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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA NO. 29931-7-III

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

CHRISTIAN VERN WILLIAMS, Respondent

PETITION FOR REVIEW

Mathew J. Enzler
WSBA# 38105
Deputy Prosecuting Attorney
Stevens County Courthouse
215 S. Oak St., Colville, WA 99114

Timothy Rasmussen
WSBA# 32105
Prosecuting Attorney
Stevens County Courthouse
215 S. Oak St., Colville, WA 99114

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A. IDENTITY OF PETITIONER

The State of Washington, by and through its attorney, Mathew J. Enzler, deputy Prosecuting Attorney for Stevens County, asks this Court to accept review of the Court of Appeals decision remanding this action to Superior Court for further proceedings, and seeks the relief designated in part B of this petition.

B. RELIEF REQUESTED

The State of Washington seeks review of the Division III Court of Appeals ruling filed August 15, 2013, Case # 29931-7-III. This ruling remands proceedings to Stevens County Superior Court for a factual determination of an offender score, and specifically for the determination of whether or not two prior offenses were the same criminal conduct. The State requests these rulings be overturned, and the sentence upheld as imposed.

A copy of the decision is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

ISSUE NO 1: Whether the Court of Appeals ignored the Supreme Court decisions in *Graciano* 176. Wn. 2d 531 (2013) and *Lessley* 118 Wn.2d 773(1992), by shifting the burden for challenging same criminal conduct determinations of prior convictions from the defendant to the State.

ISSUE NO. 2: Whether the burglary anti-merger statute is applicable to the determination of separate criminal conduct in subsequent sentencing?

D. STATEMENT OF THE CASE

The Matter of State v. Williams proceeded to trial in October 2010, resulting in convictions for trafficking in stolen property in the first degree and residential burglary by jury verdict entered October 13, 2010 (CP at 103-104). The matter proceeded to sentencing before the Trial Judge, the Honorable Allen C. Nielson, on November 1, 2010. At the sentencing hearing, the State presented argument on the offender score, referencing the judgment and sentence in an earlier conviction for burglary and robbery (VRP 11-16-2010 at 2-5). The sentencing court reviewed a 2004 judgment and sentence, for robbery and burglary, and heard argument from the State that these were previously ruled separate criminal conduct, and should be counted as separate crimes in the current sentencing hearing (VRP 11-16-2010 at 3). The Court also heard argument from the defense that the prior robbery and burglary should be same criminal conduct, however, the defense put on no evidence to support their claim (VRP 11-16-2010 at 9). The Court, in reviewing the documents put forward [2004 judgment and sentence for burglary and robbery, and NCIII], found the criminal history existed, as argued by the State, specifically finding that the prior burglary and robbery were to be counted as separate offenses in the current sentencing hearing. (VRP 11-16-2010 at 12).

Defendant appealed the judgment and sentence on several grounds, one of which was the determination of separate criminal conduct of the prior offenses of Burglary

and Robbery. The Court of Appeals issued a Commissioners Ruling, dated July 10, 2012, denying all grounds of appeal, and upholding the sentence imposed. The Court of Appeals Subsequently issued an order granting in part appellant's motion to modify, dated September 26, 2012. This order did not state what specifically the court found to be error, other than referencing the third argument of the defendant. A Mandate on the Order was issued November 5, 2012. Superior Court began proceedings pursuant to the mandate, and much debate was heard over whether the Court had even remanded the case for further action, or what further action was required; however, no written findings were entered as a Clerk's Ruling Recalling Mandate was issued March 28, 2013.

The Court of Appeals issued a Published Opinion on August 15, 2013. This published opinion remands the matter to the superior court for further proceedings on the determination of whether or not the prior set of Burglary and Robbery was same criminal conduct. Judge Korsmo dissented from the majority opinion. It is this Published Opinion the State now seeks to be reviewed by the Supreme Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

- 1) The decision of the Court of Appeals appears to be in conflict with the Supreme Court decisions of *Lessley* and *Graciano*. RAP 13.4(b)(1).
- 2) The decision of the Court of Appeals involves an issue of substantial public interest that should be determined by the Supreme Court: Specifically, with whom does the burden of proof lie in challenging a prior court's determination of same criminal conduct, and also whether the burglary anti-merger statute can be applied

to the determination of a set of prior offenses at a subsequent sentencing. RAP 13.4(b)(4).

ISSUE 1: WHETHER THE DEFENDANT BEARS THE BURDEN OF PROOF OF CHALLENGING A PRIOR SENTENCING COURT'S DETERMINATION OF SAME CRIMINAL CONDUCT.

Recently, the Supreme Court ruled that once the state meets the burden of proving that a prior conviction exists, the defendant bears the burden of challenging whether the prior convictions were miscalculated under the same criminal conduct doctrine. See *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013), which states:

It is because the existence of a prior conviction favors the State (by increasing the offender score over the default) that the State must prove it. See RCW 9.94A.500(1) ("If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist."); *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002).

In contrast, a "same criminal conduct" finding favors the defendant by lowering the offender score below the *presumed* score. *State v. Lopez*, 142 Wash.App. 341, 351, 174 P.3d 1216 (2007) ("In determining a defendant's offender score ... two or more current offenses ... are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct."); *In re Pers. Restraint of Markel*, 154 Wn.2d 262, 274, 111 P.3d 249 (2005) ("[A] 'same criminal conduct' finding is an exception to the default rule that all convictions must count separately. Such a finding can operate *only* to decrease the otherwise applicable sentencing range."). Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct.

...

Because Graciano bore the burden to establish each element of same criminal conduct under RCW 9.94A.589(1)(a), and failed to do so at the same time and place, the trial court's refusal to enter a finding of same criminal conduct was not an abuse of discretion. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013).

In the present matter, the Court of Appeals concludes that the court applied the anti-merger statute exclusively, and did not exercise any discretion. While the record does support this interpretation, that is not necessarily the case. The Court actually said the following:

The sentence of the Court --- the offender's score I don't have a memorandum or the benefit of legal authority on the actual offender's score. What I have here is the NCIC printout I guess the summary page, four felonies it lists and so a burglary in the month of March of '04, a robbery one and burglary one April of '04 and my understanding of the legal authority in this area is the burglaries do not merge. So, in other words they are separate and apart so they're four points if you will for scoring on the --- scoring on the --- I'm drawing a blank, trafficking in stolen property. Now, there's another burglary on the current offense so that would make a total of five points by my record on the trafficking in stolen property. Now, then to look at the burglary part of this and again I have to say based on my understanding and these things change from time to time to be honest with you but the burglaries when you score another burglary you get two points for each prior burglary so to speak. That's the way that's set up so we have a burglary here residential and we have two burglaries so there's four and then do these other three felonies count to make a total of seven which is what Mr. Enzler is arguing as I understand it and Mr. Wasson's saying wait a minute Judge you don't include those. You know and my belief is, is that there's no merger here that those do indeed count against you. Now, I hesitate a little bit because I'm not entirely sure on that point and --- but I'm going to go ahead and say the offender's score here today is seven and you know it's something that Mr. Wasson is --- is very up to date on and knows his law very well and I think if he sees an argument there that I missed I would welcome hearing about it and I would reduce your offender's score accordingly. But that's based on my best understanding at this point that it is a seven. So, that leaves a standard range of forty-three to fifty-seven months.
VRP 11-16-2010 at 12.

The Court specifically commented on the lack of authority presented by the Defense for the proposition that the prior offenses were the same criminal conduct, but none-the-less found that he had been presented with sufficient evidence to conclude that both convictions did exist, and that these convictions were previously counted separately.

This is precisely the situation addressed in *Graciano*. Here, the Court found that the prior offenses existed, based upon the evidence put forward by the State. Then, according to *Graciano*, the burden of challenging the same criminal conduct determination lies with the Defendant. Here, the Defendant did not meet that burden, provided no authority, factual or legal, for the proposition that these prior offenses should be counted as same criminal conduct. Because the State proved the convictions existed (and went further to prove they were previously found to be separate criminal conduct), the Defendant bore the burden of challenging that determination. The sentencing court even went so far as to comment on the lack of evidence put on by the defendant, showing the court properly exercised its discretion in determining the offender score. The Court of Appeals decision has misinterpreted *Graciano*, ruling the State must have this burden as well.

ISSUE 2: WHETHER THE BURGLARY ANTI-MERGER STATUTE CAN BE APPLIED TO AN OFFENDER SCORE CALCULATION WITH RESPECT TO A PRIOR CONVICTION?

The Court of Appeals ruled that *State v. Lessley*, 118 Wn2d 773, 827 P.2d 996 (1992) was applicable only to current burglary convictions, and does not have any bearing over a current sentencing court's treatment of prior convictions. They interpret the statute narrowly, holding the "burglary antimerger statute's plain language applies solely to current offenses before a current sentencing court." (COA No. 29931-7-III at 6). The statute in question is the "burglary anti-merger statute", RCW 9A.52.050, which provides: "Every person who, in the commission of a burglary shall commit any other

crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.”

The issue of whether or not the anti-merger statute can apply to the treatment of prior convictions in a current sentencing hearing is a novel issue. The problem is, the interpretation adopted by the Court of Appeals is contrary to the statutory interpretation as applied by the Supreme Court and numerous Appellate Court decisions over the years. The Court of Appeals merely states their rationale “comports with logic,” but provides little, if any, legal background regarding the historic interpretation of this statute. Repeatedly, decisions have stated the legislature evinced a clear intent to have burglary convictions and their component crimes counted separately. Specifically, the Supreme Court decision of *Lessley* stated:

We believe the better approach is to hold the antimerger statute gives the sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct. As the lead Court of Appeals opinion stated:

When two statutes appear to conflict, every effort should be made to harmonize their respective provisions. Here, that is easily done by recognizing that application of the burglary antimerger statute is discretionary with the sentencing judge and permits punishment for burglary and other crimes simultaneously committed. This result accords with the well-established rules that **the more specific statute controls over a conflicting, more general statute, and that the Legislature is presumed to be familiar with its prior legislation. In this case, then, the antimerger statute controls over the general language as to “same criminal conduct” when the sentencing judge imposes punishment pursuant to RCW 9A.52.050. Repeals by implication are not favored. If repeal is appropriate, it should be done by the Legislature, not by the courts.**

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.

State v. Lessley 118 Wn.2d 773, 781-82, 827 P.2d 996, 1000 (1992).
(emphasis added).

The Court of Appeals ruling misinterprets these statutes, and much more narrowly construes the anti-merger statute than was intended by the plain language of the statute, and by the Supreme Court in *Lessley*.

Legislative intent to punish these offenses as separate conduct has been addressed by the court a number of times. The burglary anti-merger statute gives the sentencing judge discretion to punish for burglary, even where the burglary and an additional crime encompass the same criminal conduct. *State v. Bradford* 95 Wash.App. 935, 978 P.2d 534 (1999), review denied 139 Wn.2d 1022, 994 P.2d 850, post-conviction relief granted 140 Wash.App. 124, 165 P.3d 31. **Existence of this section is an express statement that the legislature intended to punish separately any other crime committed during course of burglary.** *State v. Hunter* 35 Wash.App. 708, 669 P.2d 489 (1983), review denied. Imposition of separate punishment for crimes of assault and burglary did not violate prohibition against double jeopardy; as language of this section indicated, legislature **expressly intended cumulative punishment for crimes committed during commission of burglary.** *State v. Davison* 56 Wash.App. 554, 784 P.2d 1268 (1990), review denied 114 Wn.2d 1017, 791 P.2d 535. **Burglary anti-merger statute expresses intent of Legislature that “any other crime” committed in the commission of a burglary does not merge with the offense of first-degree burglary when a defendant is convicted of both.** *State v. Sweet* 138 Wn.2d 466, 980 P.2d 1223 (1999).

“Merger is a rule of statutory interpretation.” ... “[T]he fundamental object of statutory interpretation is to ascertain and give

effect to the intent of the legislature” — which is done by “first look[ing] to the plain meaning of words used in a statute.” ...“When the words in a statute are clear and unequivocal, this court must apply the statute as written” — unless the statute evidences an intent to the contrary.”

“The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court *then* asks if the Legislature intended only one punishment for the multiple convictions.” ...It will “only appl [y] where the Legislature has clearly indicated” it intended the offenses to merge....

The plain language of RCW 9A.52.050 expresses the intent of the Legislature that “any other crime” committed in the commission of a burglary would not merge with the offense of first-degree burglary when a defendant is convicted of both. In this instance the “other crime” is assault. The statute does not evidence a contrary intent. *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223, 1230 (1999) (Internal citation and footnotes omitted)(Emphasis added).

The Court of Appeals, in the present case, has diverged greatly from the long standing interpretation of both other divisions, and the Supreme Court. The Court has repeatedly held the legislature has clearly evinced intent that these crimes be counted separately. This is a statute removing this determination from the “Same criminal conduct” analysis of RCW 9.94A.589(1)(a), and *State v. Dunaway*, 109 Wn.2d 207,215, 743 P.2d 1237, 749 P.2d 160 (1987), and specifically authorizing the sentencing court to use discretion to find separate criminal conduct, even where it would otherwise be same criminal conduct. Absolutely nothing in this statute evinces any intent that this be limited to the one-time sentencing. Rather the legislature recognizes that these are separate offenses, and ought to be treated as separate offenses. This recognition ought apply at the current sentencing, and to all future sentences in which the convictions are counted as criminal history.

F. CONCLUSION

The sentencing court commented specifically on the lack of evidence or authority presented by the defendant for diverging from the prior court's determination that the burglary and robbery from a prior judgment and sentence was not the same criminal conduct. The Defendant did not meet his burden of proof when challenging this determination. The Supreme Court can overturn the Court of Appeals opinion on this ground alone, citing to *Graciano*, and need not address the merger issue.

However, if the Court so wishes to address the second issue: while it is unclear whether the sentencing court relied solely upon the burglary anti-merger statute, however, the Court did find these to be separate criminal conduct, and counted them as separate convictions for scoring purposes under the SRA. This comports with the historic treatment of the burglary anti-merger statute, and the legislative intent, as repeatedly declared by numerous decisions. While the prior decisions address the application with respect to a current burglary sentence, it is clear the intent would continue forward to subsequent sentences.

This Court should reverse the Court of Appeals opinion, and deny the Defendant's appeal, specifically holding 1) the burden of challenging a prior court's determination of same criminal conduct lies with the defendant, and/or 2) it is not abuse of discretion to apply the burglary anti-merger statute to a prior conviction at a current sentencing.

Dated this 9th day of September 2013,

Respectfully submitted,
Signature



MATHEW J. ENZLER, WSBA#38105
Stevens County Prosecutor's Office
215 S. Oak Street
Colville, WA 99114
Phone: (509) 684-7500
FAX: (509) 684-7589

APPENDIX

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	No. 29931-7-III
)	
Respondent,)	
)	
v.)	
)	
CHRISTIAN VERN WILLIAMS,)	PUBLISHED OPINION
)	
Appellant.)	

BROWN, J. — Christian Vern Williams appeals the sentencing court’s decision to count his prior burglary and robbery convictions separately in calculating his offender score. He contends the court abused its discretion and misapplied the law by relying on the burglary antimerger statute, RCW 9A.52.050, and overlooking the same criminal conduct test, RCW 9.94A.525(5)(a)(i) and .589(1)(a). We hold as a matter of first impression that a current sentencing court lacks discretion to count prior convictions separately under the burglary antimerger statute and must do so, if at all, under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. Accordingly, we reverse and remand for resentencing.

FACTS

In October 2010, a jury found Mr. Williams guilty of residential burglary and first degree trafficking in stolen property. The sentencing court calculated his offender score as seven by separately counting his April 2004 convictions for first degree burglary and first degree robbery, each of which he committed in December 2003. The court applied the burglary antimerger statute, apparently viewing it as mandatory, instead of applying the same criminal conduct test. Mr. Williams appealed. The sole remaining dispute after our commissioner's motion-on-the-merits ruling concerns Mr. Williams's offender score calculation. Because the trial court failed to conduct a same criminal conduct analysis as required by RCW 9.94A.525(5)(a)(i) and .589(1)(a), we reverse and remand for the trial court to perform that analysis.

ANALYSIS

The issue is whether the sentencing court erred by deciding to count Mr. Williams's prior burglary and robbery convictions separately in calculating his offender score. He contends the court abused its discretion and misapplied the law in relying on the burglary antimerger statute to the exclusion of the same criminal conduct test.

We review a discretionary sentencing decision made under the SRA for abuse of discretion or misapplication of law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990). A trial court abuses its discretion if its decision is "manifestly unreasonable," based on "untenable grounds," or made for "untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); see *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) ("A decision is based on untenable grounds or made for

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untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices." (citations omitted) (internal quotation marks omitted)). We interpret a statute de novo. *State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996). In doing so, we "ascertain and carry out" our legislature's intent. *State v. Neher*, 112 Wn.2d 347, 350, 771 P.2d 330 (1989).

A current sentencing court must calculate an offender score based on an offender's "other current and prior convictions." RCW 9.94A.589(1)(a). If a prior sentencing court found multiple offenses "encompass the same criminal conduct," the current sentencing court must count those prior convictions as one offense. RCW 9.94A.525(5)(a)(i). If the prior sentencing court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must independently evaluate whether those prior convictions "encompass the same criminal conduct" and, if they do, must count them as one offense. *Id.*; RCW 9.94A.589(1)(a); *State v. Tomgren*, 147 Wn. App. 556, 563, 196 P.3d 742 (2008) ("A sentencing court . . . *must* apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct. The court has no discretion on this." (citation omitted) (citing RCW 9.94A.525(5)(a)(i); *State v. Reinhart*, 77 Wn. App. 454, 459, 891 P.2d 735 (1995); *State v. Lara*, 66 Wn. App. 927, 931-32, 834 P.2d 70 (1992)), *abrogated on other grounds by*

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State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013).¹ The offender bears the burden of proving offenses encompass the same criminal conduct. *Graciano*, 176 Wn.2d at 539.

Here, the prior sentencing court did not find Mr. Williams's 2004 burglary and robbery convictions encompass the same criminal conduct. But it nonetheless ordered him to serve his sentences concurrently.² Under these circumstances, the current sentencing court needed to apply the same criminal conduct test. See RCW 9.94A.525(5)(a)(i), .589(1)(a); *Torgren*, 147 Wn. App. at 563. It did not. While we think it doubtful that Mr. Williams met his burden of proof, we cannot decide this issue because the trial court failed to exercise discretion required under the same criminal conduct test. See *Lara*, 66 Wn. App. at 932 (remanding for resentencing because the trial court failed to exercise discretion required under the portion of former RCW 9.94A.360(6)(a) (1988) our legislature later amended to incorporate the same criminal conduct test); *State v. Wright*, 76 Wn. App. 811, 829, 888 P.2d 1214 (1995) (same);

¹ Prior convictions encompass the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a); see RCW 9.94A.525(5)(a)(i). Whether offenses involve the same criminal intent depends on "the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). This analysis considers "whether one crime furthered the other," *id.*, or the two were "part of a recognizable scheme or plan." *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). If any of these statutory elements are missing, the trial court must count the offenses separately in calculating an offender score. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

² In arguing to the current sentencing court, the parties noted the 2004 sentencing court did not check the same criminal conduct box on Mr. Williams's judgment and sentence but imposed concurrent imprisonment terms totaling 78 months.

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Reinhart, 77 Wn. App. at 459 (same); *State v. McCraw*, 127 Wn.2d 281, 287-88, 898 P.2d 838 (1995) (approving *Lara*, *Wright*, and *Reinhart*).

Instead of applying the same criminal conduct test, the current sentencing court relied solely on the burglary antimerger statute, which provides, "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050. In *State v. Lessley*, 118 Wn.2d 773, 779-82, 827 P.2d 996 (1992), our Supreme Court held this statute grants a current sentencing court discretion, in calculating an offender score, to count current burglary and non-burglary convictions separately even if they encompass the same criminal conduct.³ We are unaware of any reported decision extending this holding to a current sentencing court's treatment of prior convictions.⁴ Therefore, we must interpret the statute.

Certainly, if a person commits a burglary simultaneously with another crime, the statute allows the State to separately "prosecute[]" both current offenses. RCW 9A.52.050. If a judge or jury then finds the defendant guilty, the statute allows a current sentencing court to separately "punish[]" both current convictions, including by counting them separately in calculating an offender score. *Id.*; *Lessley*, 118 Wn.2d at 779-82. But the statute provides no direction to a later sentencing court regarding how it may

³ Relying on the State's arguments, the current sentencing court apparently believed the burglary antimerger statute required it to count Mr. Williams's 2004 convictions separately. To the extent the court viewed applying the statute as mandatory, it erred.

⁴ Our Supreme Court declined to reach this issue in *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 464, 28 P.3d 729 (2001).

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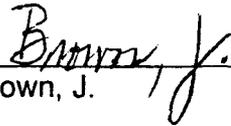
treat prior convictions.

We hold the burglary antimerger statute's plain language applies solely to current offenses before a current sentencing court. Our interpretation comports with logic. While sentences must be proportionate to criminal history, our legislature has designed them to punish current, not prior offenses. See RCW 9.94A.010(1); LAWS OF 2002, ch. 107, § 1 ("[T]he provisions of the [SRA] act upon and punish only current conduct; the [SRA] does not act upon or alter the punishment for prior convictions." (citing *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 362-64, 759 P.2d 436 (1988))). And, our legislature has established the SRA, not the burglary antimerger statute, as the proper means for ensuring sentences are proportionate to criminal history. Compare RCW 9.94A.010(1), with RCW 9A.04.020. See generally RCW 9.94A.030(11), .500(1), .525-.530; LAWS OF 2008, ch. 231, § 1.

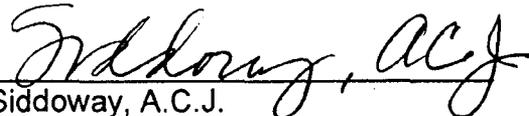
Applying this interpretation, we conclude the current sentencing court erred by relying on the burglary antimerger statute to count Mr. Williams's 2004 burglary and robbery convictions separately in calculating his offender score. Instead, the court needed to apply the same criminal conduct test. Because the court applied the wrong legal standard, it exercised its discretion on untenable grounds or reasons. Therefore, the court abused its discretion and misapplied the law.

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Reversed and remanded for resentencing.


Brown, J.

I CONCUR:


Siddoway, A.C.J.

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KORSMO, C.J. (dissenting) —The majority opinion runs afoul of *State v. Lessley*, 118 Wn.2d 773, 827 P.2d 996 (1992), which is an adequate basis to reject appellant's position. More fundamentally, even while properly acknowledging that it was his burden to establish that the 2004 crimes constituted the same criminal conduct, the opinion overlooks the fact that Mr. Christian Williams never attempted to meet the burden. The sentence should be affirmed.

As to the latter point first, *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013), clearly places the burden on Mr. Williams to establish that the 2004 crimes constituted the same criminal conduct. At sentencing, the prosecutor presented the 2004 judgment and sentence for the purpose of showing that Judge Baker had not found the burglary and robbery convictions to be the same criminal conduct and had used an offender score of "3" for each offense even though there were only two prior convictions. Mr. Williams thereafter did not present argument suggesting that the two crimes occurred at the same time and place or that they involved the same victim(s) and the same criminal intent; rather, he argued that it was unclear how Judge Baker had treated them.¹ There

¹ The defense's confusion was understandable because the 2004 offender score of "3" was not possible for the first degree robbery offense under any scenario. In sentencing that offense, the two prior crimes each scored one point and the current first degree burglary would be worth two points, resulting in an offender score of "4" unless the burglary was not counted at all, which would mean the score was "2." Former RCW 9.94A.525(8) (2003). The first degree burglary score could have been "3" if the robbery

simply was no evidence presented, nor any argument made, that the two offenses somehow satisfied the RCW 9.94A.589(1) standard.²

Since the defense failed to meet its burden, *Graciano* requires rejection of the argument and there is no need to discuss the burglary anti-merger statute and its application to this case. Nonetheless, since the majority desires to address the statute, I, will do so too, although in a rather cursory manner. The short answer to the majority's position is that *Lessley* faced the same ultimate task as what the trial court faced here – application of the same criminal conduct test of *State v. Dunaway*, 109 Wn.2d 207, 215, 749 P.2d 160 (1987), and RCW 9.94A.589(1). The fact that the test has to be applied to the prior offenses in this case does not make it significantly different than *Lessley*, which had to apply that statute to current offenses. The trial judge in both instances had the same duty to look at whether the offenses constituted the same criminal conduct issue. In *Lessley* our court decided that the anti-merger statute could be applied to essentially trump the need to look at same criminal conduct as it related to the burglary offense.

was treated as same criminal conduct because the prior burglary counted two points and the drug conviction counted one point. If the robbery had counted, it would have resulted in an offender score of "5" for the offense. Former RCW 9.94A.525(10) (2003).

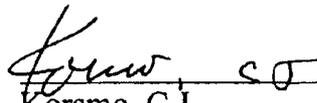
² Curiously, the majority repeatedly mentions that the 2004 offenses were served concurrently as if that is a fact of consequence to the issue at hand in this proceeding. Since they were sentenced at the same time, they needed to be served concurrently. RCW 9.94A.589(1). The information does not inform on the question of whether they are the same criminal conduct.

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There is no way to meaningfully distinguish this case. If it was permissible in *Lessley*, it had to be permissible here.³ Since this court lacks the power⁴ to overturn *Lessley*, the trial judge could properly apply the anti-merger statute to the 2004 crimes.⁵

This case should be affirmed for the simple reason that Mr. Williams never attempted to meet his burden under *Graciano* and therefore the alleged legal error is simply not relevant. If we reach the same criminal conduct issue, however, this case cannot be meaningfully distinguished from *Lessley* and the trial judge did not err in applying the anti-merger statute to the prior offenses.

For both reasons, I respectfully dissent.


Korsmo, C.J.

³ Even appellant's counsel recognizes that the anti-merger statute could be applied to prior offenses. *See* Br. of Appellant at 9. The majority cites no authority suggesting the statute was inapplicable.

⁴ *E.g.*, *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

⁵ It is unclear from my reading of the judge's ruling whether he actually did apply the anti-merger statute to the 2004 convictions since that discussion appears during the analysis of the same criminal conduct argument relating to the two current offenses. However, both parties read the transcript as if the judge did do so; that is a plausible interpretation.

AFFIDAVIT OF MAILING

I, Michelle Lembcke, Paralegal for the Stevens County Prosecutor's Office, declare that I have personal knowledge of the matters set forth below, and that I am competent to testify to the matters stated herein.

On the 9th Day of September, 2013, I deposited in the mail of the United States of America, USPS, postage prepaid, the original document to which this proof of service is attached in an envelope addressed to:

Renee S. Townsley, Clerk/Administrator
COURT OF APPEALS, DIVISION III
500 N. Cedar Street
Spokane, WA 99201-1905

On the 9th Day of September, 2013, I deposited in the mail of the United States of America, USPS, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

KENNETH H. KATO
Attorney At Law
1020 N. Washington Street
Spokane, WA 99201-2237

CHRISTIAN VERN WILLIAMS
#868479
P.O. Box 2049
Airway Heights, WA 99001

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

Signed this 9th day of September, 2013, in Colville, WA


Michelle Lembcke, Paralegal
Stevens County Prosecutor's Office
215 S. Oak Street
Colville, WA 99114