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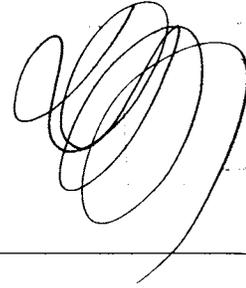
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN DAVID COLA, APPELLANT



Appeal from the Superior Court of Pierce County
The Honorable Serjio Armijo

No. 06-1-02629-4

BRIEF OF RESPONDENT

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

1. Has defendant waived any alleged error regarding “same criminal conduct” or merger by stipulating to his criminal history and offender score during the plea proceeding below?

(Appellant’s Assignment of Error Nos. 1 and 2)

2. Has defendant failed to show that his crimes constitute the same criminal conduct where the crimes do not share the same intent or the same victim?

(Appellant’s Assignment of Error No. 2)

3. Has defendant failed to show that his convictions for kidnapping and assault merge with the robbery where the former crimes involve a different victim than the robbery?

(Appellant’s Assignment of Error No. 1)

4. Was defendant provided effective assistance of counsel throughout the plea proceedings below?

(Appellant’s Assignment of Error No. 3 and 4)

B. STATEMENT OF THE CASE.

1. Procedure

The State filed an Information in Pierce County Superior Court charging the defendant, JUSTAN DAVID COLA, with one count of first degree burglary (count I), two counts of first degree kidnapping (counts II

and III), one count of first degree robbery (count IV), one count of first degree assault (count V), one count of second degree assault (count VI) and one count of first degree unlawful possession of a weapon (count VII). CP 1-4. The State charged firearm enhancements on counts I through VI. CP 1-4.

Pursuant to plea negotiations, the State agreed to dismiss one count of first degree kidnapping and one count of first degree assault in exchange for defendant's plea of guilty. On July 26, 2006, defendant entered a plea of guilty to the Amended Information charging him with the following crimes: first degree burglary (count I); first degree kidnapping against P. Shafer (count II); first degree robbery against C. Grey (count IV); second degree assault against P. Shafer (count VI); and first degree unlawful possession of a firearm (count VII). CP 7-9, 10-20. The State charged firearm enhancements on counts I, II and IV. CP 7-9. After a brief colloquy, the Court accepted defendant's plea as a knowing, intelligent and voluntary plea. RP 14-15.

A sentencing hearing was held on August 3, 2006. At that hearing, the State advised the court that the defendant had stipulated to his criminal history and that the recommendation for sentence was an agreed recommendation between the parties. RP 2-4. Defense counsel advised the court that the defendant wanted to take responsibility for his actions almost immediately after he was arrested. RP 6-7. Defendant also addressed the court and apologized for his actions. RP 8. Defendant's

mom addressed the court and asked the court to impose a low-end sentence. RP 9. In response to this, the parties reiterated to the court that the sentencing recommendation was an agreed recommendation. RP 9. The court imposed the agreed recommendation and sentenced the defendant to a term of 355 months in the Department of Corrections. CP 31-44; RP 9-10.

This timely appeal follows. CP 24-25.

2. Facts

The following facts are taken from the Declaration for Determination of Probable Cause¹:

The defendant, JUSTAN COLA, has extensive criminal history to include juvenile convictions for reckless burning first degree, unlawful possession of a controlled substance, theft second degree, residential burglary, and taking a motor vehicle without permission. COLA also has an adult felony conviction for robbery in the second degree, a requisite crime of violence for purposes of RCW 9.41.010/.040 – the unlawful possession of firearm statute. COLA was recently released from prison and is on community custody for the robbery second degree conviction

¹ The State has corrected spelling mistakes that were made in the original declaration. The State has not changed the substance of the declaration in any way.

The following narrative is based on police reports generated by PCSO deputies as well as a detailed narrative provided to this DPA, by the lead detective assigned to the case, PCSO Detective D. Heishman.

On June 12, 2006, PCSD Deputies responded to 917 271st St. E., Graham, in regards to a home invasion robbery. Once at the residence, deputies contacted victim C. Grey (owner of the home) and victim P. Shafer (Grey's contractor).

Grey reported at approximately 6:45 a.m., she was home alone with her 1 year old child when she responded to a knock at her door. At the door was a person later identified as the defendant, COLA. COLA asked Grey if he could be let in to use the phone since his car had broken down. Grey refused and began to close the door when COLA pulled out a black semi-auto handgun and threatened her with it. COLA then forced his way into the residence. Grey reported that COLA was wearing gloves on his hands.

Once inside the home, COLA bound Grey's hands with duct tape and took her through the home while searching for valuables. Soon thereafter, victim Shafer, who was to do some work at the Grey residence, arrived at the home. COLA unbound Grey and had her answer the door to allow Shafer into the home. Once Shafer was inside, COLA confronted him at gunpoint. Shafer and Grey were taken into the garage and forced to collect tools and other valuables. While in the garage, Shafer attempted to fight back against COLA. COLA was able to keep the upper hand in the

situation and while armed with the gun, he repeatedly kicked and stomped Shafer's head, knocking him unconscious. Later, COLA forced Grey to awaken Shafer and forced both to load Grey's Chevy Tahoe vehicle with valuables taken from the home. COLA then tied up both Shafer and Grey with tape and fled the scene. After COLA fled the scene in Grey's Tahoe, Grey was able to untie herself and call for help.

Deputies observed that Grey had black tape on her wrist and she was crying. Shafer was bleeding from the right side of his face and appeared to have a shoe pattern bruise on his face. Deputies observed the home was ransacked.

Near the scene of the robbery, a witness noticed a suspicious male jumping into a Mercury Topaz. The witness was able to get a license plate number for the vehicle. The stolen Chevy Tahoe was located in some brush near where the witness had seen the male with the Topaz. Deputies later stopped suspect D. Geyer in the Topaz. Post-Miranda, Geyer stated he received a call from his brother, suspect B. Geyer, asking him to pick up "Justin" – later identified as COLA. Geyer reported he then picked up COLA and reported that COLA was armed with a handgun. Through investigative interviews with both Geyer brothers, PCSO detectives learned the identity of defendant COLA.

PCSO Detective Heishman then compiled a photo montage that included a photo of COLA. Detective Heishman met with victim Grey

who positively identified COLA as the man who committed the home invasion robbery. CP 5-6.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY CALCULATED DEFENDANT'S OFFENDER SCORE.

- a. Defendant waived any alleged error regarding "same criminal conduct" or merger when he stipulated to his criminal history and offender score below.

It is the general rule in Washington that a defendant cannot waive a challenge to an incorrect offender score. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Exceptions to this rule exist, however, where the alleged error involves a stipulation to incorrect facts or a matter of trial court discretion. Goodwin, 146 Wn.2d at 874. The same criminal conduct doctrine involves both factual determinations and matters of trial court discretion. Goodwin, 146 Wn.2d at 875. Thus, a defendant may waive an alleged error regarding same criminal conduct if he fails to assert this argument at sentencing. Goodwin, 146 Wn.2d at 875 (favorably citing State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000)); see also State v. Hickman, 116 Wn. App. 902, 907-08, 68 P.3d 1156 (2003).

In State v. Nitsch, defendant pleaded guilty to charges of first degree burglary and first degree assault arising from a violent assault on defendant's former girlfriend. Nitsch, 100 Wn. App. at 513. At

sentencing, both parties represented to the court that the defendant's offender score was two, arrived at by counting each offense as an "other current offense." Nitsch, 100 Wn. App. at 518. For the first time on appeal, defendant argued that his offender score was miscalculated because his two crimes encompassed the same criminal conduct and should have counted as one crime under former RCW 9.94A.400(1)(a). The court rejected the defendant's argument not only because he failed to raise it in the proceedings below, but also because he affirmatively agreed to his standard range and offender score prior to entering the plea. Nitsch, 100 Wn. App. at 522. 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 "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 the offender score. Nitsch, 100 Wn. App. at 520.

Whether or not crimes merge also involves a factual determination. The merger doctrine is a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions. State v. Vladovic, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983)(citing Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Two crimes merge when proof of one is necessary to prove the other. State v. Zumwalt, 119 Wn. App. 136, 129, 832 P.3d 672 (2003),

aff'd sub nom., State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).

Offenses that appear to have merged under the doctrine may still be considered separate when the injury or injuries caused by the predicate offense are separate and distinct from, and not merely incidental to, the crime of which the predicate offense forms an element. Freeman, 153 Wn.2d at 778-79; State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979); State v. Frohs, 83 Wn. App. 803, 807, 815-16, 924 P.2d 384 (1996). Whether an injury is incidental to a crime is necessarily a factual determination. Failure to develop the factual record at the trial level thus waives the issue on appeal.

In this case, petitioner affirmatively agreed to his standard range and offender score when he signed the stipulation on prior record and the judgment and sentence. CP 21-22, 31-44. Both documents specify that petitioner's offender score is as follows:

COUNT NO	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	13	VII	87-116 MOS.	60 MOS.	147-177 MOS.	LIFE
II	12	X	149-198 MOS.	60 MOS.	209-258 MOS.	LIFE
IV	12	IX	129-171 MOS.	60 MOS.	189-231 MOS.	LIFE
VI	12	IV	63-84 MOS.	NONE	63-84 MOS.	10 YRS.
VII	8	VII	77-102 MOS.	NONE	77-102 MOS.	10 YRS.

CP 21-22, 31-44. By acknowledging his criminal history and affirmatively agreeing to his offender score, petitioner waived his right to challenge his offender score. Accordingly, this court should not reach the merits of petitioner's claim that his crimes merged and/or constituted same criminal conduct.

- b. Defendant's crimes do not constitute the same criminal conduct.

Assuming, *arguendo*, that defendant did not waive the issue of same criminal conduct, defendant is still not entitled to relief because he cannot show from the record that the trial court erred when it included his current convictions in the calculation of his offender score.

When a defendant is sentenced for two or more current offenses, the trial court determines the sentence range for each offense by adding together all other current and prior offenses. If it finds that all or some of the current offenses are the same criminal conduct, the court may count them as one crime. RCW 9.94A.589(1)(a). Accordingly, if two current offenses encompass the "same criminal conduct," then those current offenses together merit only one offender score point. State v. Haddock, 141 Wn.2d 103, 108, 3 P.3d 733, 735 (2000). Offenses involve the same criminal conduct only if they: (1) share the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a). The absence of any one of the three prongs prevents a finding of "same criminal conduct." State v. Price, 103 Wn. App. 845, 855, 14 P.2d 841 (2000). Courts must narrowly construe RCW 9.94A.589(1)(a) to disallow most assertions of same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999).

In this case, defendant claims that his convictions for unlawful possession of a firearm, assault and kidnapping constitute the same criminal conduct and that his convictions for unlawful possession of a firearm and robbery constitute same criminal conduct. Because defendant did not raise this issue below, he may not raise it on appeal unless it involves “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To establish manifest error, there must be actual prejudice and it must be apparent from the record. McFarland, 127 Wn.2d at 333 (no relief where undeveloped record did not indicate whether trial court would have granted motion to suppress because this showing was necessary to establish actual prejudice). Based on the limited record before this court, defendant cannot show that his crimes share the same objective criminal intent or the same victim.

In determining whether multiple crimes involved the same objective criminal intent, such that they may be treated as “same criminal conduct” at sentencing, the relevant inquiry is to what extent did the criminal intent, when viewed objectively, change from one crime to the next. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). Clearly, the intent to possess a firearm is different than the intent to assault or restrain someone. Defendant provides no argument as to how these intents are the

same for purposes of “same criminal conduct.” Courts also consider whether the crimes were “merely sequential, or part of a continuous, uninterrupted sequence of conduct.” State v. Price, 103 Wn. App. 845, 858-59, 14 P.3d 841 (2000)(finding separate and distinct criminal conduct when a defendant shot at his victims, and then pursued them from surface streets to the freeway in another attempt to murder them). Based on the limited factual record here, the crimes were not part of a continuous, uninterrupted sequence of conduct. According to the declaration of probable cause, defendant knocked on Grey’s door, displayed a firearm and forced his way into her home. Once inside, defendant bound and tied Grey and started looking for valuables. After the defendant tied Grey, Shafer (her contractor) arrived to do some work on the house. Defendant untied Grey, ordered her to answer the door and then he confronted Shafer at gunpoint once Shafer was inside the home. Defendant then ordered both Shafer and Grey to load valuables into Grey’s car. During this time, he assaulted Shafer with the gun and beat him into unconsciousness. After beating Shafer with the firearm, defendant again bound and tied the victims and then fled the scene. The sequence of events here was not continuous and uninterrupted. Rather, defendant’s act of tying and untying the victims and assaulting them at different times throughout the incident suggests a series of independent crimes. Defendant has not shown the defendant had the same intent throughout the incident.

Additionally, the unlawful possession of a firearm cannot be considered the same criminal conduct as the assault and kidnapping because the respective victim of that crime differs. Clearly, the victim of the assault and kidnapping (P. Shafer) was the same. But the victim of the unlawful possession of a firearm is the general public. Haddock, 141 Wn.2d at 110-11 (relying on State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Garza-Villarreal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993)). Defendant relies on Haddock for the proposition that, if the defendant assaults a victim with a firearm that he is not legally allowed to possess, the victim of the assault becomes the victim of the unlawful possession of a firearm, rather than the general public. Br. of Appellant, at 14-15. But this statement from Haddock is dicta and not in accord with the Washington cases cited above. This court should not adhere to defendant's claim.

Defendant has not shown that the trial court erred when it treated his crimes as separate offenses. First, defendant waived the issue when he stipulated to his offender score. Second, even if defendant had not waived this issue, he cannot show that his crimes shared the same criminal intent or the same victim. Having failed to show that his crimes are, in fact, same criminal conduct, defendant is not entitled to relief. See McFarland, supra.

c. Defendant's convictions for assault and kidnapping do not merge into the robbery.

Like the “same criminal conduct” doctrine, the concept of merger is inapplicable as well. Crimes merge when proof of one is necessary to prove an element or the degree of another crime. Vladovic, 99 Wn.2d at 419. But if one of the crimes involves an injury that is separate and distinct from that of the other, the crimes do not merge. Vladovic, 99 Wn.2d at 421.

In Vladovic, the Supreme Court addressed a claim by the defendant that his robbery and kidnapping convictions merged. In that case, the armed defendant entered a building at the University of Washington, ordered four employees to get on the floor, taped and bound the employees and then stole at least \$12 from a fifth employee, Mr. Jensen. Vladovic, 99 Wn.2d at 415-16. Defendant was charged with four counts of kidnapping for his restraint of the employees and one count of robbery for taking Mr. Jensen’s money by threat of deadly force.² The Supreme Court held that, because the robbery and kidnappings involved different victims, they created separate injuries and could not merge:

Petitioner was charged with robbing Mr. Jensen. He was charged and convicted of kidnapping four people other than Mr. Jensen. The kidnapping charges involved forcing these four people to lie on the floor, binding their hands and

² Defendant was charged with other crimes that are not pertinent to this analysis.

taping their eyes. The robbery charge arose when money was taken from Mr. Jensen after the display of what appeared to be a deadly weapon. Because the injuries of the robbery and kidnappings involved different people, they clearly created separate and distinct injuries. Accordingly, petitioner's robbery conviction does not merge into his kidnapping convictions.

Vladovic, 99 Wn.2d at 421-22. This case is virtually indistinguishable from Vladovic. Because the victim of the kidnapping and assault (Shafer) was different from the victim of the robbery (Grey), the crimes do not merge. See also State v. McJimpson, 79 Wn. App. 164, 901 P.2d 354 (1995) ("Crimes against different victims clearly seem to satisfy [the] 'independent purpose or effect' test") (citing State v. Clapp, 67 Wn. App. 263, 275, 834 P.2d 1101 (1992)).

Defendant relies on State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), for the proposition that second degree assault merges with robbery as a matter of law. Br. of Appellant, at 6-9. But Freeman did not involve two different victims. Here, the robbery and the assault involved two different victims. As such, Freeman is inapplicable.

For these same reasons, defendant's claim that the kidnapping merges with the robbery also fails. Defendant relies on State v. Korum, 120 Wn. App. 686, 705, 86 P.3d 13 (2004), reversed in part on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2006), for the proposition that a kidnapping which is incidental to a robbery merges with the robbery as a

matter of law. Br. of Appellant, at 10. Like Freeman, the victim of each kidnapping and robbery in Korum was the same. Here, because the victims of the robbery (P. Schafer) and the kidnapping (C. Grey) were different, the crimes cannot merge.

Even if the counts involved the same victims, defendant's claim would fail in light of the Supreme Court's decision in State v. Louis, 155 Wn.2d 563, 571, 120 P.3d 936 (2005). In Louis, the defendant, while robbing a jewelry store, bound the two owners' hands and feet, covered their eyes and mouths with duct tape, and coerced them into a bathroom. Louis, 155 Wn.2d at 566-67. He warned them that if they left he bathroom he would kill them. Id. His victims "waited a few minutes before freeing themselves" and calling the police. Id. at 567. He was convicted of one count of first degree kidnapping and one count of first degree robbery for each victim. Id. On appeal, Louise argued that his convictions for kidnapping and armed robbery should have merged because the kidnappings were simultaneous and incidental to the robbery. Id. at 570. The court determined the crimes do not merge because proof of one is not necessary to prove the other. Louis, 155 Wn.2d at 571 (citing Vladovic, 99 Wn.2d at 423-24 and In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 50, 53, 776 P.2d 114 (1989)). Proof of kidnapping is not necessary to prove first degree robbery, and proof of first degree

kidnapping requires only the intent to commit robbery, not the completion of robbery. Louis, 155 Wn.2d at 571; Fletcher, 113 Wn.2d at 53.

Distinct crimes committed against different victims do not merge. Here, defendant committed the crimes of assault and kidnapping against victim Shafer, while the robbery was committed against Grey. Because the victims were different, neither the kidnapping nor the assault merged into the robbery.

2. DEFENDANT WAS PROVIDED EFFECTIVE 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. Cronin, 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 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); 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.

A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately

prepare for trial, or subpoena necessary witnesses. State v. Maurice, 79 Wn. App. 541, 544, 903 P.2d 514 (1995). 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 (C.A. 9, 1995).

Defendant alleges that he received ineffective assistance of counsel based upon his attorney's failure to argue that: (1) the kidnapping, assault

and unlawful possession of a firearm were same criminal conduct; (2) the robbery and unlawful possession of a firearm were same criminal conduct; (3) the assault merged with the robbery pursuant to Freeman, supra; and (4) the kidnapping merged with the robbery under Korum, supra. Br. of Appellant, at 22-23.

As argued above, however, none of these claims have merit. Counsel was, therefore, not deficient for failing to argue meritless claims. See Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990)(an attorney is not ineffective for failing to argue meritless claims).

Moreover, even if defendant could show deficient performance, he cannot show that he was prejudiced by his attorney's failure to argue these claims. 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. In the context of plea bargaining, defendant must show that there is a reasonable probability that he would not have pleaded guilty but for counsel's errors. State v. Acevedo, 137 Wn.2d 179, 198-99, 970 P.2d 299 (1999). Here, defendant entered a plea agreement with the State wherein he agreed to plead guilty to first degree burglary, second degree assault, first degree robbery and first degree kidnapping, and unlawful possession of a firearm, in exchange for the dismissal of the

charge of first degree kidnapping and first degree assault (both with firearm enhancements). Pursuant to this agreement, defendant obtained the dismissal of a **two** serious violent offenses and **three** firearm enhancements.³ The record further indicates that both parties committed to making a joint recommendation as to sentencing of 355 months (175-month base sentence plus 180-month enhancement). RP 2-4, 9. The court adopted the recommendation and imposed a sentence of 355 months. RP 9-10. The point of the plea bargaining process was to reach an agreement as to the number and seriousness of the charges and the length of time in custody. Issues regarding same criminal conduct and merger became subsumed in this process. The State was not agreeing to an arrangement that allowed defendant to argue for a lower sentence than 355 months. The defendant committed to his agreed recommendation as part of the plea agreement. There is no suggestion that defense counsel was ineffective for assisting his client in entering this guilty plea. Defendant cannot show that his attorney agreed to a sentence that is not lawful under the provisions of the Sentencing Reform Act. Thus defendant has failed to show deficient performance or resulting prejudice from his attorney's

³ Dismissal of these offenses decreased defendant's potential sentence significantly because serious violent offenses shall be served consecutively to each other. RCW 9.94A.589(1)(c).

“failure” to argue about merger and whether defendant’s offenses should be treated as the same criminal conduct when such arguments would have been contrary to the terms of the plea agreement. The prosecutor here would not have agreed to a plea that resulted in a lesser sentence. Thus, had defendant insisted on arguing for a lower offender score, the State would have withdrawn the plea offer and proceeded to trial on the original charges. Because defendant cannot show that he was prejudiced by counsel’s performance, he cannot establish ineffective assistance of counsel.

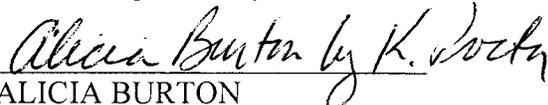
Further, because counsel was not ineffective throughout the plea proceedings, defendant cannot show that his plea was involuntary.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm defendant’s convictions and sentence.

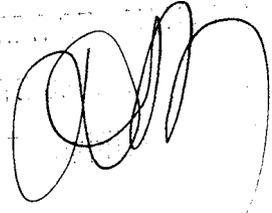
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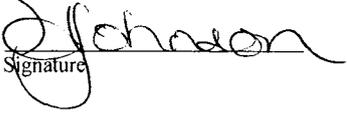
GERALD A. HORNE
Pierce County
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WSB # 29285

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.

FILED
STATE OF WASHINGTON
BY: 

4/27/07 
Date Signature