

NO. 43762-7-II

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

In re the Personal Restraint of
LA'JUANTA LE'VEAR CONNER,

Petitioner.

REGARDING THE JUDGMENT AND SENTENCE ENTERED BY
THE SUPERIOR COURT OF KITSAP COUNTY
Superior Court No. 11-1-00435-8

BRIEF OF RESPONDENT

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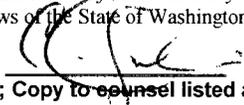
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court was required to make a finding of probable cause upon the filing of the amended information?

2. Whether the to-convict instructions correctly included all elements charged in the information?

3. Whether Conner fails to show that the state engaged in vindictive prosecution?

4. Whether Conner has waived the claim that the trial court should have counted various offenses as same criminal conduct by affirmatively endorsing his offender score, and whether, even if he has not, the trial court acted its discretion?

5. Whether Conner's convictions violate double jeopardy?
[CONCESSION OF ERROR AS TO THIRD-DEGREE THEFT ONLY]

6. Whether Conner's claim that the trial court improperly imposed an exceptional sentence is incorrect where the court imposed standard range sentences, but ran his firearms enhancements consecutively, as required by law?

II. RESPONSE

The State respectfully moves this court for an order vacating Conner's third-degree theft conviction but dismissing the remaining

claims in the petition with prejudice because it is otherwise without merit.

III. NOTE REGARDING THE RECORD

The Court has consolidated the instant petition with Conner's pending direct appeal. Record citations will be to the direct appeal record.

Additionally, the appendices Conner has attached to his petition are already part of the direct appeal record. For clarity the State will cite to the Clerk's Papers or Report of Proceedings. The following table indicates where Conner's appendices may be found:

Appendix	Record
A Judgment and Sentence	CP 326
B Certificate of Probable Cause	CP 6
C Information	CP 1
C [sic] Second Amended Information	CP 208
D Jury Instructions	CP 234
E Report of Sentencing Hearing (excerpt)	38RP ¹

IV. STATEMENT OF THE CASE

The State relies on its statement of the case as set forth in its direct appeal brief already filed herein, as supplemented in the argument portion of this brief.

¹ The State will continue to follow the numbering scheme adopted by Conner's direct appeal counsel. *See* Brief of Appellant at 4 n.1.

V. AUTHORITY FOR PETITIONER’S RESTRAINT

The authority for the restraint of La’Juanta Le’Vear Conner lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on July 27, 2012, in cause number 11-1-00435-8, upon Conner’s conviction of conspiracy to commit first-degree burglary, two counts of second-degree unlawful possession of a firearm, two counts of possession of a stolen firearm, eight counts of first-degree robbery, five counts of first-degree burglary, four counts of second-degree theft, theft of a firearm, and one count of third-degree theft.

VI. ARGUMENT

A. THE TRIAL COURT WAS NOT REQUIRED TO MAKE A FINDING OF PROBABLE CAUSE UPON THE FILING OF THE AMENDED INFORMATION.

Conner argues that the second amended information was “inadequate” because the facts supporting the charges were not included in the original probable cause statement and no amended probable cause statement was filed. This claim is without merit because no such requirement exists.

CrR 2.1(a) sets forth the requisites of a valid information:

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be

alleged that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

Notably absent from the rule is any requirement that a statement of probable cause be filed. Likewise, there exists no requirement of a filing or finding of probable cause at arraignment. *See* CrR 4.1.

A finding of probable cause is required in several instances, none of which pertain to the information (or amended information) itself. Probable cause *may* be required to be shown prior to the issuance of an arrest warrant. CrR 2.2(a). Probable cause is also a prerequisite for the continued detention of, or the placing of conditions on the release of, the defendant. *See* CrR 3.2 ("If the court does not find, or a court has not previously found, probable cause, the accused shall be released without conditions."); CrR 3.2.1(a) ("A person who is arrested shall have a judicial determination of probable cause no later than 48 hours following the person's arrest, unless probable cause has been determined prior to such arrest."). Here, probable cause was found on the original information. Since the amended information included all but one of the

original charges,² it cannot be said there was no basis to have held Conner or imposed conditions of release.

Moreover a defendant is free to file a bill of particulars if he finds the factual basis as set forth in the information to be vague. CrR 2.1(c); *State v. Witherspoon*, 171 Wn. App. 271, 294 n.6, 286 P.3d 996 (2012) (“A defendant may waive his vagueness challenge to a constitutionally sufficient information if he fails to request a bill of particulars.”). Likewise if he believed that the State lacked the evidence to prove the charges, Conner could have filed a *Knapstad* motion to dismiss. CrR 8.3(c); *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). He did neither of these things.

Finally, Conner cites absolutely no authority for his claim that there must be a finding of probable cause on an amended information for it to be valid. The only authority he does cite is *State v. Campbell*, 103 Wn.2d 1, 2, 691 P.2d 929 (1984) (“The decision to prosecute must be based on the prosecutor’s ability to meet the proof required by the statute.”). He also cites the ABA prosecution standards to the effect that it would be unprofessional to lay charges the prosecutor knows are unsupported by probable cause. The State has no quarrel with these assertions. But considering that he was found guilty beyond a reasonable

² Conspiracy to commit robbery was dropped. *Cf.* CP 1 and CP 37.

doubt by a jury of all but two of the 26 charges, it cannot reasonable be entertained that he charges lacked probable cause. It is notable that neither Conner nor his appellate counsel have challenged the sufficiency of the evidence to support any of his convictions. This claim lacks both legal and factual basis and should be rejected.

**B. THE TO-CONVICT INSTRUCTIONS
CORRECTLY INCLUDED ALL ELEMENTS
CHARGED IN THE INFORMATION.**

Conner next claims that various to-convict instructions were deficient. This claim is without merit because all the to-convict instructions included requisite elements as charged.

1. Conspiracy

Conner first alleges that Instruction 10, the to-convict instruction for Count I, which charged conspiracy to commit burglary, CP 246, was defective because it did not name the coconspirators. Conner mistakenly relies on *State v. Brown*, 45 Wn. App. 571, 726 P.2d 60 (1986). The error in *Brown* arose because the information alleged specific coconspirators, but the to-convict did not:

Although a conspiracy charge allows the State to cast a wide net in order to prosecute those involved in criminal activity, a conspiracy instruction may not be more far-reaching than the charge in the information. Here, the information charged a conspiracy comprised of 12 named individuals. The instruction, in contrast, required only that the jury find that the defendant had agreed with “one or more persons to engage in or cause the performance of

conduct constituting the crime of theft in the first degree.”
... Since an accused must be informed of the charge against
him and cannot be tried for an offense not charged, ... the
instruction was defective.

Brown, 45 Wn. App. at 575-76 (citations omitted).

Indeed, *Brown* itself shows that the instruction in this case was
proper:

Although we find that the error requires reversal in
the present case, it can be easily corrected in the future by
including language in the information which indicates that
there are other conspirators who are either unknown or
uncharged. Such a charge would be proper, since a person
can be convicted of conspiring with a person whose name
is unknown, *Rogers v. United States*, 340 U.S. 367, 375, 71
S. Ct. 438, 95 L. Ed. 344 (1951), as long as the evidence
supports the proposition that such a coconspirator did exist
and that the defendant did conspire with him. *United States
v. Cepeda*, 768 F.2d 1515, 1517 (2d Cir. 1985); *United
States v. Pruett*, 551 F.2d 1365, 1369 (5th Cir. 1977).

Brown, 45 Wn. App. at 577. Here, the to-convict matched the charge in
the information which read:

TO COMMIT THIS CRIME, the Defendant, with intent that
conduct constituting this crime be performed, did agree
with one or more persons who were not necessary
participants in the crime to engage in or cause the
performance of such conduct, and any one of them did take
a substantial step in pursuance of such agreement; contrary
to Revised Code of Washington 9A.28.040(1) and *State v.
Miller*, 131 Wn.2d 78,88-89,929 P.2d 372 (1997).

CP 209. Because no specific coconspirator was named in the information,
none was required to be included in the to-convict instruction. This claim
is thus without merit.

2. *Other charges*

Conner also “invi[es] this Court to look at the other *to convict* instructions ... with the same error, to determine their deficiency.” Petition at 10. As with the conspiracy charge, these instructions also mirror the charges in the information. They are therefore also not erroneous.

a. **Theft charges**

Conner first faults Instructions 39, 45 and 56 for not naming the theft victims while Instructions 49, 51 and 57 did. The cited charges and to-convict instructions may summarized as follows:

Count	Charge	CP	JI No.	To-Convict	CP
X	Second-degree theft (value over \$750) on 9/15/10	215	39	Second-degree theft (value over \$750) on 9/15/10	275
XV	Second-degree theft (value over \$750) on 9/28/10	220	45	Second-degree theft (value over \$750) on 9/28/10	281
XXIV	Theft of a Firearm on 11/3-4/10	227	56	Theft of a Firearm on 11/3-4/10	292
XVIII	Third-degree theft from Cummings on 9/28/10	222	49	Third-degree theft from Cummings on 9/28/10	285
XX	Second-degree theft (value over \$750) from Birkett on 10/2-3/10	223	51	Second-degree theft (value over \$750) from Birkett on 10/3/10	287
XXV	Second-degree theft (access device) from Ann-Marie Tucheck on 11/3-	227	57	Second-degree theft (access device) from Ann-Marie Tucheck on	293

	4/10			11/3-4/10	
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All of the to-convict instructions precisely reflect the charges laid. There is therefore no error under *Brown*.

Nor was there a likelihood of jury confusion. Under *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) a defendant may be convicted only if a unanimous jury concludes he committed the criminal act charged in the information. If the State presents evidence of multiple acts that could form the basis of one charged count, the State must tell the jury which act to rely on or the court must instruct the jury to agree on a specific act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

Here, all but Counts XV and XVIII allege different dates. Count XVIII alleges the specific victim. Nevertheless the State specifically told the jury that Count XV applied to the second home invasion on 12th Street. 34RP 2520, 2557.³

b. Burglary charges

Conner also faults Instructions 37, 47, 50 and 54 for not indicating the address where the burglaries occurred while Instruction 44 did. Again, the cited charges and to-convict instructions may summarized as follows:

Count	Charge	CP	JI No.	To-Convict	CP
IX	First-degree	214	37	First-degree	273

³ The defense also indicated that Count XV applied to the second, September 28 robbery at 705 12th Street. 34RP 2588.

	burglary (deadly weapon) on 9/15/10			burglary (deadly weapon) on 9/15/10	
XVII	First-degree burglary (deadly weapon and/or assault on Cummings) on 9/28/10	221	47	First-degree burglary (deadly weapon and/or assault on Cummings) on 9/28/10	283
XIX	First-degree burglary (deadly weapon) on 10/2-3/10	223	50	First-degree burglary (deadly weapon) on 10/2-3/10	286
XXIII	First-degree burglary (deadly weapon) on 11/3-4/10	226	54	First-degree burglary (deadly weapon) on 11/3-4/10	290
XIV	First-degree burglary (deadly weapon) on 9/28/10	219	44	First-degree burglary (deadly weapon) at 704 12 th Street on 9/28/10	280

Again, with the exception of Instruction 44, all these charges include the same elements alleged in the information. This single variance makes the to-convict narrower than the information. This is not improper.

Indeed, under the law of the case doctrine, jury instructions not objected to become the law of the case. *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). In criminal cases, this means the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included in the to-convict instruction. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

Likewise, the addition of the address in Instruction 44/Count XIV also addresses the *Petrich/Kitchen* issue. The burglaries in Counts XIV and XVII were the only ones alleged to have occurred on the same date. The instruction for Count XVII named the victim and the instruction for Count XIV provided the address, thus making it crystal clear to the jury what evidence applied to each count.⁴ Conner fails to show any error; these claims should be rejected.

C. CONNER FAILS TO SHOW THAT THE STATE ENGAGED IN VINDICTIVE PROSECUTION.

Conner next claims that the charges filed in the amended information constituted vindictive prosecution. This claim is without merit because his argument relies on the part of the holding in *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), that was reversed by the Supreme Court in *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006).

Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges. *Korum*, 157 Wn.2d at 625; *see also Deal v. United States*, 508 U.S. 129, 134 n. 2, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993) (recognizing prosecutors have “universally available and unavoidable power to charge or not to charge an offense.”).

⁴ And again, the State also specifically told the jury which count applied to which incident. 34RP 2520.

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, recognizes this discretion and provides standards, not mandates, to guide prosecutors:

These standards are intended solely for the guidance of prosecutors in the state of Washington. They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state.

RCW 9.94A.401. *See also* David Boerner, *Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981*, § 12.24, at 12-47 (1985) (“It is clear the Sentencing Guidelines Commission and the Legislature intended to prevent judicial review of [the prosecutor’s charging] decisions.”).

In view of these standards, the Supreme Court in *Korum* held that the Court of Appeals misapplied the law:

Despite this express language, the Court of Appeals held that prosecutorial discretion is statutorily limited. *See Korum*, 120 Wn. App. at 701-02. Specifically, the court relied on former RCW 9.94A.440(2)(2) and (b) (1996), *recodified as* RCW 9.94A.411(2)(a)(ii) and (b), which provide that “[t]he prosecutor should not overcharge to obtain a guilty plea,” and notes that overcharging includes “[c]harging additional counts.” *See Korum*, 120 Wn. App. at 701-02.

However, the Court of Appeals failed to reference relevant portions of the SRA’s guidelines that support the State’s decision to charge *Korum* with the additional counts. Whereas the language cited by the Court of Appeals is precatory, earlier language in former RCW 9.94A.440(2) provides that “[c]rimes against persons will be filed if sufficient admissible evidence exists.” (emphasis

added). All of the charges filed against Korum, with the exception of unlawful possession of a firearm in the second degree, fall under the category of crimes against persons. *See* former RCW 9.94A.440(2).

Additionally, former RCW 9.94A.440(2)(1)(a) provides that other charges should be filed if they are necessary to strengthen the State's case at trial. Here, the additional charges related to crimes where Korum personally entered the invaded homes and hence was identifiable by nonparticipants in the crime. In the incident related to the original charges, Korum did not enter the homes. Thus, the State would have depended almost entirely on the testimony of Korum's accomplices. As a result, the decision to add charges after Korum withdrew his plea agreement was not only within the prosecuting attorney's discretion, it was also supported by the SRA guidelines and strengthened the State's case.

Korum, 157 Wn.2d at 626-27 (footnotes omitted).

Korum observed that constitutional due process principles prohibit prosecutorial vindictiveness, which occurs when “the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights.” *Korum*, 157 Wn.2d at 627 (quoting *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987)). Thus, “a prosecutorial action is ‘vindictive’ only if *designed* to penalize a defendant for invoking legally protected rights.” *Id.* (emphasis the Supreme Court's).

The Court observed that there are two kinds of prosecutorial vindictiveness: actual vindictiveness and the presumption of vindictiveness. A presumption of vindictiveness arises when a defendant

can prove that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness. *Korum*, 157 Wn.2d at 627. The prosecution may then rebut the presumption by presenting “objective evidence justifying the prosecutorial action.” *Korum*, 157 Wn.2d at 628.

As noted in *Korum*, the United States Supreme Court has “emphatically rejected the notion that filing additional charges after a defendant refuses a guilty plea gives rise to a presumption of vindictiveness.” *Korum*, 157 Wn.2d at 629 (citing *United States v. Goodwin*, 457 U.S. 368, 377-85, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982), and *Bordenkircher v. Hayes*, 434 U.S. 357, 360-65, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)).⁵

In *Bordenkircher*, the Court held that the defendant’s due process rights were not violated when a prosecutor carried out an explicit threat, made during plea negotiations, to seek a habitual offender indictment if the defendant refused to plead guilty to the original charge. *Bordenkircher*, 434 U.S. at 365. The prosecutor originally offered to recommend a five year sentence. *Bordenkircher*, 434 U.S. at 358. The habitual offender indictment, however, would subject the defendant to a

⁵ The Court questioned whether the presumption-of-vindictiveness analysis even applied in the pretrial setting. *Korum*, 157 Wn.2d at 629 (quoting *State v. McDowell*, 102 Wn.2d 341, 344, 685 P.2d 595 (1984) (“Washington case law ... suggests that actual vindictiveness is required to invalidate the prosecutor’s adversarial decisions made prior to trial.”) (ellipsis the Court’s)).

mandatory sentence of life in prison. *Bordenkircher*, 434 U.S. at 358-59. The defendant declined the plea offer, and was convicted and sentenced to life imprisonment after trial. *Bordenkircher*, 434 U.S. at 359. The Supreme Court held that there was no violation of due process because “the accused [wa]s free to accept or reject the prosecution’s offer” and “the prosecutor ha[d] probable cause to believe that the accused committed an offense defined by statute.” *Bordenkircher*, 434 U.S. at 363-64.

The U.S. Supreme Court reaffirmed these principles in *Goodwin*, and applied them where, as here, the prosecution filed additional charges after the defendant insisted on going to trial: “the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified.” *Goodwin*, 457 U.S. at 382–83.

Goodwin and *Bordenkircher* both involved procedural scenarios indistinguishable from the present case. In *Korum*, however, the Supreme Court went further and held that no presumption of vindictiveness arises even if the new charges are filed after withdrawal of a previously accepted guilty plea.

Moreover, in *Korum* the Supreme Court specifically rejected the factors Conner alleges show vindictiveness: a disparity between the

sentence offered before trial and that imposed, and the disparity between Conner's sentence and those of his codefendants who pled guilty. *Korum*, 157 Wn.2d at 632. Further, the mere filing of additional charges and the consequent increase in sentence, regardless of the "magnitude," cannot support a presumption of vindictiveness. *Korum*, 157 Wn.2d at 634; *see also State v. Bonisisio*, 92 Wn. App. 783, 790-92, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999) (finding no prosecutorial vindictiveness when the State charged the defendant with 10 additional counts after the defendant rejected a plea agreement); *State v. Lee*, 69 Wn. App. 31, 35-38, 847 P.2d 25 (1993) (finding no prosecutorial vindictiveness when the State increased the charge after defendant refused to plead guilty); *State v. Lass*, 55 Wn. App. 300, 306, 777 P.2d 539 (1989) (filing a more serious charge after the defendant elected to go to trial did not amount to prosecutorial vindictiveness); *State v. Fryer*, 36 Wn. App. 312, 316-17, 673 P.2d 881 (1983) (finding no prosecutorial vindictiveness when the prosecutor carried out a threat to file an additional charge against the defendant if he refused to plead guilty to two lesser charges); *State v. Serr*, 35 Wn. App. 5, 10-11, 664 P.2d 1301 (1983) (finding no prosecutorial vindictiveness when the State carried out a threat to file a habitual criminal charge against the defendant if he refused to plead guilty); *State v. Penn*, 32 Wn. App. 911, 913-14, 650 P.2d 1111 (1982) (finding no prosecutorial vindictiveness when the State filed

additional charges after the defendant elected to go to trial).

The underlying circumstances between this case and *Korum* are quite similar:

[N]either *Korum* nor the Court of Appeals ever contended that the prosecutor lacked probable cause for the additional charges, or that the added charges exceeded the 16 additional charges that the prosecutor had promised to file if *Korum* did not plead guilty. The charges added after *Korum* withdrew his plea agreement involved three additional home invasions in which *Korum* was a personal participant and that the prosecution was investigating concurrently with the plea negotiations. We conclude that the increased number and the consequent severity of the collective charges caused the discrepancy in the sentences, not prosecutorial vindictiveness.

Korum, 157 Wn.2d at 632-33.

Here, as discussed above, Conner's claims regarding probable cause are frivolous. There not only existed probable cause for these charges, but on the overwhelming number of them, the jury found Conner guilty beyond a reasonable doubt. Notably in neither his direct appeal brief nor in his PRP has Conner challenged the sufficiency of the evidence to support any of his convictions.

D. CONNER HAS WAIVED THE CLAIM THAT THE TRIAL COURT SHOULD HAVE COUNTED VARIOUS OFFENSES AS SAME CRIMINAL CONDUCT BY AFFIRMATIVELY ENDORSING HIS OFFENDER SCORE; MOREOVER, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.

Conner next claims that all his offenses except those occurring on November 17, 2010, should have counted as same criminal conduct for purposes of sentencing. He asserts that therefore only one of the offenses in each of the incidents involved in Counts VII through XXV should have been included in his offender score. Conner has waived these claims by endorsing his offender score as correct. Moreover, these claims are without merit because the crimes all involved different victims or criminal intents and/or were properly counted as separate criminal conduct under the burglary anti-merger statute.

1. These claims are not preserved for review

Conner did not contest his offender score or standard range at sentencing. Generally, a defendant cannot waive a challenge to a miscalculated offender score. *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). When the sentencing error is a legal one, the waiver doctrine does not apply. *Goodwin*, 146 Wn.2d at 874.

Nevertheless, a defendant may waive a miscalculated offender score if the alleged error involves an agreement to facts, later disputed, or

a matter of trial court discretion. *Goodwin*, 146 Wn.2d at 874. “Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion.” *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000).

Goodwin cited *Nitsch* with approval, noting that the Court of Appeals properly found waiver. *Goodwin*, 146 Wn.2d at 875. In *Nitsch*, the defendant alleged a standard range identical to that calculated by the State. *Nitsch*, 100 Wn. App. at 522. At sentencing, Nitsch and the State both agreed to the calculation of his standard range. *Nitsch*, 100 Wn. App. at 517. For the first time on appeal, Nitsch argued that his two convictions constituted the same criminal conduct. *Nitsch*, 100 Wn. App. at 514.

The Court of Appeals noted that Nitsch did not merely remain silent but instead affirmatively acknowledged his standard range, thereby implicitly asserting that his crimes did not constitute the same criminal conduct. *Nitsch*, 100 Wn. App. at 522. Because Nitsch agreed to the calculation of his standard range, the court held that he waived review of the issue. *Nitsch*, 100 Wn. App. at 514, 997 P.2d 1000.

Here, Conner’s counsel affirmatively acknowledged the calculation of his offender score, and thus Conner has waived this issue on appeal. At sentencing, the trial court specifically asked whether Conner contested his offender score:

THE COURT: All right. With respect to the defendant's offender score, do you have anything that you would like to say?

MR. LONGACRE: No, Your Honor. I think that is consistent.

THE COURT: You believe that it's an accurate calculation of his offender score?

MR. LONGACRE: I do believe so, Your Honor.

38RP 2760.

Under identical circumstances to those here, this Court held that by affirmatively acknowledged the calculation of his standard range, indicating that his prior convictions did not constitute the same criminal conduct, *Nitsch* controlled and the issue was waived. The Court should decline to consider these claims.

2. Standard of review

Even if the issue were properly before the court it would be without substantive merit. Matters of sentencing are largely within the trial court's discretion, and this Court will not disturb the trial court's determination absent a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). Where two or more offenses encompass the same criminal conduct, the sentencing court counts them as a single crime when calculating the defendant's offender score. RCW 9.94A.589(1)(a). "Same criminal conduct" means "two or more crimes that require the same criminal intent,

[were] committed at the same time and place, and involve[d] the same victim.” RCW 9.94A.589(1)(a). If any one of these elements is missing, the sentencing court must count the offenses separately in calculating the offender score. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

3. Burglaries

Under RCW 9A.52.050, “[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.” Thus, the anti-merger statute contains both sentencing and charging language. *State v. Smith*, 99 Wn. App. 510, 517, 990 P.2d 468 (2000). The Supreme Court has specifically held that “[t]he plain language of RCW 9A.52.050 expresses the intent of the Legislature that ‘any other crime’ committed in the commission of a burglary would not merge with the offense of first-degree burglary when a defendant is convicted of both.” *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999). Even if the burglary and other crime involve the same criminal conduct, the trial court has discretion to punish burglary separately from the other crime. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). It follows that the trial court did not abuse its discretion in treating any of the burglaries as separate criminal conduct for sentencing purposes.

4. 12th Street (Counts VII-XV)

Both the 12th Street thefts involved victims different than the robberies. In the first home invasion the robbery⁶ victims were Aaron and Robert Dato. CP 212-13. The evidence showed that two televisions and the laptop taken were the property of Thomas Halverson and/or Aaron Rents. 20RP 1045, 21RP 1093-96. In the second incident,⁷ the robbery victims were again the Dato brothers and additionally Jeffrey Turner. CP 216-18. The theft victim (of two televisions) was Thomas Halverson and/or Quality Rentals. 20RP 1045, 21RP 1102-03. These crimes were thus not the same criminal conduct. *Lessley*, 118 Wn.2d at 779 (“crimes affecting multiple victims are not to be considered the same criminal conduct”).

5. Shore Drive (Counts XVI-XVIII)

The theft here was a misdemeanor charge and as such was not included in the offender score, CP 331-32, and was also was not subject to RCW 9.94A.589(1)(a) in any event. *State v. Langford*, 67 Wn. App. 572, 587-88, 837 P.2d 1037 (1992) (Sentencing Reform Act does not apply to misdemeanor sentences).⁸

⁶ Counts VII-X.

⁷ Counts XI-XV.

⁸ However, as noted *infra*, the third-degree theft conviction must be vacated under double-jeopardy principles.

6. *Weatherstone Apartments (Counts XIX-XX)*

This incident only involved a burglary and a theft. As previously discussed, the burglary anti-merger statute permitted the trial court to count this offense as separate criminal conduct.

7. *Wedgwood (Counts XXI-XXV)*

The Wedgwood⁹ thefts involved a different victim than the robberies, which also involved different victims. Additionally, while the thefts involved the same victim, they involved different criminal intents. The robbery victims were Aaron Tucheck and Keefe Jackson. CP 224-25. The victim of the thefts was Ann-Marie Tucheck. CP 227; 22RP 1316, 1327, 1337, 1371. Although they involved the same victim, the thefts were not the same criminal conduct. The criminal intent for second-degree theft of an access device differs from that of other theft crimes and therefore it is not the same criminal conduct. *State v. Lust*, 174 Wn. App. 887, 891-92, 300 P.3d 846 (2013).

E. WITH THE EXCEPTION OF HIS CONVICTION OF THIRD-DEGREE THEFT, CONNER FAILS TO SHOW THAT HIS CONVICTIONS VIOLATED DOUBLE JEOPARDY PROTECTIONS.

In addition to his same criminal conduct claim Conner also briefly alludes to the double jeopardy provisions of the state and federal

⁹ Counts XXI-XXV.

constitutions. Petition at 20. This claim fails, with the exception of his conviction for third-degree theft, which should be vacated.

The double jeopardy clauses of the Fifth Amendment and article I, section 9 of the Washington State Constitution protect a defendant from multiple punishments for the same offense. *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). Article I, section 9 provides the same level of protection as the Fifth Amendment. *In re Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

No double jeopardy violation occurs if the legislature specifically authorizes multiple punishments. *Garrett v. United States*, 471 U.S. 773, 778, 105 S. Ct. 2407, 85 L.Ed.2d 764 (1985). As discussed above, the Legislature has specifically authorized that burglaries be punished separately.

Under the ‘same evidence’ rule, a defendant’s double jeopardy rights may be violated if he is convicted of offenses that are identical in law and in fact. *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995). But if each offense includes an element not included in the other offense, the multiple convictions stand. *Calle*, 125 Wn.2d at 777.

As discussed above, with the exception of the Shore Drive incident, none of the robberies had the same victims as the thefts. As such they were not identical in fact. Likewise the theft Ann Marie Tucheck’s

debit card and shotgun involved the theft of different items and additionally had different elements, and as such were also proper.

The State does concede, however that the robbery and theft from Cummings during the Shore Drive home invasion were the same in law and fact. The only item taken was Cummings's laptop. *See State v. Ralph*, 175 Wn. App. 814, 826, 308 P.3d 729 (2013) ("second degree robbery and the second degree TMVWP, as charged and proved here, are the same in fact: The robbery was based on the single act of Ralph's taking a motor vehicle from a single victim by force; and proof of the theft element of the robbery also proved the TMVWP charge."). On remand, the third-degree theft conviction should therefore be vacated. *State v. Turner*, 169 Wn.2d 448, 455, 466, 238 P.3d 461 (2010) (on remand for a double jeopardy violation, the remedy is to vacate the lesser crime).

F. THE TRIAL COURT DID NOT ENTER AN EXCEPTIONAL SENTENCE; RATHER IT IMPOSED STANDARD RANGE SENTENCES, BUT RAN HIS FIREARMS ENHANCEMENTS CONSECUTIVELY, AS REQUIRED BY LAW.

Conner next claims that the trial court imposed an exceptional sentence by running his sentences consecutively without entering written findings in support of the exceptional sentence. This claim is without merit because the trial court did not enter an exceptional sentence.

Although the jury and the trial court found the existence of the

alleged aggravating circumstances, CP 312-15, 38RP 2761, the State did not request, 38RP 2767, and the trial court did not impose, 38RP 2780, an exceptional sentence. Examination of the judgment and sentence shows that the individual sentences were within the standard range, and that court ran the sentences for the underlying offenses concurrently. CP 330-33. The reason the court imposed 1148.5 months was due to the requirement that the firearms enhancements run consecutively under RCW 9.94A.533(3).¹⁰ CP 333. This claim should be rejected.

VII. CONCLUSION

For the foregoing reasons, with the exception of vacating his third-degree theft conviction, Conner's petition should be denied.

DATED April 14, 2014.

Respectfully submitted,
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¹⁰ As noted in the State's direct appeal brief, Conner's judgment will nevertheless need to be corrected because of the erroneous inclusion of an "extra" firearm enhancement. *See* Brief of Respondent at 89. The State concedes as to his third-degree theft conviction does not otherwise affect his offender score as that offense was a misdemeanor.

KITSAP COUNTY PROSECUTOR

April 14, 2014 - 10:46 AM

Transmittal Letter

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