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62577-2

No. 62577-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RYAN B. BARTOCILLO,

Appellant.

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

The Honorable Monica J. Benton

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 5

THE TWO OFFENSES OF FIRST DEGREE ROBBERY
AND UNLAWFUL IMPRISONMENT ENCOMPASSED THE
SAME CRIMINAL CONDUCT, AS THEY OCCURRED AT
THE SAME TIME AND PLACE, AGAINST THE SAME
VICTIM, AND INVOLVED THE SAME OBJECTIVE INTENT
TO STEAL MONEY 5

1. Crimes occurring at the same time and place, involving
the same victim, and having the same objective criminal
intent, encompass the same criminal conduct for
sentencing purposes 5

2. The offenses encompassed the same criminal conduct
and should have counted as only one point in Bartocillo's
offender score 6

a. The two offenses occurred at the same time and
place against the same victim..... 6

b. The two offenses involved the same objective criminal
intent—to steal money 7

E. CONCLUSION..... 10

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160
(1987) 7, 8

State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992) 8

State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999)..... 5

State v. Vike, 125 Wn.2d 407, 885 P.2d 824 (1994) 6

Court of Appeals

State v. Adame, 56 Wn. App. 803, 785 P.2d 1144 (1990) 7

State v. Clark, 46 Wn. App. 856, 732 P.2d 1029 (1987) 8

State v. Dolen, 83 Wn. App. 361, 921 P.2d 590 (1996) 6

State v. Holmes, 69 Wn. App. 282, 848 P.2d 754 (1993)..... 8, 9

State v. Rienks, 46 Wn. App. 537, 731 P.2d 1116 (1987)..... 8

Statutes

RCW 9.94A.500 6

RCW 9.94A.589 5

A. ASSIGNMENT OF ERROR

The trial court abused its discretion in finding that Bartocillo's two convictions for first degree robbery and unlawful imprisonment were not the same criminal conduct and in counting each conviction separately in his offender score.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Two convictions encompass the same criminal conduct for sentencing purposes where they occur at the same time and place, against the same victim, and involve the same objective criminal intent. It is well settled that where a person commits a kidnapping in order to further a robbery against the same person, the two crimes encompass the same criminal conduct. Here, Ryan Bartocillo committed unlawful imprisonment in order to further a robbery against the same person. Did the trial court abuse its discretion in finding the two crimes did not encompass the same conduct?

C. STATEMENT OF THE CASE

1. Procedural history. Ryan Bartocillo was charged with one count of burglary in the first degree, RCW 9A.52.020, one count of robbery in the first degree, RCW 9A.56.200(1)(a)(iii) and RCW 9A.56.190, and one count of unlawful imprisonment, RCW

9A.40.040. CP 15-16. The jury found him guilty as charged of unlawful imprisonment and robbery in the first degree, but not guilty of burglary in the first degree. CP 50-52. At sentencing, the court counted the two convictions separately in the offender score. CP 53-54.

After trial, counsel filed a CrR 7.8 motion to amend the judgment, arguing the two offenses constituted the "same criminal conduct" and should have been counted separately in the offender score. CP 62. After a hearing, the trial court denied the motion. CP 62.

2. Trial testimony. At trial, Zita Zingmark testified she lived with her 86-year-old sister Lorna Gray in a house near Greenlake in Seattle. 9/09/08RP 26, 28; 9/10/08RP 75. For about two years, the women had employed Ryan Bartocillo, the son of a friend of Zingmark's, to do yard work and other odd jobs around the home. 9/09/08RP 34; 9/10/08RP 76. Sometimes Bartocillo would spend the night at the house. 9/09/08RP 38-39. He had access to the keys to the house and the car, but would always return them to Zingmark when he was finished using them. 9/09/08RP 39.

Zingmark kept about \$4,000 in cash in envelopes in the basement. 9/09/08RP 40-41, 44. Bartocillo was aware that

Zingmark kept cash in the basement and saw her put money in the envelopes on occasion. 9/09/08RP 41-43.

On November 21, 2007, Zingmark left the house around noon as usual to visit her husband who was in a nursing home. 9/10/08RP 15-16. Zingmark visited her husband there every day, from late morning until around midnight. 9/10/08RP 14-15. Bartocillo was aware of her schedule. 9/10/08RP 14-15.

On this date, Gray was in the house alone while Zingmark was at the nursing home. 9/10/08RP 78. Sometime between 9 and 10 p.m., Gray was in the front room watching television when she heard someone unlocking the padlock on the screen door. 9/10/08RP 79, 90. She looked through the window and saw that it was Bartocillo, who was with two companions. 9/10/08RP 79-80, 91-92. She went back to her room, as it was natural for Bartocillo to be there. 9/10/08RP 80, 92. A few minutes later, one of Bartocillo's companions took her by the shoulder and dragged her to the bathroom. 9/10/08RP 81-82. When she passed through the kitchen, she saw Bartocillo going down the stairs to the basement with his other companion. 9/10/08RP 82. She heard Bartocillo say to his friend, "not there but in the basement." 9/10/08RP 82.

The man who dragged Gray to the bathroom forced her inside and put a cloth over her mouth; she soon passed out.

9/10/08RP 83. The man locked her inside. 9/10/08RP 23-24. The bathroom door locked from the outside and there was no latch inside. 9/10/08RP 23-24, 87.

When Zingmark returned home at around 1 a.m., she heard moaning coming from the bathroom. 9/10/08RP 22-23, 84. She opened the bathroom door and found Gray lying on the floor.

9/10/08RP 24. Gray's speech was slurred and she said, "Ryan did this to me with his companions." 9/10/08RP 24-25, 67, 70.

Zingmark called 911. 9/10/08RP 25. The parties stipulated that Gray was injured from lying on the cold bathroom floor for several hours. 9/15/08RP 16.

A few days later, Zingmark noticed that the money she kept in the envelopes in the basement was missing. 9/10/08RP 32.

D. ARGUMENT

THE TWO OFFENSES OF FIRST DEGREE ROBBERY AND UNLAWFUL IMPRISONMENT ENCOMPASSED THE SAME CRIMINAL CONDUCT, AS THEY OCCURRED AT THE SAME TIME AND PLACE, AGAINST THE SAME VICTIM, AND INVOLVED THE SAME OBJECTIVE INTENT TO STEAL MONEY

1. Crimes occurring at the same time and place, involving the same victim, and having the same objective criminal intent, encompass the same criminal conduct for sentencing purposes.

Under RCW 9.94A.589(1)(a), when a defendant is to be sentenced for two or more current offenses, generally the offender score for each current conviction is determined by using all other current convictions as if they were prior convictions. RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 120, 985 P.2d 365 (1999). An exception exists for current offenses if the sentencing court finds that the offenses "encompass the same criminal conduct." RCW 9.94A.589(1)(a). Such convictions count as one crime in the offender score. Id.

The Sentencing Reform Act (SRA) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). All three prongs of the same criminal conduct test must be met; the absence of any one of them

prevents a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The State bears the burden of proving by a preponderance of the evidence that two or more offenses amount to separate criminal conduct. RCW 9.94A.500(1); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996).

A trial court's determination of what constitutes the same criminal conduct for sentencing purposes must be reversed on appeal where the court has abused its discretion or misapplied the law. Tili, 139 Wn.2d at 122.

2. The offenses encompassed the same criminal conduct and should have counted as only one point in Bartocillo's offender score.

a. The two offenses occurred at the same time and place against the same victim. Bartocillo was charged and convicted of unlawful imprisonment for his accomplice's actions in locking Gray in the bathroom. CP 15-16; 9/15/08RP 25, 33-34. The first degree robbery charge rested on the allegation that he (or an accomplice) took property from her and in her presence, against her will, through the use or threatened use of force, violence and fear of injury, and that he inflicted bodily injury upon her during the

commission of the robbery. CP 15-16. The State's theory was that the accomplice's actions in dragging Gray to the bathroom amounted to an assault, and that Gray was injured from lying on the cold bathroom floor. 9/15/08RP 25, 33-34.

In sum, the unlawful imprisonment occurred during the commission of the robbery and therefore the two crimes occurred at the same time and place. Further, the two crimes were committed against the same victim, Lorna Gray.

b. The two offenses involved the same objective criminal intent—to steal money. To determine whether two crimes involve the "same criminal intent" for purposes of the "same criminal conduct" analysis, the relevant inquiry is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). Intent, as used in this analysis, "is not the particular *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).

Same objective criminal intent can be measured by determining whether one crime furthered the other. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

It is well settled that where a person commits a kidnapping in furtherance of a robbery against the same victim, the two crimes encompass the same criminal intent. Dunaway, 109 Wn.2d at 217; State v. Holmes, 69 Wn. App. 282, 290, 848 P.2d 754 (1993); cf. State v. Clark, 46 Wn. App. 856, 860, 732 P.2d 1029 (1987) (assault committed in furtherance of robbery against same victim encompasses same criminal intent); State v. Rienks, 46 Wn. App. 537, 543-44, 731 P.2d 1116 (1987) (same).

In Dunaway, Dunaway got into a car with two women; showed them a gun and under threat asked them to drive toward Seattle; told them to give him the cash they had on them, which they did; and then took the money. 109 Wn.2d at 211. He was charged and convicted of two counts of robbery and two counts of kidnapping. Id. at 212. The Supreme Court concluded that the kidnapping and robbery of each victim were "intimately related," as "robbery was the objective intent behind both crimes." Id. at 217. Further, "it is evident that the kidnapping furthered the robbery." Id.

Therefore, "the kidnapping and robbery of a single victim should be treated as one crime for sentencing purposes." Id.

Similarly, in Holmes, Holmes and an accomplice robbed and kidnapped the victim at gunpoint and stole his car. 69 Wn. App. at 284. Because the two crimes occurred at the same time and place and "the kidnapping furthered the commission of the robbery," the crimes encompassed the same criminal conduct. Id. at 290.

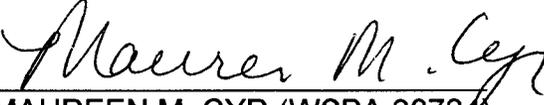
Here, Bartocillo and his accomplices locked Lorna Gray in the bathroom while they went into the basement and took money from the envelopes. It is apparent they locked her in the bathroom so that they could commit the robbery. In other words, "robbery was the objective intent behind both crimes." Dunaway, 109 Wn.2d at 217. Moreover, the unlawful imprisonment furthered the robbery. Id. Therefore, as with the crimes of kidnapping and robbery, the two crimes of unlawful imprisonment and first degree robbery, as charged and proved in this case, should be treated as one crime for sentencing purposes. Id.

Where the trial court abuses its discretion in treating the same crime conduct as separate crimes, the remedy is to remand for resentencing with instructions to treat the convictions as the same offense in the offender score. Id.

E. CONCLUSION

Because the trial court abused its discretion in counting the convictions for unlawful imprisonment and first degree robbery as separate offenses in the offender score, the sentence must be reversed and remanded for resentencing.

Respectfully submitted this 16th day of July 2009.


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STATE OF WASHINGTON,)	
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RYAN BARTOCILLO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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