IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY E. JOHNSON, Appellant.	No. 38062-5-II UNPUBLISHED OPINION

HUNT, J.—Anthony E. Johnson appeals his residential burglary jury conviction. He argues that the evidence was insufficient to prove he actually entered the victim's residence. He also challenges his sentence, arguing that the record does not show the sentencing court understood that it had discretion about whether to apply the burglary antimerger statute and that his trial counsel was ineffective in failing to bring this to the court's attention. We affirm.

FACTS

I. Crimes

Johnson did not have permission to be at his mother's house when she was not there or at night when she was sleeping; and she, Barbara Johnson, had made that clear to him. When she awakened on the morning of March 15, 2008, her purse was missing from the kitchen chair where she had put it; her car keys had been on the kitchen counter. Thinking that she might have forgotten to bring her purse in from her car, she went outside to check and discovered that her car

was also missing. On her back porch, she found two duffels containing some of her son's clothes.

Johnson appeared shortly afterwards and returned her car and purse. He told his mother that he had taken them because somebody was demanding money and had threatened to kill him. Her purse no longer contained the money that she had put there or her credit card and checkbook. She did not question Johnson about coming into her house because, as she later explained, "[W]e both knew that's what had happened." Report of Proceedings (RP) at 8.

II. Procedure

The State charged Johnson with residential burglary, perpetrated as a crime of domestic violence, and taking a motor vehicle without permission (TMVWP). A jury convicted him as charged.

The State calculated Johnson's offender score as 9 for the burglary and 7 for the TMVWP, resulting in a standard sentencing range for the burglary of 63-84 months; for the TMVWP, it was 14-18 months. At sentencing, defense counsel initially argued for the low ends of both standard ranges, accepting the State's calculation of Johnson's offender scores for both convictions.[1] The trial court initially agreed that the low ends of the range were appropriate and announced that it would impose concurrent sentences of 63 months and 14 months, respectively.

Johnson's counsel then took issue with the State's calculation of the offender score for the TMVWP, arguing that it should be 8. The State responded:

> There is [sic] two ways to analyze the concurrent offense. Either it's separate criminal conduct, it would be 9 and 8, on the same it would be 9 and 7, wouldn't

[1] Defense counsel accepted 9 as the offender score for the burglary. He mentioned that he was unsure how 7 was the proper offender score for the TMVWP, and stated that he thought "it should be 8, but that doesn't control or have an impact." RP at 59.

> go against each other, accept [sic] for the res burg. Because the anti-merger statute for residential burglary . . . it couldn't count against the taking the motor vehicle, and because it doesn't affect ultimately the entire sentence I thought this was an easier way to do it.

RP at 68.

Agreeing with the State's analysis, the trial court permitted defense counsel to make his argument. Defense counsel argued that if the crimes were the same criminal conduct,[2] the offender scores would be 9 and 7; if the crimes were not the same criminal conduct, the scores would be 9 and 8. Addressing the State, the trial court asked if the State objected to Johnson's offer to stipulate that the correct offender score for the TMVWP was 8. The State did not object. Johnson's offender score on the TMVWP was changed to 8, and his standard range became 17 to 22 months.

Johnson appeals his burglary conviction and his sentence.[3]

ANALYSIS

I. Burglary Conviction

Johnson argues that the evidence was insufficient to prove that he entered his mother's residence. We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of

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[2] Defense counsel did not argue that Johnson's crimes constituted the same criminal conduct for sentencing purposes under RCW 9.94A.589(1)(a). Nor did the trial court make such a finding.

[3] Our court commissioner initially considered this matter and referred it to a panel of judges under RAP 18.14.

insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). To establish residential burglary, the State had to prove that, with the intent to commit a crime against a person or property therein, the defendant entered or remained unlawfully in a dwelling other than a vehicle. RCW 9A.52.025(1).

First, Johnson admitted to having entered his mother's home and taking her car keys. The officer who responded to Mrs. Johnson's 911 call testified that he heard Johnson talking with his mother about having gone into her house and getting the keys.

Nonetheless, Johnson relies on his mother's testimony that initially she believed she might have left her purse in her car and on the lack of her specific testimony that the keys were missing. But his mother testified that (1) he did not have permission to take the keys; and (2) when Johnson appeared at her home, he returned her car and purse, telling her that he had taken them because somebody had been demanding money and threatening to kill him. The record does not show any tampering with or "hot-wire" type damage to the ignition of Mrs. Johnson's car. This evidence supports a reasonable inference that Johnson took his mother's car keys to drive away her car. And to obtain her car keys, Johnson had to have entered her house to remove the keys from the kitchen counter, where she had left them.

We hold that the evidence was sufficient to establish the "entry" element of burglary.

II. Sentence – "Same Criminal Conduct"

Johnson next argues that the record does not show the trial court knew it had discretion to count his current crimes as "the same criminal conduct" under RCW 9.94A.589(1)(a), despite the burglary antimerger statute, RCW 9A.52.050. This argument also fails.

A. Trial Court Discretion

Both parties agree that the burglary antimerger statute, RCW 9A.52.050, gives the sentencing court discretion to punish or to decline to punish for two crimes when a burglary and an additional crime encompass the same criminal conduct. *See State v. Bradford*, 95 Wn. App. 935, 950, 978 P.2d 534 (1999); *State v. Davis*, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998). The State's characterization of the antimerger statute's effect on Johnson's sentencing, however, implied that the trial court was required to apply the statute, ignoring the statute's permissive "may."[4]

But we need not reach this argument because Johnson did not argue to the trial court that his crimes constituted the "same criminal conduct" for sentencing purposes under RCW 9.94A.589(1)(a).[5] Furthermore, when Johnson's defense counsel said he did not believe the trial court had made such a finding, the court confirmed that it had not. Because Johnson neither

[4] RCW 9A.52.050 provides: "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." (Emphasis added.) The State's statement incorrectly implies that the court *must* apply the antimerger statute to the burglary. *See* RCW 9A.52.050.

[5] Defense counsel noted the option of treating Johnson's burglary and theft as the same criminal conduct, but he never discussed these requirements. Instead, his approach was similar to that in *State v. Beasley*, 126 Wn. App. 670, 685-86, 109 P.3d 849, *review denied*, 155 Wn.2d 1020 (2005), in which defense counsel left the determination to the court.

argued for nor requested a finding of "same criminal conduct," he has waived any challenge on appeal to the failure to make it below. *State v. Beasley*, 126 Wn. App. 670, 685-86, 109 P.3d 849, *review denied*, 155 Wn.2d 1020 (2005); *State v. Nitsch*, 100 Wn. App. 512, 523-25, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000).

Therefore, we do not consider whether the crimes were the same criminal conduct. Accordingly, there is no issue of the trial court's exercise of its discretion under the antimerger statute to treat Johnson's burglary and theft as separate or the same crime.

B. Ineffective Assistance of Counsel

Johnson also argues that his trial counsel's performance was deficient in failing to explain to the trial court that application of the burglary antimerger statute was discretionary, and in arguing for a higher offender score on the TMVWP. This argument also fails.

In order to prevail on his ineffective assistance of counsel claim, Johnson must show that counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced him. *Beasley*, 126 Wn. App. at 686. Johnson fails to make this showing.

With respect to the first prong of the test, defense counsel's argument below clearly communicated that (1) the trial court could find the "same criminal conduct" under RCW 9.94A.589(1)(a); and (2) if it did, Johnson's offender score for the burglary would be 8. The trial court simply did not find that Johnson's burglary and thefts constituted the "same criminal conduct" for sentencing purposes. As for Johnson's argument about his offender score for the TMVWP conviction, he cites no authority for the proposition that failure to acquiesce in a misapplication of the law is deficient performance. Therefore, we do not further consider this

argument. RAP 10.3(a)(6); *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

With respect to the second prong of the test, Johnson argues that he was prejudiced because (1) the trial court "seemed prepared to accept the State's concession that [the] crimes constituted the same criminal conduct," Br. of Appellant at 10; and (2) thus, there is a strong possibility that the trial court might have declined to apply the antimerger statute had the court recognized it had the discretion to do so. The record, however, does not support Johnson's speculations. On the contrary, the trial court expressly noted that it had not found Johnson's crimes to be the same criminal conduct.[6] Furthermore, Johnson's burglary and theft sentences run concurrently. Thus, he suffers no prejudice from serving these two sentences. We hold, therefore, that Johnson fails to establish ineffective assistance of counsel at sentencing.

Affirmed.

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

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Hunt, J.

We concur:

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Houghton, J.

[6] And, in spite of the State's characterization of the antimerger statute's impact on Johnson's sentencing, Johnson offers no evidence to suggest that the trial court did not consider the discretionary language of the antimerger statute.

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Van Deren, C.J.