IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29128-6-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
RICKY DESHAWN THOMAS,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Ricky Thomas challenges his offender score calculation, arguing that some of the crimes constituted the same criminal conduct. The issue was waived by his failure to present it to the trial judge. It also is without merit. The convictions are affirmed.

FACTS

Mr. Thomas was charged as the result of an incident in which he entered Shanda Howard's apartment in violation of a no-contact order. He grabbed her by the face and pushed her into a wall, and then began searching the apartment. After the search, he

threw Ms. Howard on the couch and began hitting her. She attempted to flee the apartment, but he repeatedly slammed the door on her arm. A neighbor called police.

Mr. Thomas fled, but was arrested the following day. Seven charges were filed in an amended information. On the eve of trial, he pleaded guilty to five counts: a felony no-contact order violation (predicated on assault upon entering apartment), witness tampering, and three no-contact order violations based on telephone calls. The remaining two charges, first degree burglary and third degree assault (arm slammed in door) proceeded to jury trial.

The jury found Mr. Thomas guilty on the two charges. It also found an aggravating factor—Ms. Howard was pregnant at the time. The court imposed an exceptional sentence of 60 months on the burglary count based upon the jury's finding. Mr. Thomas then timely appealed to this court.

ANALYSIS

Counsel argues that the trial court erred in its offender score calculation by not finding that the burglary, felony no-contact order violation, and third degree assault convictions constituted the same criminal conduct. Mr. Thomas filed a Statement of Additional Grounds (SAG) raising two additional claims. We will address each in order.

Same Criminal Conduct

Except in the circumstance of serious violent crimes, the Sentencing Reform Act of 1981, 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 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 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).

Mr. Thomas did not ask the trial court to find that the offenses constituted the same criminal conduct. He therefore waived his claim and cannot pursuit in this appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874-875, 50 P.3d 618 (2002); *State v. Nitsch*, 100 Wn. App. 512, 523-525, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000). As the Washington Supreme Court recently observed, offender score calculations are subject to waiver "where the alleged error involves an agreement to facts, later disputed, or where an alleged error involves a matter of trial court discretion." *State v. Wilson*, 170 Wn.2d 682, 689, 244 P.3d 950 (2010) (quoting *Goodwin*, 146 Wn.2d at 874).

Not having asked the trial court to exercise its discretion in this regard, Mr. Thomas has waived his opportunity to present the claim here.

Even if asked to find the offenses constituted the same criminal conduct, the trial court was not compelled to do so. In each instance, there was assaultive conduct constituting an element of the crime. Appellant argues that the three crimes occurred at the same time and place. We agree. The remaining question is whether, objectively viewed, the three offenses manifested the same criminal intent. As to the no-contact

order violation and the third degree assault, the answer is clearly "no." The assault constituting the no-contact order violation occurred when Mr. Thomas broke into the apartment. The third degree assault occurred when he later stopped Ms. Howard from leaving. Neither offense furthered the other; the no-contact order violation was completed well before the third degree assault. The two offenses do not constitute the same criminal conduct.

It is a closer issue with respect to the burglary and the other two offenses. The burglary was completed before the third degree assault and neither crime appears to further the other; both involved different assaultive behavior. The burglary and the no-contact order are closer in that each occurred at the beginning of this incident and involved assaults much closer in time. Once again, however, neither crime furthered the commission of the other. They did not show the same criminal intent even if both had the same ultimate goal of assaulting Ms. Howard. If the trial judge had been asked to consider these events the same criminal conduct, there was a factual basis for declining to do so.

For both reasons, we disagree with the argument that the offender score was wrongly calculated.

Statement of Additional Grounds

In his *pro se* SAG, Mr. Thomas argues that the evidence did not support the jury's determination that Ms. Howard was pregnant. He also argues that the court erred in admitting recordings of his telephone calls to Ms. Howard from the jail. He argues that evidence was not relevant in light of his guilty pleas to the tampering and no-contact charges.

The first argument can be dismissed summarily. Ms. Howard testified that she was pregnant. We believe that is sufficient evidence for the jury to conclude that she was. There was no need for a doctor to testify to the same information.

The telephone recordings present a closer issue. A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). While the tape recordings were no longer relevant to proving the tampering and no-contact offenses, his actions in attempting to dissuade Ms. Howard from testifying still constituted an admission of guilt on the underlying burglary and assault counts. *State v. Moran*, 119 Wn. App. 197, 218-219, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032 (2004). Thus, the trial court had a tenable basis for admitting the recordings. There was no error.

Affirmed.

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.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.