

FILED

FEB 22 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29931-7-III

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

THE STATE OF WASHINGTON

Respondent

v.

CHRISTIAN VERN WILLIAMS

Appellant

BRIEF OF RESPONDENT

Ms. Shadan Kapri
Senior Deputy Prosecuting Attorney
Attorney for Respondent

Stevens County Prosecutor's Office
215 S. Oak Street
Colville, WA
(509) 684-7500

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I.

ASSIGNMENTS OF ERROR

1. The State's evidence was insufficient to support Mr. Williams convictions for first-degree trafficking in stolen property and residential burglary.
2. The court erred by refusing to consider whether prior convictions for burglary and robbery committed on the same date were the same criminal conduct for purposes of calculating the offender score.
3. The court erred by refusing to consider whether the current convictions for burglary and trafficking in stolen property were the same criminal conduct for purposes of calculating the offender score.

II.

ISSUES PRESENTED

1. Whether substantial evidence supported Mr. Williams jury convictions for first degree trafficking in stolen property and residential burglary.
2. Whether the trial court erred in determining that the prior convictions for burglary and robbery did not constitute the same criminal conduct for purposes of calculating Mr. Williams' offender score.

3. Whether the trial court erred in determining that the current convictions for residential burglary and trafficking in stolen property did not constitute the same criminal conduct for purposes of calculating Mr. Williams' offender score.

III.

STATEMENT OF THE CASE

The State accepts the Appellant's Statement of the Case.

IV.

ARGUMENT

A. WHETHER SUBSTANTIAL EVIDENCE SUPPORTED THE JURY CONVICTIONS FOR FIRST-DEGREE TRAFFICKING IN STOLEN PROPERTY AND RESIDENTIAL BURGLARY.

Mr. Williams argues that there was insufficient evidence to support the jury convictions for first-degree trafficking in stolen property and residential burglary. When reviewing a challenge to the sufficiency of the evidence, appellate courts must determine, considering the evidence in the light most favorable to the prosecution, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

The Court of Appeals draws all reasonable inferences from the evidence in the prosecution's favor, and interprets the evidence most strongly against the defendant. *State v. Joy*, 121 Wash.2d 333, 339, 851 P.2d 654 (1993); *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

The Court assumes the truth of the prosecution's evidence and all inferences that the trier of fact could reasonably draw from it. *State v. Wilson*, 71 Wash. App. 880, 891, 863 P.2d 116 (1993), *rev'd on other grounds*, 125 Wash.2d 212, 883 P.2d 320 (1994).

The trier of fact is deferred to when resolving any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses. *State v. Boot*, 89 Wash. App. 780, 791, 950 P.2d 964, *review denied*, 135 Wash.2d 1015, 960 P.2d 939 (1998).

The elements for first degree trafficking of stolen property in the State of Washington occur when a person "knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property." RCW 9A.82.050(1). Residential burglary is committed when a person enters or remains unlawfully in a dwelling with the intent to commit a crime against a person or property therein. RCW 9A.52.025(1).

During the trial, Nicole Bashaw testified in front of the jury regarding her life and living arrangements. (Report of Proceedings 52 – 55; unless

otherwise noted, the Report of Proceedings refers to the trial transcript on October 13, 2010)

She lived with her significant other, Bo Larsen, at 45 E. First Avenue in Colville, Washington along with their children. (RP 52 - 53) On Monday, April 12th, Ms. Bashaw woke up to get their children ready for school (RP 53 – 54)

After returning from taking her child to school, she noticed her jewelry box was missing. (RP 55-56) She went to her husband's place of employment to ask if he had moved her jewelry box and its belongings. (RP 57) Mr. Larsen responded that he had not moved her belongings or the box. (RP 58)

She returned to her home and realized that other things were missing as well. (RP 58) She testified that at a later date, she visited the police station to identify items that had been missing from her home and retrieved by the police. (RP 60) Those included the personal belongings that had been in the missing jewelry box. (RP 60)

Mr. Bo Larsen, Nicole Bashaw's significant other, next testified in front of the jury. (RP 63) He explained that on the day their personal items went missing from their home, Mr. Christian Williams had come to their home early in the morning on April 12th. (RP 67) Mr. Larsen left for work around the same time Mr. Williams left in his black mustang. (RP 69)

After his wife had taken the children to school, she stopped by his place of employment to tell him about the missing items from their home. (RP 70) Mr. Larsen become worried and later left work to return home. (RP 72) While

driving back home, he saw Mr. Williams's black mustang outside the local pawn shop. (RP 72) He pulled his car behind the black mustang to block the car in. (RP 72) Mr. Larsen got outside of his car and told Mr. Williams that "he should just give me my stuff back." (RP 72)

Mr. Williams responded by saying that "it was wrong" and he proceeded to get out of the black mustang and give Mr. Larsen his items back. (RP 73) Mr. Larsen retrieved his personal belongings including the "tools that were in there, my remote control vehicle, Nicole's jewelry box." (RP 73)

Mr. Larsen returned home. He decided to drive back to the pawn shop to check if there were any more of his items still at the pawn shop. (RP 73)

An employee at the Pawn Shop, Barron Lundbery testified in the jury trial. (RP 81) He had been working at the Pawn Shop on the day in question. (RP 81 – 84) He testified that the pawn ticket on April 12th had been made by him. (RP 84) Several items had been pawned. (RP 84) This included a one-half inch electric impact Colbalt band and a Skill Dorm Drive. R(P 8485)

Police Officer Newport next testified that he placed Mr. Williams under arrest. (RP 90 – 93) After Mr. Williams stepped outside of his car and was placed under arrest, an officer found a pill bottle made out to Bo Larson in center console of his black mustang. (RP 95) Under the pill bottle was also women's jewelry (necklaces and earrings). (RP 95)

Officer Newport testified that "I knew that the pill bottle did not belong to Mr. Williams and I knew it belonged to my victim of the burglary so I kept

that as evidence.” (RP 95) The officer was not sure whom the jewelry belonged to so it was taken into evidence to be identified later. (RP 95) The owner of the jewelry, Nicole Bashaw, identified the jewelry as her pieces that had gone missing from her home on April 12th. (RP 101-102)

After considering the evidence presented at trial, it is clear that based upon the testimony any rational trier of fact could have found the essential elements of the crimes trafficking of stolen property in the first degree and residential burglary beyond a reasonable doubt. *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

B. WHETHER THE COURT ERRED IN DETERMINING THAT PRIOR CONVICTIONS FOR BURGLARY AND ROBBERY DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING MR. WILLIAMS OFFENDER SCORE.

Under Washington case precedent and statutory law, when a defendant is convicted of two or more current offenses, the trial court calculates the offender score, and resulting sentence ranges, by counting all other current and prior convictions as prior convictions. RCW 9.94A.589(1)(a); *State v. Dolen*, 83 Wn.App. 361, 364, 921 P.2d 590 (1996), review denied, 131 Wn.2d 1006 (1997).

The phrase ‘same criminal conduct’ is narrowly construed to disallow most assertions of same criminal conduct. *State v. Flake*, 76 Wn.App. 174, 181,

883 P.2d 341 (1994); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The appellate court will reverse the trial court's ruling on same criminal conduct only if it's found that the trial court abused its discretion. *Porter*, 133 Wn.2d at 181.

In this case, the trial court did not abuse its discretion when it determined that Mr. Williams prior convictions for burglary and robbery did not constitute the same criminal conduct. The court relied on the burglary anti-merger statute, RCW 9A.2.050, and determined that the burglary and robbery would not be counted as the same criminal conduct. The court counted them separately in calculating the offender score. (RP 11 – 12; November 16, 2010)

This exercise of discretion was not an abuse of discretion or lack of discretion. An abuse of discretion is only present if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). That has not occurred in this case.

C. WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT MR. WILLIAMS CURRENT CONVICTIONS FOR FIRST-DEGREE TRAFFICKING OF STOLEN PROPERTY AND RESIDENTIAL BURGLARY DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.

Under case precedent and statutory law, when a defendant in Washington is convicted of two or more current crimes, the trial court

calculates the offender score, and resulting sentence ranges, by counting all other current and prior convictions as prior convictions. RCW 9.94A.589(1)(a); *State v. Dolen*, 83 Wn.App. 361, 364, 921 P.2d 590 (1996), review denied, 131 Wn.2d 1006 (1997). If, however, any of the current offenses encompass 'the same criminal conduct,' the court counts these offenses as one crime. RCW 9.94A.589(1)(a).

RCW 9.94A.589(1)(a) provides in relevant part:

Whenever a person is to be sentenced for 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: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently.... 'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

The phrase 'same criminal conduct' is narrowly construed to disallow most assertions of same criminal conduct. *State v. Flake*, 76 Wn.App. 174, 181, 883 P.2d 341 (1994); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The appellate court will reverse the trial court's ruling on same criminal conduct only if it's found that the trial court abused its discretion. *Porter*, 133 Wn.2d at 181.

Judge Nielsen did not abuse his discretion when deciding that the current convictions did not constitute the same criminal conduct. (RP 11 – 12;

November 16, 2010) Judge Nielsen concluded that based upon the anti-merger statute the residential burglary and trafficking crimes could not constitute the same criminal conduct. (RP 11 – 12; November 16, 2010) The court has the discretion to apply the statute in this case. *Lessley*, 118 Wn.2d at 781 – 782.

An abuse of discretion did not occur because the trial judge's decision was not manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

CONCLUSION

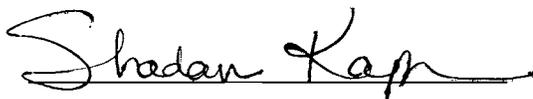
Based upon the legal arguments, statutory law, and case precedent presented above, the State requests that the jury convictions be affirmed.

Dated this 17th day of February, 2012.


Shadan Kapri WSBA # 39962
Senior Deputy Prosecuting Attorney
Stevens County Prosecuting Attorney's Office
Attorney for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201, and mailed to Mr. Kenneth Kato, Attorney at Law, 1020 N. Washington St. Spokane, WA 99201 and Christian Williams, DOC #868479, P.O. Box 2049, Airway Heights, WA 99001 on February 17, 2012.

A handwritten signature in black ink that reads "Shadan Kapri". The signature is written in a cursive style with a long horizontal flourish at the end.

Shadan Kapri

Senior Deputy Prosecuting Attorney