IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29091-3-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
JOHN LEWIS EBERLY, JR.,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — John Eberly Jr. challenges the trial court's determination that his convictions for first degree burglary and second degree assault did not constitute the same criminal conduct. The trial court did not abuse its discretion. We affirm.

FACTS

Mr. Eberly engaged in a heated argument with his neighbor, Muriel Vermillion, about a gate that Ms. Vermillion believed blocked access to her property. Later that day Ms. Vermillion returned home and saw Mr. Eberly's truck behind some trees. She hurried into her house and locked the door. Mr. Eberly followed; she yelled for him to leave. Instead, he came on the porch and shook the door while yelling at her.

Ms. Vermillion heard a gunshot and looked through the living room window. She saw Mr. Eberly on the porch with a pistol in his hand. A second shot shattered the window and struck Ms. Vermillion in the hip. Mr. Eberly then forced open the front door and fell into the living room, still holding his gun. Ms. Vermillion described him as highly intoxicated. She believed he was trying to kill her.

A fight ensued. The two eventually landed on the floor with Ms. Vermillion on top. He lost control of the gun. She grabbed a hatchet and hit him on the foot with the blunt end, causing him to scream in pain. She ran upstairs to call for aid, but found that there was no dial tone. Mr. Eberly eventually left. Ms. Vermillion drove to a neighbor's house and summoned aid.

The prosecutor filed charges of attempted first degree murder, first degree burglary, and first degree assault. Mr. Eberly testified that he went to Ms. Vermillion's house to give her a key to the gate and instead had to defend himself against attack. He was not intoxicated at that time, but did drink heavily to deal with the pain of the hatchet injury. Counsel argued the case on a theory of self-defense.

The jury was unable to reach a verdict on the attempted murder count. It did find Mr. Eberly guilty of first degree burglary and of the inferior degree offense of second degree assault. The jury also concluded both crimes were committed with a firearm.

At sentencing, the trial court determined that the two crimes did not constitute the same criminal conduct. The State sought an exceptional sentence, but the trial court imposed concurrent high-end standard range sentences.

Mr. Eberly timely appealed to this court.

ANALYSIS

The sole issue presented by this appeal, although argued in two separate manners, is whether the two crimes constituted the same criminal conduct for scoring purposes.[1] We conclude that the trial court did not abuse its discretion in finding the two offenses did not constitute the same criminal conduct.

Except in the circumstance of serious violent crimes, the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, directs a trial judge to count the other crimes being sentenced as part of the offender score for each other crime, but then have the sentences for the crimes run concurrently with each other. RCW 9.94A.589(1). This requirement is generally referred to as the "multiple offense policy." *State v. Batista*, 116 Wn.2d 777, 786-787, 808 P.2d 1141 (1991). An exception to the requirement that each crime be

[1] Mr. Eberly has filed a lengthy, neatly written Statement of Additional Grounds. The document largely reiterates his version of the events. However, he has presented no legal argument and no authority to suggest what errors he believes occurred at trial. Under the circumstance, there is nothing for us to review. RAP 10.10(c); *Accord*, RAP 10.3(a)(6); *Ang v. Martin*, 154 Wn.2d 477, 486-487, 114 P.3d 637 (2005).

added to the offender score exists if a trial judge finds multiple current offenses constituted the "same criminal conduct." In that instance, the multiple offenses are to be treated as one crime for scoring purposes. RCW 9.94A.589(1)(a). "'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." *Id.* Crimes have the same criminal intent if, objectively viewed, one crime furthered the other. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

A judge's ruling with respect to a "same criminal conduct" determination is reviewed for abuse of discretion. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion exercised in violation of a statute is untenable and amounts to an abuse of discretion. *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006); *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), *review denied*, 129 Wn.2d 1003 (1996).

Typically, the failure to challenge an offender score calculation waives the issue "where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *State v. Wilson*, 170 Wn.2d 682,

689, 244 P.3d 950 (2010) (quoting *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)). Because he did not object or argue the ruling in the trial court, Mr. Eberly has waived a direct challenge to the ruling. Nonetheless, we will address the claim because he has alternatively argued that his counsel was ineffective for failing to object to the ruling.

Effectiveness of counsel is judged by the two prong standard of *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). That test is whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately. *Id*. at 689-691. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Whether or not appellant has satisfied the first *Strickland* prong is dependent on whether or not the court had to find the two crimes constituted the same criminal conduct. The answer to that question is "no" for two reasons. The first is the existence of RCW 9A.52.050. That statute 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.

This statute was applied in the context of a "same criminal conduct analysis" in *Lessley*. The court concluded that it gives the trial court authority to punish two crimes separately even if they would otherwise encompass the same criminal conduct. 118 Wn.2d at 782-783.

The second reason that the same criminal conduct argument fails is found in the definition of the phrase: the crimes must be committed at the same time and place, involve the same victim, and have the same intent—i.e., they further one another. RCW 9.94A.589(1)(a); *Lessley*, 118 Wn.2d at 777. While these crimes shared the same victim and location, they did not satisfy the other elements of the same criminal conduct test.

First, the crimes did not occur at the same time. Instead, they were sequential. Ms. Vermillion was assaulted by the gunshot into the living room window. Mr. Eberly then committed the burglary by smashing the front door and unlawfully entering the living room. The time element was not the same. Instructive in this regard is *Lessley.* There the defendant broke into a house at gunpoint and kidnapped a woman inside. The Washington Supreme Court confirmed that the burglary and kidnapping offenses did not constitute the same criminal conduct. 118 Wn.2d at 778. One reason was that the two

offenses were in different locations at different times. The burglary was accomplished in the home, but the kidnapping only began there and continued through the various locations where the defendant took the victim over the next several hours. *Id.* While here the two offenses occurred close in time one after the other, they were not co-temporal.

The sequential nature of the offenses also helps explain why they did not share the same intent. The assault was completed before the burglary occurred. Ms. Vermillion was over at the window, not the front door, when she was shot. The wounding did not assist in the forced entry that constituted the burglary. Similarly, the burglary, committed after the assault was complete, did not further the assault. If anything, the burglary furthered the attempted murder count, but that charge was never proven to the jury's satisfaction. Neither crime furthered the commission of the other offense. Accordingly, they did not share the same criminal intent.

Counsel understandably did not make a same criminal conduct argument because it would have been unavailing under the facts of the case. Mr. Eberly has not established that his counsel failed to perform to the standard of the profession. Because he has failed to establish the first *Strickland* prong, we need not consider the second prong. *Foster*, 140 Wn. App. at 273. The ineffective assistance claim is without merit.

Affirm.

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.

_____
Korsmo, J.

WE CONCUR:

_____
Kulik, C.J.

_____
Sweeney, J.