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NO. 64374-6-I

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDRE KARLOW,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES E. ROGERS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KRISTIN A. RELYEA
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES

1. Under ER 105 and longstanding jurisprudence, a party's failure to request a limiting instruction at trial prevents that party from claiming on appeal that an instruction should have been given. At trial, Karlow did not request a limiting instruction regarding the admission of ER 404(b) evidence. Did Karlow waive his right to challenge the trial court's failure to give a limiting instruction?

2. To prevail on an ineffective assistance of counsel claim, the defendant must show deficient performance and resulting prejudice. Legitimate trial tactics and strategy cannot form the basis of an ineffective assistance of counsel claim. A defendant is prejudiced when there is a reasonable probability that but for counsel's deficient performance, the trial would have resulted in a different outcome. At trial, Karlow testified about his prior convictions, warrant history, and an event leading up to the charged incident. Karlow's counsel failed to request a limiting instruction regarding this ER 404(b) evidence. Does counsel's failure to request a limiting instruction about evidence Karlow testified to at length reflect a legitimate trial strategy? If not, has Karlow failed to show prejudice from the lack of a limiting instruction?

3. Disarming a law enforcement officer has an anti-merger provision that allows a trial court to punish a defendant for disarming an officer separately from any other crime committed by the defendant during the course of the disarming. The trial court found that Karlow's actions in disarming an officer and escaping from that officer were not the same criminal conduct. Did the trial court properly exercise its discretion under the anti-merger provision when it scored each crime separately?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Andre Karlow with Assault in the Third Degree, Disarming a Law Enforcement Officer, and Escape in the First Degree. CP 29-30. The jury convicted Karlow as charged. CP 63-65. The trial court sentenced Karlow within the standard range on all counts: 60 months for Assault in the Third Degree, 12 months for Disarming a Law Enforcement Officer, and 84 months for Escape in the First Degree. CP 117-25; 6RP 28.¹

¹ The Verbatim Report of Proceedings consists of six volumes. The State has adopted the following reference system: 1RP (8/24/09 and 8/25/09), 2RP (8/26/09), 3RP (8/27/09), 4RP (8/31/09), 5RP (8/31/09 and 9/2/09), and 6RP (10/23/09).

Additionally, the trial court sentenced Karlow to serve an additional 9-12 months on community custody following his release. CP 121.

2. SUBSTANTIVE FACTS

On December 23, 2008, Seattle Police Officer Robert Brown exited a Starbucks coffee shop in the University District and saw Andre Karlow walking down the street with his father. 2RP 92, 94. Ofc. Brown recognized Karlow from previous occasions and engaged him in short conversation as Ofc. Brown walked back to his patrol car. 2RP 90-91, 94-96. After Ofc. Brown took a seat in his car, he ran a routine warrants check and learned that Karlow had two outstanding warrants for his arrest.² 2RP 99-100. Although Ofc. Brown tried to relocate Karlow to arrest him that day, Ofc. Brown was unsuccessful. 2RP 103.

A few days later, Ofc. Brown learned from another officer that Karlow had been involved in an incident on December 26, 2008, in downtown Seattle. 2RP 103, 105. Reviewing dispatch's account of the incident, Ofc. Brown learned that Karlow had fled

² Karlow's warrants stemmed from his convictions for Attempting to Elude, Theft in the First Degree, and Conspiracy to Deliver Cocaine. Ex. 19 and 20. Karlow received the warrants for failing to appear for a restitution hearing on the eluding and theft case, and for failing to report to his corrections officer on the drug case. 3RP 50-52; 5RP 75.

officers and had been in proximity to someone, unknown to him, with a gun. 2RP 106-08. Based on this incident, Ofc. Brown had increased concerns about Karlow and worried that he may have access to a gun. 2RP 108-09.

On December 28, 2008, Ofc. Brown was working again in the University District when he saw Karlow on the sidewalk. 2RP 112-13, 118. Ofc. Brown saw Karlow's muscles tighten as they faced each other and Ofc. Brown drew his gun and ordered Karlow to the ground. 2RP 119-21. Ofc. Brown told Karlow he was "wanted" and had outstanding warrants. 2RP 121. Karlow initially complied with Ofc. Brown's orders and then began moving his arms and having an "urgent agitated conversation" with a nearby acquaintance, Portia Barlow. 2RP 130-32.

Although Ofc. Brown directed Karlow to stop talking and moving, Karlow persisted and ultimately "popped up" off the ground. 2RP 133-34. Ofc. Brown tried unsuccessfully to restrain Karlow while holstering his gun. 2RP 134. Karlow repeatedly kicked and elbowed Ofc. Brown, who tried to gain control of the situation by pushing Karlow up against the window of a drugstore. 2RP 141-42. At the same time, Barlow began pulling and yanking

on Ofc. Brown and ultimately escalated to hitting and kicking him.
2RP 147.

As Ofc. Brown struggled to restrain Karlow and holster his gun, Karlow made "repeated lunges" at Ofc. Brown's gun and ultimately knocked it from his grip. 2RP 154-55. When the gun fell to the ground, Karlow blocked Ofc. Brown's efforts to reach for it and yelled at Barlow to "Get the gun. Pick up the cop's gun." 2RP 160-61. Based on Karlow's order to "pick up" the gun, Ofc. Brown feared that Karlow intended to use the gun against him. 2RP 161. Barlow, however, did not pick up the gun and instead kicked it 10 feet south on the sidewalk. 2RP 162. Ofc. Brown scrambled to retrieve the gun while Karlow took off running. 2RP 163. Karlow successfully eluded police and fled to California where he was later arrested. 3RP 71.

At trial, Karlow offered a different view of the incident. Karlow testified that Ofc. Brown ordered him to the ground at gunpoint, but did not explain the reason for his detention. 5RP 35-36. Unsure if he was being arrested, Karlow decided to get up slowly from the ground with his hands in the air. 5RP 37-38. According to Karlow, Ofc. Brown grabbed him around the neck and threw him into a window. 5RP 38-39. Although Karlow admitted to

struggling with Ofc. Brown, Karlow denied ever kicking or elbowing him. 5RP 71, 73. Karlow also denied reaching for Ofc. Brown's gun and suggested that the gun might have "bounced off my body somehow." 5RP 47. Karlow admitted to telling Barlow to "get the gun," but said he was trying to ensure that no one got shot. 5RP 49. Karlow also admitted to running that night and later fleeing to California to avoid arrest. 5RP 50, 52-53.

Other witnesses also testified about the December 28, 2008 incident, including Barlow and two other witnesses who saw the events unfold outside their work. Barlow admitted to grabbing, hitting, and kicking Ofc. Brown, as well as kicking his gun away.³ 3RP 89. Learina Redwoman, a manager at a nearby business, testified that she called 911 when she saw the situation escalate to Barlow hitting Ofc. Brown's back and Karlow trying to get away. 2RP 65, 72, 74-75. Similarly, Matthew Scroggs, another witness from a nearby store, testified that he called 911 when he saw Karlow trying to dislodge Ofc. Brown from his back by running Ofc. Brown into a wall. 3RP 26-27, 29.

³ Barlow also admitted to drinking and smoking marijuana that day and wishing she had broken Ofc. Brown's nose, or done more to hurt him, given the amount of time she had spent in custody for assaulting him. 3RP 92, 97.

Karlow's community corrections officer, Mark Deabler, also testified at trial. Deabler testified about Karlow's conviction for Conspiracy to Deliver Cocaine and his efforts to supervise Karlow. As part of his testimony, the State admitted Exhibit 19, a certified copy of the Judgment and Sentence imposed for that conviction. 3RP 50. The State later admitted Exhibit 20, a certified copy of Karlow's Judgment and Sentence for his Attempting to Elude and Theft in the First Degree convictions. 3RP 188. Both exhibits were admitted without objection from defense and referenced additional criminal convictions. Ex. 19, 20.

Prior to trial, the State sought to admit ER 404(b) evidence of Karlow's prior convictions and warrant history, underlying his Escape charge. 1RP 67-70; CP 132-33. Defense counsel did not object to the admission of this evidence. 1RP 70. Defense counsel objected, however, to the State's efforts to admit additional ER 404(b) evidence of the December 26, 2008 incident, when Karlow fled officers and was in proximity to an unknown person with a gun. 1RP 79. The trial court admitted this evidence to show Ofc. Brown's state of mind on the date of the charged incident.

1RP 93. Defense counsel did not propose or request a limiting instruction to the admission of the ER 404(b) evidence.

Following Karlow's conviction, the State urged the trial court to sentence him for each crime he committed. CP 158. Defense argued that the crimes constituted the same criminal conduct, and that they should be counted as one crime for purposes of calculating Karlow's offender score. CP 109. Additionally, the State asked the trial court to exercise its discretion to punish Karlow separately for Disarming a Law Enforcement Officer based on that crime's anti-merger provision. CP 158-60; 6RP 8. Defense counsel argued the contrary and asked the trial court to exercise its discretion to score all of Karlow's crimes together. CP 111-12.

The trial court considered all of these arguments and concluded that Karlow's convictions for Assault in the Third Degree and Escape in the First Degree constituted the same criminal conduct. 6RP 12. The court decided to punish Karlow separately for disarming Ofc. Brown, relying on the anti-merger provision and its conclusion that Karlow's convictions for disarming and escape did not constitute the same criminal conduct. 6RP 13.

C. ARGUMENT

1. THE LACK OF A LIMITING INSTRUCTION DOES NOT REQUIRE REVERSAL.

Karlow argues that the trial court erred in failing to instruct the jury that it could consider ER 404(b) evidence only for a proper purpose. Alternatively, Karlow contends that his counsel's failure to request a limiting instruction resulted in ineffective assistance.

Karlow's argument fails on both counts. Karlow's failure to request a limiting instruction at trial precludes him from seeking review on appeal. In light of Karlow's testimony at trial, his counsel made a legitimate, tactical decision not to request a limiting instruction.

Karlow cannot show that he was prejudiced by the lack of a limiting instruction.

To admit evidence of other crimes, wrongs, or acts, the trial court must: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for introducing the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of admitting the evidence against the prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The purpose of ER 404(b) is "not intended to deprive the State of relevant evidence

necessary to establish an essential element of its case," rather it is designed to prevent the State from arguing that a defendant is guilty based on prior bad acts that show a propensity to commit the crime charged. Id. at 859. A trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

At trial, the State sought to admit ER 404(b) evidence that Karlow had been previously convicted and received warrants for failing to appear for a hearing and failing to report to his corrections officer. 1RP 67-70; CP 132-33. Defense counsel agreed with the State's theory that this evidence was admissible because it formed the basis for the Escape charge. 1RP 70. Additionally, the State sought to admit evidence that Karlow fled officers and was in proximity to someone with a gun two days prior to the charged incident. 1RP 72-78; CP 132-33. Although Karlow objected to the admission of this evidence, the trial court admitted it to show Ofc. Brown's state of mind on the day of the incident. 1RP 93. Defense counsel did not propose or request limiting instructions relating to any of the ER 404(b) evidence.

a. Karlow's Failure To Request A Limiting Instruction Precludes Review.

When a trial court admits evidence under ER 404(b), the party whom the evidence is admitted against is entitled to a limiting instruction indicating the proper scope and use of the evidence. ER 105; State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001). A party who fails to request a limiting instruction generally "waives any argument on appeal that the trial court should have given the instruction." State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007), review denied, 163 Wn.2d 1045 (2008).

Karlow argues that the trial court erred by failing to give a limiting instruction at trial, even though he failed to ask for one. *App. Br.* at 14. To support his argument, Karlow relies on State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007), and State v. Russell, 154 Wn. App. 775, 784, 225 P.3d 478, review granted, 169 Wn.2d 1006 (2010). In Foxhoven, the Washington Supreme Court noted, *in dicta*, that "a limiting instruction must be given" if ER 404(b) evidence is admitted at trial. Foxhoven, 161 Wn.2d at

175 (citing Lough, 125 Wn.2d at 864).⁴ Relying on this statement, Division Two of the Court of Appeals held that a trial court's failure *sua sponte* to provide a limiting instruction amounts to an abuse of discretion requiring reversal.⁵ Russell, 154 Wn. App. at 786.

The contention, however, that a trial court must provide a limiting instruction whenever ER 404(b) evidence is admitted, regardless of whether a party requests such an instruction, stands in stark contrast to ER 105 and longstanding jurisprudence to the contrary. ER 105 directs a trial court to give a limiting instruction "upon request."⁶ For decades, the Washington Supreme Court has consistently held that a party's failure to request a limiting instruction at trial waives the issue on appeal. See, e.g., DeVincentis, 150 Wn.2d at 23 n.3 (the request for a limiting instruction must be made by the complaining party); State v. Hess,

⁴ The Supreme Court's reliance on Lough for the proposition that a limiting instruction must always be given, regardless of whether it is requested, is misplaced given that Lough never discussed the issue. 125 Wn.2d at 864. Although the Lough court noted that the trial court gave multiple, clear limiting instructions, the court never suggested that a trial court must give such an instruction *sua sponte*. Id.

⁵ The Russell decision is currently on review in the Washington Supreme Court. 169 Wn.2d 1006 (2010).

⁶ ER 105 provides in full, "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

86 Wn.2d 51, 52, 541 P.2d 1222 (1997) (defendant's failure to request a limiting instruction at trial precluded review on appeal); State v. Noyes, 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966) (same), cert. denied, 386 U.S. 968 (1967). This Court has similarly followed suit. E.g., State v. Ortega, 134 Wn. App. 617, 625, 142 P.3d 175 (2006), review denied, 160 Wn.2d 1016 (2007); State v. Mahmood, 45 Wn. App. 200, 213, 724 P.2d 1021, review denied, 107 Wn.2d 1002 (1986).

Karlow thus cannot claim that the trial court erred by failing to give a limiting instruction when he failed to request one below. The Court should adhere to longstanding precedent and find that Karlow's failure to request a limiting instruction precludes him from seeking review on appeal.

b. Karlow's Counsel Provided Effective Representation.

Karlow argues alternatively that his counsel's failure to request a limiting instruction resulted in ineffective assistance of counsel. *App. Br.* at 14. Karlow's claim is meritless. Given Karlow's testimony at trial, counsel's failure to request a limiting instruction was a legitimate, tactical decision. Karlow cannot show

that he was prejudiced by his counsel's failure to request a limiting instruction.

Ineffective assistance of counsel claims present a mixed question of law and fact. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). As a result, they are reviewed *de novo*. Id. To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that his attorney's conduct fell below an objective standard of reasonableness and (2) this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id. at 78.

There is a strong presumption that counsel has provided effective representation. Strickland, 466 U.S. at 689. Courts must be highly deferential when reviewing counsel's performance given the temptation to second guess counsel's conduct post conviction. Id. The relevant inquiry is "whether counsel's assistance was

reasonable considering all the circumstances." Id. at 688. If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Karlow argues that his counsel's failure to propose a limiting instruction was not a legitimate trial tactic and that the failure "may have tipped the scale in favor of conviction on all three counts." *App. Br.* at 17. Karlow's claim fails because his attorney's conduct was reasonable in light of the circumstances and he cannot demonstrate the required "but for" standard of prejudice.

Karlow challenges the admission of his prior convictions, his failure to appear for court and report to his corrections officer, and his escape from police on December 26, 2008, a couple days prior to the charged incident. Yet, Karlow testified to all of this evidence, at length, on direct examination. 5RP 29-32. Karlow provided a detailed explanation of the December 26, 2008 incident, including his activities that day, who was with him, the unknown person who allegedly flashed his gun, the reasons he lied to the police about his

name, and the reasons he ran from police. 5RP 29-31. Karlow also testified on direct examination about his prior convictions, the reasons he had warrants for his arrest, and his efforts to contact his corrections officer. 5RP 32. On cross-examination, Karlow provided further explanation about all of these issues. 5RP 57-58, 60-63, 74-75.

Given this extensive testimony, it is reasonable that Karlow's counsel did not ask for a limiting instruction. A limiting instruction would have essentially asked the jury to disregard much of Karlow's testimony. Karlow cannot show that his counsel's alleged failure was neither a legitimate trial tactic nor strategy. Karlow testified at length about the 404(b) evidence. 5RP 29-32, 57-58, 60-63, 74-75. His counsel reasonably chose not to have the jury instructed to disregard his testimony. Considering all of the circumstances and the strong presumption in favor of counsel's performance, the Court should find that Karlow's counsel's performance was not deficient.

Even if the Court finds that counsel's failure to request a limiting instruction amounted to deficient performance, Karlow cannot show that he was prejudiced by counsel's failure. To prevail, Karlow must show that "but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d

at 78. Karlow does not even attempt to meet this burden, arguing that "[t]he lack of limiting instruction **may** have tipped the scale in favor of conviction." *App. Br.* at 17 (emphasis added). Karlow cannot show that he would not have been convicted but for the alleged deficiency.

Karlow generally contends that the lack of a limiting instruction allowed the jury to consider evidence of other crimes as evidence of his propensity to commit the crimes charged. *App. Br.* at 15. More specifically, Karlow argues that the lack of a limiting instruction made the jury more likely to dismiss his theories of self defense and necessity, and less likely to believe his counsel's arguments that he was not in "custody" as required by the Escape charge. *App. Br.* at 17. Karlow's arguments, however, rely on mere *possibilities*, rather than demonstrating the required *probability* that a limiting instruction would have changed the outcome of his case.

There are multiple reasons the jury could have discredited Karlow's theories of the case, separate and apart from the lack of a limiting instruction. First, the jury could have simply found Ofc. Brown's testimony more credible. Ofc. Brown provided lengthy, detailed testimony about Karlow's assault, Karlow's

successful effort to disarm him, and Karlow's escape from custody. 2RP 112-63; 4RP 2-13, 20-31, 33-49. Karlow, on the other hand, provided significantly less testimony about the incident, some of which contradicted his own theories of the case. 5RP 32-51, 55-56, 63-73.

For example, Karlow claimed that he acted in self defense, but denied ever actually assaulting Ofc. Brown, stating, "It is my testimony I never kicked the officer. . . I never elbowed him." 5RP 71. Karlow also suggested that the "whole time I was standing my hands were in the air." 5RP 47. Other eye witnesses, however, disputed this testimony. 2RP 75 (Redwoman) and 3RP 30 (Scroggs). After being pressed further on cross-examination, Karlow ultimately admitted to struggling with Ofc. Brown. 5RP 73.

Additionally, Karlow claimed that necessity motivated his actions to disarm the officer, but testified that there was "no way possible" that he could have reached Ofc. Brown's gun, and speculated that "maybe the gun bounced off my body somehow." 5RP 47, 56. Karlow's apparently inconsistent and at times contradictory testimony, gave the jury ample reason to discredit his theories of the case.

The admission of trial exhibits 19 and 20, certified copies of the convictions underlying the Escape charge, resulted in little, if any prejudice to Karlow. Although Karlow claims that the exhibits contained "yet more crimes and criminal sentences for which no limiting instruction was given," he fails to provide the context for their admission and the details of what they contained. *App. Br.* at 19. The trial court admitted these exhibits without objection from defense. 1RP 97-98; 3RP 50, 188; 5RP 100. Neither party at trial appears to have noticed that the exhibits included Karlow's other criminal convictions.

Exhibit 19 is the certified copy of Karlow's conviction for Conspiracy to Deliver Cocaine. On page two, it references two other "current" convictions as "05-1-11149-2 ASLT 2; 05-1-09432-6 ATT ASLT 2." There is no evidence in the record that these case numbers and abbreviations were ever discussed, let alone explained to the jury. Karlow cannot show that the jury understood their import and was thereby prejudiced.

Similarly, Exhibit 20 is a certified copy of Karlow's convictions for Attempting to Elude and Theft in the First Degree. On page two, it references Karlow's juvenile convictions for three crimes of dishonesty. These convictions may have been

independently admissible under ER 609, resulting in no prejudice to Karlow.⁷ Regardless, the fact that Karlow had been convicted of crimes of dishonesty as a juvenile, none of which were mentioned at trial, bears little consequence given that the jury already knew that Karlow had been convicted as an adult of crimes of dishonesty and already knew how to properly consider them. 5RP 75, 128; CP 76 (Jury Instruction 7).⁸

Finally, Karlow cannot show that but for his counsel's failure to request a limiting instruction, he would have been acquitted. The State was entitled to admit the ER 404(b) evidence underlying the Escape charge, specifically Karlow's prior convictions and failure to appear history, to prove the elements of knowledge and detention. CP 91 (Jury Instruction 20). The State properly confined its presentation of this evidence in closing argument, referring only once to the evidence as it related to proving the Escape charge. 5RP 123-24. The State never argued that Karlow's prior

⁷ Although evidence of juvenile adjudications is "generally not admissible," ER 609 provides some leeway for admission. ER 609(d).

⁸ Jury Instruction 7 provided, "You may consider evidence that the defendant has been convicted of the crimes of Possessing Stolen Property in the First Degree and Possessing Stolen Property in the Second Degree only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose." CP 76.

convictions or failure to appear history demonstrated his propensity to commit the crimes charged.

Admitting the evidence that Karlow ran from police and was in proximity to a gun a couple days prior to the charged incident, without a limiting instruction, resulted in little, if any, prejudice to Karlow. Karlow candidly admitted on direct examination that he ran from police because he did not want the unknown, armed assailant to see him cooperating with police and he did not want to receive a probation violation. 5RP 31. By his own admission, Karlow ran from the police to protect himself.

Although evidence of gun possession can be prejudicial, the jury heard repeatedly that Karlow neither possessed the gun nor knew the person who did. 2RP 107-08; 5RP 15, 29-31, 61. Karlow testified that the unknown assailant accused his father of staring at him and then followed him and his father as they tried to leave, flashing his gun in the process. 5RP 30. By Karlow's account, he and his father were essentially victims of an unknown, armed assailant. Karlow cannot show that admitting *this* evidence, without a limiting instruction, prejudiced him. The Court should affirm Karlow's convictions based on his failure to show that the lack of a

limiting instruction requires reversal, and his failure to show that he received ineffective assistance of counsel.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION UNDER THE ANTI-MERGER STATUTE.

Karlow contends that his convictions for Disarming a Law Enforcement Officer and Escape in the First Degree constitute the same criminal conduct and that the trial court erred by concluding otherwise. Additionally, Karlow argues that the trial court failed to consider the anti-merger provision that applies to disarming convictions and failed to exercise its discretion to score the crimes together. Contrary to Karlow's claims, the trial court considered the anti-merger provision and properly scored Karlow's convictions separately.

To determine a defendant's sentencing range, the trial court must first calculate the defendant's offender score. State v. Victoria, 150 Wn. App. 63, 206 P.3d 694, review denied, 167 Wn.2d 1004 (2009). The trial court counts both the defendant's current offenses and prior convictions, unless two or more of the defendant's current offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Crimes constitute the same criminal

conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. For the same criminal intent prong, the standard is "the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). The trial court will count each offense separately unless all three of the statutory elements of same criminal conduct exist. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

The trial court's determination on same criminal conduct will be upheld on appeal unless it is based on a "clear abuse of discretion or misapplication of the law." State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990). When the facts in the record support a finding either way on one of the three elements of same criminal conduct, the proper standard of review is an abuse of discretion. State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003) (affirming trial court's finding that first degree assault and first degree robbery did not constitute same criminal conduct because the evidence supported both the defendant's argument of same intent and the trial court's finding of different intent), aff'd on other grounds, 153 Wn.2d 765, 108 P.3d 753 (2005).

Prior to sentencing, Karlow's counsel and the State filed briefs advising the trial court of the anti-merger provision that applies to defendants convicted of disarming an officer while committing another crime. CP 111-12 (Def. Presentence Report); CP 158-60 (State Sentencing Mem.). The anti-merger provision provides that the defendant "may be punished for the other crime as well as for disarming . . . and may be prosecuted separately for each crime." RCW 9A.76.025. In other words, the anti-merger provision allows the trial court to punish an offender separately for disarming an officer, even if the disarming constitutes the same criminal conduct as another crime, such as escape.

The trial court referenced this provision at the beginning of the sentencing hearing, stating "I understand the issue to be whether - that the **parties agree that I have discretion** to decide whether disarming a police officer is the same criminal conduct as the escape charge." 6RP 5 (emphasis added).⁹ The State urged the trial court to score the charges separately, arguing that "**the Court has discretion** to consider the disarming offense and the

⁹ Additionally, the trial court considered whether the assault and escape charges constituted the same criminal conduct and found that they did. 6RP 5, 12-13.

others as separate because they - the disarming, like burglary, has an anti-merger statute." 6RP 8 (emphasis added).

After hearing argument from both sides, the trial court concluded:

On the issue of whether disarming a police officer and escape in the first degree are the same criminal conduct, the parties agree that **I have some discretion under the anti-merger statute to decide whether or not they are same criminal conduct, and I conclude for purposes of scoring today they are not.**

I did not consider the seriousness of the offense. I don't think that's a proper consideration in making my decision. **I did look at the test of same criminal conduct, even though I have the discretion to overlook that,** but I did look at that, **that this crime of escape in the first degree I think under these facts were different than the efforts to disarm the police officer in this case,** specifically the testimony that I think was believed by the jury verdict about the statements made to -- by Mr. Karlow to Ms. Barlow to try and obtain the gun. And based on those and other facts proved at trial I conclude that they are separate, and therefore I conclude that Mr. Karlow is a 9.

6RP 13 (emphasis added). Despite the trial court's repeated references to discretion and the anti-merger provision, Karlow claims on appeal that the trial court "failed to exercise its discretion

in determining whether to apply the anti-merger statute." *App. Br.* at 26. Karlow is mistaken.

The parties advised the trial court of the anti-merger provision in briefing filed prior to sentencing, each party encouraged the trial court to use its discretion in that party's favor, and the trial court referenced its discretion multiple times in ruling. Given this record, Karlow cannot claim on appeal that the trial court failed to consider the anti-merger provision and failed to exercise its discretion. The trial court scored the disarming and escape offenses separately, relying explicitly on the discretion provided for under the anti-merger provision.

The Court should refuse to consider Karlow's renewed attempt to argue on appeal what he argued at sentencing, specifically that the disarming and escape convictions constitute the same criminal conduct. Even if the trial court erred in its same criminal conduct analysis, the trial court had discretion to score the offenses separately based on the anti-merger provision. See State v. Davis, 90 Wn. App. 776, 783, 954 P.2d 325 (1998) ("even when the trial court decides that the defendant's crimes constitute the

same criminal conduct, it has discretion to punish for each crime under the burglary antimerger statute").¹⁰

Given the trial court's comments at sentencing, it is clear that the trial court exercised its discretion in scoring the disarming and escape offenses separately. The Court should reject Karlow's attempts to re-litigate this issue on appeal and find that the trial court properly exercised its discretion under the anti-merger provision.

3. THE TRIAL COURT SHOULD STRIKE KARLOW'S COMMUNITY CUSTODY RANGE.

Karlow argues, and the State concedes, that the trial court erred by imposing a sentence on his Assault in the Third Degree conviction that exceeds the five-year statutory maximum. The trial court must strike the term of community custody previously imposed to ensure that Karlow's sentence does not exceed the statutory maximum.

¹⁰ The burglary anti-merger statute is nearly identical to the disarming anti-merger statute. The burglary anti-merger statute provides, "Every 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." RCW 9A.52.050.

Under the Sentencing Reform Act of 1981 (SRA), a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime. RCW 9.94A.505(5). The statutory maximum for Assault in the Third Degree, a Class C felony, is five years in prison and a \$10,000 fine. RCW 9A.20.021(1)(c); RCW 9A.36.031(2). If the defendant's total term of confinement plus community custody exceeds the statutory maximum provided for the crime, the defendant's term of community custody must be reduced. RCW 9.94A.701(9).

Here, the trial court sentenced Karlow to serve the high end of the standard range, 60 months, and imposed an additional 9-12 months on community custody. 6RP 28; CP 120-21. The combined total of Karlow's term of confinement and community custody exceeds the 60-month statutory maximum. The Court should remand this matter to the trial court to strike the term of community custody previously imposed.

D. CONCLUSION

The admission of ER 404(b) evidence at trial without a limiting instruction warrants neither reversal nor a finding of ineffective assistance of counsel. The trial court properly exercised its discretion to score Karlow's disarming and escape convictions separately. The only error requiring review and remand is the trial court's imposition of a sentence on the assault conviction that exceeds the statutory maximum. In all other respects, the Court should affirm Karlow's convictions.

DATED this 21st day of October, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

