

No. 41707-3-II
(Consolidated cases)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NELSON G. HERNANDEZ,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Frederick W. Fleming, Judge

OPENING BRIEF OF APPELLANT HERNANDEZ

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A. ASSIGNMENTS OF ERROR

1. The conviction for first-degree burglary must be reversed because there was insufficient evidence to prove an essential element of that crime. In addition, as a result, the trial court erred in refusing to dismiss the first-degree burglary charges.

2. Hernandez assigns error to Finding of Fact 16, which provides:

These defendants knew that the green soft rifle case that was stolen from the Menza residence contained a gun and they were armed in immediate flight from the residence as required to support the charge of burglary 1.

CP 680.¹

3. Hernandez assigns error to “Conclusion of Law” 8, which provides:

The evidence presented does establish that the above named defendants were armed with a deadly weapon in immediate flight from the Menza and Kraut residences for the purpose of [the] Burglary in the First Degree charge[s].

CP 681.

4. The state and federal constitutional rights of appellant Nelson Hernandez to be free from double jeopardy were violated when he was convicted of multiple crimes for the very same act.

5. Hernandez was deprived of his Sixth Amendment and Article I, § 22, rights to effective assistance of counsel.

6. Pursuant to RAP 10.1(g), Hernandez adopts and incorporates herein by reference the arguments and authorities submitted on behalf of his codefendants.

¹The same findings and conclusions were filed in the case of codefendant Rivera, who filed a supplemental designation of clerk’s papers for that document. In an abundance of caution, in addition to referring to the clerk’s papers pages based upon Rivera’s supplemental designation, Hernandez is filing a similar supplemental designation herewith.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove Hernandez guilty of first-degree burglary as charged, the prosecution had to show that he was “armed” with a deadly weapon either during the crime or in immediate flight therefrom. A person is not “armed” with a firearm simply because there is a firearm present at a crime and instead there must be evidence that the defendant in some way used or showed a willingness or intent to use the weapon as part of the crime. Was the evidence completely insufficient and did the court err in failing to dismiss a conviction for first-degree burglary where the only evidence was that the defendants took a gun as part of the “loot” they acquired during a burglary but neither took the gun out of its zippered case nor handled it in any way indicating an intent or willingness to use the gun during or in immediate flight from the crime?
2. Did the trial court further err in entering findings and conclusions which declared that the defendant was “armed” in immediate flight from the residence where there was no evidence to support that conclusion?
3. Hernandez was convicted of both residential burglary and first-degree burglary for the very same burglary of the very same house. Were his rights to be free from double jeopardy violated by these multiple convictions for the same offense?
4. Counsel failed to argue for dismissal of a charge which should have been dismissed and did not argue that the court should treat certain convictions as the “same criminal conduct” for the purposes of sentencing. Was counsel prejudicially ineffective?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Nelson G. Hernandez was charged by second amended information with two counts of first-degree burglary (each with a firearm enhancement), three counts of residential burglary, three counts of first-degree theft, two counts of theft of a firearm, two counts of second-degree unlawful possession of a firearm, possession of a stolen firearm, first-

degree possession of stolen property with a firearm enhancement, and first-degree trafficking in stolen property. CP 179-85; RCW 9.41.010; RCW 9.41.040; RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.530; RCW 9A.52.020(1)(a); RCW 9A.52.025; RCW 9A.56.020(1)(a); RCW 9A.56.030(1)(a); RCW 9A.56.140(1); RCW 9A.56.150(1); RCW 9A.56.300(1)(a); RCW 9A.82.050(1).

After pretrial proceedings were held before the Honorable Judges Vicki Hogan, James Orlando, Thomas Felnagle, Linda CJ Lee and Katherine Stolz, trial was held before the Honorable Frederick Fleming on October 4-7, 11-14, 21, 25-26, 28-29, and November 1, 2010.² The court dismissed all of the Hernandez was acquitted of one count of second-degree unlawful possession of a firearm, two counts of first-degree theft, one count of first-degree burglary but convicted of a lesser included offense of second-degree theft for that same count, as well as another count of first-degree burglary, three counts of residential burglary, two counts of first-degree theft, two counts of theft of a firearm, one count of possession of a stolen firearm, first-degree possession of stolen property, first-degree trafficking in stolen property, second-degree unlawful possession of a firearm. CP 456-70.

²There are 24 volumes of transcript, which will be referred to as follows:
June 12, 2009, as "1RP;"
October 28, 2009, as "2RP;"
April 7, 2010, as "3RP;"
August 4, 2010, as "4RP;"
August 30, 2010, as "5RP;"
the 18 chronologically paginated volumes containing the trial proceedings of
October 4-7, 11-14, 21, 25-26, 28, 29 and November 1, 2010, as "TRP;"
October 27, 2010, as "6RP;"
January 21, 2011, as "SRP."

Mr. Hernandez appealed, and this pleading timely follows. See CP 481, 500.

2. Testimony at trial

Pursuant to RAP 10.1(g), Hernandez adopts and incorporates by reference the facts as set forth in the opening brief of Rivera as sufficient, in the interest of trying to reduce duplicative briefing. Hernandez submits these additional facts which are relevant to his specific arguments on appeal.

At trial, Marin-Andres initially testified that he was “coerced by the cops” to making statements. TRP 545. After a recess, he said that he drove people to where the burglaries occurred in Lakewood and Graham after his cousin, Gerardo Andres, also known as “Looney,” called him and asked him for a ride to the homes in Lakewood. TRP 564. Andres offered him gas money to drive his Blazer so Marin-Andres drove to Auburn and picked up Andres, Hernandez and Rivera, after which they picked up Delacruz somewhere in Lakewood. TRP 567.

Marin-Andres first said he did not really know what was going to happen but then he said that he did. TRP 567. His claims about what occurred varied, telling police the men were inside the house for 30-40 minutes before they called him to pull up and get them while being sure that it was only 10 minutes when he testified at trial. TRP 568-69, 619. He said at trial that he answered the phone but to police he said it was Delacruz. TRP 570. At trial, he claimed the men were already outside, holding bags, when he pulled up but when he spoke to police, he said the men were not already standing there but were just coming outside when he

arrived. TRP 620. At trial, he denied that there was any kind of “soda” involved. TRP 571. In his statement to police, he told them he had gotten a “Code Red” soda from one of the houses. TRP 572. To police, he said that “Shadow” (Hernandez) had directed him to go to another house after the men got into the vehicle after the first house, but at trial, Marin-Andres said it was his cousin, that he was really tired when he had told police it was Hernandez and, in fact, no one had really told him to drive to a certain place but they were just driving around and saw a house which looked “lonely” which is when they decided to “hit it” too. TRP 572-731, 621

Marin-Andres maintained that his memory was better on the day of trial than it was when he gave his statement, a few days after the event. TRP 619.

Marin-Andres said that he did not know what was in the bags at that point and actually did not learn until later, when they were back at his cousin’s home and he saw inside the bags as the men looked at the loot. TRP 570-71. But he also said that, after the second house was robbed, he saw a shotgun in a case after they were driving away. TRP 576. He did not relate any conversation about that gun, nor did he say that anyone had touched it prior to them looking at the loot later at the home of Andres. TRP 560-95.

The next day, after the incident in Graham, Marin-Andres returned to the home of Andres and saw some jewelry and then, after coming back from the “B and I,” he remembered seeing three pistols. TRP 590. He did not initially recall telling police that he had seen six guns and a taser gun and only recalled seeing two firearms and a taser. TRP 590, 606.

Marin-Andres admitted that he was the one who “pawned” the jewelry at the “B and I” coin shop, having gone there with Delacruz, Rivera and Smith Escalante. TRP 594. Marin-Andres said the guns were going to be sold, too, but did not initially remember who was going to do that. TRP 596. He then thought it was Delacruz but then said it was Rivera, Delacruz, Escalante and Hernandez. TRP 597. A few moments later, he said it was Rivera who had made those initial calls but he thought Hernandez did so, too. TRP 606.

Marin-Andres admitted that Hernandez did not go to Tukwila when the games and items were sold, nor was Hernandez there when they went to the “B and I” coin store and Marin-Andres went to pawn the items. TRP 628. Smith Escalante confirmed that Hernandez was not there at the “B and I.” TRP 684.

Marin-Andres said he had a difficult time remembering things and that he was very stressed and scared when he saw that police had his father in a police car before they took his statement. TRP 599. He said that when he was “stressed out,” “like, if I say some things, it could have just been made up or, you know, I might have a hard time remembering things or how it actually happened.” TRP 600.

Marin-Andres was clear that the first house in Lakewood was not a particular house picked out in advance but just a “random house” where they ended up going. TRP 568.

Marin-Andres pled guilty to five charges as a result of his involvement and initially said he was facing only a standard range of 57-75 months in custody in exchange for incriminating the others. TRP 565.

He would have gotten about 500 months without the agreement. TRP 601.

When he spoke to police, they said that, if he did not answer their questions, his father was going to jail. TRP 634-35. They had his father inside the police car. TRP 635. He said he figured it was then best to give officers “any and all names” he could to help his father out, “[w]hether or not they were actually at the scenes of those burglaries.” TRP 635.

Marin-Andres claimed at trial that he had only known Hernandez for about 10 weeks prior to the incidents. TRP 562, 613. On cross-examination, however, he admitted that he had seen Hernandez at the junior high school they both attended. TRP 613. He nevertheless maintained he only knew Hernandez “from the crime scene” but had “nothing against him.” TRP 614. At that point, when confronted by counsel, Marin-Andres admitted that Hernandez had, in fact, “beat up” Marin-Andres, about five months before the burglaries. TRP 615. He then tried to say that 10 weeks was five months. TRP 615. Marin-Andres again said he had a “memory problem” and was “really scared” when he spoke to police, and that, under those circumstances, he did not really “remember how it really went down,” so he told them something but “that’s not really how it went down.” TRP 616.

At Menza’s home, a shotgun which was under his bed underneath the slats in a soft case was taken and the bed was flipped upside down. TRP 170. Menza said it was loaded with two blanks, possibly some birdshot and “maybe one or two slugs” but it had been 3-6 months since he used it. TRP 171.

No effort was made to run fingerprints on the recovered guns.

TRP 378-79.

Kraut admitted that the outside of the safe said “Brinks” but nothing on it indicated that it was storing guns and it was “not particularly a gun safe.” TRP 297.

Griego Smith Escalante testified that he was at Andres’ house, as was Rivera and Hernandez” and he saw “a lot of stuff” in the back of Marin-Andres’ truck, including two shotguns, rather than just one. TRP 637-41. He denied involvement in the Lakewood burglaries but admitted he had been involved in the incident in Graham at the Kraut home. TRP 644-49. Smith Escalante said Marin-Andres said no one was home and “[h]e’s on vacation” when they arrived at the home there but Smith Escalante, Hernandez and Delacruz said, “no, we can’t do that,” so they drove off. TRP 652. The others called and said “they already got the door broke in” and, ultimately, Smith Escalante claimed, he and Hernandez and Delacruz returned, with Delacruz threatening Smith Escalante to get him out of the car. TRP 652-54. Escalante said he then tried to get into the other car but Marin-Andres and the girl would not open the door. TRP 654. He said that Hernandez then said, “[c]ome on, fool. Stop wasting time,” so they then tried the front door, found it was locked and went over the fence on the side of the house and in the house by the side door, which might have had a broken side door lock. TRP 654. Rivera and Andres were in the garage and there were dogs barking inside the home, so Andres told Smith Escalante to kick in the door but Smith Escalante refused. TRP 655. According to Smith Escalante, Rivera then kicked in the door. TRP 656.

Hernandez was not in the room when the safe was found. TRP 656-58. Smith-Escalante said that Rivera was trying to grab things and then he saw a safe and he picked it up and they threw it out the window. TRP 658. When they left, they drove to a garage somewhere where they managed somehow to get the safe open by doing something with the hinges. TRP 661, 670. They then started going through the gold on the top of the hood and in the safe were a .357 snub nose, a big .357, a .25, a .22 and some slugs. TRP 661-62.

Escalante pled guilty to first-degree burglary, theft of a firearm, possession of a firearm, trafficking of stolen property and possibly another offense. TRP 672. He was looking at less than five years in custody for testifying against the others, as opposed to the close to 40 years he would have otherwise faced. TRP 673, 684-85.

Escalante admitted that, when they took the safe, they had "no idea what was in it" but just hoped there were valuables. TRP 676. Nothing on the outside of the safe indicated anything about there being guns inside. TRP 679.

Rivera testified that he had been smoking "meth" and "weed" and drinking a lot and was involved in the Graham robbery but denied being involved in either of the two Lakewood robberies. TRP 733-36. He recalled seeing the safe and admitted thinking there were probably valuables in it, and also said he made some phone calls to try to sell some guns. TRP 739.

Rivera also said that Hernandez was not at the Graham burglary. TRP 742.

Jason Delacruz testified that his only involvement was to meet with Rivera and some others at the “B and I” to sell gold. TRP 751-52. He admitted that he started to ask if the stuff they were selling was stolen but then said, “[t]he less I know, the better.” TRP 754. He got about \$75 from the gold. TRP 754.

Frances Aguirre testified that she knew Hernandez as a friend of her kids and rented a room for him at the Motel 6 on the night of June 8. TRP 766. Aguirre and her family were living there temporarily, too. TRP 766. Aguirre did not have a receipt to show her payment. TRP 766-67.

D. ARGUMENT

1. **THE CONVICTION FOR FIRST-DEGREE BURGLARY
MUST BE REVERSED BECAUSE THERE WAS
INSUFFICIENT EVIDENCE TO PROVE ALL THE
ESSENTIAL ELEMENTS OF THAT OFFENSE**

At the close of the state’s case, Hernandez and his codefendants moved to dismiss not only the firearm enhancements but also the first-degree burglary charges, arguing that the burglaries were not committed while armed with a firearm and instead the firearms were just “loot.” TRP 697-701. The court dismissed the enhancements, holding that there must be a “nexus between the defendant, the crime and the weapon” and that there was no such nexus between the crime and the weapon in the burglaries here. TRP 730. Without further analysis, however, the court declined to dismiss the first-degree burglary convictions, saying, “I’m going to allow it here.” TRP 730. Hernandez was then convicted by the jury of first-degree burglary for the Menza incident. See CP 456. In later entered Findings of Fact and Conclusions of Law entered by the court, it dismissed

the firearm enhancements because the guns stolen in both the Menza and Kraut incidents “constituted loot and were not readily available for use during the actual commission of the crime.” CP 680. It nevertheless also entered findings that the defendants knew that the green rifle case stolen from the Menza residence contained a gun and thus “they were armed in immediate flight from the residence as required to support the charge of Burglary 1,” and that, although “[t]he evidence presented does not establish a nexus between the weapons and the crimes charged,” it “does establish that the above[-]named defendants were armed with a deadly weapon in immediate flight from the Menza and Kraut residences for the purpose of Burglary in the First Degree charge[.]” CP 679-82.

The court erred in entering those findings and denying the motions to dismiss the first-degree burglary charges, and the first-degree burglary conviction should be reversed and dismissed, because there was insufficient evidence to prove all the essential elements of the crime. Pursuant to RAP 10.1(g), Hernandez hereby adopts and incorporates by reference all of the arguments presented on behalf of codefendants Delacruz and Rivera regarding this issue. In addition, he submits the following argument on this point.

Under both the state and federal due process clauses, the prosecution must bear the burden of proving all the essential elements of the crime, beyond a reasonable doubt. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), reversed in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560

(1979). If the prosecution fails to meet that burden at trial, reversal and dismissal of the conviction is required. Green, 94 Wn.2d at 221.

Here, the prosecution failed to prove the essential elements of first-degree burglary for the Menza incident. RCW 9A.52.020(1) defines that crime as follows:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

In this case, Hernandez was accused of and convicted of first-degree burglary for the Menza incident based upon the theory that he or another was “armed with a deadly weapon” in “flight” from the burglary. See CP 179-80; CP 383. However, a person is not “armed with a deadly weapon” for the purposes of a charge of first-degree burglary unless and until the firearm is “easily accessible and readily available for use by the defendant for either offensive or defensive purposes.” See State v. Hall, 46 Wn. App. 689, 695, 732 P.2d 524 (1987) (quotations omitted). This definition of “armed” is identical to the definition used in cases where there is a firearm enhancement. See, e.g., State v. Gurske, 155 Wn.2d 134, 138-39, 118 P.3d 333 (2005). Further, it mandates that there is a “nexus” or link not only between the gun and the defendant but also the gun and the crime itself. See State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005).

Thus, more than just the mere presence of a gun where illegal activity is required. See State v. Johnson, 94 Wn. App. 882, 895-96, 974

P.2d 855 (1999), review denied, 139 Wn.2d 1028 (2000). Further, even where the defendant is in a car with drugs and a gun, where there is no evidence the defendant made any movement towards the gun or had used it or accessed it at the time that he acquired or possessed the drugs, the Supreme Court has held there was no “nexus” sufficient to uphold a finding that the defendant was “armed.” Gurske, 155 Wn.2d at 143.

As noted by Rivera in his opening brief, this Court’s analysis regarding when someone is “armed” has undergone refinement in recent years, most notably for the purposes of this case in State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007). Further establishing the “nexus” requirement, the Supreme Court in Brown rejected the idea that a defendant is “armed” for the purposes of a first-degree burglary charge simply because a gun is among the items taken in the burglary or intended to be so taken. 162 Wn.2d at 432. Instead, there must be some evidence that the gun is handled by one of the perpetrators in such a way during the crime that indicates “an intent or willingness to use it in furtherance of the crime.” Brown, 162 Wn.2d at 432.

Here, the trial court’s findings specifically include a finding that the gun in the Menza burglary was not, in fact, “readily available for use during the actual commission of the crime.” CP 679. And it specifically found that “[t]he evidence presented does not establish a nexus between the weapons and the crimes charged.” CP 679-80. The court’s subsequent conclusion of law that the men were nevertheless “armed in immediate flight from the residence as required to support the charge of Burglary 1,” and that the evidence “does establish that the above[-]named defendants

were armed with a deadly weapon in immediate flight from the Menza and Kraut residences for the purpose of Burglary in the First Degree charge[s]" (CP 679-80) are thus unsupported by the findings of fact and in direct conflict with the law which requires such a nexus for someone to be "armed." See Brown, 162 Wn.2d at 432.

Further, there was no evidence that anyone - including Hernandez - used or handled the gun taken in the Menza burglary during that burglary or in "flight" therefrom in any way which might show an intent or even willingness to use in the burglary. The only evidence was that they carried it in the container, keeping that container zipped up and not opening it, or holding the gun, or doing anything with it at all until it was divided up with the other "loot" after the men returned to the home of Andres. Indeed, it was not even in the passenger compartment with the men, but rather in the trunk with the other items stolen.

Thus, there is no evidence whatsoever that the gun was in any way used or associated with the burglary except for the happenstance of having being part of the loot. To uphold the conviction for first-degree burglary in this case would effectively rewrite the first-degree burglary statute from requiring that the perpetrator be "armed" to requiring only that part of what is stolen is a deadly weapon. Such a holding would be in conflict with not only Brown but all of the caselaw which has carefully defined when a person is "armed," clearly establishing that more than the mere presence of a gun is required. This Court should reverse and dismiss the conviction for first-degree burglary entered against Hernandez in this case.

2. IN THE ALTERNATIVE, THE CONVICTIONS FOR FIRST-DEGREE BURGLARY AND RESIDENTIAL BURGLARY FOR THE SAME BURGLARY VIOLATED THE PROHIBITIONS AGAINST DOUBLE JEOPARDY

Mr. Hernandez was convicted of both residential burglary and first-degree burglary for the Menza incident. See CP 179-81; CP 395 (Instruction 23, “to convict” for count II, residential burglary of 90th St. S. home); CP 383 (Instruction 11, “to convict” for count I, first-degree burglary, 90th St. S. home). As noted, *infra*, the conviction for first-degree burglary must be reversed, because it was unsupported by sufficient evidence as constitutionally required. Even if that conviction was somehow proper, however, that conviction coupled with the conviction for residential burglary for the very same burglary violated Hernandez’ rights to be free from double jeopardy.

Both the state and federal double jeopardy clauses protect against, *inter alia*, multiple punishments and multiple convictions for the same offense. See State v. Womac, 160 Wn.2d 643, 650-62, 160 P.3d 40 (2007); In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004); Fifth Amend.; Art. I, § 9. At the outset, this issue is properly before the Court. A violation of double jeopardy prohibitions is a manifest constitutional error which may be raised for the first time on appeal. See, State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Further, Mr. Hernandez filed a pro se motion below, asking for relief based upon the violation of his rights to be free from double jeopardy. CP 364-66.

On review, in the unlikely event that this Court somehow concludes that the conviction for first-degree burglary can withstand review, this

Court should reverse and dismiss one of the two convictions, with prejudice. In general, where there are two convictions under separate statutes for the same criminal act, the Court must first determine whether the Legislature has explicitly intended for such multiple punishments to be imposed. See State v. Borrero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007), cert denied sub nom Borrero v. Washington, 552 U.S. 1154 (2008); State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The first part of this determination is to look at the language of the criminal statutes to see whether they expressly disclose legislative intent with respect to multiple punishments. Borrero, 161 Wn.2d at 536. For example, with the burglary anti-merger statute, the Legislature has disclosed an intent that separate punishments be imposed in cases where there is a burglary and an underlying crime. See, Calle, 125 Wn.2d at 776; RCW 9A.52.050. But the burglary statutes do not disclose an intent that the defendant be punished separately for separate “burglary” crimes for the very same burglary. See RCW 9A.52.050. Nor do the two statutes defining the two types of burglary support any such intent. See, e.g., RCW 9A.52.020(1)(a); RCW 9A.52.025.

Because the statutes are silent, the Court then applies principles of statutory construction. Jackman, 156 Wn.2d at 746. The primary rule used in this state is the “same evidence” rule, often called the Blockburger test after the seminal case on this issue in federal courts, Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). See State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). With this test, if each offense contains an element the other does not, or if each offense requires

proof of a fact the other does not, the offenses are not the same. Orange, 152 Wn.2d at 816-18; see Calle, 125 Wn.2d at 777-78.

The Blockburger test has been called the “same evidence” test, but the proper interpretation of that test has changed over time. At one point, courts were routinely applying the test by using an abstract comparison of the statutory elements of the two crimes. See Orange, 152 Wn.2d at 817-19; see Jackman, 156 Wn.2d at 749. But in Orange, the Supreme Court rejected this analysis as based upon a “misconception about the Blockburger test.” Orange, 152 Wn.2d at 819. The defendant in Orange was convicted of, *inter alia*, first-degree attempted murder and first-degree assault of a man named Walker, for firing at least 11 shots at people at a gas station, one of which struck and wounded Walker. 152 Wn.2d at 800. Orange argued that, because the two crimes were “based on the same shot in the same incident,” the two convictions violated double jeopardy. 152 Wn.2d at 816. The court of appeals rejected the argument, interpreting the Blockburger test as requiring “nothing more than” comparison of “the statutory elements at their most abstract level” and concluding that there was no double jeopardy violation because the two crimes *could*, in the abstract, involve different elements. Orange, 152 Wn.2d at 818.

On review, the Supreme Court faulted the Court of Appeals for this analysis, declaring that, in applying it, the lower appellate court was only “[p]urporting to apply the [Blockburger] test.” Orange, 152 Wn.2d at 817. The Court declared that:

The . . . reluctance to look at the facts used to prove the statutory elements exposes a misperception about the Blockburger test. That the test has been alternatively called the “same elements” and the

“same evidence” test underscores that the Blockburger test requires the court to determine “whether each provision *requires proof of a fact which the other does not.*” Unless the abstract term. . . is given a factual definition, there is simply no way to assess whether [one crime] . . . requires proof of a *fact* not required in proving the [other crime].

Orange, 152 Wn.2d at 818 (emphasis in original; citations omitted).

Because the Court of Appeals had mistakenly believed that the “same elements’ test requires a court to compare a generic element in one offense to a specific element in a second offense,” that lower appellate court had reached the wrong conclusion, the Supreme Court held. Orange, 152 Wn.2d at 819-20.

In addition, the Court declared that cases following the reasoning of the Court of Appeals in Orange and so construing Blockburger were wrong, the Supreme Court said, because the “same elements’ test” in fact mean that “double jeopardy will be violated where “*the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other.*” Orange, 152 Wn.2d at 820, quoting, State v. Reiff, 14 Wash. 664, 667, 45 P.3d 318 (1896) (quotations omitted). The Orange Court concluded that, under Blockburger, the first-degree attempted murder by taking the “substantial step” of shooting at Walker and the first-degree assault of Walker, committed with a firearm, “were the same in fact and law” even though they involved different statutory elements, because

[t]he two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first[-]degree attempted murder was sufficient to convict Orange of first[-]degree assault.

152 Wn.2d at 820.

Orange was followed by other cases, in which the Supreme Court again reaffirmed the Orange analysis. In State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), for example, the Court quoted Orange and declared that, “[w]hen applying the Blockburger test, we do not consider the elements of the crime on an abstract level.” Freeman, 153 Wn.2d at 776. Indeed, the Freeman Court declared, “[u]nder Blockburger, we presume that the legislature did not intend to punish criminal conduct twice when “*the evidence required* to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other.” Freeman, 153 Wn.2d at 777 (emphasis in original), quoting, Orange, 152 Wn.2d at 820 (internal quotations omitted). While the fact that the same conduct is used to prove each crime is not necessarily dispositive, the Court said, it is necessary to look at the crimes as “charged *and proved*,” rather than at the level “of an abstract articulation of the elements.” Freeman, 153 Wn.2d at 777.

And in Womac, *supra*, the Court again which further cemented the propriety of the Orange analysis. In Womac, the defendant was convicted of homicide by abuse, second-degree felony murder and first-degree assault for the death of his son. 160 Wn.2d at 647. The Supreme Court applied the “same evidence” rule as articulated in Orange, noting that, using that analysis, double jeopardy violations can be found “*despite* a determination that the offenses involved clearly contained different legal elements.” 160 Wn.2d at 652 (emphasis in original).

These cases recognize the principle that defendants should not be subjected to multiple convictions based upon “spurious distinctions

between the charges.” See Jackman, 156 Wn.2d at 749, quoting, State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1988). They also highlight the danger of relying on pre-Orange caselaw as dispositive when a double jeopardy issue is raised.

In this case, both the residential burglary and the first-degree burglary convictions were based on the very same burglary. And indeed, under the facts of this case, the residential burglary charge was actually a lesser included offense of the first-degree burglary charge. See, e.g., State v. Gilbert, 68 Wn. App. 379, 842 P.2d 1029 (1993). To prove the residential burglary in this case, the prosecution had to prove that Hernandez entered or remained unlawfully in a residence, with intent to commit a crime against a person or property therein. See RCW 9A.52.025; CP 395 (Instruction 23, “to convict” for count II, residential burglary of 90th St. S. home). To prove the first-degree burglary, the exact same evidence was used, with the only additional fact that the defendant or an accomplice was “armed” with a deadly weapon either during or in flight from the very same home. See CP 179-81; CP 383. Where, as here, the very same evidence establishes the two crimes and there is no clear intent from the legislature to allow such multiple punishments, allowing the two convictions to stand is “unjust and oppressive” and violates the prohibitions against double jeopardy regardless whether the sentencing court “merged” one of the counts, as our Supreme Court held in Womac:

The trial judge. . .determined double jeopardy concerns are implicated *only when a defendant receives more than one sentence*. This determination is incorrect. That Womac received only one sentence is of no matter as he still suffers the punitive consequences of his convictions.

160 Wn.2d at 656 (emphasis in original). The Court concluded that, while the prosecution may bring multiple charges for the same conduct in a single proceeding, a court may not “enter multiple convictions for the same offense without offending double jeopardy.” 160 Wn.2d at 658. Because Womac (like Hernandez) was not charged in the alternative but was instead charged in separate counts and all of those convictions were reduced by the trial court to judgment, his constitutional rights to be free from double jeopardy were violated. Similarly, here, Hernandez was deprived of his rights to be free from double jeopardy were violated by the convictions for both first-degree burglary and residential burglary for the Menza incident. As a result, even if this Court somehow decides the evidence was sufficient to uphold the first-degree burglary conviction for the Menza home, reversal and dismissal with prejudice of the residential burglary conviction for that same burglary is required.

3. COUNSEL WAS INEFFECTIVE AT SENTENCING

The sentencing hearing involved both Rivera and Hernandez. SRP 4. At Rivera’s sentencing, held first, the prosecutor admitted that the verdicts for possession of stolen property in the first-degree and theft in the first degree should “merge” because “there’s case law that an individual cannot be thief and possessor of the same stolen property.” SRP 4. He also said the same for the first-degree burglary and residential burglary counts of counts I and II, which “involve[] the same residence,” so that they should “merge” for sentencing purposes. SRP 4-5. The prosecutor told the court that the counts for “Theft of a Firearm and Possession of a Stolen Firearm” did not “merge” because “we’re talking about multiple firearms” and the

jury never said which firearm it relied on for each of those counts. SRP 5-6.

When it came time to sentence Hernandez, the prosecutor again said that counts I and II, the first-degree burglary and residential burglary charges for Kraut, “merge[d] into Burglary in the First Degree.” SRP 22. He also said that the offender score “merged” first-degree theft and first-degree possession of stolen property, counts 14 and 15, saying those “involved the same property,” which was the “non-firearm related” property taken from the Kraut home. SRP 23.

Pursuant RAP 10.1(g), Hernandez hereby adopts and incorporates by reference all of the arguments presented on behalf of codefendant Rivera in which he argued that convictions for both theft of a firearm and possession of a stolen firearm for the Kraut incident violated the maxim that a person may not be convicted of both stealing and then possessing stolen goods. For Hernandez, this applies not only to the convictions for theft of a firearm (count 12) and possession of a stolen firearm (count 13) for the Kraut incident but also the unlawful possession of a firearm count, count 17. This Court should apply State v. Melick, 131 Wn. App. 835, 840-41, 129 P.2d 916 (2006), and State v. Hancock, 44 Wn. App. 297, 300-301, 721 P.2d 1006 (1986), as argued by Rivera in his opening brief, and should hold that those convictions merged.

Further, Hernandez submits that his counsel was equally as ineffective as that of Rivera on this point and, in addition, on the question of whether several of the counts should have been calculated as “same criminal conduct” in determining the offender score. Under RCW

9.94A.589(1)(a) when offenses are tried together and involve the “same criminal conduct,” they are treated as one crime when calculating the defendant’s offender score. See State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In addition to the arguments presented by Rivera, adopted and incorporated herein pursuant to RAP 10.1(g), Hernandez submits that his convictions for theft of a firearm and first degree theft from the Menza home (counts 4 and 5), the counts for theft of a firearm and first-degree theft from the Kraut burglary (counts 12 and 14) and the possession of a stolen firearm, possession of stolen property and unlawful possession of a firearm counts (counts 13, 15 and 17) were all committed at the same time and place, involve the same victim and had the same objective purpose. As in Rivera’s case, counsel was ineffective in failing to make these arguments to the court and the result was a higher sentence than was proper. This Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should grant Mr. Hernandez the relief to which he is entitled, as argued in this brief.

DATED this 1st day of November, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402; to codefendants through their counsel of record, and to Mr. Nelson Hernandez, DOC 346582, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 1st day of November, 2011.



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