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Division II  
State of Washington  
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No. 507765

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

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STATE OF WASHINGTON, Respondent

v.

ANGELA CREAMER, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF KITSAP COUNTY  
THE HONORABLE JUDGE WILLIAM HOUSER

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BRIEF OF APPELLANT Corrected

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred in holding the offenses were not the same criminal conduct.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Ms. Creamer was charged with burglary second degree and theft second degree for removing marijuana plants from the shed of Kevin Chambers, an authorized medical marijuana grower. At sentencing, the court held the offenses were not the same criminal conduct, finding the end user of the medical marijuana was a separate victim. Did the trial court misapply RCW 9.94A.589(1)(a)?

II. STATEMENT OF FACTS

Kevin Chambers was an authorized medical marijuana grower and user. He was also an authorized provider for Kendall, his brother. RP 32. Ms. Creamer was a friend of Kendall Chambers, and they often smoked marijuana together. RP 39, 63.

Kevin Chambers grew the marijuana in a shop on his property. RP 30. In 2016, on a daily basis, Ms. Creamer donated her labor by trimming the marijuana plants, spraying them, or cultivating them under Chambers' direction. RP 38. In early May,

Chambers “fired” Ms. Creamer and told her not to return to his property. RP 40.

On May 31, 2016, Chambers returned home from work and saw his 15 marijuana plants had been removed from the shop. RP 29-30. He called the police, and they reviewed the video surveillance tape. RP 46. From the tape Chambers identified Ms. Creamer as one of the individuals who entered his shop and removed the plants. RP 46-47.

Kitsap County prosecutors charged Ms. Creamer by amended information with burglary second degree and theft second degree. CP 18.

#### COUNT 1

##### Burglary in the Second Degree

On or about May 31, 2016, in the County of Kitsap, State of Washington, the above named Defendant, with intent to commit a crime **against a person or property** therein, entered and remained unlawfully in a bldg.; contrary to the Revised Code of Washington 9A.52.030(1).

CP 17. (emphasis added).

#### COUNT II

##### Theft in the Second Degree

On or about May 31, 2016, in the County of Kitsap, State of Washington, the above-named Defendant did wrongfully obtain or exert unauthorized control over the property of

another, **to wit: Kevin Robert Chambers**, or the value thereof, with intent to deprive such person of such property or services, such property or services being in excess of seven hundred fifty dollars (\$750) in value; contrary to the Revised Code of Washington 9A.56.020(1)(a) and RCW 9A.56.040(1)(a).

CP 18. (emphasis added).

The matter proceeded to a jury trial. The court gave jury

instruction 12:

To convict the defendant of the crime of burglary in the second degree, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about May 31, 2016, the defendant or an accomplice entered or remained unlawfully in a building;
- (2) That at the time of the entering or remaining, the defendant had an intent, or knew her accomplice had intent, to commit a crime ***against a person or property therein***; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

CP 69 (emphasis added).

Jury Instruction No. 13:

A person commits the crime of theft in the second degree when he or she commits **theft of property** or services exceeding \$750 in value.

CP 70. (emphasis added).

Jury Instruction No. 14:

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive **that person** of such property or services.

CP 72. (emphasis added).

Jury Instruction No. 18:

To convict the defendant of the crime of theft in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 31, 2016, the defendant or an accomplice wrongfully obtained or exerted unauthorized control over the **property of another**, and
- (2) That the property exceeded \$750 in value; and
- (3) That the defendant intended, or knew her accomplice intended to deprive **the other person** of the property; and
- (4) that this act occurred in the State of Washington.

CP 75 (emphasis added). The jury convicted Ms. Creamer on both counts. CP 79.

At sentencing, defense counsel argued the offenses were the same criminal conduct. 8/25/17 RP 4-6; CP 91-95. The trial court instead found there were two victims: Kevin Chambers and Kendall Chambers: Kevin Chambers because he owned the plants, and Kendall Chambers because there was an expectation that he would be the end user of the marijuana. 8/25/17 RP 9-10. The court analogized the facts as:

...similar if there was a television in a child's room at home, and they go off to college, and someone burglarizes the home and takes that television. They are certainly not in possession of it at that time, but they have some ownership in that property.

8/25/17 RP 10.

The court sentenced Ms. Creamer, with an offender score of "1", under a first-time offender waiver. CP 102. She makes this timely appeal. CP 100.

### III. ARGUMENT

#### A. The Offenses Constituted The Same Criminal Conduct And Should Have Been Scored As A Single Offense Under RCW 9A.94.589(1)(a).

Multiple current offenses encompassing the same criminal conduct are counted as one crime in determining the defendant's offender score." *State v. Tili*, 139 Wn.2d 107, 118, 985 P.2d 365 (1999). For separate offenses to encompass the same criminal conduct under the SRA, three elements must be present: (1) same criminal intent; (2) same victim; and (3) same time and place. *State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). RCW 9.94A.589(1)(a). The trial court's decision on same criminal conduct

is reviewed for abuse of discretion or misapplication of the law.

*State v. Graciano*, 176 Wn.2d 531, 533, 295 P.3d 219 (2013).

Here, the trial court's reasoning for finding the two offenses were not the same criminal conduct is a misapplication of the law. The burglary and theft offenses meet the standards for same criminal conduct.

First, the crimes had the same criminal intent. As part of the analysis of same criminal intent, courts look to the "furtherance test," that is, whether one offense was committed in furtherance of the other. *State v. Garza-Villarreal*, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993). If one offense is committed in furtherance of the second offense, they encompass the same criminal conduct. *State v. Dunaway*, 109 Wn.2d 207, 213-214, 743 P.2d 1237 (1987).

In *Anderson*, a defendant was convicted of both assault and escape, after assaulting an officer while attempting to escape from his custody. *State v. Anderson*, 72 Wn. App. 453, 464, 864 P.2d 1001, *rev. denied*, 124 Wn.2d 1013 (1994). The assault was committed to further the escape, and thus the criminal intent was the same from one other to the other. *Id.* Similarly, here, because the plants were inside of the shed, the unlawful entry was in furtherance of the theft of the plants.

The issue of "same victim" is where the trial court erred. The court incorrectly found that there were two victims of the theft: Kevin Chambers who owned the marijuana plants, and Kendall Chambers, who prospectively was an anticipated end user of the marijuana.

In the context of the theft statute, "owner" means a person, other than the actor, who has *possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services.* RCW 9A.56.010(11)(emphasis added). The record contains no evidence that Kendall Chambers had possession of the marijuana or any financial ownership interest in it. Equally significant, the record contains no evidence that absent his permission, no one else could lawfully exert control over the marijuana. *State v. Longshore*, 97 Wn. App. 144, 982, P.2d 1191, *affirmed* 141 Wn.2d 414, 5 P.3d 1256 (1999). He was not an owner of the plants or a victim of their theft.

Further, the state charged Ms. Creamer with theft from Kevin Chambers, and the jury convicted her for theft from Kevin Chambers. The court misapplied the law when it reasoned:

Similarly, there was some expectation of ownership in this marijuana by the end user and the medical marijuana situation. I think that he is a victim of the theft because his product was taken away as well, **so I believe there are two victims.**

**I do not believe this is the same criminal conduct because of that,** so the theft does count against the burglary. The burglary does count against the theft, so there is an offender score of one in this case at the time of sentencing.

8/25/17 RP 10.

For the court to hold Ms. Creamer accountable for two victims is not substantiated by the record, goes outside of the jury verdict and is not upheld by case law. The burglary and theft took place at the same time and place, the burglary was in furtherance of the theft, and both were against the same victim.

RCW 9A.52.050<sup>1</sup> authorizes the trial judge to exercise discretion to punish a burglary separately, even where the burglary and the other crime encompass the same criminal conduct. *State v. Knight*, 176 Wn.App. 936, 962, 309 P.3d 776 (2013). A trial court abuses its discretion if its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). The court’s decision to

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<sup>1</sup> For every person who, in the commission of a burglary, shall commit any other crime, **may** be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.

punish the offenses separately is based on an untenable reason: the law and the record did not support the finding of different victims. That error precluded the court from properly exercising its discretion concerning the anti-burglary merger statute.

While Ms. Creamer has already served the ordered days of jail time, she remains under community custody through August 2018. CP 81. Her appeal is not moot because the consequences of the court not finding the offenses constituted the same criminal conduct are ongoing. If Ms. Creamer were to have future convictions, she begins with a score higher than it would otherwise be; that is, an offender score of “2” rather than “1”. RCW 9.94A.525. Where there are significant and adverse collateral consequences, such as an inaccurate offender score, a case is not moot. *In re Cross*, 99 Wn.2d 373, 662 P.2d 828 (1983). This matter should be reached on the merits.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Creamer respectfully asks this Court to remand to the trial court for proper consideration of same criminal conduct scoring.

Respectfully submitted this 8<sup>th</sup> day of March 2018.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Angela Creamer, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on March 12, 2018 to:

Angela Creamer  
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And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Kitsap County Prosecuting Attorney (at [kcpa@co.kitsap.wa.us](mailto:kcpa@co.kitsap.wa.us)).

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**Comments:**

This is a corrected brief which contains page numbers that were missing from brief originally filed on 3/8/18- per COA 2 case manager.

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