

No. 47648-7-II
Consolidated with No. 48748-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

ROBERT OSTASZEWSKI,
Appellant.

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

The Honorable Jennifer A. Forbes, Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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I.
SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred in finding that Count 2, first-degree assault, and Count 3, drive-by shooting, are not the same criminal conduct.

II.
SUPPLEMENTAL ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Where the first degree assault and the drive-by shooting took place on the same day against the same victim with the same criminal intent, are they the same criminal conduct?

III.
SUPPLEMENTAL STATEMENT OF THE CASE

On April 29, 2015, Robert Ostaszewski filed a motion for new trial alleging that trial counsel was ineffective for failing to argue that Count 2, assault in the first degree, was the same criminal conduct as Count 3, drive-by shooting. A hearing was held and the State agreed that trial counsel simply missed the issue and that there was no strategic decision to avoid the argument. 2/25/16 RP 13-14. After argument, the trial court considered the legal issue. 2/15/14 RP 26-27. The trial judge later issued a brief order finding that the two counts were not the same criminal conduct. CP 170-74.

IV.
SUPPLEMENTAL ARGUMENT

As argued in Ostaszewski's Opening Brief, the trial court's ruling is incorrect. Multiple current offenses are presumptively counted separately in determining a defendant's offender score unless the trial court finds that current offenses encompass the "same criminal conduct." RCW 9.94A.589(1)(a). Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The legislature intended the phrase "same criminal conduct" to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If any one of the factors is missing, the multiple offenses do not encompass the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Moreover, because a finding by the sentencing court of same criminal conduct always favors the defendant, "it is the defendant who must establish [that] the crimes constitute the same criminal conduct." *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219, 223 (2013).

The intent inquiry in regard to the "same criminal conduct" focuses on the extent to which the offender's "criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), *suppl.*, 749 P.2d 160 (Jan. 28,

1988). Although the statute is generally construed narrowly, the analysis does not focus on the mens rea element of the particular crime, but on the defendant's objective criminal purpose. 13B Wash. Prac., Criminal Law § 3510 (2015-2016 ed.). Thus, the Supreme Court held that simultaneous delivery or possession with intent to deliver two different drugs constitutes the same criminal conduct. *State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993).

Bowman v. State, 162 Wn.2d 325, 172 P.3d 681 (2007), is not a "same criminal conduct" case. The analysis there had to do with a question of felony murder and the merger of two kinds of assault. But the Supreme Court has said that there is a distinction between the "same criminal conduct" inquiry and the doctrine of merger. Both merger and "same criminal conduct" avoid double punishment for the same acts. But each does so in a different way. *State v. Collicott*, 118 Wn.2d 649, 668-69, 827 P.2d 263 (1992); David Boerner, Sentencing in Washington sec. 5.8(a), at 5-17 (1985); Joseph P. Bennett, Note, The "Same Criminal Conduct" Exception of the Washington Sentencing Reform Act: Making the Punishment Fit the Crimes, 65 Wash.L.Rev. 397, 398 (1990). Thus, *Bowman* has no application here.

For purposes of the same criminal conduct analysis, the question is not whether the same two crimes contain identical legal definitions of the

“intent.” The question is whether one crime furthered the overall criminal purpose. *Garza-Villarreal*, 123 Wn.2d at 49. Objectively viewed, Ostaszewski’s intent was the same as to all of the shots fired. In his view, it was to protect himself.

The State’s theory was that Ostaszewski intended to kill the victim. In fact, the State failed to distinguish in the amended information, CP 6-11, or in the jury instructions, CP 54-97, which act was the assault and which act constituted the drive-by shooting. There was no *Petrich*¹ instruction and the State did not formally elect one shot as opposed to the other. Under the jury instructions, the jury could have found that the same shot constituted both the first degree assault and the drive-by shooting. As a practical matter, then, these two counts involved the “same criminal purpose.”

The State now makes the argument that, in closing, the State suggested a manner by which the jury might have allocated the gunshots. But that “election” was only the State’s theory made briefly in closing. Argument is neither evidence nor a jury instruction. The State did not propose any special interrogatories asking the jurors to distinguish

¹ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

between the shots. Moreover, there was no evidence that anyone – other than Mr. Johannessen – was placed in substantial risk.

Finally, the affirmative defense instructions told the jury that Ostaszewski could have been acting in self-defense in regard to the drive-by shooting. Those instructions can only be understood in relationship to Johannessen – the man who said “If you don’t shoot me now, I am going to climb in there and beat the ever-living ‘F’ out of you” – and not as to some generalized risk to unidentified others.

Here, the State wants it both ways. It did not want to make an election because that would have limited the jury’s consideration to which shot constituted the intent to kill, which one was the assault, and which was the drive-by shooting. Moreover, the State wanted to be able to leave the jury an out to convict Ostaszewski if the jury rejected the intent to kill or accepted that the first shot was in self-defense and the remaining two shots were simply excessive force. Now, the State wants to argue that, in fact, it did make that election in order to avoid the application of some criminal conduct principles. This Court should reject those arguments.

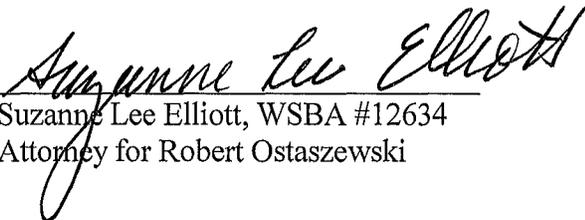
Because this was a meritorious issue and counsel’s failure to raise it prejudiced Ostaszewski, his sentence should be reversed.

V.
CONCLUSION

For the reasons stated in appellant's opening brief and this supplemental brief, his conviction and sentence should be reversed.

DATED this 6 day of July, 2016.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, and by email where indicated, one copy of this brief on the following:

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