

No. 44371-6-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

SHAWN ERIN MULLEN,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 11-1-05075-2  
The Honorable Katherine Stolz, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENT OF ERROR**

The trial court erred when it ruled that Appellant's two current crimes of robbery and burglary were not the same criminal conduct for the purpose of calculating Appellant's offender score.

## **II. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR**

Where Appellant's two offenses involved the same intent to commit a theft, and occurred at the same time, place and against the same victim, did the trial court err when it found that the two offenses did not constitute the same criminal conduct?

## **III. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The State charged Shawn Erin Mullen, as a principal or accomplice, with one count of first degree robbery (RCW 9A.56.190, 9A.56.200(1)(iii)) and one count of first degree burglary (RCW 9A.52.020(1)(b)). (CP 1-2) The State also alleged that Mullen or an accomplice was armed with a deadly weapon, a golf club, during the commission of the crimes. (CP 1-2) The jury convicted Mullen as charged. (TRP 488-89; CP 95, 99, 101, 102)<sup>1</sup>

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<sup>1</sup> The trial transcripts, labeled Volumes I thru IV (containing trial dates 10/22/12 thru 01/11/13), will be referred to as "TRP." The transcript for the pretrial hearing on 10/18/12 (also labeled Volume I) will be referred to by the date of the proceeding.

At sentencing, Mullen asked the court to consider the two crimes as being the same criminal conduct for the purpose of calculating his offender score, and asked the court to exercise its discretion and not apply the burglary anti-merger statute. (TRP 496-97; CP108-11) The court determined that the crimes did not constitute the same criminal conduct, and did not address the anti-merger statute. (TRP 498) The court calculated Mullen's offender score as three, sentenced him within the standard range for that score, and imposed two 24-month deadly weapon sentence enhancements, for a term of confinement totaling 77 months. (TRP 498, 500; CP 115, 118) This appeal follows. (CP 127)

#### B. SUBSTANTIVE FACTS

Leonard DeWitt and Shawn Mullen were casual friends. (TRP 73-74, 205, 295, 298) They socialized, and occasionally went gambling together at casinos. (TRP 74, 295, 298) DeWitt did not own a car, so Mullen frequently gave DeWitt a ride when they were together or when DeWitt needed to go somewhere. (TRP 74, 203)

In early December, 2011, DeWitt, Mullen, and Mullen's girlfriend, Alexis McGregor, went together to a casino. (TRP 32, 36, 76, 123) DeWitt ran out of cash, so he asked Mullen to loan him some money. (TRP 76) According to DeWitt, Mullen loaned

him between \$30.00 and \$50.00, and DeWitt promised to pay him back. (TRP 77, 206-07) De Witt also borrowed an expensive pair of sunglasses from Mullen, and had not returned them. (TRP 77-78, 207, 311)

On the night of December 16, 2011, DeWitt arrived home with a friend sometime after 11:00. (TRP 80, 123) DeWitt and his friend went inside the house through the garage, and left the garage door open and the light on because DeWitt's boyfriend was due home any minute. (TRP 88-89, 213) While DeWitt was using the bathroom on the second floor of his house, he heard what at first sounded like two unfamiliar voices. (TRP 89-90) He then recognized one of the voices as belonging to Mullen. (TRP 89-90) Although DeWitt expected to see Mullen at some point in the near future because he owed Mullen money, De Witt did not expect to see Mullen at his home at that time of night. (TRP 87)

DeWitt testified that he came downstairs and saw Mullen standing with a second, larger man. (TRP 91, 92) Both men seemed angry. (TRP 91, 92) DeWitt testified that he heard Mullen mutter something about a PlayStation videogame console, then the second man began striking DeWitt repeatedly with a golf club. (TRP 94) DeWitt tried to run away, but the man followed him and

continued to strike him with the golf club. (TRP 102-03) DeWitt then tried to run outside, but Mullen blocked his way. (TRP 129)

DeWitt testified that Mullen did not try to intervene or stop the man from hitting him. (TRP 96) DeWitt also testified that Mullen made a comment about things being stolen from his house, and that Mullen sounded angry. (TRP 96, 130) DeWitt had a \$100.00 bill in his pocket, and once Mullen got it from him the second man stopped beating him with the golf club. (TRP 107, 109, 111) However, according to DeWitt, Mullen punched him in the face once. (TRP 130)

DeWitt ran upstairs and locked himself in his office. (TRP 133) He heard Mullen follow him, and Mullen began banging and kicking the door. (RP133) Mullen left after DeWitt said he was calling the police. (TRP133, 134) DeWitt also ran outside and saw Mullen pulling away in his truck. (TRP 143) DeWitt reported Mullen's license plate number to the 911 operator. (TRP 144, 148)

Alexis McGregor sat in Mullen's truck during the incident. (TRP 40) She testified that she had seen Mullen and the second man, Albert Huniu, go into the house through the garage, and that Huniu was carrying a golf club. (TRP 39, 41, 313-14) When they came out, Huniu was still holding the golf club, but instead of

getting into the truck he began walking down the street. (TRP40-41) Then Mullen came out of the house and got into the truck. (TRP 42) McGregor asked Mullen what was going on, and Mullen said, "Nothing. Shut up." (TRP 52-53)

McGregor then saw DeWitt, with blood dripping from his nose, standing in front of the truck. (TRP 43) Mullen drove away, and picked up Huniu down the street. (TRP 44-45) When McGregor again asked Mullen what happened, he told her that Huniu "got carried away." (TRP 60-61)

Police located and stopped Mullen in his truck shortly after the incident. (TRP 220, 222-23, 239) Mullen told police that he was tired of DeWitt robbing him, and that whatever DeWitt said, "it's probably a lie." (TRP 248) Police found two \$100.00 bills in Mullen's pockets, and a golf club in some bushes about a block and a half east of DeWitt's house. (TRP 251, 185, 187)

DeWitt testified that he was treated at the hospital then released, and that he suffered injuries to his arms, hand, forehead, and side. (TRP 151-52, 155-56, 157)

Mullen testified that he had loaned DeWitt money several times, and that DeWitt owed him about \$1,000.00 in total. (TRP 310-11) DeWitt always said he would pay Mullen back, but he



never did. (TRP 312) Mullen was frustrated because he also believed that DeWitt had stolen other items from him, and that DeWitt was “punking” or taking advantage of him. (TRP 346, 347-48)

Mullen testified that he went to DeWitt’s house to get the money that DeWitt owed him. (TRP 313) He asked Huniu to come too, because he felt that DeWitt would be more likely to give him the money if he was accompanied by a larger, stronger man. (TRP 332, 334) Mullen testified that he told Huniu not to use violence, and told Huniu not to bring the golf club into the house. (TRP 314, 317, 318)

When they arrived at the house, they entered through the open and lit garage, and knocked on the door. (TRP 317) According to Mullen, he heard DeWitt ask who was there, and that Mullen said, “it’s Shawn,” then walked into the house. (TRP 318) He testified that DeWitt immediately seemed afraid of Huniu. (TRP 324) DeWitt and Huniu ran around a corner, and when Mullen caught up, he saw DeWitt on the floor and Huniu beating him with the golf club. (TRP325-26) Mullen did not immediately try to intervene because Mullen was also intimidated by Huniu. (TRP 374-75) But Huniu stopped hitting DeWitt, and left. (TRP 326)

Mullen apologized to DeWitt, and asked him to return the money and other items that belonged to Mullen. (TRP 326, 327-28) DeWitt walked upstairs, and Mullen followed because he thought DeWitt was going to get the items that belonged to Mullen. (TRP 327-28) But when DeWitt instead slammed a door and called the police, Mullen became frustrated and started kicking the door. (TRP330) Mullen then left. (TRP 330)

Mullen testified that he had the \$100.00 bill in his pocket when he arrived, and that he did not take it from DeWitt. (TRP 383-84) Mullen also testified that he never asked Huniu to hit DeWitt, and that he never personally hit DeWitt. (TRP 331)

#### **IV. ARGUMENT & AUTHORITIES**

Mullen was convicted of first degree robbery and first degree burglary. To convict Mullen of first degree robbery, the jury had to find that he “took personal property” from another and that he “intended to commit theft” of property. RCW 9A.56.190, 9A.56.200(1)(iii); see *also* Jury Instruction 7 (CP 67). To convict Mullen of first degree burglary, the jury had to find that he “entered or remained unlawfully in a building”, and that the entering or remaining was done with the “intent to commit a crime against a person or property therein.” RCW 9A.52.020; see *also* Jury

Instruction 17 (CP 77).

Under Washington law, multiple convictions that arise out of the “same criminal conduct” count as a single offense for the purpose of calculating the offender score. RCW 9.94A.589(1)(a). The sentencing court's decision concerning whether multiple offenses constitute the same criminal conduct is reviewed for a clear abuse of discretion or misapplication of the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990).

RCW 9.94A.589(1)(a) 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.” Mullen’s two crimes clearly involved the same victim and occurred at the same time and place. The question is whether Mullen had the same criminal intent during the two crimes.

Criminal intent is the same for two or more crimes when the defendant's intent, viewed objectively, does not change from one crime to the next, or when one crime furthers the other. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

For example, in State v. Rienks, the court found that burglary, robbery and first degree assault encompassed the same criminal conduct where the defendant went to the victim's

apartment to collect money owed to a third person; the defendant entered, assaulted one man and stole money from a briefcase. 46 Wn. App. 537, 731 P.2d 1116 (1987). The court determined that the three offenses were committed as part of a recognizable scheme or plan and were committed with “no substantial change in the nature of the criminal objective,” and therefore encompassed the same criminal conduct within the meaning of the Sentencing Reform Act. 46 Wn. App. at 543 (citing State v. Calloway, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985)). The court pointed out that “there was no independent motive for the secondary crime; rather, the objective was to accomplish or complete the primary one.” 46 Wn. App. at 544.

In State v. Davis, the defendant entered a home uninvited and began yelling at victim A. 90 Wn. App. 776, 779, 954 P.2d 325 (1998). Davis then pulled a gun from under his shirt and pointed first at victim A’s head. 90 Wn. App. at 779. He then pointed the gun at victim B when she tried to call the police to stop the burglary and assault on victim A. 90 Wn. App. at 779, 782. Davis was convicted of first degree burglary and two counts of second degree assault. 90 Wn. App. at 780.

On appeal, the court agreed with the trial court’s conclusion

that the assaults furthered the burglary and, therefore, Davis had the same criminal intent in each. 90 Wn. App. at 782. Though the court ultimately concluded that the crimes were not the same criminal conduct, this was only because one of the crimes had a separate victim. 90 Wn. App. at 782.

In this case, Mullen testified that he went to DeWitt's house to get the money and items that DeWitt owed him. (TRP 313) He brought Huniu thinking he would intimidate DeWitt into giving Mullen the money and items. (TRP 332, 334) Mullen's objective throughout the incident was to take property from DeWitt. The entry into the house was committed with the intent to take property from DeWitt, and so furthered the commission of the robbery. The two offenses are clearly the "same criminal conduct."

The trial court did not explain its decision to the contrary, except to say, "I think that the [Lessley] case does distinguish. I think that a burglary and a robbery are two separate offenses[.]" (TRP 498) But the trial court's reading of Lessley is incorrect.

In Lessley, the defendant broke down the door of his ex-girlfriend's parents' home in Seattle, brandished a revolver, and demanded to see his ex-girlfriend. 118 Wn. 2d at 775. While her father slipped out of the house to call the police, Lessley ordered

his ex-girlfriend and her mother into their car and forced his ex-girlfriend to drive to a house in Maple Valley. 118 Wn. 2d at 775. When they arrived, Lessley ordered the mother out of the car at gunpoint. 118 Wn. 2d at 775. He then drove toward North Bend, stopped the car, and assaulted his ex-girlfriend and threatened to shoot her. 118 Wn. 2d at 775. Lessley subsequently drove with his ex-girlfriend to another house in White Center, where police shortly thereafter arrested him. 118 Wn. 2d at 775.

Lessley pleaded guilty to burglary, kidnapping (for the abduction of the mother), kidnapping (for the abduction of his ex-girlfriend), and intimidating a witness. 118 Wn. 2d at 776. At sentencing, Lessley argued that the burglary and the kidnapping offenses encompassed the same criminal conduct because he entered the home intending to take his ex-girlfriend away with him. 118 Wn. 2d at 776.

The trial court disagreed, finding the burglary was completed when Lessley broke in and assaulted the three victims with the revolver, and the kidnappings were separate crimes. 118 Wn. 2d at 776. The State Supreme Court agreed, holding that Lessley's convictions for first degree burglary and first degree kidnapping did not encompass the same criminal conduct. 118 Wn. 2d at 776-77.

The Court explained:

In this case, the objective intent of Lessley's burglary was completed when he broke into the Thomas residence armed with a deadly weapon. . . . Objectively viewed, then, Lessley's criminal intent changed when he moved from the burglary to the kidnapping; the former did not further the latter. . . . Additionally, the "same time and place" element is unmet in this case. The burglary occurred in Seattle . . . while the first degree kidnapping was carried out over several hours' time in Seattle, Maple Valley, North Bend, and White Center. The burglary and the kidnapping were not confined to the same time and place. Finally, in this case, the burglary and the first degree kidnapping claimed more than one victim.

118 Wn. 2d at 778.

The Lessley Court did not hold that burglary and robbery are always two separate offenses. In fact, Lessley did not even involve the crime of robbery. Moreover, with regard to the facts, Lessley is completely dissimilar to this case. Unlike in Lessley, Mullen did not break a door or otherwise damage property in order to gain entrance to DeWitt's house; rather, the garage door was left fully open and Mullen entered without incident. (TRP 39, 88, 213, 317) Unlike in Lessley, the entire incident in this case occurred in one place, DeWitt's house. Unlike in Lessley, there was only one victim in this case, DeWitt. And unlike in Lessley, the burglary did further the second crime of robbery. So while Lessley is indeed

distinguishable, it does not support the trial court's conclusion that Mullen's two offenses are not the same criminal conduct.

As in Rienks, there was no "substantial change in the nature of the criminal objective" from one crime to the next. 46 Wn. App. at 543. And as in Davis, the burglary furthered the robbery and, therefore, Mullen had the same criminal intent for each crime. 90 Wn. App. at 782. The trial court's conclusion that Mullen's two offenses did not encompass the same criminal conduct was an error and an abuse of discretion.

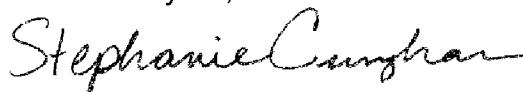
Furthermore, the burglary anti-merger statute, RCW 9A.52.050, provides that a sentencing court "may" punish burglary separately from other crimes, even if the crimes encompass the "same criminal conduct." The decision of whether or not to apply the anti-merger statute is discretionary, Lessley, 118 Wn.2d at 782. Mullen asked the court to exercise its discretion and not apply the anti-merger statute. (TRP 497; CP 110-11) But the trial court did not address this statute at sentencing. It is not clear from the record whether the court would have applied the statute if it had correctly concluded that the crimes encompassed the same criminal conduct. Therefore, this court should not apply the anti-merger statute on appeal.



**V. CONCLUSION**

There is no doubt that Mullen's objective intent throughout this incident was to recover money and property from DeWitt, and that the burglary furthered the robbery. The court's failure to find that Mullen's two offenses encompassed the same criminal conduct was an abuse of discretion, and Mullen's case should be remanded for resentencing.

DATED: July 22, 2013



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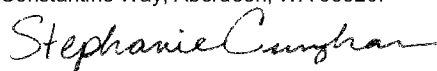
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**CERTIFICATE OF MAILING**

I certify that on 07/22/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Shawn E. Mullen, DOC# 860517, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

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