No. 44236-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JESSUP BERNARD TILLMON,

Appellant.

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

The Honorable Gary Tabor, Judge
Cause No. 09-1-01930-8

BRIEF OF RESPONDENT

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2. Whether the court abused its discretion to either apply or not apply the burglary anti-merger statute when calculating Tillmon's offender scores.

3. Whether, had the court applied the burglary anti-merger statute, it would have found that the burglary and robbery convictions constituted the same criminal conduct.

4. Whether Tillmon, having the burden to establish that his crimes constituted the same criminal conduct, waived a claim of error by agreeing to the calculation of his offender score and standard range.

B. STATEMENT OF THE CASE.

The State accepts the Tillmon's statement of the case with two clarifications. Counts 2, 3, and 4 were to run consecutively resulting in a total of 234 months. CP 74. Counts 1 and 5, with sentences of 77 months and 108 months, respectively, were to run concurrently with each other and Counts 2, 3 and 4. CP 74.

C. ARGUMENT.

1. Tillmon is precluded from raising the error for the first time on appeal because it does not concern a manifest error affecting a constitutional right.

The general rule is that a reviewing court will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); State v.

McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). RAP 2.5(a) reads in part:

> (a) Errors raised for first time on review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

Under this rule, to raise an error for the first time on appeal the error must be "manifest" and truly of constitutional dimension. State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional error and show how the alleged error actually affected his trial rights and whether the error is "obvious on the record." State v. Fraser, 170 Wn. App. 13, 27-28, 282 P.3d 152, 160 (2012) review denied, 176 Wn.2d 1022, 297 P.3d 708 (2013). It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. McFarland, 127 Wn.2d at 333; Scott, 110 Wn.2d at 688. Tillmon has failed to identify a constitutional error that affected his trial rights; nor is the error "obvious on the record." Fraser, 170 Wn. App. at 27-28. Further, Tillmon, through his counsel, agreed during sentencing to

the calculation of his offender scores and the subsequent sentence. 11/2/12 RP 7, 13, 21, 24.

Courts will look to the merits of the claim to see if it has a "likelihood of succeeding" to determine whether the constitutional error is manifest. State v. Sanchez, 122 Wn. App. 579, 590-591, 94 P.3d 384 (2004) (quoting WWJ Corp., 138 Wn. 2d at 603)). Tillmon does not have a likelihood of succeeding on his claim of error because the trial court was quite limited in its determination whether burglary and robbery could be counted as one crime for the purposes of calculating the offender score.

2. The court did not abuse its discretion in calculating Tillmon's offender scores without applying the burglary anti-merger statute.

Tillmon argues that the trial court's calculation of his offender scores was based upon untenable grounds because it should have taken into consideration that the first degree burglary offense constituted the same criminal conduct as the first degree robbery, counting the burglary and robbery as one crime for calculating Tillmon's offender scores under the burglary anti-merger statute. RCW 9A.52.050; Appellant's Opening Brief at 7; State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Here the burglary and the robbery did not involve the same victims, and thus cannot

constitute the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006) (citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Dixon, 159 Wn.2d at 75-76. A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." Dixon, 159 Wn.2d at 75-76.

The burglary anti-merger statute permits courts to punish separately any other crime occurring in the course of a burglary. State v. Davis, 90 Wn. App. 776, 782-783, 954 P.2d 325 (1998). RCW 9A.52.050 reads:

> 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.

Under this statute, courts are allowed the discretion to determine whether or not to merge other offenses occurring in the course of a burglary for purposes of calculating a defendant's offender score. Lessley, 118 Wn.2d at 782. The Washington Supreme Court and Division Two of the Court of Appeals have concluded that courts have this discretion even when offenses constitute the "same criminal conduct." Davis, 90 Wn. App. at 783 (quoting Lessley, 118 Wn.2d at 778); State v. Kisor, 68 Wn. App. 610, 618, 844 P.2d 1038 (1993), review denied 121 Wn.2d 1023).

Under RCW 9.94A.589(1)(a), when sentencing on two or more current offenses, if "some or all of the current offenses encompass the same criminal conduct" they may be counted as one crime. RCW 9.94A.589(1)(a); Vike, 125 Wn.2d at 410. Finding same criminal conduct requires that two or more crimes have the (1) same objective criminal intent, (2) occurred at the same time and at the same place, and (3) involved the same victim. RCW 9.94A.589(1)(a); Lessley, 118 Wn.2d at 778. While the burglary and robbery appear to have had the same objective criminal intent and occurred at the same time and place, they nevertheless did not involve the same victims. CP 30-37. The absence of any one of the elements precludes a finding of same criminal conduct and

multiple offenses cannot be counted as one crime. Lessley, 118 Wn.2d at 778.

Tillmon claims that the burglary and robbery had the same victims. Appellant's Opening Brief at 9. The State disagrees. In Davis, the defendant entered an apartment occupied by Anthony and Milton and pointed a gun at Milton; the court found that Anthony and Milton were both victims of the burglary, but only Anthony was the victim of assault. Davis, 90 Wn. App. at 782. Contrary to Tillmon's claim "two crimes cannot be the same criminal conduct if one involves two victims and the other only involves one." Davis, 90 Wn. App. at 782. Accordingly, the victims of a burglary include the occupants of a residence and their guests. State v. Davison, 56 Wn. App. 554, 559-560, 784 P.2d 1268. It follows that the victims of the burglary included everyone that was present in the residence at the time of Tillmon's entry:[1] Dodge, Oatfield, Nick and Aaron Ormrod, Jones, Moore, and Burgess. CP 30-32. The sole victim of the robbery, however, was Dodge. CP 12-14, 31-32; Lessley, 118 Wn.2d at 778-779.

Since the two crimes are not the "same criminal conduct," the court was limited in making a discretionary determination

[1] Occupants of the residence: Dodge, Oatfield, Nick Ormrod, and Aaron Ormrod. Guests of the occupants: Jones, Moore, and Burgess.

because regardless of whether or not the burglary anti-merger statute was applied, counting first degree burglary and first degree robbery as one crime was precluded under RCW 9.94A.589(1)(a).

The calculation of Tillmon's offender scores without the application of the burglary anti-merger statute is a proper exercise of discretion. The calculation is based on tenable grounds and for tenable reasons since the burglary and robbery would be treated as separate crimes under either statute, thereby arriving at a decision within the range of acceptable choices. Dixon, 159 Wn.2d at 75-76. Additionally, the decision the court arrived at is not manifestly unreasonable since, even if the burglary anti-merger statute were considered and the court sought to apply it, first degree burglary and first degree robbery do not merge under RCW 9.94A.589(1)(a). Dixon, 159 Wn.2d at 75-76.

In State v. Wachsmith, the court found that "there is no requirement [for the] court [to] provide written or oral reasons for imposing statutorily mandated consecutive sentencing." State v. Wachsmith, 23 Wn. App. 283, 284-286, 595 P.2d 64 (1979). Some statutes do require the court to make clear its reasoning. For example, the statute governing exceptional sentences requires that "whenever a sentence outside the standard range is imposed, the

court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535. However, neither RCW 9.94A.589(1)(a) nor RCW 9A.52.050 require the court to enter formal findings of fact or conclusions of law to support its exercise of discretion and sentencing. Wachsmith, 23 Wn. App. at 284-286. Under those circumstances, the lack of written or oral reasons for the calculation of the offender scores, and consequently the sentence, is not error because it is consistent with RCW 9.94A.589(1)(a) and 9A.54.050. Wachsmith, 23 Wn. App. at 286.

3. Had the court applied the burglary anti-merger statute it would have found that burglary and robbery convictions could not merge and Tillmon's offender score would not be lower.

For the foregoing reasons, the burglary and robbery did not constitute same criminal conduct under RCW 9.94A.589(1)(a) and cannot be counted as one crime. Vike, 125 Wn.2d at 410; Lessley, 118 Wn.2d at 778. By counting the burglary and robbery convictions separately, the offender score for First Degree Kidnapping would not change, and the actual time Tillmon would serve would not be reduced. CP 58-67.

4. Tillmon had the burden to establish that his crimes constituted the same criminal conduct. He waived the claim that the court should have considered the burglary anti-merger statute.

The burden is on a moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor. State v. Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2012) (quoting State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)). A same criminal conduct finding favors the defendant by lowering the offender score below the presumed score. Graciano, 176 Wn.2d at 539 (citing State v. Lopez, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007)). Thus, because finding same criminal conduct favors the defendant, "it is the defendant who must establish [that] the crimes constitute the same criminal conduct." Graciano, 176 Wn.2d at 539. Tillmon had the burden to convince the court that the burglary and robbery involved the same objective criminal intent, same time and place, and the same victim, otherwise the burglary and robbery would each count toward his offender score. Graciano, 176 Wn.2d at 540. Tillmon has failed to meet this burden. Therefore, this court need not consider his argument.

In State v. Nitsch, the defendant explicitly agreed to a particular offender score, but later attempted to challenge it on appeal, asserting that the lower court should have sua sponte found the two crimes for which he was convicted were the same criminal conduct. State v. Nitsch, 100 Wn. App. 512, 513-514, 997 P.2d 1000. The Nitsch court commented on the propriety of permitting review of such cases for the first time on appeal:

> Only an illegal or erroneous sentence is reviewable for the first time on appeal. Application of the same criminal conduct statute involves both *factual determinations* and the *exercise of discretion*. It is not merely a calculation problem, or a question of whether the record contains sufficient evidence to support the inclusion of out-of-state convictions in the offender score. We therefore see a fundamental difference between this case and *Ford* and *McCorkle*. Unlike the out-of-state conviction provision, the same criminal conduct statute is not mandatory, and sound reasons exist for the implicit grant of discretion contained in the legislative language ("*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*").

Nitch, 100 Wn. App at 523 (citations omitted) (emphasis added). The court in Nitsch recognized that the determination of whether offenses constitute the same criminal conduct is discretionary with the trial court, requiring some factual basis on which to make such a determination. Nitsch, 100 Wn. App. at 521.

Tillmon failed to object to the State's calculation of his offender scores or offer an alternative offender score calculation while explicitly agreeing with the State's calculation of his offender scores. 11/2/12 RP 7, 13. While Tillmon did not explicitly state what his offender score was, his acquiescence of the sentence "is an implicit assertion of his score, and also an implicit assertion that his crimes did not constitute the same criminal conduct." Nitsch, 100 Wn. App. at 522. Thus, the trial court relied on the information acknowledged by Tillmon during sentencing. Id.

Finally, Tillmon cannot demonstrate prejudice in the calculation of offender scores and the subsequent sentence because there was only one possible outcome.

D. CONCLUSION.

The trial court did not err by failing to explicitly either apply or refrain from applying the burglary anti-merger statute. Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm the trial courts calculation of Tillmon's offender scores and his sentence.

Respectfully submitted this 30th day of May, 2013.

Carol La Verne, WSBA# 19229
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THURSTON COUNTY PROSECUTOR

May 31, 2013 - 7:58 AM

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