

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GORDON R. CLARK,

Appellant.

No. 42404-5-II

UNPUBLISHED OPINION

Armstrong, P.J. — Gordon R. Clark appeals his sentences for second degree burglary and residential burglary. Clark argues that the trial court erred when it failed to count the two crimes as the same criminal conduct in calculating his offender score. RCW 9.94A.589(1)(a). We affirm.¹

FACTS

In late October 2009, at night, Clark and Charles Haven went to 1761 Caples Road, Woodland, Washington, when the property's owners, Katrina and Ronald Child, were not at home. All of the buildings on the property were locked. Clark and Haven opened the garage and backed Haven's truck into a garage bay of a detached garage. They entered the garage and loaded a crate into the back of Haven's truck. Haven left the garage. Clark waited in the garage for a few moments for Haven to return and then followed Haven into the residence through the back door of the detached garage. At trial, Clark testified that he did not know that Haven lacked the owners' permission to enter the property and that he left the premises after he realized that Haven was there to steal property from the garage and house.

¹ This matter was referred to a panel of judges. RAP 17.2.

In a pretrial statement to police, however, Clark stated that he went to help Haven take property from the address and was paid in methamphetamine. He stated that he followed Haven from the garage to the residence and waited in the doorway of the house while Haven handed him items. At some point, Clark also helped Haven load a crate into his truck from the garage. Clark eventually got scared and ran off.

The jury convicted Clark of residential burglary and second degree burglary. At sentencing, Clark argued that the two crimes were part of the same criminal conduct and should be counted as a single offense for sentencing purposes. The trial court, however, disagreed, relying on *State v. Garnier*, 52 Wn. App. 657, 763 P.2d 209 (1988), *overruled on other grounds by State v. Stephens*, 116 Wn.2d 238, 803 P.2d 319 (1991). *Garnier* held that multiple burglaries of separate suites in an apartment building in the same timeframe were not part of the same criminal conduct. *Garnier*, 52 Wn. App. at 657.

ANALYSIS

A trial court's finding that multiple offenses were not part of the "same criminal conduct" is reviewed for abuse of discretion or misapplication of law. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). RCW 9.94A.589(1) defines the phrase "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." The absence of any of these prongs prevents a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

When, as here, the statutory intents of the crimes are the same, a trial court next focuses on the extent to which criminal intent, "as objectively viewed, changed from one crime to the

next. . . . [P]art of this analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same.” *Garnier*, 52 Wn. App. at 660 (quoting *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987), supplemented by *State v. Dunaway*, 109 Wn.2d 207, 749 P.2d 160 (1988), reconsideration denied (Mar 07, 1988)).

The State argues that because of the length of time it would have taken Clark and Haven to empty items from each building and because each building required a separate entry, Clark had the time after entering the garage and before entering the house to form the intent to commit a second criminal act, the residential burglary. Clark argues that “[t]he entire incident was one continuing course of conduct which took place at the same Caples Road property over a short time span during the middle of a single night.” Appellant’s Br. at 12.

In *Garnier*, 52 Wn. App. at 659, police apprehended the defendant after he entered 18 different suites in a large building by breaking the window of each with a fire extinguisher. In its sentencing analysis, the court first recognized that new case law mandated a conclusion that the crimes were not the same criminal conduct because each crime involved a separate victim. That is not the case here. The court added, however, that even absent the new law, because “[e]ach burglary was a complete and final act; each was not dependent on nor interrelated to the other,” the burglaries were not the same criminal conduct.

Here, the record supports that the trial court did not abuse its discretion in concluding that the “separate building issue” created different crimes for sentencing purposes when objectively examining whether the two crimes involved the same “criminal intent”: the two buildings were

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separate, they were both locked, and Clark testified that he waited in the garage before following Haven from the garage to the residence. Report of Proceedings (RP) at 188-89, 325, 328; *Garnier*, 52 Wn. App. at 660.

We affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.