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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to dismiss count II, theft in the second degree while armed with a firearm, for insufficient evidence.
02. The trial court erred in not dismissing one of Lander's convictions for theft of a firearm or unlawful possession of a firearm in the second degree, counts I and IV, where the two convictions violated the constitutional prohibition against double jeopardy.
03. The trial court erred in not dismissing one of Lander's convictions for theft of a firearm or trafficking in the first degree, counts I and III, where the two convictions violated the constitutional prohibition against double jeopardy.
04. The trial court erred in not dismissing one of Lander's convictions for theft in the first degree or theft in the second degree, counts V and VI, where the two convictions violated the constitutional prohibition against double jeopardy.
05. The trial court erred in not dismissing one of Lander's convictions for theft in the second degree or trafficking in the first degree, counts VI and VII, where the two convictions violated the constitutional prohibition against double jeopardy.

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06. The trial court erred in calculating Lander's offender score by counting his current convictions for theft of a firearm and theft in the second degree, counts I and II, as separate offenses for purposes of calculating his offender score.
07. The trial court erred in calculating Lander's offender score by counting his current convictions for theft in the second and unlawful possession of a firearm in the second degree, counts II and IV, as separate offenses for purposes of calculating his offender score
08. The trial court erred in calculating Lander's offender score by counting his current convictions for theft in the first degree and theft in the second degree, counts V and VI, as separate offenses for purposes of calculating his offender score.
09. The trial court erred in permitting Lander to be represented by counsel who provided ineffective assistance by failing to argue that his set of current convictions for theft of a firearm and theft in the second degree, counts I and II, his set of convictions for theft in the second degree and unlawful possession of a firearm in the second degree, counts II and IV, and his set of convictions for theft in the first degree and theft in the second degree, counts V and VI, encompassed the same criminal conduct for purposes of calculating his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence to uphold Lander's conviction for theft in the second degree while armed with a firearm, count II? [Assignment of Error No. 1].

02. Whether each set Lander's convictions for theft of a firearm and unlawful possession of a firearm in the second degree, counts I and IV, his convictions for theft of a firearm and trafficking in the first degree, counts I and III, his convictions for theft in first degree and theft in the second degree, counts V and VI, and his convictions for theft in the second degree and trafficking in the first degree, counts VI and VII, violated the constitutional prohibition against double jeopardy? [Assignments of Error Nos. 2-5]
03. Whether each set of Lander's convictions for theft of a firearm and theft in the second degree, counts I and II, his convictions for theft in the second degree and unlawful possession of a firearm in the second degree, counts II and IV, and his convictions for theft in the first degree and theft in the second degree, count V and VI, encompassed the same criminal conduct for purposes of calculating his offender score? [Assignments of Error Nos. 6-8].
04. Whether the trial court erred in permitting Lander 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 second degree, counts I and II, his convictions for theft in the second degree and unlawful possession of a firearm in the second degree, counts II and IV, and his convictions for theft in the first degree and theft in the second degree, counts V and VI, encompassed the same criminal conduct for purposes of calculating his offender score? [Assignment of Error No. 9].

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C. STATEMENT OF THE CASE

01. Procedural Facts

David Lee Lander (Lander) was charged by information filed in Thurston County Superior Court on February 23, 2009, under cause number 09-1-00341-0, with theft of a firearm, count I, theft in the second degree while armed with a firearm, count II, trafficking in stolen property in the first degree while armed with a firearm, count III, and unlawful possession of a firearm in the second degree, count IV, contrary to RCWs 9.41.040(2)(a), 9.94A.533(3), 9.9.94A.602, 9A.56.021(1)(a), 9A.56.300(1), 9A.82.020(19) and 9A.82.050(1). [CP 2-3].¹ Lander was also charged by information filed in the same court on the same day, under cause number 09-1-00342-8, with theft in the first degree, count I, theft in the second degree, count II, and trafficking in stolen property in the first degree, count III, contrary to RCWs 9A.52.020(1)(a), 9A.56.030(1)(a), 9A.56.040(1)(c), 9A.82.010(19) and 9A.82.050(1). [CP 2 under cause number 09-1-00342-8]. The cases were consolidated for trial. [CP 8].

The court denied Lander's pretrial motion to suppress statements pursuant to CrR 3.5. [CP 43-45; RP 06/22/09 52-54].

¹ All clerk's papers referenced herein are to those filed under Thurston County cause number 09-1-00341-0 unless otherwise indicated.

Trial to a jury commenced on June 30, the Honorable Richard D. Hicks presiding. The parties stipulated that Lander had previously been convicted of a felony offense. [RP 75].² Neither exceptions nor objections were taken to the jury instructions. [RP 92].

The jury returned verdicts of guilty as charged, Lander was sentenced within his standard range and timely notice of this appeal followed. [CP 90-95, 98-108; CP 6-19 under cause number 09-1-00342-8].

02. Substantive Facts: CrR 3.5 Hearing

On December 17, 2008, while investigating a vehicle prowl case, Detective Eugene DuPrey interviewed Chris Lander, the defendant's brother, about a stolen Music 6000 gift card belonging to Carol Roden that Chris had cashed. [RP 06/22/09 6-8]. Chris explained that his brother had given him the card as a gift, in addition to giving their mother a gift of a black powder muzzle loaded rifle, which had also been stolen during a vehicle prowl. [RP 06/22/09 8-9].

The next day, at approximately 9:30 in the morning, Detective Eugene DuPrey received a telephone call from Lander saying he wanted to talk to the detective about his involvement in some local vehicle prowl

² Unless otherwise noted, all references to the Report of Proceedings are to the transcript entitled Jury Trial.

cases. [RP 06/22/09 8-9]. They agreed to meet later that afternoon at Lander's mother's house. [RP 06/22/09 9].

It was "snowing quite heavily" when DuPrey and Deputy Snaza arrived at the residence, and they "were invited into the home to speak to (Lander)(,)" whose grandmother and sister were also there. [RP 06/22/09 10, 16, 22-23].

Upon entry into the residence, DuPrey explained to Lander that he was investigating the theft of a Music 6000 gift card and a black powder rifle. [RP 06/22/09 10].

(Lander) proceeded to tell me that these items he purchased from an individual out of the Centralia area, tried to give me directions. At that point, I stopped (Lander) and I explained to him that I didn't believe his story and I advised him of his Miranda³ rights.

[RP 06/22/09 10-11].

Lander acknowledged that he understood his rights and agreed to speak to DuPrey. [RP 06/22/09 12, 24]. Lander "again tried to elaborate" on his initial story; DuPrey again told him he didn't believe him.

We then began talking about the Music 6000 card, and he admitted that he did steal that item from a vehicle prowler, and then he agreed to help us recover the black powder rifle, at which point Deputy Snaza and him went outside. He stated it was out in the

³ Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

vehicle or some of the items he had were out in his vehicle.

[RP 06/22/09 13].

Snaza had asked Lander if he could speak to him outside, and he said yes. [RP 06/22/09 25, 32]. While outside, the deputy explained to

Lander

.... that my intent is not to take you to jail today, we're investigating vehicle prowls and we want to get that - - we want to find that black powder rifle and that I'm sure that he does not want his mother being in trouble for being in possession of that.

[RP 06/22/09 26].

I said that, you know, you're embarrassing yourself by lying and that your family knows you're lying, and if you're (sic) family knows, then I know, and, you know, it's time to do the right thing. So it was in that context.

[RP 06/22/09 32].

When Snaza and Lander came back inside, Lander retrieved the black powder rifle from behind the refrigerator in the kitchen and turned it over to the officers. [RP 06/22/09 14, 26].

Lander then agreed to go with the officers to the police station where he gave a recorded statement. [RP 06/22/09 14, 26-27].

Lander's grandmother and sister claimed that the two officers had accused Lander of committing crimes and told him that they would take

him to jail if he didn't tell them what they wanted to know [RP 06/22/09 35-37, 39-41], a claim both DuPrey and Snaza denied. [RP 06/22/09 18, 31]. Lander repeated the last claim, saying he was a "little intimidated" before he turned over the rifle because he did not want to go to jail. [RP 06/22/09 44-46].

03. Substantive Facts: Trial⁴

At its essence, this case flowed from two instances of alleged unlawful conduct on Mr. Lander's part, which resulted in the seven counts and two concomitant firearm enhancements.

03.1 Count I-IV: Theft of Firearm, Theft Second Degree Armed with Firearm, Trafficking First Degree Armed with Firearm, Unlawful Possession Firearm

On December 1 or 2, 2008, a firearm and other property were stolen (counts I-II, IV) from a truck belonging to Matthew Ware. [RP 16-17]. At trial, Ware identified the firearm, which he had fired on numerous occasions. [RP 16]. Lander was responsible for taking the firearm and giving it to his mother as a gift (count III). [RP 30, 45, 58, 60-61].

03.2 Count V-VII: Theft First Degree, Theft Second Degree, Trafficking First Degree

⁴ By order, the seven counts under both cause numbers were sequentially numbered for trial purposes, beginning with the four counts under cause number 09-1-00341-0. [CP 5 under cause number 09-1-00342-8].

On December 4, 2008, a wallet containing \$1,500 and a Music 6000 card and other items was stolen (counts V-VI) from a vehicle belonging to Carol Roden. [RP 41, 48, 56, 61]. Lander was responsible for taking the wallet, the Music 6000 card from which he gave to his bother as a gift (count VII). [RP 28-29].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE THAT LANDER COMMITTED THE OFFENSE OF THEFT IN THE SECOND DEGREE WHILE ARMED WITH A FIREARM, COUNT II.

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.

As charged and argued in this case, to convict Lander of theft in the second degree while armed with a deadly weapon, count II, the State, in part, had to prove beyond a reasonable doubt that Lander took property belonging to Matthew Ware that exceeded \$250 in value. This did not happen. While there were admissions that Lander had taken Ware's firearm, count I, the same cannot be said regarding the other property—Nikon range finder, binoculars, chain saw – RP 16-17—alleged missing by Ware, who identified only the firearm at trial.

02. EACH SET OF LANDER'S CONVICTIONS FOR THEFT OF A FIREARM AND UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE, COUNTS I AND IV, HIS CONVICTIONS FOR THEFT OF A FIREARM AND TRAFFICKING IN THE THE FIRST DEGREE, COUNTS I AND III, HIS CONVICTIONS FOR THEFT IN THE FIRST DEGREE AND THEFT IN THE SECOND DEGREE, COUNTS V AND VI, AND HIS CONVICTIONS FOR THEFT IN THE SECOND DEGREE AND TRAFFICKING IN THE FIRST DEGREE, COUNTS VI AND VII, VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

Article 1, section 9 of the Washington State
Constitution and the Fifth Amendment to the United States Constitution

provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). 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 629, 631, 965 P.2d 1072 (1998); See also State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. State v. Calle, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (citing State v. Calle, 125 Wn.2d at 780). 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).

Here, none of the offenses contains specific language authorizing separate punishments for the same conduct in relationship to respective paired offense. The offenses are thus not automatically immune from double jeopardy analysis. Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” Id. Under the facts of this case, it cannot be claimed that the offenses here at issue do not violate the prohibition against double jeopardy under this prong. See State v. Zumwalt, 119 Wn. App. 126, 130, 82 P.3d 672 (2003). The question is whether each offense, as charged and proved, includes elements not included in the other. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005); State v. Calle, 125 Wn.2d at 777.

Of course, the “same evidence” test is not always dispositive. Burchfield, 111 Wn. App. at 897. This court may 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. 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).

02.1 Counts I and IV: Theft of Firearm
and Unlawful Possession of a Firearm
Second Degree

The crime of theft of a firearm, count I, occurred in furtherance of the crime of unlawful possession of a firearm in the second degree, count IV: The commission of the former was required to prove the latter, with the result that it was incidental to the unlawful possession of a firearm and therefore merges into the offense. See State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

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02.2 Counts I and III: Theft of Firearm
and Trafficking First Degree

Similarly, the conviction for theft of a firearm, count I, occurred in furtherance of the crime of trafficking in the first degree, count III. The commission of the former was required to prove the latter, the item of which was the firearm, with the result that the offenses were incidental to one another and therefore merge into one another. See State v. Freeman, 153 Wn.2d at 778.

02.3 Counts V and VI: Theft First
and Theft Second

When viewed in terms of what was charged and proved, the evidence required to prove each crime was sufficient to warrant a conviction for the other, with the inescapable result that the two crimes constitute one offense under Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932); State v. Freeman, 153 Wn.2d at 777. The two convictions were the same in law and in fact, and because the legislature has not authorized separate punishment for the two crimes, double jeopardy bars Lander's conviction for both offenses.

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).⁵

Moreover, the money, count V, and the music card, count VI, were in the same wallet and taken at the same time, with the result that the offenses were incidental to one another and therefore merge into one another. See State v. Freeman, 153 Wn.2d at 778.

02.4 Counts VI and VII: Theft Second Degree and Trafficking First Degree

Finally, the conviction for theft in the second degree, count VI, occurred in furtherance of the crime of trafficking in the first degree, count VII. The commission of the former was required to prove the latter, the item of which was the music card that formed the basis for the theft conviction, with the result that the offenses were incidental to one

⁵ 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).

another and therefore merge into one another. See State v. Freeman, 153 Wn.2d at 778.

03. EACH SET OF LANDER'S CONVICTIONS FOR THEFT OF A FIREARM AND THEFT IN THE SECOND DEGREE, COUNTS I AND II, HIS CONVICTIONS FOR THEFT IN THE SECOND DEGREE AND UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE, COUNTS II AND IV, AND HIS CONVICTIONS FOR THEFT IN THE FIRST DEGREE AND THEFT IN THE SECOND DEGREE, COUNTS V AND VI, 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).

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03.1 Counts I and II: Theft of Firearm and Theft Second Degree

In sentencing Lander, the trial court calculated his offender score, in part, by counting his convictions for theft of a firearm and theft in the second degree, counts I and II, as separate offenses. [CP 100, 103, 110, 116].

“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 victim was the same, Matthew Ware. Additionally, 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 vehicle. Accordingly, the matter must be remanded for resentencing based on an offender score that does not include both convictions.

03.2 Counts II and IV: Theft Second and Unlawful Possession of a Firearm Second Degree

Similarly, in sentencing Lander, the trial court calculated his offender score, in part, by counting his convictions for theft in the second degree and unlawful possession of a firearm, counts II and IV, as separate offenses. [CP 100, 103, 115, 116].

These offenses also occurred at the same time and place and the property in each belonged to and was taken from Matthew Ware. The

same act accomplished both crimes and the purpose was the same: the theft of property from the vehicle, with the result that the matter must be remanded for resentencing based on an offender score that does not include both convictions.

03.3 Counts V and VI: Theft First and Theft Second

Finally, in sentencing Lander, the trial court calculated his offender score, in part, by counting his convictions for theft in the first degree and theft in the second degree, counts V and VI, as separate offenses. [CP 11, 14, 21-22 under cause number 09-1-00342-8].

These two offenses also occurred at the same time and place and the victim was the same, Carol Roden. The purpose was also the same: the theft of property from the Roden's vehicle, where the wallet containing the cash and music card was located. As with the above counts, the matter must be remanded for resentencing based on an offender score that does not include both convictions.

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04. LANDER WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE THAT HIS SET OF CURRENT CONVICTIONS THEFT OF A FIREARM AND THEFT IN THE SECOND DEGREE, COUNTS I AND II, HIS CONVICTIONS FOR THEFT IN THE SECOND DEGREE AND UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE, COUNTS II AND IV, AND HIS CONVICTIONS FOR THEFT IN THE FIRST DEGREE AND THEFT IN THE SECOND DEGREE, ENCOMPASSED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.⁶

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 trial counsel waived the issues set forth in the preceding section of this brief relating to the counting of Lander's current sets of convictions as separate offenses because he agreed with the standard range or failed to object to the sentence range [RP 07/16/09 6], 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 the argument for the reasons set forth in the preceding section.

⁶ 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.

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 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, Lander respectfully requests this court to reverse and dismiss his convictions and remand for resentencing consistent with the arguments presented herein.

DATED this 12th day of January 2010.

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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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