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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

Gregory Wilson, Jr.,

Respondent.

Clallam County Superior Court

Cause No. 05-1-00383-8

The Honorable Judge George Wood

Response Brief

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STATEMENT OF ISSUES

Gregory Wilson, Jr. was charged with Burglary in the First Degree, Assault in Violation of a No Contact Order, and Harassment. The prosecution alleged that Mr. Wilson assaulted his girlfriend in his own home while there was an order preventing contact between the two of them. The order did not restrict Mr. Wilson from his home.

1. Did the trial court correctly decide that an assault in violation of a no contact order is not automatically transformed into a first-degree burglary simply because it takes place in a building?

2. Did the trial court correctly dismiss the charge of burglary in the first degree?

The trial court found that the assault charge and the harassment charge occurred at the same time and place, involved the same victim, and involved the same criminal intent. Accordingly, the trial court determined that they were the same criminal conduct. The prosecution challenges the trial court's determination that the crimes involved the same criminal intent.

3. Did the trial court act within its discretion in determining that the assault and the harassment charges involved the same criminal intent?

4. Did the trial court act within its discretion in determining that the assault and the harassment charges were the same criminal conduct?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mr. Wilson accepts (for purposes of this brief) the state's recitation of the facts and procedures with the following additions. The defendant brought a motion to dismiss the charge of Burglary in the First Degree at the close of the state's evidence on November 2, 2005. RP (11-2-05) 11-16. At the prosecutor's request, the court deferred ruling. RP (11-2-05) 43-53. On November 9, the court set aside the verdict and dismissed the burglary charge. RP (11-9-06) 13-17.

Although Charlene Sanders' address was documented on the No Contact Order, it was listed along with her identifying information, and not among the possible restrictions. CP 40-41.

When Ms. Sanders was asked with whom she resided, she said her daughter and best friend (Gregory Wilson). RP (10-31-05) 45. Mr. Wilson had been living at the house for six months at the time of the incident. RP (10-31-05) 45, 49, 67, 72. Mr. Wilson had keys to the house, and Ms. Saunders considered it "our house." RP (10-31-05) 72, 73.

ARGUMENT

I. MR. WILSON DID NOT COMMIT BURGLARY BECAUSE HE DID NOT ENTER OR REMAIN UNLAWFULLY IN A BUILDING.

A person is guilty of burglary in the first degree if “with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building... assaults any person.” RCW 9A.52.020. A person enters or remains unlawfully “when he is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010.

Without citation to authority, the prosecution asserts that a person can be guilty of entering or remaining unlawfully in his or her own residence, despite having a license to so enter or remain. The state is unable to cite a single case in which the defendant was found to have unlawfully entered or remained in a house she was occupying (except where a no contact order specifically barred the defendant from the house, *see, e.g., State v. Stinton*, 121 Wn.App. 569, 89 P.3d 717 (2004); *State v. Spencer*, 128 Wn. App. 132, 114 P.3d 1222 (2005)). Where no authority is cited, this court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001). Curiously, the prosecution does not even refer to the

definition of the phrase “enters or remains unlawfully” contained in RCW 9A.52.010.

The state compares this case to *State v. Schneider*, 36 Wn.App. 237, 673 P.2d 200 (1983). In *Schneider*, the defendant hired teenage boys to break into her estranged husband’s house and kill him. After being charged as an accomplice to burglary, she claimed the boys’ entry was lawful because the home was community property and she had an ownership interest in the house. Division One disagreed, and held that the standard for evaluating lawfulness hinged on occupancy, not ownership. *Schneider*, at 241.

In this case, Mr. Wilson resided at the house he was alleged to have burglarized. He was on the lease, he’d lived there continuously for at least six months, and there was no order barring him from the house. RP (10-31-05) 45, 49, 67, 72-73; CP 40-41. Unlike the defendant in *Schneider*, Mr. Wilson was an occupant of the house at the time of the alleged crime. Accordingly, he had a license or privilege to enter and remain at the property, and could not be guilty of burglary.

Despite this, the state argues that he remained unlawfully at the residence because there was a no contact order preventing him from having contact with Charlene Sanders. Under the prosecution’s theory, an assault in violation of a no contact order is always a burglary if it occurs

within a building-- whether the building is the defendant's private residence, a grocery store, a friend's house, or a field enclosed by a fence. *See* RCW 9A.04.110(5). There is no justification either in caselaw or statute for this astounding stretch of the burglary. Accordingly, the trial court's order dismissing the burglary charge must be affirmed.

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN CONCLUDING THAT THE ASSAULT AND HARASSMENT CHARGES INVOLVED THE SAME CRIMINAL CONDUCT.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. Where a person is sentenced for two or more current offenses, each offense counts separately unless "the court enters a finding that some or all of the current offenses encompass the same criminal conduct," in which case "those current offenses shall be counted as one crime." RCW 9.94A.589. 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.

When reviewing a trial court's determination of "same criminal conduct," an appellate court will generally defer to the discretion of the sentencing court, and will reverse only if there is a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3P.3d 733 (2000).

In this case, Mr. Wilson's two crimes -- assaulting Ms. Sanders and threatening to kill her-- occurred at the same time and place, involved the same victim and the same overall criminal intent. They were part of one "continuing, uninterrupted sequence of conduct." *State v. Porter*, 133 Wn.2d 177 at 186, 942 P.2d 974 (1997). Accordingly, the trial court was correct in concluding that they comprised the same criminal conduct.

The state has conceded that Mr. Wilson's criminal activity occurred at the same place and involved the same victim. The state characterizes the crimes as "sequential" rather than simultaneous, but does not dispute that they occurred at the "same time" for purposes of the same criminal conduct analysis. Brief of Respondent, p. 25. Instead, the state contends only that Mr. Wilson's intent changed from one crime to the next, focusing on whether or not one crime furthered the other. Brief of Respondent, pp. 25-29.

This approach is incorrect. As the Supreme Court stated in *Haddock, supra*,

the "furtherance test" was never meant to be and never has been the linchpin of this court's analysis of "same criminal conduct." See [*State v.*] *Dunaway*, 109 Wn.2d [207] at 215[, 743 P.2d 1237 (1987)], ("part of this analysis [of criminal intent] will often include the related issues of whether one crime furthered the other").
Haddock, at 103.

With its myopic focus on whether or not one crime furthered the other, the prosecution has failed to apply the general test for the same intent prong of the “same criminal conduct” determination: the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *State v. Vike*, 125 Wn.2d 407 at 411, 885 P.2d 824 (1994); *State v. Williams*, 135 Wn.2d 365 at 368, 957 P.2d 216 (1998).

Here, when objectively viewed, Mr. Wilson’s criminal intent (under the evidence presented by the state) was to intimidate and inflict violence upon Ms. Sanders. To accomplish this, he assaulted her and he threatened to kill her. Both crimes furthered his objective criminal intent. Accordingly, the trial court did not abuse its discretion in finding that the two crimes comprised the same criminal conduct. The Judgment and Sentence should therefore be affirmed. *Haddock, supra*.

CONCLUSION

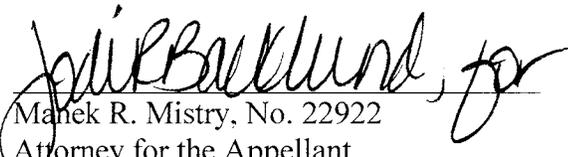
For the foregoing reasons, this court should affirm the trial court's decision dismissing the burglary charge, and should affirm the trial court's determination that the assault and harassment charges comprised the same criminal conduct.

Respectfully submitted on July 13, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Respondent's Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 13, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 13, 2006.


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