

Original

NO. 36868-4-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LEIF ALLEN,

Appellant,

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-00493-2

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in convicting Allen of two counts of felony violation of order prohibiting contact where it is ambiguous as to whether former RCW 26.50.110 requires a violation amounting to “acts or threats of violence.”
02. The trial court violated Allen’s double jeopardy rights by entering judgment against him for two convictions for violation of order prohibiting contact.
03. The trial court erred in calculating Allen’s offender score by including three of his five alleged prior criminal convictions in determining his offender score.
04. The trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction.
05. The trial court erred in calculating Allen’s offender score by counting his two current convictions as separate offenses.
06. The trial court erred in permitting Allen to be represented by counsel who provided ineffective assistance by failing to argue statutory ambiguity, double jeopardy and that his offender score was incorrect.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in convicting Allen of two counts of felony violation of order prohibiting contact where it is ambiguous as to whether former RCW 26.50.110 requires a violation amounting to “acts or threats of violence?” [Assignment of

Error No. 1].

02. Whether Allen's two convictions for violation of order prohibiting contact violate the constitutional prohibition against double jeopardy? [Assignment of Error No. 2].
03. Whether the trial court erred in calculating Allen's offender score by including three of his five alleged prior criminal convictions in determining his offender score? [Assignment of Error No. 3].
04. Whether, as a matter of law, the trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction? [Assignment of Error No. 4].
05. Whether the trial court erred in calculating Allen's offender score by counting his two current convictions as separate offenses? [Assignment of Error No. 5].
06. Whether the trial court erred in permitting Allen to be represented by counsel who provided ineffective assistance by failing to argue statutory ambiguity, double jeopardy and that his offender score was incorrect? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Leif Allen (Allen) was charged by second amended information filed in Thurston County Superior Court on October 3, 2007, with two counts of violation of order prohibiting contact (domestic

violence), contrary to RCWs 26.50.110, 10.99.020 and 10.99.050(2)(b).
[CP 37-38].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 12]. Trial to a jury commenced on October 3, the Honorable Christine A. Pomeroy presiding. The parties entered the following stipulation, which was read to the jury:

The defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no contact order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.52, or 74.34 RCW under Thurston County Superior Court Number 04-1-1201-9 and 02-1-1396-5 dated this 3rd day of October 2007. You should consider this as if it was proven to you. This is evidence.

[RP 41-42].

Neither exceptions nor objections were taken to the jury instructions. [RP 10/03/07 49]. The jury returned verdicts of guilty as charged, Allen was sentenced within his standard range based on an offender score of 6, which included 5 prior offenses and his other current offense, and timely notice of this appeal followed. [CP 33-36, 43-44, 47-57].

02. Substantive Facts

On March 4, 2007, Aletta Foley checked her e-mail for the first time in approximately three weeks and learned that Allen had sent her

two recent messages, one dated February 12, which was the return of an e-mail she had sent him while they were dating back in January 2006, and the other February 14, which amounted to an invitation to join a website. [State's exhibits 5-6; RP 28-30, 33]. At the time, there was a valid protection order in place prohibiting Allen from having contact with Foley either directly or indirectly or in writing or by telephone. [State's exhibit 8; RP 30-31, 43].

Allen admitted to sending the February 12 e-mail, explaining that he had inadvertently clicked the reply or forward button while clearing out his e-mail folder that contained Foley's prior e-mail to him [RP 44], and, in reference to the February 14 e-mail, explained:

I'd gone through - - there's a portion that you can go through your contact list at the Yahoo account and send an invitation to each member on there, not realizing that I still had Ms. Foley's contact information in there. Several other people also received the same message.

[RP 46].

Allen did admit to sending an e-mail to Foley's current boyfriend on February 17 [RP], which contained the following message: "Never turn your back on a Foley." [RP 41]. He explained that he had sent this because he was upset about some information "that Ms. Foley's family had been sending." [RP 46].

D. ARGUMENT

01. ALLEN'S TWO CONVICTIONS FOR FELONY VIOLATION OF ORDER PROHIBITING CONTACT MUST BE REVERSED AND DISMISSED WHERE IT IS AMBIGUOUS AS TO WHETHER FORMER RCW 26.50.110 REQUIRES A VIOLATION AMOUNTING TO "ACTS OR THREATS OF VIOLENCE."

When interpreting a statute, the court must give effect to the plain meaning of the statutory language, State v. Radan, 98 Wn. App. 652, 657, 990 P.2d 962 (1999), and may not engage in statutory construction if the statute is unambiguous, State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996), and at all times must resist the temptation to rewrite an unambiguous statute to suit the court's notions of what is good policy, recognizing the principle that "drafting of a statute is a legislative, not judicial function." State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). The language of an unambiguous statute is not subject to judicial interpretation, State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), review denied, 145 Wn.2d 1013 (2001), and when the legislature omits language from a statute, intentionally or inadvertently, the court will not read into the statute the language it believes was omitted. State v. Moses, 145 Wn.2d 370, 374, 37 P.2d 1216 (2002). Under the rule of lenity, any

ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App. at 358.

Allen was convicted of two counts of violation of order prohibiting contact under RCWs 10.99.050, 10.99.020 (domestic violence definition) and former 26.50.110 (the penalties statute). [CP 37-38].

RCW 10.99.050(2)(a) reads:

Willful violation of a court order issued under this section is punishable under RCW 26.50.110.

Violation of an order prohibiting contact is a class C felony under certain circumstances. Former RCW 26.50.110(1) provides that whenever a protection order is issued under chapter 10.99 RCW,

and the respondent or the person to be restrained knows of the order, a violation of the restraint provisions ... for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.”

Subsection (5) provides that a violation of the order

“is a class C felony if the offender has at least two previous convictions for violating the provisions of an order....”

RCW 10.31.100 provides in relevant part:

- (2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

- (a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, 26.09, 26.10, 2226.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person [Emphasis added].

While it is unclear whether former RCW 26.50.110 requires a violation constituting “acts or threats of violence” as a condition precedent to bringing into play the felony provision of Subsection (5), given the statute’s direct reference to RCW 10.31.100(2)(a), it is clear that under the rule of lenity the statute must be read to favor Allen, thus requiring a violation amounting to “acts or threats of violence” for him to be convicted of a class C felony. There was no such violation in this case, with the result that Allen’s two convictions for felony violation of an order prohibiting contact must be reversed and dismissed.

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02. ALLEN'S TWO CONVICTIONS FOR VIOLATION OF ORDER PROHIBITING CONTACT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

The double jeopardy clauses of the state and federal constitutions prevent the imposition of multiple punishments for the same offense. U.S. Const. amend. 5; Const. art. 1, § 9; North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969). As the Washington Supreme court observed, “[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998). Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, reviewed denied, 143 Wn.2d 1009 (2001) (citing RAP 2.5(a) and State v. Adel, 136 Wn.2d at 631-31).

The “same evidence” or “same elements” test of Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932), and State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995), does not apply in situations where a defendant is convicted of violating one statute multiple times. State v. Adel, 136 Wn.2d at 633. Rather, the courts employ the “unit of prosecution” test, which is determined by examining the statute. State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). When a defendant is convicted of multiple violations of the same statute, the question is what unit of prosecution the Legislature intended as the punishable act under the statute. In re Personal Restraint of Davis, 142 Wn.2d 165, 172, 12 P.3d 603 (2000). The “unit of prosecution” for a crime may be an act or a course of conduct. State v. Root, 141 Wn.2d 701, 710, 9 P.3d 214 (2000).

Allen was convicted of two counts of violation of order prohibiting contact under RCWs 10.99.050, 10.99.020 (domestic violence definition) and former 26.50.110 (the penalties statute), the latter of which was amended subsequent to the charging period in this case. [CP 37-38]. RCW 10.99.050 simply is declares that “(w)illful violation of a court order issued under this section punishable under RCW 26.50.110, which, in turn, classifies the offense as a class C felony under circumstances not relevant to this argument. The statutes are unclear as to whether multiple counts under the facts of this case may be punished more than once. As a result of this ambiguity as to the unit of prosecution in this context, the

rule of lenity dictates that the ambiguity should be resolved in Allen's favor, thus precluding his conviction for multiple counts. See State v. Adel, 136 Wn.2d at 635 (where a statute does not indicate whether the Legislature intended to punish a person multiple times for possession of a controlled substance discovered in numerous places, lenity dictates that only one count of possession is permitted); State v. Turner, 102 Wn. App. at 209 (rule of lenity dictates that multiple convictions for theft by different schemes or plans against the same victim over the same period of time under theft statute that is ambiguous as to the unit of prosecution cannot stand because they violate double jeopardy); Prince v United States, 352 U.S. 322, 329, 77 S. Ct. 403, 407, 1 L. Ed. 2d 370 (1957) (where there are several alternative means of violating a single statute, the courts should not infer that Congress intended to impose multiple punishments); Bell, 349 U.S. at 84 (“[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses[.]”).

Here, the two counts are not differentiated by time, location, or intended purpose, since there was only one contact with Foley, which occurred when she opened her e-mail and discovered the two messages at the same time. Thus both crimes were committed at the same time and place and involved the same criminal intent. Allen's convictions for the

two counts violate double jeopardy under the facts of this case, with the result that this court should reverse and dismiss one of the convictions.

03. THE TRIAL COURT MISCALCULATED ALLEN'S OFFENDER SCORE BY INCLUDING THREE OF HIS FIVE ALLEGED PRIOR CRIMINAL CONVICTIONS IN DETERMINING HIS OFFENDER SCORE.

Without objection or acknowledgment, the trial court included five of Allen's prior criminal convictions in determining his offender score. [RP 78-82; CP 48-49, 59-60].

One of the following must occur for a trial court to include prior convictions in a defendant's criminal history: (1) the State proves the prior convictions with the required evidence; (2) the defendant admits to the prior convictions; (3) the defendant acknowledges the prior convictions by failing to object to their inclusion in a presentence report. RCW 9.94A.500(1); RCW 9.94A.530(2).

Since none of the above happened during Allen's sentencing [RP 78-82], the trial court erred by including three of Allen's five alleged prior criminal convictions in determining his offender score.¹ While issues not raised in the trial court may not generally be raised for the first time on

¹ At trial, as previously set forth herein, Allen stipulated to two of his prior convictions. [RP 41-42].

appeal, State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996), illegal or erroneous computations of an offender score that alter the defendant's standard sentence range may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). If Allen's three alleged prior criminal convictions were improperly included in his offender calculation, his offender score would drop from six points to three points and, correspondingly, his sentencing range from 41 to 54 months to 15 to 20 months. [CP 59]. At sentencing, the State bears the burden of proving all prior convictions before those convictions can be used in an offender score or otherwise. See State v. Ford, 137 Wn.2d at 479-80. A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d at 481-82.

Allen's sentence should be remanded for resentencing under the general rule that the State is held to the existing record on remand. State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). At the sentencing hearing, given that the State presented no evidence to prove Allen's three alleged prior criminal convictions here at issue, there was nothing to object to in this regard. Unlike the facts in State v. Ford, 137 Wn.2d at 485, where our Supreme Court remanded for an evidentiary hearing to permit the State to prove the disputed matters because "defense counsel

has some obligation to bring deficiencies of the State's case to the attention of the sentencing court(,)" 137 Wn.2d at 485, here there was no "State's case." Nothing occurred that could possibly have warranted an objection from Allen's counsel.

In In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), a three-strikes case where Cadwallader had failed to object to his criminal history at sentencing, and thereby failed to put the sentencing court on notice that one of his prior strike convictions had washed out, our Supreme Court ruled that the State would be held to the existing record on remand, stating, "(g)iven that Cadwallader had no obligation to disclose his criminal history, it follows that he had no obligation to object to the State's failure to include the 1985 Kansas theft conviction in his criminal history." Id. at 876.

Here, because Allen was under no obligation to prove his alleged three prior criminal convictions – that being the State's exclusive burden – he was under no obligation to object to the State's failure to present any evidence to establish these convictions. In short, since there was no "State's case" vis-à-vis these convictions, and thus nothing warranting an objection from Allen, his sentencing on this issue should be remanded and the State held to the existing record.

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04. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIME OF CONVICTION.

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

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

A sentencing court “may not impose a sentence providing

for a term of confinement or community supervision, community placement, or custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” RCW 9.94A.505(5); State v. Hudnall, 116 Wn. App. 190, 195, 64 P.3d 687 (2003); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004)(the total punishment, including imprisonment and community custody, may not exceed the statutory maximum). Nothing in the statute grants the sentencing court the authority to speculate that a defendant will earn early release and to impose a sentence beyond the statutory maximum based on that speculation. If the Legislature had so intended, it would have made that provision.

In addition to sentencing Allen to 50 months for his two convictions for violation of order prohibiting contact, the trial court imposed 9 to 18 months’ community custody. [CP 52]. As this sentence exceeds the statutory maximum sentence of five years imprisonment, or a \$10,000 fine, or both, See RCW 26.50.110(5); RCW 9A.20.021(1)(c), this court should remand for resentencing within the five-year statutory maximum for assault in the third degree, a class C felony.

For felonies committed on or after July 1, 1984, adult defendants are subject to the provisions of the Sentencing Reform Act of 1981, as amended (SRA). Under the enabling legislation of this sentencing system,

RCW 9.94A et seq., the jurisdiction of sentencing courts is limited to the imposition of determinate sentences, i.e., “a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation.” RCW 9.94A.030(18).

Division I of this court, in State v. Sloan, supra, while recognizing that total punishment, including imprisonment and community custody, may not exceed the statutory maximum for a particular offense, Sloan 121 Wn. App. at 221, created a workaround, holding that though Sloan had been sentenced to the statutory maximum of 60 months followed by 36 to 48 months community custody, everything was okay since the judgment and sentence included the qualification that Sloan was “not to be incarcerated for any violations as upon her release she will have served the maximum time allowed.” Sloan, 121 Wn. App. at 222.

This is not the correct remedy, given that the solution proffered in Sloan results in an indeterminate sentence, a sentence failing to state with exactitude the term of confinement or restrictions, which is, most critically, incompatible with the aforementioned limiting jurisdiction of a sentencing court operating under the SRA to impose determinate sentences, and which, in addition, may operate to deny a defendant of his

or her protected liberty interest in his or her good time credits, since any early release time earned by a defendant would merely be applied to extend the duration of his or her community custody by the same period. See In re Personal Restraint Johnson, 109 Wn.2d 493, 496-97, 745 P.2d 864 (1987). The second point is linked with the first, and the court lacks jurisdiction in each instance, either because the court is without jurisdiction to impose an indeterminate sentence, the first point, or because the court is without authority to restrict a defendant's earned early release in this manner, since only the correctional agency having jurisdiction over a defendant has the authority to determine earned early release time, the second point. In re Personal Restraint of West, 154 Wn.2d 204, 212, 110 P.3d 1122 (2005).

The remedy is simple. As the two crimes for which Allen was sentenced carried a five year maximum sentence, with a community custody range of 9 to 18 months, for which he was sentenced to 50 months plus the community custody range of 9 to 18 months, an indeterminate sentence exceeding the statutory maximum, the matter should be remanded for a determinate sentence with directions that the period of community custody shall not exceed 10 months (50 + 10 = 60).

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05. ALLEN'S TWO CONVICTIONS FOR VIOLATION OF ORDER PROHIBITING CONTACT ENCOMPASSED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.

A challenge to the calculation of an offender score may be raised for the first time on appeal. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); State v. McCorkle, 137 Wn.2d at 495. Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d at 482-83. A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. State v. Mitchell, 81 Wn. App. 387, 390, 914 P.2d 771 (1996).

In sentencing Allen, the trial court calculated his offender score on each count as six by counting his two current convictions as separate offenses. [CP 47-56, 59].

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an

offender score. State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

“RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant’s offender score.” State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), reviewed denied, 143 Wn.2d 1010 (2001) (quoting State v. Tili, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

Here, as previously set forth, given that the evidence demonstrated that Allen’s two counts were not differentiated by time, location or intended purpose, since there was only one contact with Foley, which happened when she accessed her e-mail and discovered the two messages at the same time, the offenses encompassed the same course of criminal conduct for purposes of calculating Allen’s offender score, with the result that matter must be remanded for resentencing based on an offender score that does not include both convictions. See State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994) (simultaneous possession of two different

controlled substances encompasses the same criminal conduct for sentencing purposes).

06. ALLEN WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE STATUTORY AMBIGUITY, DOUBLE JEOPARDY AND THAT HIS OFFENDER SCORE WAS INCORRECT BECAUSE HIS TWO CURRENT CONVICTIONS WERE COUNTED AS SEPARATE OFFENSES.²

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

² While it has been argued in the preceding sections of this brief that these issues can be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

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

Should this court find that trial counsel waived the issues and errors set forth in the preceding sections of this brief relating to statutory ambiguity, double jeopardy and the counting of his two current convictions as separate offenses, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly make these arguments for the reasons set forth in the preceding sections.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly made these arguments, Allen would have been convicted of fewer crimes, if any, and the trial court would not have imposed a sentence based on a miscalculated offender score.

E. CONCLUSION

Based on the above, Allen respectfully requests this court to reverse and dismiss his convictions and/or to remand for resentencing.

DATED this 1st day of April 2008.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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