

FILED

NOV 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 29931-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

CHRISTIAN VERN WILLIAMS, Appellant.

BRIEF OF APPELLANT

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Spokane, WA 99201
(509) 220-2237

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR

A. The State’s evidence was insufficient to support Christian Vern Williams’ convictions for first degree trafficking in stolen property and residential burglary1

B. The court erred by refusing to consider whether prior convictions for burglary and robbery committed on the same date were the same criminal conduct for purposes of calculating his offender score.....1

C. The court erred by refusing to consider whether the current convictions for burglary and trafficking in stolen property were the same criminal conduct for purposes of calculating his offender score.....1

Issues Pertaining to Assignments of Error

1. Was the State’s evidence sufficient to support Mr. Williams’ convictions of first degree trafficking in stolen property and residential burglary? (Assignment of Error A).....1

2. Did the court err by refusing to consider whether prior convictions for burglary and robbery committed on the same date were the same criminal conduct for purposes of calculating the offender score? (Assignment of Error B).....1

3. Did the court err by refusing to consider whether the current burglary and trafficking in stolen property convictions were the same criminal conduct for purposes of calculating the offender score? (Assignment of Error C).....2

II. STATEMENT OF THE CASE.....2

III. ARGUMENT.....5

 A. The evidence was insufficient to support the convictions for first degree trafficking in stolen property and residential burglary.....5

 B. The court erred by refusing to consider whether prior convictions for burglary and robbery committed on the same date were the same criminal conduct for purposes of calculating the offender score.....7

 C. The court erred by refusing to consider whether the current convictions for residential burglary and trafficking in stolen property were the same criminal conduct for purposes of calculating the offender score.....9

IV. CONCLUSION.....11

TABLE OF AUTHORITIES

Table of Cases

Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 976 P.2d 643 (1999).....9, 10

State v. Colquitt, 133 Wn. App., 789, 137 P.3d 892 (2006).....5

State v. Davis, 90 Wn. App. 776, 954 P.2d 325 (1998).....9

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987).....10

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....5, 6

State v. Hutton, 7 Wn. App. 726, 502 P.2d 1037 (1972).....6

State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992)..8, 9, 10

State v. Luna, 71 Wn. App. 755, 862 P.2d 620 (1993).....6

State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001).....9

State v. Rodriguez, 78 Wn. App. 769, 898 P.2d 871
(1995), *review denied*, 128 Wn.2d 1015 (1996)..... 5

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005).. 5

State v. Walker, 143 Wn. App. 880, 181 P.3d 31 (2008).....10

Statutes

RCW 9.94A.400(1)(a).....8

RCW 9.94A.525(5)(a)(i).....8, 9, 10

RCW 9.94A.589(a)(1).....8, 10

RCW 9A.52.050.....7, 8

I. ASSIGNMENTS OF ERROR

A. The State's evidence was insufficient to support Christian Vern Williams' convictions for first degree trafficking in stolen property and residential burglary.

B. The court erred by refusing to consider whether prior convictions for burglary and robbery committed on the same date were the same criminal conduct for purposes of calculating his offender score.

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Issues Pertaining to Assignments of Error

1. Was the State's evidence sufficient to support Mr. Williams' convictions for first degree trafficking in stolen property and residential burglary? (Assignment of Error A).

2. Did the court err by refusing to consider whether prior convictions for burglary and robbery committed on the same date were the same criminal conduct for purposes of calculating the offender score? (Assignment of Error B).

3. Did the court err by refusing to consider whether the current burglary and trafficking in stolen property convictions were the same criminal conduct for purposes of calculating the offender score? (Assignment of Error C).

II. STATEMENT OF THE CASE

Mr. Williams was charged by information with one count of first degree trafficking in stolen property and one count of residential burglary. (CP 1). The case proceeded to jury trial.

Nichole Bradshaw and Beau Larsen are married and live at 845 E. 1st in Colville, Washington. (10/13/10 RP 52). Around 7 a.m. on April 12, 2010, Christian Vern Williams stopped by their home and visited with Mr. Larsen. (*Id.* at 67, 68). They had been friends since they were kids. (*Id.* at 64). Mr. Williams had lived with Ms. Bradshaw and Mr. Larsen for awhile. (*Id.* at 53, 65). Mr. Larsen had to leave for work and Mr. Williams left about the same time. (*Id.* at 69). Mr. Williams was driving a black Mustang. Another person was in the car, but did not come into the home. (*Id.*).

Ms. Bradshaw had been sleeping while the two men conversed. (10/13/10 RP 53, 54). She awoke when Mr. Larsen left in his truck around 7:30 a.m. (*Id.* at 54). Ms. Bradshaw left the

home for 10 minutes to take the kids to school. (*Id.* at 54-56).

Upon returning, she noticed her jewelry box was missing and off the dresser. (*Id.* at 56). Things did not seem right so she went to Mr. Larsen's workplace to see whether he had moved the jewelry box and to tell him stuff was out of place at the house. (*Id.* at 57-58, 70). He told her he had not messed with the jewelry box and she should go back and look around. (*Id.*).

Ms. Bradshaw noticed Mr. Larsen's remote control (RC) car was gone. (10/13/10 RP 58-59). She also saw some tools were missing. (*Id.* at 59). Mr. Larsen later confirmed his RC car, a few tools (including a saw), and an empty pill bottle taken from his tool box were missing along with the jewelry box. (*Id.* at 75).

Mr. Larsen left work at 8:30 a.m. to check the house. (10/13/10 RP 70-71). On his way home, he went by the pawn shop and saw Mr. Williams' black Mustang parked outside. Mr. Larsen rolled up behind the car and blocked it in. (*Id.* at 72). He saw some of his stuff in the back seat and asked for it back. (*Id.*). He grabbed the keys out of the Mustang's ignition. (*Id.*). Mr. Williams told him it was wrong and gave Mr. Larsen his tools, the RC car, and the jewelry box. (*Id.* at 73). The other person, Arthur Jones, was not in the car. (*Id.* at 73, 74). Mr. Jones walked around the

corner of the pawn shop. (*Id.* at 73). He was the only one coming out of there. (*Id.* at 79). Mr. Larsen let them both go. (*Id.* at 74).

After getting off work, Mr. Larsen went into the pawn shop. (10/13/10 RP 75). He recovered more of his tools. (*Id.* at 76). The empty pill box that was taken from his tool box was an old prescription with his name on it. (*Id.* at 77).

Barron Lundberg, a pawn broker, did a transaction around 9:30 a.m. on April 12, 2010, where Mr. Jones pawned an electric impact wrench and a Skil worm drive saw for \$40. (10/13/10 RP 81, 85, 88). Mr. Williams was not on the pawn ticket. (*Id.* at 88).

Colville Police Officer Rex Newport was on duty on April 12, 2010, and arrested Mr. Williams at 3 pm. that day. (10/13/10 RP 91, 92). When searching the Mustang, the officer found an empty pill bottle with Mr. Larsen's name on it in the center console and some jewelry. (*Id.* at 95). He had arrested Mr. Jones earlier in the day. (*Id.* at 95, 97).

At the end of the State's case, the defense moved to dismiss both counts, but the court denied the motion. (10/13/10 RP 105-111). Mr. Williams rested without calling any witnesses. (*Id.* at 118). He was convicted as charged. (CP 103, 104, 111). This appeal follows. (CP 126).

III. ARGUMENT

A. The evidence was insufficient to support the convictions for first degree trafficking in stolen property and residential burglary.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005). The defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006).

As for the trafficking, Mr. Williams was in his automobile and did not enter the pawn shop. Arthur Jones was the person who went in, pawned some tools, and got \$40 for them. Other than his mere presence near the pawn shop, Mr. Williams had no connection with the trafficking charge.

Although an information that charges an accused as a principal adequately apprises him of his potential liability as an accomplice, *State v. Rodriguez*, 78 Wn. App. 769, 773-74, 898 P.2d 871 (1995), *review denied*, 128 Wn.2d 1015 (1996), the

accused's mere presence at the scene of a crime, even if coupled with assent to it, is insufficient to prove complicity. The State must prove the defendant was ready to assist in the crime. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Here, the State showed only Mr. Williams' presence near the pawn shop. Even if he agreed to pawning the tools, his mere presence and assent do not prove he was an accomplice. *Id.* Mr. Williams neither was ready to assist in the trafficking nor did he so assist Mr. Jones. Indeed, he returned Mr. Larsen's items to him. In these circumstances, the State's evidence did not prove beyond a reasonable doubt that Mr. Williams was guilty of first degree trafficking in stolen property as an accomplice. *Luna, supra.*

By the same token, the State's evidence was also insufficient to support the residential burglary conviction. The evidence was entirely circumstantial. The defense theory at trial was that Mr. Jones was the culprit. No facts established beyond a reasonable doubt that Mr. Williams entered the home unlawfully and took the items. *Green*, 94 Wn.2d at 220-21. The existence of facts cannot be based on guess, speculation, or conjecture by a fact finder. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). But the jury improperly based its guilty verdict on

speculation. His conviction for residential burglary must be reversed.

B. The court erred by refusing to consider whether prior convictions for burglary and robbery committed on the same date were the same criminal conduct for purposes of calculating the offender score.

Mr. Williams was convicted in Stevens County of first degree robbery and first degree burglary, both of which were committed on December 25, 2003. (CP 113). The defense argued at sentencing that these were the same criminal conduct. (11/16/10 RP 9). Relying solely on the burglary anti-merger statute, RCW 9A.52.050, the court determined they could not constitute the same criminal conduct and counted them separately in calculating the offender score. (11/16/10 RP 11-12).

The sentencing court in 2004 apparently found the robbery and burglary, both committed on December 25, 2003, were the same criminal conduct and counted as one crime since it used an offender score of 3 for each offense and did not count one against the other. (11/16/10 RP 9). Although the 2004 judgment and sentence was not made part of the record, the State did not disagree with the defense on this point. Under RCW

9.94A.525(5)(a)(i), the current sentencing court “shall determine with respect to other prior adult offenses for which sentences were served concurrently . . . , whether those offenses shall be counted as one offense or as separate offenses using the ‘same criminal conduct’ analysis found in RCW 9.94A.589(1)(a). . . .”

But the court here failed to use that analysis. (11/16/10 RP 11-12). RCW 9.94A.589(1)(a) defines “same criminal conduct” as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” These factors were not taken into consideration at all. Rather, the court relied on the burglary anti-merger statute, RCW 9A.52.050: “Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.” Although the analysis under that statute is similar in some respects, it is not the same as and consideration must also be given to RCW 9.94A.589(1)(a). See *State v. Lessley*, 118 Wn.2d 773, 827 P.2d 996 (1992) (involving former RCW 9.94A.400(1)(a), now recodified as RCW 9.94A.589(1)(a)). Indeed, the trial court has discretion to refuse to apply the burglary anti-merger statute based on the facts

before it. *Lessley*, 118 Wn.2d at 781-82; *State v. Davis*, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998).

The court abused its discretion by misapplying the law as it failed to follow the dictates of RCW 9.94A.525(5)(a)(i). *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Indeed, the court exercised no discretion at all because it concluded application of the burglary anti-merger statute was mandatory and prevented the offenses here from being the same criminal conduct. (11/16/10 RP 11-12). But it did have the discretion to apply or not to apply the statute. *Lessley*, 118 Wn.2d at 781. Discretion unexercised is discretion abused. *Bowcutt v. Delta N. Star. Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999). The case must be remanded for resentencing.

C. The court erred by refusing to consider whether the current convictions for residential burglary and trafficking in stolen property were the same criminal conduct for purposes of calculating the offender score.

The sentencing court again concluded application of the burglary anti-merger statute was mandatory so the convictions for residential burglary and trafficking could not constitute the same criminal conduct. The court, however, did have discretion to apply

or not to apply the statute. *Lessley*, 118 Wn.2d at 781; *Davis*, 90 Wn. App. at 783-84. Although required by RCW 9.94A.525(1)(a), it failed to use the analysis in RCW 9.94A.589(1)(a). By misapplying the law, the court abused its discretion and remand for resentencing is warranted. *Neal, supra*. Moreover, the court did not exercise any discretion at all, and thus abused it, by concluding the burglary anti-merger statute was mandatory. *Bowcutt*, 95 Wn. App. at 320.

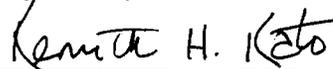
In any event, the burglary and trafficking were the same criminal conduct as they involved the same criminal intent, were committed at the same time and place, and involved the same victims. RCW 9.94A.589(1)(a). The burglary furthered the trafficking for without one, there was no other. The events flowed from one to the other both in time and place. The victims were Mr. Larsen and Ms. Bradshaw as the items were pawned with no title being transferred. See *State v. Walker*, 143 Wn. App. 880, 891-92, 181 P.3d 31 (2008). Accordingly, Mr. Williams' criminal purpose or intent did not change and the offenses encompass the same criminal conduct. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). The court erred by refusing to so find. The case should be remanded for resentencing.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Williams respectfully urges this Court to reverse his convictions and dismiss the charges or remand for new trial or resentencing.

DATED this 3rd day of November, 2011.

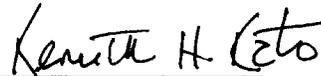
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on November 3, 2011, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Christian V. Williams, #868479, 1313 N. 13th Ave., Walla Walla, WA 99362; and on Timothy Rasmussen, Stevens County Prosecutor, 215 S. Oak St., Colville, WA 99114-2862.



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