

NO. 42548-3-II

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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

SHELLEY L. CLARK

Appellant.

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

The Honorable Michael Evans, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's application of the burglary anti-merger statute was manifestly unreasonable and based on untenable grounds.

2. The trial court erred when it ruled that Appellant's two current crimes of attempted robbery and burglary were not the same criminal conduct for the purposes of calculating Appellant's offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant was convicted of burglary and attempted robbery occurring in the same time and place and involving the same victim and criminal intent. The sentencing court applied the burglary anti-merger statute and scored these offenses separately when calculating Appellant's offender score. Where the court applied the statute based on its erroneous conclusion that the offenses did not encompass the same criminal conduct, and its untenable belief that appellant should have known better than to commit the offenses due to a first degree kidnapping conviction from 1998, must Appellant's sentence be vacated? (Assignment of Error 1)

2. Where Appellant's two offenses involved the same intent to commit a theft, and occurred at the same time, place and against the same victim, did the trial court err when it found that the two offenses did not constitute the same criminal conduct? (Assignment of Error 2)

C. STATEMENT OF THE CASE

1. Procedural Facts:

Appellant Shelley Clark (hereinafter Clark) was charged by information filed in Cowlitz County Superior Court with first degree burglary and attempted second degree robbery, contrary to RCW 9A.52.020(1)(b) and RCW 9A.28.020(1). Clerk's Papers [CP] 4-5.

The matter came on for jury trial on August 22 and 23, 2011, the Honorable Michael Evans presiding. The State filed a second amended information the first day of trial. 2Report of Proceedings [RP] at 4;¹ CP 40-41. The court heard a CrR 3.5 motion, motion to continue the trial, and motion for change of venue on August 22, 2011. 2RP at 9-37, 59-72.

The jury returned verdicts of guilty to the offenses as charged. CP 91, 92; 3RP at 115.

At sentencing on August 31, 2011, the prosecution scored the burglary and attempted robbery counts separately and thereby calculated Clark's offender score for each offense as eight. 1RP at 28. The State calculated Clark's standard sentence range on the burglary count at 77 to 102 months, and 39.75 to 52.5 months on the attempted robbery count. 1RP at 28; CP 96.

¹The record of proceedings is designated as follows: 1RP – preliminary hearings and sentencing; 2RP—August 22, 2011 (jury trial, morning and afternoon session), 2RP—August 22, 2011 (jury trial, afternoon session), 3RP—August 23, 2011 (jury trial).

Defense counsel argued that the burglary and attempted robbery encompassed the same criminal conduct and should be counted as one crime in calculating Clark's offender score. 1RP at 35-37. Defense counsel also argued that the court merge the robbery conviction into the burglary conviction. 1RP at 35-37, 42.

Judge Evans found the offenses were not the same criminal conduct and applied the burglary anti-merger statute. 1RP at 44. Based on the disputed calculation, the court imposed standard range sentences for a total term of confinement of 95 months. 1RP at 45; CP 99.

Timely notice of appeal was filed on August 31, 2011. CP 108. This appeal follows.

2. Trial Testimony:

Shelley Clark was charged with unlawfully entering an apartment shared by Mary Richards and Ashley Loven and assaulting Loven in an attempt to take a computer. CP 40-41.

At trial, Loven testified that she was in the apartment, located at 953 Eighth Avenue in Longview, Washington, on the afternoon of October 1, 2010. 2RP at 87. Richards was not in the apartment at the time. 2RP at 88. At 3:45 p.m. Shelley Clark knocked on the door and Loven answered it. 2RP at 89. According to Loven, Clark asked "is Mary here?" 2RP at 89. Loven, who did not know Clark, told her that

Richards was not there and that Clark could come back later. 2RP at 89. According to Loven, Clark said that Richards owed her \$1000.00 and that she would not leave until she got it. 2RP at 91, 93. Loven stated that she did not invite Clark into the apartment, and that Clark pushed her out of the way and walked in. 2RP at 91, 92. She said that after looking in the apartment for Richards, Clark started to disconnect a modem from a computer belonging to Richards and moved the computer around as if she intended to take it. 2RP at 95. She told Clark that she could not leave with something that did not belong to her. 2RP at 95. According to Loven, Clark started pushing her and she backed up until she hit the kitchen counter. 2RP at 96. Clark, who was yelling at Loven, then resumed trying to pack up the computer. 2RP at 96. Loven testified that she asked Clark to leave and that Clark grabbed her by the neck. 2RP at 96-97, 99-100; Exhibits 4 and 6. Photographs showed the computer was unplugged and had been moved from its original position. 2RP at 102-04; Exs. 2, 3, and 6.

The police were dispatched to at the apartment and spoke with Loven and Clark, who was leaving the apartment when police arrived. 2RP at 149, 155. While talking with police, Clark denied that there had been a physical confrontation with Loven and said that Richards, whom

she had known for many years, had asked her to go the apartment to check on it. 2RP at 157.

Richards received a call from police and she returned to her apartment. After she arrived, Richards determined that she had received a number of voice mails, which she identified as having been left by Clark. 2RP at 134, 135, 160, 161. Before Richards arrived at the apartment, Clark called her and left a voice mail while she was talking to the police. 2RP at 158.

Richards played the voicemail messages for police, who recorded them. 2RP at 166. Over defense objection, five voicemail messages were played to the jury. 2RP at 205-07.

Richards testified that she had not given Clark permission to enter the apartment uninvited. 2RP at 136.

The defense rested without calling witnesses. 3RP at 19.

D. ARGUMENT

1. **THE COURT ERRED BY APPLYING THE BURGLARY ANTI-MERGER STATUTE AND BY FINDING THE OFFENSES WERE NOT THE SAME CRIMINAL CONDUCT**

a. **Clark's attempted robbery conviction merged into her burglary conviction.**

In a prosecution for burglary, where the burglary is frequently elevated based on the commission of some other, included offense, the

Legislature has provided a sentencing court with the discretion to decide whether or not to merge a burglary with the included crime:

Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well for the burglary, and may be prosecuted for each crime separately.

RCW 9A.52.050; see also, *State v. Davis*, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998) (trial court may, in its discretion, refuse to apply the provisions of the burglary “anti-merger” statute).

The merger doctrine is a tool of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions. *State v. Michielli*, 132 Wn.2d 229, 238, 937 P.2d 587 (1997). Application of the doctrine arises after the State has obtained convictions on multiple crimes that potentially merge. *Id.* Whether merger applies is evaluated on a case-by-case basis: “it turns on whether the predicate and charged crimes are sufficiently ‘intertwined.’” *State v. Saunders*, 120 Wn. App. 800, 821, 86 P.3d 232 (2004).

The merger doctrine must be distinguished from the “same criminal conduct” analysis provided under the Sentencing Reform Act (SRA). For merger to apply, Clark does not need to show that the offenses were the same criminal conduct.

Under the SRA, multiple offenses that encompass the same

criminal conduct are counted as a single offense in calculating a defendant's offender score. RCW 9.94A.589(1)(a). When one of those offenses is burglary, however, the sentencing court has discretion to either apply the same criminal conduct provision and count the offenses as one crime, or apply the burglary anti-merger statute and score the offenses separately. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). Under the same criminal conduct provision of RCW 9.94A.589(1)(a), a defendant who has committed multiple crimes that involve the same time and place, same intent, and same victim constitute the same criminal conduct, and may be punished as one offense. Merger, on the other hand, is a component of double jeopardy analysis and prevents “pyramiding the charges” to obtain greater punishment. *State v. Johnson*, 92 Wn.2d 671, 678-80, 600 P.2d 1249 (1979); see also *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983) (citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and *Whalen v United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed. 2d 715 (1980)).

Therefore, two crimes may constitute the same criminal conduct but may not merge. See e.g. *Saunders*, 120 Wn. App. at 824-25. On the other hand, a crime may merge into another offense without satisfying all three predicates of the “same criminal conduct” test. Rather, “the underlying substantive criminal offense” is more properly viewed as a “species of lesser-included offense.” *United States v Dixon*, 509 U.S.

688, 698, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993).

Merger would have required the included crime being vacated and would have prevented the imposition of multiple punishments. *Johnson*, 92 Wn.2d at 682 (application of merger doctrine results in “striking” of convictions). Here, the court abused its discretion by applying the anti-merger statute on untenable grounds. See *State ex rel. Carroll v Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The offense of attempted robbery in the second degree met the predicates for merger with the burglary because the crimes were sufficiently “intertwined” for the doctrine to apply. The burglary was merely incidental to the attempted robbery of the computer; there was no independent purpose or effect to the burglary. Compare *Johnson*, 92 Wn.2d at 680 (additional conviction “cannot be allowed to stand unless it involves some injury . . . which is separate and distinct from and not merely incidental to the crime of which it forms an element”).

In this case, the court gave two reasons for applying the anti-merger statute. One reason was that the court was satisfied the burglary and attempted robbery did not encompass the same criminal conduct. 1RP at 44. A sentencing court's same criminal conduct determination is reversible if it is an abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). As argued in §2, *infra*, Clark's offenses meet the statutory definition of same criminal

conduct, and the court's conclusion to the contrary is wrong. Accordingly, that conclusion is an untenable basis for applying the anti-merger statute.

In addition, the court stated that, "somebody with a history—with a prior strike offense—should know better, you need to—and need to be careful not to do—commit different crimes. 1RP at 44. Under this reasoning, the court's purpose in applying the anti-merger statute to increase Clark's sentence was to punish Clark for her 1998 conviction for first degree kidnapping. CP 95.

It is not clear from the record that the court would have chosen to apply the anti-merger statute if it had not erroneously concluded Clark's offenses were not the same criminal conduct, or if it did not unreasonably believe Clark should be additionally punished for the 1998 kidnapping offense. Remand for resentencing is therefore required.

b, The court erred by finding the offenses were not the same criminal conduct.

As noted in §1, *supra*, crimes encompass the same criminal conduct when 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). The sentencing court's decision concerning whether multiple offenses constitute same criminal conduct is reviewed for a clear abuse of discretion or misapplication of the law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990).

In this case, there is no question that the burglary and attempted robbery occurred at the same place and time—in Loven’s and Richards’ apartment on October 1, 2010. The offenses also involved the same victim –Loven. In addition, the offenses required the same objective criminal intent. 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 the other. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

The appellant submits that *State v Rienks*, 46 Wn. App. 537, 731 P.2d 1116 (1987) is instructive. In *Rienks*, Division One found that burglary, robbery and first degree assault encompassed the same criminal conduct where the defendant went to a victim's apartment to collect money owed to a third person. The defendant entered the apartment, assaulted one man and stole money from a briefcase. The court determined that the three offenses were committed as part of a recognizable scheme or plan and were committed with “no substantial change in the nature of the criminal objective,” and therefore encompassed the same criminal conduct within the meaning of the SRA. *Rienks*, 46 Wn. App. at 543 (citing *State v Calloway*, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985)). The court pointed out that "there was no independent motive for the secondary crime; rather, the objective was to accomplish or complete the primary one." *Rienks*, 46 Wn App. at 544.

Clark was convicted of attempted second degree robbery and first degree burglary. To convict her of attempted robbery, the jury had to find that Clark attempted to take personal property from another and that she “intended to commit theft” of property. RCW 9A.56.190; see also Jury Instruction 17 (CP 86). To convict her of first degree burglary, the jury had to find that she “entered or remained unlawfully in a building”, and that the entering or remaining was done with the “intent to commit a crime against a person or property therein.” RCW 9A.52.020; see also Jury Instruction 11 (CP 80).

Clearly, Clark had the same objective, to commit a theft, when she committed both the burglary and the attempted robbery. She entered the apartment in order to obtain something of value in lieu of a \$1000 debt allegedly owed to her by Richards. The State argued that Clark’s objective intent changed, and that she initially entered the apartment to find Richards. 1RP at 28, 29. This theory, however, ignores the evidence that makes clear that her reason for looking for Richards in the first place was to obtain payment for the debt. She entered the apartment with an intent to obtain repayment, not merely to “find” Richards. The assault of Loven constituted a substantial step toward committing the robbery. Thus the assault, on which the burglary charge was based, furthered the attempted robbery. The attempted robbery was also committed for the same purpose as the burglary—to unlawfully remove property from

Loven's control. See *Rienks*, 46 Wn. App. at 544.

Clark's objective throughout the incident was to complete the crime of theft. There was no "substantial change in the nature of the criminal objective." *Rienks*, 46 Wn. App. at 543. Objectively viewed, the criminal intent was the same from one crime to the next, and the crimes furthered each other toward the same end. Because the burglary and attempted robbery were committed at the same time and place and involved the same victim and intent, those offenses encompass the same criminal conduct. See RCW 9.94A.589 (1)(a). The trial court's decision to the contrary was clearly wrong. The court's failure to find that the two offenses encompassed the same criminal conduct was an abuse of discretion. Accordingly, the offenses must be scored as a single offense. See *Lessley*, 118 Wn.2d at 781.

E. CONCLUSION

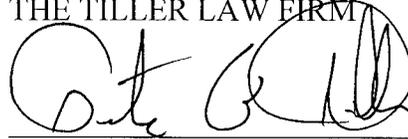
The court abused its discretion in applying the burglary anti-merger statute. In addition, the court abused its discretion by finding that Clark's convictions for first degree burglary and attempted second degree robbery do not involve the same criminal conduct. The appellant respectfully requests that this Court remand her case for resentencing.

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DATED: February 14, 2012.

Respectfully submitted,
THE TILLER LAW FIRM

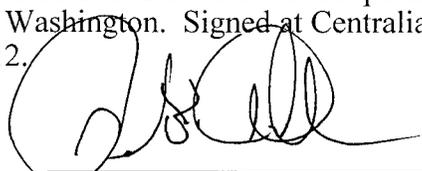


PETER B. TILLER-WSBA 20835
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CERTIFICATE OF SERVICE

The undersigned certifies that on February 14, 2012, that this Appellant's Opening Brief was mailed by U.S. mail, postage prepaid, to the Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to Mr. Eric Bentson, Prosecuting Attorney, Hall of Justice, 312 SW First Street, Kelso, WA 98626 and Shelly L. Clark, DOC #753562, W.C.C.W., 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300, true and correct copies of this Opening Brief of Appellant.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 14, 2012.



PETER B. TILLER

EXHIBIT A

STATUTES

RCW 9.94A.589

Consecutive or concurrent sentences.

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony

crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include

periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

RCW 9A.52.020

Burglary in the first degree.

- (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

- (2) Burglary in the first degree is a class A felony.

RCW 9A.52.050

Other crime in committing burglary punishable.

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.56.190

Robbery — Definition.

A person commits 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 immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.210

Robbery in the second degree.

(1) A person is guilty of robbery in the second degree if he or she commits robbery.

(2) Robbery in the second degree is a class B felony.