

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CURTIS M. SMITH,

Appellant.

No. 40710-8-II

UNPUBLISHED OPINION

Worswick, A.C.J. — Curtis Smith appeals his sentence for his Grays Harbor County conviction of second degree taking a motor vehicle without the owner’s permission. He contends that the trial court should have counted two prior crimes as the same criminal conduct. We affirm.

FACTS

Smith pleaded guilty to second degree taking a motor vehicle without the owner’s permission, but challenged the State’s calculation of his offender score. At issue were two 2004 crimes, residential burglary and second degree assault. According to the affidavit supporting arrest for those crimes, Smith and codefendant Brigham entered Robert Ayerst’s residence without permission. They accused Ayerst of owing Brigham money. Smith hit Ayerst with a motorcycle helmet, and Brigham shocked him with a stun gun. Smith then took money from Ayerst’s wallet, and the two men left. During this altercation, Ayerst’s guest, Christa Anderson, escaped through a window. The trial court imposed concurrent sentences for the 2004 crimes.

At the current sentencing hearing, the State argued that the court had the discretion to apply RCW 9A.52.050, the burglary antimerger statute, and count the 2004 crimes separately, giving Smith an offender score of seven points. Smith asserted that his offender score should be six. He contended that the antimerger statute applied only to crimes being currently prosecuted, and the court could not rely on it as a basis for counting the 2004 crimes separately. He argued that in the absence of the statute, the facts of those crimes required that they be treated as the same criminal conduct. The trial court did not specifically address the parties' arguments, but it counted the 2004 crimes separately. The judge told Smith, "You've been auditioning for this for a long time. You're a slow learner. I think seven is the right number." Verbatim Report of Proceedings (Apr. 12, 2010) at 6. The court imposed 18 months of incarceration, the high end of the standard range.

ANALYSIS

The scoring of prior crimes is governed by RCW 9.94A.525(5)(a), which provides, in pertinent part:

(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a)

We review a trial court's determination of what constitutes the same criminal conduct for abuse of discretion. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). Curtis first asserts that the court failed to exercise its discretion under RCW 9.94A.525(5)(a) because it considered itself bound by the burglary antimerger statute. The record does not support that claim. The State clearly told the court that its decision regarding the antimerger statute was discretionary. And nothing in the court's ruling suggests that it believed it was bound by the statute.

Smith also contends, as he did below, that the antimerger statute applies only to current crimes. We disagree. RCW 9A.52.050 states:

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.

There is nothing in this language that suggests a limitation to current crimes. The statute makes the crimes separate. It allows separate punishment, even when the crimes are the same criminal conduct. *See State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). The nature of the crimes does not change after sentencing and there is no reason why the antimerger statute should not continue to apply.

Regardless, the trial court did not need to rely on the antimerger statute to count the 2004 crimes separately. Crimes are not the same criminal conduct unless they require the same criminal intent, occur at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). Ayerst was the victim of Smith's 2004 assault. However, the 2004 burglary involved two victims, Ayerst and Anderson. *See State v. Davis*, 90 Wn. App. 776, 782, 954 P.2d 325 (1998); *State v. Davison*, 56 Wn. App. 554, 558-60, 784 P.2d 1268 (1990), *review denied*, 114 Wn.2d 1017

40710-8-II

(1990) (victims of a burglary include guests of the residents). Two crimes cannot be the same criminal conduct if one of them involves an additional victim. *Davis*, 90 Wn. App. at 782. The trial court correctly calculated Smith's offender score.

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.

Worswick, A.C.J.

We concur:

Hunt, J.

Johanson, J.