

NO. 41707-3-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NELSON HERNANDEZ, JASON DELACRUZ, and ENRIQUE RIVERA,
APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming

No. 09-1-02903-4, 09-1-02999-9, and 09-1-02907-7

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Whether sufficient evidence was adduced to prove the elements of burglary in the first degree, specifically that one or more defendants were armed during the burglary or while in immediate flight therefrom? 1

 2. Whether counts 12 and 13; theft of a firearm and possession of a stolen firearm, merge where the counts involve the same firearm?..... 1

 3. Whether defendants Hernandez and Rivera waived challenge to the determination of same criminal conduct were both defendants stipulated to the calculation of their offender scores? 1

 4. Whether the defendants can demonstrate deficiency of counsel and prejudice thereby regarding determination of same criminal conduct, where they cannot demonstrate that the court's decision would have been different? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts..... 2

C. ARGUMENT..... 4

 1. ALL THREE CODEFENDANTS COMMITTED BURGLARY IN THE FIRST DEGREE WHEN ANY ONE OF THE CODEFENDANTS STOLE THE SHOTGUN AND REMOVED IT FROM THE MENDEZ RESIDENCE 4

 2. THE CHARGES OF THEFT OF A FIREARM AND POSSESSION OF A STOLEN FIREARM IN COUNTS 12 AND 13 MERGE..... 10

3. DEFENDANTS HERNANDEZ AND RIVERA WAIVED
THEIR CHALLENGE TO THE DETERMINATION OF
SAME CRIMINAL CONDUCT..... 10

4. THE DEFENDANTS CANNOT DEMONSTRATE
DEFICIENCY OF COUNSEL OR PREJUDICE
THEREBY..... 13

D. CONCLUSION..... 16

Table of Authorities

State Cases

<i>In re Personal Restraint of Connick</i> , 144 Wn.2d 442, 464, 28 P.3d 729 (2001), <i>overruled in part by</i> , <i>In re Personal Restraint of Goodwin</i> , 146 Wn.2d 861, 874, 50 P.3d 618 (2002).....	12
<i>In re Personal Restraint of Goodwin</i> , 146 Wn.2d 861, 874, 50 P.3d 618 (2002).....	10, 11, 13
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).....	13
<i>State v. Brown</i> , 162 Wn.2d 422, 173 P. 3d 245 (2007).....	8, 9
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988).....	14
<i>State v. Easterlin</i> , 159 Wn.2d 203, 206, 149 P.3d 366 (2006).....	7
<i>State v. Faille</i> , 53 Wn. App. 111, 766 P.2d 478 (1988).....	5, 8, 9
<i>State v. Gurske</i> , 155 Wn.2d 134, 118 P.3d 333 (2005).....	6, 7
<i>State v. Haddock</i> , 141 Wn.2d 103, 112, 3 P.3d 733 (2000).....	10, 14
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....	13, 14
<i>State v. Nitsch</i> , 100 Wn. App. 512, 997 P.2d 1000 (2000)....	11, 12, 13, 14
<i>State v. Randle</i> , 47 Wn. App. 232, 734 P.2d 51 (1987).....	5
<i>State v. Schelin</i> , 147 Wn.2d 562, 567-568, 55 P.3d 632 (2002).....	5, 6
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	13
<i>State v. Valdobinos</i> , 122 Wn.2d 270, 282, 858 P.2d 199 (1993).....	5, 6

Federal and Other Jurisdictions

<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	13
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Statutes

RCW 9.94A..... 10
RCW 9A.52.020..... 5

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence was adduced to prove the elements of burglary in the first degree, specifically that one or more defendants were armed during the burglary or while in immediate flight therefrom?
2. Whether counts 12 and 13; theft of a firearm and possession of a stolen firearm, merge where the counts involve the same firearm?
3. Whether defendants Hernandez and Rivera waived challenge to the determination of same criminal conduct were both defendants stipulated to the calculation of their offender scores?
4. Whether the defendants can demonstrate deficiency of counsel and prejudice thereby regarding determination of same criminal conduct, where they cannot demonstrate that the court's decision would have been different?

B. STATEMENT OF THE CASE.

1. Procedure

On June 12, 2009, the Pierce County Prosecuting Attorney (State) filed an Information charging the defendants with burglary in the first degree, conspiracy to commit burglary in the first degree, trafficking in stolen property, residential burglary, and conspiracy to commit residential

burglary. CP 159-162. On September 16, 2009, the State amended the charges to add counts of theft in the first degree, theft of a firearm, and unlawful possession of a firearm. CP 167-171. On March 16, 2010, the State again amended the Information to charge additional counts of possession of a stolen firearm, and possession of stolen property. CP 179-185.

On October 4, 2010, the case was assigned to Hon. Frederick Fleming for trial. 1 RP 4. After hearing all the evidence, the jury convicted the defendants of burglary in the first degree, theft in the first degree, two counts of theft of firearms, two counts of residential burglary, theft in the second degree, possession of stolen property, trafficking in stolen property, and unlawful possession of firearms. CP 487-488, 146-147, and 661-662. The defendants were sentenced on January 21, 2011. 1/21/11 RP 3ff.

2. Facts

On June 8, 2009, Susan Powell was driving a school bus in a neighborhood at So. 109th and Kline Streets in Lakewood, Washington. 5 RP 109. As she stopped at an intersection, Powell noticed some young men loading things items from a nearby house into a dark SUV. 5 RP 113. Thinking the activity suspicious, Powell recorded the license plate number. 5 RP 116.

Later the same day, Sara Spencer learned of the suspicious activity at her home at So. 109th and Kline Streets. 5 RP 125. She went home and discovered that her front door had been kicked in. She called the police. 5 RP 127. When the police arrived, she entered and discovered that her home had been ransacked. 5 RP 128.

The same morning, June 8, 2009, Iolani Menza, who lived at 3115 So. 90th St. in Tacoma, went out to a Denny's restaurant nearby. 6 RP 160. When he returned, he discovered that his home had been burglarized. 6 RP 162. His home had been ransacked. Stolen items included a home computer, an iPod, Wii and Gamecube game consoles, a purse, and a 20 gauge shotgun. 6 RP 164, 168, 172.

Stephen Burns was a neighbor of Joe Kraut on 78th Ave. Ct. East, a cul-de-sac in the Graham area of Pierce County. 6 RP 183. On June 9, 2009, shortly after noon, Burns saw another neighbor speaking to some unknown persons in a dark SUV. 6 RP 186. He also saw a strange tan-colored car in the neighborhood. 6 RP 187. Burns thought it suspicious and wrote down the license plate numbers. *Id.* After these cars left the area, Burns went over to Kraut's house because Burns was caring for Kraut's pets while Kraut was on vacation. 6 RP 183. Burns discovered that Kraut's home had been broken into and ransacked. 6 RP 189.

Upon being informed of the burglary, Joe Kraut returned from his vacation. 7 RP 260. Kraut discovered that a safe containing guns, jewelry, a stamp collection, a Social Security card, and a Tazer had been stolen. 7

RP 259. An autographed Green Bay Packer raincoat and jewelry from an unlocked cabinet in the bedroom had also been stolen. 7 RP 276.

Gerardo Marin-Andres was the driver of the dark SUV, a Chevrolet Blazer. 13 RP 566. He drove the burglars, including Hernandez, Delacruz, and Rivera to the victim residences. 13 RP 564. He remained on lookout as the others broke into the residences and stole the property. 13 RP 568. The others would then load the property into his Blazer. 13 RP 570, 575. Hernandez and Rivera accompanied Marin-Andres when he later sold the jewelry at the B and I coin shop. 13 RP 594.

Griego Smith Escalante accompanied the group, including Hernandez, Rivera, and Delacruz to the burglary of the Kraut residence. 13 RP 649. They broke into the house, stealing jewelry and a safe. 13 RP 657-658. They went to a location in South Tacoma and opened the safe, discovering 5 handguns and more jewelry. 13 RP 661.

C. ARGUMENT.

1. ALL THREE CODEFENDANTS COMMITTED BURGLARY IN THE FIRST DEGREE WHEN ANY ONE OF THE CODEFENDANTS STOLE THE SHOTGUN AND REMOVED IT FROM THE MENDEZ RESIDENCE.

A person commits burglary in the first degree where, with intent to commit a crime against a person or property therein, he or she enters 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 is

armed with a deadly weapon. RCW 9A.52.020. Under the statute, if one of the participants is armed, all the participants are armed, and all are guilty of burglary in the first degree. See *State v. Randle*, 47 Wn. App. 232, 734 P.2d 51 (1987). A burglar can transform an ordinary burglary into a first degree burglary by arming himself with a gun he finds in the building. See *State v. Faille*, 53 Wn. App. 111, 766 P.2d 478 (1988). In *Faille*, the Court found that the defendant was “armed” as per the statute where the weapon was “readily accessible and available for use.” *Id.*, at 115.

A person is “armed” if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes. *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). In addition to the test announced in *Valdobinos*, the Supreme Court has indicated that when determining the sufficiency of the evidence there is also a nexus requirement: “Under a two-part analysis, there must be a nexus between the weapon and the defendant and between the weapon and the crime.” *State v. Schelin*, 147 Wn.2d 562, 567-568, 55 P.3d 632 (2002).

This Court has repeatedly discussed the nexus requirement in the context of constructive possession cases, see *Valdobinos, supra* (police found cocaine and an unloaded rifle under a bed in the defendant’s home while searching for evidence of delivery and possession of cocaine); *Schelin, supra* (police found defendant in the basement of his home where the police later discovered a marijuana grow operation and a loaded revolver on the wall).

When the Court first discussed the nexus requirement in *Schelin*, the Court did so in the context of a constructive possession case. The majority of the court in *Schelin* noted that the “*Valdobinos* court clearly established that mere constructive possession is insufficient to prove a defendant is “‘armed’ with a deadly weapon during the commission of a crime” as required by the enhancement statute. *Schelin*, 147 Wn.2d at 567. It then went on to discuss “the nexus required in a constructive possession” case. *Schelin*, 147 Wn.2d at 567-568. Finally it noted that the “requirement of a nexus to connect a defendant to a deadly weapon, and the weapon to the crime, guards against a deadly weapon enhancement being found whenever constructive possession is established.” *Schelin*, 147 Wn.2d at 575. The majority opinion discussed the nexus requirement in constructive possession cases. The majority in *Schelin* did not include actual possession cases within its discussion. The dissenting opinion in *Schelin* also focused on constructive possession cases. Considering the repeated references to “constructive possession” in the majority opinion in *Schelin* and the lack of any subsequent case law holding there is a nexus requirement in actual possession case, the application of *Schelin* to actual possession cases is limited.

The Supreme Court recognized the limited application of the *Schelin* decision to constructive possession cases in the case of *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005):

In adopting the “easily accessible and readily available” test, we recognized that being armed is not confined to those defendants with a deadly weapon actually in hand or on their person. This is consistent with the legislature’s obvious intent to punish those who are armed during the commission of a crime more severely than those who are unarmed because the risk of serious harm to others is greater. This greater risk exists whether the defendant actually has a weapon in hand or the weapon is easily accessible and readily available.

Gurske, 155 Wn.2d at 138-139. The above language suggests that the *Gurske* court agreed that a defendant in actual possession of a weapon is “armed” for purposes of the enhancement statute. The Court went on to discuss when evidence is sufficient to prove that a defendant in constructive possession of a weapon is armed for purposes of the enhancement statute.

Committing a crime while in actual possession of a weapon increases the risk of serious harm to others and poses an increasing and major threat to public safety. *See Gurske*, 155 Wn.2d at 138. When a defendant chooses to commit a crime while he has a weapon in his actual possession, he has engaged in the precise conduct the legislature intended to punish more harshly.

In *State v. Easterlin*, 159 Wn.2d 203, 206, 149 P.3d 366 (2006), the Supreme Court held that actual possession of a firearm is almost always sufficient to show a nexus and that Easterlin’s statements that he possessed drugs and was armed was sufficient for a trier of fact to find that he was armed to protect his drugs. *Id.*, at 209. In actual possession cases, it

is rarely necessary to go beyond the commonly used “readily accessible and easily available” instruction. Where the defendant actually, instead of constructively, possesses a firearm, the State need not show more than that the weapon was easily accessible and readily available unless some unique circumstance so requires. See *Easterlin*, 159 Wn.2d at 209 n. 3 (giving examples of such circumstances, including possession of a ceremonial weapon for religious purposes or a kitchen knife in a picnic basket).

Recently, with *State v. Brown*, 162 Wn.2d 422, 173 P. 3d 245 (2007), there has been additional analysis of whether a person is “armed” when handling guns in a burglary. Brown and his cousin broke into a house and took property. They discovered a rifle in a bedroom closet and placed it on the bed. They left the house without the gun.

The Supreme Court held that “the circumstance under which the weapon was found does not support a conclusion that Brown was “armed” as intended by the legislature.” 162 Wn. 2d at 432. The rifle was found on the bed only a few feet from where it had been kept. The Court went on to conclude that the facts suggested that the weapon was “merely loot,” and not there to be used. *Id.*, at 434.

The determination of whether the burglar is “armed” when he picks up a gun in a burglary is fact-driven and based upon circumstances. *Brown* did not overrule *Faille* or even limit it. The court distinguished *Faille* by pointing out that Faille, as the defendants in this case, took the gun with him. 162 Wn. 2d at 434, n. 4.

Brown is distinguishable from the present case. In *Brown*, there was no evidence that Brown or his accomplice actually handled the firearm; rather, the occupant merely observed that the firearm was not stored in its usual location. *Brown*, 162 Wn.2d at 432. Here, in contrast, the defendants carried the shotgun to the waiting vehicle, where it was behind the back seat. The jury found that at least one of the defendants not only had handled, but had also possessed and stolen the firearm.

There was evidence from which the jury could conclude that one of the defendants carried the shotgun from Mr. Menza's house to the SUV. 13 RP 575-576. Apparently, Mr. Menza did not consider the case containing the shotgun to be an impediment to its intended use. Mr. Menza testified that he kept the shotgun loaded, in the case, in a rack under the bed. 6 RP 170. Its purpose was for home defensive purposes. 6 RP 174. From this, the jury could certainly conclude that, if the shotgun was kept in a state so as to be "readily available and easily accessible" for defensive purposes for Mr. Menza, it was certainly so in the hands of the defendants as they fled the burglary scene with the stolen property. These facts go beyond "the mere presence of a deadly weapon at the crime scene" as discussed in *Brown*. It is possible, as in *Faille* and in this case, for a firearm to be both a weapon and "loot" at the same time.

2. THE CHARGES OF THEFT OF A FIREARM
AND POSSESSION OF A STOLEN FIREARM IN
COUNTS 12 AND 13 MERGE.

Theft of property and possession of the same stolen property generally merge, and the most serious charge is scored under RCW 9.94A for sentencing. The unlawful possession of property taken in a theft is a mere continuation of the thief's act of depriving the true owner of his or her right to possess their property. *See State v. Haddock*, 141 Wn.2d 103, 112, 3 P.3d 733 (2000).

In the present case, counts 12 and 13 for defendants Hernandez and Rivera were the same guns: those contained in the safe stolen from Joseph Kraut. These two counts should merge. The case should be remanded for the court to determine which count to dismiss.

3. DEFENDANTS HERNANDEZ AND RIVERA
WAIVED THEIR CHALLENGE TO THE
DETERMINATION OF SAME CRIMINAL
CONDUCT.

A defendant may waive a challenge to a miscalculated offender score “where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.” *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (failure to identify a factual dispute for the court’s resolution and to request an exercise of the court’s discretion waives challenge to offender score). In *Goodwin*, the Supreme Court approved of

the analysis in *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000 (2000). After agreeing to his offender score at the sentencing hearing, Nitsch argued on appeal that his offender score was incorrect and that the sentencing court should have found his two crimes encompassed the same criminal conduct. *Nitsch*, 100 Wn. App. at 520. Nitsch could not raise this argument for the first time on appeal:

Only an illegal or erroneous sentence is reviewable for the first time on appeal. Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion.... This is not an allegation of pure calculation error.... Nor is it a case of mutual mistake regarding the calculation mathematics. Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion.

Nitsch, 100 Wn. App. 520-523.

Thus, because the determination of whether two crimes constitute the same criminal conduct involves both determinations of fact and an exercise of judicial discretion, a defendant may waive the argument. And here, as in *Nitsch*, the defendants waived the argument regarding same criminal conduct by not raising it, and by specifically stipulating to their scores at sentencing.

While a defendant may not waive his objection to an illegal sentence, he may explicitly or implicitly waive an objection to calculation of his offender score. *Goodwin*, 146 Wn.2d at, 874.

Once a defendant agrees to an offender score that counts his prior offenses separately, he cannot subsequently challenge the sentencing

court's failure to consider some of those prior offenses as the same criminal conduct. See *In re Personal Restraint of Connick*, 144 Wn.2d 442, 464, 28 P.3d 729 (2001), *overruled in part by Goodwin, supra*.

In *Nitsch*, the defendant agreed to the representation of his standard range and requested an exceptional below the standard range. The court rejected his request and sentenced him to the high end of the range. On appeal, he argued that his score had been miscalculated. He claimed for the first time that his crimes were the same criminal conduct. He argued that the sentencing court should have considered the same criminal conduct issue sua sponte.

The Court of Appeals rejected this contention and held that he was barred from raising the issue for the first time on appeal. 100 Wn. App. at 525. The Court observed that the determination of whether two crimes are the same criminal conduct for scoring purposes is discretionary with the trial court. *Id.*, at 523. Nitsch failed to identify that factual issue for the trial court to resolve in an exercise of discretion. *Id.*, at 520. When he agreed to his standard range, he implicitly agreed to the calculation of his score, i.e. that the two crimes were scored separately. *Id.*, at 522. He therefore waived his argument regarding same criminal conduct and that objection to the calculation of his offender score.

In the present case, both Henderson and Rivera stipulated to their criminal histories and their offender scores. CP 478-480, 140-142. Their offender scores included counts 4, 5, 12, and 14; implicitly conceding that

they were not the same criminal conduct. CP 479, 141. Under *Nitsch* and *Goodwin* the defendants cannot now claim that these counts were the same criminal conduct.

5. THE DEFENDANTS CANNOT
DEMONSTRATE DEFICIENCY OF COUNSEL
OR PREJUDICE THEREBY.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. The standard of review for effective assistance of counsel is whether, after examining the whole

record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988).

To demonstrate that his counsel provided ineffective assistance by failing to bring a motion to count certain crimes as the same criminal conduct, the defendants must demonstrate that the trial court probably would have granted the motion. *See McFarland*, 127 Wn.2d at 334-335, 337, n4.

A sentencing court has broad discretion to determine what constitutes same criminal conduct. *Haddock*, 141 Wn.2d at, 110. Where the issue is permissibly raised on appeal, the defendant is not entitled to resentencing unless he can show that the lower court, as a matter of law, would have made a same criminal conduct finding. *See Nitsch*, 100 Wn. App. at 525-526; *see also McFarland*, 127 Wn.2d 322, 334-35, 337 & n. 4, 899 P.2d 1251 (1995) (where the defendant alleges ineffective assistance for counsel's failure to bring a motion, he must show that the motion would have been granted and the outcome would have been different).

Trial strategy is left to the discretion of trial counsel. Here, defense counsel were familiar with the rulings by the trial court and the evidence presented. They may have decided that, in light of the court's earlier rulings, or based on the evidence presented at trial, or their knowledge of

the case, that the same criminal conduct arguments now advanced would not have been successful.

The defendants in the present case cannot show that the court would have found that the crimes committed in the Kraut burglary were the same criminal conduct. The trial judge drew some narrow factual distinctions in this case. He made the distinction between when and where the defendant's possessed the shotgun, for purposes of whether they were "armed," in the Menza burglary. CP 683-687. He found that they were not armed when one of them was carrying the shotgun inside the house, but once the shotgun was carried outside, they were. CP 687. Therefore, it is by no means certain that the court would have agreed that the general thefts and the thefts of firearms were the same criminal conduct.

For example, the defendants cannot show that the court would necessarily have found that the victims in the Kraut burglary were all the same. Trooper Kraut testified that he had given the jewelry to his wife. Therefore, it could have been argued that she was a separate victim. Trooper Kraut also testified that at least one of the guns, the 9mm Beretta, had been issued to him by the State Patrol. 7 RP 264. Therefore, it could have been argued that the State Patrol was also a victim in the case.

The issue here is not whether the defense attorneys in this case could have made more or better arguments regarding the offender scores and same criminal conduct. The issue is whether their decisions and performance were constitutionally deficient. They were not.

D. CONCLUSION.

The defendants received a fair trial where sufficient evidence was adduced to prove that they were guilty, as found by the jury. The defendants waived their objection to a determination of same criminal conduct where they stipulated to the calculation of their offender scores. The State respectfully requests that the judgments be affirmed.

DATED: January 23, 2012

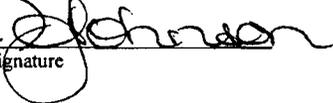
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