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Court of Appeals
Division II
State of Washington
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No. 50949-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY SHARLOW,

Appellant.

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

The Honorable John Skinder, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE BURGLARY IN COUNT 2 AND THE ATTEMPTED BURGLARY IN COUNT 1 CONSTITUTE THE SAME CRIMINAL CONDUCT

In the Brief of Respondent (BR), the State relies on *State v. Grantham*, 84 Wash.App. 854, 932 P.2d 657 (1997), to support its argument that the second degree burglary (Count 2) and attempted first degree burglary (Count 1) involved two different criminal intents. BR at 12-13. *Grantham*, however, is factually distinguishable from the present case.

In determining whether crimes shared the same criminal intent, the courts evaluate two things: (1) whether a defendant's intent, viewed objectively, changed from one crime to the next; and (2) whether one crime furthered the other. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); *Grantham*, 84 Wn. App. at 858. As part of this analysis, courts consider whether the crimes are “merely sequential, or whether they form a continuous, uninterrupted sequence of conduct.” *State v. Price*, 103 Wn. App. 845, 858, 14 P.3d 841 (2000).

In *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999), the Washington Supreme Court provided guidance in analyzing whether crimes share the same criminal intent. 139 Wn.2d 107. There, the court

held that the three counts of rape constituted the same criminal conduct. *Tili's* three penetrations of the victim were nearly simultaneous, all occurring within two minutes. The court focused on the “extremely short time frame coupled with *Tili's* unchanging pattern of conduct” and found it unlikely that *Tili* formed “an independent criminal intent between each separate penetration.” *Tili*, 139 Wn.2d at 124 (emphasis added).

In reaching its conclusion, the *Tili* court distinguished *Grantham*. In *Grantham*, the defendant raped the same victim, at the same place twice, within minutes of each other. 84 Wn. App. at 859. *Grantham* forced anal intercourse on the victim, and then withdrew. *Id.* at 856. The victim crouched in a corner, while the defendant kicked her, called her names, and threatened her not to tell anyone about the rape. *Id.* The victim begged him to stop and take her home. *Id.* At that point, *Grantham* forced her to perform oral sex upon him. *Id.*

Although the rapes occurred close in time, the court found the evidence in *Grantham* supported a conclusion that the criminal episode had ended with the first rape. The *Grantham* Court held that the crimes constituted different criminal conduct for two reasons. First, “*Grantham*, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” *Grantham*, 84 Wash.App. at

859. Second, each sexual act “was complete in itself; one did not depend upon the other or further the other.” *Id.* The evidence in *Grantham* showed that “the criminal episode had ended with the first rape” (forced anal intercourse) and thereafter the defendant had the “ ‘time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.’ ” *Id.* at 123 (quoting *Grantham*, 84 Wash.App. at 859, 932 P.2d 657). After raping his victim, Grantham stood over her and threatened her; then began to argue with her and physically assaulted her in order to force her to perform oral sex. *Id.* at 123–24. The *Tili* court observed that “Grantham was able to form a new criminal intent before his second criminal act because his ‘crimes were *sequential*, not simultaneous or continuous.’ ” *Id.* at 124 (emphasis added) (quoting *Grantham*, 84 Wash.App. at 856–57, 859.) The *Tili* court contrasted Grantham's circumstances to the three penetrations at issue in *Tili*, which were “continuous, uninterrupted, and committed within a much closer time frame—approximately two minutes.” *Id.* *Tili* observed that “[t]his extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration [crime].” *Id.*

The State also relies on *State v. Channon*, 105 Wn. App. 869, 20

P.3d 476 (2001). BR at 14-15. The facts of *Channon*, however, are wildly divergent from the case at bar. In *Channon*, this Court reviewed whether the trial court failed to consider whether three counts of first degree assault arose from the same criminal conduct. 105 Wn.App. at 871, 876. On review, this Court found that although the record does not contain the specific time lapses between assaults, the record from oral argument and the State's brief shows that Channon's offenses occurred at three different places, noting that "[t]here was a distance of eight blocks between first and second shooting episodes and a distance of approximately one mile between the second and third shooting episodes." *Channon*, 105 Wn.App. at 877, n.7. The record also "establishes definite time breaks between the successive assault at these three separate locations." *Channon*, 105 Wn.App. at 877. This Court found that the assaults did not occur at the same place and therefore are not the same criminal conduct. *Id.*

One element of *Channon* that is applicable to the case at bar, however, is that Courts have found that the "same time" requirement does not require that the crimes be committed literally at the same time. *Channon*, 105 Wn.App. at 877 n. 6; *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). Appellate courts have recognized a "clear category" of cases where the "same criminal conduct" is when the same crime is

committed against the same victim within a relatively short period of time.

Porter, 133 Wn.2d at 181.

Our case law compels a finding of same criminal conduct here. In *Tili*, supra, the Washington Supreme Court reviewed the three convictions for rapes that occurred in rapid succession over a two-minute time span, 139 Wn.2d at 124. Coupled with the defendant's pattern of conduct, objectively viewed, the virtually uninterrupted sequence rendered it unlikely the defendant formed a separate criminal intent for each rape. *Id.* Accordingly, the crimes constituted the same criminal conduct. *Id.*

In this case, after Mr. Sharlow rolled off the roof, he stood up and immediately started walking toward Officer Henrichsen, who told him to sit down. RP at 197-99. Mr. Sharlow “pointed and muttered something” and Officer Henrichsen commanded him to have a seat. RP at 200. Ms. Atwood came out of the front door of the house and Mr. Sharlow sprinted to the front door, which Ms. Atwood immediately slammed shut. RP at 204-07.

Almost identically to the time period in *Tili*, Officer Henrichsen testified that the time from his arrival at the house until Ms. Atwood came outside the front door was “approximate[ly] a couple of minutes.” RP at 241. Moreover, as was the case in *Tili*, the facts show a continuous course of uninterrupted action from the moment he rolled off the roof until

he ran toward the front door of the house. From the time he jumped on his feet after rolling off the roof he was walking toward the officer while on a retaining wall in front of the house while also being given commands to sit down. RP at 238-40. This activity took “a couple of minutes,” at which time Ms. Atwood came out of the front door. RP at 241. Mr. Sharlow’s pattern of conduct did not change from the time he rolled off the roof to running toward the door. He was disheveled with wet, stringy hair and made no discernable statements. RP at 199. At no time was there even a momentary pause or lull in the proceedings during which Mr. Sharlow showed evidence that he stopped to reflect on the burglary and the attempted first degree burglary, making *Grantham* and *Channon* distinguishable.

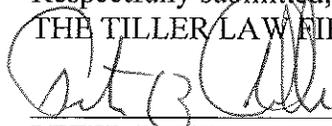
In sum, because the crimes were committed against the same victim, as part of a single continuous event and with the same criminal purpose of burglary, the trial court abused its discretion in refusing to find same criminal conduct. The trial court’s erroneous finding prejudiced Mr. Sharlow because he received an offender score of “6” in Count 1 and score of “5” in Count 2 based on each felony conviction counting as an “other current offense” against the other. RCW 9.94A.525(1), (5)(a)(i); RCW 9.94A.589(1)(a); CP 206. Mr. Sharlow’s sentence should be reversed and remanded.

B. CONCLUSION

For the reasons stated herein and in the appellant's opening brief, this Court should grant the relief previously requested.

DATED: July 27, 2018.

Respectfully submitted,
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CERTIFICATE

I certify that on July 27, 2018, a reply brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Mr. Scott Jackson, and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

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