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Court of Appeals
Division III
State of Washington

No. 33073-7-III (consolidated)

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent/Cross-Appellant,

vs.

DAVID R. JOHNSON,
Defendant/Appellant/Cross-Respondent.

APPEAL FROM THE ASOTIN COUNTY SUPERIOR COURT
Honorable Scott D. Gallina, Judge

REPLY/RESPONSE BRIEF OF APPELLANT/CROSS-RESPONDENT DAVID R. JOHNSON

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ARGUMENT IN REPLY TO BRIEF OF RESPONDENT

Mr. Johnson relies upon his Brief of Appellant to address the arguments made in the state's brief of respondent. Brief of Appellant, pp. 9–27.

B. CROSS-APPELLANT'S ASSIGNMENT OF ERROR

The state, as cross-appellant, makes no assignment of error, as is required by RAP 10.3(a)(3). In its brief the state instead sets forth as an additional issue (Brief of Respondent (BOR), p. 1):

> 5. Did the trial court err as a matter of law in determining that the crimes of burglary in the first degree and robbery in the first degree constituted the same criminal conduct?

C. CROSS-RESPONDENT'S ISSUE REGARDING CROSS-APPEAL

> Under the facts of this case did the trial court properly exercise its discretion in determining the crimes of burglary in the first degree and robbery in the first degree constituted the same criminal conduct?

D. SUPPLEMENTAL STATEMENT OF FACTS

Mr. Johnson incorporates as if set forth fully herein the statement of facts in his Brief of Appellant, pp. 3–9.

E. ARGUMENT

Under the facts of this case the trial court properly exercised its discretion in determining the crimes of burglary in the first degree and robbery in the first degree constituted the same criminal conduct.

As a preliminary matter, the State failed to assign error to the trial court's findings of fact. CP 98–102. Thus, the findings of fact are verities on appeal. *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Crimes 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). Determining whether two crimes encompass the same criminal conduct is a matter within the discretion of the sentencing court. The court's decision will not be reversed absent a clear abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn. 2d 531, 536–38 ¶¶12-14, 295 P.3d 219 (2013); *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994); *State v. Burns*, 114 Wn.2d 314, 317, 788 P.2d 531 (1990).

In co-defendant Ralph Whitlock's sentencing, the court had determined the two crimes were same criminal conduct based on the objective intent of Mr. Johnson in committing the two crimes:

> [T]he only reason for the burglary was to facilitate the robbery and so I think there is same criminal conduct under that analysis.

BOR, page 23–24, citing RP (Whitlock) 699. At Mr. Johnson's sentencing the state argued the crimes were not the same criminal conduct because they did not have the same victim. According to the state the robbery victims were Ms. Routt, Ms. Ansel and Mr. Hester, while the burglary victims included those three plus Ms. Jones and her daughter, and Mr. Blue and two other people from Orofino. The state urged the court to punish the crimes separately. RP 73–74, 76–77, 80–81.

After considering the parties' arguments, the court found as it had in the co-defendant's case that the burglary and robbery were same criminal conduct, and imposed its sentence accordingly. RP 81–82.

The state does not dispute the crimes of first degree burglary and first degree robbery involved the same criminal intent, and were committed at the same time and place. BOR 22–25. Both offenses involved the same victim, Tonya Routt, who was the absent tenant of the residence in which Mr. Johnson was found to have unlawfully remained and the owner of the property found to have been taken. Even construing the Court's conclusions of law in the most expansive light possible, the identity of victims across both offenses is still the same: Ms. Routt as the

owner of the property taken while Mr. Johnson remained in her home, and Crista Ansel and Damien Hester as the persons subjected to the assault by firearm in the burglary count and "force, intimidation, and/or fear of injury" in the robbery count. The trial court properly exercised its discretion in determining the two crimes constituted "same criminal conduct."

With respect to the in-common identity of victims, the state's reliance on two cases is misplaced. BOR, pp. 24–25. In *State v. Davison*, 56 Wn. App. 554, 784 P.2d 1268 (1990), the defendant broke into a home and assaulted the homeowner and his guest. The State charged the defendant with first degree burglary based on the elevating factors of the two attacks on the homeowner and his guest and one count of assault for the attack on the guest. The assault charge was based on the same assault on the guest as alleged in the burglary charge. *Davison*, 56 Wn. App. at 555–57. The court concluded the crimes could not be the same criminal conduct because both people were victims of the burglary but only one was the victim of the assault. *Id.* at 560. Here, unlike in *Davison*, the same three people were victims of the burglary and the robbery.

In *State v. Davis*, 90 Wn. App. 776, 954 P.2d 325 (1998), the defendant arrived to see his friend crying outside and entered his friend's apartment to yell at her boyfriend for pushing her while she was pregnant. When told to leave the defendant pointed his gun at the boyfriend and then at a guest when she tried to call the police. The defendant was charged and convicted of first degree burglary based on the elevating factors of the two attacks on the boyfriend and the guest and two counts of second degree assault for the attacks on the boyfriend and the guest. The court did not impose any sentence for the two counts of assault because it concluded they were the same criminal conduct as the burglary. *State v. Davis*, 90 Wn. App. at 779–80.

The appellate court reversed, holding "[T]here is no distinction between *Davison* and the present case except that [the defendant] was charged with both assaults. This is a distinction without a difference. The fact remains that the assaults had two different victims. As such, they cannot be the same criminal conduct [as the burglary]. The trial court erred in not imposing a sentence for the assault on [the guest]." *Davis*, 90 Wn. App. at 782 (footnote omitted). Here, unlike in *Davis* <u>and</u> *Davison*, the same three people were victims of the burglary and the robbery.

The state also relies on *Davis* for the proposition that in same criminal conduct analysis, the victims of a burglary must include the tenants of a residence and all of their guests and therefore argues there were "ten victims (Routt, Ansel, Hester, Jones, three children, and three unidentified others)" of the burglary in the present case. BOR 24–25. In *Davis*, two additional people were present in the apartment when the incident occurred. *Davis*, 90 Wn. App. at780. The *Davis* Court does not mention their presence in its analysis of same criminal conduct. *Davis* does not support the State's position.

The court below did not misapply the law. The record adequately supports its conclusion the crimes constituted the "same criminal conduct." The court properly exercised its discretion and its decision may not be reversed. *Graciano*, 176 Wn. 2d at 536–38; *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

F. CONCLUSION

For the reasons stated herein and in his opening brief, this Court should grant the relief previously requested and uphold the sentencing decision by denying the state's cross-appeal.

Respectfully submitted on December 24, 2015.

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s/Susan Marie Gasch, WSBA #16485
Gasch Law Office, P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 24, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply/response brief of appellant/cross-respondent David R. Johnson:

David R. Johnson (#865703)
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla WA 99362

E-mail: bnichols@co.asotin.wa.us
Benjamin C. Nichols/Curtis Liedkie
Asotin County Prosecutor
PO box 220
Asotin WA 99402-0220

E-mail: khkato@comcast.net
Kenneth H. Kato
Attorney on appeal for Ralph E. Whitlock

____
s/Susan Marie Gasch, WSBA #16485