

NO. 291286-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

FEB 02 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

RICKY DESHAWN THOMAS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-01147-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

ANITA I. PETRA, Deputy
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ISSUES PRESENTED ON APPEAL

1. Did the trial court fail to properly sentence the defendant using a "same criminal conduct" analysis on the first-degree burglary and felony violation of a post conviction protection order?
2. Does the burglary anti-merger statute apply?

STATEMENT OF THE CASE

A. Nature of the Case

The defendant, Ricky Deshawn Thomas, brought this action to appeal the sentence imposed following his convictions of: first-degree burglary with an aggravating circumstance of a pregnant victim, felony violation of a post-conviction protection order, third-degree assault, tampering with a witness, and three counts of gross misdemeanor violation of a protection order. (CP 258, 265-67). The defendant contends the trial court erred in calculating his standard range sentence because the calculation of his offender score was incorrect. Specifically, the defendant contends that the

first-degree burglary and felony violation of a post-conviction protection order, required a "same criminal conduct" analysis. (App's brief, 1).

B. Course of the Proceedings

On May 17 2010, the State filed an amended information charging the defendant with:

- Count I: Burglary in the first degree with an aggravating circumstance of pregnant victim;
- Count II: Felony Violation of a Post-Conviction Protection Order;
- Count III: Assault in the Third Degree;
- Count IV: Tampering With a Witness;
- Count V-VII: Misdemeanor Violation of a Protection Order. (CP 63-66).

On May 17, 2010, the day of jury selection, the defendant entered pleas of guilt to Count II, IV, and V-VII. (CP 67, 203; RP 2, 4). The State proceeded to trial on first-degree burglary with the aggravating circumstance and third-degree

assault. (CP 203-04; RP 6). On May 20, 2010, the defendant was found guilty on both counts, and the jury answered "yes" to the aggravating circumstance. (CP 204, 197-99). On June 4, 2010, the defendant was sentenced to 60 months on Count I, 25 months on Count II, 20 months on count III, 16 months on Count IV, and 12 months each on Counts V-VII, all to run concurrent. (CP 258, 261; RP 131). At the sentencing hearing, defense counsel did not argue, "same criminal conduct" on Counts one and two.

C. Statement of the Facts

On June 4, 2008, the Benton County Superior Court ordered the defendant to not have contact with Shanda Howard after he entered a plea of guilty to Felony Harassment on cause number 08-1-00302-1. (Ex. 1; RP 13-15). Felony harassment is a class-C felony, and as such, the no-contact order is in place for five years.

On December 4, 2009, at approximately ten in the evening, the defendant came to the home of

Shanda Howard. (RP 24). Ms. Howard was pregnant with the defendant's child. (RP 24). The defendant knocked on Ms. Howard's door and she woke up. (RP 24). Ms. Howard peaked out the window and saw the defendant outside the door. (RP 24). Rather than open the door, she called the defendant on his cell phone and demanded to know what he wanted. (RP 24). The defendant advised Ms. Howard that he wanted a bag of his stuff. (RP 24). Ms. Howard told him to back away from the door and she would place the bag outside. (RP 24). When Ms. Howard opened the door, the defendant forced his way into the apartment, threw her up against the wall, and began hitting and choking her. (RP 24). The defendant then ran around the apartment looking for another man. (RP 25). When the defendant did not find anyone, he threw Ms. Howard down on the couch and began hitting her again. (RP 25). As the defendant was hitting Ms. Howard, she began to scream for help and pounded her feet on the

floor in hopes that the neighbor below would hear. (RP 25). Ms. Howard was able to get away, tried to call 911, and began to run out of the apartment. (RP 25). The defendant went after her and tried to drag her into the apartment. (RP 25). The defendant slammed the door several times on Ms. Howard's arm as she tried to get away. (RP 25). A neighbor, Ladene Holloway, heard her cries for help and came running up to the door. (RP 42). Ms. Holloway witnessed the defendant assaulting Ms. Howard with the door, and told him the police were called. (RP 42-44). The defendant ran off. (RP 44). The next day the defendant continued to text and call Ms. Howard all day. (RP 28, 61-62). Ms. Howard was afraid and called the police. (RP 29). The police staked out her residence, and the defendant showed up. (RP 29-30). The defendant tried to run from the police and was taken into custody. (RP 30). The defendant was charged with first degree burglary. (CP 1). While in custody, the defendant made

numerous calls to Ms. Howard begging her to not show up for trial or to not testify. (CP 25-62; RP 30, 35-40).

ARGUMENT

A. THE TRIAL COURT DID NOT FAIL TO APPLY THE "SAME CRIMINAL CONDUCT" ANALYSIS WHEN SENTENCING THE DEFENDANT TO FIRST DEGREE BURGLARY AND FELONY VIOLATION OF A POST-CONVICTION PROTECTION ORDER.

The trial court did not fail to apply the "same criminal conduct" analysis when sentencing the defendant to first-degree burglary and felony violation of a post-conviction protection order. An Appellate Court, when reviewing a sentence under RCW 9.94A.589(1)(a), will generally defer to the discretion of the sentencing court, and will reverse a sentencing court's determination of "same criminal conduct" only on a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Under the general rule in RCW 9.94A.589 (1)(a), "Whenever a person is to be sentenced to

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." Under the same criminal conduct provision in RCW 9.94A.589(1)(a), the current offense counts as one crime "if the court enters a finding that some or all of the current offense encompass the same criminal conduct. . . ." Multiple offenses encompass the same criminal conduct when they involve the same (1) objection, criminal intent, (2) time and place, and (3) victim. RCW 9.94A.589(1)(a). To decide whether two crimes involve the same criminal intent, the court must examine and compare each statute underlying each crime to determine whether the required intents are the same or different for each crime. *State v. Hernandez*, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). Two crimes do not contain the same criminal intent when the defendant's intent objectively changes from one

crime to the other. *State v. Israel*, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002). Objective intent may be determined by examining whether one crime furthered the other or whether both crimes were part of a recognizable scheme or plan. *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). But where the second crime is accompanied by a new objective intent, one crime can be said to have been completed before commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the same criminal conduct. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997) (sequential rapes of the same victim).

Here, the defendant argues that this event at the victim's apartment was a continuous assault; therefore, the defendant had the same criminal intent. (App. brief, 3).

Arguably, this was not a continuous assault. The trial court heard testimony that the defendant came to the victim's home at night

while she was sleeping and knocked on her door. (RP 24). She peaked out the window, saw it was the defendant and decided to call him on the phone, rather than open the door. (RP 24). The defendant told her he was there to get a bag of his stuff. (RP 24). The victim told him to back up so she could drop the bag out the door. (RP 24). As she opened the door to quickly drop the bag, he forced his way in and slammed her up against the wall. (RP 24). While he had her against the wall, he began hitting and choking her. (RP 24). The defendant then stopped and began running through the apartment looking for another man. (RP 25). After he did not find anyone, he grabbed her again and threw her on the couch and assaulted her another time. (RP 25). At this point the victim started banging on the floor for help. (RP 25). The victim was able to get away from the couch, tried to call 911, and attempted to run out of the apartment. (RP 25). The defendant then got up and tried to stop her

from leaving the apartment. (RP 25). The victim was able to get partially outside, and the defendant was pulling her back. (RP 25). The defendant slammed the door on the victim's arm over and over. (RP 25). Pictures of the injuries were submitted at trial. (Ex. 3, 4; RP 26).

Clearly, the defendant had ample opportunity to stop assaulting the victim on at least three occasions. He could have left after he forced his way into her apartment and assaulted her against the wall. (RP 24). Instead, he ran around the apartment looking for another man. (RP 25). After he did not find another man, he could have left. Instead, he threw her down on the couch and assaulted her again. (RP 25). After this assault, she was able to break away and tried to call 911. (RP 25). He could have left after this assault, but chose to run after her and drag her back into the apartment. (RP 25). When that did not work, he slammed the door over and over on her arm. (RP 25). All of these assaults varied in severity and

were interrupted on at least two occasions:

1-when the defendant began to run around the apartment looking for another man, and 2-when the victim got away and tried to escape. The trial court was in a better position to evaluate the testimony and the credibility of the witnesses, and to determine whether the first-degree burglary and felony violation of a protection order constitute the same criminal conduct. The Court in *State v. Rodriguez*, held:

If the facts objectively viewed, can only support a finding that the defendant had the same criminal intent with respect to each count, then the counts constitute the same criminal conduct. If the facts, objectively viewed, can only support a finding that the defendant had different criminal intent with respect to each count, then the counts constitute different criminal conduct. If the facts are sufficient to support either finding, then the matter lies within the trial court's discretion and an appellant court will defer to the trial court's determination of what constitutes the same criminal conduct when assessing the appropriate offender score.

State v. Rodriguez, 61. Wn. App. 812, 816, 812 P.2d 868 (1991).

Arguably, the assaults in the present matter were not continuous because the assaults were sufficiently interrupted. Furthermore, each assault had a different objection, i.e., to gain entry, to harm, or to avoid escape. Nonetheless, if the Court finds "same criminal conduct," the burglary anti-merge statute applies. The defendant concedes this point. (App.'s brief, 8).

2. THE BURGLARY ANTI-MERGER STATUTE APPLIES.

RCW 9A.52.050, the burglary anti-merger statute, provides, "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."

The anti-merger statute makes no explicit requirement that the trial court enter findings on the record in support of a decision to punish two offenses separately. If this Court finds the first-degree burglary and felony violation of a post-conviction protection order constitutes the

same criminal conduct, the burglary anti-merger statute still applies. The statute gives the sentencing court discretion to punish the [first-degree burglary and the felony violation of post-conviction protection order] separately, even when they constitute the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). In the present matter, the Judge appropriately punished the defendant separately for each offense.

CONCLUSION

The trial court properly sentenced the defendant separately for each offense. Based on the foregoing, the State respectfully requests that the decision of the trial court be affirmed.

RESPECTFULLY SUBMITTED this 1st day of February 2011.

ANDY MILLER

Prosecutor



ANITA I. PETRA, Deputy

Prosecuting Attorney

Bar No. 32535

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COURT OF APPEALS, DIVISION III
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vs.

DECLARATION OF SERVICE

RICKY DESHAWN THOMAS,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on February 1, 2011.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on February 1, 2011.


PAMELA BRADSHAW