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January 11, 2016
Court of Appeals
Division I
State of Washington

COA NO. 73240-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

GLEN SIMS,

Appellant.

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

The Honorable Veronica Galvan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. **THE COURT ERRED IN FAILING TO COUNT PRIOR OFFENSES AS THE SAME CRIMINAL CONDUCT IN COMPUTING THE OFFENDER SCORE.**

The State claims the two crimes do not share the same criminal objective because one offense contains a statutory intent element and the other does not. Brief of Respondent (BOR) at 1. That claim fails.

First, there is a mens rea requirement for the firearm possession offense. Under 18 U.S.C. § 924(c)(1)(A), the government must show a defendant "knowingly" possessed a firearm in furtherance of a federal drug trafficking crime. United States v. Woodard, 531 F.3d 1352, 1362 (11th Cir. 2008).

To the extent the State argues there can be no same criminal conduct because the statutory mens rea for each crime is different, the argument fails. Case law interpreting the "same criminal intent" language in RCW 9.94A.589(1)(a) distinguishes it from the mens rea element of the particular crime involved. The inquiry in this context is not whether the crimes share a particular mens rea element but whether the offender's objective criminal purpose in committing both crimes is the same. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030, 793 P.2d 976 (1990). Division One of this Court embraces this

view. State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (citing Adame), review denied, 182 Wn.2d 1022, 347 P.3d 458 (2015).

Whether the crime of possession of a firearm in furtherance of a drug trafficking offense and the underlying drug trafficking offense share the same statutory intent element is therefore of no import. Indeed, the absence of any mens rea element for a crime is irrelevant because the objective intent standard is the controlling standard, not statutory intent. Adame, 56 Wn. App. at 811; see State v. Baldwin, 63 Wn. App. 303, 307, 818 P.2d 1116 (1991), amended, 837 P.2d 646 (1992) (treating possession of controlled substance, a strict liability crime, as having an objective "intent" for the same criminal conduct analysis).

Appellate courts have thus held two offenses encompass the same criminal conduct despite one of the offenses having no mens rea requirement. See State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993) (second degree rape of child and attempted rape encompassed the same criminal conduct); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996) (Division Two holding child rape and child molestation were same criminal conduct), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013).

Division Two, however, has advanced a contrary approach in some cases, requiring two crimes to have the same statutory intent to qualify as

same criminal conduct. This error started in State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, review denied, 118 Wn.2d 1006, 822 P.2d 288 (1991), back when courts were just beginning to formulate the standard for determining same criminal conduct. As recognized by Division One, Rodriguez relied on an "element sharing" analysis that has since been rejected by the Supreme Court. State v. Vike, 66 Wn. App. 631, 634-35, n. 5, 6, 834 P.2d 48 (1992) (citing State v. Collicott, 118 Wn.2d 649, 668, 827 P.2d 263 (1992)), rev'd on other grounds, 125 Wn.2d 407, 885 P.2d 824 (1994).

But like a stubborn weed that refuses to die, the error perpetuates itself in Division Two. See State v. Hernandez, 95 Wn. App. 480, 485-86, 976 P.2d 165 (1999) (citing Rodriguez); State v. Price, 103 Wn. App. 845, 857, 14 P.3d 841 (2000) (citing Hernandez), review denied, 143 Wn.2d 1014, 22 P.3d 803 (2001); State v. Bickle, 153 Wn. App. 222, 234, 222 P.3d 113 (2009) (citing Rodriguez); State v. S.S.Y., 150 Wn. App. 325, 323-34, 207 P.3d 1273 (2009) (citing Price, Hernandez), aff'd, 170 Wn.2d 322, 241 P.3d 781 (2010).

Not surprisingly, the Supreme Court has criticized Division Two's statutory intent approach as contrary to both its precedent and that of Division One and Division Three. State v. S.S.Y., 170 Wn.2d 322, 332-33,

n.5, 241 P.3d 781 (2010).¹ This Court should reject the discredited statutory intent test advanced by the State in this case.

Applying the correct objective intent test leads to the conclusion that the federal offenses of possession of methamphetamine with intent to distribute and possession of a firearm in furtherance of that drug trafficking offense meet the same criminal conduct test. "[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Here, there is no guesswork on whether the firearm possession furthered the drug crime. The federal jury found beyond a reasonable doubt that it did because furtherance is an element of the crime. CP 75-76. To prove that possession of a firearm was in furtherance of the drug trafficking crime, the government must show a "specific nexus between the gun and the crime charged" and that the firearm "was strategically located so that it is quickly and easily available for use." United States v.

¹ Notwithstanding Division Three's decision in Adame and the Supreme Court's criticism in S.S.Y., Division Three has subsequently issued conflicting decisions on the point. Compare State v. Polk, 187 Wn. App. 380, 396, 348 P.3d 1255 (2015) (citing Rodriguez, ignoring Adame) with State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088 (citing Adame), review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014).

Ham, 628 F.3d 801 (6th Cir. 2011) (quoting United States v. Mackey, 265 F.3d 457, 462 (6th Cir. 2001)). "The government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense." United States v. Timmons, 283 F.3d 1246, 1252 (11th Cir.), cert. denied, 537 U.S. 1004, 123 S. Ct. 516, 154 L. Ed. 2d 401 (2002). The two offenses satisfy the furtherance test under a same criminal conduct analysis.

The State, however, cites State v. Haddock, 141 Wn.2d 103, 114, 3 P.3d 733 (2000) for the proposition that the "furtherance test" was never meant to be the lynchpin of the same criminal conduct analysis. BOR at 7. But what the Supreme Court meant was that two offenses can be the same criminal conduct even though one did not further the other because additional factors can show same objective intent. Haddock, 141 Wn.2d at 113-14. No appellate court has ever found lack of same intent where one crime furthered the other.

The Supreme Court has stated "the furtherance test lends itself to sequentially committed crimes," but its "application to crimes occurring literally at the same time is limited." State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). The context for that statement involved two simple drug possession crimes occurring simultaneously. Under that circumstance, it did not make sense to say one crime further the other.

Vike, 125 Wn.2d at 412. Vike was saying what Haddock was saying: even if one offense did not further the other, two offenses can still be same criminal conduct once additional factors are considered. But where one crime does further the other, the same objective intent standard is satisfied. Lessley, 118 Wn.2d at 777.

Further, while application of the furtherance test to simultaneous crimes may be "limited," that does not mean the test never applies to simultaneous crimes. It depends on the crimes involved. See State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998) (simultaneous kidnapping and second degree assault with gun shared same objective intent because assault furthered the kidnapping); Phuong, 174 Wn. App. at 548 (shared intent where unlawful imprisonment furthered the offense of attempted rape where both took place simultaneously).

In the present case, there is no dispute that the possession with intent to distribute crime and the possession of a firearm to further that drug crime occurred at the same time. The furtherance test naturally fits the facts because Sims was convicted of an offense that required that it be in furtherance of the drug offense.

The State does not address Sims's alternative argument that the two offenses are part of the same scheme or plan and thus share the same objective intent. Brief of Appellant at 9.

Finally, the State contends that even if the drug possession and firearm in furtherance offenses should have been counted as one offense, the trial court still arrived at the correct offender score of 6 points. BOR at 9. The State is mistaken.

The trial court ruled the federal offenses of felon in possession of a firearm (count 1), felon in possession of ammunition (count 2), and possession of a firearm in furtherance of a drug trafficking offense (count 5) were all part of the same criminal conduct. 4RP 10-11. The court did not find the possession of methamphetamine with intent to distribute offense or the possession of body armor offense qualified as same criminal conduct in relation to any other federal offense. Id. The court therefore treated the federal offenses as three separate offenses adding 3 points to the offender score, resulting in a total score of 6 points once prior Washington offenses are taken into account. 4RP 11.

But if the drug possession offense and the firearm in furtherance offense should be treated as one offense, and the firearm in furtherance offense is part of the same criminal conduct as the felon in possession of a firearm and felon in possession of ammunition offenses (as found by the trial court), then the total number of federal offenses to be counted separately is two, not three. The federal offenses add two points to the offender score, resulting in a total of 5 points, not 6 points as the trial court

ruled. Resentencing is required based on a lower offender score of 5 points for the current conviction.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Sims requests remand for resentencing on the same criminal conduct and LFO issues.

DATED this 14th day of January 2016

Respectfully Submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73240-4-1
)	
GLEN SIMS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GLEN SIMS
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SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF JANUARY 2016.

X *Patrick Mayovsky*