

COA No. 33073-7-III

FILED
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Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

RALPH E. WHITLOCK,

Appellant/Cross-Respondent.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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TABLE OF CONTENTS

I. COUNTER-STATEMENT OF ASSIGNMENT OF ERROR.....1

 1. The trial court’s findings of fact are verities on appeal as they are unchallenged and are supported by substantial evidence in any event.....1

 2. The trial court properly determined the crimes of first degree burglary and first degree robbery constituted the same criminal conduct.....1

II. COUNTER-STATEMENT OF THE CASE

III. ARGUMENT.....1

 A. The trial court’s findings of fact are verities on appeal as they are unchallenged and are supported by the evidence in any event.....1

 B. The trial court properly determined the crimes of first degree burglary and first degree robbery constituted the same criminal conduct.....1

IV. CONCLUSION.....4

TABLE OF AUTHORITIES

Table of Cases

McIntyre v. Fort Vancouver Plywood Corp., 24 Wn. App. 120, 600 P.2d 619 (1979).....2

State v. Davis, 90 Wn. App. 776, 954 P.2d 325 (1998).....3

State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013).....2, 3

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

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)..4

United Nursing Homes, Inc. v. McNutt, 35 Wn. App. 632,
669 P.2d 476, *review denied*, 100 Wn.2d 1030 (1983).....2

Statutes

RCW 9.94A.589(1)(a).....2, 3, 4

Rules

RAP 10.3 (g).....1

I. COUNTER-STATEMENT OF ASSIGNMENT OF ERROR

1. The trial court's findings of fact are verities on appeal as they are unchallenged and are supported by substantial evidence in any event.

2. The trial court properly determined the crimes of first degree burglary and first degree robbery constituted the same criminal conduct.

II. COUNTER-STATEMENT OF THE CASE

The State has not assigned error to any of the findings of the trial court so they are verities on appeal.

III. ARGUMENT

A. Because the State did not challenge any of the court's findings of fact, they are verities on appeal.

RAP 10.3(g) provides in relevant part:

. . . A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

The State did not comply with the rule so review is precluded. *United Nursing Homes, Inc. v. McNutt*, 35 Wn. App. 632, 634, 669 P.2d 476, *review denied*, 100 Wn.2d 1030 (1983). If

this court wishes to review the claimed error regarding same criminal conduct, its inquiry is limited to whether the unchallenged findings of fact support the conclusions of law. *McIntyre v. Fort Vancouver Plywood Co.*, 24 Wn. App. 120, 123, 600 P.2d 619 (1979).

B. The court properly determined the crimes of first degree burglary and first degree robbery constituted the same criminal conduct.

The State claims that the two crimes cannot be the same criminal conduct because they did not involve the same victim. It argues there were at least seven victims of the burglary and at least three victims of the robbery, *i.e.*, Tonya Routt, Damien Hester, Lisa Jones and/or Crista Ansel. (State's brief at 19). But the court was correct.

Under RCW 9.94A.589(1)(a), same criminal conduct means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This determination is left to the sound discretion of the trial court. *State v. Graciano*, 176 Wn.2d 531, 536-38, 295 P.3d 219 (2013).

The State itself noted that “the same criminal conduct test focuses on the extent to which a defendant’s criminal intent, as objectively viewed, changes from one crime to the next.” (State’s brief at 18, citing *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992)). Interestingly enough, the trial court focused exactly on that intent in finding the two crimes were the same criminal conduct:

“[T]he only reason for the burglary was to facilitate the robbery and so I think there is same criminal conduct under that analysis. (RP 699).

The only element at issue is whether the crimes involved the same victim. RCW 9.94A.589(1)(a). Even so, Tanya Routt, the tenant, Mr. Hester, and Ms. Ansel were the victims involved in both offenses. The other persons in the home were not the victims of those crimes so the court’s focus on the intent element was proper and not an abuse of discretion. *Graciano, supra*. Their mere presence in the home does not alone make them victims. See *State v. Davis*, 90 Wn. App. 776, 780, 954 P.2d 325 (1998).

Furthermore, the cases cited by the State are inapposite for the reasons stated in Mr. Johnson’s brief in response to the cross appeal. (Johnson reply brief at 4-5). Mr. Whitlock concurs and adopts Mr. Johnson’s arguments as well.

The court did not abuse its discretion in finding the crimes were the same criminal conduct as the decision was based on tenable grounds for tenable reasons and was legally sound. *Graciano, supra; State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

IV. CONCLUSION

Based on the foregoing, Mr. Whitlock respectfully urges this Court to affirm the decision of the trial court on the same criminal conduct issue.

DATED this 4th day of January, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 4, 2016, I served a copy of the Brief of Appellant/Cross-Respondent by USPS on Ralph Whitlock, # 877866, 1830 Eagle Crest Way, Clallam Bay, WA 98326; and by email, as agreed, on Curt Liedkie at lwebber@co.asotin.wa.us and Susan Gasch at gaschlaw@msn.com.


