

FILED

Dec 19, 2014
Court of Appeals

Division III
State of Washington

No. 911604-9

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SHAWN ERIN MULLEN,

Petitioner.

FILED
DEC 31 2014

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CRF

PETITION FOR REVIEW

Court of Appeals No. 32293-9-III
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 11-1-05075-2
The Honorable Katherine Stolz, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is SHAWN ERIN MULLEN, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division III, case number 32293-9-III, which was filed October 16, 2014, and of the Order Denying Motion for Reconsideration filed on November 20, 2014 (Attached in Appendix). The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

Where Petitioner's two offenses involved the same intent to commit a theft, and occurred at the same time, place and against the same victim, did the trial court err when it found that the two offenses did not constitute the same criminal conduct?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Shawn Erin Mullen, as a principal or accomplice, with one count of first degree robbery (RCW 9A.56.190, 9A.56.200(1)(iii)) and one count of first degree burglary (RCW 9A.52.020(1)(b)). (CP 1-2) The State also alleged that Mullen or an accomplice was armed with a deadly weapon, a golf club, during the

commission of the crimes. (CP 1-2) The jury convicted Mullen as charged. (TRP 488-89; CP 95, 99, 101, 102)¹

At sentencing, Mullen asked the court to consider the two crimes as being the same criminal conduct for the purpose of calculating his offender score, and asked the court to exercise its discretion and not apply the burglary anti-merger statute. (TRP 496-97; CP108-11) The court determined that the crimes did not constitute the same criminal conduct, and did not address the anti-merger statute. (TRP 498) The court calculated Mullen's offender score as three, sentenced him within the standard range for that score, and imposed two 24-month deadly weapon sentence enhancements, for a term of confinement totaling 77 months. (TRP 498, 500; CP 115, 118)

Mullen timely appealed. (CP 127) The Court of Appeals affirmed the trial court and affirmed Mullen's sentence in an unpublished opinion filed on October 16, 2014. The Court found that the trial court did not abuse its discretion when it concluded that Mullen's burglary and robbery offenses were not the same criminal

¹ The trial transcripts, labeled Volumes I thru IV (containing trial dates 10/22/12 thru 01/11/13), will be referred to as "TRP." The transcript for the pretrial hearing on 10/18/12 (also labeled Volume I) will be referred to by the date of the proceeding.

conduct for purposes of calculating his offender score. (Opinion at 1, 9-10)

B. SUBSTANTIVE FACTS

Leonard DeWitt and Shawn Mullen were casual friends. (TRP 73-74, 205, 295, 298) They socialized, and occasionally went gambling together at casinos. (TRP 74, 295, 298) DeWitt did not own a car, so Mullen frequently gave DeWitt a ride when they were together or when DeWitt needed to go somewhere. (TRP 74, 203)

In early December, 2011, DeWitt, Mullen, and Mullen's girlfriend, Alexis McGregor, went together to a casino. (TRP 32, 36, 76, 123) DeWitt ran out of cash, so he asked Mullen to loan him some money. (TRP 76) According to DeWitt, Mullen loaned him between \$30.00 and \$50.00, and DeWitt promised to pay him back. (TRP 77, 206-07) De Witt also borrowed an expensive pair of sunglasses from Mullen, and had not returned them. (TRP 77-78, 207, 311)

On the night of December 16, 2011, DeWitt arrived home with a friend sometime after 11:00. (TRP 80, 123) DeWitt and his friend went inside the house through the garage, and left the garage door open and the light on because DeWitt's boyfriend was due home any minute. (TRP 88-89, 213) While DeWitt was using the bathroom on

the second floor of his house, he heard what at first sounded like two unfamiliar voices. (TRP 89-90) He then recognized one of the voices as belonging to Mullen. (TRP 89-90) Although DeWitt expected to see Mullen at some point in the near future because he owed Mullen money, De Witt did not expect to see Mullen at his home at that time of night. (TRP 87)

DeWitt testified that he came downstairs and saw Mullen standing with a second, larger man. (TRP 91, 92) Both men seemed angry. (TRP 91, 92) DeWitt testified that he heard Mullen mutter something about a PlayStation videogame console, then the second man began striking DeWitt repeatedly with a golf club. (TRP 94) DeWitt tried to run away, but the man followed him and continued to strike him with the golf club. (TRP 102-03) DeWitt then tried to run outside, but Mullen blocked his way. (TRP 129)

DeWitt testified that Mullen did not try to intervene or stop the man from hitting him. (TRP 96) DeWitt also testified that Mullen made a comment about things being stolen from his house, and that Mullen sounded angry. (TRP 96, 130) DeWitt had a \$100.00 bill in his pocket, and once Mullen got it from him the second man stopped beating him with the golf club. (TRP 107, 109, 111) However, according to DeWitt, Mullen punched him in the face once. (TRP

130)

DeWitt ran upstairs and locked himself in his office. (TRP 133) He heard Mullen follow him, and Mullen began banging and kicking the door. (RP133) Mullen left after DeWitt said he was calling the police. (TRP133, 134) DeWitt also ran outside and saw Mullen pulling away in his truck. (TRP 143) DeWitt reported Mullen's license plate number to the 911 operator. (TRP 144, 148)

Alexis McGregor sat in Mullen's truck during the incident. (TRP 40) She testified that she had seen Mullen and the second man, Albert Huniu, go into the house through the garage, and that Huniu was carrying a golf club. (TRP 39, 41, 313-14) When they came out, Huniu was still holding the golf club, but instead of getting into the truck he began walking down the street. (TRP40-41) Then Mullen came out of the house and got into the truck. (TRP 42) McGregor asked Mullen what was going on, and Mullen said, "Nothing. Shut up." (TRP 52-53)

McGregor then saw DeWitt, with blood dripping from his nose, standing in front of the truck. (TRP 43) Mullen drove away, and picked up Huniu down the street. (TRP 44-45) When McGregor again asked Mullen what happened, he told her that Huniu "got carried away." (TRP 60-61)

Police located and stopped Mullen in his truck shortly after the incident. (TRP 220, 222-23, 239) Mullen told police that he was tired of DeWitt robbing him, and that whatever DeWitt said, "it's probably a lie." (TRP 248) Police found two \$100.00 bills in Mullen's pockets, and a golf club in some bushes about a block and a half east of DeWitt's house. (TRP 251, 185, 187)

DeWitt testified that he was treated at the hospital then released, and that he suffered injuries to his arms, hand, forehead, and side. (TRP 151-52, 155-56, 157)

Mullen testified that he had loaned DeWitt money several times, and that DeWitt owed him about \$1,000.00 in total. (TRP 310-11) DeWitt always said he would pay Mullen back, but he never did. (TRP 312) Mullen was frustrated because he also believed that DeWitt had stolen other items from him, and that DeWitt was "punking" or taking advantage of him. (TRP 346, 347-48)

Mullen testified that he went to DeWitt's house to get the money that DeWitt owed him. (TRP 313) He asked Huniu to come too, because he felt that DeWitt would be more likely to give him the money if he was accompanied by a larger, stronger man. (TRP 332, 334) Mullen testified that he told Huniu not to use violence, and told Huniu not to bring the golf club into the house. (TRP 314, 317, 318)

When they arrived at the house, they entered through the open and lit garage, and knocked on the door. (TRP 317) According to Mullen, he heard DeWitt ask who was there, and that Mullen said, "it's Shawn," then walked into the house. (TRP 318) He testified that DeWitt immediately seemed afraid of Huniu. (TRP 324) DeWitt and Huniu ran around a corner, and when Mullen caught up, he saw DeWitt on the floor and Huniu beating him with the golf club. (TRP325-26) Mullen did not immediately try to intervene because Mullen was also intimidated by Huniu. (TRP 374-75) But Huniu stopped hitting DeWitt, and left. (TRP 326)

Mullen apologized to DeWitt, and asked him to return the money and other items that belonged to Mullen. (TRP 326, 327-28) DeWitt walked upstairs, and Mullen followed because he thought DeWitt was going to get the items that belonged to Mullen. (TRP 327-28) But when DeWitt instead slammed a door and called the police, Mullen became frustrated and started kicking the door. (TRP330) Mullen then left. (TRP 330)

Mullen testified that he had the \$100.00 bill in his pocket when he arrived, and that he did not take it from DeWitt. (TRP 383-84) Mullen also testified that he never asked Huniu to hit DeWitt, and that he never personally hit DeWitt. (TRP 331)

V. ARGUMENT & AUTHORITIES

The issues raised by Mullen's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals and this Court. RAP 13.4(b)(1) and (2).

- A. MULLEN'S OFFENSES AROSE OUT OF THE SAME CRIMINAL CONDUCT AND SHOULD HAVE COUNTED AS A SINGLE OFFENSE FOR THE PURPOSE OF CALCULATING HIS OFFENDER SCORE.

Mullen was convicted of first degree robbery and first degree burglary. To convict Mullen of first degree robbery, the jury had to find that he "took personal property" from another and that he "intended to commit theft" of property. RCW 9A.56.190, 9A.56.200(1)(iii); see *also* Jury Instruction 7 (CP 67). To convict Mullen of first degree burglary, the jury had to find that he "entered or remained unlawfully in a building", and that the entering or remaining was done with the "intent to commit a crime against a person or property therein." RCW 9A.52.020; see *also* Jury Instruction 17 (CP 77).

Under Washington law, multiple convictions that arise out of the "same criminal conduct" count as a single offense for the purpose of calculating the offender score. RCW 9.94A.589(1)(a). The

sentencing court's decision concerning whether multiple offenses constitute the same criminal conduct is reviewed for a clear abuse of discretion or misapplication of the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990).

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.” Mullen’s two crimes clearly involved the same victim and occurred at the same time and place. The question is whether Mullen had the same criminal intent during the two crimes.

Criminal intent is the same for two or more crimes when the defendant's intent, viewed objectively, does not change from one crime to the next, or when one crime furthers the other. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

For example, in State v. Rienks, the court found that burglary, robbery and first degree assault encompassed the same criminal conduct where the defendant went to the victim's apartment to collect money owed to a third person; the defendant entered, assaulted one man and stole money from a briefcase. 46 Wn. App. 537, 731 P.2d 1116 (1987). The court determined that the three offenses were committed as part of a recognizable scheme or plan and were

committed with “no substantial change in the nature of the criminal objective,” and therefore encompassed the same criminal conduct within the meaning of the Sentencing Reform Act. 46 Wn. App. at 543 (citing State v. Calloway, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985)). The court pointed out that “there was no independent motive for the secondary crime; rather, the objective was to accomplish or complete the primary one.” 46 Wn. App. at 544.

In State v. Davis, the defendant entered a home uninvited and began yelling at victim A. 90 Wn. App. 776, 779, 954 P.2d 325 (1998). Davis then pulled a gun from under his shirt and pointed first at victim A’s head. 90 Wn. App. at 779. He then pointed the gun at victim B when she tried to call the police to stop the burglary and assault on victim A. 90 Wn. App. at 779, 782. Davis was convicted of first degree burglary and two counts of second degree assault. 90 Wn. App. at 780.

On appeal, the court agreed with the trial court’s conclusion that the assaults furthered the burglary and, therefore, Davis had the same criminal intent in each. 90 Wn. App. at 782. Though the court ultimately concluded that the crimes were not the same criminal conduct, this was only because one of the crimes had a separate victim. 90 Wn. App. at 782.

In this case, Mullen testified that he went to DeWitt's house to get the money and items that DeWitt owed him. (TRP 313) He brought Huniu thinking he would intimidate DeWitt into giving Mullen the money and items. (TRP 332, 334) Mullen's objective throughout the incident was to take property from DeWitt. The entry into the house was committed with the intent to take property from DeWitt, and so furthered the commission of the robbery. The two offenses are clearly the "same criminal conduct."

The trial court did not explain its decision to the contrary, except to say, "I think that the [Lessley] case does distinguish. I think that a burglary and a robbery are two separate offenses[.]" (TRP 498) But the trial court's reading of Lessley is incorrect.

In Lessley, the defendant broke down the door of his ex-girlfriend's parents' home in Seattle, brandished a revolver, and demanded to see his ex-girlfriend. 118 Wn.2d at 775. While her father slipped out of the house to call the police, Lessley ordered his ex-girlfriend and her mother into their car and forced his ex-girlfriend to drive to a house in Maple Valley. 118 Wn.2d at 775. When they arrived, Lessley ordered the mother out of the car at gunpoint. 118 Wn. 2d at 775. He then drove toward North Bend, stopped the car, and assaulted his ex-girlfriend and threatened to shoot her. 118

Wn.2d at 775. Lessley subsequently drove with his ex-girlfriend to another house in White Center, where police shortly thereafter arrested him. 118 Wn.2d at 775.

Lessley pleaded guilty to burglary, kidnapping (for the abduction of the mother), kidnapping (for the abduction of his ex-girlfriend), and intimidating a witness. 118 Wn.2d at 776. At sentencing, Lessley argued that the burglary and the kidnapping offenses encompassed the same criminal conduct because he entered the home intending to take his ex-girlfriend away with him. 118 Wn. 2d at 776.

The trial court disagreed, finding the burglary was completed when Lessley broke in and assaulted the three victims with the revolver, and the kidnappings were separate crimes. 118 Wn.2d at 776. This Court agreed, holding that Lessley's convictions for first degree burglary and first degree kidnapping did not encompass the same criminal conduct. 118 Wn.2d at 776-77. The Court explained:

In this case, the objective intent of Lessley's burglary was completed when he broke into the Thomas residence armed with a deadly weapon. . . . Objectively viewed, then, Lessley's criminal intent changed when he moved from the burglary to the kidnapping; the former did not further the latter. . . . Additionally, the "same time and place" element is unmet in this case. The burglary occurred in Seattle . . . while the first degree kidnapping was carried out

over several hours' time in Seattle, Maple Valley, North Bend, and White Center. The burglary and the kidnapping were not confined to the same time and place. Finally, in this case, the burglary and the first degree kidnapping claimed more than one victim.

118 Wn.2d at 778.

The Lessley Court did not hold that burglary and robbery are always two separate offenses. In fact, Lessley did not even involve the crime of robbery. Moreover, with regard to the facts, Lessley is completely dissimilar to this case. Unlike in Lessley, Mullen did not break a door or otherwise damage property in order to gain entrance to DeWitt's house; rather, the garage door was left fully open and Mullen entered without incident. (TRP 39, 88, 213, 317) Unlike in Lessley, the entire incident in this case occurred in one place, DeWitt's house. Unlike in Lessley, there was only one victim in this case, DeWitt. And unlike in Lessley, the burglary did further the second crime of robbery. So while Lessley is indeed distinguishable, it does not support the trial court's conclusion that Mullen's two offenses are not the same criminal conduct.

As in Rienks, there was no "substantial change in the nature of the criminal objective" from one crime to the next. 46 Wn. App. at 543. And as in Davis, the burglary furthered the robbery and, therefore, Mullen had the same criminal intent for each crime. 90

Wn. App. at 782. The trial court's conclusion that Mullen's two offenses did not encompass the same criminal conduct was an error and an abuse of discretion.

Furthermore, the burglary anti-merger statute, RCW 9A.52.050, provides that a sentencing court "may" punish burglary separately from other crimes, even if the crimes encompass the "same criminal conduct." The decision of whether or not to apply the anti-merger statute is discretionary, Lessley, 118 Wn.2d at 782. Mullen asked the court to exercise its discretion and not apply the anti-merger statute. (TRP 497; CP 110-11) But the trial court did not address this statute at sentencing. It is not clear from the record whether the court would have applied the statute if it had correctly concluded that the crimes encompassed the same criminal conduct. Therefore, the anti-merger statute should not be applied now on appeal.

B. THE COURT OF APPEALS' DECISION WAS LEGALLY AND FACTUALLY INCORRECT.

First, the Court of Appeals misapplied the law and misapprehended the facts when it found that Mullen's two offenses were not the same criminal conduct because "Shawn Mullen completed the crime of burglary when he entered Lenny Dewitt's

home with the intent to intimidate him.” (Opinion at 9)

The evidence was clear that Mullen wanted DeWitt to repay the money DeWitt owed him. That was his goal and mission throughout the entire incident. The evidence clearly shows this, and shows that Mullin did not go to DeWitt’s home in order to intimidate him. This Court’s recitation of the testimony shows this:

About 6:00 p.m. on December 16, 2011, Shawn Mullen decided to go to Lenny Dewitt's home to “get [his] money back.” RP at 313. Mullen invited Alexis McGregor and Albert Huniu to join him. He told the two he wanted to collect his money. Mullen barely knew Huniu but wanted to bring “a big guy to intimidate [Dewitt] a little bit.” RP at 332.

(Opinion at 2)

Mullen brought Huniu in order to intimidated DeWitt into giving Mullen money. Mullen did not enter DeWitt’s home simply to deliver a “message of intimidation.” (Opinion at 10) Mullen’s mission would not have been complete simply because DeWitt felt intimidated. Intimidating DeWitt was not an ends to itself, but rather a means to achieve Mullin’s ultimate goal--to get DeWitt to pay him the money he owed.

As noted above, to be considered the “same criminal conduct” for sentencing, an offender’s crimes must have the same criminal intent. RCW 9.94A.589(1)(a). Criminal intent is the same for two or

more crimes when the defendant's intent, viewed objectively, does not change from one crime to the next, or when one crime furthers the other. Lessley, 118 Wn.2d at 777.

Mullen's objective throughout the incident was to get money or property from DeWitt. The entry into the house was committed with the intent to get money or property from DeWitt, and so furthered the commission of the robbery.

The Court of Appeals also concluded that the burglary offense had ended because "Mullen could have allowed Dewitt to escape outside with his message of intimidation already delivered." (Opinion at 10) But the fact that Mullen did not allow DeWitt to leave shows that Mullen was not simply attempting to intimidate DeWitt for the sake of intimidation. So this interpretation of the facts actually supports the conclusion that Mullen's intent throughout the incident did not change.

Furthermore, even if the burglary was complete at that point in time, that does not preclude a finding of same criminal conduct because the crimes need not be simultaneous to be the same criminal conduct. State v. Porter, 133 Wn.2d 177, 181, 942 P .2d 974 (1997).

Mullen's objective intent did not change from one crime to the

next. The burglary was committed to further the robbery, and the two offenses are the "same criminal conduct."

VI. CONCLUSION

Based on the above-stated authority and argument, Mullen respectfully requests that this Court grant his petition, find that the trial court erred in counting both offenses separately in calculating his offender score, and remand his case for resentencing.

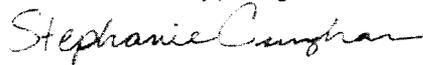
DATED: December 19, 2014



STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Shawn Erin Mullen

CERTIFICATE OF MAILING

I certify that on 12/19/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Shawn E. Mullen, DOC# 860517, Cedar Creek Corrections Center, PO Box 37, Littlerock, WA 98556. I further certify that I provided a copy of this document to Respondent State of Washington by e-mail attachment sent to pccpatcecf@co.pierce.wa.us, and this method of service is by prior agreement of the parties.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion & Order Denying Motion for Reconsideration

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

STATE OF WASHINGTON,)	
)	No. 32293-9-III
Respondent,)	
)	
v.)	
)	
SHAWN ERIN MULLEN,)	UNPUBLISHED OPINION
)	
Appellant.)	

FEARING, J. — A jury found Shawn Mullen guilty of first degree burglary and first degree robbery for entering the home of Leonard Dewitt, assaulting him, and taking a \$100 bill from him. On appeal, Mullen contends the trial court abused its discretion when it concluded that the burglary and robbery were not the same criminal conduct for purposes of calculating his offender score. We disagree and affirm Mullen’s sentence.

FACTS

Shawn Mullen and his victim, Leonard (Lenny) Dewitt, were not close friends, but knew each other and shared mutual friends. Dewitt did not own a car and so Mullen occasionally provided Dewitt rides, including to and from a casino. Mullen also loaned Dewitt money.

On December 12, 2011, Lenny Dewitt, Shawn Mullen, and Mullen's girl friend, Alexis McGregor, went to a casino. Since he lacked cash, Dewitt asked Mullen to loan him money. Mullen lent Dewitt between \$30 and \$50.

Shawn Mullen testified at trial that Lenny Dewitt owed him \$1,000 total, and that Dewitt failed to return sunglasses he borrowed from Mullen. According to Mullen, Dewitt repeatedly promised to satisfy the debt, but never did. Mullen also believed that Dewitt had stolen electronics from him.

About 6:00 p.m. on December 16, 2011, Shawn Mullen decided to go to Lenny Dewitt's home to "get [his] money back." RP at 313. Mullen invited Alexis McGregor and Albert Huniu to join him. He told the two he wanted to collect his money. Mullen barely knew Huniu but wanted to bring "a big guy to intimidate [Dewitt] a little bit." RP at 332. The three went to Dewitt's home, knocked on the front, but there was no response. They left to return later that night.

Lenny Dewitt arrived home after 11:00 p.m. with a friend, Kevin O'Connor. Dewitt and O'Connor entered the home through the garage, because the front door was broken. Dewitt expected his boyfriend, Michael Haan, home any minute, so he left the garage door open and a light on. Both Dewitt and O'Connor needed to use the restroom. O'Connor used the only downstairs bathroom; Dewitt used an upstairs bathroom.

Meanwhile Shawn Mullen, Alexis McGregor, and Albert Huniu returned to Lenny Dewitt's home. McGregor sat in Mullen's truck and played a game on her cell phone.

Mullen and Huniu entered Lenny Dewitt's home through the open garage. Huniu carried a golf club. Mullen testified that he instructed Huniu to not use violence and that the golf club was unnecessary.

From the upstairs, Lenny Dewitt heard two voices in his home. Dewitt recognized one of the voices as Shawn Mullen's tone, but did not recognize the other. Dewitt ran downstairs to discover Mullen and Albert Huniu. Dewitt was not expecting Mullen and had never met Huniu. Dewitt described Huniu as "a big, stocky-type guy, you know, medium height, just really big and stocky," and "[t]hat he was kind of angry." RP at 91. Mullen was also upset.

Shawn Mullen talked about a PlayStation 3. Then Albert Huniu repeatedly beat Lenny Dewitt with the golf club. Dewitt tried to escape the assault by shielding himself with furniture, but Huniu persisted in striking him. Dewitt tried to run outside. Mullen blocked his way. Dewitt handed Mullen two \$100 bills, after which Huniu ended his attack. Mullen spoke of property stolen from his house and then punched Dewitt in the face.

Lenny Dewitt ran upstairs into his office and locked the door. Shawn Mullen pursued him upstairs. According to Mullen, Dewitt went upstairs to collect and then return Mullen's property. Mullen pounded on the office door. Dewitt told Mullen, "I'm calling 911" which he did. RP at 133. Mullen left.

From the truck, Alexis McGregor saw Albert Huniu leave Lenny Dewitt's home

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and walk down the street with the golf club. Shawn Mullen exited the house and entered the truck. When McGregor asked what happened, Mullen replied “[n]ot to worry about it.” RP at 53. McGregor then saw Dewitt, with blood dripping from his nose, standing in front of the truck. Mullen drove down the street and picked up Huniu. Huniu entered the truck, without the golf club. Mullen told McGregor that “Albert got a little carried away.” RP at 61.

From his driveway, Lenny Dewitt reported Shawn Mullen’s license plate number to a 911 operator. About 15 minutes later, police pulled Shawn Mullen over. Mullen told police that he was tired of Dewitt robbing him and that whatever Dewitt said was a lie. Police arrested Mullen, found two \$100 bills in Mullen’s pocket and a golf club in bushes near Dewitt’s home.

PROCEDURE

The State charged Shawn Mullen with first degree burglary and first degree robbery, with deadly weapon enhancements for both counts. The charges proceeded to a jury trial.

The trial court instructed the jury on first degree burglary:

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime assaults any person.

....

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To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of December, 2011, the defendant entered or remained unlawfully in a building;

(2) *That the entering or remaining was with intent to commit a crime against a person or property therein;*

(3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged assaulted a person, and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk Papers (CP) at 76-77 (emphasis added). The burglary instruction did not specify the other crime intended to be committed by Mullen when entering Lenny Dewitt's home.

For first degree robbery, the trial court instructed the jury:

A person commits the crime of robbery in the first degree when in the commission of a robbery he or she inflicts bodily injury.

.....
To convict the defendant of the crime of robbery in the first degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of December, 2011 the defendant or an accomplice unlawfully took personal property from the person or in the presence of another;

(2) That the defendant or accomplice intended to commit theft of the property;

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(3) That the taking was against the person's will by the defendant or accomplice's use or threatened use of immediate force, violence or fear of injury to that person;

(4) That the force or fear was used by the defendant or accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts the defendant or an accomplice inflicted bodily injury; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 66-67.

The jury found Mullen guilty of both counts. By special verdict, the jury also found for each count that Mullen was "armed with a deadly weapon." CP at 101-02.

At sentencing, Shawn Mullen argued that the burglary and robbery should constitute the same criminal conduct for purposes of sentencing. Friends and family also wrote to the trial court requesting leniency, pointing to Mullen's strong work ethic and dedication to his son.

The trial court concluded that the burglary and robbery were not the same criminal conduct for purposes of calculating Mullen's offender score under RCW 9.94A.589. The trial court calculated Shawn Mullen's offender score as three based on a 2003 conviction for unlawful possession of a controlled substance and the two convictions at issue in this case.

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Under RCW 9A.52.050, the burglary anti-merger statute, “a trial judge [has] discretion to punish a burglary separately, even where the burglary and another crime encompassed the same criminal conduct.” *State v. Knight*, 176 Wn. App. 936, 962, 309 P.3d 776 (2013), *review denied*, 179 Wn.2d 1021, 318 P.3d 279 (2014). Because it concluded that Mullen’s burglary and robbery were not the same criminal conduct, the trial court did not review whether to apply the anti-merger statute.

Based on the offender score of three, the trial court sentenced Shawn Mullen to 41 months confinement for first degree burglary and 53 months for first degree robbery. The trial court added 24 months to each crime as a deadly weapon enhancement for a total of 65 months for burglary and 77 months for robbery. The court ordered Mullen’s sentences to run concurrently for a total of 77 months’ confinement.

LAW AND ANALYSIS

Same Criminal Conduct

Shawn Mullen contends that his convictions for first degree burglary and first degree robbery constitute the “same criminal conduct” for purposes of calculating his offender score under RCW 9.94A.589. “‘A trial court’s determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law.’” *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999) (quoting *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993)). “A trial court abuses its discretion when its decision is

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manifestly unreasonable or based on untenable grounds or reasons.” *State v. Mehrabian*, 175 Wn. App. 678, 710, 308 P.3d 660, *review denied*, 178 Wn.2d 1022, 312 P.3d 650 (2013).

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

Except as provided in (b) or (c) of this subsection, whenever 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*. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

(Emphasis added.) “If any one of these elements is missing, the sentencing court must count the offenses separately in calculating the offender score.” *Knight*, 176 Wn. App. at 959.

Shawn Mullen committed the burglary and robbery at the same time and place and against the same victim. At issue is whether Mullen’s convictions required the same criminal intent for purposes of RCW 9.94A.589(1)(a).

“In order to determine whether two crimes share the same criminal intent, courts look at whether the defendant’s intent, viewed objectively, changed from one crime to the next and whether commission of one crime furthered the other.” *State v. Bickle*, 153 Wn.

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App. 222, 229-30, 222 P.3d 113 (2009). “Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). “To determine whether a defendant’s intent changed, we analyze whether crimes are sequential or continuous.” *Mehrabian*, 175 Wn. App. at 711. “When a defendant ‘ha[s] the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,’ the crimes are sequential and not the same criminal conduct.” *Mehrabian*, 175 Wn. App. at 711 (quoting *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997)).

RCW 9.94A.589 affords a trial court discretion. The trial court could have concluded that Shawn Mullen’s convictions for burglary and robbery expressed a singular criminal purpose—namely, to bully Lenny Dewitt into returning Mullen’s property and satisfying debts. Mullen testified he went to Dewitt’s home in order to get his money. He admitted that he brought Albert Huniu along to intimidate Dewitt. Mullen unlawfully entered Dewitt’s home in order to retrieve what he perceived to be his; in this way, Mullen’s burglary furthered the robbery. During the assault, Mullen twice mentioned property Dewitt purportedly stole from him. Thus, a trial court could conclude the evidence showed continuous criminal conduct.

The opposite conclusion is equally plausible. Shawn Mullen completed the crime of burglary when he entered Lenny Dewitt’s home with the intent to intimidate him.

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Dewitt ran downstairs. Mullen spoke about a PlayStation 3, after which Albert Huniu beat Dewitt with a golf club. Dewitt shielded himself with a piece of furniture and then tried to run outside. At this point, Mullen had not yet assaulted Dewitt. Mullen could have allowed Dewitt to escape outside with his message of intimidation already delivered. But instead, Mullen blocked Dewitt from leaving and punched Dewitt in the face. Only after Mullen punched Dewitt did Dewitt give Mullen one or two \$100 bills, completing the robbery. Mullen committed burglary, with an underlying assault by intimidation. Then, Mullen committed robbery, punching Dewitt into surrendering his property. Thus, the trial court could conclude the evidence showed sequential criminal activity and intent.

The trial court's refusal to exercise its discretion in a manner favoring Shawn Mullen does not constitute an abuse of that discretion. The court's application of RCW 9.94A.589 was reasonable and tenable. The trial court did not misapply the law.

Statement of Additional Grounds (SAG)

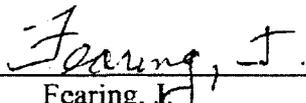
In his SAG, Shawn Mullen contends that the State deliberately misled the court when it paraphrased Lenny Dewitt's testimony at Mullen's sentencing hearing. He does not argue any basis for relief, however. There is no cognizable issue for this court to address.

CONCLUSION

We affirm Shawn Mullen's sentence.

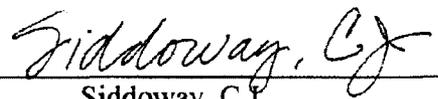
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A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

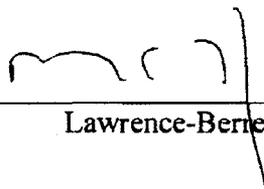


Fearing, J.

WE CONCUR:



Siddoway, C.J.



Lawrence-Berney, J.

FILED
November 20, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 32293-9-III
)	
Respondent,)	
)	
v.)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
SHAWN ERIN MULLEN,)	
)	
Appellant.)	

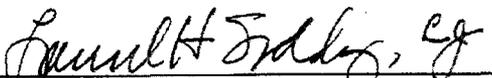
THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of October 16, 2014, is hereby denied.

DATED: November 20, 2014

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:


LAUREL H. SIDDOWAY, Chief Judge

CUNNINGHAM LAW OFFICE

December 19, 2014 - 9:19 AM

Transmittal Letter

FILED
Dec 19, 2014
Court of Appeals
Division III
State of Washington

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Case Name: State v. Shawn Erin Mullen

Court of Appeals Case Number: 32293-9

Party Represented: Appellant Shawn Erin Mullen

Is This a Personal Restraint Petition? Yes No

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- Designation of Clerk's Papers
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Hearing Date(s): _____
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- Response to Personal Restraint Petition
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- Other: PETITION FOR REVIEW _____

Comments:

No Comments were entered.

Sender Name: S C Cunningham - Email: sccattorney@yahoo.com