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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent,	)	No. 29903-1-III
v.	)	UNPUBLISHED OPINION
KEVIN NEILD CARAKER, Appellant.	)	

Korsmo, C.J. — Kevin Caraker challenges his conviction for second degree burglary, arguing that the trial court erred by refusing to sever two charges and in its calculation of the offender score. We affirm the conviction and the sentence, but direct the trial court to correct the judgment and sentence to reflect an offender score of 10.

FACTS

Mr. Caraker was charged with second degree burglary of a Les Schwab store and second degree possession of stolen property involving a laptop that had been stolen from a church one year earlier.[1] The laptop had been discovered when officers serving a

[1] An additional charge of second degree possession of stolen property involving a

search warrant on the burglary charge recovered it along with evidence of the burglary. Motions in limine were heard during jury selection. Counsel moved at that time to sever the two counts. Finding that the evidence would overlap, the trial court denied the motion.

Counsel renewed the motion to sever at the conclusion of the prosecution's case. The trial court again denied the motion. The jury found Mr. Caraker guilty on the burglary count, but also found that he was not guilty on the possession of stolen property charge.

The trial court imposed a 65-month sentence after determining that Mr. Caraker's offender score was 11. Included in that tally was one point for the defendant being on federal probation at the time of the burglary. Several burglary convictions from Grant County that entered on the same day were also counted as separate offenses. The parties agreed that the standard range was 51 to 68 months.

Mr. Caraker then timely appealed to this court.

ANALYSIS

Mr. Caraker argues that the trial court erred in denying his motion to sever and that the offender score was miscalculated because of the prior burglary convictions and the

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different computer was dismissed prior to trial.

federal probation. We will address the scoring arguments as one issue after consideration of the challenge to the severance ruling.

Severance

Joinder is proper under CrR 4.3(a) when two offenses are of the same character or are based on connected acts. The decision whether to sever charges is reviewed for abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 536, 852 P.2d 1064 (1993). Discretion is abused when 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).

It is the defendant's burden to establish abuse of discretion by showing that "a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Factors to be considered when analyzing a motion to sever include (1) whether the defendant was confounded in presenting separate defenses, (2) whether the jury might infer a criminal disposition from the two offenses, and (3) whether the jury might cumulate evidence to find guilt where it would otherwise not. *Id*. (quoting *State v. Smith*, 74 Wn.2d 744, 755, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), *overruled on other grounds by State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)).

Mr. Caraker argues that the second factor—the danger the jury would infer criminal disposition—justified severing the two counts. We disagree. With the benefit of hindsight, the jury's decision to acquit Mr. Caraker on count II strongly suggests the jury did not find that Mr. Caraker was "a criminal type" and convict simply on that basis. Instead, the jury considered the evidence and found him guilty on the strongest count and not guilty on the weakest count. Critically, the jury's verdicts show that they were able to treat the two counts separately as directed by the court's instructions.

Mr. Caraker has not demonstrated that he actually was prejudiced by the denial of his severance motions. Accordingly, the trial court did not abuse its discretion when it denied them.

Sentencing Claims

Mr. Caraker makes two challenges to the calculation of his offender score. Both are controlled by well settled law.

He first argues that the trial court erred by failing to consider whether some of his Grant County burglary convictions that were entered on the same day might have constituted the same criminal conduct, thus reducing his offender score. No party raised the issue to the trial court; in fact, both sides agreed that the standard sentencing range was 51 to 68 months.

RCW 9.94A.525(5)(a)(i) provides in part:

> The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently . . . 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).

Offenses constitute the same criminal conduct if they occur at the same time and place, involve the same victim, and share the same criminal intent. RCW 9.94A.589(1)(a). The judgment and sentence shows that there were five Grant County convictions sentenced on July 29, 2003. They were a burglary and malicious mischief committed on June 10, 2003, two burglaries committed on March 31, 2003, and a burglary committed March 29, 2003.

It is conceivable that both of the March 31 and June 10 convictions involved the same criminal conduct, thus reducing the offender score by two points.[2] However, the record does not allow us to make that determination. The prior judgment and sentence forms are not in the record, so there is no way of knowing if the Grant County offenses were served concurrently. Without knowing that fact, the statute did not require the trial court to conduct a same criminal conduct analysis.

Mr. Caraker's argument also is foreclosed by *State v. Nitsch*, 100 Wn. App. 512,

[2] It is highly unlikely that the two burglary convictions committed on March 31, 2003, could meet the same criminal conduct test (same time, place, victim, intent), let alone do so without running afoul of the double jeopardy protections of our constitutions.

997 P.2d 1000 (2000). There, the defendant attempted to argue for the first time on appeal that the two crimes to which he had pleaded guilty constituted the same criminal conduct. *Id*. at 517-18. The court rejected the attempt, noting that the same criminal conduct determination is, in part, a factual determination by the trial court and also is, in part, a matter of judicial discretion. In such circumstances, and particularly where there is a plea agreement that includes an agreement to the offender score and sentencing range, there simply is no basis for an appellate court to make a determination for the first time on appeal. *Id*. at 523-25. Not only would there be unresolved factual questions (did the events occur at the same time and place, involve the same victim, and have the same intent), there is no way of knowing whether the trial court would have exercised its discretion favorably to the defendant. *Id*. Finally, it undermines plea bargains to permit the defendant to agree to one sentencing range after pleading guilty and then attempt to change that range after the trial court has approved it. *Id*. at 523-24.

We agree with *Nitsch* that this issue is not reviewable when raised for the first time to an appellate court. Accordingly, we reject Mr. Caraker's argument that the court erred by failing to consider an inquiry it was never asked to make.

However, we do agree with Mr. Caraker's final argument. This court already has determined that the one point enhancement to the offender score when a crime is

committed while the offender is on "community custody" applies only to supervision required by a conviction under our Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. *State v. King*, 162 Wn. App. 234, 240, 253 P.3d 120 (2011). The federal probation to which Mr. Caraker was subject when he committed this crime should not have added one point to the offender score.

Nonetheless, reducing the offender score from 11 to 10 does not change the sentence range in this case. The top range under the SRA is described as "9 or more." RCW 9.94A.510. It does not change regardless of how far above 9 the offender score is. Thus, the error with respect to counting the federal probation in the offender score was harmless. It did not affect the standard range. Mr. Caraker's offender score was still in the "9 or more" category even when reduced from 11 to 10. We direct the trial court to correct the offender score computation on the judgment and sentence, but there is no need to conduct a new sentencing hearing.

Affirmed and remanded to correct the offender score.

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, C.J.

WE CONCUR:

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Sweeney, J.	Siddoway, J.