NO. 44371-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHAWN ERIN MULLEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 11-1-05075-5

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court err when it found that defendant's convictions for robbery in the first degree and burglary in the first degree did not constitute the same criminal conduct when defendant had a separate intent for each crime?

B. STATEMENT OF THE CASE.

1. Procedure

On December 11, 2011, the Pierce County Prosecuting Attorney (State) charged Shawn Mullen, hereinafter defendant, with one count of robbery in the first degree and one count of burglary in the first degree. CP 1-2. Defendant was charged as either a principle or accomplice in committing the crimes, and both crimes were charged with a deadly weapon enhancement. CP 1-2. Trial began on October 23, 2012, in front of the Honorable Judge Stolz. 1RP 30.[1] On October 30, 2012, the jury found defendant guilty as charged on both counts. 1RP 488-89; CP 95, 99, 101, 102.

[1] The trial transcripts, containing the trial dates 10/22/12 -01/11/13, will be labeled as 1RP followed by the page number. The remaining transcript containing the pretrial hearing will be referred to by the date of the proceeding followed by the page number.

At sentencing, the defense argued that the two crimes constituted the same criminal conduct, and thus defendant's offender score should be one for the purposes of sentencing. 1RP 495-46. The court determined that the two crimes did not constitute the same criminal conduct, and concluded that defendant's offender score was three. 1RP 498. The court sentenced defendant within the standard range to fifty- three months on count one, and forty-one months on count two, with a twenty-four month enhancement for use of a deadly weapon. 1RP 500, CP 115, 118. The court ordered the counts to be served concurrently for a total of seventy seven months confinement, with one hundred and forty-eight days credit for time served. 1RP 500; CP 118.

On January 11, 2013, defendant filed this timely notice of appeal. CP 127.

2. Facts

Defendant and Leonard Dewitt were friends and would often socialize and frequent casinos together. 1RP 73-74. In December of 2011, defendant and Dewitt went to a casino together. 1RP 75. Dewitt ran out of money and defendant lent him approximately forty dollars. 1RP 75, 77. Dewitt promised to pay defendant back but did not specify when he would do so. 1RP 77. Dewitt had also borrowed an expensive pair of sunglasses from defendant a week prior and had not returned them. 1RP 77.

Defendant later testified at trial that during the course of their friendship he had lent Dewitt money approximately five times, totaling about one thousand dollars. 1RP 311.

On the evening of December 16, 2011, Dewitt arrived at his home sometime after 11:00pm. 1RP 80. Dewitt had left his garage door open because he was expecting his domestic partner to arrive home at any minute. 1RP 88-89. While Dewitt was using the bathroom upstairs he heard what sounded like two unfamiliar voices. 1RP 90. He then recognized one of the voices as the defendant's. 1RP 90. Dewitt immediately came downstairs to discover defendant with another man that he had never seen before. 1RP 90-91. Dewitt testified that the other man, later identified as Albert Huniu, was large in size and "was kind of angry." 1RP 91. Dewitt stated that defendant then muttered something about a PlayStation 3, following which Huniu immediately began to strike Dewitt with a golf club. 1RP 94.

Dewitt testified that while he was being attacked by Huniu, defendant stood by Dewitt, never tried to intervene or stop the attack, and seemed angry toward Dewitt. 1RP 95-96. Dewitt tried to get away and run outside but defendant blocked his way. 1RP 129. Defendant then made a comment about things being stolen from his house and punched Dewitt in the face. 1RP 130. Dewitt had a $100 bill in his pocket which he gave to defendant at some point during the attack. 1RP 107. Once Dewitt surrendered the money, defendant and Huniu stopped attacking him. 1RP

111. Huniu then attempted to take Dewitt's telescope, which was located in Dewitt's living room, but decided against it and dropped it on the floor. 1RP 111-12, 140.

Dewitt ran upstairs into his office and locked the door. 1RP 133. Defendant ran after Dewitt and began hitting the door and telling him to come out. 1RP 133. Dewitt informed defendant that he was calling 911 and defendant and Huniu left at that point. 1RP 142. Dewitt ran outside as he was calling 911 and gave the operator the license plate of defendant's truck. 1RP 143-44.

Defendant's girlfriend, Alexis McGregor, had arrived with defendant and Huniu and sat in defendant's truck during the attack. 1RP 36. She testified that she saw defendant and Huniu enter Dewitt's house on the night in question through the opened garage door, and that Huniu was carrying a golf club. 1RP 39, 41. When they came out, Huniu still had the golf club, but instead of getting back into the truck with defendant he began walking down the street. 1RP 40-41. Defendant got into the truck and when asked by McGregor what happened, he replied "Nothing. Shut up." 1RP 53.

McGregor then saw Dewitt standing in front of the truck, with blood dripping from his nose. 1RP 43. Defendant drove away and picked up Huniu further down the street, who no longer had the golf club. 1RP 45. McGregor again asked defendant what happened, to which he replied that Huniu "got carried away." 1RP 61.

Police located defendant's truck and detained defendant shortly after the incident. 1RP 223, 243. Defendant told police "I don't know what the victim said; but whatever it is, it's probably a lie," and also that he was tired of the victim robbing him. 1RP 248. Police discovered two $100 bills, one in each of defendant's pockets, and a golf club in some bushes about a block away from Dewitt's house. 1RP 251, 185, 187.

At trial, defendant testified that he felt Dewitt was taking advantage of him, or "punking" him, because he had stolen things from his home and had not repaid the money defendant had lent him. 1RP 348-48. Defendant also testified that on the night of the incident he went over to Dewitt's to "get my money back" and had "brought the big guy to intimidate him a little bit." 1RP 313, 332. Defendant stated that this was during "a bad time in the relationship," but that he specifically instructed Huniu that there be no violent contact and to not bring the golf club into the house. 1RP 297, 314, 317-18. Defendant also claimed that the two $100 bills found in his pockets belonged to him and that he did not take one of them from Dewitt's house. 1RP 383-84.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT DEFENDANT'S TWO OFFENSES DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT.

In determining a defendant's offender score, multiple current offenses are presumptively counted separately unless the trial court finds that the current offenses encompass the "same criminal conduct." RCW 9.94A.589(1)(a). Crimes constitute the same criminal conduct only if they share each of three elements: (1) the same criminal intent, (2) the same time and place, and (3) the same victim. *Id.* If any of these elements are missing, the multiple offenses cannot encompass the same criminal conduct and must be counted separately in calculating the offender score. ***State v. Vike***, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

Criminal intent is the same for two or more crimes when the defendant's intent, viewed objectively, does not change from one crime to the next, such as when one crime furthers another. ***State v. Lessley***, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). Intent, in this context, is not the *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime. ***State v. Adame***, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Courts narrowly construe the statutory language to disallow most assertions of the same criminal conduct. ***State v. Price***, 103 Wn. App 845, 855, 14 P.3d 841 (2000).

Appellate courts review a trial court's same criminal conduct determination for abuse of discretion or misapplication of the law. *Id.* at 855.

a. Defendant had a separate objective intent for each criminal act.

In the present case, defendant was charged with one count of robbery in the first degree and one count of burglary in the first degree. CP 1-2. At sentencing, the trial court determined that the burglary and robbery were separate offenses, and did not constitute the same criminal conduct. 5RP 498. The trial court relied on ***State v. Lessley*** in concluding that the two crimes were not the same criminal conduct. 118 Wn.2d 773, 817 P.2d 996 (1992); 5RP 498.

In ***Lessley***, the defendant broke down the door of his ex-girlfriend's house, brandished a revolver, forced his ex-girlfriend and her mother into his car, and ordered them to drive to a house in Maple Valley. 18 Wn.2d at 775. Lessley then ordered the mother out of the car at gun point and drove his ex-girlfriend to North Bend, where he stopped the car and assaulted her at gun point. *Id.* at 775. Lessley subsequently drove his ex-girlfriend to another house in White Center, where police arrested him shortly thereafter. *Id.*

Lessley pled guilty to burglary, two counts of kidnapping, and intimidating a witness. *Id.* at 776. At sentencing, Lessley argued that the burglary and the kidnappings encompassed the same criminal conduct because he entered the home intending to take his ex-girlfriend away with him. *Id.* at 776.

In affirming the trial court's ruling, the Supreme Court held that Lessley's crimes did not encompass the same criminal conduct. *Id.* at 776-77. Specifically, the Court held that the objective intent of Lessley's burglary was completed when he broke into the residence. *Id.* at 778.

The defense argues that the trial court's reading of ***Lessley*** is incorrect. Appellant's brief at 10. The defense asserts that the trial court incorrectly relied on ***Lessley*** because in ***Lessley*** the crimes involved more than one victim and the "same time and place" element was not met. Appellant's brief at 12. However, the court in ***Lessley*** specifically addressed the intent element of the crimes and stated that

> [C]rimes which [defendant] objectively intended to commit [in the Thomas residence] included the property damage caused when he broke in, the assault against Mr. Thomas, and the assaults against Mrs. Thomas and his former girl friend, Dorothy Olson. *His subjective intent is irrelevant, and we would only be speculating to assume that the subjective intent was to kidnap and [assault] his former girl friend.* He may initially only have intended to confront her.

Lessley, 118 Wn.2d at 778, *citing* ***State v. Lessley***, 59 Wn. App. 461, 468-69, 798 P.2d 302 (1990)(emphasis added).

Similarly in this case, defendant's initial objective intent was to assault Dewitt at his home. This is supported by defendant's testimony at trial, where he stated that he "brought the big guy to intimidate [Dewitt] a little bit" 1RP 332. In addition, defendant's girlfriend testified that she saw Huniu enter Dewitt's residence carrying a golf club, accompanied by defendant. 1RP 39, 41. Defendant's objective intent was to commit burglary by entering unlawfully into Dewitt's residence and committing the crime of assault therein. *See* RCW 9A.52.020. That objective intent was completed as soon as defendant entered Dewitt's home.

Defendant's objective intent then became to commit robbery. To assume that defendant planned to burglarize and then rob Dewitt would be speculation as to his subjective intent. Defendant could have originally only intended to assault Dewitt.

In ***State v. Grantham***, the defendant was convicted of two counts of second degree rape against the same victim that occurred in the same incident. 84 Wn. App. 854, 932 P.2d 657 (1997). After raping his victim the first time, Grantham stood over her and threatened her not to tell. *Id.* at 856. He then began to argue with and physically assault his victim in order to force her to perform oral sex. *Id.* at 856. The appellate court held that the rapes were not "same criminal conduct" for sentencing purposes because defendant formed new intent before committing the second rape. *Id.* at 859. The court determined that Grantham, upon completing the act

of the first forced rape, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. *Id.* He chose the later, forming a new intent to commit the second act of rape. *Id.* The crimes were sequential, not simultaneous or continuous. *Id.*

Similarly, defendant's crimes in this case were also sequential as opposed to simultaneous or contentious. Furthermore, defendant had an opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act once he was inside Dewitt's home.

Dewitt was in the second floor of his home when defendant and Huniu burglarized the residence. 1RP 89. Once inside, defendant's objective intent to commit burglary was completed. At that point, defendant had an opportunity to pause, reflect, and cease his criminal activity before he decided to commit any crime. Defendant also had an opportunity to pause and reflect while Huniu was assaulting Dewitt. By choosing not to cease his criminal activity, defendant then formed new objective intent to commit the crime of robbery.

Defendant's crimes did not constitute the same criminal conduct because he had formed separate objective intent for the burglary and the robbery he committed. Furthermore, defendant had opportunity to pause, reflect, and cease his criminal conduct between each act, and chose not to do so.

b. Even if defendant's crimes constituted the same criminal conduct, the court had discretion to apply the burglary anti-merger statute and punish both crimes separately.

The burglary anti-merger statute provides: "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 9A.52.050. The anti-merger statute gives the sentencing court discretion to punish for burglary even where an additional crime encompasses the same criminal conduct. ***State v. Lessley***, 118 Wn.2d at 781. The anti-merger statute makes no explicit requirement that trial courts enter findings on the record as to the same criminal conduct of the crime or any other reason in support of a decision to punish two offenses separately.

In the present case, the trial court determined that defendant's crimes of burglary and robbery were not the same criminal conduct. However, even if the court determined that the crimes encompassed the same criminal conduct, the trial court still had discretion to sentence the crimes separately under the anti-merger statute. Defendant's sentence would not have changed. The trial court did not abuse its discretion in sentencing defendant.

D. CONCLUSION.

The trial court did not abuse its discretion or misapply the law when it found that defendant's two crimes of burglary and robbery did not constitute the same criminal conduct. Defendant had formed separate objective intent for the two acts, had completed the act of burglary before proceeding to commit the act of robbery, and had an opportunity to pause, reflect, and cease his criminal conduct prior to committing the robbery. Furthermore, even if the court determined both crimes encompassed the same criminal conduct, the court had the discretion to apply the burglary anti-merger statute and sentence defendant separately for each crime. The trial court did not abuse its discretion. The State respectfully requests this Court affirm defendant's sentence.

DATED: September 12, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

Miryana Gerassimova
Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9-16-13 Therese K
Date Signature

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