NO. 44236-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JESSUP BERNARD Tillmon,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

State Cases

Statutes and Court Rules

ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it calculated the defendant's offender score without first exercising its discretion in determining the application of the burglary anti-merger statute.

Issues Pertaining to Assignment of Error

Under circumstances in which the trial court sentences a defendant on a burglary charge along with other offenses constituting the same criminal conduct to the burglary, does a trial court err if it calculates that defendant's offender scores without first exercising its discretion in determining the application of the burglary anti-merger statute?

STATEMENT OF THE CASE

By third amended information filed February 23, 2012, the Thurston County Prosecutor charged the defendant Jessup Bernard Tillmon with the following crimes out of a single incident on December 27, 2009:

I. First Degree Burglary,

II. First Degree Kidnaping against Malcom Moore,

III. First Degree Kidnaping against Casey Jones,

IV. First Degree Kidnaping against Brittany Burgess,

V. First Degree Robbery against Zachery Dodge,

VI. First Degree Robbery against Nicholas Oatfield,

VII. First Degree Robbery against Aaron Ormrod, and

VIII. First Degree Robbery against Nicholas Ormrod.

CP 12-14.

The state alleged that the defendant or an accomplice committed each of these offenses while "armed with a deadly weapon, to-wit: a firearm." *Id.* The case went to trial before a jury with the defendant eventually being convicted on each count with each special verdict found proven. CP 28-37. The defendant then sought review, and this division of the Court of Appeals reversed the defendant's first degree robbery convictions on counts VI, VII and VIII finding that substantial evidence did not support the conclusion that the defendant or an accomplice took personal property "from the person of"

Nicholas Oatfield (Count VI), Aaron Ormrod (Count VII) or Nicholas Ormrod (Count VIII). *Id.* Although there was substantial evidence that the defendant or an accomplice had taken personal property "in the presence of" each of these three victims, the "to convict" instructions the state proposed and the court gave omitted this alternative method of committing the crimes. *Id.* As a result, under the doctrine of law of the case, the court vacated these three convictions along with the alleged firearms enhancements and remanded with instructions to dismiss counts VI, VII and VIII, and then resentence the defendant on Counts I, II, III, IV and V given the change in the standard range that resulted from the dismissal of the last three counts. *Id.*

The defendant had no prior convictions that counted in his offender score. CP 57. Thus, at the new sentencing hearing, both parties and the court calculated the defendant's offender scores, standard ranges and actual ranges as follows:

Count	Offense	Class	Score	Range	Actual
I	Burg 1	Violent	8	77-102	77-102
II	Kidnap 1	S. Violent	4	72-96	174-232
III	Kidnap 1	S. Violent	0	51-68	174-232
IV	Kidnap 1	S. Violent	0	51-68	174-232
V	Rob 1	Violent	8	108-144	108-144

The court calculated the offender score on the burglary and robbery

convictions at eight points on each count, which reflected a score of two points assigned for each of the four other concurrent convictions. CP 46-56; RP 11/2/12 1-25. Since the kidnaping convictions were serious violent offenses and were to run consecutive to each other under the Sentencing Reform Act, the first kidnaping conviction was assigned an offender score of four points, which reflected a score of two points on each of the other convictions that were not serious violent offenses (two points for the burglary and two points for the robbery). *Id.* As serious violent offenses, the other two kidnaping convictions were assigned an offender score of zero points each. *Id.* By running the three kidnaping offenses consecutive, this yielded an effective standard range of 174-232 on each of the kidnaping offenses, which would then run concurrent to the standard range sentences on the burglary and robbery charges. *Id.*

In this case the jury had returned special verdicts that the defendant had committed each of these Class A felonies while armed with a firearm. CP 46-56. These findings then added five consecutive 60 month enhancements for a total of 300 months to be added to each standard range. *Id.* At sentencing the court imposed a sentence at the bottom end of each standard range on each count and declared an exceptional sentence under the standard range whereby the court ordered four of the firearms enhancements to run concurrently instead of consecutively. CP 74. This yielded actual

sentences of 77 months on Count I, 234 months each on Counts II, III and IV, and 108 months on Count V with all time to run concurrently. CP 73. Following imposition of these sentences the defendant filed timely notice of appeal. CP 68-71.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT CALCULATED THE DEFENDANT'S OFFENDER SCORE WITHOUT FIRST EXERCISING ITS DISCRETION IN DETERMINING THE APPLICATION OF THE BURGLARY ANTI-MERGER STATUTE.

Under RCW 9.94A.589(1)(a), at sentencing on two or more offenses, if "some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." *State v. Vike,* 125 Wn.2d 407, 885 P.2d 824 (1994). Under this statute, the term "same criminal intent" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). The term "same criminal intent" as used in this definition does not mean the same "specific intent." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Rather, it means the same "objective intent." *Id.* The only exception to this rule is found in burglary convictions where the burglary anti-merger statute acts to require the court to exercise its discretion in deciding whether or not to count burglary convictions as same criminal conduct with other offenses. *State v. Lessley*, 118 Wn.2d 773, 782, 827 P.2d 996 (1992).

The burglary anti-merger statute is found in RCW 9A.52.050. It was originally adopted in 1909 with the purpose of giving our courts discretion to punish burglary as a separate and distinct offense even when the sole

purpose of the burglary was to commit a separate criminal offense for which the defendant is charged and convicted. *State v. Prater,* 30 Wash.App. 512, 635 P.2d 1104 (1981). This statute states as follows:

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

RCW 9A.52.050.

In the context of the Sentencing Reform Act, this statute also applies to allow the courts to treat burglary as a separate offense for the purpose of calculating a defendant's offender score even if the burglary and the other offense constitute the same criminal conduct under RCW 9.94A.589(1)(a). *State v. Dunbar*, 59 Wn.App. 447, 798 P.2d 306 (1990); *State v. Lessley*, *supra*. The operative word in the anti-merger statute is "may," which our courts have interpreted to give the court's discretion to apply it both in determining whether or not to merge two offenses or to treat two convictions as same criminal conduct. *Id.* In the case at bar, the defendant argues that the trial court abused its discretion when it failed to exercise discretion in deciding whether or not to apply the anti-merger statute to treat the burglary conviction as the same criminal conduct with the other offenses.

An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001). Thus, a court

abuses its discretion if it categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis, or if it simply fails to exercise that discretion when required. *State v. Khanteechit*, 101 Wn.App. 137, 5 P.3d 727 (2000).

For example in *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005), the defendant appealed the trial court's refusal to give a DOSA sentence, arguing that the court had abused its discretion. In this case the court had stated that it believed the legislature had failed to adequately fund DOC's supervision of defendants on DOSA sentences. Thus the court would not consider a sentence under this provision. The Washington Supreme Court agreed and reversed, holding as follows:

> Next, we consider whether, as Grayson contends, the trial judge abused his discretion by categorically refusing to consider a DOSA sentence. Again, while trial judges have considerable discretion under the SRA, they are still required to act within its strictures and principles of due process of law. While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. A trial court abuses discretion when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." The failure to consider an exceptional sentence is reversible error. Similarly, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.

State v. Grayson, 154 Wn.2d at 341-342 (citations omitted).

In the case at bar the defendant was convicted of four substantive

crimes committed after he illegally entered a house. The purpose for entering was to commit the other crimes charged. Thus, the burglary had the same objective intent as the kidnapings and the robbery, and it had the same victims. As a result, it constituted the same criminal conduct under RCW 9.94A.589. While it was well within the trial court's discretion under the burglary anti-merger statute to treat the burglary as a separate offense, it was not within the court's discretion to simply ignore the issue. Thus, by failing to address this issue, the trial court abused its discretion to either apply or not apply the burglary anti-merger statute.

The trial court's failure also caused prejudice to the defendant, given the court's stated desire to give the defendant the bottom of each standard range and then add 60 months for one consecutive firearm enhancement. Had the court exercised its discretion and found the burglary to be same criminal conduct, the offender score on the first kidnaping charge would have changed from four points with a standard range of 72 to 96 months to two points with a standard range of from 62 to 82 months, thereby reducing the actual time the defendant would serve if the court followed its stated intent of imposing the bottom of the standard range. As a result, this court should vacate the defendant's sentences and remand for a new sentencing hearing.

CONCLUSION

The trial court erred when it failed to exercise its discretion in either applying or refraining from applying the burglary anti-merger statute. As a result, this court should vacate the sentences and remand for a new sentencing hearing.

DATED this 23rd day of April, 2013.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 9A.52.050
Other Crime in Committing Burglary Punishable

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 9.94A.589(1)(a)

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if 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. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

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

STATE OF WASHINGTON, **Respondent,**	**NO. 09-1-01930-8** **COURT OF APPEALS NO: 44236-1-II**
vs.	**AFFIRMATION OF SERVICE**
JESSUP B. TILLMON, **Appellant.**	

STATE OF WASHINGTON)
) **ss.**
COUNTY OF THURSTON)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **April 23RD, 2013**, I personally placed in the mail and/or E-Filed the following documents

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