel and the court reporter was available to address any inconsistencies in testimony). When transcripts are needed for preparation of a defense or an appeal, two factors are relevant in determining whether an indigent defendant should be given free transcripts: 1) the value of the transcript in connection with the trial; and, 2) the lack of functional alternatives. Britt, 404 U.S. at 227. Where an informal alternative exists that is substantially equivalent to a transcript, a court need not grant a defendant's request for transcripts. Id. at 229-230.

A different standard is used when the transcripts are requested for preparation for a motion for new trial. In United States v. Banks, 369 F.Supp. 951, 953 (M.D.Pa. 1974), the district court of Pennsylvania held that an indigent defendant's request for a free transcript to prepare a motion for new trial was committed to the sound discretion of the trial judge. The court noted that Britt v. North Carolina, supra, required, as a matter of equal protection, that an indigent prisoner receive "the basic tools of an adequate defense or appeal" but held that a motion for new trial was neither "a defense" nor "an appeal" but something in between. Thus, a different standard applied to a request for a transcript to assist with a motion for new trial.

When the need is for a post-judgment motion, the decision on whether to give the defendant transcripts is discretionary with the trial

court. Hardy, 37 Wn. App. at 468. The trial court's decision should consider the following factors: 1) whether the trial counsel is pursuing the post-trial motion; 2) whether the trial judge is deciding the post-judgment motion; 3) the length of the trial; 4) the grounds for the motion; 5) the usefulness of the transcript in substantiating the defendant's allegations; and 6) the likelihood of a dispute between counsel which could be resolved by transcribing all or part of the proceedings. Id., citing United States v. Banks, 369 F.Supp. 951, 955 (M.D. Pa. 1974).

A denial of a motion for transcripts is reviewed for an abuse of discretion. Hardy, 37 Wn. App. at 468.

On the initial sentencing date, defendant's trial attorney moved to withdraw in light of the pro se pleadings defendant had filed seeking a new trial on the grounds of ineffective assistance of counsel. RP 1114-1119; CP 201-216. The court granted the motion to withdraw and appointed a lawyer to be determined by the local public defender's office ("DAC") to replace him. RP 1120; CP 165-166, 564-565. At the next hearing, which was to continue the motion/sentencing date, defendant's new counsel indicated that he was trying to obtain authorization from DAC for \$10,000 to pay for trial transcripts. RP 1134. Two weeks later, defendant's new counsel was back before the court asking for another continuance of the hearing on the motion for new trial and the sentencing. RP 1140-1142. Defendant's counsel again raised the subject of transcripts indicating that the director of DAC was not willing to authorize payment

for \$10,000 for the full trial transcripts, but that he might be willing to pay for some of the transcripts, if new counsel could identify the important portions. RP 1142-1144. The court pointed out that two of the three claims defendant raised were not dependant upon the trial transcripts. RP 1156-1161, 1166. Ultimately, the court granted the defense motion for continuance of the hearing/sentencing date; it also set a date for defendant to bring a motion to compel production of transcripts, should new counsel be unable to negotiate a satisfactory resolution regarding payment for transcripts with the director of DAC. RP 1174-1179.

The defense ultimately sought court authorization for payment of transcripts for the opening, closing, motions in limine<sup>3</sup>, and the testimony of Debra Douglas, Carroll Pederson, and Pauline Pederson. 1/13/06 RP 4-5. The court considered the nature of the claims defendant raised in his motion for new trial, and granted the request for transcripts of the pre-trial hearings, including the motions in limine, and of the opening and closing statements. 1/13/06 RP 10-11. The court denied the motion with respect to the testimony of the witnesses because it could not see how this testimony had any bearing on the claims defendant raised. 1/13/06 RP 8-11.

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<sup>3</sup> Defendant asked for the transcript of the 3.5 hearing, but the court later clarified that he meant the transcripts for the motions in limine. 1/13/06 RP 5, 10.

This record does not reveal an abuse of discretion. In applying the above factors, the court was faced with an attorney bringing a post-judgment motion who was not trial counsel and, therefore, at a disadvantage. However, the court knew that it would be deciding the post-judgment motion and was familiar with what had occurred at trial. The trial had lasted two weeks and a full transcript would cost \$10,000. Despite his claim of error on appeal, defendant did not ask the trial court to provide a full transcript at public expense, but only for portions of the record. There is nothing in the record regarding the cost of the trial testimony that was requested but not given. The defendant had alleged ineffective assistance of counsel, but the court had already determined that only one of his three factual bases concerned matters that would appear in transcripts. The court examined the nature of defendant's claims and assessed which portions of the transcript might be useful in substantiating the defendant's allegations.

This case did not present a situation where a dispute between counsel was likely to be resolved by transcribing all or part of the proceedings. While certain post trial motions, such as whether there was sufficient evidence to support the value of property stolen or whether a witness violated the terms of a motion in limine during a particular answer, are easily resolved by a review of a transcript, the dispute before the court in this case does not fall into this category. Ineffective assistance of counsel requires a court to set aside actions that could be considered as

trial tactics. The prosecution and defense could look at the same transcript and disagree as to whether a particular act should be considered trial tactics. As far as the court's assessment of trial counsel's performance as a whole, the court's own recollection of the trial proceedings would suffice. Considering these factors, the trial court was well within its discretion in granting of a portion of defendant's request and denying the rest. The trial court should be upheld.

Defendant claims the court erred by not giving defendant a full transcript. As noted earlier, defendant did not ask the court for a full transcript, but only limited portions. 1/13/06 RP 4-5. The trial court cannot be faulted for denying a motion that was never brought. Moreover, the State can find no authority that requires a trial court to provide a full transcript of a two week trial so that counsel can go on a fishing expedition to try to find ineffective assistance of counsel. A criminal defendant is entitled to the necessary tools to present a defense at trial and, when given an appeal as a matter of right, the right to a transcript to pursue his appeal. Neither party in this case can find any authority that a convicted defendant is entitled in all case to a full transcript for a "pre-appeal" post-trial motion. The record indicates that the trial court in this case properly exercised its judgment in assessing defendant's need and in granting him some transcripts to aid in the presentation of his post-trial motion. Defendant has failed to demonstrate an abuse of discretion.

3. WHILE DEFENDANT HAS FAILED TO DEMONSTRATE ANY ERRORS IN THE COURT'S DETERMINATION OF THE APPROPRIATE STANDARD RANGE, HE IS ENTITLED TO A LIMITING PROVISION TO INSURE THAT HE WILL NOT SERVE BEYOND THE STATUTORY MAXIMUM OF THE CRIME.

Defendant raises several claims regarding alleged errors at his sentencing. While in his brief, he argues these errors in the context of an ineffective assistance of counsel claim, some of his assignments of error are directed at the action of the court and not his attorney. See, Brief of Appellant at p. 1 (Assignments of Error 8, 9, 10). Consequently the State will address the propriety of the court's action directly.

- a. As defendant was convicted of a Level V offense, the court used the correct standard range.

In 2000, the Legislature passed legislation amending several statutes concerning various types of protection orders frequently issued in domestic violence situations to simplify the charging and prosecution of any violations of these orders. Laws of Washington 2000, Ch. 119. Under these amendments, the Legislature made any violation of orders issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.52, or 74.34 RCW to be a criminal offense in violation of RCW 25.50.110. Laws of Washington 2000, Ch. 119, § 24. At the same time, the Legislature established that a violation of RCW 26.50.110 would be a Level V offense under the Sentencing Reform Act (SRA). Laws of Washington 2000, Ch.

119, § 17. A domestic violence court order violation has always been a Level V offense. See, Appendix A, 2003 Sentencing Manual Scoring Sheet.

Defendant contends that the trial court used the incorrect range for an offender score of five, asserting that a conviction for a domestic violence court order violation is a Level IV offense and that the appropriate range is 22-29 months rather than the 33-43 range that the court employed. Appellant's brief at p. 75. Defendant is incorrect. The court properly sentenced defendant using the range for a Level V offense.

- b. Defendant waived review of any claimed error regarding whether the court order violation and the arson were the same criminal conduct by not raising the issue in the trial court.

A defendant's current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they 'encompass the same criminal conduct.' RCW 9.94A.589(1)(a). Offenses encompass the same criminal conduct when they are committed against the same victim, in the same time and place, and involve the same objective criminal intent. Id. The trial court's determination on the issue is reviewed for abuse of discretion. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

In State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000), the defendant argued for the first time on

appeal that the two crimes he was convicted of constituted the same criminal conduct, and therefore neither could not be counted as part of his offender score for sentencing for the other crime. The Court of Appeals noted that application of the same criminal conduct statute involves both factual determinations and the exercise of discretion. Nitsch, 100 Wn. App. at 523. The court held that the defendant's "failure to identify a factual dispute for the court's resolution and . . . failure to request an exercise of the court's discretion" waived the challenge to his offender score. Id. at 520. The Supreme Court agreed that under circumstances such as these, the challenge to the offender score calculation has been waived. In re Personal Restraint Petition of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002).

In his assignments of error, defendant asserts that the sentencing court erred by using an incorrect standard range for the court order violation offense. Appellant's Brief at pp.1, 3. Because this issue was not raised in the trial court, defendant has waived review of this claim. As he may raise it in the context of ineffective assistance of counsel, the State will address the merits of this argument in the section regarding ineffective assistance of counsel.

- c. Remand for the addition of a limiting provision is appropriate so that the sentence defendant actually serves on the domestic violence court order violation does not exceed the maximum term.

When a court sentences an offender for a crime against a person, such as assault in the third degree, the court “shall in addition to the other terms of the sentence, sentence the offender to community custody.” RCW 9.94A.715(1)(a); RCW 9.94A.411. The community custody term begins upon completion of the term of confinement or when the offender is transferred to community custody in lieu of earned early release. Id. The presumptive sentence ranges for total confinement do not include the periods of community placement. In Re Caudle, 71 Wn. App. 679, 680, 863 P.2d 570 (1993); see also, State v. Bader, 125 Wn. App. 501, 504-05, 105 P.3d 439 (2005)(defendant’s period of confinement would not be reduced by three years, the term of his mandatory community custody). Community custody is not an exceptional sentence based on aggravating circumstances. RCW 9.94A.535(2). Rather, community custody automatically applies when the defendant is convicted of certain crimes. RCW 9.94A.715(1).

The total time served between incarceration and community custody cannot exceed the statutory maximum sentence for the crime. State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004). Under the

Sentencing Reform Act it is possible for a court to impose a sentence where the combined terms of confinement and community custody facially exceed the statutory maximum sentence, but which, due to the possibility of earned early release credits, will not result in the offender actually serving a sentence that exceeds the statutory maximum. Sloan, 121 Wn. App. at 221; State v. Vanoli, 86 Wn. App. 643, 655, 937 P.2d 1166 (1997). When a court imposes a combination of terms of confinement and community custody that facially exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum. State v. Sloan, 121 Wn. App. at 223-224.

Here, defendant was sentenced to 43 months on the domestic violence court order violation and given a term of community custody of 9-18 months. CP 648-659. Facially this sentence exceeds, by one month, the statutory maximum of the crime of 60 months. Under Sloane, the court should have included a limiting provision. As the court did not do this, remand is appropriate to add this limiting language to the judgment.

4. DEFENDANT HAS FAILED TO MEET HIS  
BURDEN OF SHOWING INEFFECTIVE  
ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial

testing.” United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also, State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “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, 335, 899 P.2d 1251 (1995); see also, Strickland, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting

guilt.”). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme court has stated “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1,157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decided and “so admissions of deficient performance by attorneys are not decisive.” Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” Strickland, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel’s failure to litigate

a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case defendant seeks to show ineffective assistance of his trial counsel as well as the ineffectiveness of the counsel who represented him at the motion for new trial and sentencing. As the assertions pertain to two attorneys, they will be addressed separately.

- a. Defendant has failed to show that his trial attorney was so ineffective that he was essentially without counsel.

As noted above the Sixth Amendment envisions as adversarial proceeding where the prosecutions case is tested. The record shows that defendant was zealously represented by a trial counsel who brought motions in limine. RP 5-6, 14-15, 16. Defense counsel cross examined the prosecutions witnesses. RP 88-106, 181-210, 241-242, 265-270, 280-284, 288-291, 297-301, 313, 329-333, 366-372, 383-386, 416-418, 455-

475, 508-521, 537-538, 560-565, 568-574, 581-582, 601-611, 621-628, 630-635, 747-805, 808-810, 871-954. He objected to evidence. RP 52, 231-237, 393-411, 412-413. He presented a witness on his client's behalf. RP 861-869. He proposed jury instructions relevant to his theory of the case. CP 29-64, 386-423, 479-487, 488-496. He argued to the jury that the defendant had been goaded into the assaults by the Pedersons as they were trying to help their daughter win custody of the defendant's child in a divorce action; he furthered argued that there was insufficient evidence to prove that defendant had anything to do with the arson, burglary, or violation of the protection order. RP 1064-1084. Both of these theories had been developed throughout the trial by cross examination. Both theories were objectively reasonable theories to put forth given the state's evidence. The law presumes counsel to be competent and the record confirms that defendant's trial counsel was acting as an advocate on defendant's behalf.

At the motion for new trial, the trial court commented on trial counsel's performance finding that he presented "what I thought was a reasonable defense and did a reasonable job with examining witnesses." RP 1225. The court did not find any basis for finding trial counsel's performance deficient. RP 1226.

Defendant alleges as series of unprofessional actions. As will be discussed below these claims are: 1) without merit; 2) not prejudicial; or

3) not sufficiently egregious to constitute a deprivation of the right to counsel.

**i. Counsel actively opposed the motion to consolidate.**

Defendant claims that his counsel was unprepared for the argument on the State's motion to consolidate and that if he had properly prepared, he would have noted that the State cited the wrong rule in its supporting brief. Appellant's brief at p. 60. The State asserted in its brief that the applicable rule was CrR 4.3(a). CP 362-366. Defendant now contends that the proper rule was CrR 4.3.1(b)(2). CrR 4.3.1(b)(2) by its express terms pertains to "related offenses" which are subject to mandatory joinder under CrR 4.3(b). Offenses are "related" under this rule if they are "within the jurisdiction and venue of the same court and are based upon the same conduct." CrR 4.3(b); State v. Lee, 132 Wn.2d 498, 501, 939 P.2d 1223 (1997). Defendant presents no argument that the assaults on July 25, 2004 were the same conduct as the arson on October 10, 2004. These crimes are clearly not the same conduct. It is important to note that there is a distinction between cases which must be joined under the mandatory joinder rule and cases which may be joined under the permissive joinder rule of CrR 4.3(a)(2) (permissive joinder is allowed where offenses are based "on a series of acts connected together or constituting parts of a single scheme or plan"). Lee, 132 Wn.2d at 502-503. The State was properly asserting that the offenses were subject to

permissive joinder under CrR 4.3(a). The State was not citing the wrong rule. There was no deficiency in trial counsel's performance. Moreover, he strenuously argued against the State's motion. 3/9/05 RP 5-7. The fact that the court ruled against him does not render counsel's performance deficient.

**ii. Defendant cannot show that a motion in limine excluding gun evidence would have been granted.**

Defendant argues that his attorney's failure to bring a motion in limine to exclude any references to the guns and ammunition that defendant had in his possession when he was arrested allowed the jury to consider evidence that would have been excluded had the motion be brought. The record does not support defendant assertion that a motion in limine would have been successful. An officer who arrested defendant on his outstanding bench warrant testified without objection that in the lunge area of the vehicle defendant was driving he found two guns, two boxes of ammunition and holsters. RP 342-344, 361-366. When the prosecutor tried to admit the guns, ammunition and holsters in to evidence, defense counsel objected and argued that the physical evidence of gun possession was irrelevant and too prejudicial. The court overruled defense counsel's objection articulating several reasons: 1) the objection was untimely as the jury had already heard about the guns; 2) the physical evidence confirmed the oral testimony of the officers; 3) the evidence was relevant

to show the defendant's willingness to violate a court order<sup>4</sup>; and, 4) it was flight evidence that showed consciousness of guilt. RP 348-351 353-358. Defendant has not assigned error to the court's evidentiary ruling on this matter, therefore it is unchallenged on appeal. The court gave multiple reasons for finding the evidence relevant and admissible and only one of those reasons was impacted by defense counsel's failure to bring a motion in limine or to timely object. Thus, the record indicates that the evidence would have been admitted had the motion been made. As defendant cannot show that a motion in limine would have been meritorious, he cannot show deficient performance or resulting prejudice.

Moreover, defendant overemphasizes the impact this evidence had on trial. The jury heard approximately 10 pages of testimony out of a thousand page transcript regarding the guns. It was mentioned only in passing by the prosecutor in closing arguments. RP 1062. The prosecutor referred to the fact that defendant had guns when arrested but did not argue that this was a reason to convict him by itself. Id. Even if counsel was deficient, defendant has failed to demonstrate that the outcome of his trial would have been different.

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<sup>4</sup> Defendant was under a court order setting conditions of release that he was not to possess any guns. Thus any arguments regarding defendant's constitutional right to have a gun is not apposite. Defendant had no right to possess a gun at the time he was arrested.

**iii. Defendant has not established that counsel was deficient in his efforts to impeach Carroll Pederson or that there was any prejudice to his case.**

Defendant contends that defense counsel's failure to prepare a transcript of a pretrial interview of Carroll Pederson left him incapable of properly cross-examining a crucial state's witness. The record shows that the intended impeachment was on a relatively minor point. More importantly, the record does not establish that there were any inconsistent statements made by Mr. Pederson. Counsel did accomplish his goal of establishing a discrepancy between the testimony of Mr. and Mrs. Pederson.

Mrs. Pederson testified that defendant seemed angry from the outset when they met him at the Bonney Lake Police Department on July 25, 2004. RP 669, 761. When Mr. Pederson was being cross examined, counsel adduced that Mr. Pederson thought that defendant was agitated when he got to the parking lot. RP 913. Counsel then asked if that answer was different than what Mr. Pederson had told him at the interview on May 11, to which Mr Pederson replied "I don't recall." RP 913. The following exchange ensued:

Defense Counsel: [I]n my interview with you on May 11...didn't you tell me that what got my client, quote, unquote, agitated was the fact that you were not going to let him have his daughter until after the boxes had been photographed?

...

Mr. Pederson: I'm not sure how I worded it; but when he got out of his truck, we had seen that he was agitated, and that really didn't have any bearing on whether I was going to give him his daughter or not

RP 914. The jury was then excused and defense counsel asked the court to listen to the tape of the interview. RP 915. The court indicated that it wanted a transcript of the tape and that one should have been provided to the prosecutor if he wanted to impeach with prior inconsistent statements made in the interview. RP 915-923. The next day, the court listened to the taped excerpt of the interview and disagreed with defense counsel as to whether his trial question was properly phrased to lay the foundation for an inconsistent statement. RP 993-1001. Apparently on the tape,<sup>5</sup> Mr. Pederson stated that what got defendant agitated was when they indicated that they were going to photograph the contents of the boxes, but there was no statement that defendant got agitated because they refused to hand over Alyssa until after that was done. RP 993-1000. The court allowed the defense to recall Mr. Pederson to the stand in the defense case to ask questions about what happened on July 25, but would not allow defense counsel to impeach Mr. Pederson without a transcript of the interview. RP 1001-1004. When recalled to the stand, Mr. Pederson testified that defendant seemed unhappy from the outset on July 25, 2004. Defense

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<sup>5</sup> The tape was not made part of the trial court record.

counsel got Mr. Pederson to agree that defendant's temperament was okay until Mr. Pederson and his wife insisted on taking photographs of the stuff in the boxes. RP 1005-1006. Mr. Pederson testified that defendant became more agitated when they wouldn't turn Alyssa over until the photographs were taken. Mr. Pederson testified that that they didn't "refuse" to turn Alyssa over to defendant but did state that they wanted to take the pictures first. RP 1006.

This record does not establish that there were any inconsistent statements in the prior interview of Mr. Pederson that could be used for impeachment. Defendant fails to establish that the lack of a transcript of the interview caused any prejudice to him or his case. In any event, the area that counsel was trying to develop was on a minor point in a lengthy cross-examination. Defendant also fails to establish that this would have been reasonably likely to change the outcome of the trial.

**iv. The "to convict" instruction on the domestic violence protection court order violations does not constitute an improper comment on evidence.**

Defendant contends that his attorney was ineffective for failing to object to a defective jury instruction that constituted a comment on the evidence. See, RP 1044. An appellate court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Pirtle,

127 Wn.2d 628, 656, 904 P.2d 245 (1995). A judge is prohibited by article IV, section 16 from “conveying to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). A judge need not expressly convey his or her personal feelings on an element of the offense; it is sufficient if they are merely implied. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The Supreme Court has found certain instructions to constitute improper comments. A jury instruction referencing a victim’s birth date is an improper judicial comment when an element of the crime is the victim’s minority. State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). Nor may a court instruct a jury that a certain program was a school when that fact was highly contested by the parties. Becker, 132 Wn.2d at 64. A court may instruct a jury that a revolver is a deadly weapon as a matter of law. State v. Levy, 156 Wn.2d 722. The Court also held that it was not inappropriate for a court to instruct that “jewelry” constitutes personal property. Id. In Levy there was no dispute as to whether jewelry was personal property; the only question was related to whether jewelry had been taken from the victims. Id. The court also noted that the pattern instructions allow for the insertion of a descriptive term appropriate to the context of the case. Id. The court found that

because a victim's name was not an element of the offense of robbery that inclusion of the victim's name in the to convict is not improper. Id.

A judicial comment in a jury instruction is not a structural error or prejudicial per se. State v. Levy, 156 Wn.2d at 725. It is an error that is presumed prejudicial, and the State bears the burden of showing the absence of prejudice, unless the "record affirmatively shows no prejudice could have resulted." Levy, 156 Wn.2d at 725. The State makes this showing when, without the erroneous comment, no one could realistically conclude that the element was not met. See, Levy, 156 Wn.2d at 726-27. On the other hand, the burden is not carried, and the error therefore prejudicial, where the jury conceivably could have determined the element was not met had the court not made the comment. See, Jackman, 156 Wn.2d at 745.

Defendant asserts that the phrasing of the first element of the "to convict" instruction on the domestic violence court order violation was faulty. It read:

(1) That on or about the 10<sup>th</sup> day of October, 2004, the defendant violated the provisions of a protection order *that excluded him from the residence or premises of Carroll and Pauline Pederson, that restrained him from committing acts of domestic violence against Carroll or Pauline Pederson, and that restrained him from having contact with Pauline and Carroll Pederson.*

CP 499-532, Instruction No 28 (emphasis added).

Defendant's argument fails because under the facts of this case it was not an issue as to whether such a protection order existed. The court admitted a copy of the protection order into evidence. EX 48. It listed the petitioners as "Carroll L. Pederson and Pauline Pederson and the respondent as James P. Douglas." Id. The order stated that respondent is: 1) "RESTRAINED from causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening or stalking petitioners[;]" 2) "RESTRAINED from coming near and from having any contact whatsoever...by phone mail or any means, directly or indirectly...with petitioners[;]" 3) "EXCLUDED from going onto the grounds or entering petitioner's residence...at 12109 212thAve Ct. E, Sumner WA[;]" and, 4) "PROHIBITED from knowingly coming within, or knowingly remaining within the property boundaries of petitioner's residence." EX 48. There was no dispute that the order excluded him from the residence or premises of Carroll and Pauline Pederson, that it restrained him from committing acts of domestic violence against Carroll or Pauline Pederson, or that it restrained him from having contact with Pauline and Carroll Pederson. The issues in this case were whether defendant knew about the existence<sup>6</sup> of the protective order and whether he did any act which violated its terms. Just as it was not error to instruct the jury that "jewelry" was the specific "personal property" at issue in a

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<sup>6</sup> A return of service was also admitted. EX 49.

robbery case, it was not improper here to describe the specific provisions of a protective order that were at issue in a case involving a violation of that order. The jury in Levy still had to find beyond a reasonable that the jewelry had been taken and that Levy had done it. Just as here the jury had to find beyond a reasonable doubt that the provisions of the order had been violated by the defendant. The instruction was not improper.

**v. Any improper evidence that was invited by counsel's actions was cumulative of other properly admitted evidence.**

Defendant alleges that his counsel was ineffective for opening the door on cross examination of a police officer to some hearsay evidence as to the specific complaints the Pedersons reported to him regarding a confrontation with the defendant at a Safeway store. RP 308-313.

The record demonstrates that the prosecutor always planned to adduce the specifics regarding this confrontation from the Pedersons. The prosecutor discussed this evidence in her opening. RP 29-30. She asked both Mrs. Pederson and Mr. Pederson about this confrontation. RP 660-662, 756-760, 814-816. So while this evidence had not yet been adduced at the time defense counsel opened the door to some hearsay statements being adduced from the responding officer, defense counsel knew that it would be before the trial was over. There has been no challenge to the testimony of Mr. or Mrs. Pederson regarding this confrontation.

Defendant cannot show that he was prejudiced by the admission evidence that was cumulative of other properly admitted evidence.

**vi. Defendant fails to establish resulting prejudice from his other claimed errors.**

Defendant lists a myriad of other alleged failures and claimed deficiencies but fails to articulate how any were prejudicial to his case. For example, defendant claims that some of counsel's proposed instructions were deficient but fails to explain how he could have been prejudiced by instructions that were not given. The showing of ineffectiveness requires a showing of both prongs- deficient performance and resulting prejudice. Errors that do not result in prejudice cannot accumulate no matter how many of them are committed. Defendant must show both prongs of the Strickland test in order to prove a Sixth Amendment violation. He has failed to meet this burden.

**b. Defendant has failed to show ineffective assistance of his counsel at the motion for new trial/sentencing hearing.**

Defendant's complaints regarding the attorney that represented him at the motion for new trial/sentencing hearing are that his attorney lacked the necessary transcripts of the trial to be effective and that, despite claiming to be unprepared for the hearing, did not ask for a continuance.

The State has earlier addressed defendant's claim that the court erred in only partially granting defendant's request for transcripts. As the court only partially granted counsel's motion for transcripts, his attorney cannot be held responsible (deficient) for the scope of the court's ruling. Defendant implies that defendant's replacement counsel was somehow dilatory in asking the court to order payment for these transcripts at public expense. The record indicates that counsel was trying to negotiate payment through the public defenders office and, when that proved unsuccessful, obtained at least partial payment by court order. RP 1165; 1/13/06 RP 4-11. The transcripts that were authorized were available approximately ten days before the hearing on the motion for new trial. RP 1188. Thus, defendant cannot show that some delay in obtaining the completed transcripts was the result of deficient performance or that it caused any resulting prejudice.

As for the claim that counsel admitted he was unprepared for the hearing, the record shows a different reason for any unpreparedness other than lack of diligence. Shortly after the hearing where the court ordered preparation of certain transcripts at public expense, the defendant expressed in a letter to the court a desire to proceed pro se with his current attorney as standby counsel. RP 1186. Less than a month earlier, the court had engaged defendant in a colloquy about whether he wanted to continue with this counsel or represent himself at the motion for new trial; defendant had decided to continue with counsel. RP 1166-1174. Upon

learning of defendant's letter to the court, defendant's attorney wrote to him asking defendant what he wanted counsel to do with respect to the upcoming hearing; defendant never responded. RP 1187. Counsel indicated that his lack of preparedness was the result of defendant's unwillingness to communicate with him. RP 1189-1191. Counsel indicated that despite defendant's lack of communication that he had considered defendant's written claims and whether there was anything to support these contentions. Counsel found that trial counsel's declaration and deposition testimony as to the information defendant had given him regarding possible witnesses indicted that there was no basis for claiming a failure to investigate or call witnesses on defendant's behalf. RP 1189-1190. Counsel also reviewed defendant's medical records that trial counsel had reviewed. RP 1190. He told the court that "quite frankly, didn't see a lot there that would support a diminished capacity defense." RP 1190. The record indicates that despite defendant's unwillingness to cooperate with his attorney, his counsel did review the materials relevant to defendant's claims to see if anything supported defendant's assertions.

Defendant asserts that counsel should have asked for a continuance, but he cannot show: 1) that he would have been more cooperative with his attorney had a delay had been granted; or 2) that the court would have granted a continuance had one been asked for. The court had previously indicated that it was concerned over the delay between the jury's determination of guilt and the hearing on the motion for

new trial/sentencing, and that it anticipated the continuance to February 10, 2006, would be that last one granted. RP 1175-1176. Considering the court had earlier indicated that there would be no further continuances, defendant cannot show that any motion for a continuance would have been meritorious.

Nor does defendant articulate what arguments could have been made with additional time to prepare based upon the information that was at counsel's disposal. While defendant makes many assertions regarding the alleged ineffectiveness of his trial counsel, he does not raise any claims regarding errors that occurred in the portions of the transcript that were available to his counsel at the motion for new trial. Defendant fails to articulate in his brief any argument that could have and should have been brought by his "unprepared" counsel.

Defendant also claims ineffective assistance of counsel with respect to sentencing. The State has addressed the claim regarding the allegedly incorrect standard range earlier in the brief. As there was no error in sentencing in this regard, it cannot provide a basis for ineffective assistance of counsel.

Defendant claims that counsel was ineffective for not arguing that the arson and the domestic violence court order violation constituted the same criminal conduct. For the purposes of sentencing "same criminal conduct" involves crimes that (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same

victim. RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The absence of any one of these criteria prevents a finding of same criminal conduct. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Generally, a trial court's determination as to whether separate acts constitute the same criminal conduct will be reversed only for clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Because this issue was not raised in the sentencing court, defendant can only raise this claim in the context of an ineffective assistance of counsel claim. To succeed on this claim he must show that the trial court would have granted the motion to treat the arson and violation of the court order as same criminal conduct had a motion been brought. Thus, defendant must show that there was a legal basis for making this argument and that the court would have ruled in his favor in order to succeed on this claim. He cannot make this showing.

Under RCW 9.94A.589 (1)(a)<sup>7</sup>, two crimes shall be considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase "same criminal conduct"

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<sup>7</sup> Formerly codified as RCW 9.94A.400(1)(a).

to be construed narrowly. State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. State v. Lessley, supra, at 778. An appellate court will generally defer to a trial court's decision on whether two different crimes involve the same criminal conduct and will not reverse absent a clear abuse of discretion or a misapplication of the law. State v. Haddock, 141 Wn.2d 103, 3 P.2d 733 (2000).

To begin with, the two crimes did not have the same victims. The fact that there is some overlap in victims does not suffice. For example, in Lessley, the Supreme Court refused to treat a burglary and a kidnapping as the same criminal conduct. The court reasoned that while the kidnapping victim was also a victim of the burglary, the burglary involved additional victims- her parents with whom she lived; therefore the victims of the two crimes were not the same. 118 Wn.2d at 778-779. In this case Mr. and Ms. Pederson were the petitioners on the order of protection which the defendant violated. EX 48. However, the authority of the court issuing the order was also harmed when the defendant violated its terms. This is why the Legislature provided that a violation of the order "shall also constitute contempt of the court." RCW 26.50.110(3). Our Supreme Court rejected an argument that consent of the person protected by the order can be a defense stating "[a] domestic violence protection order issued under RCW 26.50 ... does not protect merely the 'private right' of the person named as petitioner in the order" but also the public interest in

preventing domestic violence. State v. Dejarlais, 136 Wn.2d 939, 943-944, 969 P.2d 90 (1998). As for the arson, the court found that everyone who lived at the house at the time of the arson was a victim; this included Mr. and Mrs. Pederson, their daughter, and their granddaughters. RP 1249. Ms. Douglas and the granddaughters, however, were not victims of the domestic violence protection order violation. Thus, the victims were not the same for the two crimes.

Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. State v. Lessley, supra, at 777. To find the objective intent, the courts should begin with the intent element of the crimes charged. See, State v. Flake, supra, at 180; State v. Dunaway, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). A defendant's subjective intent is irrelevant. State v. Lessley, supra, at 778.

In State v. Dunaway, supra, the Washington Supreme Court distinguished between the objective intent and a defendant's subjective intent for the purposes of the "same criminal conduct" analysis. Defendant Green had been convicted of robbery and attempted murder. He had robbed a donut shop and shot one of the employees during his escape. On appeal, Green argued these two crimes constituted the "same criminal conduct" under former RCW 9.94A.400(1)(a). He reasoned that his intent when he shot his victim was to avoid being arrested for the robbery, so his intent did not change between the robbery and the

attempted murder. The Supreme Court disagreed, noting that this approach focused on Green's subjective intent. State v. Dunaway, supra, 216. Instead, the court looked at the intent element in the statutes for robbery, RCW 9A.56.190, and attempted murder, RCW 9A.32.030, to find Green's objective intent. Id. As these intent elements were different, the court determined that the two crimes did not have the same objective intent, and thus did not constitute the same criminal conduct. Id.

The object intent of violation of a domestic violence protection order is to knowingly violate the terms of restraint on a valid protection order. RCW 26.50.110. The objective intent for arson in the first degree is to knowingly and maliciously cause a fire or explosion which is manifestly dangerous to human life. These intents are not the same.

A second test to determine if two crimes have the same criminal intent is the furtherance test. Under this test, two crimes share the same intent if one crime directly furthers the second crime. State v. Anderson, 72 Wn. App. 453, 464, 864 P.2d 1001 (1994). For a court to conclude that one crime furthered the second, it must be clear from the record that the one crime was committed for the purpose of furthering the second crime; the courts should not speculate. State v. Lessley, supra, at 778. It is not sufficient that the two crimes with different intent elements further the same goal if one crime does not directly further the other. See, State v. Dunaway, supra, (attempted murder did not further a robbery, even though the attempt was made to facilitate escape).

In 2000, the Supreme Court clarified that the furtherance test had limited utility:

[T]he “furtherance test” was never meant to be and never has been the linchpin of this court’s analysis of “same criminal conduct.” ...Additionally, this court has stated that “the furtherance test lends itself to sequentially committed crimes, [but] its application to crimes occurring literally at the same time is limited.” Finally, requiring convictions to further each other would logically bar treating [defendant’s] multiple, simultaneous convictions of the same crime as “same criminal conduct.”

Haddock, 141 Wn.2d at 114. Therefore, the furtherance test is limited in cases such as the present case.

As the violation of the protection order and the arson did not involve the same victims or the same intent, they do not constitute the same criminal conduct. The court would have committed legal error in treating the crimes as the same criminal conduct. Defendant’s attorney was not deficient for failing to ask the court to treat them as such because the motion was without merit.

Defendant’s additionally claims that his attorney was ineffective for not asking the court to exercise its discretion by not applying the burglary anti-merger statute and treating the burglary as the same criminal conduct as the arson and the violation of the court order. The anti-merger statute gives the sentencing court discretion to punish burglary separately from the other crimes, even if the other crime encompasses the same criminal conduct. Lessley, 118 Wn.2d at 781. The statute provides:

“Every 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.” RCW 9A.52.050.

In setting forth his argument, defendant acknowledges that even if the court found the burglary and the arson were the same criminal conduct that the burglary anti-merger statute gave it the authority to treat the crimes as if they were not. In other words the court was under no legal obligation to sentence other than it did below. Thus, defendant cannot meet his burden of showing that the court would have granted this motion had it been brought unless he can demonstrate that the court wanted to sentence defendant less harshly than it did. The record does not support a conclusion that the court wanted to impose a less severe sentence. Defendant’s counsel asked the court to impose midrange sentences rather than the high end sentences for which the prosecutor was advocating. RP 1237-1238. The court imposed the high end sentence of 61 months on the arson and stated that he found the defendant to be “a pretty dangerous guy” who was obsessive and probably needed some mental health treatment. RP 1248-1249. There is nothing in the court’s comments at sentencing indicating that it was looking for a way to impose a sentence that was less harsh than the sentence it did impose. As such, defendant has failed to meet his burden of showing prejudice from counsel’s failure to ask the court to treat the burglary as the same criminal conduct as the arson despite the existence of the burglary anti-merger statute.

Defendant has failed to meet his burden of showing ineffective assistance of counsel.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions and sentences entered below. The court should direct a remand on Cause No. 04-1-05086-5 so that the court can insert limiting language into the judgment to ensure that defendant does not serve a sentence that exceeds the statutory maximum for the domestic violence court order violation.

DATED: SEPTEMBER 25, 2007

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/25/07   
Date Signature

# **APPENDIX “A”**

## *Offender Scoring Sheet*

**DOMESTIC VIOLENCE COURT ORDER VIOLATION**

(RCW 26.50.110)

CLASS C FELONY

NONVIOLENT

*(If sexual motivation finding/verdict, use form on page III-11)*

**I. OFFENDER SCORING (RCW 9.94A.525(7))**

**ADULT HISTORY:**

Enter number of felony convictions ..... x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of serious violent and violent felony dispositions ..... x 1 = \_\_\_\_\_

Enter number of nonviolent felony dispositions ..... x ½ = \_\_\_\_\_

**OTHER CURRENT OFFENSES:** (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other felony convictions..... x 1 = \_\_\_\_\_

**STATUS:** Was the offender on community placement on the date the current offense was committed? (if yes), + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score**  
(Round down to the nearest whole number)

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**II. SENTENCE RANGE**

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL V)	6 - 12 months	12+ - 14 months	13 - 17 months	15 - 20 months	22 - 29 months	33 - 43 months	41 - 54 months	51 - 60* months	60* months	60* months

B. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-5 or III-6 to calculate the enhanced sentence.

C. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 9 to 18 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).

- *Statutory maximum sentence is 60 months (five years) (RCW 9A.20.021).*

**III. SENTENCING OPTIONS**

A. If "First-time Offender" eligible: 0-90 days confinement and up to one year of community custody. If treatment is ordered, the period of community custody may include up to the period of treatment, but shall not exceed two years.

B. If sentence is one year or less: one day of jail can be converted to one day of partial confinement or eight hours of community service (up to 240 hours) (RCW 9.94A.680).

C. If sentence is one year or less: community custody may be ordered for up to one year (RCW 9.94A.545).

D. Partial confinement may be served in home detention (RCW 9.94A.030).

E. If eligible, Work Ethic Camp may be recommended (RCW 9.94A.690).

F. If Drug Offender Sentencing Alternative (DOSA) eligible: see DOSA form for alternative sentence on page III-7 (RCW 9.94A.660).

- *The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules*