IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID LEE LANDER, Appellant.	Consolidated Nos. 39578-9-II and 39585-1-II UNPUBLISHED OPINION

Hunt, J. — David Lee Lander appeals multiple jury convictions and sentences. He argues that the evidence is insufficient to support his conviction for second degree theft while armed with a firearm. He also argues that the following pairs of convictions violate the constitutional prohibition against double jeopardy: firearm theft and second degree unlawful firearm possession; firearm theft and first degree trafficking; first degree theft and second degree theft; and second degree theft and first degree trafficking. He contends that the following pairs of convictions constitute the "same criminal conduct" for offender score purposes such that his trial counsel rendered ineffective assistance in failing to pursue this argument at sentencing: firearm theft and second degree theft; second degree theft and unlawful firearm possession; and first degree theft

and second degree theft. We affirm his convictions but remand for the trial court to consider Lander's "same criminal conduct" arguments and for resentencing if such consideration changes his offender score calculation.

FACTS

I. Underlying Offenses

On December 2, 2008, Matthew Ware discovered that the toolbox in his red Chevrolet Silverado truck parked at his Rochester, Washington residence had been opened and several items removed, including a .50 caliber Thompson/Center black powder rifle, a Nikon 440 rangefinder, a backpack containing a pair of binoculars, hunting knife, rifle accessories and walkie-talkies, and a chainsaw. Ware valued the total sum of the items removed as $550 to $600. He reported the incident to Thurston County law enforcement officials.

On December 4, Carol Roden reported a vehicle prowl and theft of her wallet at her Rochester residence. Her wallet contained a credit card, her check book, her driver's license, $1,500.00 in cash, and a Music 6000[1] gift card. Later that day, along a road in Chehalis, Lewis County law enforcement officials recovered Roden's wallet which contained only Roden's driver's license. Two days later, Roden reported that her residence and barn had also been broken into on December 4 and that two laptops and other items were missing.

On December 11, Music 6000 employees informed Roden that someone had used her gift card on December 4 to purchase an item at their retail location. The retailer traced who negotiated the stolen gift card and notified authorities. Thurston County Sheriff's Deputy Eugene

[1] Music 6000 is a store that carries music instruments.

DuPrey contacted Chris Lander, the person who had reportedly used the gift card. Chris Lander admitted to having used the gift card, which, he told law enforcement officials in a recorded statement, that his brother, David Lander,[2] had given him as a Christmas gift. Chris also informed DuPrey that Lander had given their mother a firearm for Christmas. Later that night, Chris telephoned DuPrey and expressed concern that the firearm might have been stolen. During subsequent research, DuPrey came across Ware's reported theft which had been in the vicinity of Roden's vehicle prowl and theft.

On December 18, Lander telephoned DuPrey about his (Lander's) involvement with the Music 6000 gift card to "kind of clear some things up." Verbatim Report of Proceedings (VRP) (June 30—July 1 2009) at 54. That same day, DuPrey contacted Lander's mother to inquire about a "black powder rifle," which she said Lander had brought into her house and was still there. VRP (June 30—July 1 2009) at 33. Lander met DuPrey and Sheriff's Deputy John Snaza at Lander's mother's residence.

After being read his *Miranda*[3] rights, Lander admitted having entered and removed items from Roden's vehicle, including the Music 6000 gift card. Lander denied having knowledge of the black powder rifle, stated that his mother owned a gun safe, and explained that he kept all his guns in her safe. DuPrey telephoned Lander's mother (who was not at the residence) to obtain consent to look in her safe. Snaza asked Lander to step outside with him, and advised Lander

[2] For ease of reference, we refer to Chris Lander as "Chris" and to defendant David Lander as "Lander."

[3] *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

that his mother could be prosecuted for possessing a stolen firearm. While DuPrey was still on the phone with Lander's mother, Lander and Snaza returned inside the house and Lander gave the deputies a rifle that was hidden behind a refrigerator in the kitchen. Lander then admitted to having taken the rifle during a vehicle prowl.[4]

The deputies transported Lander to their substation, where they re-read his *Miranda* rights. Lander repeated his earlier admissions made at his mother's residence—that he had stolen the Music 6000 gift card and the rifle from different vehicles, including that he had stolen the rifle from a "red Chevy pickup." Clerk's Papers, Pierce County Superior Court No. 09-1-00341-0 (hereinafter referred to as CP 341-0) at 25. In great detail, Lander also described his involvement with other vehicle prowls. After the interview, Lander, DuPrey, and Snaza returned to Lander's mother's residence where Lander gave the deputies a GPS unit that he had taken during one of the vehicle prowls.

II. Procedure

For his theft of the rifle and other items from Ware's truck, the State charged Lander with theft of a firearm, RCW 9A.56.300(1), count I; (2) second degree theft, RCWs 9A.56.040(1)(a), 9A.56.020(1)(a), 9.94A.602, and 9.94A.533(3) count II; (3) first degree trafficking in stolen property, RCWs 9A.82.050(1), 9A.82.010(19), 9A.82.010(19), 9.94A.602, and 9.94A.533(3), count III; and (4) second degree unlawful possession of a firearm, RCW 9.41.040(2)(a), count

[4] According to Lander, DuPrey had said that "if [Lander] did not tell [DuPrey] what he wanted to hear, that [Lander] would be going to jail and [he] would not get out before Christmas." VRP (June 30—July 1, 2009) at 80. After hearing this, Lander admitted to stealing the Music 6000 gift card. At the sheriff's substation, Lander reiterated having stolen the gift card; he also admitted having stolen the rifle, explaining that he "did not want to go to jail" or to get his mother and brother in trouble. VRP (June 30—July 1, 2009) at 82.

IV. The State also alleged that Lander had been armed with a firearm while committing the second degree theft and trafficking in stolen property for purposes of a special firearm sentence enhancement under former RCW 9.94A.602, recodified as 9.94A.825 (2009). For his theft of the Music 6000 gift card, credit card, check book, and $1,500.00 in cash from Roden, the State charged Lander with (1) first degree theft, RCW 9A.56.030(1)(a), count V; (2) second degree theft, RCW 9A.56.040(1)(c), count VI; and (3) first degree trafficking in stolen property, RCW 9A.82.050(1), count VII.

Lander moved to suppress his statements to DuPrey and Snaza. Following a CrR 3.5 hearing, the trial court denied this motion. A jury found Lander guilty as charged, including finding by special verdict that he had been armed with a firearm while committing the second degree theft from Ware and while trafficking in stolen property.

Lander did not challenge any of his jury convictions or ask the trial court to treat any of them as the "same criminal conduct" for purposes of calculating his offender score.[5] For the firearm theft and unlawful firearm possession convictions, counts I and IV**,** the trial court calculated an offender score of "5," and imposed special verdict firearm sentence enhancements. For the other convictions, the trial court calculated an offender score of "6." Added together, Lander's sentences totaled 114 months on confinement: 43 months on count I, 18 months on count II, 36 months on count III, and 17 months on count IV. But counts I and IV run

[5] When given the opportunity to speak at sentencing, however, Lander himself said, "I was just wondering if the same criminal conduct went into the gift card and money, same criminal conduct law, because, evidently, it was out of the same wallet." The trial court responded, "I can't give you any legal advice at this time." There was no further mention of "same criminal conduct." VRP (July 16, 2009) at 7.

consecutively and the firearm enhancements of 18 months on count II and 36 months on count III run consecutively to each other and to counts I and IV.

Lander appeals his convictions and sentences.

ANALYSIS

I. Sufficient Evidence

Lander argues that insufficient evidence supports his conviction for second degree theft while armed with a firearm (count II, theft of items from Ware's truck). He contends that, although he admitted having stolen Ware's firearm from his truck, he never admitted having stolen the other property Ware had reported stolen after the vehicle prowl, which other items were never recovered. Because Lander neither cites authority nor supports his position with substantive analysis, his argument fails.

A. Standard of Review

The test for sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *Salinas*, 119 Wn.2d at 201 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)). Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)). We defer to the trier of fact on issues of conflicting testimony,

credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (citing *State v. Longuskie*, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990)).

B. Value of Stolen Property

The items stolen from Ware's truck included a Nikon 440 rangefinder, a black powder rifle with accessories, a chain saw, and a backpack containing binoculars, a hunting knife, and walkie-talkies, all of which Ware valued at $550 to $600. Lander admitted his involvement in 50 to 60 vehicle prowls, during one of which he had taken Ware's rifle and given it to his mother. Lander also admitted a vehicle prowl in which he had taken Roden's Music 6000 gift card and given it to a third party the day it was stolen. As the State argued, the jury could have reasonably determined that the officers were unable to recover the other stolen items because Lander sold or gave them away to third parties, just as he had done with the gift card.

Viewing this evidence in the light most favorable to the State, a rational trier of fact could have reasonably concluded that Lander broke into Ware's truck and stole, not only Ware's rifle, but also the rest of the contemporaneously reported stolen property. *Delmarter*, 94 Wn.2d at 638. The jury could have also reasonably found Ware credible when he testified about the nature and value of the property stolen from his truck and found Lander's testimony that he stole only the firearm incredible. We hold, therefore, that the evidence is sufficient to support Lander's conviction for second degree theft from Ware's truck, count II.

II. Double Jeopardy

Lander next argues that his convictions violate his constitutional right to be free from

double jeopardy. He argues that the following convictions should have merged because the former occurred in furtherance of and was required to prove the latter: (1) the firearm theft (count I) should have merged with both second degree unlawful firearm possession (count IV) and first degree trafficking (count III), and (2) second degree theft (count VI) should have merged with first degree trafficking (count VII). Lander also argues that his first degree theft conviction (count V) is the same in law and fact as his second degree theft conviction (count VI) because on these counts the jury convicted him of stealing several articles of property from the same owner at the same time and place.

A. Same Evidence Test[6]

Article I, section 9 of the Washington Constitution and the Fifth Amendment to the federal constitution protect persons from a second prosecution for the same offense and from multiple punishments for the same offense imposed in the same proceeding. *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 49, 75 P.3d 488 (2003) (citing *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995)). Nevertheless, the legislature may constitutionally authorize multiple punishments for a single course of conduct. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 1436, 63 L. Ed. 2d 715 (1980)).

To determine whether the legislature authorized multiple punishments, Washington courts use a three-step analysis. *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892, 895, 46 P.3d

[6] Washington's "same evidence" test is sometimes referred to as the "same elements" test or "the *Blockburger* test." The federal rule is very similar to Washington's test. *See Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

840 (2002). We first look for express language within the statute authorizing separate punishments. *Calle*, 125 Wn.2d at 776. If the statutory language is silent, we apply the "same evidence" test, inquiring whether, as charged, each offense includes elements not included in the other and whether proof of one offense would also prove the other. *Calle*, 125 Wn.2d at 777 (citing *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Although this second step, the "same evidence," test is a significant indicator of legislative intent, it is not dispositive. We then turn to the third step and look for other clear evidence of legislative intent such as the statutes' historical developments, differing purposes, and different locations in chapters of the criminal code. *Calle*, 125 Wn.2d at 779 (citing *State v. Johnson*, 92 Wn.2d 671, 678, 600 P.2d 1249 (1979), *cert. denied*, 446 U.S. 948, 100 S. Ct. 2179, 64 L. Ed. 2d 819 (1980) (*overruled on other grounds by*, *State v. Sweet*, 138 Wn.2d 466, 476-79, 980 P.2d 1223 (1999) (*Johnson* I)).

B. Merger

The merger doctrine evaluates whether the legislature intended multiple crimes to merge into a single crime for punishment purposes. *Vladovic*, 99 Wn.2d at 419 n.2 (citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). The merger doctrine applies only where to prove a more serious crime, the State must prove an act that a statute defines as a separate crime. *Vladovic*, 99 Wn.2d at 420-21. Where the legislature has provided a statutory scheme distinguishing different degrees of a crime, we may determine that the legislature intended a single punishment for a higher degree of a single crime rather than multiple punishments for several, separate, lesser crimes. *Vladovic*, 99 Wn.2d at 419. In *Johnson* I, for example, the crimes of assault and kidnapping merged into first degree rape because these two

crimes were elements necessary to prove the first degree rape; additional convictions for assault and kidnapping would, therefore, constitute double jeopardy. *Johnson* I, 92 Wn.2d at 681; *State v. Johnson*, 96 Wn.2d 926, 936, 639 P.2d 1332 (1982) (*overruled on other grounds by*, *Calle*, 125 Wn.2d at 775 (1995), (*Johnson* II)).

If the evidence required to prove one crime is also necessary to prove a second crime or a higher degree of the same crime, we consider whether the facts show that the additional crime was committed incidental to the original crime. If one crime was incidental to commission of the other, the merger doctrine precludes additional convictions; but if the offenses have independent purposes or effects, they may be punished separately. *Vladovic*, 99 Wn.2d at 421. To establish an independent purpose or effect of a particular crime, that crime must injure the person or property of the victim or others in a separate and distinct manner from the crime for which it also serves as an element. *Johnso*n I, 92 Wn.2d at 680.

1. Firearm theft and second degree unlawful firearm possession

Lander argues that (1) the statutes proscribing firearm theft, count I, and second degree unlawful firearm possession, count IV, do not contain specific language authorizing separate punishments for the same conduct, and (2) his firearm theft conviction should have merged with his second degree unlawful firearm possession conviction because the former occurred in furtherance of and was required to prove the commission of the latter. This argument fails.

In RCW 9.41.040(6), the legislature clearly stated its intent to punish both theft of a firearm and unlawful possession of a firearm:

> Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the

> separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

Where, as here, the legislature has made its intent clear, no further statutory construction, under either the same evidence test or the merger doctrine, is necessary. *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005). We hold, therefore, that theft of a firearm and unlawful possession of a firearm are separate crimes for which the legislature has constitutionally authorized separate convictions and which, therefore, do not constitute double jeopardy.

2. Firearm theft and first degree trafficking;
second degree theft and first degree trafficking

Lander next argues that the failure to merge his firearm theft conviction, count I, and his first degree trafficking in stolen property conviction, count III, violated prohibitions against double jeopardy because the former occurred in furtherance of and was required to prove the commission of the latter. This argument also fails.

The legislature proscribed theft of a firearm in RCW 9A.56.300, which provides, in part:

> (1) A person is guilty of theft of a firearm if he or she commits a theft of any firearm.
> (2) This section applies regardless of the value of the firearm taken in the theft.
> (3) Each firearm taken in the theft under this section is a separate offense.

The legislature proscribed first degree trafficking in stolen property in RCW 9A.82.050(1), which provides:

> A person who knowingly initiates, organizes, plans, finances, directs, manages, or

> supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

The merger doctrine would apply if the first degree trafficking in stolen property statute provided that proof of another crime was necessary to prove this crime. But the first degree trafficking statute provides otherwise: Instead, it requires only that the defendant know the property was stolen and transfer it,[7] not that the defendant commit theft.

Here, the statutory elements of trafficking included that Lander knew the rifle was stolen and that he meant to transfer or to dispose of it. Lander's admission that he had stolen Ware's rifle proved that he knew the rifle was stolen when he gave it to his mother, thus proving the trafficking charge. Nevertheless, his theft of the rifle was not an element necessary to prove his trafficking charge. *State v. Michielli*, 132 Wn.2d 229, 237, 937 P.2d 587 (1997) (under trafficking statute, one who knowingly sells, or transfers, stolen property can be charged with trafficking, regardless of whether that person stole the property).[8]

Lander similarly argues that failure to merge his convictions for second degree theft and first degree trafficking also violated prohibitions against double jeopardy. We apply the same rationale to these two crimes. Here, Lander's theft of the Music 6000 gift card was second

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[7] According to RCW 9A.82.010(19): "Traffic means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person."

[8] *See also State v. Strohm*, 75 Wn. App. 301, 311, 879 P.2d 962 (1994), *review denied*, 126 Wn.2d 1002 (1995) (defendant may be convicted of both theft and trafficking in stolen property on basis of same stolen property).

degree theft,[9] and his knowing and intentional transfer of the card to his brother was trafficking. As with the paired crimes above, Lander's theft of the gift card shows he knew it was stolen when he gave it to his brother; similarly, however, the theft was not a necessary element of his trafficking charge. We hold, therefore, that the crimes in neither of these two sets of offenses merge.

[9] *See*, n. 10.

3. First degree theft and second degree theft

Lander argues that (1) his first degree theft conviction is the same in law and in fact as his second degree theft conviction, thus placing him in double jeopardy; and (2) these offenses also merge because both are for stealing several articles of property from the same owner at the same time and place and were incidental to each other. Both arguments fail.

Lander's convictions are not the same in law because the applicable statutory elements of first and second degree theft differ. Second degree theft includes the element of theft of an account "access device,"[10] which is not an element included in first degree theft. *Compare* former RCW 9A.56.030(1) and 9A.56.040(1) (2007).[11]

Similarly, these two convictions were not the same in fact. Lander stole Roden's wallet

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[10] RCW 9A.56.010(1) defines an access device as:

> any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

[11] Former RCW 9A.56.030(1) (2007) provided:

> A person is guilty of theft in the first degree if he or she commits theft of:
> (a) Property or services which exceed(s) one thousand dollars in value other than a firearm as defined in RCW 9.41.010[.]

Former RCW 9A.56.040(1) provides:

> A person is guilty of theft in the second degree if he or she commits theft of:
> (a) Property or services which exceed(s) two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle; or
> . . .
> (c) An access device.

(Effective July 26, 2009, the legislature increased the value range for second degree theft from exceeding "two hundred fifty dollars" but not exceeding "one thousand five hundred dollars" to exceeding "seven hundred fifty dollars" but not exceeding "five thousand dollars." (Laws of 2009, ch. 431, § 8)).

and its contents, including: $1,500 cash, a credit card, an identification card, and a Music 6000 gift card. Lander completed his second degree theft when he stole the gift card, an "access device," which was not necessary to prove the separate first degree theft charge predicated on proof of value exceeding $1,500. Because Lander's second and third degree theft convictions were not the same in law or fact, these charges did not constitute double jeopardy.

Citing *State v. Carosa*, 83 Wn. App. 380, 921 P.2d 593 (1996), Lander also argues that because the items were stolen from the same wallet at the same time and place, they constitute one crime and, thus, the failure of these convictions to merge violated prohibitions against double jeopardy. This argument also fails.

First, his reliance on *Carosa* is non-persuasive because that case did not involve the merger doctrine. In *Carosa*, we held that the State properly prosecuted three felony, rather than misdemeanor, thefts when the defendant took varying amounts of less than $250 through false refunds but accumulated more than $250 total during each of three different work shifts. *Carosa*, 83 Wn. App. at 383. Our statement "multiple takings from the same victim at the same time and place constitute one crime" is too general to be helpful here. *Carosa*, 83 Wn. App. at 381. Furthermore, *Carosa* does not address whether the legislature intended to merge punishments for these sequential thefts. Nor does it address whether the State might prosecute both second and third degree theft when proof of the second degree theft is not necessary as proof of the first degree theft.

Second, our legislature has not expressly indicated whether it intended to merge different degrees of theft where second degree theft is completed simply by stealing an access card, without

reference to a dollar amount value. Addressing a similar question of legislative intent Division One of our court held that (1) although the identity theft and second degree theft statutes did not express a clear legislative intent to authorize punishment under both provisions, each statute contained an element that the other did not; and (2) the defendant could not rebut the presumption that double jeopardy did not attach by showing evidence the legislature did not authorize multiple punishments for the two offenses. *State v. Milam*, 155 Wn. App. 365, 375, 228 P.3d 788, *review denied*, 169 Wn.2d 1023 (2010). Thus, even though Milam's two convictions arose from the same course of conduct, they did not constitute double jeopardy in the absence of evidence that the legislature intended to punish the crimes separately. *Milam*, 155 Wn. App. at 375.

Similarly here, as in *Milam*, Lander offers no evidence of legislative intent to merge first degree theft based on value and second degree theft of an access card. Nor does he offer evidence that the legislature did not authorize multiple punishments for first and second degree theft. On the contrary, the second degree theft statute's express inclusion of theft of an access device, without a monetary value, and no such inclusion for first degree theft, suggests that the legislature chose to recognize theft of an access card as a separate crime, distinct from the theft of personal property.

Third, the merger doctrine applies only where the State must prove an act separately defined as a crime in the criminal statutes in order to prove an additional crime. *Vladovic*, 99 Wn.2d at 420-21. As charged here, the theft of the gift card was not necessary to prove first degree theft. Neither is the theft of the wallet with $1,500 cash, credit card, and identification

card necessary to prove second degree theft. We hold, therefore, that as charged here, these two offenses do not merge.

III. Offender Score

For the first time on appeal, Lander argues that several of his convictions encompassed the "same criminal conduct" and, therefore, the trial court should have counted them as one crime for purposes of calculating his offender score. Br. of Appellant at 16. More specifically, he contends that the following pairs of convictions constituted the same criminal conduct under RCW 9.94A.589(1)(a)**:** (1) theft of a firearm (count I) and second degree theft (count II), which Lander argues occurred at the same time and place, involved the same victim, and shared the same criminal intent; (2) second degree theft (count II) and unlawful possession of a firearm (count IV), which he similarly argues occurred by the same act at the same time and same place, involved the same victim, and occurred with the same purpose; and (3) first degree theft (count V) and second degree theft (count VI), which he also argues occurred by the same act at the same time and same place, involved the same victim, and occurred with the same purpose.[12] In the alternative, Lander argues that his trial counsel rendered ineffective assistance in failing to argue that some of his convictions constituted the same criminal conduct.

We agree with Lander's alternative argument that his trial counsel rendered ineffective assistance in failing to ask the trial court to consider some of his convictions to be the same criminal conduct under RCW 9.94A.589(1)(a) for offender score calculation purposes. We

[12] Although at sentencing Lander personally asked the trial court why these two convictions were counted separately, neither he nor his counsel asked the court to treat these two convictions as the same criminal conduct. Thus, in our view, he has not preserved this issue for appeal.

remand to the trial court to address this point, to develop any pertinent record, and to resentence if Lander's offender score changes. Therefore, we leave to the trial court and do not address in this appeal which pairs of convictions might constitute the same criminal conduct under RCW 9.94A.589(1)(a).

A. "Same Criminal Conduct"

If when calculating an offender score "the court enters a finding that some or all of the current offenses encompass the same criminal conduct[,] then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a). The court will find that criminal conduct is the same only when crimes occurred (1) with the same criminal intent, (2) at the same time and place, and (3) involved the same victim. *State v. Haddock*, 141 Wn.2d 103, 109-10, 3 P.3d 733 (2000). Application of the same criminal conduct statute involves both factual determinations and the exercise of trial court's discretion. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P. 2d 1000, *review denied*, 141 Wn.2d 1030 (2000). Therefore, we generally defer to the sentencing court's determination of "'same criminal conduct'" and disturb it only for "'clear abuse of discretion or misapplication of the law.'" *Haddock*, 141 Wn.2d at 110 (quoting *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990)). Here, however, because trial counsel did not raise the issue at sentencing, the trial court has not yet had the opportunity to exercise its discretion.

B. Ineffective Assistance of Counsel

To establish that his trial counsel ineffectively represented him by "waiv[ing] the issues . . . relating to the counting of Lander's current sets of convictions as separate offenses" at sentencing, Br. of Appellant at 21, Lander must show that his trial counsel's representation (1)

"was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances"; and (2) "prejudiced [Lander's case], i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))).

Under the first prong, Lander's trial counsel's failure to argue that firearm theft and second degree theft convictions constitute the same criminal conduct was objectively unreasonable where (1) Lander raised the point himself;[13] and (2) as the State concedes, these two thefts occurred at the same time, place, and against the same victim (Ware). Agreeing with Lander, we perceive *no* tactical reason for his trial counsel's failure to pursue this point at sentencing.

Turning to the second prong of the ineffective assistance of counsel test, we hold that Lander has shown prejudice, at least with respect to the pair of thefts noted in the above paragraph, which even the State concedes the trial court could have considered as the same criminal conduct. As a result, Lander's offender score could have been at least one point lower, which would have affected his standard sentencing range and, therefore, likely his sentence. In this way, Lander shows a "reasonable probability that but for counsel's unprofessional errors, the result would have been different." *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988).

[13] Lander specifically inquired about "same criminal conduct" of convictions the State has not conceded occurred at the same time, place and against same victim. VRP (July 16, 2009) at 7.

We hold, therefore, that Lander has met the threshold requirement for establishing ineffective assistance of counsel, warranting remand to the trial court to determine whether RCW 9.94A.589(1)(a) applies to any of Lander's convictions such that his offender score should be recalculated and he should be resentenced.

IV. Statement of Additional Grounds: Firearm Sentence Enhancement

A. No Double Jeopardy

In his Statement of Additional Grounds (SAG), Lander first claims that the trial court violated his right to be free from double jeopardy when it applied a firearm sentence enhancement to his sentence for "traffic[k]ing [in] a stolen firearm" because firearm sentence enhancements do not apply to convictions "where the use of a firearm is an element of the offense" and, according to Lander, use of a firearm is an element of the "traffic[k]ing [in] a stolen firearm" offense. SAG at 9. This argument fails.

The State neither charged nor did the jury convict Lander of "traffic[k]ing [in] a stolen firearm." SAG at 9. Washington does not have a criminal offense of that name. Instead, the jury convicted Lander of first degree trafficking in stolen property and found he committed that crime while armed with a firearm. The trial court then applied the firearm sentence enhancement to that trafficking conviction.[14] Lander is incorrect that firearm sentence enhancements do not apply to convictions for which use of a firearm is an element of the charged offense.[15] Further, "use of a

[14] RCW 9.94A.533(3)(f) provides a firearm enhancement provision which applies to "to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony[.]"

[15] *State v. Kelley*, 168 Wn.2d 72, 84, 226 P.3d 773 (2010).

firearm" is not an element of first degree trafficking of stolen property. We hold that the trial court did not violate Lander's double jeopardy rights on this ground.

B. Sufficient Evidence

Lander next appears to assert that "[t]here is not testimony or evidence at trial," SAG at 12, to support the jury's finding that he was armed with a firearm while committing second degree theft as set forth under the firearm sentence enhancement provision of RCW 9.94A.533(3). This argument also fails.

We inquire about "whether there was sufficient evidence for any rational trier of fact to find beyond a reasonable doubt that one or more of the defendants were armed." *State v. O'Neal*, 159 Wn.2d 500, 504, 150 P.3d 1121 (2007) (citing *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003)). "'A defendant is 'armed' when he or she is within proximity of an easily and readily available deadly weapon for offensive or defensive purposes and when a nexus is established between the defendant, the weapon, and the crime.'" *O'Neal*, 159 Wn.2d at 504 (quoting *State v. Schelin*, 147 Wn.2d 562, 575-76, 55 P.3d 632 (2002)). Mere proximity or mere constructive possession is insufficient to establish that a defendant was armed at the time the crime was committed. *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005).

Lander argues that, under the RCW 9.94A.533(3) definition, the firearm with which he was "armed" was a "muzzle loader," SAG at 11, which was "mere loot" from his second degree theft, not a "firearm" under the statute. SAG at 12. According to Lander, because the firearm was a fruit of his crime, rather than an instrument used to perpetuate the crime, he was not "armed" under RCW 9.94A.533(3) while committing second degree theft.

Lander relies upon *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007), a case in which the defendant and another man burglarized a house but did not remove anything. When the

occupant of the house returned home, the occupant observed his unloaded AK-47 rifle, normally kept in the closet, on his bed with an ammunition clip from a different rifle. Based on the AK-47 rifle's location on the bed, the trial court convicted Brown of burglary and applied a firearm sentence enhancement. *Brown*, 162 Wn.2d at 425-26. But our Supreme Court vacated the burglary conviction and firearm enhancement, holding that "[n]o evidence exists that Brown or his accomplice handled the rifle on the bed at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime" and that the mere "[s]howing that a weapon was accessible during a crime does not necessarily show a nexus between the crime and the weapon." *Brown*, 162 Wn.2d at 432.

Brown, however, is distinguishable from this case. There was no evidence that Brown or his accomplice actually handled the firearm; rather, the occupant merely observed that the firearm was not stored in its usual location. *Brown*, 162 Wn.2d at 432. Here, in contrast, the jury found that Lander not only had handled, but had also possessed and stolen the firearm. These facts go beyond "the mere presence of a deadly weapon at the crime scene." *See State v. Willis*, 153 Wn.2d 366, 371-72, 103 P.3d 1213 (2005).

Lander's contention that he did not "br[ing] the [firearm] to the crime" but rather "found [it] at the crime," SAG at 12, has no support in case law. Lander may have stumbled on the firearm, but rather than leaving it alone, he chose to take it and to possess it. The legislature intended to punish more severely those who commit crimes while armed with a firearm because of the additional threat to society. The armed criminal is capable of compelling victims with force, injuring one who tries to stop the criminal act, and using the weapon to aid escape. *Brown*, 162

Wn.2d at 444 (Madsen, J. dissenting). When Lander stumbled on and then possessed the firearm, he fell within the ambit of firearm sentence enhancement, even though he did not possess the firearm before he commenced the underlying charged crime of theft. We hold, therefore, that Lander was "armed" under RCW 9.94A.533(3) when he came into possession of the firearm while committing second degree theft.

We affirm Lander's convictions but remand for the trial court to consider whether any of his convictions constitute the "same criminal conduct" under RCW 9.94A.589(1)(a) and for resentencing if his offender score calculation changes as a result.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Van Deren, J.