

64346-1

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COA NO. 64346-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIE RAINEY,

Appellant.

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

The Honorable Alan R. Hancock, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in failing to exercise its discretion in determining whether to treat burglary and the assault as the "same criminal conduct" for offender score purposes.

Issue Pertaining to Assignment of Error

Appellant was convicted of burglary and assault based on acts that involved the same time and place, the same victim, and the same intent. Is remand for resentencing required because the court, relying on an erroneous view of the law, failed to exercise its discretion to treat the burglary and assault offenses as the same criminal conduct?

B. STATEMENT OF THE CASE

1. Substantive Facts

Joseph Kisner held a party at his house, which Willie Lee Rainey and many others attended. 1RP<sup>1</sup> 12-13, 15-16, 48. Rainey's girlfriend, Jill Glaspie, was at the party. 1RP 43-44. A no contact order prevented Rainey from contacting Glaspie. 1RP 45-46.

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 6/10/08 and 6/11/08 (filed under 62098-3-I); 2RP - 7/10/08 (filed under 62098-3-I); 3RP - 9/21/09 (filed under 64346-1-I). On March 23, 2010, this Court granted Rainey's motion to transfer the verbatim report of proceedings from 62098-3-I.

Witnesses gave different stories about what happened that night. For the purpose of this appeal, it is sufficient to set forth facts supporting the State's theory of the case.

At one point during the party, Rainey slapped Glaspie outside the house. 1RP 17-19. Kisner took her to his bedroom. 1RP 19. He then returned to the front porch and told Rainey to leave, at which point Rainey punched Kisner in the mouth. 1RP 20. Kisner, his brother Kyle, and another man fought with Rainey for a few minutes. 1RP 21, 34-35.

Kisner, Kyle, Glaspie, and Patrick Metcalf (Kisner's friend) were in the kitchen when Rainey later came back. 1RP 22, 68. Kisner testified Rainey walked in and pointed a gun at Kisner, then at the others, and then back at Kisner. 1RP 22-23. Metcalf testified Rainey came into the kitchen waving a gun around. 1RP 70. When Kisner confronted him, Rainey put the gun in his face. 1RP 70. When Glaspie said something, Rainey told her to shut up and struck her in the face. 1RP 24, 71. Kisner took her out of the house and called 911. 1RP 24. Police arrived shortly thereafter. 1RP 26.

## 2. Procedural Facts

The State charged Rainey with first degree burglary, second degree assault against Kisner, and two counts of felony violation of a protection order. CP 36-39. Rainey's entry into Kisner's house and gun pointing

formed the basis for the burglary and assault counts. CP 36-39; 1RP 159-61.

A jury convicted Rainey on all counts and found he was armed with a deadly weapon during the commission of the burglary. CP 35; Supp CP \_\_ (sub no. 46-50, 52, Verdict Forms, 6/11/08). The court sentenced Rainey to concurrent confinement terms of 113 months for burglary, 57 months for assault, and 60 months for each count of violating a protection order. CP 22-34.

Rainey appealed, arguing instructional error violated his right to be free from double jeopardy on the two counts involving violation of a protection order. State v. Rainey, 2009 WL 1452671 at \* 1 (2009).<sup>2</sup> The State conceded error and this Court remanded to the trial court to vacate one of the protection order counts. Id.

On remand, the court resentenced Rainey. 3RP 3-23. The State wanted to make sure the judgment and sentence was correct and did not want to Rainey to be sentenced under an incorrect offender score. 3RP 5-6.

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<sup>2</sup> Rainey cites to this Court's previous unpublished decision only for purposes of providing the underlying procedural background for the present matter. See GR 14.1(a) (unpublished Court of Appeals opinions may not be cited as authority).

During the course of the resentencing hearing, defense counsel raised the issue of whether the burglary and assault offenses constituted the same criminal conduct for scoring purposes. 3RP 8-9. If those two offenses were counted as same criminal conduct, then Rainey's offender score would be a "4" instead of a "6." 3RP 9. Defense counsel stated "So for the purpose of sentencing here, I just want to make my objection to that." 3RP 9. She did not want to waive any objection to that issue. 3RP 10. The court noted her objection for the record. 3RP 10.

The court, at least initially, mistakenly believed the same criminal conduct issue was resolved by the State's agreement that the sentences should run concurrently. 3RP 9-11. The prosecutor responded:

Well, at the risk of muddying the waters, I'm not sure that is correct with these particular charges because the rules the Court is referring to I think applies to serious violence offenses, the consecutive/concurrent rule. Although you would think that first-degree burglary would be a serious violence, it actually is not. It's just a violent offense.

So the issue here for same criminal conduct or not really just come [sic] down to scoring. If they are same criminal conduct, one would not score against the other.

However, *all that argument is inapplicable by virtue of our burglary antimerger statute and that really resolves the issue.* It's black letter law now in Washington that the antimerger statute which permits a defendant to be prosecuted and punished for both the burglary and the crime committed in the course of the burglary, that has been interpreted to include applying resentencing laws such that it would also score against it, not just that it could be

prosecuted and convicted. So that really resolves the issue for the burglary and the assault.

3RP 11-12 (emphasis added).

The court responded "All right" and confirmed with the prosecutor that the sentences would run concurrent and the offender score would be "6" for the burglary and assault charges. 3RP 12-13. Based on an offender score of "6," the court resentenced Rainey to concurrent, standard range confinement terms of 99 months for the burglary and 43 months for the assault. CP 4, 6, 9. The court also imposed concurrent term of 43 months for the protection order violation. CP 4, 9. This appeal follows. CP 1-2.

C. ARGUMENT

1. THE COURT ERRED IN FAILING TO EXERCISE ITS DISCRETION ON WHETHER TO TREAT THE BURGLARY AND ASSAULT OFFENSES AS THE "SAME CRIMINAL CONDUCT" FOR OFFENDER SCORE PURPOSES.

Rainey objected that his burglary and assault offenses should be counted as the same criminal conduct in determining his offender score. Reversal of the sentence and remand for resentencing is required because the court failed to exercise its discretion under the burglary anti-merger statute in determining whether the two offenses should be counted the same for scoring purposes.

a. The Burglary And Assault Constituted The Same Criminal Conduct Under RCW 9.94A.589(1)(a).

RCW 9.94A.589(1)(a) provides:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

"Same criminal conduct" is defined as two or more crimes that 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 test is an objective one that "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

The crimes charged in this case — burglary and assault — involved the same time, the same place, and the same victim. Both crimes occurred at the same time. Both crimes occurred inside Kisner's house. Kisner was the victim of both crimes.

The only remaining question is whether the crimes involved the same criminal intent. "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v.

Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). "[I]f one crime *furthered* another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The burglary and assault offenses involved the same criminal intent because the burglary furthered the assault. State v. Collins, 110 Wn.2d 253, 262-63, 751 P.2d 837 (1988) (burglary and assault should be considered one crime where burglary was committed in furtherance of the assault and occurred at the same time and in the same place).

At resentencing, the State did not dispute the two offenses could constitute the same criminal conduct.

- b. The Court Wrongly Failed To Actually Consider Whether The Burglary And Assault Should Be Treated As The Same Criminal Conduct In The Exercise Of Its Discretion.

The trial court did not make a ruling on whether the burglary and assault could constitute the same criminal conduct. Less clear is the reason why it failed to do so.

The court initially labored under the misapprehension that it need not reach the same criminal conduct issue based on a misunderstanding of

RCW 9.94A.589(1)(b).<sup>3</sup> The consecutive sentence provision in RCW 9.94A.589(1)(b) does not apply to Rainey because he was not convicted of two or more "serious violent offenses." RCW 9.94A.030(41).

The prosecutor attempted to correct the court on this point of law. 3RP 11-12. It is unclear whether the court accepted the prosecutor's correction, only saying "All right" in response and proceeding to resentence Rainey in accordance with the prosecutor's recommendation. 3RP 12.

Even if the court stood corrected on the RCW 9.94A.589(1)(b) issue, the court still failed to address the merits of the same criminal conduct issue. The State wrongly maintained any argument about same criminal conduct was inapplicable due to the burglary anti-merger statute. 3RP 11-12. The trial court apparently accepted the State's argument and

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<sup>3</sup> RCW 9.94A.589(1)(b) provides "Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection."

did not make any ruling on whether the burglary and assault constituted the same criminal conduct.

RCW 9A.52.050, the burglary anti-merger statute, provides "[e]very 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." The court has discretion to punish burglary separate from other offenses otherwise constituting the same criminal conduct. Lessley, 118 Wn.2d at 781. The court also retains the discretion *not* to apply the anti-merger statute. State v. Davis, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998).

Separate punishment is not mandatory under this provision. The State was therefore wrong in arguing the trial court did not need to address whether the burglary and the assault qualified as same criminal conduct. The court did need to address Rainey's claim. The court abused its discretion in failing to exercise its discretion on the issue.

Analogy to other cases involving the trial court's failure to exercise discretion is instructive. For example, the court's failure to exercise its discretion in considering whether to impose a sentence below the standard range is reversible error. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005); State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008) (court committed reversible error in erroneously concluding it did

not have discretion to consider mitigating sentencing factor), review granted on other grounds, 165 Wn.2d 1003, 198 P.3d 512 (2008). No defendant has the right to obtain a sentence below the standard range. The court can decline to impose such a sentence in the exercise of its discretion. Grayson, 154 Wn.2d at 342. But "[w]hile no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Id.

The same rationale applies here. While Rainey was not entitled to have the court treat his burglary and assault offenses as the same criminal conduct, he was entitled to ask the court to consider such a sentence and to have it actually considered.

Had the court exercised its discretion in Rainey's favor, the offender score would have been "4" instead of "6" on the burglary and assault counts. His standard range for the burglary would have been 36 to 48 months rather than 57 to 75 months, and his range for the assault offense would have been 15 to 20 months rather than 33 to 43 months.<sup>4</sup>

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<sup>4</sup> See RCW 9.94A.510 (setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (seriousness level of VII for first degree burglary and seriousness level of IV for second degree assault); RCW 9.94A.525(8) and (10) (prior felonies count as two points where present conviction is for violent offense or first degree burglary); RCW 9.94A.589(1)(a) (sentence range for each current offense determined by

Despite the burglary anti-merger statute, a sentencing court has authority to treat burglary and other offenses as same criminal conduct. Davis, 90 Wn. App. at 783-84. Rainey's offenses satisfy the same criminal conduct test and he had the right to have the trial court actually consider whether to treat those offenses as the same criminal conduct.

The reason for the court's failure to exercise its discretions stemmed from its reliance on the prosecutor's misstatement of law regarding the anti-merger statute or its erroneous view of RCW 9.94A.589(1)(b). Either way, the court abused its discretion in failing to exercise its discretion. Remand for resentencing is required to give the court an opportunity to exercise its discretion.

D. CONCLUSION

For the reasons set forth above, this Court should remand the case to the trial court for a new sentencing hearing.

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using other current convictions as if they were prior convictions for offender score).

DATED this 31st day of March 2010.

Respectfully submitted,

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