

64346-1

64346-1

COA NO. 64346-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIE RAINEY,

Appellant.

2010 JUL -1 PM 3:56
FILED
COURT OF APPEALS
DIVISION ONE

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

The Honorable Alan R. Hancock, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A.	<u>ARGUMENT IN REPLY</u>	1
1.	THE COURT ERRED IN FAILING TO EXERCISE ITS DISCRETION ON WHETHER TO TREAT THE BURGLARY AND ASSAULT OFFENSES AS THE "SAME CRIMINAL CONDUCT" FOR OFFENDER SCORE PURPOSES.....	1
B.	<u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Locklear,
118 Wn.2d 409, 823 P.2d 1078 (1992)..... 3

State v. Collins,
48 Wn. App. 95, 737 P.2d 1050 (1987),
aff'd, 110 Wn.2d 253, 751 P.2d 837 (1988)..... 2

State v. Collins,
110 Wn.2d 253, 751 P.2d 837 (1988)..... 1, 2

State v. Davison,
56 Wn. App. 554, 784 P.2d 1268 (1990)..... 2, 3

State v. Delgado,
148 Wn.2d 723, 63 P.3d 792 (2003)..... 3

State v. Larson,
88 Wn. App. 849, 946 P.2d 1212 (1997).....4

State v. Lessley,
118 Wn.2d 773, 827 P.2d 996 (1992)..... 2, 3

State v. Salavea,
151 Wn.2d 133, 86 P.3d 125 (2004)..... 3

STATUTES

Former RCW 9.94A.400(1).....2

RCW 9.94A.589(1)(a) 2

A. ARGUMENT IN REPLY

1. THE COURT ERRED IN FAILING TO EXERCISE ITS DISCRETION ON WHETHER TO TREAT THE BURGLARY AND ASSAULT OFFENSES AS THE "SAME CRIMINAL CONDUCT" FOR OFFENDER SCORE PURPOSES.

Rainey argues the burglary and assault on Joseph Kisner constitute the "same criminal conduct" because each offense involves the same intent, the same time and place, and the same victim. Brief of Appellant (BOA) at 5-7. The trial court erred in failing to exercise its discretion on whether to apply the burglary anti-merger statute to this same criminal conduct. BOA at 1, 7-11.

According to the State, the two offenses do not constitute the same criminal conduct because Joseph Kisner was not the only victim of the burglary. Brief of Respondent (BOR) at 6. The State maintains Kyle Kisner, Jill Glaspie and Patrick Metcalf were also victims of the burglary because they were all present in the kitchen when Rainey entered with a gun. Id. From this, the State asserts the burglary and assault convictions could not constitute the same criminal conduct for scoring purposes. Id.

The State's contention fails under State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988). In that case, Collins entered a home in which the homeowner and a guest were present. Collins, 110 Wn.2d at 254-55. He then assaulted the homeowner and raped the guest. Id. A judge found

Collins guilty on one count each of first degree burglary, second degree rape of the guest, and second degree assault of the homeowner. State v. Collins, 48 Wn. App. 95, 96-97, 737 P.2d 1050 (1987), aff'd, 110 Wn.2d 253, 751 P.2d 837 (1988). Recognizing crimes against separate victims are always to be considered separate crimes, the Supreme Court held (1) the burglary and the rape and (2) the burglary and the assault offenses both constituted the same criminal conduct. Collins, 110 Wn.2d at 262-63.

The Collins Court could not have reached that result if, as the State claims, the mere presence of another inside a house during the commission of a burglary precludes a same criminal conduct finding.

The State relies on State v. Davison 56 Wn. App. 554, 784 P.2d 1268 (1990) and State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992). BOR at 6. Neither case mentions Collins. Those cases conflict with Collins.

The result in Collins comports with the plain language of RCW 9.94A.589(1)(a), which defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." In Rainey's case, Joseph Kisner was indisputably victimized by both the burglary and the assault. Those crimes therefore "involve the same victim."

The statute specifies that an offense need only "involve the same victim," not that it "involve only one victim." If the Legislature had meant to limit "same criminal conduct" to offenses that involve only one and the same victim, it would have said just that. State v. Salavea, 151 Wn.2d 133, 144, 86 P.3d 125 (2004); In re Pers. Restraint of Locklear, 118 Wn.2d 409, 417, 823 P.2d 1078 (1992). When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

In any event, Davison and Lessley are distinguishable. In neither case is it evident that the State's theory of the case was anything but that the burglary involved multiple victims. In *Davison*, for example, the information specifically alleged the defendant committed first degree burglary by assaulting two named victims. Davison 56 Wn. App. at 556.

In contrast, the State in Rainey's case at no time maintained anyone besides Joseph Kisner was the victim of the burglary. The information alleged Rainey committed first degree burglary by entering Joseph Kisner's house unlawfully and assaulted "any person therein." The first degree burglary was predicated on the assault of a person while in the building. CP 36; Supp CP __, sub no. 45, Instructions to Jury at 10 (Instruction 7), 6/11/08). That person was Joseph Kisner. CP 37. In

closing argument, the State addressed the elements of the first degree burglary and made it clear Joseph Kisner, in being assaulted, was the victim of first degree burglary. 1RP 159-60.

The State should not be allowed to change its theory of the case in a post hoc manner on appeal to defeat a same criminal conduct argument. Where, as here, the State's theory of the case at the trial level is that only one person was victimized from the burglary, the State should be precluded from contending on appeal that the burglary involved more than one victim. See State v. Larson, 88 Wn. App. 849, 852, 946 P.2d 1212 (1997) (refusing to affirm on the basis of a theory that the State argued for the first time on appeal).

B. CONCLUSION

For the reasons set forth above and in the opening brief, this Court should remand the case to the trial court for a new sentencing hearing.

DATED this 1st day of July 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant