

NO. 36918-4-II
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

MICHAEL W. ROBINSON,
Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-01283-8

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Robinson's motion for a mistrial.
02. The trial court erred in permitting Robinson to be represented by counsel who provided ineffective assistance by failing to immediately object and move for a mistrial regarding the prosecutor's implied argument that he had a duty to present evidence.
03. The trial court erred in not taking count V from the jury for lack of sufficiency of the evidence that Robinson possessed methamphetamine found in the trunk of the vehicle.
04. The trial court erred in allowing the jury to find Robinson subject to the sentence enhancement for armed with a firearm while in possession of methamphetamine where the evidence does not support such a finding.
05. The trial court violated Robinson's double jeopardy rights by entering judgment against him for theft of a firearm and theft in the first degree.
06. The trial court erred in calculating Robinson's offender score by counting his current convictions for theft of a firearm and theft as separate offenses.

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07. The trial court erred in permitting Robinson to be represented by counsel who provided ineffective assistance by failing to argue that his current convictions for theft of a firearm and theft in the first degree encompassed the same criminal conduct for purposes of calculating his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court abused its discretion in denying Robinson's motion for a mistrial where the prosecutor implied that Robinson had a duty to present evidence? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting Robinson to be represented by counsel who provided ineffective assistance by failing to immediately object and move for a mistrial regarding the prosecutor's implied argument that he had a duty to present evidence? [Assignment of Error No. 2].
03. Whether there was sufficient evidence to support Robinson's criminal conviction for unlawful possession of methamphetamine? [Assignment of Error No. 3].
04. Whether there was sufficient evidence to support the sentence enhancement for armed with a firearm? [Assignment of Error No. 4].
05. Whether Robinson's convictions for theft of a firearm and theft in the first degree violate the constitutional prohibition against double jeopardy? [Assignment of Error No. 5].

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06. Whether the trial court erred in calculating Robinson's offender score by counting his current convictions for theft of a firearm and theft as separate offenses? [Assignment of Error No. 6].
07. Whether the trial court erred in permitting Robinson to be represented by counsel who provided ineffective assistance by failing to argue that his current convictions for theft of a firearm and theft in the first degree encompassed the same criminal conduct for purposes of calculating his offender score? [Assignment of Error No. 7].

C. STATEMENT OF THE CASE

01. Procedural Facts

Michael W. Robinson (Robinson) was charged by second amended information filed in Thurston County Superior Court on October 16, 2007, with burglary in the first degree while armed with a firearm, count I, theft of a firearm, count II, unlawful possession of a firearm in the first degree, count III, theft in the first degree, count IV, and unlawful manufacture of methamphetamine while armed with a firearm, count V, contrary to RCWs 9A.52.020(1)(a), 9.94A.602, 9.94A.533(3), 9A.56.300(1), 9.41.040(1)(a), 9A.56.030(1)(a), 9A.56.020(1)(a) and 69.50.401(2)(b). [CP 28-29]. Count V was subsequently amended to possession of methamphetamine while armed with a firearm. [RP 253-54, 295].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 9]. Trial to a jury commenced on October 15, the Honorable Christine A. Pomeroy presiding. No objections nor exceptions were taken to the jury instructions. [RP 294].

Robinson was found guilty as charged on all but count I, for which he was found guilty of residential burglary. Timely notice of this appeal followed sentencing. [CP 76-84, 97-107].

02. Substantive Facts

02.1 Residential Burglary: Count I

On July 11, 2007, the day after the residence of Chad Yantis and Megan Moskwa was burglarized [RP 12-14, 68-69], Robinson and Daniel Smith were arrested following the chase of a vehicle driven by Smith in which Robinson was the sole passenger. [RP 27, 30, 46-48].

At the scene, Robinson admitted to Trooper Doug Clevenger that he had been with Smith during the burglary the previous day, though the extent of his involvement was not discussed. [RP 152-55, 171]. He confirmed that that property taken from the residence included items reported missing in addition to admitting that a pair of jeans found in the backseat of the vehicle were his, as was the cell phone in one of the pockets, before denying ownership or knowledge of other items found in

the jeans that were linked to the burglary. [RP 125, 128-29, 154]. A backpack seized from the backseat of the car contained numerous items taken in the burglary, as did a hat belonging to Robinson that was found in the glove box. [RP 134-38].

When questioned later that evening at the police station by Detective Brenda Anderson, Robinson added that he and Smith “had broken into a house on the west side and taken property from the house.” [RP 225]. According to Anderson, Robinson went on to say that he and Smith had entered the house and that he had assisted in removing items and putting them in the car. [RP 226-27]. He also said the jeans and cell phone were his, though he didn’t know anything about the other items. [RP 227]. He was never paid the \$50 or \$60 Smith had promised for assisting him in the burglary. [RP 228].

02.2 Theft of Firearm: Count II

The operable firearm reported missing as a result of the burglary was found in a closed box behind the passenger’s seat in the back of the vehicle Smith was driving. [RP 14-15, 41-44, 57, 94]. The officer conducting the search opened the box and removed a white cloth before discovering the gun. [RP 41, 57].

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02.3 Possession Firearm First Degree: Count III

Robinson, who stipulated to his prior conviction for burglary in the second degree [RP 195-96, 206-07, 266], admitted to Clevenger that at some unspecified time he had handled the gun: "I held up my hand and I said , 'You held it like this?' He said yes." [RP 156].

02.4 Theft First Degree: Count IV

Property taken during the burglary had a value in excess of \$1,500. [RP 11, 19, 71-89].

02.5 Possession Methamphetamine While Armed With A Firearm: Count V

Robinson informed Clevenger that Smith was "a cook" and had expressed concern about the meth lab in the trunk when they were being pulled over...." [RP 157-158, 161]. Material in the trunk, which was eventually opened two days later and searched pursuant to a search warrant, tested positive for methamphetamine. [RP 164-65, 178, 182, 214-16].

02.6 Robinson's Testimony Re Charges

Robinson denied any involvement in the burglary, claiming he had spent that day with his family. [RP 270-73]. He never saw nor touched the gun in the car and never knowingly

possessed any of the stolen property. [RP 267, 287]. He also asserted that the jeans were not his, noting as an aside that they were too small to fit him. [RP 261, 285]. And he did not know how his cell phone had wound up in the jeans: "My cell phone was stolen." [RP 285].

Robinson also denied that he ever told Clevenger that he was with Smith during the burglary or that the jeans were his or that he had ever handled the gun, further commenting that he was aware he was not allowed to be around guns because of his prior conviction. [RP 265-67, 286]. Similarly, he denied that Anderson ever asked or that he ever discussed with her the allegations regarding the burglary or any of the items taken during the burglary. [RP 268-69]. "The only thing she asked me is if I knew anything about some stolen cars and if the car I was riding in was stolen." [RP 288].

D. ARGUMENT

01. THE TRIAL COURT ABUSED ITS
DISCRETION IN DENYING ROBINSON'S
MOTION FOR A MISTRIAL.

A trial court's decision on a motion for a mistrial is reviewed under the abuse of discretion standard. State v. Marks, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967). A trial court should grant a mistrial when an irregularity in the trial proceedings is so prejudicial that it deprives the defendant of a fair trial. State v. Post, 59 Wn. App. 389, 395,

797 P.2d 1160 (1990), aff'd, 118 Wn.2d 596, 826 P.2d 172 (1992). A defendant is under no obligation or duty to present evidence, and it is error for a prosecutor to comment on a defendant's lack of evidence. State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990). If a prosecutor does comment on a defendant's lack of evidence and the defense objects, the objection should be sustained, the comment stricken, and the jury instructed to disregard it. Short of this, the appellate should reverse unless it finds the error was harmless beyond a reasonable doubt. Id. at 648.

During the State's closing argument, Robinson's objection to the prosecutor's following argument was sustained.

And then we get to the alibi. Well, I wasn't even around. I was with - - I wrote it down. I think he named five different people, including his mother, that he was with on July 10th. Now, the way you prove something in court is you get someone to come in here, sit on that witness stand, swear to tell the truth, and - -

[RP 334].

THE COURT: Sustaining. Ladies and gentlemen, you remember the evidence. What counsel both say is not evidence.

[RP 334].

The prosecutor then backdoored the same argument:

There's an instruction you may consider the lack of evidence. Well, did anyone get up here and support what Mr. Robinson said, that story? Of all those

people that he was allegedly with on July 10th, did you see anyone get up there and support that? You didn't, and that speaks volumes. [Emphasis added].

[RP 334-35].

When the State rested shortly thereafter, Robinson moved for a mistrial, arguing that the above statement unconstitutionally shifted the burden to him to present evidence, and, in the alternative, for a curative instruction "that indicates that a defendant has no obligation to bring any witnesses in." [RP 343]. The court denied the motion for the mistrial and the requested curative instruction and instructed the jury as follows:

Ladies and gentlemen, what counsel say in closing argument is that, it is not evidence. Please disregard any remark, statement, or argument which is not supported by the evidence or the law as given to you by me. The law requires the state to meet its burden beyond a reasonable doubt. The burden never shifts to the defense.

[RP 344].

Both of the prosecutor's above statements constituted error, for a prosecutor cannot imply that a defendant has a duty to present exculpatory evidence. See State v. Barrow, 60 Wn. App. 869, 872, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). And, in each instance, the court's limiting instruction did not strike the respective statement nor inform the jury to disregard either specific statement. The court did not follow the procedure set forth in Cleveland, *supra*.

The effect of the prosecutor's statements had a high potential for prejudice, and represent a serious irregularity. In the end, this case essentially turned on whom the jury was going to believe. Robinson denied any involvement. His credibility was central to the case. The fact that he didn't provide additional evidence is of no consequence, for that was not his burden, which the State blurred with its arguments to the contrary. And while it is presumed that juries follow court instructions, there is no guarantee the jury could have effectively disregarded the contested statements, particularly since the prosecutor unduly emphasized the impermissible assertions of Robinson's failure to present evidence: "that speaks volumes." [RP 335].

The trial court abused its discretion in denying the motion for a mistrial, with the result that Robinson's convictions must be reversed.

02. ROBINSON WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO IMMEDIATELY OBJECT AND MOVE FOR A MISTRIAL REGARDING THE PROSECUTOR'S IMPLIED ARGUMENT THAT ROBINSON HAD A DUTY TO PRESENT EVIDENCE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that

prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

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

Should this court find that Robinson, by failing to immediately object and move for a mistrial regarding the prosecutor's second assertion that he, Robinson, had a duty to present evidence, instead of waiting, as he did, for the prosecutor to complete his argument shortly thereafter, waived

the argument set forth in the preceding section of this brief, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to properly preserve this issue. For the reasons set forth in preceding section, had counsel done so, the trial court would have erred in failing to grant the objection and motion for mistrial.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: but for counsel's failure to properly preserve and argue the issue, the objection and motion for mistrial would have been granted for the same reasons previously set forth.

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03. THERE IS INSUFFICIENT EVIDENCE TO UPHOLD ROBINSON'S CRIMINAL CONVICTION FOR UNLAWFUL POSSESSION OF METHAMPHETAMINE WHILE ARMED WITH A FIREARM.

03.1 Legal Overview

01.1.1 Sufficiency Of The Evidence

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

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03.1.2 Actual Or Constructive Possession Of Controlled Substance

Possession may be actual or constructive. State v. Escheverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). “Actual possession occurs when the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.” State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Mere proximity is not enough to establish possession. State v. Potts, 93 Wn. App. 82, 88, 969 P.2d 494 (1998) (citing State v. Robinson, 79 Wn. App. 386, 391, 902 P.2d 652 (1995)). For example, in State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990), the court found that the defendant’s presence in a room where drugs were found plus his fingerprint on a plate that appeared to contain a controlled substance plus his rising from a chair when the police broke through the front door was insufficient to establish actual possession. Spruell, 57 Wn. App. at 388-89.

03.1.3 Armed With Deadly Weapon For Sentencing Enhancement Purposes

To support a finding that a defendant

was armed with a deadly weapon during the commission of a crime within the meaning of RCW 9.94A.602 for sentencing enhancement purposes, there must be proof beyond a reasonable doubt that at the time of the commission of the offense the weapon was easily accessible and readily available for use, either for offensive or defensive purposes. State v. Willis, 153 Wn.2d 366, 371, 103 P.3d 1213 (2005). Moreover, by the same standard, there must be a nexus between the defendant, the crime and the deadly weapon to find that the defendant was armed under the deadly weapon statute. Willis, 153 Wn.2d at 373. See Court's Instruction 33. [CP 74]. Importantly, a defendant's mere proximity to or constructive possession of a weapon at the time of the offense is insufficient to establish that the defendant was armed with a deadly weapon. State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2002). "This requirement means that where the weapon is not actually used in the commission of the crime, it must be there to be used." State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005).

03.1.4 Accomplice Liability

"A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to succeed." State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993)

(citations omitted). The evidence must demonstrate more than that the accused was present and knew what was going to happen. In order to convict under an accomplice liability theory, the State must demonstrate some nexus between the party committing the act and the party deemed the accomplice. State v. Wilson, 95 Wn.2d 828, 631 P.2d 362 (1981). A defendant's presence at the scene of criminal activity combined with knowledge of the criminal activity, does not establish accomplice liability. In re Wilson, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979); State v. Amezola, 49 Wn. App. 74, 741 P.2d 1024 (1987).

03.2 Unlawful Possession Of
Methamphetamine

RCW 69.50.4013(1) requires the State to prove that the defendant was in possession of a controlled substance. As argued by the State in closing, this charge was based on the methamphetamine found in the trunk of the vehicle after the police stopped it. [RP 362]. And given that there is nothing in the record from which to argue that Robinson was in physical custody of this methamphetamine, the issue is whether the evidence supports a finding of constructive possession. It does not.

To prove that Robinson, the passenger in the vehicle, constructively possessed the methamphetamine, the State was required to prove that he had

dominion and control over the drug, for it is not a crime to have dominion and control over a car, and mere proximity, arm length or otherwise, is not enough to establish dominion and control over a controlled substance.

State v. Potts, 93 Wn. App. at 88.

Not being the sole occupant nor the driver of the car, Robinson, in any event, did not have dominion and control over the vehicle when it was stopped, let alone the methamphetamine subsequently seized from the trunk. He was not responsible for what was in the car. No furtive movements were observed on his part and the search of his person produced nothing. No fingerprints connected him to the methamphetamine. And there was no indication he had any way of even getting inside the trunk and no indication that any of his property was found therein.

The totality of this evidence, or lack thereof, would not permit a reasonable jury to infer that Robinson had dominion and control over the methamphetamine, with the result that this conviction must be reversed and dismissed.

03.3 Armed With A Deadly Weapon Enhancement

The nature and circumstances in this case do not support a finding that there was a sufficient nexus between the

possession, if any, of the methamphetamine and the firearm concealed by a white cloth in a closed box discovered somewhere behind the passenger's seat in the back of the vehicle Smith was driving. In this regard, the State failed to carry its burden to prove that the firearm was "easily accessible and readily available" and that it was there to be used at the time of the commission of the offense.

To apply the nexus requires analyzing "the nature of the crime, the type of weapon, and the circumstances under which the weapon is found." State v. Schelin, 147 Wn.2d at 570. Here, the crime was possession of methamphetamine and the type of weapon was a firearm.

Generally, in drug possession cases, courts have found the required nexus where there is evidence from which a jury can infer that the weapon was used to protect the possession, distribution or manufacture of the drugs. See State v. Schelin, 147 Wn.2d at 574-75. In State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005), however, our Supreme Court reversed a deadly weapon enhancement where the stipulated facts demonstrated that a handgun was in a backpack, behind the driver's seat and inaccessible unless the driver exited the vehicle or switched seats. Gurske, 155 Wn.2d at 143.

Likewise, here, there was insufficient proof that the firearm was easily accessible and readily available to Robinson or Smith. There was

no evidence that it, as opposed to the box in which it was later discovered, was within reach. The box was somewhere behind the passenger's seat. It was closed. A cloth within the closed box covered the gun. There is nothing in the facts to indicate whether Robinson or Smith could open the box, remove the cloth, and remove the gun from either of their respective seats in the front of the car at the time the police stopped the vehicle. Nor was there evidence that any movement was made toward the closed box. And yet, a defendant is not "armed" even though he or she, presumably, could have obtained a weapon by taking a few steps. See State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Nor was evidence presented that Robinson or Smith had used or had easy access to use the weapon at any other time during the acquisition or possession of the methamphetamine.

The evidence is insufficient to show that the firearm was easily accessible and readily available, and any claim of constructive possession of the firearm is not enough to show a person was "armed" for purposes of RCW 9.94A.602.

Additionally, under these facts, there was no showing that the gun was there to be used as security for the possession, if any, of the methamphetamine found in the trunk of the vehicle. There was no evidence of an intent or willingness to use the gun. To the contrary, the

facts suggest the weapon was merely spoils, and not there to be used, much like the case in State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007), where our Supreme Court recently reversed the imposition of a firearm enhancement since the evidence demonstrated only that the weapon was merely handled during the course of the burglary:

Evidence that a firearm was briefly in a burglar's possession, without more, does not make Brown armed within the meaning of the enhancement statutes.

Id. at 435.

The firearm was not “easily accessible and readily available” and there was a lack of evidence that it was there to be used in order to further and aid the possession, if any, of the methamphetamine secured in the trunk, with the result that the trial court improperly applied the firearm enhancement to Robinson's sentence.

04. ROBINSON'S CONVICTIONS FOR THEFT OF A FIREARM AND THEFT IN THE FIRST DEGREE 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).

When a double jeopardy challenge relates to multiple convictions under the same statute, the inquiry 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).

Washington follows the rule that multiple items taken from the same victim at the same time and place constitute one crime, not multiple crimes. State v. Carosa, 83 Wn. App. 380, 381, 921 P.2d 593 (1996). “The rule is that ‘[w]hen several articles of property are stolen by the defendant from the same owner at the same time and at the same place,

only one larceny is committed.” Carosa, 83 Wn. App. at 382-83 (quoting 3 Charles E. Torcia, WHARTON'S CRIMINAL LAW § 346, at 366 (15th ed. 1995)). Furthermore, if several items are stolen from the same place as a result of a “single and continuing impulse or intent,” the offense is not transformed from a single larceny into multiple ones. Carosa, 83 Wn. App. at 383 (quoting 3 Torcia, WHARTON'S CRIMINAL LAW § 346, at 369).¹

For example, in State v. McReynolds, 117 Wn. App. 309, 316, 71 P.3d 663 (2003), the defendants were convicted of multiple counts of first and second degree possession of stolen property based on their possession of several different items. Possession of stolen property is defined as: “knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1). The value of the property possessed determines the degree of the crime. RCW 9A.56.150-.170.

The McReynolds court reviewed these statutes and found that “the definition [of possession of stolen property] applies to all degrees of the crime, so the unit of prosecution remains the same.” 117 Wn. App. at 335

¹ Larceny is a common law term for theft, and is defined as the unlawful taking of property of another with the intent to deprive the owner thereof. See BLACKS LAW DICTIONARY 881 (6th ed. 1992).

(citing State v. Tili, 139 Wn.2d 107, 113, 985 P.2d 365 (1999) (“The parallel construction of (rape) statutes dictates that the ‘unit of prosecution’ for rape remains the same from one degree to the next.”)). The court determined that the unit of prosecution is a single act of possessing stolen property, regardless of the number of items possessed or their individual values. 117 Wn. App. at 335, 340. The court reversed the defendants’ multiple convictions.

In this case, the State, in part, charged and convicted Robinson of theft in the first degree and theft of a firearm in violation of RCW 9A.56.030 and 300 [CP 28-29], which share the mental element defined in RCW 9A.56.020 because the Legislature specifically so provided in RCW 9A.56.300(4), which provides that the “definition of ‘theft’ ... under RCW 9A.56.020 shall apply to the crime of theft of theft of a firearm.” The only distinction between these theft offenses is the object of the theft (firearm or other property) and the value of the property. Thus the question is whether the theft statutes allow for multiple prosecutions based on the difference and value of the items taken, rather than one prosecution based on all of the items, where there has been only one act of taking.

In State v. Turner, 102 Wn. App. 202, 208-09,² P.3d 1226 (2000),

² Turner had been convicted of three counts of first degree theft based on a series of unauthorized payments from his employer’s bank accounts and purchases on his employer’s credit card, occurring over a period of 10 months. 102 Wn. App. at 204.

the parties' dispute centered on whether the Legislature intended multiple punishments for multiple thefts by different schemes or plans over the same period of time from the same victim. The Court of Appeals reviewed the theft statutes, and determined that they were ambiguous on this issue, therefore "the rule of lenity dictates that the multiple convictions in this case cannot stand because they violate double jeopardy." 102 Wn. App. at 204, 209. Similarly, the theft statutes do not clearly and unambiguously show that the Legislature intended multiple punishments for a single theft by a single scheme or plan simply because several different items happen to be taken. The rule of lenity therefore dictates that multiple convictions under such circumstances cannot stand because they would also violate double jeopardy. See Turner, 102 Wn. App. at 204, 208-09.

Where there has been just one act, as here, there cannot be multiple theft prosecutions under double jeopardy clauses of the state and federal constitutions. In fact, where the facts show a single, distinct plan or scheme, the State may only charge one count of theft. See State v. Vining, 2 Wn. App. 802, 808-09, 472 P.2d 564 (1970).

Similarly, should this court determine that the two theft convictions here do not constitute the violation of a single statute, then it can be argued that 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), is applicable, especially since, as previously argued, there was a single act of taking in this case and because theft in the first degree and theft of a firearm have the same definition of theft.

Of course, the “same evidence” test is not always dispositive. In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002). This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id; State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. “Thus, the merger doctrine is simply another means by which a court may determine

whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. Calle, 125 Wn.2d at 778.³ If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms the element.” [Emphasis Added]. State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

In this case, the crime of theft of a firearm occurred in furtherance of the crime of theft in the first degree. There was only one act of taking all of the items, with the result that the crime of theft of a firearm was incidental to the crime of theft in the first degree and therefore merges into that offense. See State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

Here, the two counts are not differentiated by time, location, or intended purpose. Both crimes were committed at the same time and place and involved the same criminal intent. Robinson’s convictions for the two counts violate double jeopardy under the facts of this case, with the result

³ In light of the following argument, it is noted that double jeopardy is implicated under Calle when multiple convictions arise out of the same act, even if current sentences are imposed. Calle, 125 Wn.2d at 775.

that this court should reverse and dismiss his conviction for theft of a firearm as argued above.

05. ROBINSON'S CONVICTIONS FOR THEFT OF A FIREARM AND THEFT IN THE FIRST DEGREE 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 490, 495, 973 P.2d 461 (1999). 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 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 Robinson, the trial court calculated his offender score, in part, by counting his convictions for theft of a firearm and theft in the first degree as separate offenses, except for his conviction for unlawful possession of a firearm because of the applicability of RCW

9.94A.589(1)(c) to the computation of the offender score for this offense. [CP 87, 109-112, 114].

“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); State v. Dunaway, 109 Wn.2d 207, 215-17, 743 P.2d 1237 (1987). This analysis may include whether the crimes were part of the same scheme or plan and whether the criminal objectives changed. State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995). Separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or use in a single, uninterrupted criminal episode over a short period of time. State v. Porter, 133 Wn.2d 177, 183, 942 974 (1997).

Here, the two theft offenses occurred at the same time and place and the victims are the same. Additionally, as previously noted, theft of a firearm and theft share the mental element defined in RCW 9A.56.020

because the Legislature specifically so provided in RCW 9A.56.300(4), which provides that the “definition of ‘theft’ ... under RCW 9A.56.020 shall apply to the crime of theft of a firearm.” And the unavoidable inference is that the criminal intent, objectively viewed, did not change from one crime to the next. The purpose was the same: the theft of property from the residence. Accordingly, the matter must be remanded for resentencing based on an offender score that does not include both convictions.

06. ROBINSON WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO ARGUE THAT HIS CURRENT CONVICTIONS FOR THEFT OF A FIREARM AND THEFT IN THE FIRST DEGREE ENCOMPASSED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.⁴

Should this court find that trial counsel waived the issue set forth in the preceding section of this brief relating to the counting of Robinson’s two current convictions for theft of a firearm and theft as separate offenses because he agreed “with what the standard ranges are

⁴ While it has been argued in the preceding section of this brief that this issue 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.

[RP 10/30/07 9](,)" then both elements of ineffective assistance of counsel have been established.⁵

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

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly made the argument, the trial court would not have imposed a sentence based on an incorrect offender score.

E. CONCLUSION

Based on the above, Robinson respectfully requests this court to reverse and dismiss his convictions and/or to remand for resentencing consistent with the arguments presented herein.

DATED this 20th day of June 2008.

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⁵ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

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CERTIFICATE

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

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