

No. 46068-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIM DUGGINS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy Judge
Cause No. 13-1-00961-1

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	1
1. <u>Duggins signed a written waiver of his right to a jury trial. The constitution does not require more</u>	1
2. <u>The charging document contained every essential element of the crimes charged. If he found it to be vague, Duggins could have sought a bill of particulars</u>	5
3. <u>Duggins cannot establish ineffective assistance of counsel because he cannot show that he was prejudiced by his attorney's failure to ask the court to count his two convictions as the same criminal conduct for scoring purposes.</u>	10
D. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Bonds</u> , 98 Wn.2d 1, 653 P.2d 1024 (1982)	8
<u>State v. Crawford</u> , 159 Wn.2d 86, 147 P.3d 1288 (2006)	12
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999)	10
<u>State v. Graciano</u> , 176 Wn.2d 531, 295 P.3d 219 (2013)	11
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	12
<u>State v. Holt</u> ; 104 Wn.2d 315, 704 P.2d 1189 (1985)	8
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991)	6-7
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 552 (1989)	6
<u>State v. Lessley</u> , 118 Wn.2d 773, 827 P.2d 996 (1992)	13-15
<u>State v. McCarty</u> , 140 Wn.2d 420, 998 P.2d 296 (2000)	6-7
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	12
<u>State v. Noltie</u> , 116 Wn.2d 831, 809 P.2d 190 (1991)	7, 9

<u>State v. Stegall,</u> 124 Wn.2d 719, 881 P.2d 979 (1994)	4
<u>State v. Wicke,</u> 91 Wn.2d 638, 591 P.2d 452 (1979)	4
<u>State v. Williams,</u> 162 Wn.2d 177, 170 P.3d 30 (2007)	8

Decisions Of The Court Of Appeals

<u>In re the Pers. Restraint of Riofta,</u> 134 Wn. App. 669, 142 P.3d 193 (2006)	13
<u>State v. Benitez,</u> 175 Wn. App. 116, 302 P.3d 877 (2013)	8
<u>State v. Brand,</u> 55 Wn. App. 780, 780 P.2d 894 (1989)	5
<u>State v. Downs,</u> 36 Wn. App. 143, 672 P.2d 416 (1983)	5
<u>State v. Elliott,</u> 114 Wn.2d 6, 785 P.2d 440 (1990)	7
<u>State v. Hos,</u> 154 Wn. App. 238, 225 P.3d 389 (2010)	3
<u>State v. Knight,</u> 176 Wn. App. 936, 309 P.3d 776 (2013)	14-15
<u>State v. Nitsch,</u> 100 Wn. App. 512, 997 P.2d 1000 (2000)	10-11
<u>State v. Pittman,</u> 134 Wn. App. 376, 166 P.3d 720 (2006)	12
<u>State v. Phuong,</u> 174 Wn. App. 494, 299 P.3d 37 (2013), <i>rev. deferred pending decisions in other cases, No. 88889-2</i>	11

<u>State v. Plano,</u> 67 Wn. App. 674, 838 P.2d 1145 (1992).....	8
<u>State v. Ramirez-Dominguez,</u> 140 Wn. App. 233, 165 P.3d 391 (2007).....	4-5
<u>State v. Saunders,</u> 120 Wn. App. 800, 86 P.3d 232 (2004).....	13

U.S. Supreme Court Decisions

<u>Strickland v. Washington,</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	12
---	----

Statutes and Rules

CR (sic) 3.3	2
CrR 6.1.....	4
CrR 2.1(c)	8
RAP 2.5(a)	5, 10
RCW 9.94A.589(1)(a)	10-11
RCW 9A.52.050	14
U.S. Constitution Amendment VI.....	6, 11
Washington Construction, Article 1 § 22 (Amendment 10).....	6

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Duggins' jury waiver was constitutionally sufficient.
2. Whether the charging document was constitutionally sufficient.
3. Whether defense counsel provided ineffective assistance by failing to ask the court to consider the two convictions to be the same criminal conduct for scoring purposes.

B. STATEMENT OF THE CASE.

The State accepts Duggins' statement of the case.

C. ARGUMENT.

1. Duggins signed a written waiver of his right to a jury trial. The constitution does not require more.

Duggins claims that, "absent a personal expression of waiver," the State cannot show that he knowingly, voluntarily, and intelligently waived his right to a jury trial. Appellant's Opening Brief at 6.

On November 26, 2013, Duggins entered into a contract with the Thurston County drug court. CP 4-7. The first three pages contain a list of 23 items that specify his obligations, the obligations of the State, and the consequences that will follow his breach of the conditions. Item 18 says:

If he/she is terminated from the program, he/she agrees and stipulates that the Court will determine the issue of guilt on the pending charge(s) solely upon the law enforcement/investigative agency reports or declarations, witness statements, field test results, lab test results, or other expert testing, or examination such as fingerprint or handwriting comparisons, which constitute the basis for the prosecution of the pending charge(s). He/She further agrees and stipulates that the facts presented by such reports, declarations, statements, and/or expert examinations are sufficient for the Court to find him/her guilty of the pending charge(s).

CP 6. Near the bottom of that page, in bold-face type, are the words **“Defendant acknowledges an understanding of, and agrees to waive the following rights,”** followed by this list:

- a. The right to a speedy trial pursuant to CR (sic) 3.3;
- b. The right to a public trial by an impartial jury in the county where the crime is alleged to have been committed;
- c. The right to hear and question any witness testifying against the defendant;
- d. The right at trial to have witnesses testify for the defense, and for such witnesses to be made to appear at no expense to the defendant; and
- e. The right to testify at trial.

CP 6. Following that is a paragraph which reads:

My attorney has explained to me, and we have fully discussed, all of the above paragraphs. My attorney has explained that my potential sentencing range is 22 to 29 and 12+ to 14 months. I understand them all

and wish to enter into this Drug Court Program Contract. I have no further questions to ask the Judge.

CP 7. Immediately below that paragraph is Duggins' signature, and immediately below that is this language:

I have read and discussed this Drug Court Program Contract with the defendant and believe that the defendant is competent to fully understand the terms of the Contract.

The signature of Duggins' attorney is just below this paragraph. CP 7. The judge made the finding that Duggins had read and understood the entire contract, and that his attorney had read it to him in full and that Duggins understood it. CP 7.

At the hearing on November 26, 2013, when the contract was entered with the court, Duggins' counsel said:

So he spent a long time with that contract this afternoon, *which included the—all the standard language*, the fee as well as the standard range should regretfully, but we're not expecting this, Mr. Duggins not be successful, and I believe he's signing it with a full knowledge of the requirements of this court and what he's getting into.

11/26/13 RP 4, emphasis added.

The State bears the burden of showing that a defendant's waiver of a jury trial is valid, and that validity is reviewed de novo. State v. Hos, 154 Wn. App. 238, 249-50, 225 P.3d 389 (2010). CrR

6.1 requires that a written waiver of a jury trial be filed and that the court approve it. Even so, failure to file the written waiver is not determinative. Waiver can be done orally on the record if it is done knowingly, intelligently, and voluntarily, without improper influence. State v. Ramirez-Dominguez, 140 Wn. App. 233, 240, 165 P.3d 391 (2007). Waivers must be either in writing or orally on the record, but all that is required is some personal expression of waiver by the defendant, not necessarily a colloquy with the court. Id. An explanation of the consequences need not be on the record. State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). Different constitutional rights require different levels of inquiry by a reviewing court. A valid waiver of the of the right to counsel or a guilty plea, for example, will usually require a full colloquy on the record to ensure the defendant understands the consequences of his decision. A waiver of a jury trial does not. Id. at 725.

The "reasonable presumption" is against a waiver "absent an adequate record to the contrary." Ramirez-Dominguez, 140 Wn. App. at 240 (citing to State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979)). The representation by defense counsel that the defendant has validly waived the right to a jury trial is "relevant evidence and entitled to consideration by the trial court." State v.

Downs, 36 Wn. App. 143, 146, 672 P.2d 416 (1983); *see also* Ramirez-Dominguez, 140 Wn. App. at 240. “Although a writing cannot be regarded as conclusive, it is certainly strong evidence that the accused effectively waived his right to a jury trial. Indeed, the purpose of the writing requirement is to ensure that a waiver is knowing, voluntary and intelligent.” Downs, 36 Wn. App. at 145. “The court and the prosecutor should be entitled to rely on the defendant’s written waiver in compliance with the rule.” State v. Brand, 55 Wn. App. 780, 788, 780 P.2d 894 (1989).

Duggins’ argument seems to assume that his signature on the contract does not constitute a personal expression of waiver. The record, which includes the contract, does indeed demonstrate a knowing, intelligent, and voluntary waiver of the right to a jury trial. Since he did not object in the trial court he may bring this claim for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a). He has not demonstrated a manifest error and his claim should be denied.

2. The charging document contained every essential element of the crimes charged. If he found it to be vague, Duggins could have sought a bill of particulars.

Duggins argues that the charging document lacked critical facts and thus he could not prepare an adequate defense. He does

not allege that the charging language, CP 3, omits any of the essential elements of the offenses.

An accused has a right to be informed of the criminal charge against him so that he will be able to prepare and mount a defense at trial. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); see U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10). The “essential elements” rule requires that, in order to provide adequate notice to a criminal defendant, a charging document must allege the elements of the charged crime as well as the conduct alleged to have constituted the crime, if the statutory language alone is insufficient. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (citing State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). “We have recently reiterated that it is sufficient to charge in the language of a statute *if* the statute defines the offense with certainty.” Id. at 99 (emphasis in original). The primary goal of the rule is simply to “give notice to an accused of the *nature* of the crime” with which he has been charged. Id. at 101 (emphasis added). “It is sufficient to charge in the language of a statute if it defines the offense with certainty.” Leach, 113 Wn.2d at 686.

A charging document that is challenged for the first time on appeal will be construed liberally in favor of its validity and will

be found sufficient if the necessary elements of the offense appear in any form, or by fair construction may be found, on the face of the document. McCarty, 140 Wn.2d at 425. Viewed in this way, the charging document will be held to include all facts which are necessarily implied by the language of the allegations. Kjorsvik, 117 Wn.2d at 109. Provided that the necessary elements appear in some form on the face of the document, a defendant can succeed in challenging the sufficiency of the information only where he was “actually prejudiced by the inartful language” of the charges. McCarty, 140 Wn.2d at 425; Kjorsvik, 117 Wn.2d at 103, 106 (noting that a liberal construction and requirement of actual prejudice would prevent defendants from “sandbagging,” or challenging an information only after defects could no longer be remedied).

Contrary to Duggins’ suggestion, a charging document is not required to describe in detail exactly *how* the defendant is believed to have committed the acts constituting the crime. State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991) (an information need not specify the “when, where, or how” of the charged offense); State v. Elliott, 114 Wn.2d 6, 13, 785 P.2d 440 (1990) (an information need not elect the specific means, out of several possible, that a

defendant might have violated the statute); State v. Plano, 67 Wn. App. 674, 678-79, 838 P.2d 1145 (1992) (an information charging assault need not specify which person the accused allegedly assaulted); State v. Benitez, 175 Wn. App. 116, 124, 302 P.3d 877 (2013) (the State may allege that the means of committing the offense are unknown).

In challenging his charging document, Duggins has overlooked the distinction drawn in State v. Bonds, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982), between “a constitutionally defective information and one which is merely deficient due to vagueness.” State v. Holt; 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). The courts have repeatedly pointed out that an information which accurately defines the elements of an offense, but is vague as to other matters deemed significant by the defendant, may be corrected by requesting a bill of particulars. CrR 2.1(c); Noltie, 116 Wn.2d at 843. A defendant who fails to timely request a bill of particulars cannot challenge the information on appeal. Id.

In determining whether a defendant suffered actual prejudice as a result of a charging document’s lack of specificity, a court is permitted to look outside the document itself. State v. Williams, 162 Wn.2d 177, 186, 170 P.3d 30 (2007). Where an information is

accompanied by a statement of probable cause that includes details of how the defendant is alleged to have committed the offense, such that the defendant can be shown to have had notice of the nature of the charges, the defendant cannot demonstrate that the information's lack of specificity caused him actual prejudice. Id. In Noltie, the court found that defense counsel's interview of the victim was an adequate way to provide the necessary particulars. Noltie, 116 Wn.2d at 845.

When Duggins signed the drug court contract he agreed that if he were terminated from the program, the court could base a finding of guilt on the law enforcement reports, witness statements, and reports of the results of expert testing or of expert opinion. CP 6. It is a reasonable inference that he had possession of those documents before he signed the contract; one would not usually agree to abide by a decision of that significance unless one knew what the documents said, and that what they said was accurate. If he did not find the charging language, which included all of the essential elements of the crimes, to be sufficient to inform him of the nature of the charges, the police reports, which included photographs in this case, did. CP 13-39. He has not alleged that

he was prejudiced by the wording of the information. It was not constitutionally deficient.

3. Duggins cannot establish ineffective assistance of counsel because he cannot show that he was prejudiced by his attorney's failure to ask the court to count his two convictions as the same criminal conduct for scoring purposes.

Duggins argues that his convictions for second degree burglary and second degree theft constitute the same criminal conduct and that he was provided ineffective assistance of counsel because his attorney did not ask the sentencing court to score them as such, and in fact, agreed to the offender score as presented by the State. 02/28/14 RP 20.

The general rule is that an issue not raised in the trial court may not be raised on appeal. RAP 2.5(a). A standard range sentence may be challenged for the first time on appeal only if it is illegal or erroneous. State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

RCW 9.94A.589(1)(a) provides that when a person is sentenced for two or more current offenses, each counts as one point against the others unless the court finds that some of all of them encompass the same criminal conduct. In that case, the

crimes which are found to be the same criminal conduct count as one point. “Crimes constitute the ‘same criminal conduct’ when they ‘require the same criminal intent, are committed at the same time and place, and involve the same victim.’” State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013); RCW 9.94A.589(1)(a). The intent referred to is not the *mens rea* required to be guilty of the crime, but the offender’s objective criminal purpose in committing the crimes at issue. State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013), *rev. deferred pending decisions in other cases*, No. 88889-2. The defendant bears the burden of convincing the court that two or more crimes constitute the same criminal conduct. “Same criminal conduct does not have a constitutional dimension . . .” Graciano, 176 Wn.2d at 539-40.

Because he waived a challenge to the same criminal conduct analysis by not raising it below, Duggins brings his challenge as a claim that his attorney was ineffective; the right to counsel is a constitutional right protected by the Sixth Amendment. Phuong, 174 Wn. App. at 547.

The statute permitting a finding of same criminal conduct is not mandatory. Nitsch, 100 Wn. App. at 523. It involves both factual determinations and the exercise of the court’s discretion. Id.

There are situations in which it would be to a defendant's benefit not to ask the court to count two or more of his offenses as the same criminal conduct. Id.

An appellate court reviews a claim of ineffective assistance of counsel de novo based on the entire record below. There is a strong presumption that counsel provided adequate representation. State v. Pittman, 134 Wn. App. 376, 384, 166 P.3d 720 (2006). To demonstrate ineffective assistance of counsel the defendant must show that his attorney's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) He must affirmatively prove prejudice, showing a reasonable probability that the outcome would have been different, not just that there could have been some "conceivable effect" on the proceedings. See State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006)

In reviewing a claim of ineffective assistance, the court engages in a strong presumption that counsel was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Additionally, legitimate trial tactics and strategy form no basis for an ineffective assistance of counsel claim. State v. Hendrickson, 129

Wn.2d 61, 77-78, 917 P.2d 563 (1996). The court evaluates the reasonableness of counsel's performance from counsel's perspective at the time of the alleged error and in light of all the circumstances. In re the Pers. Restraint of Riofta, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

This court has found a failure to seek a finding of same criminal conduct to be ineffective assistance of counsel. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004); Phuong, 174 Wn. App. at 548.¹ The result in Duggins' case, however, should be different, because he cannot show that he was prejudiced by his attorney's failure to make the same criminal conduct argument below.

Duggins was convicted of second degree burglary and second degree theft. The items that were stolen were taken during the burglary. CP 15-20. It is a reasonable inference that the intent was the same. But the burglary antimerger statute has been applied by both the Supreme Court and the Court of Appeals to the analysis of same criminal conduct. State v. Lessley, 118 Wn.2d

¹ In Nitsch, however, which raised the same criminal conduct claim for the first time on appeal but not in the context of ineffective assistance of counsel, the court found that the claim had been waived. Nitsch, 100 Wn. App. at 525.

773, 781, 827 P.2d 996 (1992); State v. Knight, 176 Wn. App. 936, 962, 309 P.3d 776 (2013).

RCW 9A.52.050 provides:

Every person who, in the commission of a burglary shall commit another crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.

In Lessley, the court upheld the trial court and Court of Appeals, which found that burglary and first degree kidnapping did not constitute the same criminal conduct. Lessley had argued that the trial court should not have the discretion to apply the burglary antimerger statute in that context, but the Supreme Court disagreed on the grounds that the it would frustrate the legislative purpose of proportional sentencing..

Because, under the SRA, sentences run concurrently, a defendant is actually punished only for the offense that yields the highest offender score. When a current burglary is not counted as a conviction for purposes of calculating the offender score, because it is considered the same criminal conduct as the more serious crime committed during the burglary, the result is disproportionate: to give defendants the same punishment they would have received if they had committed only a first degree kidnapping and never engaged in a burglary is not proportionate treatment.

We believe the better approach is to hold the antimerger statute gives the sentencing judge discretion to punish for burglary, even where it and an

additional crime encompass the same criminal conduct.

Lessley, 118 Wn.2d at 781. The court further found that “[t]his approach recognizes burglaries involve a breach of privacy and security often deserving of separate consideration for punishment.” Id. at 782. In Knight, the Court of Appeals cited to Lessley and recognized the trial court’s authority to punish burglary separately, even if the crimes would be considered the same criminal conduct. Knight, 176 Wn. App. at 962.

As argued above, Duggins must show not only deficient performance by his attorney but prejudice, that his sentence would likely have been different had counsel made the argument for same criminal conduct scoring. His argument assumes that the sentencing court would have had no choice but to count his convictions as one crime. Appellant’s Opening Brief at 13. But that is not the case, and it cannot be said that it is likely his request would have been granted.

D. CONCLUSION.

Duggins validly waived his right to a jury trial, the charging document was constitutionally sufficient, and he cannot show

ineffective assistance of counsel. The State respectfully asks this court to affirm his convictions.

Respectfully submitted this 15th day of October, 2014.



Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

October 15, 2014 - 3:20 PM

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