

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JASON PAUL KOSTRACH-TREMBLAY,

Appellant.

No. 38862-6-II

UNPUBLISHED OPINION

Armstrong, J. — Jason Kostrach-Tremblay appeals the sentence imposed following his convictions for first degree burglary, second degree assault, and felony harassment. He contends that the trial court erred in calculating his standard sentencing range. Concluding that the trial court did not err, we affirm.¹

Tremblay pushed his way into Thomas Smith’s house. After ascertaining that David Graham was sleeping on Smith’s couch, Tremblay repeatedly punched Graham in the head. When Smith tried to push Tremblay away from Graham, Tremblay screamed, “I’m going to f***ing kill you.” Report of Proceedings (RP) (Jan. 6, 2009) at 54. The jury found Tremblay guilty of first

¹ A commissioner of this court initially considered Tremblay’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

degree burglary for entering Smith's house, second degree assault for striking Graham, and felony harassment for threatening to kill Smith.

Tremblay's prior criminal history counted for five points toward his offender score.² Tremblay argued that all three crimes were parts of the "same criminal conduct" under RCW 9.94A.589(1)(a), such that his offender score would be five. Clerk's Papers at 65. The State argued that each crime was separate criminal conduct, such that as to his first degree burglary conviction, his second degree assault conviction would count for two points and his felony harassment conviction would count for one point, leading to an offender score of eight. The trial court agreed with the State and found that Tremblay's offender score for the first degree burglary conviction was eight. With that offender score, Tremblay's standard sentencing range was 77 to 102 months. The court imposed a sentence of 78 months, from which Tremblay appeals.

Tremblay argues that the trial court erred in not treating his first degree burglary and second degree assault convictions as parts of the "same criminal conduct" under RCW 9.94A.589(1)(a), because he committed the burglary in furtherance of committing the assault. *State v. Collins*, 110 Wn.2d 253, 262-63, 751 P.2d 837 (1988); *State v. Dunaway*, 109 Wn.2d 207, 212, 743 P.2d 1237 (1987). He contends that the court erred in distinguishing *Collins*, and in applying *State v. Davis*, 90 Wn. App. 776, 788-89, 954 P.2d 325 (1998) and *State v. Davison*, 56 Wn. App. 554, 558-60, 784 P.2d 1268 (1990), on the grounds that the burglary

² In his statement of additional grounds, under RAP 10.10, Tremblay questions whether the trial court correctly counted his prior juvenile assault conviction for two points. The court was correct. RCW 9.94A.525(8).

had two victims while the assault only had one victim.

The trial court did not err. In *Collins*, the court concluded that the defendant committed the burglary with the intent to assault one woman and rape another. *Collins*, 110 Wn.2d at 254-55. Accordingly, the court held that the burglary and the assault were parts of the same criminal conduct as to that victim and that the burglary and the rape were parts of the same criminal conduct as to that victim. *Collins*, 110 Wn.2d at 262-63. In contrast, while Graham was the victim of the assault, Smith was the victim of the burglary, as it was his home that Tremblay invaded. Thus, as to the burglary and the assault, the crimes had different victims and cannot be parts of the same criminal conduct under RCW 9.94A.589(1)(a). And as to the burglary and the felony harassment, the crimes had different intents and cannot be parts of the same criminal conduct under RCW 9.94A.589(1)(a). The trial court correctly calculated Tremblay's offender score. Further, as addressed below, even if the court had concluded that the burglary and the assault were parts of the same criminal conduct, it had the authority to punish them separately under the burglary anti-merger statute, RCW 9A.52.050.

Tremblay also argues that the trial court abused its discretion when it concluded that application of the burglary anti-merger statute was mandatory, such that the court could not treat the burglary and the assault as parts of the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). But a reading of the court's oral ruling indicates that it was persuaded it should apply the anti-merger statute, not that it was required to apply the anti-merger statute: "And with respect to the burglary anti-merger statute, it says you're supposed to punish all those crimes separately." RP (Jan. 30, 2009) at 416. Tremblay fails to demonstrate that the

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trial court abused its discretion.

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We 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.

Armstrong, J.

We concur:

Bridgewater, J.

Penoyar, A.C.J.