

No. 38862-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JASON KOSTRACH-TREMBLAY,

Appellant.

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STATE OF WASHINGTON
BY _____
MINDY M. ATER
COURT OF APPEALS
DIVISION II

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

The Honorable Craddock Verser

REPLY BRIEF OF APPELLANT

MINDY M. ATER
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WASHINGTON APPELLATE PROJECT
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A. ARGUMENT

THE TRIAL COURT IMPROPERLY CALCULATED
MR. KOSTRACH'S OFFENDER SCORE BECAUSE
THE BURGLARY AND ASSAULT ENCOMPASSED
THE SAME CRIMINAL CONDUCT

1. The burglary and assault encompass the same criminal conduct because they involved the same victim, the same criminal intent, and were committed at the same time and place. In his opening brief, Jason Kostrach-Tremblay (known as Jason Kostrach) argued that the sentencing court improperly calculated his offender score because it failed to count the first-degree burglary and the assault as the same criminal conduct. App. Br. at 4-9. Because the burglary was committed in furtherance of the assault, with the same intent against the same victim in the same place and at the same time, the burglary and assault encompass the same criminal conduct. RCW 9.94A.589(1)(a); State v. Dunaway, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987).

The State responds by arguing that the burglary and assault involved different victims because Mr. Kostrach entered the residence of Mr. Smith and assaulted Mr. Graham. Br. of Resp. at 8-9. The State, without citing any legal authority, assumes that the victim of a burglary is the owner of the building the perpetrator

entered. Br. of Resp. at 9. However, this assumption lacks support.

The first-degree burglary statute provides in relevant part:

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 or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020. Thus, the criminal intent involved in the crime of first-degree burglary is directed toward the person the perpetrator commits a crime against while inside the building. The statute makes no mention of the person who owns the building. Here, the State charged Mr. Kostrach with first-degree burglary based on the assault against Mr. Graham. CP 9 (amended Information), 25 (jury instructions). Therefore, Mr. Graham was the victim of both the burglary and the assault.

The State then argues that the burglary and assault involved different intents. Br. of Resp. at 9. However, the State recognizes that “the facts show Mr. Kostrach-Tremblay went to Mr. Smith’s residence with the intent to assault Mr. Graham,” and “the intent to burglarize Mr. Smith was apparently formed on the spur of the

moment and coexisted with the intent to assault Mr. Graham.” Br. of Resp. at 9.

The State does not clarify why the intent involved in the burglary is different from the intent involved in the assault. The only intent required to prove that a person committed first-degree burglary is the intent to commit a crime against a person inside a building. RCW 9A.52.020. Here, it is clear from Mr. Kostrach’s actions that he entered Mr. Smith’s residence in order to assault Mr. Kostrach. When he entered the residence, he immediately asked whether the person on the couch was Davey Graham, and began punching Mr. Graham. RP 43-44, 48-49. Thus, the intent involved in the burglary and the assault were the same – to assault Mr. Graham.

Because the burglary and assault involved the same victim, the same intent, and were committed in the same time and place, the two crimes constitute the same criminal conduct under RCW 9.94A.589(1)(a). Therefore, the sentencing court should have counted these crimes as one crime for purposes of calculating Mr. Kostrach’s offender score.

2. The trial court abused its discretion when it concluded that application of the burglary anti-merger statute was mandatory. In his opening brief, Mr. Kostrach argued that because the application of the burglary anti-merger statute is discretionary and must be based on the need for a proportional sentence, the trial court abused its discretion when it found that the burglary anti-merger statute required that the crimes be punished separately. App. Op. Br. at 9-11, citing State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992).

The State first argues that the Lessley Court's holding is mere dicta. Br. of Resp. at 11. However, the Lessley Court used the word "hold" when it established that application of the burglary anti-merger statute is discretionary:

We believe the better approach is to *hold* the antimerger statute gives the sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct.

Lessley, 118 Wn.2d at 781 (emphasis added).

The State then responds by arguing that the sentencing court also considered other cases before it concluded that the burglary anti-merger statute "says you're supposed to punish all these crimes separately." Br. of Resp. at 11, quoting RP 416-17.

Even so, the court did not consider the fact that application of the burglary anti-merger statute was discretionary, not mandatory. RP 416-17. The court did not consider the fact that the standard range for first-degree burglary already includes additional punishment for the underlying assault, nor evaluate whether the application of the burglary anti-merger statute was necessary to render a proportionate sentence. Id. Rather, the court unquestioningly applied the burglary anti-merger statute, reasoning that it “says you’re *supposed* to punish all these crimes separately.” Id.

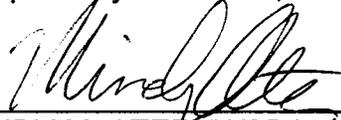
Therefore, the court’s application of the burglary anti-merger statute was based on an erroneous interpretation of the law, and constitutes abuse of discretion. State v. Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005) (citing City of Kennewick v. Day, 142 Wn.2d 1, 8, 11 P.3d 304 (2000)).

B. CONCLUSION

For the above reasons, Mr. Kostrach respectfully requests this Court reverse the calculation of his offender score and remand for re-sentencing.

DATED this 28th day of August 2009.

Respectfully submitted,



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DECLARATION OF SERVICE

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

1. THAT ON THE 28TH DAY OF AUGUST, 2009, A COPY OF APPELLANT'S REPLY BRIEF WAS SERVED ON THE PARTIES BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

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STATE OF WASHINGTON
BY  DEPUTY CLERK
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COURT OF APPEALS
DIVISION II

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF AUGUST, 2009

X  _____