

No. 41707-3-II
(41717-1-II - Consolidated Case)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ENRIQUE RIVERA, JR.,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 09-1-02907-7
The Honorable Frederick Fleming, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR	2
III.	STATEMENT OF THE CASE	4
	A. SUBSTANTIVE FACTS	4
	1. <i>Spencer/ Kline Street Southwest Incident</i>	4
	2. <i>Menza/90th Street South Incident</i>	6
	3. <i>Kraut/78th Avenue Court East Incident</i>	6
	4. <i>Investigation</i>	8
	5. <i>Accomplice Testimony</i>	10
	6. <i>Defense Testimony</i>	11
	B. PROCEDURAL HISTORY	12
IV.	ARGUMENT & AUTHORITIES	14
	A. THE TRIAL COURT ERRED WHEN IT DENIED RIVERA'S MOTION TO DISMISS THE FIRST DEGREE BURGLARY CHARGE BECAUSE THE STATE DID NOT PROVE THAT RIVERA WAS "ARMED" DURING OR IN IMMEDIATE FLIGHT FROM THE BURGLARY AT MENZA'S HOME.	14
	B. RIVERA'S COUNSEL WAS INEFFECTIVE AT SENTENCING BECAUSE HE FAILED TO ASK THE COURT TO VACATE RIVERA'S POSSESSION OF A STOLEN FIREARM CONVICTION, AND HE FAILED TO REQUEST THAT THE COURT TREAT SEVERAL OF RIVERA'S CONVICTIONS AS THE SAME CRIMINAL CONDUCT.	20
	1. <i>Rivera's possession of a stolen firearm</i>	

conviction should have been vacated because a defendant cannot be convicted of both taking property and possession of that same property.21

2. Several of Rivera’s convictions encompass the “same criminal conduct” and should have been counted as one crime when calculating his offender score.....25

3. Both prongs of the Strickland test are met..... 27

V. CONCLUSION.....30

TABLE OF AUTHORITIES

CASES

<u>State v. Brown</u> , 162 Wn.2d 422, 173 P.3d 245 (2007)	17, 18, 20
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993)	21
<u>State v. Faille</u> , 53 Wn. App. 111, 766 P.2d 478 (1988)	16
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995).....	21
<u>State v. Haddock</u> , 141 Wn.2d 103, 3 P.3d 733 (2000).....	27
<u>State v. Hall</u> , 46 Wn. App. 689, 732 P.2d 524 (1987)	15, 16
<u>State v. Hancock</u> , 44 Wn. App. 297, 721 P.2d 1006 (1986).....	21, 22, 25
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987)	30
<u>State v. Melick</u> , 131 Wn. App. 835, 129 P.3d 816 (2006).....	21, 22, 23, 25
<u>State v. Mierz</u> , 127 Wn.2d 460, 901 P.2d 286 (1995)	20
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	15
<u>State v. Schelin</u> , 147 Wn.2d 562, 55 P.3d 632 (2002)	17
<u>State v. Speece</u> , 56 Wn. App. 412, 783 P.2d 1108 (1989).....	16, 17
<u>State v. Valdobinos</u> , 122 Wn.2d 270, 858 P.2d 199 (1993)	15
<u>State v. Walker</u> , 143 Wn. App. 880, 181 P.3d 31 (2008)	26
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	20

United States v. Gaddis,
424 U.S. 544, 96 S. Ct. 1023, 47 L. Ed. 2d 222 (1976)..... 23

OTHER AUTHORITIES

RCW 9.94A.510 29, 30

RCW 9.94A.515 29, 30

RCW 9.94A.525 28, 29

RCW 9.94A.589 26

RCW 9A.52.020 15

RCW 9A.56.020 26

RCW 9A.56.030 26

RCW 9A.56.310 27

U.S. Const. amd. VI 20

Wash. Const. art. I, § 22 (amend. x) 20

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to dismiss the first degree burglary charges against Enrique Rivera because the State did not prove that Enrique Rivera was “armed” with a firearm while in immediate flight from the burglaries.
2. The trial court erred when it found that a reasonable jury could conclude that Enrique Rivera was “armed in immediate flight from the residence as required to support the charge of Burglary 1” (Finding of Fact No. 16).
3. The State failed to prove that Enrique Rivera was “armed” with a firearm while in immediate flight from the burglary.
4. Enrique Rivera’s counsel provided ineffective assistance at sentencing.
5. Trial counsel provided ineffective assistance when he failed to request that Enrique Rivera’s possession of a stolen firearm conviction be vacated.
6. Trial counsel provided ineffective assistance when he failed to request that two pairs of Enrique Rivera’s first degree theft and theft of a firearm convictions be treated as same criminal conduct.
7. Trial counsel provided ineffective assistance when he failed

to request that Enrique Rivera's possession of a stolen firearm and possession of stolen property convictions be treated as same criminal conduct.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the only firearm present during the burglary belonged to the victim homeowner; where the trial court found that the firearm was loot; and where the trial court found that Enrique Rivera was not "armed" for the purpose of the firearm sentence enhancement, did the trial court err when it concluded that Enrique Rivera was "armed" for the purpose of the first degree burglary charges? (Assignments of Error 1 & 2)
2. Where the evidence established only that Enrique Rivera and/or the co-participants in the burglary removed a shotgun from under the victim homeowner's bed, then removed it from the home and placed it in the trunk of an SUV along with other "loot" taken from the home, did the State fail to prove an intent or willingness to use the firearm, and therefore fail to prove a nexus between the shotgun and the burglary? (Assignment of Error 3)
3. Was trial counsel's representation at sentencing ineffective

where he failed to ask the court to vacate Enrique Rivera's possession of a stolen firearm conviction, and he failed to request that the court treat several of Rivera's convictions as the same criminal conduct? (Assignments of Error 4, 5, & 6)

4. Where the law states that a defendant cannot be convicted and sentenced for both stealing and possessing the same property, should Enrique Rivera's possession of a stolen firearm conviction be vacated, where he was also convicted of stealing the same firearms? (Assignments of Error 4 & 5)
5. Where each pair of Enrique Rivera's theft of a firearm offenses and first degree theft offenses occurred at the same time and place and against the same homeowner victims, and each offense requires the same objective criminal intent, should each pair of theft of a firearm and first degree theft offenses have been treated as the same criminal conduct? (Assignments of Error 4 & 6)
6. Where Enrique Rivera's possession of a stolen firearm offense and his possession of stolen property offense occurred at the same time and place and against the same homeowner victims, and each offense requires the same objective criminal intent, should the two offenses have been

treated as the same criminal conduct? (Assignments of Error 4 & 7)

III. STATEMENT OF THE CASE

This case arises from burglaries committed at three Pierce County homes over a two-day period in June of 2009, by a group of five to six young men. The men took personal items, electronic items, jewelry, and firearms. They retained certain items, and sold or attempted to sell others. The men were eventually arrested and charged in connection with the burglaries. Two of the men, Gerardo Marin-Andres and Griego Escalante, pleaded guilty to lesser charges in exchange for their testimony at trial against Enrique Rivera, Jr., Nelson Hernandez, and Jason Delacruz. Following a joint trial, a jury convicted Rivera, Hernandez and Delacruz each with multiple crimes, and their cases have been consolidated on appeal.

A. SUBSTANTIVE FACTS

1. *Spencer/ Kline Street Southwest Incident*

Sara Spencer lives with her son in a house on the 109-block of Kline Street Southwest in Lakewood, Washington. (TRP 123-

24)¹ On the morning of June 8, 2009, her house was burglarized while she was at work and her son was at school. (TRP 125-26) The burglars broke through her front door and rifled through her closets and drawers. (TRP 127, 129-30) They left with a digital camera, several DVD movies, a laptop computer, Wii and V.Smile electronic game systems, game cartridges and discs for the systems, and other miscellaneous personal items. (TRP 128, 138, 139, 143, 145, 146)

That same morning, school bus driver Susan Pernell observed a dark-colored SUV stopped improperly at an intersection. (TRP 109, 110) The two men in the SUV waved for her to go, so she proceeded through the intersection and then stopped to pick up a student. (TRP 109, 110) As she waited for the student, she noticed the SUV stop in front of Spencer's house, where she saw three men come out from behind a row of tall bushes in the front yard. (TRP 113-14) She saw the men place several items into the back of the SUV, get into the SUV, and then drive away. (TRP 116) Because these activities seemed suspicious, Pernell made a note of the SUV's license plate number.

¹ Citation to the consecutively paginated trial transcripts (in volumes labeled I through XVIII) will be to "TRP." Citation to the sentencing hearing on January 21, 2011 will be to "01/21/11 RP."

(TRP 116)

2. *Menza/90th Street South Incident*

Iolani Menza lives on the 300-block of 90th Street South in Lakewood. (TRP 159-60) On the morning of June 8, 2009, Menza's home was burglarized while he and his son were at a restaurant having breakfast. (TRP 160, 161) The front door appeared to have been kicked in, and certain areas of the house had been ransacked. (TRP 162, 164) The burglars left with a vintage ukulele, a Wii electronic game system and games, an iPod, a Coach purse, a camera, a cell phone, a computer CPU tower, and several other small items. (TRP 165-66, 168, 169)

The mattress in the master bedroom had been flipped over. (TRP 170) The burglars had taken a 20 gauge shotgun that Menza stored in a green soft-sided case underneath the mattress. (TRP 170-71, 172)

3. *Kraut/78th Avenue Court East Incident*

Joseph Kraut is a Washington State Patrol Trooper who lives in a house on the 78th Avenue Court East cul-de-sac in Graham, Washington. (TRP 182, 255, 256) Around noon on June 9, 2009, Kraut's home was burglarized while he and his wife were away on a cruise. (TRP 256, 203) The burglars appeared to have entered the

home by breaking through exterior and interior garage doors. (TRP 192, 365-66) The burglars ransacked the home, and apparently dumped pet food over the floors and discharged pepper spray in an effort to subdue Kraut's dogs. (TRP 261, 283-85, 368, 454, 656, 657) The burglars took jewelry, an autographed Green Bay Packers jacket, and baseball cards. (TRP 267, 276)

The burglars also took a large safe that had been hidden under some blankets and pillows in the master bedroom. (TRP 259, 261, 293-94) The safe contained jewelry, Kraut's social security card, a taser, a stamp collection, and spare keys. (TRP 259) It also contained several firearms, including Kraut's .4 caliber duty revolver, a .357 caliber revolver, a 9mm Beretta, a .357 Ruger, a .22 Ruger and a .25 caliber pistol. (TRP 262-66) The guns were not loaded, though magazines for some of the guns were also stored in the safe. (TRP 266) The safe was secured with both a key lock and combination lock. (TRP 292, 293) There were no markings on the outside of the safe that might have indicated what the contents of the safe were. (TRP 297)

Kraut's neighbors noticed two suspicious cars in the cul-de-sac that day; a dark colored SUV and a tan or beige colored sedan. (TRP 185-86, 187, 202, 203, 226) The occupants were young

Hispanic men and one Hispanic woman. (TRP 186, 188, 204, 225, 226) One neighbor saw two of the men approach Kraut's front door and try unsuccessfully to open it. (TRP 227, 228) The men then hopped over Kraut's fence and went into his yard. (TRP 229) The neighbor recognized Hernandez, Rivera and Delacruz as being at Kraut's house that day. (TRP 231-33)

4. *Investigation*

Lakewood police talked to the school bus driver and obtained the license plate number for the dark SUV she saw parked in front of Spencer's home. (RP 116, 386) They also obtained footage from the school bus' surveillance camera, which showed a dark colored SUV pull up in front of Spencer's house and several men getting into the SUV before it pulled away. (TRP 117, 448-49)

Police obtained the name and address of the SUV's registered owner, and also learned that a man named Gerardo Marin-Andres was in the same SUV when he was recently stopped and cited for driving with a suspended license. (TRP 387, 388) Police went to the registered address and saw the SUV parked outside, then attempted to contact the residents. (TRP 397, 397) Marin-Andres was present and talked to the police. (TRP 394) He admitted his involvement in the burglaries and implicated five other

men. (TRP 394, 488, 489, 490, 492-93)

Police obtained a search warrant for Marin-Andres' home, and discovered a computer CPU, a laptop computer, and shotgun shells. (TRP 332, 398-99, 400) Police also executed a search warrant at another residence in connection with their investigation and found a Green Bay Packers jacket, a taser and several firearms, including a 20 gauge shotgun in a green nylon case. (TRP 346-47, 348, 418-19, 434)

Police also went to B&I Coin Shop in Lakewood, and obtained a receipt indicating that Marin-Andres sold several pieces of jewelry matching those taken from Kraut. (TRP 244, 245, 247, 355, 356) Video surveillance shows Marin-Andres and several other men, including Delacruz, at the store in the afternoon of June 9, 2009.² (TRP 289-90, 355, 357, 359, 501, 502, 507; Exh. 114)

Police detained and interviewed Rivera, who admitted during questioning that he was present at the three burglaries and took property from the homes, but was not involved in selling any of the property. (TRP 499, 535, 536, 538)

² Surveillance photos show one man with a large distinctive tattoo on his back. (TRP 501) Delacruz has a similar tattoo on his back. (TRP 502, 507; Exh. 135)

5. *Accomplice Testimony*

In exchange for their prosecution testimony, Gerardo Marin-Andres and Griego Escalante reduced their potential maximum sentences from over 400 months and 200 months respectively, down to 57 months each. (TRP 564-65, 600, 601, 673) Marin-Andres testified that he drove his cousin, Gregorio Andres, Enrique Rivera, Nelson Hernandez and Jason Delacruz to Lakewood on the morning of June 8, 2009. (TRP 561, 564, 567)

The chose the target houses randomly. (TRP 568, 572) The men knocked on the front door of each of the houses to see if anyone was home and, when there was no response, they broke down a door and entered the houses. (TRP 568, 569) Marin-Andres parked his car nearby and acted as a lookout, and waited for the other men to call when they were ready to be picked up. (TRP 568, 569, 574, 575) After each break-in, the men returned to Marin-Andres' car and placed items into the trunk of the SUV. (TRP570, 575) The men split the loot once they returned home, and sold several items that evening. (TRP 577, 578, 579, 594)

The next day, Escalante joined the group and either he or Marin-Andres suggested they target a house in Graham. (TRP 580, 581-82, 622, 640, 650, 682) They drove to Graham in two

cars, the SUV and a tan sedan. (TRP 582, 583-84, 648) The men followed the same process as the day before. (TRP 584, 585) This time, however, while the other men were in the home, Marin-Andres' phone stopped working so he drove home instead of waiting around. (TRP 588, 589)

Escalante testified that Rivera found Kraut's safe and carried it to the car with Andres' help. (TRP 658, 659-60) They had no idea what was in the safe, but assumed it contained valuables. (TRP 676) Once they returned to Andres' house, they were able to open the safe and discover its contents. (TRP 661) They sold several guns and pieces of jewelry, and split the proceeds. (TRP 662, 663, 671)

6. *Defense Testimony*

Jason Delacruz denied any involvement in the burglaries, but admitted to being at B&I Coin Shop when the jewelry was sold. (TRP 752, 755) But he did not know the items were stolen. (TRP 753-54)

Enrique Rivera admitted his involvement in the Graham burglary. (TRP 735-36) He took the safe from Kraut's home, and participated in the sale of the jewelry. (TRP 739, 740) Rivera testified he was not involved with the Lakewood burglaries. (TRP

736, 740) He believes he was drunk and asleep at the time. (TRP 737) When questioned by the defense before trial, Marin-Andres also said that Rivera was “passed out” in the back of the SUV during the Lakewood burglaries, but changed his story when he testified for the prosecution. (TRP 608, 612)

B. PROCEDURAL HISTORY

The State charged Rivera with 13 crimes in connection with the three burglaries:

COUNT	CRIME CHARGED	INCIDENT
1	First Degree Burglary	Menza/90th St.
2	Residential Burglary	Menza/90th St.
4	First Degree Theft	Menza/90th St.
5	Theft of a Firearm	Menza/90th St.
8	Residential Burglary	Spencer/Kline St.
9	First Degree Theft	Spencer/Kline St.
10	First Degree Burglary	Kraut/78th Ave. Ct.
11	Residential Burglary	Kraut/78th Ave. Ct.
12	Theft of a Firearm	Kraut/78th Ave. Ct.
13	Possession of a Stolen Firearm	Kraut/78th Ave. Ct.
14	First Degree Theft	Kraut/78th Ave. Ct.
15	Possession of Stolen Property	Kraut/78th Ave. Ct.
16	Trafficking in Stolen Property	Kraut/78th Ave. Ct.

(CP 12-17) For counts 1 and 10, the State alleged that Rivera and/or an accomplice were armed with a firearm during or in flight from the crime, thus elevating the crime to first degree burglary.

(CP 12, 14) The State also alleged that Rivera and/or an accomplice was armed with a firearm during commission of counts

1, 4, 10 and 15, for the purposes of a firearm sentence enhancement. (CP 12-17)

After the State rested its case-in-chief, Rivera moved to dismiss the firearm enhancement allegations, arguing that a burglar is not "armed" for the purposes of the enhancement unless he takes some action to indicate the firearm is more than simply "loot." (TRP 698-705; CP 21-25) The trial court agreed, and found an insufficient nexus existed between the stolen firearms and the burglaries. (RP 728; CP 163)

Rivera also argued that this lack of a nexus also defeated the first degree burglary charges because they were based on the defendants being "armed" with the stolen firearms. (TRP 728-29) The trial court rejected this argument, however, and refused to dismiss the first degree burglary charges. (TRP 730; CP 163)

The jury found Rivera guilty on all counts except: for count 9, the jury found Rivera not guilty of first degree theft of the Spencer home, but guilty instead of the lesser crime of second degree theft; and for count 10, the jury found Rivera not guilty of first degree burglary of the Kraut home. (CP 122-35; TRP 865-66)

At sentencing, Rivera again argued that the first degree burglary should be dismissed because he was not "armed" during

or in flight from the crime, but the court disagreed. (01/21/11 RP 11-13; CP 163)

However, the State conceded that count 2, residential burglary, merges with count 1, first degree burglary, and that count 15, possession of stolen property, merges with count 14, first degree theft. (01/21/11 RP 4-5) The State asserted that the remaining charges did not merge and were not the same criminal conduct. (01/21/11 RP 6-7) The State calculated Rivera's offender score for the most serious offense, first degree burglary, at 11 points and his standard range as 87-116 months. (01/21/11 RP 4-5; CP 146) Rivera's counsel did not dispute his offender score, and the trial court sentenced him to 116 months of confinement. (01/21/11 RP 18-19; CP 149, 140-42)

This appeal timely follows. (CP 136)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT ERRED WHEN IT DENIED RIVERA'S MOTION TO DISMISS THE FIRST DEGREE BURGLARY CHARGE BECAUSE THE STATE DID NOT PROVE THAT RIVERA WAS "ARMED" DURING OR IN IMMEDIATE FLIGHT FROM THE BURGLARY AT MENZA'S HOME.

The State charged Rivera in count 1 with first degree burglary of the Menza home. (CP 12) A necessary element of burglary in the first degree is that the defendant was armed with a

deadly weapon during the commission of the burglary. RCW 9A.52.020(1)(a). A defendant is "armed with a deadly weapon" for the purposes of first degree burglary if a firearm is "easily accessible and readily available for use by the defendant for either offensive or defensive purposes." State v. Hall, 46 Wn. App. 689, 695, 732 P.2d 524 (1987) (quoting State v. Sabala, 44 Wn. App. 444, 448, 723 P.2d 5 (1986)).

The same definition of "armed" applies when determining whether a person is "armed" for the purposes of a deadly weapon or firearm sentence enhancement. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993) (citing Sabala, 44 Wn. App. at 448). In this case, the State failed to prove that Rivera or a co-participant was armed with the shotgun during or in flight from the robbery at the Menza house.³

In State v. Hall, the defendant argued that possession of a firearm taken in the course of a burglary did not constitute being "armed with a deadly weapon" for purposes of first degree burglary.

³ Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

46 Wn. App. at 690. The defendant had transported unloaded guns and ammunition to the trunk of a car. The court held that the guns stolen by the defendant were easily accessible and available while he was in the residence or transporting them to the car. 46 Wn. App. at 695. The court also noted that the defendant's mere possession of a firearm and present ability to use it was sufficient to show that he was armed with a deadly weapon. 46 Wn. App. at 695–96.

In State v. Faille, the court affirmed a first degree burglary conviction, holding that guns were readily accessible and available for use during the burglary because the defendant had removed them from the residence and placed them in nearby bushes. 53 Wn. App. 111, 113, 766 P.2d 478 (1988).

Similarly, in State v. Speece, the court affirmed the defendant's first degree burglary conviction where he took two guns during a burglary. 56 Wn. App. 412, 417, 783 P.2d 1108 (1989). The court rejected the defendant's argument that the State's evidence was insufficient because there was no evidence as to the manner in which the guns were stolen or how they were transported. 56 Wn. App. at 418. The court held that "no analysis of Speece's willingness or present ability to use the guns is

necessary.” 56 Wn. App. at 418 (citing Hall, 46 Wn. App. at 695).

However, these cases predate State v. Schelin, 147 Wn.2d 562, 55 P.3d 632 (2002), and State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007), where our State Supreme Court refined and clarified what the State must prove in order to establish that a defendant is “armed.” In Schelin, the Court held that the mere presence of or access to a weapon is insufficient to establish that a defendant is “armed.” Rather, the State must also show a “nexus between the weapon and the defendant and between the weapon and the crime.” 147 Wn.2d at 568. In determining whether the nexus requirement is met, the Court explained that “[o]ne should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found[.]” 147 Wn.2d at 570.

In Brown, the Court applied the nexus requirement to *both* a first degree burglary charge *and* a firearm sentence enhancement. 162 Wn.2d at 430, 432. In that case, the evidence established that the defendants moved a rifle from a closet to a bed, along with other property, then fled the home empty-handed when the homeowner unexpectedly returned. 162 Wn.2d at 430-31, 432. The Court reversed both the burglary conviction and its firearm

enhancement because the State failed to prove a nexus between the firearm and the burglary, and therefore failed to prove that Brown was “armed.” 162 Wn.2d at 432, 435

The Brown Court rejected the idea that mere possession of a gun taken during a burglary is sufficient to establish that a defendant is armed, because “[s]howing that a weapon was accessible during a crime does not necessarily show a nexus between the crime and the weapon.” 162 Wn.2d at 432.

The Court held instead that there was no nexus between the firearm and the burglary because there was no evidence “that Brown or his accomplice handled the rifle on the bed at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime.” Brown, 162 Wn.2d at 432.

Therefore, in order to prove that a defendant is “armed” for the purpose of either a firearm enhancement or a first degree burglary charge, there must be a nexus between the firearm and the burglary, which is established with evidence of a defendant’s intent or willingness to use the firearm. Brown, 162 Wn.2d at 432, 433-34.

The trial court in this case correctly concluded that the “evidence presented does not establish a nexus between the

weapons and the crimes charged” for the purposes of the firearm enhancement allegations. (CP 163; TRP 724-25, 728, 730) But the trial court refused to apply the nexus standard to a determination of whether Rivera was “armed” for the purposes of the first degree burglary charges. (TRP 729-30; CP 163) The court allowed those charges to go to the jury, and subsequently entered a judgment and sentence on the first degree burglary conviction relating to the Menza home (count 1). (TRP 729-30; CP 163, 145, 149) The trial court erred because, if there is an insufficient nexus to support a firearm enhancement, there is an insufficient nexus to support a first degree burglary conviction.

Furthermore, there was no evidence that Rivera or any of his co-participants handled Menza’s shotgun in a manner evidencing an intent or willingness to use it in furtherance of the burglary. There is no evidence that any of the participants opened the green nylon case during or in flight from the burglary. The case containing the shotgun was placed into the trunk of the SUV, along with all of the other stolen items, and not in the passenger compartment where it would be more easily accessible. (TRP 113-14, 570, 571) In fact, the trial court specifically concluded that “[a] reasonable jury could find that the [shotgun] constituted loot[.]” (CP

162) As in Brown, the participants' behavior indicates that the shotgun was simply "regarded as nothing more than valuable property." 162 Wn.2d at 432.

Just as there was insufficient evidence to prove a nexus between the shotgun and the burglary for the purpose of the firearm sentence enhancements, there was insufficient evidence to prove a nexus for the purpose of Rivera's first degree burglary conviction. This conviction should be stricken, and judgment entered instead on the residential burglary conviction charged in count 2, which the trial court merged with count 1 at sentencing. (01/21/11 RP 19; CP 146)

B. RIVERA'S COUNSEL WAS INEFFECTIVE AT SENTENCING BECAUSE HE FAILED TO ASK THE COURT TO VACATE RIVERA'S POSSESSION OF A STOLEN FIREARM CONVICTION, AND HE FAILED TO REQUEST THAT THE COURT TREAT SEVERAL OF RIVERA'S CONVICTIONS AS THE SAME CRIMINAL CONDUCT.

Effective assistance of counsel is guaranteed by both the United States and Washington State constitutions. U.S. Const. amd. VI; Wash. Const. art. I, § 22 (amend. x); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel

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); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

1. *Rivera's possession of a stolen firearm conviction should have been vacated because a defendant cannot be convicted of both taking property and possession of that same property.*

The trial court entered judgment against Rivera for both theft of a firearm (count 12) and possession of a stolen firearm (count 13) in connection with the Kraut burglary. (CP 146, 149) But a conviction for both taking and possessing the same firearm is improper.

Beyond merger and the constitutional protections against double jeopardy, where a party is a principal thief, he or she may not also be convicted of receiving or possessing stolen goods. State v. Melick, 131 Wn. App. 835, 840-41, 129 P.3d 816 (2006); State v. Hancock, 44 Wn. App. 297, 300-01, 721 P.2d 1006 (1986).

The underlying reasoning is that a person may not take from another and give possession to himself. Melick, 131 Wn. App. at 843. In instances where the acts of both stealing and possessing or receiving the stolen item are charged and a conviction results, the trial court should vacate one of the convictions before sentencing. Melick, 131 Wn. App. at 843-44; Hancock, 44 Wn. App. at 301-02.

For example, in Hancock, the defendant worked with an accomplice to steal cases of cheese from a local government agency. 44 Wn. App. at 299. He was convicted of first degree theft and first degree possession of stolen property. 44 Wn. App. at 300. On appeal, Hancock argued that the trial court should have dismissed the possession charge. 44 Wn. App. at 300. The court reversed the possession conviction, holding that “one cannot be both the principal thief and the receiver of stolen goods.” 44 Wn. App. at 301. ““And this is so for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken.”” 44 Wn. App. at 301 (quoting State v. Flint, 4 Wn. App. 545, 547, 483 P.2d 170 (1971) (quoting Milanovich v. United States, 365 U.S. 551, 558, 5 L. Ed. 2d 773, 81 S. Ct. 728 (1961) (Frankfurter, J., dissenting))).

In Melick, the defendant was charged with and convicted of two crimes: taking a motor vehicle and possession of stolen property (the motor vehicle). 131 Wn. App. at 838. Both convictions arose out of the same act. 131 Wn. App. at 838. On appeal, the court applied the Hancock rule, and found that both convictions could not stand. 131 Wn. App. at 840-841 (citing Hancock, 44 Wn. App. at 301). The Melick court noted that “when the evidence does not support a possession separate in time or by actor from the original theft, only the theft conviction may stand.” 131 Wn. App. at 843.⁴

This rule has also been applied in the bank robbery context. See United States v. Gaddis, 424 U.S. 544, 547, 96 S. Ct. 1023, 47 L. Ed. 2d 222 (1976), wherein the Court held that a person convicted of robbing a bank cannot also be convicted of receiving or possessing the proceeds of that robbery.

In this case, the State charged Rivera with theft of a firearm from Kraut’s home (count 12), and also with possessing a firearm

⁴ The court noted that the State may charge both theft or robbery and possession arising out of the same act, but that the jury must be instructed that if it finds that the defendant committed the taking crime, it must stop and not reach the possession charge. Only if the fact finder does not find sufficient evidence of the taking can it go on to consider the possession charge. Melick, 131 Wn. App. at 841. If the jury is not properly instructed, as in this case, then the remedy is to vacate the possession charge. Melick, 131 Wn. App. at 842, 844.

stolen from Kraut (count 13). (CP 15) Rivera was therefore convicted and sentenced for both taking and possessing the same property.

At sentencing, the prosecutor conceded that Rivera's possession of stolen property (count 15) and first degree theft convictions (count 14) connected to the Kraut burglary should merge, because "there's case law that an individual cannot be thief and possessor of the same stolen property." (01/21/11 RP 4) But the prosecutor asserted that the case law did not preclude conviction and sentence for theft of a firearm and possession of a firearm in this case because there were multiple firearms, and "[t]he jury was not asked and did not return a verdict that specified which firearms they found Mr. Rivera guilty of . . . so it is absolutely conceivable that the jury is finding him guilty of theft of one of the firearms and guilty of possession of a separate stolen firearm." (01/21/11 RP 6)

This assertion is absurd. The evidence established that Rivera assisted in removing the safe from Kraut's home. (TRP 658, 659-60, 738) The safe contained all of the firearms stolen from Kraut's home. (TRP 259) Any firearm that Rivera later possessed was in that safe when it was taken from Kraut's home. It would be

impossible for any rational trier of fact to find that Rivera possessed a firearm that he did not also assist in stealing.

In Hancock, the court vacated the possession conviction even though the defendant continuously possessed the goods for 24 days after the theft, because the defendant constructively possessed the stolen cheese, and therefore exercised dominion and control, while he and a co-participant attempted to procure a buyer. 44 Wn. App. at 301-02. Similarly here, even though the possession continued over several days, Rivera constructively possessed the stolen firearms while he and his co-participants attempted to and did procure buyers. (TRP 596, 597661, 663) Accordingly, as in Hancock, the possession was not separate in time or by actor from the original theft.

“When the defendant is convicted of both taking and possession, the proper remedy is to dismiss the possession charge[.]” Melick, 131 Wn. App. at 842. Accordingly, Rivera’s conviction for possession of a stolen firearm (count 13) should be vacated. Melick, 131 Wn. App. at 844.

2. *Several of Rivera’s convictions encompass the “same criminal conduct” and should have been counted as one crime when calculating his offender score.*

If “some or all of the current offenses encompass the same

criminal conduct[,] then those current offenses shall be counted as one crime.” RCW 9.94A.589(1)(a). “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). “Intent in this context means the defendant's objective criminal purpose in committing the crime.” State v. Walker, 143 Wn. App. 880, 891, 181 P.3d 31 (2008).

First, Rivera's theft of a firearm conviction (count 5) and his first degree theft conviction (count 4) in connection with the Menza burglary are the same criminal conduct. Similarly, Rivera's theft of a firearm conviction (count 12) and his first degree theft conviction (count 14) in connection with the Kraut burglary are the same criminal conduct. Each pair of convictions occurred at the same time and place and against the same homeowner victims.

RCW 9A.56.030(4) states that “[t]he definition of 'theft' and the defense allowed against the prosecution for theft under RCW 9A.56.020 shall apply to the crime of theft of a firearm.” “Theft” means “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(a). Accordingly, each pair of convictions also involved

the same criminal intent—the “intent to deprive” the owner of property.

Second, Rivera’s possession of a stolen firearm conviction (count 13) and his possession of stolen property conviction (count 15) in connection with the Kraut burglary are also the same criminal conduct.⁵ Both crimes occurred at the same time and place and against the same victim, Kraut. And RCW 9A.56.310(4) states that “[t]he definition of ‘possessing stolen property’ and the defense allowed against the prosecution for possessing stolen property under RCW 9A.56.140 shall apply to the crime of possessing a stolen firearm.” Therefore, “possession of stolen property and possession of stolen firearms share the mental element defined in RCW 9A.56.140 because the Legislature specifically so provided[.]” State v. Haddock, 141 Wn.2d 103, 3 P.3d 733 (2000).

3. *Both prongs of the Strickland test are met.*

Counsel’s representation was deficient when he failed to challenge the State’s offender score calculation by requesting that the possession of a stolen firearm conviction be vacated and that the specified convictions were the same criminal conduct. There

⁵ As argued in section IV.B.1 above, the possession of a stolen firearm conviction in count 13 should be vacated. This argument is presented in the event that this Court disagrees.

was no tactical reason for not asserting these challenges to the offender score, and no reason why these arguments should not have been made at sentencing.

The deficient performance was prejudicial because Rivera's offender score and corresponding standard range would have been several points lower, and would have resulted in a significantly shorter sentence.

Using Rivera's most serious offense, first degree burglary in count 1, the State calculated Rivera's offender score as follows:

COUNT	CRIME	POINTS
1	First Degree Burglary	0 (most serious off.)
2	Residential Burglary	0 (merged with ct. 1)
4	First Degree Theft	1
5	Theft of a Firearm	1
8	Residential Burglary	2 (x2 multiplier) ⁶
9	First Degree Theft	1
11	Residential Burglary	2 (x2 multiplier)
12	Theft of a Firearm	1
13	Possession of a Stolen Firearm	1
14	First Degree Theft	1
15	Possession of Stolen Property	0 (merged with ct. 14)
16	Trafficking in Stolen Property	1
TOTAL POINTS		11

(CP 141, 146; 01/21/11 RP 4-6) With an offender score of 11, Rivera's standard range is 87 to 116 months. (CP 141, 146;

⁶ When an offender is sentenced for a first degree burglary conviction, all other adult residential burglary convictions shall count as two points each. RCW 9.94A.525(10).

01/21/11 RP 5) The trial court sentenced Rivera to the maximum allowable 116 months. (01/21/11 RP 18; CP 149)

If Rivera's offender score is calculated using residential burglary as the most serious offense (because, as argued above, the first degree burglary conviction should be vacated) and the remaining convictions had been properly vacated or counted as same criminal conduct as argued above, then his offender score is calculated as follows:

COUNT	CRIME	POINTS
1	First Degree Burglary	0 (vacated)
2	Residential Burglary	0 (most serious off.)
4	First Degree Theft	1
5	Theft of a Firearm	0 (scc as count 4)
8	Residential Burglary	2 (x2 multiplier) ⁷
9	First Degree Theft	1
11	Residential Burglary	2 (x2 multiplier)
12	Theft of a Firearm	0 (scc as count 14)
13	Possession of a Stolen Firearm	0 (vacated or s.c.c. as count 15)
14	First Degree Theft	1
15	Possession of Stolen Property	0 (merged with ct. 14)
16	Trafficking in Stolen Property	1
TOTAL POINTS		8

With an offender score of eight, Rivera's standard range becomes 53 to 70 months. See RCW 9.94A.510, .515.

⁷ When an offender is sentenced for a residential burglary conviction, all other adult residential burglary convictions shall count as two points each. RCW 9.94A.525(16).

When comparing the two calculations, it is clear that counsel's inattention at sentencing prejudiced Rivera because he would have received a sentence at least 46 months (almost 4 years) shorter than the one imposed using the State's incorrect calculations.⁸ There is, therefore, a "reasonable probability that but for counsel's unprofessional errors, the result would have been different." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987).

V. CONCLUSION

The trial court's ruling that the State did not establish a nexus between the shotgun and the Menza burglary for the purposes of a firearm sentence enhancement should have also been applied to Rivera's first degree burglary conviction. The State did not establish that Rivera was "armed" during the burglary, and his first degree burglary conviction should be vacated.

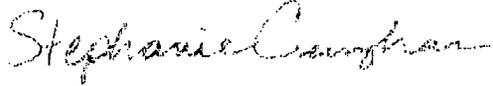
Moreover, Rivera's offender score calculation is incorrect because his possession of a firearm conviction should have been vacated because it involved possessing the same firearms that he stole from Kraut, and because the various possession and theft

⁸ Rivera's standard range would be 77 to 102 months if the first degree burglary conviction is not vacated and is used as the most serious offense. RCW 9.94A.510, .515. This would still result in a shorter sentence.

convictions should have been counted as the same criminal conduct. Rivera received ineffective assistance at sentencing because counsel failed to raise these issues. If counsel had done so, Rivera would have received a shorter sentence.

This court should reverse and remand this case to the trial court with directions to vacate Rivera's first degree burglary and possession of a stolen firearm convictions, and to recalculate Rivera's offender score and resentence him within his correct standard range.

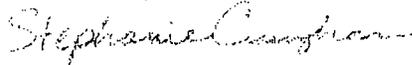
DATED: September 7, 2011



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Enrique Rivera, Jr.

CERTIFICATE OF MAILING

I certify that on 09/07/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Enrique Rivera, Jr., DOC#346578, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

September 07, 2011 - 1:08 PM

Transmittal Letter

Document Uploaded: 417073-Appellant's Brief.pdf

Case Name: State v. Enrique Rivera, Jr.

Court of Appeals Case Number: 41707-3

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

▪ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: S C Cunningham - Email: sccattorney@yahoo.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us