

No. 45046-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LONZO LAWSON, II.,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Was there sufficient evidence presented to sustain Lawson's conviction for Burglary in the First Degree?
- B. Was Lawson's offender score miscalculated when the trial court found the two counts of Trafficking in Stolen Property in the First Degree were not same criminal conduct and his two counts of Unlawful Possession of a Controlled Substance were counted separately for purposes of calculating Lawson's offender score?

II. STATEMENT OF THE CASE

Gena Allen is the owner of Frosty's Saloon & Grill located in Napavine, Washington. RP 68.¹ Ms. Allen has owned the business for 15 years. RP 68. Inside the building there is an office which the employees have access to as it is open during the day and then locked up at night. RP 71-72. Pull tabs, credit card tape, pens, supplies for the bar, book work, a safe, change, and extra pull tab money are kept inside the office. RP 72. The safe locks but can be temperamental and needs to be in the correct position to fully engage the lock. RP 73, 155-56. The combination to the safe is written down and posted underneath a shelf in the office, near the safe. RP 73. Frosty's has three possible entrances. RP 69. There is a fence enclosure that is approximately six feet tall around the

¹ The State will refer to the transcript of the trial, Volumes I through V, and the sentencing hearing which are consecutively paginated as RP. Any other hearings will be referred to by RP and the date of the proceedings.

outdoor area which is accessed through a set of French doors. RP 128.

Christopher Carsten has worked at Frosty's for the last three to four years. RP 73, 171. Mr. Carsten spent some time at the Lewis County Jail starting around January 13, 2013 for attempting to elude a police vehicle. RP 172-73. Mr. Carsten and Lawson were housed together at the Lewis County Jail from February 14, 2013 to March 15, 2013. RP 195. Mr. Carsten told some of the people he was in jail with he worked at Frosty's because he figured it was a place that some of the people would know. RP 179. Lawson asked Mr. Carsten where Frosty's was located and about Mr. Carsten's employment there. RP 179. Lawson inquired as to where the money was kept and if there was a safe. RP 179. Mr. Carsten told Lawson there was money on the premises, it may be kept in the office or in the safe, and that Frosty's had no security system. RP 180. Mr. Carsten shared this information with Lawson to get Lawson off his back. RP 181.

Julie Canedo has been an employee of Frosty's since 2001. RP 119. On April 8, 2013 Ms. Canedo was working as a closer. RP 120. Ms. Canedo received a phone call at the end of her shift, around midnight. RP 120. The caller asked if they were closed, Ms.

Canedo said yes, and the male caller stated, "Closed, huh?" and hung up. RP 121. The context of the phone call was unusual because people usually called Ms. Canedo by her name and were calling to ask if they could still get food and how long she was going to be at Frosty's. RP 121. Most of the customers at Frosty's are regulars. RP 121.

When closing Ms. Canedo makes sure all the doors are locked, she puts the till away, checks to ensure the office door is locked, and makes sure everything is shut off and locked. RP 122. The till is placed on the desk in the office and the office door is locked. RP 122. When Ms. Canedo left that night all the panes in the French door were intact, the door frame had no damage, the bar was across the door, and the door was locked. RP 124.

Janice Ham has worked at Frosty's for eight years and was the first person to arrive on April 9, 2013 as she was the opener that day. RP 129-30. Ms. Ham arrived at Frosty's between 6:00 a.m. and 6:30 a.m. RP 130. Ms. Ham did not notice anything was wrong at first but did see a hat on the kitchen floor and a drawer that housed utensils was left open. RP 130-31. Ms. Ham later discovered broken glass at the rear of the restaurant, near the French doors that go outside. RP 132. Ms. Ham also found the

office door was open, there were papers all over the floor of the office, and she noticed a spatula and a knife on the floor. RP 132. Ms. Ham called the police. RP 132. There was also a steak knife inside the office, which was not a normal occurrence. RP 146.

Officer Elwood from Napavine Police Department arrived at Frosty's and found two areas that appeared to have forced entry, one was the initial entry at the French doors and the second was the office. RP 361-62. Part of the door to the office was damaged; there were pieces of wood missing and chunks of the door were basically ripped away. RP 84. The kitchen at one point had two chef's knives but after the break in only one remained intact. RP 81-82. One chef's knife was found broken in front of the office. RP 82. Officer Elwood collected a hat, a knife handle, and a steak knife as evidence. RP 101, 361. Ms. Allen later determined that 14,797 dollars in cash had been removed from the safe. RP 75-76.

Kevin Dawkins has known Lawson and Thomas Pennypacker for about a year. RP 197. Mr. Pennypacker lives with Mr. Dawkins and considers Mr. Dawkins his best friend. RP 259. Mr. Pennypacker has known Lawson for a number of years. RP 259.

On April 8, 2013 Mr. Pennypacker and Lawson were at Mr. Dawkins' house in Chehalis. RP 194. The men were trying to figure out ways to come up with money because they wanted to get high. RP 261. While Mr. Dawkins was outside smoking he could hear Mr. Pennypacker and Lawson discussing Frosty's. RP 200. Lawson shared details about the layout and the amount of money estimated to be kept at Frosty's. RP 200, 262. Mr. Pennypacker was interested because he is a junkie and it sounded like easy money. RP 262. Lawson made it sound like they could get 8,000 to 10,000 dollars from the burglary. RP 263. Lawson indicated that he was going to try to get into Frosty's later that night. RP 201. Mr. Pennypacker initially agreed to go and act as a lookout but he "chickened out" and stayed home with Mr. Dawkins. RP 263-64

Mr. Dawkins gave Lawson a flashlight for his bike but did not actually believe Lawson would go and commit a break in at Frosty's. RP 201. Lawson left Mr. Dawkins' house between 10:00 and 11:00 p.m. RP 201. Lawson came back over to Mr. Dawkins' house the following morning around 8:00 a.m. RP 202. According to Mr. Dawkins, "We let him in and he came in. He had a leather jacket on, pulled out a bunch of cash out of the leather jacket and I believe there was a tan or a blue bank bag. And he handed me and

Tommy 2 grand apiece. You know, so we went shopping, went out to eat, went shopping,” RP 203. Lawson told Mr. Dawkins and Mr. Pennypacker he got the money from the safe at Frosty’s. RP 203.

Later, when Mr. Dawkins was contacted by the police he was only able to return 70 to 80 dollars of the 2,000 dollars he had received from Lawson. RP 242. Mr. Dawkins had spent the money buying drugs, clothes, shoes, loaning money to friends, giving money to friends, sharing drugs with friends, and purchasing Suboxone. RP 242. Mr. Pennypacker and Lawson went to the Lucky Eagle Casino and gambled. RP 268. When contacted by law enforcement Mr. Pennypacker was able to give back approximately 840 dollars. RP 267. Mr. Pennypacker and Mr. Dawkins both implicated Lawson in the burglary. RP 380.

On April 11, 2011 Lawson was contacted inside his hotel room at the Chehalis Inn. RP 488, 510, 518. Detective Holt received permission from Lawson to look at property inside the hotel room. RP 489. Detective Kimsey saw heroin, a new laptop computer, a backpack that had a blue bank bag inside of it, and clothing in the room. RP 527-28. Detective Holt found a new set of hair clippers and a cell phone box. RP 489. Lawson admitted he had just purchased those items. RP 489. Detective Holt also

discovered used syringes, which Lawson stated he had forgotten about. RP 489. Detective Holt found a large amount of cash inside the cardboard insert for the clippers. RP 489. There were also baggies containing methamphetamine and heroin. RP 400-01, 490, 566, 569.

As part of the investigation law enforcement tested various items collected from Frosty's for fingerprints and DNA evidence. DNA matching Lawson was located on the beanie hat Ms. Ham found in the kitchen and the white knife handle found on the floor next to the office door. RP 600.

The State charged Lawson with Count I – Burglary in the First Degree, Count II – Theft in the First Degree, Counts III and IV – Trafficking in Stolen Property in the First Degree, and Count V – Possession of Heroin. CP 1-4. On May 2, 2013 the State filed an amended information adding a deadly weapon enhancement to Count I – Burglary in the First Degree and adding Count VI – Possession of Methamphetamine. CP 14-17. Lawson's trial counsel filed a *Knapstad*² motion to dismiss. CP 18-49. The trial court heard and denied the motion to dismiss. RP (5/5/13) 2-18. The State filed

² *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

a second amended information, cleaning up the charging language but not altering the crimes charged for each count. CP 77-81.

Lawson elected to have his case tried to a jury. See RP. The jury convicted Lawson as charged in the second amended information. CP 132-39. At sentencing Lawson stipulated to his prior criminal history but disputed the State's calculation regarding his offender score. RP 715-723; CP 140-41. The trial court agreed with the State's calculation, counting each Trafficking in Stolen Property in the First Degree count as separate criminal conduct. RP 721; CP 142-51. Lawson was sentenced and he timely appeals his conviction and sentence. CP 142-51, 160.

The State will supplement the facts as necessary in the argument section below.

III. ARGUMENT

A. THERE IS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN LAWSON'S CONVICTION FOR BURGLARY IN THE FIRST DEGREE.

The State presented sufficient evidence to sustain the jury's conviction for Burglary in the First Degree. Lawson challenges the sufficiency of evidence for Count I – Burglary in the First Degree. Lawson argues there was no evidence presented that Lawson used, attempted to use, or threatened to use a deadly weapon, a

knife, in a manner that was readily capable of causing death or substantial bodily harm. App.'s Br. 8-15. The State respectfully disagrees with Lawson's interpretation of the evidence presented at trial. The evidence was sufficient to prove Lawson used, attempted to use, or threatened to use the knife in a manner that was readily capable of causing death or substantial bodily harm.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. There Was Sufficient Evidence Presented To Prove Lawson Used, Attempted To Use, Or Threatened To Use The Knife In A Manner That Was Readily Capable Of Causing Death Or Substantial Bodily Harm.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a

conviction, the evidence must be viewed in the light most favorable to the State. *Salinas*, 119 Wn.2d at 201. If “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *State v. Vazquez*, 66 Wn. App. 573, 578, 832 P.2d 883 (1992). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the finder of fact by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the trier of fact and not subject to review. *State v. Vasquez*, 66 Wn. App. 573, 580, 832 P.2d 883 (1992), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be

assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

The State charged Lawson with Burglary in the First Degree. CP 77. To convict Lawson of Burglary in the First Degree the State was required to prove Lawson entered or remained in a building, with the intent to commit a crime against a person or property therein, and was armed with a deadly weapon. RCW 9A.52.020(1); See WPIC 60.01 and WPIC 60.02. Lawson argues the State did not prove he was armed with a deadly weapon. App.’s Br. at 8-15. Lawson does not dispute that he entered or remained unlawfully in the building with the intent to commit a crime against person or property therein (in this case theft). See App.’s Br.

A deadly weapon is defined as,

any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6). A knife, such as the ones used by Lawson, is not a deadly weapon per se. *In re Martinez*, 171 Wn.2d 354, 365, 256 P.3d 277 (2011). A weapon, other than an explosive or firearm, is a deadly weapon when “under the circumstances in which it is

used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” *Martinez*, 171 Wn.2d at 365, *citing State v. Taylor*, 97 Wn. App. 123, 126, 982 P.2d 687 (1999). The Supreme Court has made it clear that the statute defining deadly weapon is unambiguous and mere possession of a deadly weapon, other than a firearm or explosive, is insufficient. *Martinez*, 171 Wn.2d at 366, *citing* RCW 9A.04.110(6).

The Supreme Court noted in the *Martinez* opinion that it was disapproving of *State v. Gamboa*, 137 Wn. App. 650, 154 P.3d 312 (2007) “to the extent that it rejected a totality of the circumstances test for determining whether a weapon other than a firearm or explosive is deadly under the first degree burglary statute.” *Martinez*, 171 Wn.2d at 368, n. 6. In *Gamboa* the evidence was that Gamboa had used the machete as a tool to gain access to the victim’s house. *Gamboa*, 137 Wn. App. at 651-53. The Supreme Court criticized Division Three because it characterized a machete, without regard to actual, attempted, or threatened use, as a deadly weapon on the basis of its dangerousness. *Martinez*, 171 Wn.2d at 368, n. 6. Determining whether a weapon, other than a firearm or explosive, is a deadly weapon based solely on its dangerousness

treats the weapon as a per se deadly weapon instead of the totality of the circumstances test that is required by the language of the statute. RCW 9A.04.110(6); *Martinez*, 171 Wn.2d at 368, n. 6.

In *Martinez* the Supreme Court found the evidence presented was insufficient to sustain the Burglary in the First Degree conviction. The Court held that the State did not present sufficient evidence that Martinez was armed with a deadly weapon. *Martinez* 171 Wn.2d at 368-69. Martinez had fled from a closed farm shop that he was found inside after a burglar alarm alerted police to the shop. *Id.* at 357-58. After Martinez was apprehended the officer noticed an empty knife sheath on Martinez's belt. *Id.* at 358. Martinez remarked that the knife must have fallen out while he was running. *Id.* The knife was located in the mud and had a fixed blade that was about three and a half inches long. *Id.* The Supreme Court held the evidence, that no one saw Martinez reach for the knife or use it, was "insufficient to lead a rational fact finder to find intent to use the weapon beyond a reasonable doubt." *Id.* at 368.

Lawson broke into Frosty's and armed himself, twice, with a knife from the kitchen. RP 341, 350. Lawson had to grab a knife from the kitchen and traverse the restaurant to the locked office, a length of approximately 40 feet. RP 143. Lawson obviously used

the chef's knife, and possibly the steak knife, to gain access to the office. RP 132, 146, 370; Ex. 9, 11, 15. It also appears Lawson used a spatula to gain access to the office after he broke the chef's knife. RP 132; Ex. 9. Lawson chose to arm himself with a knife, at one point a large chef's knife with a nine and a half inch blade, and also use the weapon as a tool to attempt to gain access to the office. RP 556. Lawson continued to be armed with the steak knife, which had a four inch blade, as he entered the office as evidenced by the knife, with a bend in it, which was located in the office on the desk. RP 146, 370, 556; Ex. 15.

There is nothing in the case law that states under the totality of the circumstances test that a person cannot use a weapon as a tool to gain access and be armed with that weapon in a manner that makes it a deadly weapon. The question is under the circumstances that the weapon is used, attempted to be used, or threatened to be used, is readily capable of substantial bodily harm or death. Lawson did not know if the employee was locked inside the office, or perhaps elsewhere in the building. There was no reason to choose a knife over other, better suited methods of gaining access to the office other than to have the knife available to use against a person who may be therein. This circumstantial

evidence is punctuated by Lawson's continued possession of the steak knife into the office. Had the steak knife merely been a tool, there was no reason to carry it, available and ready for use against a person, into the office. It would have been discarded like the chef's knife and the spatula which were found on the floor outside the office door. The State presented sufficient evidence for a rational fact finder to find intent to use the weapon beyond a reasonable doubt. Lawson's conviction for Burglary in the First Degree should be affirmed.

B. LAWSON'S OFFENDER SCORE WAS PROPERLY CALCULATED.

Lawson argues that his offender score was incorrectly calculated because his two Trafficking in Stolen Property in the First Degree convictions are same criminal conduct and should have been counted as one point. App.'s Br. at 15-20. Lawson also argues his attorney was ineffective for failing to argue his two convictions for Possession of a Controlled Substance (methamphetamine and heroin) were same criminal conduct. App.'s Br. at 20-23. Lawson's arguments fail because the two Trafficking in Stolen Property in the First Degree convictions are separate conduct and the two Possession of Controlled Substance convictions were treated as same criminal conduct.

1. Standard Of Review.

Offender scores are reviewed de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). A claim that two crimes encompass the same criminal conduct is reviewed under a misapplication of the law or an abuse of discretion standard. *State v. Grantham*, 84 Wn. App. 854, 857, 932 P.2d 657 (1997) (citation omitted). A trial court abuses its discretion when it “(1) adopts a view that no reasonable person would take and is thus “manifestly unreasonable,” (2) rests on facts unsupported in the record and is thus based on “untenable grounds,” or (3) was reached by applying the wrong legal standard and is thus made “for untenable reasons.” *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. The Two Counts Of Trafficking In Stolen Property In The First Degree Were Not The Same Criminal Conduct, Therefore, Lawson's Offender Score Was Properly Calculated.

Offenses considered same criminal conduct will not be used in a defendant's offender score against each other and will be counted as one crime for sentencing purposes. RCW 9.94A.589(1). Same criminal conduct as used in RCW 9.94A.589(1) "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." If one of the elements outlined in RCW 9.94A.589(1) is missing, the offenses are not considered same criminal conduct. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) (citation omitted). While the court will analyze whether one crime furthered the next, the court must look at the specific facts of the case. *State v. Longuskie*, 59 Wn. App. 838, 847, 807 P.2d 1004 (1990).

Lawson argues that the two Trafficking in Stolen Property in the First Degree convictions are same criminal conduct for the following reasons: (1) sequential transactions are considered same place and time, (2) both transactions involve the same victim, Ms. Allen, and (3) both transactions involve the same criminal intent, to dispose of Ms. Allen's money. App.'s Br. at 16-18. The State argued, successfully to the trial court that the successive

transactions fall under the same analysis as *State v. Vanoli*.³ RP 715-22. The trial agreed that the successive transactions, giving Ms. Allen's money to Mr. Pennypacker and Mr. Dawkins, were separate criminal conduct. RP 715-22. While the State does agree the victim and the time and place are the same, the State maintains that the successive transactions fall under the analysis Division One articulated in *Vanoli*, that the criminal objective was different for each transaction. See *State v. Vanoli*, 86 Wn. App. 643, 937 P.2d 1166 (1997).

Vanoli sold liquid LSD to three minors in a short time span, successively, at his residence. *Vanoli*, 86 Wn. App. at 650. Vanoli argued that the deliveries were same criminal conduct, as the victim (the public) was the same for each count, they were at the same time and place, and the criminal intent for all three deliveries was the same. *Vanoli*, 86 Wn. App. at 651. Division One disagreed with Vanoli, finding that the criminal intent was not the same for all three crimes "because there were three separate transactions with three separate buyers. Each transaction had as its objective the sale of LSD to a different purchaser." *Id.*

³ *State v. Vanoli*, 86 Wn. App. 643, 937 P.2d 1116 (1997).

Lawson attempts to draw a distinction between his conduct and the *Vanoli* decision by arguing that the court in *Vanoli* “was swayed by the fact that each transaction created a new injury to society as a whole because each provided a different member of society with an illegal substance, and because the purchasers were three different minors and therefore additional victims.” App.’s Br. at 19. Lawson also argues that when two crimes are the same crime against the same person over a short period of time those two crimes encompass the same criminal conduct. App.’s Br. at 19-20, *citing State v. Porter*, 133 Wn.2d 177, 180, 942 P.2d 974 (1997).

First, the facts of *Porter* are distinct from the facts in Lawson’s case because Porter delivered two different controlled substances, successively, to the same person. *Porter*, 133 Wn.2d at 185-86. Lawson is correct that Division One, in *Vanoli*, did state the age of purchasers made them additional victims and also that each delivery was a new injury to society because there was a different person who drugs were delivered to as two of the reasons it found there was separate criminal conduct. *Vanoli* at 651-52. Lawson’s statement disregards Division One’s first ground it found for holding the conduct to be separate, that there were three distinct transactions to different purchasers. The facts are similar to this

case, where you have Lawson trafficking stolen property, 2,000 dollars of Ms. Allen's money, successively to two different people, Mr. Dawkins and Mr. Pennypacker. RP 74, 203, 266. The trial court correctly held the two counts of Trafficking in Stolen Property in the First Degree were separate criminal conduct and this Court should affirm Lawson's sentence.⁴

3. Lawson's Trial Counsel Was Not Ineffective For Failing To Argue The Two Counts Of Possession Of A Controlled Substance Were Same Criminal Conduct Because The Two Counts Were Treated As Same Criminal Conduct.

To prevail on an ineffective assistance of counsel claim Lawson must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must

⁴ If this Court were to disagree with the State's analysis, the State would note that Lawson's sentence would remain unchanged because he has been subsequently convicted of a new crime – Possession of a Controlled Substance in Lewis County case number 13-1-00839-9.

evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Lawson argues his attorney was ineffective for failing to argue that his convictions for Possession of Methamphetamine and Possession of Heroin were same criminal conduct and he was prejudiced by this conduct because the trial court would necessarily have found them to be the same criminal conduct. App.'s Br. at 20-23. Lawson's argument fails because the trial court did not count the two Possessions of a Controlled Substance convictions separately in regards to calculating his offender score. CP 140-151. The trial court calculated Lawson's offender score as seven. CP

144. Lawson had prior convictions for Assault in the Third Degree and VUCSA (Violation of the Uniform Controlled Substances Act), which yielded two points towards his offender score. CP 140-41,144. Lawson was sentenced for Count I: Burglary in the First Degree, Count II: Theft in the First Degree, Count III and IV: Trafficking in Stolen Property in the First Degree, Count V: VUCSA – Possession of a Controlled Substance – Heroin, and Count VI: VUCSA – Possession of a Controlled Substance – Methamphetamine. CP 142-51. The trial court then held that the two trafficking counts were separate criminal conduct. RP 715-21; CP 144. The trial court also found that Lawson committed his current offense while on community custody. CP 144. This finding added one point to Lawson’s offender score. RCW 9.94A.525. Therefore, with two points for the prior conviction, one point for community custody, and four points from the concurrent convictions in this case, the offender score was seven. CP 142-44.

The two Possession of a Controlled Substance counts were not considered separate criminal conduct. It appears to the State that Lawson simply overlooked the additional point for community custody. Lawson’s offender score of seven was correct, Counts V and VI were not counted separately, and therefore Lawson’s

attorney was not ineffective for failing to argue same criminal conduct because the trial court sentenced Lawson calculating the two Possession of a Controlled Substance counts as same criminal conduct. This Court should affirm Lawson's sentence.

IV. CONCLUSION

The State presented sufficient evidence that Lawson was armed with a deadly weapon, and therefore, committed Burglary in the First Degree. The trial court correctly calculated Lawson's offender score. This Court should affirm the convictions and sentence.

RESPECTFULLY submitted this 18th day of March, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. LONZO LAWSON, II., Appellant.	No. 45046-1-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 18, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Stephanie C. Cunningham, attorney for appellant, at the following email addresses: SCCAAttorney@yahoo.com.

DATED this 18th day of March, 2014, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

March 18, 2014 - 3:16 PM

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