

NO. 67658-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BOGDAN FEDAS,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Fedas burglarized an appliance store, stealing over \$40,000 worth of high-end appliances. While inside the store, he discovered a large safe, containing valuables and other items, in one of the offices. He intentionally dismantled and damaged the office door while removing the 800-pound safe from the business. Also while in the building, Fedas discovered the keys to the store's delivery truck, which he stole and used to transport the safe. He later expended a fire extinguisher in the back of the truck, damaging it. Did the trial court properly exercise its discretion when it determined that Fedas's convictions for second degree burglary, theft of a motor vehicle, and second degree malicious mischief should each score separately toward his offender score?

B. STATEMENT OF THE CASE

Bogdan Fedas was charged in King County Superior Court with second degree burglary, theft of a motor vehicle, first degree theft, and second degree malicious mischief. CP 11-13. He was convicted of all counts following a jury trial. CP 92-95.

The evidence at trial proved that Fedas, along with one or more unknown accomplices, broke into the Metropolitan Appliance

store sometime after closing on November 1, 2009. 1RP 135-45;¹ 2RP 52-53. The burglary was not speedy; Fedas and his accomplice(s) were in the store for a significant period of time. 1RP 147; 2RP 52-53.

The alarms at both the front and rear of the store were disabled. 1RP 73, 104-05, 141, 183-84. Instead of randomly stealing appliances, or taking only the appliances that required no disassembly, Fedas and his accomplice(s) selected the most expensive appliances that the store sold. 1RP 96-97, 140-41, 144-46, 161; 2RP 52-53. Those appliances were dismantled from various locations around the showroom floor and stolen. Id.

During the course of the burglary, Fedas and his accomplice(s) located a large, 800-pound safe in the store's office. 1RP 99, 139, 141, 147. The safe contained the store's valuables as well as personal items. 1RP 159-60, 181. Fedas stole the safe, dismantling and damaging the office door in the process. 1RP 99, 143.

¹ The verbatim report of proceedings in front of Judge Middaugh is two volumes. The first volume includes the proceedings from June 6, 2011 and June 8, 2011, and will be referred to as "1RP." The second volume contains the proceedings from June 9, 2011, June 13, 2011, and August 5, 2011, and will be referred to as "2RP."

Also during the course of the burglary, Fedas and his accomplice(s) discovered the keys to the store's two delivery trucks, and took one of them. 1RP 140, 181-82; 2RP 48. The truck was later found abandoned in Auburn. 1RP 57-58, 108. A fire extinguisher had been expended in the cargo area of the truck, presumably to destroy any evidence linking Fedas and his accomplice(s) to the crime. 1RP 108-09, 142. The safe was located in the truck; it had been forcibly broken into and had its valuables removed. 1RP 109, 181.

During the lengthy process of disconnecting and removing the appliances from the store, Fedas took a soda from the employees' refrigerator and consumed a portion of it, leaving the can behind. 1RP 86-88, 138; 2RP 51-54. His DNA was discovered on the lip of the soda can. 1RP 117; 2RP 105-08.

The police located surveillance video from a business near where the Metropolitan Appliance delivery truck had been abandoned. 1RP 110-11. The video showed the delivery truck arriving in the area with a Ford van; the Ford van had a black rear lift. 1RP 114. The driver of the Metropolitan Appliance truck exited, and left in the Ford van. Id.

Approximately three months after the Metropolitan Appliance burglary, Fedas was contacted by Mount Vernon law enforcement outside of an appliance store at night, in a white Ford Econoline van with a black electric lift on the back. 2RP 39-42. The van was registered to Fedas. 1RP 118.

Police detectives contacted Fedas, who denied ever having been inside the Metropolitan Appliance store. 1RP 120-23.

At sentencing, Fedas asked the court to find that his four convictions constituted the same criminal conduct for purposes of calculating his offender score. CP 171-72; 2RP 181. The State agreed that the burglary and first degree theft were the same criminal conduct, but argued that the theft of a motor vehicle and malicious mischief charges were separate criminal conduct from the burglary. CP 133. Moreover, regardless of its ultimate finding with respect to same criminal conduct, the State asked the court to exercise its discretion pursuant to the burglary "anti-merger" statute and score all four offenses separately. CP 136; 2RP 179, 189.

The trial court found Fedas's convictions for burglary and theft to be the same criminal conduct. 2RP 195. However, the court refused to "merge" Fedas's convictions for theft of a motor vehicle and malicious mischief with his burglary conviction, stating:

[I]t seems clear to me that his intent was to break in and steal the appliances. And then when he got there they found the car, they found the safe, and decided to expand their intent. I would merge the burglary and theft because I think those did involve the same criminal intent, but breaking outside of that and taking the van, destroying the door frame, taking the safe – that was clearly separate, opportunistic activities and I don't think it's fair to merge those and I am not going to do that.

2RP 195.

Despite his request for an exceptional sentence, Fedas received a sentence within the standard range. CP 187-94; 2RP 181, 195. He appealed. CP 215.

C. ARGUMENT

Fedas argues that the court erred when it determined that his convictions for theft of a motor vehicle and malicious mischief were separate criminal conduct from his burglary conviction. He claims that a *de novo* standard is appropriate when reviewing the trial court's decision, but argues that the court erred even if the standard of review is deferential. Fedas's argument must be rejected because the court properly scored the crimes separately.

1. THE TRIAL COURT PROPERLY SCORED FEDAS'S CONVICTIONS FOR THEFT OF A MOTOR VEHICLE AND SECOND DEGREE MALICIOUS MISCHIEF SEPARATELY FROM HIS BURGLARY CONVICTION.

Offenses that are considered the same criminal conduct are scored as one offense. RCW 9.94A.589(1)(a). "Same criminal conduct" refers to two or more crimes requiring the same criminal intent, committed at the same time and place, and involving the same victim. Id.; State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The definition of "same criminal conduct" is to be construed narrowly so that most crimes are not considered the same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If any one of the three elements is missing, the offenses are not the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

To determine whether two or more criminal offenses involve the same criminal intent, courts are required to focus on "the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." State v. Dunaway, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); Lessley, 118 Wn.2d at

777-78. Whether the defendant's intent changed is determined “in part by whether one crime furthered the other.” State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (quoting Vike, 125 Wn.2d at 411). Other factors to consider include whether the crimes were part of the same scheme or plan or whether the defendant's criminal objectives changed. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995).

a. Standard Of Review.

Citing to State v. Torngren, 147 Wn. App. 556, 196 P.3d 742 (2008), Fedas argues that a *de novo* standard is applied when reviewing a sentencing court's determination regarding “same criminal conduct.” Brf. of Appellant at 7-8. That is not the appropriate standard of review.

Torngren reasoned that because the question of same criminal intent is determined under an objective standard, an appellate court is on equal footing with the trial court when making such a determination. 147 Wn. App. at 562-63. But the court in Torngren was not asked the question of whether the defendant's *current* crimes constituted the same criminal conduct. Id. at 560. Rather, the question presented was whether the defendant's *prior*

convictions involved the same criminal intent. Id. Unlike a defendant's current offenses, about which the trial court heard evidence of first-hand, a determination regarding prior offenses must be made from a sterile record of documents such as the information, declaration of probable cause, judgment and sentence, and statement of defendant on plea of guilty. In such a case, the appellate court presumably has access to all of the same information that the sentencing court used to make its decision.

Despite Torngren, the standard of review for a trial court's decision regarding same criminal conduct has long been abuse of discretion or misapplication of the law. State v. French, 157 Wn.2d 593, 613, 141 P.3d 54 (2006); State v. Haddock, 141 Wn.2d 103, 3 P.2d 733 (2000); State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 2d 80 (1990); State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999). See also Flake, 76 Wn. App. at 180; State v. Stockmyer, 136 Wn. App. 212, 218, 148 P.3d 1077 (2006); State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998).

Fedas correctly notes that the reasoning in Torngren is currently pending before our state supreme court in its review of Division III's unpublished decision in State v. Graciano, 173 Wn.2d

1012, 266 P.3d 221 (No. 86530-2). However, unless and until the court decides to reverse itself, this Court is bound by clear precedent.² In the absence of a misapplication of the law, a trial court's decision on same criminal conduct will not be reversed unless the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

When the facts in the record support a finding either way regarding the issue of same criminal intent, the trial court's determination is entitled to deference. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991) (citing State v. Burns, 114 Wn.2d 314, 317, 788 P.3d 531 (1990)). See also State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003), affirmed on other grounds, 153 Wn.2d 765 (2005) (trial court's finding of separate criminal conduct was upheld because the evidence supported both the defendant's argument of same intent and the trial court's finding of different intent).

Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has

² The State does not concede that the trial court's decision here would be reversed even if a *de novo* standard of review were applied.

not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

b. The Trial Court Properly Exercised Its Discretion To Find That Fedas's Crimes Were Separate Criminal Conduct.

Here, the trial court properly determined that Fedas's convictions for theft of a motor vehicle and second degree malicious mischief were separate criminal conduct from his underlying burglary conviction. Because the evidence produced at trial supported a finding of separate criminal conduct, the sentencing court did not abuse its discretion.

Although Fedas committed his crimes against the same victim, it is not completely clear that his crimes occurred at the same time and place. His actions took place over a significant period of time, in different rooms of the business. 1RP 145-47; 2RP 52-53. However, even if Fedas's crimes were committed at the same time and place, his criminal intent was not the same.

As outlined supra, when determining criminal intent, the trial court's analysis is an objective one, and asks whether the defendant's intent changed from one crime to the next. Dunaway, 109 Wn.2d at 214-15. When crimes occur simultaneously, the

question of whether one crime “furthered the other” is not particularly useful. Haddock, 141 Wn.2d at 114. Instead, whether Fedas’s criminal objectives changed or whether his crimes were part of an overall scheme or plan is the key inquiry. See Calvert, 79 Wn. App. at 577-78.

The evidence at trial amply supported the trial court’s conclusion that Fedas’s criminal intent, as objectively viewed, changed from the time he committed the burglary to when he committed the theft of a motor vehicle and the malicious mischief.

After his initial act of breaking into the store with the intent to steal appliances, Fedas had ample opportunity to reflect on his actions and form new intents to commit the subsequent crimes of malicious mischief and theft of a motor vehicle. The additional crimes occurred because of what Fedas found inside the business after he broke in (vehicle keys, tools, and safe). He took advantage of additional opportunities as they arose, after his initial crime of burglary was completed. He stole a safe that contained personnel records, valuables and personal items; he used the victim’s own tools to damage the office door and remove the safe. Given his ongoing decision-making and resourcefulness, his initial intent

(to break into the business to steal appliances) objectively changed to encompass additional criminal activity.

In State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997), multiple counts of rape occurring during a relatively short time frame (the same evening) were found to be separate criminal conduct based on the fact that the defendant, upon completing one rape, "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." 84 Wn. App. at 859. That same opportunity for reflection existed for Fedas, and instead of ceasing his criminal activity, he chose to commit additional crimes.

Fedas argues that the evidence shows his intent all along was to use the store's own truck to steal heavy merchandise. However, it is an equally valid conclusion to draw from the evidence that once Fedas entered the building and discovered the keys to the delivery truck, he expanded his criminal intent and took additional appliances beyond that which would have originally fit into his Ford van. Moreover, after discovering the safe inside the office, Fedas again expanded his criminal objective to include damaging the door and removing the safe, which he could now transport in the store's delivery truck. When the record supports

either of two findings, the trial court's determination is entitled to deference. Rodriguez, 61 Wn. App. at 816.

The sentencing court agreed with the State's position.³ 2RP 195. At sentencing, the judge found that Fedas's original intent was to break into the store and to steal appliances. Id. However, the court went on to find that after Fedas broke into the store and discovered the delivery truck and the safe, his criminal intent expanded by "taking the van, destroying the door frame, taking the safe . . . clearly separate, opportunistic activities." Id.

Because the facts in the record support a finding that Fedas's objective criminal intent changed from the time he committed the burglary to when he committed the theft of the truck and the malicious mischief, the court properly exercised its authority to count the crimes as separate criminal conduct. This Court should affirm that finding.

³ Fedas claims that the State "essentially agreed" with his analysis on the issue of same criminal conduct. Brf. of Appellant at 5. He overstates the record. Although the deputy prosecutor noted that the matter was within the discretion of the court, she extensively outlined her position that the theft of a motor vehicle and malicious mischief charges were separate conduct from the burglary. CP 133-36. She argued that "even if" the court agreed with Fedas, it still had discretion to apply the anti-merger statute and count the crimes separately. 2RP 179.

c. The Trial Court Properly Scored The Crimes Separately Pursuant to RCW 9A.52.050.

The burglary “anti-merger” statute provided the sentencing court with the discretion to score Fedas’s crimes separately regardless of whether they constituted the same criminal conduct. As such, it cannot be said that the sentencing court abused its discretion when it counted the crimes separately.

The legislature has made an explicit exception to the general rule that crimes constituting the same criminal conduct be scored together:

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 specifically allows defendants to be punished separately for multiple crimes stemming from a burglary. See Lessley, 118 Wn.2d at 781-82 (the court is permitted to use its discretion to punish crimes arising from a burglary separately, even where they are the same criminal conduct).

Here, the State asked the court to apply the anti-merger statute in the event it determined that Fedas’s crimes were the same criminal conduct. CP 136-39; 2RP 189-91. Although not

entirely clear, the court appeared to find that the crimes had different criminal intents, but that the equities favored separate scoring regardless:

I am going to find, **because I am merging just the [first degree theft] because I think that is more proportionate and I have the discretion to do that,** I am finding on [the burglary count] there is a seriousness level 3, there is an offender score of 7 and the standard range is 33 to 43 months.

2RP 198 [emphasis supplied]. Because the court could exercise its discretion under the anti-merger statute to score the motor vehicle theft and malicious mischief crimes separately from the burglary, this Court should affirm Fedas's sentence.

Fedas argues that the anti-merger statute cannot be considered on appeal. Brf. of Appellant at 8. Without citation to the record, he asserts that "the court decided that it would not apply the anti-merger statute, and it did not do so." Id. [emphasis included]. However, as noted supra, it is not at all clear from the record that the sentencing court refused to apply the anti-merger statute. In fact, the record supports a finding that the sentencing court exercised its discretion to score the crimes separately even if they were the same criminal conduct. When scoring the crimes

separately, the court stated it was doing so "because I think that is more proportionate and I have the discretion to do that." 2RP 198.

Fedas's claim that the court refused to exercise its discretion under RCW 9A.52.050 is not clear from the record. The anti-merger statute provides yet another basis for this Court to affirm the sentence.

D. CONCLUSION

For all the reasons stated above, the State respectfully asks this Court to affirm Fedas's sentence.

DATED this 29 day of June, 2012.

Respectfully submitted,

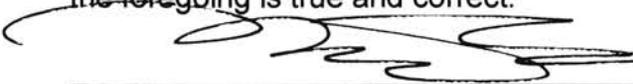
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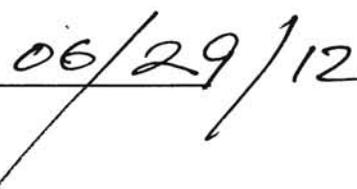
Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BOGDAN FEDAS, Cause No. 67658-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

Date


06/29/12