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NO. 68914-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SANDOR RIVERA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

TOMÁS A. GAHAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Two crimes constitute the “same criminal conduct” only when the crimes (1) required the same criminal intent; (2) were committed at the same time and place; and (3) involved the same victim. Sandor Rivera deceived a Radio Shack store manager into letting him into the stockroom of the store, where Rivera repeatedly tortured and bound the manager, took his personal property and stole Radio Shack merchandise. The evidence indicates that Rivera’s intent changed throughout the commission of his crimes, and that the violence against the manager was not merely to further the other crimes. The victim of the assault and the robbery was the store manager, while the victim of the burglary was Radio Shack. Did the court properly exercise its discretion by finding that Rivera’s assault, robbery and burglary convictions were not the same criminal conduct?

2. The burglary antimerger statute permits a sentencing court to count a burglary charge separately in calculating the offender score even where it is the same criminal conduct as other crimes. Did the trial court properly exercise its discretion in scoring the burglary conviction against Rivera even if it was the same criminal conduct as the other crimes?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS.

The State charged defendant Sandor Rivera with assault in the first degree, robbery in the first degree, burglary in the first degree, and witness intimidation, for his crimes against Gary Cook and the Radio Shack store that Cook managed. CP 19-21. Rivera was convicted of all charges, including deadly weapon enhancements, and was sentenced to the maximum sentence within his standard range of 268 months in custody. 3RP 1595¹; CP 136.

2. SUBSTANTIVE FACTS.

On Valentine's Day, 2010, Gary Cook, a manager at a Federal Way Radio Shack, arrived early to prepare the store for that day's business. 3RP 18, 76. Sandor Rivera was waiting for him outside of the store. 3RP 81. Rivera, who had recently quit his job as a Radio Shack employee at a separate branch, was dressed in a standard Radio Shack uniform and sported the official company name tag on his lapel, emblazoned with his own name.

¹ This brief will cite to the Verbatim Report of Proceedings as follows: 1RP (3/13, 3/15, 3/19, 3/21, 3/22/2012); 2RP (3/27/2012); 3RP (3/28, 3/29, 4/2, 4/3, 4/4, 4/9, 4/11, 4/12, 4/16 - 4/17/2012, 6/12/2012).

3RP 82-83. Using company lingo, Rivera tricked Cook into opening the store for him to execute what Rivera made Cook believe was a routine "intracompany stock transfer" for a fellow Radio Shack employee; Cook opened the store and Rivera followed him to a stockroom reserved for employees only, where high-end electronic items were stored in a locked "cage." 3RP 91-116.

Rivera told Cook the item that he wanted and, as Cook kneeled to unlock the cage, Rivera hacked at Cook's head three times with a sharp object. 3RP 119. Cook felt a "burning pain" at the base of his skull and fell to the floor. 3RP 119. At trial, he told the jury that Rivera was slashing down at him in large, sweeping swings, "like with a machete to chop down a vine." 3RP 120. After collapsing to the ground, Cook crawled to a corner of the stockroom and told Rivera to take whatever he wanted, assuring him that he was not going to put up a fight over the merchandise. 3RP 121. Rivera told him, "Okay. Well, lay down on the ground and I'll get what I need..." 3RP 121. Then Rivera demanded that Cook give him his cellular phone and his personal set of keys, and Cook complied. 3RP 122.

Cook touched his hand to the back of his head and felt the bare bone of his exposed skull. 3RP 121. When he pulled his

hand away, he saw that it was soaked in blood. 3RP 121. Then Cook looked up at Rivera and saw him holding a knife with a large blade, presumably what he had used to strike Cook's head. 3RP 121.

Cook obeyed Rivera and lay flat on the ground as blood pooled around him. 3RP 122. Rivera told Cook that he was going to remove Cook's keys from his belt to access the cage, and proceeded to do so, asking Cook to show him which key unlocked the cage. 3RP 122. Throughout their interaction, Rivera apologized to Cook; at one point Cook replied, "Don't apologize, just hurry so I can get help." 3RP 123.

While Rivera removed the merchandise from the cage, Cook talked about his children, telling Rivera that he had three boys at home that "need their daddy," and begged him to hurry because Cook was not "doing real good." 3RP 124. Then Rivera left the stockroom area and returned with some paper towels and some ice; he pressed it against Cook's wounds and told him that it should slow the bleeding. 3RP 124.

Then Rivera left the cage area again and Cook could hear packages being ripped open; when Rivera returned two minutes later, he used a Radio Shack cellular phone cord to tie Cook's

hands behind his back. 3RP 125. When the cord did not hold, Rivera used zip ties from the store to bind Cook's wrists and elbows behind his back and to secure Cook to a large rolling shelf in the storeroom. 3RP 126. Rivera also used the zip ties to bind Cook's ankles. 3RP 126. Rivera continued apologizing as he did this. 3RP 124-27. As Rivera was binding him, Cook made a point of pressing his wrists and arms as far apart as he could against the tightening ties to buy himself a little extra room. 3RP 154-55.

After tying Cook up, Rivera began removing more electronic merchandise from the cage, but eventually stopped and left the stockroom again. 3RP 127. When Rivera returned, he loomed over Cook and used his knife to chop against the back of Cook's head again, striking him another two or three times. 3RP 127. Cook's bleeding worsened as he struggled to avoid further blows, rolling and kicking at Rivera's ankles and yelling, "I'm not going to fight you. I just want to see my kids." 3RP 128. Then Rivera stopped this second assault and negotiated with Cook, saying, "Okay, I won't hit you. Just – just lay back down." 3RP 128. Again, Cook obeyed and rolled onto his stomach and Rivera again left the stockroom. 3RP 128.

Cook testified that a short time later Rivera returned and pressed a knee against Cook's back. 3RP 128. Cook was still lying face down on his stomach as Rivera suddenly used a screwdriver to tap at the exposed section of skull at the base of Cook's head, prompting a panicked Cook to muster all of his strength to fight back:

I could instantly identify the feeling of it ... it was a cross trip screwdriver of some type. I had no idea what he was trying to do but I didn't like it, so I fought as hard as I could against the zip ties, managing to snap through all the ones holding my wrists and elbows, at the same time rolling over and swinging my arm, knocking the screwdriver out of his hand.

3RP 128.

Cook testified that he was confused because he thought that the robbery was over, that Rivera had what he wanted, and he did not understand why Rivera returned to assault him again:

"I thought if I was compliant, I could keep it from escalating."

3RP 129, 156.

Rivera responded to Cook's fight against the screwdriver with surprise, saying, "I thought you weren't going to fight me."

3RP 130. Cook reiterated that Rivera could take all of the merchandise, but insisted that he would not let Rivera kill him.

3RP 130.

Rivera ordered Cook to tell the police that the robbery and assault were committed by a “big black guy” named “Terry.” 3RP 167. Then Rivera told Cook he was going to take him to the employee bathroom, so he did not have to “worry” about him; because Cook’s feet were still zip tied and he was bleeding profusely from his head, Rivera helped Cook hobble his way to the bathroom. 3RP 130-31.

In the bathroom, Rivera ordered Cook to remove his jacket and shoes before Rivera removed Cook’s wallet from his pants. 3RP 138. Looking through the wallet, Rivera took Cook’s driver’s license, containing his home address, and told him “if I hear that you cooperated with the police or told anybody who I am.... Then I’m going to come to your house and I’m going to get your family... I’ll send somebody and you’ll watch your kids die.” 3RP 138.

In the employee bathroom, Rivera again tied up Cook, this time with a cord from a vacuum cleaner Rivera found in the bathroom, forcing him to kneel on the ground, facing the toilet. 3RP 131. Rivera told Cook that he was going to place a plastic sack over his head so that Cook could report that he was unable to identify Rivera; Rivera assured Cook that he would put air holes in the bag. 3RP 131. Rivera left and returned with more zip ties and

a plastic Radio Shack sack. 3RP 132. He placed the plastic sack over Cook's head and secured it tightly with a zip tie around Cook's neck; Cook testified that Rivera did not make any air holes in the sack. 3RP 132. Cook testified that Rivera did all of this with great calm, like he was doing Cook a "favor." 3RP 162. Cook could barely breathe. 3RP 161.

Rivera left the bathroom and, after some time had passed, Cook began to consider leaving the bathroom, believing Rivera had left the store. 3RP 132. But then Rivera returned to assault him yet again, swinging his knife at the left side of Cook's head. 3RP 132. Cook yelled for Rivera to stop, and reminded him that he had said he was not going to hit him anymore; Rivera apologized again and Cook asked him if he was going to kill him. 3RP 133. Rivera initially said "no," but then said, "probably, well, I don't want to, I can't leave a witness, I'm not going to jail for a long time." 3RP 133. It was then that Cook felt a blade against his throat. 3RP 133. Even with his head shrouded in plastic, Cook could sense Rivera's shadow over him: "I knew he was standing next to me, I thought he was going to slit my throat – he was lining up where he was going to cut." 3RP 33.

Cook testified that at this point, he panicked and fought, thinking he was going to die. 3RP 134. Cook jumped into Rivera as hard as he could and reached up to pull the bag off his head, punching and shoving with everything that he had. 3RP 134. Cook was able to free his hands from the vacuum cord enough to gouge at Rivera's eyes; Rivera swung back with his knife, slashing at Cook's head and cutting his ear. 3RP 134-35. By this time, the two were grappling outside of the bathroom and Rivera told Cook that if he returned to the bathroom for one hour, Rivera would not hurt him anymore. 3RP 136. Cook agreed and went back into the bathroom, counting the seconds, slowly and deliberately. 3RP 136.

After he counted to 980 seconds, Cook gathered the last reserve of strength he had left and crawled out of the bathroom to call 911 from his office telephone. 3RP 137. Rivera was gone – he had used Cook's personal keys to steal Cook's van that was parked in front of the Radio Shack. 3RP 137, 1242. Cook managed to cut the zip ties off from around his neck and take one deep breath before collapsing, unconscious. 3RP 137.

Rivera's testimony at trial, in large part, coincided with Cook's description of the assault, but Rivera claimed that he had

acted under duress from a roommate of his named Brian Borelli.² 3RP 1207-17. Cook claimed that he and Borelli smoked some marijuana that was laced with something with a chemical taste, and that afterward Borelli pointed a gun at him and forced him to impersonate an employee and rob the Radio Shack. 3RP 1215-23. Rivera testified that Borelli told him that if he did not follow through with the plan, Borelli would kill his family. 3RP 1215-23. Rivera also contradicted Cook's testimony by saying that he did not have a knife, but instead used an L-shaped shelf support from the stockroom. 3RP 1230. Rivera also testified that he did try to put air holes in the plastic bag he placed over Cook's head, but punched them near the back of Cook's head. 3RP 1238-39.

A friend of Rivera's testified on behalf of the State that, a few hours after the robbery, he attended a party with Rivera where Rivera was flashing large amounts of cash, using a new digital camera (later revealed to be one of the items taken from the Radio Shack heist), and drinking liquor and smoking marijuana.

3RP 487-91. Another friend who was at the same party told the jury that Rivera bought a significant amount of marijuana with a

² Brian Borelli pleaded guilty to rendering criminal assistance in the first degree and two counts of possession of stolen property in the first degree for his actions relating to Rivera's crimes (10-C-01057-9).

“wad of cash” and that he “appeared upbeat” at the party.

3RP 530-32.

The Harborview doctor who treated Cook in the aftermath of the attacks testified that Cook suffered from multiple head lacerations, a fractured skull and jaw, and damage to his ears and inner ear canal. 3RP 399. After over 60 staples, 20 stitches, and surgery to his inner ear and sinuses, Cook was released from Harborview Hospital. 3RP 181-83. While many of his scars have healed, Cook testified that he suffered permanent injuries from the attack: his sense of equilibrium is permanently damaged such that he requires a cane, he has lost some sensation in his legs, and he suffers from seizures that prevent him from driving and from severe post-traumatic stress disorder that “limits [him] from getting out of the house almost at all.” 3RP 238.

During Cook’s first few interviews with the police, he insisted that he did not see his assailant because he was afraid that Rivera would follow through with his threats to murder his family should he report. 3RP 237-38. But, after receiving encouragement from his wife, Cook finally identified Rivera to police on February 22, 2010 as the man who had robbed and tortured him. 3RP 237-38.

The jury also heard from a jailhouse informant who claimed that Rivera had bragged to him while in jail about the robbery and called it a "Valentine's day massacre." 3RP 981-92. The informant testified that Rivera had told him that he "tied the guy up and brought him in the back of the store, stabbed him several times in the back of the head..." 3RP 983.

3. FACTS REGARDING CHARGES, JURY INSTRUCTIONS AND SAME COURSE OF CRIMINAL CONDUCT HEARING.

The "to convict" jury instruction for count I, assault in the first degree, required that the jury find that Rivera "acted with intent to inflict great bodily harm" and that the assault either "was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death" or "resulted in the infliction of great bodily harm." CP 72.

In the jury instructions, great bodily harm was defined as "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." CP 75.

The jury was also instructed that a person “acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 77.

The “to convict” instruction for count II, robbery in the first degree, required that a convicting jury find that Rivera “took personal property” from Cook, that he “intended to commit theft of the property,” that the “taking was against” Cook’s will by Rivera’s “use or threatened use of immediate force, violence or fear of injury to that person,” and that Rivera used “force or fear... to obtain or restrain possession of the property.” CP 82. Before finding Rivera guilty of count II, the “to convict” instruction also required the jury to find that, during the commission of those acts, Rivera was either “armed with a deadly weapon” or that he “inflicted bodily injury.” CP 82.

The “to convict” instruction for count IV, burglary in the first degree, required that, before convicting, the jury had to find beyond a reasonable doubt that Rivera “unlawfully entered or remained unlawfully in a building,” that he did so “with intent to commit a crime against a person or property therein,” and that he was either “armed with a deadly weapon” when he entered or remained or “assaulted a person.” CP 91.

At his sentencing hearing, Rivera argued that his crimes were the same course of criminal conduct and should therefore not be scored against each other. 3RP 1592. The State countered that all of the charges involved separate criminal intents and purposes, that the various assaults were far and beyond that which was required for the commission of the robbery, that the burglary charged involved an additional victim in Radio Shack, and that the antimerger burglary statute applied. 3RP 1588-91. The trial court agreed with the State's arguments:

There doesn't seem to be a dispute as to whether or not, of the three criteria that the Court must look at, that the acts occurred at the same time and did occur in the same place, which was Radio Shack. I will find as to the Burglary charge that there were two victims, that was Mr. Cook as well as the business of Radio Shack.

I am going to further find that the antimerger statute does apply as it relates to the facts in this case.

I am going to find that there are differing intents as to the other charges. Looking at the charge of Burglary, if you will, there certainly was the intent to enter into the store; and the charge of Burglary in the First Degree once there was an assault. I will find that that intent was committed.

The issue of Robbery, I will find that although he did enter and remain in the store, which this Court following the assault finds is burglary, that there further was the intent to commit a Robbery with force.

He did, in fact, turn his attention on Mr. Cook, took the keys to the cage, as well as took – as well as he [took] the phone of Mr. Cook. He did so with the threatened use of violence, and he also did so with a deadly weapon.

As to the assault. Even after entering into the store, and, if you will, robbing Mr. Cook, he continued to assault Mr. Cook. Indeed, he basically tortured Mr. Cook, causing great bodily harm. I am going to find that the attack or the torture, the cutting of the neck, the tapping the base of the skull, the placing of that bag around his head, indeed, was -- it was so far in excess of what was necessary in order to commit the burglary and the robbery, as well.

...Having said that, I am going to find that the offender score is five, recognizing that intents did change.

3RP 1593-94.

C. ARGUMENT

1. THE CRIMES INVOLVED DIFFERENT OBJECTIVE INTENTS, RIVERA'S TORTURE OF COOK WAS IN EXCESS OF MERELY FURTHERING THE OTHER CRIMES, AND THE BURGLARY CHARGE INVOLVED AN ADDITIONAL VICTIM.

Rivera argues that the trial court abused its discretion by finding that his convictions for assault, robbery and burglary were not the same criminal conduct. But each crime involved a different objective intent, permitting the trial court, in its discretion, to find that they were not the same criminal conduct. Additionally, even

though all three charges shared the same victim in Cook, the burglary charge had another victim in Radio Shack, barring a same course of conduct finding for the burglary.

In determining a defendant's offender score under the Sentencing Reform Act, multiple current offenses are presumptively counted separately, unless the trial court finds that the offenses encompassed the "same criminal conduct." RCW 9.94A.589(1)(a). Two crimes constitute the same criminal conduct only if the crimes (1) required the same criminal intent; (2) were committed at the same time and place; and (3) involved the same victim. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589(1)(a). Failure to meet any one element precludes a finding of same criminal conduct, and the offenses must be counted separately in calculating the offender score. Vike, 125 Wn.2d at 410. Courts narrowly construe the concept of same criminal conduct to disallow most assertions of it. State v. Grantham, 84 Wn. App. 854, 858, 932 P.2d 657 (1997).

An appellate court will not disturb a trial court's determination regarding same criminal conduct absent a clear abuse of discretion or a misapplication of the law. State v. Haddock, 141 Wn.2d 103,

110, 3 P.3d 733 (2000). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

a. The Robbery And The Assault Were Not Part Of The Same Criminal Conduct.

Rivera contends that the robbery and the assault were the same criminal conduct because the “assault furthered the robbery by keeping Cook at bay and prevented him from resisting Rivera, contacting police, or running out of the store.” Brief of Appellant at 16. Rivera argues that his primary motivation was simply to “steal and get away with as much merchandise as possible.” Brief of Appellant at 17. But, as the trial court concluded, Rivera’s assaultive actions went far beyond those that would have been needed to accomplish the robbery, and revealed an altogether separate intent and purpose – to torture Cook. Rivera’s repeated visits to Cook in the stockroom and the bathroom to resume torturing him went far beyond the initial assault that was in furtherance of the robbery.

To determine whether two or more crimes involve the same intent, the court focuses “on the extent to which the defendant’s criminal intent, as objectively viewed, changed from one crime to the next.” State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). “Objective intent *may* be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan.” State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007) (emphasis added). The Washington Supreme Court has made clear that “the ‘furtherance test’ was never meant to be and never has been the lynchpin of this court’s analysis of ‘same criminal conduct.’” Haddock, 141 Wn.2d at 114. The focus of the inquiry remains on the extent to which the criminal intent changed from one crime to the next. Wilson, 136 Wn. App. at 613.

To determine criminal intent, for purposes of calculating an offender score, courts first objectively view each underlying statute and determine if the required intents were the same for each count; where the statutory intents were the same, the court next objectively views the facts to determine whether a defendant’s intent was the same with respect to each count. State v. Bickle, 153 Wn. App. 222, 222 P.3d 113 (2009). As such, even crimes

with identical mental elements will not be considered the “same criminal conduct,” if they were committed for different purposes. State v. Price, 103 Wn. App. 845, 854, 14 P.3d 841 (2000).

The requisite intent for the assault charge here was “intent to inflict great bodily harm,” while the intent for the robbery was “with intent to commit theft.” CP 19, 20; RCW 9A.36.011(1)(a),(c); RCW 9A.56.200(1)(a)(i). The underlying *purpose* of each crime on its face is different: one is to cause severe injury and the other is to take property. While Rivera’s initial objective intent may well have been to “commit theft,” the “bodily injury” required to facilitate the robbery was complete after the first three slashes of his knife against Cook’s skull. After this, Cook crawled to a corner of the room and invited Rivera to take whatever he wanted, and Rivera agreed. 3RP 120-21. Rivera had the keys to the cage, had Cook’s cellular phone and van keys, and had Cook’s carte blanche to take whatever he wanted; the objective intent “to commit theft” was satisfied. 3RP 122, 145, 1232. The robbery, for all intents and purposes, was accomplished. All Rivera had to do next was take the items and leave.

But Rivera made a conscious decision to continue assaulting Cook even after his initial purpose had been accomplished, even, in

fact, as he apologized profusely for those same repeated assaults. 3RP 123, 126-27, 147, 153, 157-58, 1223. On at least three separate occasions after the initial assault that facilitated the robbery, Rivera left Cook alone and then returned to torture him: poking at his exposed skull with a screwdriver, hacking at his head and ears with a knife, suffocating him with a plastic sack, tracing the skin of his throat with the knife blade. 3RP 120-21, 127-28, 132-33. Cook never resisted the robbery, and explicitly permitted Rivera to take all the merchandise that he wanted after Rivera attacked him the first time, and repeated this to Rivera throughout the incident. 3RP 121, 123, 126, 130, 133. Rivera's various assaults thereafter were not necessary to keep Cook "at bay" because Cook had already been subdued and never resisted the taking of the merchandise. 3RP 121, 123, 126, 130, 133, 136.

The facts and analysis in State v. Freeman are helpful here. 118 Wn. App. 365, 76 P.3d 732 (2003) (affirmed on other grounds in State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005)). In Freeman, defendant Freeman and some of his friends drove their victim to a dark, dead-end street where Freeman pointed a gun at him and ordered him to "come out your stuff." 118 Wn. App. at 368. When the victim hesitated, Freeman shot him; the victim tried to

run, but Freeman stopped him and threatened to shoot him again if he did not hand over his belongings. Id. The victim gave Freeman everything he had and Freeman and his friends left him bleeding in the street. Id. Freeman was charged with first degree assault and first degree robbery and a jury convicted him of both charges. Id. at 369-70.

At sentencing, Freeman argued that his two crimes were part of the same criminal conduct, but the trial court disagreed, saying that the shooting “was not necessary to accomplish the robbery... It was gratuitous... one could almost say a cold-blooded afterthought to and not just an adjunct of the robbery.” Id. at 370.

On appeal, this Court agreed with the trial court, holding that where the offenses have “independent purposes or effects, they may be punished separately.” Id. at 376, citing State v. Vladovic, 99 Wn.2d 413, 421, 662 P.2d 853 (1995). While the evidence was sufficient to satisfy Freeman’s view of his own conduct, that the shooting was merely to accomplish the robbery, this Court found that it was also sufficient to support the trial court’s factual finding that in shooting his victim, Freeman “did something far beyond what was necessary to merely further the robbery.” 118 Wn. App. at

378. Freeman, after all, shot his victim before he had a chance to hand over his possessions. 118 Wn. App. at 368.

Because, viewed objectively, the intent requirements for the assault and the robbery were different, this Court found in Freeman that the “trial court was not legally bound to accept Freeman’s self-serving depiction of his *subjective* intent.” Id. (emphasis in original). There was, this Court found, sufficient evidence at trial to persuade a fair-minded trier of fact that the shooting was indeed a “gratuitous, cold-blooded afterthought that went far beyond the force required to accomplish the robbery,” and the trial court’s finding that the crimes were not the same course of criminal conduct was squarely within its discretion. Id.

Just like in Freeman, the trial court here made an explicit finding that Rivera’s various acts of torture against the restrained and already-wounded Cook were “so far in excess of what was necessary” to further the other crimes and that they were not, therefore, part of the same course of criminal conduct. 3RP 1594. The evidence overwhelmingly supported the trial court’s findings, and Rivera could have easily robbed Cook without returning again and again to torture him.

Rivera's repeated torture of Cook was far more extreme than Freeman's single pull of the trigger, and far less essential to further the taking of the property. The trial court acted well within its discretion and this Court should affirm.

b. The Burglary Was Not Part Of The Same Criminal Conduct As The Robbery Or The Assault.

Rivera argues that the burglary and the other crimes were "part of a continuing criminal episode and were motivated by a desire to steal merchandise." Brief of Appellant at 18. But Rivera's actions against Cook so far exceeded the scope of his initial purpose in merely burglarizing Radio Shack, that the trial court had discretion to find that the crimes were not the same course of criminal conduct. Even if the objective intents were the same, a same course of criminal conduct finding is barred because the burglary involved an additional victim in Radio Shack.

i. The objective intent was different.

The intent of a burglary is to enter or remain in a building in order to commit some crime against a person or property therein. RCW 9A.52.020. In this case, Rivera's objective intent for the

burglary was to enter and remain in the Radio Shack with the intent to steal store merchandise. But, as the trial court ruled, once Rivera entered the Radio Shack with the intent to burglarize the store and assaulted Cook to further the initial burglary and robbery, his purpose was accomplished. 3RP 1593-94. See Lessley, 118 Wn.2d at 778 (objective intent of burglary completed upon entering residence). The further assaults against Cook manifested a different purpose that was above and beyond the requirements for either of the other two crimes.

Rivera relies extensively on State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988), to argue that the burglary was part of the same conduct as the other crimes. But his reliance on Collins is misplaced. In Collins, the defendant was initially invited into a home by the two elderly victims to use their telephone; once inside, Collins forced them into a bedroom, where he digitally penetrated one and dislocated the collarbone of the other. Id. at 255. After a trial, he was convicted of first degree burglary, first degree rape, and second degree assault. Id. The Washington Supreme Court held that the burglary was the same criminal conduct as the rape and the assault because, from the start, Collins' objective intent in entering the residence was to rape and assault the victims, and

because the burglary was committed solely in furtherance of accomplishing this single intent. Id. at 261-62.

This case is distinguishable from Collins in that Rivera's objective intent was different for each of his crimes, and they were not committed in furtherance of each other. There was no evidence that Rivera entered the store with the ultimate intention of binding Cook with zip ties and vacuum cleaner cords, and torturing him repeatedly. Except for the knife which he probably used in the initial assault, Rivera did not arrive ready to torture Cook; instead, after the requisite elements for the robbery and burglary had been met, Rivera improvised, using Radio Shack's zip ties, vacuum cords, and plastic sacks (and, according to Rivera's own testimony, an L-shaped shelf buttress from the stockroom). 3RP 1230.

Even Rivera testified that his initial objective intent for the burglary was to enter the store, beat up Cook, steal Radio Shack property, and leave. 3RP 1223, 1231. Once inside, upon completion of the unlawful entry, Rivera's objective intent expanded and evolved throughout the morning, as he tied up Cook, slashed and poked at him and dragged him from one room to another, all long after Cook had assured him that he was not going to resist; the merchandise was at Rivera's disposal. 3RP 1231.

Unlike Collins, this was not one fluid attack; Rivera could have entered, struck Cook on the head, taken the merchandise and left the store as he had initially planned. Instead, he elected to remain for an extended period of time to torment Cook. His sentence reflected the uniqueness of his actions, and should stand.

- ii. The burglary involved an additional victim.

Two crimes constitute the “same criminal conduct” only if the crimes, among other factors, also involved the same victim. Tili, 139 Wn.2d at 123; RCW 9.94A.589(1)(a). Failure to meet this one element precludes a finding of same criminal conduct, and the offenses must be counted separately in calculating the offender score. Vike, 125 Wn.2d at 410.

Rivera's first degree burglary conviction involved an additional victim not included in the other three charges. The only victim in the assault and robbery was Gary Cook. The victims of the first degree burglary charge, however, were both Gary Cook, assaulted during the burglary, and Radio Shack, the business where Rivera unlawfully entered and remained and from where Rivera stole merchandise. The trial testimony was clear that the

store was owned by Radio Shack and that the majority of the property taken belonged to it.³ 3RP 899-914. The trial court was explicit in its findings at sentencing that Radio Shack was also a victim of the burglary charge. 3RP 1593.

Because the burglary charge in this case involved an additional victim not included in the other charges, the burglary conviction cannot encompass the same criminal conduct as the remaining charges. See State v. Walker, 143 Wn. App. 880, 892, 181 P.3d 31 (2008) (theft and trafficking did not encompass same criminal conduct in part because the crimes involved two victims: the owner who was deprived of property was the victim of the theft, while the person to whom the stolen property was transferred was the victim of the trafficking). Id. Accordingly, the first degree burglary conviction was properly included in the offender score calculation.

³ According to Cook, Rivera claimed, "I steal from companies, not people." 3RP 138.

2. EVEN IF THE BURGLARY WAS THE SAME CRIMINAL CONDUCT, THE BURGLARY ANTIMERGER STATUTE PERMITTED THE COURT DISCRETION TO SCORE THE BURGLARY SEPARATELY AGAINST RIVERA.

Even if this Court somehow holds that Rivera's intent for the burglary was the same as for the robbery and/or the assault, the burglary antimerger statute permitted the trial court to score the offense separately.

The antimerger statute provides as follows: "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." RCW 9A.52.050.

"[A]pplication of the burglary antimerger statute is discretionary with the sentencing judge and permits punishment for burglary and other crimes simultaneously committed." Lessley, 118 Wn.2d at 781. The statute furthers the proportionality function of the Sentencing Reform Act and "recognizes burglaries involve a breach of privacy and security often deserving of separate consideration for punishment." Id. at 782. The burglary antimerger statute, therefore, explicitly allowed the sentencing court discretion to punish the burglary conviction as a separate offense even if this

court finds that it was part of the same criminal conduct as the other crimes; the trial court acted within its discretion.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Rivera's sentence.

DATED this 7 day of June, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

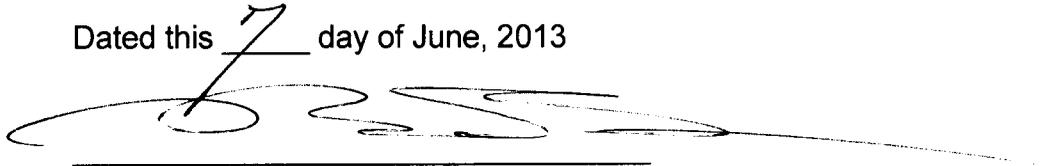
TOMÁS A. GAHAN, WSBA #32779
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the RESPONDENT'S BRIEF, in STATE V. SANDOR RIVERA, Cause No. 68914-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 7 day of June, 2013

A handwritten signature in black ink, appearing to be "Andrew P. Zinner", written over a horizontal line.

Name
Done in Seattle, Washington