No. 45473-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHANARA SOEUN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in refusing to find that Chanara Soeun's three prior convictions from 2007 encompassed the "same criminal conduct" for purposes of calculating the offender score for the current offense.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Multiple offenses encompass the "same criminal conduct" for sentencing purposes if they were committed at the same time and place, with the same objective criminal intent, and involved the same victim. Here, Mr. Soeun had prior convictions for first degree theft, first degree robbery, and third degree assault, arising from a single course of criminal conduct occurring over a short period of time involving the same victim. Mr. Soeun had the same objective criminal intent in committing the three offenses—to steal a car. Did the trial court abuse its discretion in refusing to find the three offenses were the "same criminal conduct" and counted as only one point in the offender score?

C. STATEMENT OF THE CASE

On March 14, 2013, Mr. Soeun was charged with one count of first degree robbery. CP 1. At the jury trial, Young Park testified that one morning, Mr. Soeun entered the convenience store in Tacoma that

she owned with her husband. RP 39-41. Mr. Soeun asked her for money. RP 42. His hand was in his pocket as he walked toward her but he did not say he had a gun and she did not see him holding anything that looked like a gun. RP 55-57, 74, 79-80. Ms. Park gave him some money from the cash register. RP 42. Mr. Soeun then left the store, got in a car and drove away. CP 42. Ms. Park called the police and they apprehended Mr. Soeun at his home a short time later. CP 120, 124.

The jury found Mr. Soeun guilty of the lesser-included offense of second degree robbery. CP 15.

At sentencing, defense counsel argued Mr. Soeun's three prior convictions from 2007 for first degree robbery, first degree theft, and third degree assault, which the prior sentencing court ordered to be served concurrently, encompassed the "same criminal conduct" and should count as only one point in his current offender score. CP 41, 47, 62. The State objected. CP 66-67.

The trial court reviewed several documents from the 2007 convictions, including the judgment and sentence, information, probable cause declaration, jury instructions, verdict forms, and a note the jury submitted to the court during deliberations. RP 264-65; CP 83-

93. The court also reviewed the statement of facts set forth in the Court of Appeals opinion affirming the prior convictions. RP 263; see State v. Soeun, 2008 WL 3319819 (No. 36317-8-II, Aug. 12, 2008); CP 66.

According to those documents, the prior convictions arose from the following facts. One day in June 2006, Eli and Carrie Adamson left their residence in a relative's truck to buy flooring at a hardware store. Soeun, 2008 WL 3319819, at *1. After they left, Mr. Soeun stole their Honda Accord that was parked in the driveway. Id. A neighbor aw Mr. Soeun steal the car and called the Adamsons on their cellular phone. Id. Ms. Adamson turned the truck around, while Mr. Adamson spoke with police on their cellular phone. Id.

On their way home, the Adamsons passed Mr. Soeun driving their car towards them in the opposite lane. Id. Ms. Adamson turned the truck around again, followed Mr. Soeun into a cul-de-sac, and pulled the truck up next to the Honda when Mr. Soeun parked in front of his residence. Id. Mr. Adamson got out of the truck, yelled at Mr. Soeun to get out of the car, and grabbed him by his hair. Id. Mr. Soeun shifted the Honda into reverse and stepped on the gas pedal. Id.

The moving Honda ran over Mr. Adamson's ankle while he tried to pull Mr. Soeun from the car. Id. The Honda continued in

reverse, running over Mr. Adamson's torso and coming to a stop when it hit a telephone pole. Id.

The current sentencing court concluded from these facts that the prior offenses all arose from "separate and distinct acts" and thus did not encompass the "same criminal conduct." RP 264-65. The court counted the three offenses separately in Mr. Soeun's offender score. CP 47.

D. ARGUMENT

The trial court abused its discretion in refusing to find that Mr. Soeun's three prior offenses encompassed the "same criminal conduct" for purposes of calculating the current offender score

1. If a defendant has multiple prior convictions that were committed at the same time and place, with the same objective criminal intent, involving the same victim, the current sentencing court must count them as a single offense in the current offender score

In Washington, a sentencing court's calculation of a criminal defendant's standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which is a list of his prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525.

The sentencing court must calculate the offender score based on the offender's "other current and prior convictions." RCW 9.94A.589(1)(a). If a prior sentencing court found multiple offenses "encompass the same criminal conduct," the current sentencing court must count those prior convictions as one offense. RCW 9.94A.525(5)(a)(i). If the prior sentencing court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must independently evaluate whether those prior convictions "encompass the same criminal conduct" and, if they do, must count them as one offense. Id. ("The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently . . . , whether those offenses shall be counted as one offense or as separate offenses using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a)").

Thus, the current sentencing court must apply the same criminal conduct test to multiple prior convictions, served concurrently, that a court has not already concluded amount to the same criminal conduct. State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295

P.3d 219 (2013); see also State v. Reinhart, 77 Wn. App. 454, 459, 891 P.2d 735 (1995) ("the language of the statute appears clear and unambiguous in mandating that the current sentencing court determine whether to count prior offenses, served concurrently, as separate offenses").

Multiple offenses encompass the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). In determining whether two offenses require the same criminal intent, the court focuses on "the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Courts consider "how intimately related the crimes are," "whether, between the crimes charged, there was any substantial change in the criminal objective," and "whether one crime furthered the other." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

Crimes need not occur simultaneously to meet the "same time" element of the statute. State v. Porter, 133 Wn.2d 177, 182-83, 942 P.2d 974 (1997). Sequential crimes involving the same victim may qualify as same criminal conduct if one crime furthers the other. Id. If

the crimes are part of a continuous, uninterrupted sequence of conduct, they occur at the "same time" for purposes of the same criminal conduct analysis. Id.

A trial court's decision regarding "same criminal conduct" is reviewed for abuse of discretion or misapplication of the law. State v. Graciano, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013). Under this standard, if the record supports only one conclusion on whether crimes constitute the "same criminal conduct," a sentencing court abuses its discretion in arriving at a contrary result. Id. But if the record adequately supports either conclusion, the matter lies within the court's discretion. Id. The defendant bears the burden to prove multiple convictions encompass the same criminal conduct. Id. at 539-40.

2. The prior robbery and theft were part of the same continuous transaction—resulting from the same intent to steal—and therefore encompass the same criminal conduct

In committing the prior offenses, Mr. Soeun took a Honda Accord from the Adamsons' driveway, drove it to his own neighborhood, and parked it in front of his residence. CP 66. The Adamsons followed him there and arrived at the same time. Id. Before Mr. Soeun could get out of the car, Mr. Adamson approached him and grabbed him by his hair. Id. Mr. Soeun shifted the car into reverse and

ran over Mr. Adamson's ankle as Mr. Adamson pulled him from the car. Id. The car continued moving, running over Mr. Adamson again, then coming to a stop when it hit a telephone pole. Id.

At the current sentencing hearing, the State argued the theft and robbery convictions arising from this continuous series of events did not encompass the same criminal conduct. RP 263-64. According to the State, the theft occurred, and was completed, when Mr. Soeun took the car from the Adamsons' driveway, and the robbery occurred when the car ran over Mr. Adamson's ankle. RP 263-64. The State's argument is contrary to the case law and the nature of the crime of robbery, which is defined as an ongoing offense.

A person commits the crime of robbery when he or she unlawfully takes personal property from the person of another, or in his or her presence, against his or her will, by the use, or threatened use, of force, violence, or fear of injury. RCW 9A.56.190. "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking." Id. Here, Mr. Soeun was convicted of robbery in the first degree, which required proof that he inflicted bodily injury in the course of the robbery. RCW 9A.56.200(1)(a)(iii).

Washington courts apply the "transactional" analysis of robbery, which provides that the force or threat of force used to accomplish a robbery need not precisely coincide with the taking. State v. Truong, 168 Wn. App. 529, 535-36, 277 P.3d 74, review denied, 175 Wn.2d 1020, 277 P.3d 74 (2012). The robbery statute provides that the force may be used either to obtain *or retain* possession of the property. RCW 9A.56.190. Consistent with the statute, Washington courts hold that "the force necessary to support a robbery conviction need not be used in the initial acquisition of the property. Rather, the retention, via force against the property owner, of property initially taken peaceably *or* outside the presence of the property owner, is robbery." State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992).

A necessary corollary to the rule that the taking need not coincide with the force used, is that the taking and force are not distinct criminal acts and may not be separately punished. Id. at 291. In Handburgh, the defendant stole a bicycle that was left unattended outside a recreation center. Id. at 285-86. When the owner of the bicycle came outside and saw the defendant riding off on her bike, she approached him and demanded that he return it. Id. When she tried to

retrieve the bike, he threw rocks at her and a struggle ensued. Id. The owner was injured in the struggle and left the bicycle behind. Id.

The Washington Supreme Court explained that the defendant in Handburgh committed a single crime of robbery and not separate crimes of theft and assault. Id. at 290-91. "[A] peaceable taking or a taking in the owner's absence, followed by the use of force, is a robbery" and not two separate crimes. Id. at 292. The force may be used *either* at the time of the taking, *or* "in flight after an attempt or commission of theft." Id. In either case, a single crime of robbery occurs. A thief's willingness to use force against those who would restrain him in flight after a peaceable taking raises the crime from theft to robbery. Id. at 292-93. It does not create two separate crimes.

Thus, robbery is an ongoing offense that begins with the initial taking and ends when the assailant uses force in an attempt to retain the property while effecting an escape. Truong, 168 Wn. App. at 535-36; State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). The taking is considered to be ongoing or continuing so that the later use of force to retain the property taken renders the actions a robbery. Handburgh, 119 Wn.2d at 290; see also State v. Robinson, 73 Wn. App. 851, 856, 872 P.2d 43 (1994) ("Pursuant to [the transactional view of robbery], a

robbery can be considered an ongoing offense so that, regardless of whether force was used to obtain property, force used to retain the stolen property or to effect an escape can satisfy the force element of robbery.").

Because robbery is an ongoing offense, a person may not be punished separately for theft and robbery merely because the taking and force occurred at different times. See Handburgh, 119 Wn.2d at 291-92. Both robbery and theft include the essential element of a specific intent to deprive the owner of his or her property. State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012); RCW 9A.56.020(1)(a) ("theft" means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services."). Theft is a lesser-included offense of robbery. State v. Ralph, 175 Wn. App. 814, 825, 308 P.3d 729 (2013), review denied, 179 Wn.2d 1017, 318 P.3d 280 (2014). It is the use of force that raises the theft to a robbery. Handburgh, 119 Wn.2d at 292-93. Thus, a person may not be punished for both theft and robbery arising from a single taking. Ralph, 175 Wn. App. at 825-27 (holding defendant's separate convictions for taking a motor vehicle without permission and

second degree robbery, where defendant punched victim in face and drove away in his truck, violated the constitutional prohibition against double jeopardy).

Here, only a single continuous robbery occurred and therefore Mr. Soeun's separate conviction for theft encompasses the same criminal conduct. As in Handburgh, the robbery began when Mr. Soeun peaceably took the Honda from the Adamsons' driveway. Handburgh, 119 Wn.2d at 292-93. The robbery was ongoing and ended when he used force in an attempt to retain possession of the Honda in front of his own residence. Truong, 168 Wn. App. at 535-36. The initial taking occurred at the same time and place as the robbery and was indeed an *essential part* of the robbery. Both the theft and the robbery entailed the same objective criminal intent—to deprive the owner of the property.

In sum, the robbery and theft convictions required the same criminal intent, were committed at the same time and place, and involved the same victim. RCW 9.94A.589(1)(a). They therefore encompassed the same criminal conduct and should have counted as only one offense in Mr. Soeun's offender score.

3. The prior assault and robbery were also part of the same continuous transaction—resulting from the same intent to steal—and likewise encompass the same criminal conduct

Mr. Soeun's conviction for third degree assault arose from his conduct of shifting the Honda into reverse and stepping on the gas pedal, causing the car to run over Mr. Adamson.[1] CP 66. The assault occurred during the struggle between Mr. Soeun and Mr. Adamson over possession of the Honda. Id. It therefore occurred at the same time and place as the robbery and entailed the same objective criminal intent—to deprive the owner of the property. The assault and robbery therefore encompassed the same criminal conduct.

When a person commits an assault in an effort to deprive a person of property, the assault encompasses the "same criminal conduct" as the robbery or attempted theft. State v. Miller, 92 Wn. App. 693, 964 P.2d 1196 (1998); State v. Rienks, 46 Wn. App. 537, 731 P.2d 1116 (1987). In Miller, the defendant was convicted of third degree assault and attempted theft of a firearm after he struggled with a police officer in an attempt to deprive the officer of his firearm. Miller,

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[1] The third degree assault conviction required proof that Mr. Soeun, "[w]ith criminal negligence, cause[d] bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d).

92 Wn. App. at 697. The Court held the assault was "intimately related" to the attempted theft because Miller could not deprive the officer of his holstered weapon without assaulting him. Id. at 708. Both crimes shared the same objective intent—to deprive the officer of the weapon. Id. Therefore, the assault and attempted theft encompassed the "same criminal conduct" for sentencing purposes. Id.; see also State v. Anderson, 72 Wn. App. 453, 456-57, 464, 864 P.2d 1001 (1994) (convictions for first degree assault and first degree escape encompassed "same criminal conduct" where defendant assaulted corrections officer while attempting to escape; both offenses shared the same objective criminal intent—to escape the officer's custody).

Similarly, in Rienks, the defendant was convicted of first degree assault and first degree robbery after he pointed a gun at several individuals inside an apartment while he took personal property from a briefcase and then left the scene. Rienks, 46 Wn. App. at 538-39. The Court concluded the two offenses were part of a single recognizable scheme or plan and were committed with no substantial change in the nature of the criminal objective, which was to rob the victim. Id. at 543-44. Therefore, they encompassed the "same criminal conduct."

This case is indistinguishable from Miller, Anderson, and Rienks. Mr. Soeun assaulted Mr. Adamson in an effort to retain possession of the Honda. CP 66. The assault and the robbery were "intimately related" because Soeun could not commit the first degree robbery without using force and inflicting bodily injury on Mr. Adamson. See Miller, 92 Wn. App. at 708. The two crimes were part of a single recognizable scheme or plan and were committed with no substantial change in the nature of the criminal objective, which was to steal the property. See Rienks, 46 Wn. App. at 543-44. Therefore, they encompassed the "same criminal conduct" and should have counted as one offense in the offender score.

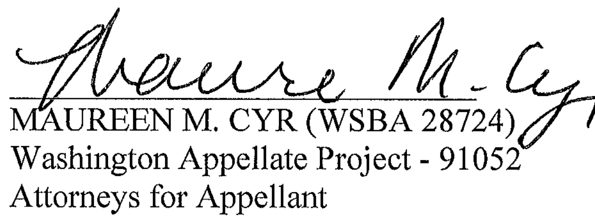
4. Mr. Soeun must be resentenced based on an offender score in which the prior assault, robbery and theft are counted as one offense

When the trial court abuses its discretion in treating the same criminal conduct as separate crimes, the remedy is to remand for resentencing with instructions to treat the convictions as one offense in the offender score. Dunaway, 109 Wn.2d at 217. That is the remedy here.

E. CONCLUSION

The court abused its discretion in refusing to count the three prior offenses as one offense in the offender score. Mr. Soeun must be resentenced.

Respectfully submitted this 4th day of April, 2014.



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

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