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Court of Appeals
Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

ANGELA MAXINE CREAMER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00235-4

BRIEF OF RESPONDENT

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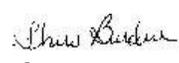
SERVICE	<p>Marie Jean Trombley Po Box 829 Graham, WA 98338-0829 Email: marietrombley@comcast.net</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED April 10, 2018, Port Orchard, WA </p> <p>Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS1

III. ARGUMENT4

 THE TRIAL COURT PROPERLY REFUSED TO TREAT
 CREAMER’S OFFENSES AS SAME CRIMINAL
 CONDUCT WHERE THE BURGLARY ANTIMERGER
 STATUTE APPLIED AND WHERE THERE WERE
 MULTIPLE VICTIMS OF EACH CRIME.....4

IV. CONCLUSION.....7

TABLE OF AUTHORITIES

CASES

Hoflin v. City of Ocean Shores,
121 Wn.2d 113, 847 P.2d 428 (1993)..... 6

State v. Dunaway,
109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987)..... 5

State v. Graciano,
176 Wn.2d 531, 295 P.3d 219 (2013)..... 4, 5

State v. Gutierrez,
92 Wn. App. 343, 961 P.2d 974 (1998)..... 6

State v. Lessley,
118 Wn.2d 773, 827 P.2d 996 (1992)..... 5, 6

State v. Michielli,
132 Wn.2d 229, 937 P.2d 587 (1997)..... 6

STATUTORY AUTHORITIES

RCW 9.94A.589(1)(a) 4

RCW 9A.52.050..... 5

I. COUNTERSTATEMENT OF THE ISSUES

Whether the trial court properly refused to treat Creamer's offenses as same criminal conduct where the burglary antimerger statute applied and where there were multiple victims of each crime?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Angela Maxine Creamer was charged by information filed in Kitsap County Superior Court with second-degree burglary and second-degree theft. CP 17. A jury found her guilty as charged. CP 79. Over defense objection, RP (8/25) 3-6, CP 91, the trial court found the crimes were not the same criminal conduct, RP (8/25) 10, and based on an offender score of one, imposed concurrent standard-range sentences of 30 days on each offense. CP 81-82.

B. FACTS

Kevin Chambers had a medical marijuana authorization. RP (8/15) 32. He was also an authorized provider for his brother Kendall.¹ RP (8/15) 32, 66. He was authorized to grow 15 plants per person, but he had a total of 15 plants. RP (8/15) 32. In May 2016 they were two to four weeks from harvest. RP (8/15) 33. They were about six feet tall. RP (8/15) 33. The plants

¹ Kevin and Kendall Chambers will be referred to by their first names to avoid confusion. No disrespect is intended.

were worth about \$500 each. RP (8/15) 34.

Kevin came home from work one evening that month to find his shop had been broken into. RP (8/15) 29. The shop was a 24' by 26' building on the same property as his house. RP (8/15) 30. When he approached it, the door was ajar. RP (8/15) 31. He looked in his "flower room" and it was a "total disaster." RP (8/15) 31. The night before everything had been in order. RP (8/15) 31. The plants were gone. RP (8/15) 34. Only the remains of one plant were left. RP (8/15) 34. Kevin called the police, who arrived a few hours later. RP (8/15) 36.

Kevin had known Creamer for about 15 years. RP (8/15) 37. She helped him cultivate his plants in exchange for gas money and some marijuana. RP (8/15) 38, 57. But she was not allowed on the property unless someone was there. RP (8/15) 38, RP (8/16) 111.. A few weeks before the burglary he told her to leave and not come back. RP (8/15) 39-40.

Karen Smith had been Kevin's roommate since 2006. RP (8/15) 31. She worked the swing shift at the shipyard: 3:30 p.m. to midnight. RP (8/16) 107. She felt "pretty violated" by the burglary, and left work when Kevin notified her of it. RP (8/16) 108.

Kevin had a number of video surveillance cameras on the property. RP (8/15) 41. Kevin was distressed because when he looked at the system, the monitor was down. RP (8/16) 108. But Smith looked at it and

determined that it was only the monitor, and the system was still recording. RP (8/16) 108. It had been out for at least three weeks, but Smith had not gotten to looking at it until after the burglary. RP (8/16) 108. Creamer was the one who had pointed out to her that the system did not appear to be working. RP (8/16) 109.

He reviewed the video and saw three people on his property between 3:00 and 3:30 p.m. RP (8/15) 41, 48, 50. Creamer was among them and she knocked on the front door a few times. RP (8/15) 41-42, RP (8/16) 113. Kevin could not identify the other two men. RP (8/15) 48, 50. After there was no answer, she directed the others to shop. RP (8/15) 42, RP (8/16) 113. They went in and then came out and looked around. RP (8/15) 42. Then they came back out with his plants. RP (8/15) 42.

Creamer had stopped by Kendall's house around 1:00 p.m. the day of the burglary and wished him a happy birthday, which had been the previous day. RP (8/15) 64. She was with Joe Nephary, Cameron Eckhart and a third person. RP (8/15) 65, 71.

III. ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO TREAT CREAMER'S OFFENSES AS SAME CRIMINAL CONDUCT WHERE THE BURGLARY ANTIMERGER STATUTE APPLIED AND WHERE THERE WERE MULTIPLE VICTIMS OF EACH CRIME.

Creamer argues that the trial court abused its discretion in refusing to find her theft and burglary charges were the same criminal conduct. This claim is without merit because the burglary antimerger statute applied and there were multiple victims of each crime.

Our Supreme Court has “repeatedly observed that a court's determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law.” *State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). When calculating an offender score, the sentencing court abuses its discretion by arriving at a contrary result “when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct.’” *Graciano*, 176 Wn.2d at 537-38. “But where the record adequately supports either conclusion, the matter lies in the court's discretion.” *Graciano*, 176 Wn.2d at 538.

“Two crimes manifest the ‘same criminal conduct’ only if they ‘require the same criminal intent, are committed at the same time and place, and involve the same victim.’” *Graciano*, 176 Wn.2d at 540 (quoting RCW 9.94A.589(1)(a)). “If the defendant fails to prove any element under the

statute, the crimes are not the ‘same criminal conduct.’” *Graciano*, 176 Wn.2d at 540. “[I]n deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.... [P]art of this analysis will often include the related issues of whether one crime furthered the other.” *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

However, under RCW 9A.52.050, the burglary anti-merger statute, a trial court may consider crimes committed in the commission of a burglary to be separate criminal conduct from the burglary when calculating the burglary offender score, even if the crimes would otherwise be considered the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). As the court explained:

Allowing a sentencing judge discretion to apply the burglary antimerger statute serves the SRA's proportionality function. A defendant who commits multiple crimes after breaking into a home should not be able to escape a more serious offender score. This approach recognizes burglaries involve a breach of privacy and security often deserving of separate consideration for punishment.

Lessley, 118 Wn.2d at 782. Here the trial court acted within its discretion under the burglary antimerger statute in refusing to find that the crimes were the same criminal conduct.²

² Although not specifically mentioned by the trial court, this theory was argued by the State below. CP 98. An appellate court may affirm a trial court's decision on any theory

Moreover, even if the burglary anti-merger statute did not apply, the Supreme Court in *Lessley* also rejected the “central victim concept.” *Lessley*, 118 Wn.2d at 779. The SRA “mandates multiple crimes affecting multiple victims are not to be considered the same criminal conduct.” *Id.* There the defendant broke into the victim’s house and kidnapped her. But the court reasoned that her parents, who were asleep in the home at the time, were also victims of the crime as well. As such, the defendant failed the “same victim” element of the same criminal conduct test. Here, there were two residents of the burglarized property, Kevin and Smith. Indeed, Smith testified that she felt “pretty violated” by the invasion of her home. RP (8/16) 108. Likewise there were two victims of the theft, Kevin and Kendall, for whom Kevin was growing the marijuana. The court acted within its discretion, and its ruling should not be disturbed.

supported by the record and the law. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). The appellate court may therefore affirm on other grounds even after rejecting a trial court’s reasoning. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993).

IV. CONCLUSION

For the foregoing reasons, Creamer's conviction and sentence should be affirmed.

DATED April 10, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'TR' followed by a long horizontal stroke.

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