

NO. 68914-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

SANDOR RIVERA,

Appellant.

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

The Honorable Cheryl Carey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by refusing to find the first degree robbery, first degree assault, and first degree burglary involved the same criminal conduct.

Issue Pertaining to Assignment of Error

After entering a locked Radio Shack store with the permission of the manager, Sandor Rivera assaulted the manager, subdued him, and forcibly took electronics items kept in a locked portion of an employee-only store room, from the manager's presence. Did the trial court err by rejecting Rivera's argument that the robbery, assault, and burglary offenses involved the same criminal conduct?

B. STATEMENT OF THE CASE

Gary Cook became the manager of a Federal Way Radio Shack store in December 2009. 3RP 11-12. That store, which had only "dummy" surveillance cameras that did not actually record anything, had been burglarized twice in a short time period. Shoplifting occurred almost daily and, according to Cook, it was easy to steal items from the store. 3RP 17-19. This was common knowledge among store employees. 3RP 18-19.

February 14, 2010, began as a typical Sunday for Cook. He arrived at the store at about 9:15 to prepare for the 10 a.m. opening. 3RP 24, 70-76. Sundays were minimum staffing days because of the typically low volume of business. 3RP 23. Cook opened the store alone and scheduled the first employee to arrive at about 10:30 or 11 a.m. 3RP 25, 77.

Cook parked in his usual spot near the store. 3RP 75. As he approached the store entrance, Cook observed a man standing near the door. The man said he was from a Radio Shack store in Auburn, gave the corresponding store number, and explained he was there for an "ICST," or intracompany stock transfer. 3RP 81-83, 85-86. ICSTs were part of the normal routine for Radio Shack employees. 3RP 87. Cook asked to see the man's identification, so he pulled his jacket back and displayed a Radio Shack name tag that said "Sandor." 3RP 90-91.

The man was the appellant, Sandor Rivera. 3RP 83. He had worked at the same Federal Way store as Cook from March 2009 until early November 2009. 2RP 67-70; 3RP 938-40, 1187-88. Cook did not know Rivera. 3RP 83. He would not have allowed Rivera to enter the store without a name tag. 3RP 92. Thinking Rivera was a legitimate employee on routine business, Cook unlocked the door and the two men went inside. 3RP 110-11. Rivera notified Cook he was there to pick up a

Blackberry cell phone. The phone was locked inside the "cage," an area of the stock room that contained more expensive items. 3RP 15-17, 114-15.

Cook crouched down to unlock the cage's lower lock when Rivera hit him hard in the back of the head with what felt like a flashlight or club. Two more blows immediately followed and Cook fell to the floor. 3RP 119-20. He crawled to a far corner, stood up, put up his hands, and said he was not going to fight and Rivera could take what he wanted. Cook then saw that Rivera was armed with a large-bladed knife. 3RP 121, 175-76. Cook touched the back of his head and felt bone. His hand was covered in blood. 3RP 121.

Rivera demanded Cook's personal keys and after receiving them, told Cook to lay face-down on the floor. 3RP 121-22. Cook complied. Rivera then removed a ring of store keys from Cook's belt. 3RP 122. He opened the "cage" and went inside. It sounded to Cook as if Rivera was putting items into plastic shopping bags. Rivera told Cook he was "[s]orry for this." 3RP 123. He left the cage area and returned with an ice bag and paper towels from the lunch area of the store room. He put the bag onto Cook's head and said something like the bag should slow the bleeding. 3RP 124.

Cook heard Rivera go out into the public part of the store for about two minutes. When he returned, Rivera zip-tied Cook's hands behind his back, his ankles together, and his elbows behind his back as he lay on the floor. 3RP 125-26. Rivera continued to apologize as he collected more items from inside the cage. He again briefly left the stock room and when he returned, he hit Cook two or three times in the back of the head. 1RP 127. Cook then felt a screwdriver tip tapping near his skull and thought he was going to be killed. Fighting hard, Cook snapped off all the zip-ties from his wrists and elbows, swung around, and knocked the screwdriver away. 3RP 128-30.

Rivera then helped Cook stand up and escorted him to the employee bathroom. Rivera had him kneel facing the toilet. He put a plastic shopping bag over Cook's head and zip-tied it around his neck. 3RP 131-32, 161. Rivera left and was gone for a longer time period than before. But when he returned, he hit Cook on the left side of the head with the knife. 3RP 132-33. Rivera then began apologizing again. 3RP 133.

Cook then felt the knife blade on his throat. 3RP 133-34. He pushed off the toilet, jumped up, and pulled a hole in the bag around his head. A struggle followed and both men fell down. 3RP 134. Rivera swung the knife around and struck all sides of Cook's head. 3RP 135-36.

Rivera then told Cook to return to the bathroom. Cook complied. Rivera obtained Cook's wallet, and had him remove his jacket and shoes. He pulled Cook's driver's license out of the wallet and said if Cook identified him as the assailant, he would have Cook's family killed. 3RP 138-39. Cook took the threat seriously. 3RP 139. Rivera closed the bathroom door. 3RP 136.

Time passed and Cook heard nothing. He opened the door, struggled to his desk in the store room, and dialed 911. He broke the zip tie around his neck with a pocket knife and passed out. 3RP 137-38. Police and fire personnel arrived quickly. RP 128, 140-42; 3RP 361-62, 447-50. Cook was taken to Harborview Medical Center. 3RP 385-90. He sustained two skull fractures and damage to his ear canal. 3RP 401-04. He took 60 staples and 20 stitches to his head. 3RP 181-82. He was discharged the following day. More than two years later, the scars and pain remained. He had trouble with his balance and was told not to drive. Cook also suffered from Post-Traumatic Stress Disorder than often kept him inside his house. 3RP 182.

Meanwhile, Rivera had left several bags of Radio Shack merchandise near the store's front exit door. 2RP 80-81; 3RP 189-93, 343-44. He took Cook's van and drove it away. 2RP 122-23, 3RP 208-09,

351-52. Police found the van February 16, 2010, in an unincorporated area of south King County. RP 820-26, 1083-90.

Cook initially told police he did not see his assailant. 3RP 122-23, 179-80, 230-32. Fearing Rivera's threat, Cook did not reveal his identity until his third interview with the police, which occurred on February 22. 3RP 215, 1092-93, 1098-1100.

Further investigation, including an examination of Rivera's MySpace account, led police to the Tacoma apartment of Scott Thompson. 3RP 694-96, 886-90. Thompson and Rivera were close friends. Rivera had been living at Thompson's apartment for about the previous month. 3RP 542-50. Before then, Rivera had lived with Brian Borelli. Thompson recalled Rivera gave him some reasons for why he felt uncomfortable living with Borelli. 3RP 600-02. Police obtained a search warrant for Thompson's apartment on February 25 and arrested Rivera without incident. 3RP 664-65, 696-98, 839-44, 890-92, 1102-09.

In a recorded interview with police, Rivera mentioned Borelli and police developed him as a suspect in the Radio Shack robbery. 3RP 896, 1158-60. Officers executed a search warrant for Borelli's Sumner residence on March 2. 3RP 855-57, 872. Borelli violently resisted his arrest and several officers were required to restrain him. 3RP 897-99, 920-

22. In a search of the residence, officers found three laptop computers, a television, a GPS unit, five digital cameras, and other electronics items. 3RP 899-914. In the trunk of Borelli's car, police found a prescription pill bottle with the name of one of Cook's children typed on the label. 3RP 919-20. Also found was an SKS assault rifle, magazine and ammunition. 3RP 862-63, 876, 900, 918-19.

After an initial stay at the downtown Seattle King County Jail, Rivera was transferred to the medical unit of the Regional Justice Center (RJC) on March 5, 2010. 3RP 1061-63. Michael Ranetta was moved to the RJC medical unit on April 27 and remained there until his release on June 14. 3RP 1065-66.

According to Ranetta, Rivera bragged about robbing a Radio Shack store where he used to work. He showed "everyone in there" newspaper accounts of the incident. 3RP 981-82, 988-89. Rivera purportedly revealed he and a friend with whom he lived planned the robbery. Rivera went to the store before it opened, pretended he was employed at another store, got inside, tied up the store employee, stabbed him several times in the back of the head with a knife, and made off with about \$5,000 worth of merchandise. Rivera told Ranetta he put a bag over the employee's head

and thought he was dead. 3RP 983-86. On the day of his release, Ranetta went to the police and reported what he had heard. 3RP 993-95, 1132-33.

Based on this evidence, the State charged Rivera with first degree assault, first degree robbery, witness intimidation, and first degree burglary. The State further alleged Rivera committed each crime while armed with a deadly weapon. CP 19-21.

Rivera's defense theory was that he acted under duress and while under the influence of something stronger than the marijuana Borelli had given to him earlier on the morning of February 14. 3RP 1551-62.

Rivera testified he lived on Whidbey Island with his sister until moving into Borelli's residence at the end of December 2009. 3RP 1186-88, 1190-94. But because he was not comfortable with Borelli's type of friends, Rivera moved in with Thompson in Tacoma near the end of January 2010. 3RP 1195-97. On February 13, however, Thompson asked if Rivera could spend the night elsewhere so he could have his apartment to himself and his girlfriend for Valentine's Day. After calling several friends without success, Rivera finally called Borelli, who said he could stay at his house for the night. 3RP 1199.

Thompson dropped Rivera at Borelli's home at about 6 p.m. Rivera, Borelli, and two of Borelli's friends drank, smoked marijuana, and

watched television. 3RP 1201-02. Rivera went to sleep after midnight. 3RP 1204. He woke up early the next morning, and the others were already up. He joined Borelli, who was smoking marijuana and watching TV. 3RP 1205.

After smoking for awhile, Borelli filled a bowl of what he called "snow cone." 3RP 1206. As he partook, Rivera realized there was something else in the bowl with the marijuana. 3RP 1206-09. He recalled it was "one of the best highs" he had ever experienced. 3RP 1206. At the same time, he felt "very unbalanced," as if he were stuck. 3RP 1209-10. He felt like he never had before and did not have full control over his thinking. 3RP 1215.

Borelli began making comments about committing crimes. 3RP 1208. Although Rivera did not initially believe Borelli was serious, it became apparent he was very serious. 3RP 1208-09. He asked Rivera if he wanted to rob Radio Shack and when the answer was no, Borelli became aggressive and starting talking about Rivera's family and calling him "worthless." 3RP 1211-12. At a certain point, Borelli told Rivera to "think quick if you like to breathe." 3RP 1214. Rivera took this as a threat to his life. 3RP 1214.

It only got worse. Borelli grabbed his SKS rifle, told Rivera to stand up, and pointed the weapon at him. Rivera had previously left his old Radio Shack name tag at Borelli's home, and Borelli ordered him to put it on. 3RP 1215-16. By now Rivera was "terrified." 3RP 1216. The two men got into Borelli's car and headed toward Federal Way. Borelli drove past the Radio Shack, turned into a cul de sac, and stopped in front of Rivera's family home. He told Rivera if he "fucked up," Borelli would "fuck up" his family. 3RP 1217. Rivera took this statement as meaning that if he did not comply with Borelli's orders, Borelli would kill his parents. 3RP 1220.

Borelli parked at the store next to Rivera's former Radio Shack store. He commanded Rivera to stand in front of the store, say whatever he had to say to get inside, have the employee turn the store alarm off, and knock him unconscious. He was then to grab as much merchandise as he could. 3RP 1223. After that, he was to take the employee's car, drive it to a designated area, and call Borelli. 3RP 1223-24.

Borelli said he would wait and watch the store until Rivera brought a bag of merchandise out and placed it in front of the store window. At that point he would drive back to the Rivera home and wait there. 3RP 1225. Rivera did as he was told. He remained "very unbalanced" from the

"snow cone," but successfully accompanied Cook into the store. 3RP 1228. He followed Cook back to the cage and as Cook bent down to unlock it, Rivera grabbed a shelving bracket and hit him three times in the back of the head. 3RP 1230-31.

At this point Rivera's version of events was substantially similar to Cook's. He opened the cage, filled a bag with merchandise, left the store room, and placed it near the window. Rivera then saw Borelli turn his car around and head toward Rivera's family home. 3RP 1231-33, 1366-67. Rivera knew Borelli was serious about what he said about the family. 3RP 1233.

Rivera continued filling bags with merchandise. He escorted Cook into the bathroom, zip-tied Cook, and placed a bag over his head. Cook pushed Rivera and both men fell. 3RP 1236-39. Rivera said he was leaving and directed Cook back into the bathroom. With Cook in the bathroom, Rivera loaded the stolen items into Cook's van and drove toward where Borelli had instructed him to go. 3RP 1240. He left bags of merchandise behind in the store because he panicked. 3RP 1391.

Once at the appointed location, Rivera called Borelli, who was directly behind the van. 3RP 1240-42. Rivera then followed Borelli and they stopped near where the van was found. Borelli transferred the stolen

Radio Shack merchandise from the van into his car. They got back into Borelli's car and Borelli drove toward his Sumner house. On the way, he warned Rivera that if he told the police what happened, he would kill him and Rivera's parents. 3RP 1242-45.

Once back at Borelli's home, Borelli directed Rivera to place everything he was wearing, as well as the shelving bracket he used as a weapon, into a bag. 3RP 1246. After Rivera showered and dressed, Borelli told him he would drive him to Thompson's Tacoma apartment. Rivera did not want Borelli to learn where Thompson lived. On the way, however, Rivera learned of a friend's party and had Borelli drop him off there. 3RP 483-84, 1246-47. During the party, Borelli sent a text message warning Rivera to keep his mouth shut. Rivera responded that he would. 3RP 1248-49, 1422-23.

The following morning, the host of the party gave Rivera a ride to Thompson's apartment. 3RP 499-502. Rivera said he "became a hermit" until he was arrested on February 25. 3RP 1250. He never saw Borelli again. 3RP 1430.

Rivera acknowledged spending jail time with Ranetta, but denied saying anything about the Radio Shack incident. 3RP 1353, 1434-35. Instead, Ranetta learned about the incident by calling a "paperwork check,"

which was a way for inmates to determine whether someone was a child molester or rapist. 3RP 1253-54, 1438. Producing the paperwork, i.e., legal documents related to the charge, was a way to defend oneself from becoming ostracized. 3RP 1254.

After hearing this evidence, the jury found Rivera guilty as charged. CP 100-08. At sentencing, the court rejected Rivera's argument that each crime was part of the same criminal conduct. CP 109-32; 3RP 1591-94. The court imposed concurrent, standard range terms for each offense, then added consecutive deadly weapon enhancements, for a 268-month total sentence. CP 133-40.

C. ARGUMENT

THE ASSAULT, ROBBERY AND BURGLARY INVOLVED THE SAME CRIMINAL CONDUCT.

Rivera committed the assault, robbery, and burglary at the same time and place, against the same victim, and without changing his objective intent. The crimes therefore involved the same criminal conduct and the trial court erred by ruling otherwise.

Unless two or more current crimes involve the same criminal conduct, each is counted in determining the offender score for the other offenses. 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." Id. A trial court's determination as to same criminal conduct is reviewed for an abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Starting with the time and place element, our Supreme Court has recognized that "the same time and place analysis applies . . . when there is a continuing sequence of criminal conduct." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); see State v. Williams, 135 Wn.2d 365, 368-69, 957 P.2d 216 (1998) (sale of 10 rocks of cocaine to one police informant, followed immediately and without interruption by same transaction with second informant, were same criminal conduct); State v. Porter, 133 Wn.2d 177, 183, 186, 942 P.2d 974 (1997) (rejecting "simultaneity" requirement, Court finds immediate, uninterrupted, sequential sales of methamphetamine and marijuana to same undercover officer occurred at same time).

In Rivera's case, the assault, robbery and burglary involved the same place (Radio Shack store room), the same time (morning of February 14) and the same victim (Cook). See State v. Webb, 112 Wn. App. 618, 624, 50 P.3d 654 (2002) (victims of the robberies were the clerks of the

two stores robbed); State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728 (2005) (robbery is both a property crime and a crime against the person).

The remaining question is whether the assault, robbery and burglary involved the same intent. In answering this question, this Court must determine the extent to which Rivera's objective intent changed from one crime to the next. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In this context, "intent" is not the mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990).

Factors include whether one crime furthered the other, whether one remained in progress when the other occurs, and whether the offenses were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996); State v. Edwards, 45 Wn. App. 378, 382, 725 P. 2d 442 (1986), overruled in part on other grounds, State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). Courts may also consider whether the defendant's primary motivation for

committing the crimes was the same or similar. See State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) (primary motivation for raping complainant with television antenna was to dominate and to cause pain and humiliation, which was arguably similar to the motivation for the kidnap).

Rivera assaulted Cook during the course of a continuing robbery. The assault furthered the robbery by keeping Cook at bay and preventing him from resisting Rivera, contacting police, or running out of the store. The primary motivation for both crimes was to steal and get away with as much merchandise as possible from Radio Shack. See State v. Phuong, COA No. 67524-9-I, 2013 WL 1729562, ¶ 85 (4/22/13) (Phuong's overall purpose in committing unlawful imprisonment and attempted rape was to rape complainant; Phuong dragged her from her car, through the garage, and upstairs to his bedroom in order to accomplish that purpose.).

In State v. Anderson,<sup>1</sup> this Court found an inmate's assault of a corrections officer was the same criminal conduct as his escape from the officer's custody because the assault furthered the escape. That reasoning applies here as well. Rivera's assault permitted him to rob the store and to

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<sup>1</sup> 72 Wn. App. 453, 464, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994).

flee without resistance. Rivera's objective criminal intent therefore did not change from the assault to the robbery.

Along similar lines, Rivera's intent did not change from the burglary to the assault and robbery. The burglary clearly furthered those crimes. With respect to robbery, this was not an instance in which Rivera simply intended to sneak into the store to steal merchandise. Instead, this was a planned forcible taking from the presence of the manager of the Radio Shack. Rivera's intent was not merely to commit a crime against property. The evidence shows he intended to commit robbery – a crime against a person and property.

With respect to the burglary, State v. Collins<sup>2</sup> is instructive. Collins had a limited invitation to enter the residence of two women so he could use the telephone. But he remained unlawfully, i.e., committed burglary, when he exceeded the scope of his invitation and committed rape and assault. 110 Wn. App. at 260-61. The Court held the burglary was the same criminal conduct because it was "committed in furtherance of the attacks and occurred at the same time and in the same place." Id. at 262-63.

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<sup>2</sup> 110 Wn.2d 253, 751 P.2d 837 (1988).

As in Collins, Rivera had a limited invitation to come into the store with Cook. He only exceeded the scope of his privilege, thereby committing burglary, when he assaulted Cook and robbed him. The burglary, robbery and assault were part of a continuing criminal episode and were motivated by a desire to steal merchandise. See

Finally, the trial court has discretion despite the burglary anti-merger statute<sup>3</sup> to treat burglary and other offenses as the same criminal conduct. State v. Davis, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998). Separate punishment is not mandatory. The discussion above indicates the trial court abused its discretion by treating the burglary, assault and robbery as separate offenses.

The burglary, robbery and assault involved the same criminal conduct. The trial court abused its discretion by finding to the contrary. This Court should reverse the court's decision and remand for resentencing for these crimes with the correct offender score.

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<sup>3</sup> RCW 9A.52.050 provides in relevant part, “[e]very 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.”

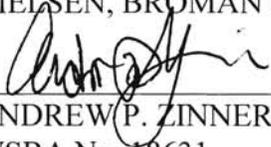
D. CONCLUSION

For the above reasons, this Court should find the assault, robbery, and burglary convictions involved the same criminal conduct, reverse the sentences for those crimes, and remand for resentencing using the corrected offender scores.

DATED this 30 day of April 2013.

Respectfully submitted,

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

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STATE OF WASHINGTON	)	
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Respondent,	)	
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v.	)	COA NO. 68914-2-1
	)	
SANDOR RIVERA,	)	
	)	
Appellant.	)	

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**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 30<sup>TH</sup> DAY OF APRIL 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL

[X] SANDOR RIVERA  
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CLALLAM BAY CORRECTIONS CENTER  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF APRIL 2013.

X *Patrick Mayovsky*

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