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NO. 51788-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

KYLE SMITH,

Appellant.

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

The Honorable Toni Sheldon, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. IN DETERMINING IF MULTIPLE CRIMES ENCOMPASS THE SAME CRIMINAL CONDUCT IT IS NOT WHETHER THE INTENT ELEMENTS OF THE CRIMES ARE THE SAME BUT WHETHER SMITH'S OBJECTIVE CRIMINAL INTENT WAS THE SAME.

There are three prongs to the same criminal conduct analysis. Under RCW 9.94A.589(1)(a), multiple offenses encompass the same criminal conduct if the crimes involve the same (1) objective criminal intent, (2) time and place, and (3) victim. State v. Walker, 143 Wn. App. 880, 890, 181 P.3d 31 (2008). The State asserts that because the forgery statute requires *the intent to injure or defraud* and the trafficking in stolen property statute requires the defendant *knowingly engage in conduct constituting the offense*, the two crimes do not meet the same objective criminal intent prong of the same criminal conduct analysis. Brief of Respondent (BOR) at 4-5. The State parrots the same misapplication of the law made by the trial court. RP 461.

The flaw in the State's argument is that the correct legal standard is not whether the crimes share the same statutory intent element, but whether the crimes share the same *objective criminal intent*. In re Pers. Restraint of Holmes, 69 Wn. App. 282, 290, 848 P.2d 754 (1993); State v. Adame, 56 Wn. App. 803, 810-11, 785 P.2d 1144 (1990). There are several factors the courts consider when determining whether multiple crimes share the same

objective criminal intent. Those factors are “how intimately related the crimes committed are” (State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990), whether “the criminal intent, when viewed objectively, changed from one crime to the next” (State v. Wright, 183 Wn. App. 719, 734, 334 P.3d 22 (2014)), “whether one crime furthered the other” (State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994)), and whether the crimes were part of the same scheme or plan (State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995)). Proper application of these factors supports the conclusion that in this case Smith’s objective criminal intent in committing the forgeries and trafficking in stolen property was the same.

Askay demanded that Smith provide him with the lost title affidavits for the three cars before he would purchase the cars. It was Askay’s reliance on the three forged affidavits releasing title to the cars that induced him to give Smith \$400 for the cars. Brief of Appellant (BOA) at 19-21. The three forged affidavits (the forgeries) were thus intimately related to the trafficking offense (selling the cars to Askay). The forgeries furthered the trafficking of the stolen cars because Askay would not have given Smith the \$400 for the cars without the affidavits. The forgeries and trafficking offenses were part of the same plan---to sell the cars belonging to Max Guy and Donald Guy to Askay. The evidence shows that Smith’s objective

criminal intent was to sell the cars he did not own to Askay and that the forged affidavits were a necessary and integral part of that transaction.

The State grudgingly concedes that “Arguably, the forgeries facilitated the trafficking offense...” BOR at 7. The forgeries did more than just facilitate the trafficking offense. The forgeries furthered the trafficking offense because without the forged affidavits Askay would not have purchased the cars from Smith and if he did not purchase the cars from Smith the trafficking offense would not have occurred. Application of the proper legal analysis conclusively shows that Smith’s objective criminal intent underlying the forgeries and trafficking offenses were indeed the same.

2. THE VICTIMS OF THE FORGERIES AND TRAFFICKING OFFENSES WERE THE SAME.

The State also argues that the three forgeries and the trafficking offense do not meet the same victim prong of the analysis because the offenses involved multiple victims. BOR at 5-6. The State cites State v. Davis, 90 Wn. App. 776, 782, 954 P.2d 325 (1998) in support of its argument. BOR at 5. The Davis case is factually and legally distinguishable.

In that case the defendant, Davis, forced his way into Milton's home and pointed a gun at Milton and his guest, Anthony. Davis, 90 Wn. App. at

779. Davis was charged and convicted of burglary based on entering Milton's home and two counts of assault based on pointing a gun at Milton and Anthony. Id. at 779-780. The trial court found that the three crimes encompassed the same criminal conduct and the State appealed. Id. at 781. The Davis court reversed in part. It concluded the assault on Anthony was not the same criminal conduct as the burglary because Milton and Anthony were each victims of the burglary but only Anthony was the victim of the assault on her. Id. at 782. The Davis court left undisturbed the trial court's ruling that the burglary and assault on Milton were the same criminal conduct despite that both Milton and Anthony were the victims of the burglary. Id. Davis only stands for the proposition that if one offense has multiple victims, but another crime has only one of those victims, the same victim prong of the same criminal conduct analysis is not met.

A victim is any person who has sustained financial injury as a direct result of the crime charged. RCW 9.94A.030. This case is not like Davis where the burglary offense had multiple victims (Milton and Anthony) but there was only one victim of the one assault (Anthony). All the offenses here had the same three victims.

Smith's jury was instructed that it could convict Smith of the trafficking offense if it found he knowingly trafficked in stolen property. CP 85. The property trafficked was the three cars---two belonging to Donald

Guy and one belonging to Max Guy. The three forged affidavits pertained to each of the three cars and the jury was so instructed. CP 80, 81 and 82. Askay, Donald Guy and Max Guy were all three victims of the forgeries and the trafficking offense. Askay was a victim of the trafficking because he sustained a financial injury when he paid \$400 for the stolen cars accompanied by the affidavits. The State agrees. BOR at 5. Donald Guy and Max Guy were also victims of the trafficking because they each sustained a financial injury when their cars were sold to Askay. The State agrees. BOR at 5. It was the three forged affidavits that not only induced Askay to purchase the cars but were part of the transaction because Askay insisted that Smith provide the affidavits before he would purchase the cars. Thus, Askay was a victim of the forgeries because he sustained a financial injury (purchasing the cars for \$400) as a result of the forgeries. And, because the forgeries pertained to the cars Donald Guy and Max Guy owned, they were also victims of the forgeries because they suffered a financial injury when Askay purchased their cars based on the forged affidavits.

Even if the two forgeries pertaining to the two cars belonging Donald Guy and the forgery pertaining to the car belonging to Max Guy were not the same criminal conduct because Donald Guy was the victim of two of the forgeries and Max Guy was the victim of the other forgery, the

trafficking offense was the same criminal conduct as to all the forgeries. Donald Guy and Askay were both victims of the two forgeries pertaining to the cars belonging to Donald Guy and the trafficking offense. Max Guy and Askay were the victims of the forgery pertaining to the car belonging to Max Guy and the trafficking offense. Thus, the victims of the forgeries and the trafficking offense were the same.

Other current offenses are treated as prior offenses under RCW 9.94A.589(1)(a) unless they encompass the same criminal conduct, in which case they are treated as only one offense. Because the objective criminal intent and the victims were the same for the forgeries and trafficking offense, the trafficking offense was the same criminal conduct as the forgeries. It should not have been counted as a prior offense in calculating Smith's offender score against the forgeries and the forgeries should not have counted as prior offenses against the trafficking.

3. REMAND FOR CORRECTION OF SMITH'S OFFENDER SCORE ON THE JUDGMENT AND SENTENCE AND TO STRIKE THE DISCRETIONARY COSTS AND THE DNA FEE IS NECESSARY.

Even if the court had not erred in failing to find the trafficking offense was the same criminal conduct as the forgeries, the State correctly concedes remand is necessary to correct the erroneous offender score in the judgment and sentence and to strike the discretionary legal financial

obligations (LFO's) the court imposed. BOR at 8-9, 11. The State, however, argues the DNA collection fee should not be stricken because the record does not conclusively show Smith previously submitted a DNA sample. BOR at 10 (citing State v. Thibodeaux, ___ Wn. App. 3d ___, 430 P.3d. 700 (2018)).

The legislature amended the DNA statute in 2018. Laws of 2018, ch. 269, § 18. As amended, the statute provides the court shall impose a collection fee of \$100 “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” RCW 43.43.7541. It strains credulity to conclude that Smith has not submitted a DNA sample based on his prior convictions. See, State v. Maling, 2018 WL 6630313 (December 18, 2018) (where the court held Maling’s lengthy criminal history indicates a DNA sample has been previously collected). The State too concedes that based on Smith’s “several” previous felony convictions it is “*most likely* he submitted a DNA sample in at least one of the prior convictions.” BOR at 10 (emphasis original). Smith’s lengthy criminal history clearly indicates his DNA sample was previously collected. If, however, this Court does not order the DNA fee stricken, Smith should be given the opportunity to show on remand that he has previously submitted a DNA sample because he was sentenced before the Washington Supreme

Court's decision in Ramirez¹ and amendments to the DNA statute so he would have had no incentive at the time of his sentencing to make the record that his DNA sample had in fact been collected.

D. CONCLUSION

Smith's offender score was calculated incorrectly because the trial court failed to find some of the current offenses were the same criminal conduct. This Court should accept the State's concession that remand is necessary, and the trial court be ordered to strike the discretionary LFOs and correct the offender score error in the judgment and sentence on remand. This Court should also order the trial court to strike the DNA fee or in the alternative order that Smith be given the opportunity on remand to show whether a DNA sample was previously submitted.

DATED this 7 day of January 2018

Respectfully submitted,

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¹ State v. Ramirez, 191 Wash.2d 732, 426 P.3d 714 (2018). The Ramirez Court held that this and the amendments to the statutes governing costs apply prospectively to cases like Smith's that are on appeal at the time the amendments were adopted.

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