NO. 30294-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

CODY KLOEPPER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Carrie Runge, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred and violated appellant's right to due process when it permitted D.W. to identify appellant as her rapist during trial.

2. Defense counsel was ineffective for failing to act once jurors learned that appellant had previously been booked for a criminal offense.

3. The trial court erred and denied appellant his right to an impartial jury when it refused to remove a juror for cause.

4. The trial court erred when it imposed consecutive sentences for assault and rape.

Issues Pertaining to Assignments of Error

1. The victim in this case repeatedly and unequivocally identified someone else as the man who entered her apartment and raped her. And although given multiple opportunities to identify appellant, did not do so. Law enforcement then told her that appellant's DNA had been found inside her apartment, an overstatement of the evidence. Thereafter, she identified appellant as her rapist. Did the trial court err when it denied a motion to preclude the victim from identifying appellant as the rapist at trial

because law enforcement's conduct was improperly suggestive and resulted in a substantial likelihood of irreparable misidentification?

2. Regarding the motion to prevent the in-court identification, did the trial court err when it entered finding of fact 15 in its Order On Defendant's Motion To Bar Victim's Testimony, which reads, "The police did not lead [D.W.] or otherwise encourage her to state that the defendant was the perpetrator"?

3. Did the trial court also err when it entered conclusions of law 3 and 4, which indicate the defense objections to the in-court identification went to weight rather than admissibility?

4. In a non-responsive answer on cross-examination, a police detective informed jurors that appellant had previously been booked in another criminal matter. Did defense counsel perform deficiently and deny appellant a fair trial by failing to take any corrective action?

5. After jury selection, one of the jurors realized that his family had been friends with the victim's family for decades. Did the trial court err when it denied a defense motion to remove this juror for cause?

6. The trial court believed it was required to impose consecutive sentences for appellant's assault and rape convictions

because both are serious violent offenses. Where, however, the two crimes satisfy the test for "same criminal conduct" did the court err?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Benton County Prosecutor's Office charged Carl Goehring, Jr. with raping D.W. after D.W. repeatedly and unequivocally identified Goehring as the perpetrator. RP 142-144. Later, however, prosecutors dropped all charges against Goehring and instead charged Cody Kloepper. CP 1-2.

Kloepper ultimately faced three charges at trial: (count 1) Rape in the First Degree; (count 2) Assault in the First Degree; and (count 3) Burglary in the First Degree. All charges included a deadly weapon enhancement. CP 14-16. A jury found Kloepper guilty, the court imposed a minimum standard range sentence of 294 months, and Kloepper timely filed his Notice of Appeal. CP 57-63, 84-85, 95-97.

2. Substantive Facts

In 2009, D.W. lived in a fourth floor apartment located in the L building at The Villas in Richland, Washington. RP 87, 123-124. On the morning of Saturday, December 5, 2009, she awoke at 4:00

a.m. and went to the kitchen to make a pot of coffee. RP 125-126. While engaged in that task, a man approached her quickly from behind and began repeatedly striking her in the head with a metal bar. RP 126-128.

D.W. attempted to avoid being hit and asked the intruder why he had selected her. The man responded, "because Obama was elected president." RP 127. D.W. asked for the real reason and the man said it was because the door to her apartment had been unlocked. RP 128. It was D.W.'s practice to always lock her door, although she had forgotten to do so in the past, and she challenged the intruder's claim that she had forgotten on this occasion. RP 124, 128, 160-161.

As the man continued to attack D.W., she ran to the living room and tried to gain control of the metal bar. RP 128-129. The two continued to struggle until D.W. finally told the intruder that if he was there to rape her he should go ahead and get it over. RP 129-130. At that point, the beating stopped and the intruder told her to get on her knees. RP 130.

D.W. is a chemist and recognized the sound of latex gloves. RP 130-131. It felt like the man put his hand inside of her. RP 130. During the struggle, D.W. had defecated in her pants, which

angered the man, who began swearing at her. RP 130-131. Although the man tried to penetrate her with his penis, D.W. did not think he ever succeeded. RP 131. The man eventually threw a blanket over D.W., who then heard the sound of running water. She waited for a period to ensure the intruder was gone before calling 911. RP 131-132; CP 174-177; exhibit 12.

When speaking with the 911 operator, D.W. initially said the rapist looked like a member of the The Villas maintenance staff, but also said she did not know who the individual was and did not think she had ever seen him before. CP 162, 174, 176. She indicated he was thin, 6' to 6' 2" tall, had shaggy brown hair, and wore jeans but no shirt. CP 176.

Police arrived and spoke to D.W., who indicated she did not know the identity of the rapist. RP 93. She told the responding paramedics it might have been a maintenance worker because she did not hear the entry. RP 185, 195. Officers searched the area, but found nothing of evidentiary value. RP 107-108, 483-485. There was no evidence of forced entry and it would have been difficult, if not impossible, for anyone to gain entry from the fourth story balcony. RP 93, 98, 448-449, 489. Detectives believed the intruder entered through the front door. RP 511.

D.W. was taken to a local hospital. RP 107, 138. Her hair was matted with blood, she had bruising to her hands and face, and she had multiple fractures to the left arm and hand. RP 209-214. Although a CT scan revealed some bleeding inside her head, her skull had not been fractured. RP 212-213. No sexual assault examination was conducted. Nor was a rape kit used. RP 216, 227, 401. Because no neurosurgeon was available at the facility, at 9:41 a.m., D.W. was transferred to Sacred Heart Medical Center in Spokane. RP 138, 216, 218.

While at Sacred Heart, police showed her a series of pictures that included Cody Kloepper, who was employed as a maintenance man at The Villas and whom D.W. knew by name. RP 138-140, 165, 335, 416; exhibit 13 (position 5). She did not select his photo as the rapist, however. Referring to whether Kloepper's photo (in which he had short hair) looked like the rapist, D.W. concluded "it didn't look right." RP 140. The following day, a sketch artist prepared a sketch of the rapist based on D.W.'s description. RP 140-141; exhibit 14.

On December 10, 2009, following D.W.'s release from the hospital, Richland Police showed her another series of photographs. In addition to once again including a photo of

Kloepper, this series also included a photo of Karl Goehring, Jr.[1] D.W. identified Goehring as the rapist. RP 142-143, 370, 525-526, 548-549; exhibits 15, 74. In fact, when D.W. saw Goehring's photograph, her eyes widened, her mouth dropped open, and she stated that she might be having a panic attack. RP 371, 525, 548-549. D.W was adamant that Goehring was the rapist. RP 144, 147, 156. And to make certain, police also placed Goehring in a live line-up. D.W. again selected Goehring and was positive the correct man had been identified. RP 144, 147, 156.

As D.W. fought her attacker, she had attempted to scratch him. Although she could not be sure she succeeded, she did break three fingernails during the struggle. RP 163-164. When Goehring was arrested on December 11, 2009, police documented multiple healing injuries. RP 338-339; exhibit 28. Goehring had a scratch on his right forearm, a scab on his right hand, horizontal red marks across his back (which he claimed were self-inflicted and demonstrated he could reach), and vertical red marks on his back

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[1] Goehring is a convicted sex offender, although jurors were not permitted to hear this evidence. CP 223-225.

(for which Goehring had no explanation and he could not reach).[2] RP 339-342, 364-366. In contrast, Kloepper had no apparent injuries. RP 285-286, 377-378.

Goehring was charged with rape. RP 144. In March of 2010, Goehring's attorney interviewed D.W., who remained positive Goehring was the rapist. RP 144-145, 148, 156-157. The attorney specifically asked D.W. whether Kloepper could be the rapist and D.W. answered that he was not. RP 145; CP 120-124. She also indicated that she had been able to memorize Goehring's face during the incident. RP 145, 154.

Subsequently, a single item of evidence caused police to switch their focus from Goehring to Kloepper. On the living room floor of D.W.'s apartment, police had collected what appeared to be the tip of a latex glove. RP 94-95, 345; exhibit 9. The color was similar to a glove worn by one of the responding paramedics, although that paramedic did not recall ripping her glove. RP 183-184. A second paramedic recalled tearing a glove, but could not say whether it was on this call or some other. RP 474, 476-477.

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[2] Police swabbed D.W.'s hands for DNA and collected her fingernail clippings. Unfortunately, they did not do so until a week after the rape. RP 342-344, 402. Goehring's DNA was not detected, although an unidentified male's DNA was. RP 576-579, 587-588, 620-621.

The color also was similar to gloves on The Villas property available to all employees.[3] RP 345-346, 446. But police never determined whether the tip actually matched those gloves or whether the evidence was even from a glove. RP 378-379, 475-476, 511.

Whatever the object, on its surface was a mixture of D.W.'s blood and the DNA of *two* males. RP 581, 617. The Y chromosome from the major male contributor matched Kloepper's Y chromosome.[4] RP 582, 588. Although Kloepper's genetic male relatives also would carry this chromosome, other non-relative males would as well. RP 582, 590-592. In fact, 1 in 440 males in the United States may carry this same Y chromosome. RP 583-584. While it is correct to say that DNA on the evidence matches Kloepper's profile in this one regard, it is incorrect to say this establishes that Kloepper's DNA was found on the evidence. RP 617 (DNA expert draws distinction).

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[3] Kloepper denied that he ever wore the gloves available on the property, although he had likely had contact with them when passing them out to other employees. RP 454-455, 529, 649-650.

[4] Kloepper had been in D.W.'s apartment in the past for maintenance and repairs, although apparently not close in time to December 2009. RP 416-419, 434-435.

On May 4, 2010, after police learned of the DNA results, they arranged a meeting with D.W. and told her about the new evidence. RP 157-158, 392-393; exhibit A.[5] But they did not limit themselves to telling D.W. the evidence merely showed a match at the Y chromosome. They told her "the DNA matched Cody Kloepper." Exhibit A at 14:59:30. They told her "there was DNA and it came back to Cody." Exhibit A at 15:00:31. And, referring to the apartment, they told her "we have Cody's DNA inside there now." Exhibit A at 15:07:51. In a subsequent interview with detectives, D.W. identified the DNA evidence specifically as what changed her mind about the rapist's identity. RP 393-397.

By the time of trial, D.W. testified that she was "very comfortable" that prosecutors had now charged the correct person and she specifically identified Kloepper as the man who entered her apartment and raped her. RP 148-149. D.W. attributed her initial failure to select Kloepper, at least in part, to the fact she was used

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[5] Exhibit A, a DVD recording of the meeting during which D.W. was told about the DNA test results, was admitted in connection with a pretrial defense motion, but not shown to jurors.

to seeing him with longer hair, and his hair was shorter in the photo used by police.[6] RP 140, 146-148.

Since no one claimed to see Kloepper arriving at or leaving D.W.'s apartment at the time of the rape, the State's case against him was largely circumstantial. Kloepper was cooperative with detectives and had provided a statement on December 5. RP 372-373, 385; exhibit 73. He told them that after leaving work on Friday, December 4, he had drinks with friends at Dax's, a Richland bar, and left sometime around midnight. RP 517-518; exhibit 73. After following his friend – Jeramie Morrow – to make sure Morrow arrived home safely, Kloepper realized he was too drunk himself to be driving and drove back to The Villas, where he went into the manager's office, obtained the keys to apartment 4025 D (an apartment on which he was already doing repair work), and slept until about 8:00 a.m. When he awoke, he had an extreme

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[6] Kloepper sometimes wore his hair short and sometimes longer. RP 279-284. With several witnesses, the prosecution focused on Kloepper's decision to cut his hair around the time of the rape. See RP 335-336, 421-425, 437-439, 535. One co-worker testified that Kloepper indicated he cut his hair because with longer hair, he looked like "that guy that assaulted the girl," an apparent reference to Goehring. RP 467. Kloepper maintained witnesses were confused about the timing of his hair cut. RP 643. In any event, it was police detectives that chose to use a work photo depicting Kloepper with short hair in the montages shown to D.W. Exhibits 13, 74; RP 334-335.

hangover. RP 429-430, 452-453, 458, 518; exhibit 73. He returned the key to the office and headed home. Exhibit 73. In a second interview, in May 2010, Kloepper provided the same version of events. RP 530.

As Kloepper would later admit at trial, that portion of his story about following Morrow home was not true. RP 632. In fact, Morrow left Dax's well before Kloepper did. RP 245-246, 257-259, 633. Kloepper continued to drink and then headed home, arranged a sexual encounter with another man through a Craigslist personal ad, and met that man – Salvador Contreras – at the home where Contreras was staying while on business in the area. RP 276-277, 291-297, 319-330, 632-634.

Contreras claimed that when Kloepper arrived, he was drunk and reeked of cigarettes – which was a turn off – and that no sex occurred.[7] RP 297-298. Kloepper, however, claimed that Contreras performed oral sex on him. RP 634. In any event, the two clearly met and Kloepper had left out this detail (claiming instead he was with Morrow) in hope of hiding the encounter from

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[7] According to Kloepper's girlfriend, he always smells of cigarettes. RP 284. There is no evidence the man who raped D.W. smelled of cigarettes at the time.

his longtime girlfriend, with whom he lived and has two children. RP 628, 636-638.

Kloepper testified that although he knew spending the night at The Villas was against company rules, he was scheduled to work the morning of December 5 and decided to sleep in the vacant apartment on which he was doing repairs so that no one would know what time he started work that morning. RP 646-647. When he awoke, however, he was very hung over and vomiting, so he simply headed home rather than trying to work that day.[8] RP 629. Kloepper denied raping D.W. RP 635, 655.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED KLOEPPER'S MOTION TO PREVENT D.W. FROM IDENTIFYING HIM AS THE RAPIST WHERE THE IDENTIFICATION HAD BEEN IRREPARABLY TAINTED.

The defense moved to preclude D.W. from identifying Kloepper as her rapist, arguing that any in-court identification was

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[8] Kloepper ran into a co-worker that morning before heading home. According to the co-worker, Kloepper said he had been drinking, he had spent the night at the complex, and he was going home because he could not work in his condition. Kloepper asked the co-worker not to tell anyone. RP 463-466. According to Kloepper's girlfriend, Kloepper arrived home around 8:30 a.m. that morning; he told her he had spent the night in the vacant apartment, was still drunk, and was heading to bed. RP 278-279, 290-291.

irreparably tainted because Kloepper's photo was the only one included both times D.W. was shown photographs, D.W. was expressly told that Kloepper's DNA was found inside her apartment, and thereafter police affirmatively suggested that Kloepper was the rapist. CP 7-13; RP 16-21, 31-33, 49-51, 53. The court denied the motion, reasoning that the defense arguments went to weight rather than admissibility. CP 78-80; RP 53-55. This was reversible error.

As an initial matter, the circumstances of this case differ somewhat from the more typical situation in which an in-court identification is challenged. Usually, the defense challenges an out-of-court identification procedure as being impermissibly suggestive and argues the identification stemming from that procedure taints any in-court identification. See, e.g., Simmons v. United States, 390 U.S. 377, 381-386, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); State v. Hilliard, 89 Wn.2d 430, 436-440, 573 P.2d 22 (1977); State v. Thorkelson, 25 Wn. App. 615, 618-620, 611 P.2d 1278, review denied, 94 Wn.2d 1001 (1980).

Here, however, the taint did not come from a prior identification. Indeed, prior to trial, D.W. was adamant that Goehring – not Kloepper – was the man who raped her. Instead, it was other conduct, including telling D.W. that Kloepper's DNA was

found in her apartment, that tainted the in-court identification. But since the consequences are the same (i.e., tainted trial testimony), decisions addressing suggestive out-of-court identification procedures are instructive.

Impermissibly suggestive out-of-court identification procedures violate due process where there is a substantial likelihood of irreparable misidentification. Simmons, 390 U.S. at 384; State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027 (2000); State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986).

The defendant bears the burden to demonstrate that a procedure is suggestive. State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001), review denied, 146 Wn.2d 1022 (2002). Once that burden is satisfied, the court must decide whether there is a substantial likelihood of irreparable misidentification based on several factors. Id. at 433 (citing Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)). And "[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself." Manson v. Braithwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

The trial court's findings of fact must be supported by substantial evidence. Vickers, 148 Wn.2d at 116. The court's ultimate decision on the admissibility of identification evidence is reviewed for abuse of discretion. Kinard, 109 Wn. App. at 431-32.

a. The Procedures Used By Law Enforcement Were Suggestive.

The initial inquiry is whether the procedures were impermissibly suggestive. A procedure is suggestive if it directs undue attention to one particular individual. State v. Eacret, 94 Wn. App. 282, 283, 971 P.2d 109 (1999); see also Linares, 98 Wn. App. at 285 (determining whether anything "unduly attracts attention" to the defendant).

This Court's decision in State v. McDonald, 40 Wn. App. 743, 700 P.2d 327 (1985), sheds light on whether the pretrial procedures used in Kloepper's case were suggestive. McDonald and Dean were charged as co-defendants with robbery. Within a day of the crime, the victim viewed a lineup that included both men. The victim chose McDonald, but not Dean – although he believed that Dean could have been the second man. Following the victim's failure to select Dean, the detective told the victim that McDonald and Dean were the two suspects who had been arrested. McDonald, 40 Wn. App. at

744. On appeal, this Court had little difficulty affirming the trial court's finding that the out of court procedure was impermissibly suggestive, noting that the detective essentially told the victim, "*This* is the man." McDonald, 40 Wn. App. at 746 (quoting Foster v. California, 394 U.S. 440, 443, 22 L. Ed. 2d 402, 89 S. Ct. 1127 (1969)).

Similarly, in Kloepper's case, by informing D.W. that Kloepper's DNA had been found in her apartment (an overstatement according to the State's DNA expert), D.W. was being told, "*This* is the man." In addition, Kloepper's photo was included in both the first set of photos shown D.W. on December 5, 2009, and the second set on December 10, 2009. RP 138-140, 525-526; exhibits 13, 74. The danger of witness misidentification is increased where police show a witness "the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." Simmons, 390 U.S. at 383; see also Foster, 394 U.S. at 443 (procedure unfair in part because defendant only person in both lineups).

The procedures in this case were suggestive, and the court's finding of fact 15 – that "police did not lead D.W. or otherwise encourage her to state that the defendant was the perpetrator" – is incorrect. While police were free to share the DNA results with D.W.,

they should not have overstated those results. Moreover, by doing so, they tainted any subsequent identification.

b. There Is A Substantial Likelihood of Irreparable Misidentification.

Factors that must be weighed to assess the likelihood of misidentification include (1) the opportunity of the witness to observe the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the time of the identification; and (5) the time between the crime and the confrontation. Manson v. Braithwaite, 432 U.S. at 114.

Assessing factors (1) and (2), D.W. claimed that she was able to memorize the rapist's face during the attacks and it was *Goehring*. CP 120-121, 154-155, 162, 166-167; RP 145, 154. Concerning factor (3), during the 911 call, she described her attacker as white, thin, 6' to 6' 2" tall, with shaggy brown hair. CP 176. Goehring is 5' 10" tall and thin. RP 338-339; exhibit 28. Kloepper is 6' 4" tall and also somewhat thin. RP 651. Later, however, D.W. specifically claimed the attacker was Goehring's height and questioned her original estimate. CP 152-153. Regarding factor (4), D.W. was absolutely certain in her identification of the rapist – as *Goehring*.

Stated another way, she was certain the rapist was not Kloepper. And, finally, factor (5): D.W. made her first two identifications (of Goehring) close in time to the rape and persisted in her insistence that he was the rapist for the next 5 months, when she was told about the DNA evidence. RP 142-144, 147, 156, 370-371, 396, 525-526, 548-549; CP 104.

When these factors are weighed against the corrupting effect of law enforcement telling D.W. (erroneously) that Kloepper's DNA had been found at the scene, it is apparent D.W.'s decision to identify Kloepper as the man who raped her was the direct product of suggestive procedures. Indeed, three months after D.W. was told about the DNA, a detective asked her, "Anything specific happened that cause you to think it was [Kloepper] now?" CP 104. D.W. answered, "Well the DNA thing." CP 104.

c. D.W.'s In-Court Identification Was Tainted.

Where law enforcement has used a suggestive procedure creating a substantial likelihood of irreparable misidentification, any subsequent in-court identification is prohibited unless the State demonstrates an independent source for the in-court identification. See United States v. Wade, 388 U.S. 218, 240-242, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); Hilliard, 89 Wn.2d at 439-440; Thorkelson,

25 Wn. App. at 619-620. There is no such independent source in this case. D.W.'s identification of Kloepper in front of the jury – like her decision to switch from Goehring to Kloepper prior to trial – is the direct result of law enforcement's overstatement that Kloepper's DNA was found in the apartment.

D.W.'s in-court identification of Kloepper likely had a significant impact on jurors. Without it, conviction was far from assured. The perpetrator's identity was very much in dispute. Other than D.W., no one saw the rapist. D.W. repeatedly and unequivocally indicated that Goehring was the rapist, and the DNA evidence was far less powerful than usual, limited to population frequencies associated with the Y chromosome. But once jurors heard and saw D.W. "comfortably" identify Kloepper as her rapist, the chance of conviction increased significantly. Kloepper should receive a new trial.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ACT ONCE JURORS LEARNED KLOEPPER HAD A CRIMINAL HISTORY.

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a

claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

More specifically, a defendant claiming ineffective assistance based on counsel's failure to object to the admission of criminal history evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three requirements are met here.

Counsel's failure occurred during cross-examination of Richland Police Detective Roy Shepherd. Counsel was inquiring about exhibit 74, the set of photos shown D.W. in December 2009 from which she selected Goehring. RP 548-549. Goehring's photo is number 14 and Kloepper's photo (which she did not select) is number 12. Exhibit 74.

Counsel inquired about the source of the photos used in the montage. Specifically counsel asked Detective Shepherd to discuss "I-Leads" and the detective answered:

> I-Leads is a software system that the police use that all the data entry reports are put in. If somebody is booked into jail, their photos are in that that you can access. So it has mostly just police information or booking information with regards to individuals that have had contact with the police.

RP 549.[9]

Counsel then attempted to point out that the photo of Kloepper in exhibit 74 was from his place of work and not I-Leads. Unfortunately, the examination did not go as planned:

> Q: And except for the picture of Mr. Kloepper, all those were from I-Leads I think. Correct?
>
> A: Again, I don't recall. I would have to go back and look at it.
>
> Q: They all look about the same format.
>
> A: Yes.
>
> Q: Okay. But Mr. Kloepper's was – you got that from – Did you get it from a DOL photograph? Or from his place of work?
>
> A: It was the photograph that they provided us from his place of work.
>
> Q: Okay. I believe you did get a DOL photograph, as well?
>
> A: <u>There was an I-Leads photograph in there on him</u>. I can't remember if we got a DOL photograph.

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[9] The verbatim report of proceedings incorrectly identifies this testimony as counsel's question. It is, however, quite obviously Detective Shepherd's answer.

RP 550-551 (emphasis added).

Defense counsel did not object to the non-responsive answer about the DOL photo, did not address the matter during a recess, and did not ask for a curative instruction or a mistrial despite the fact jurors had just learned that Kloepper was already in the I-Leads system and therefore previously had been booked for a criminal offense.

a. There Was No Legitimate Tactic

Counsel's failure to do anything to mitigate the harm from Detective Shepherd's non-responsive answer was not a legitimate tactic. Washington's Rules of Evidence prohibit the introduction of other criminal acts to prove criminal propensity:

> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. . . .

ER 404(b).

In past cases, this Court has recognized that counsel's failure to object to evidence of other crimes falls below an objective standard of reasonable attorney conduct. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failure to object to evidence of prior convictions), overruled on other grounds,

Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); State v. Dawkins, 71 Wn. App. 902, 907-10, 863 P.2d 124 (1993) (failure to object to evidence of uncharged crimes). The same is true here.

b. An Objection Would Have Been Sustained

There was no valid basis on which jurors would have been permitted to learn that Kloepper had previously been booked for a criminal charge and his photograph in the I-Leads system. The State made no attempt to elicit this evidence during trial.

c. Kloepper Suffered Prejudice

To show prejudice, Kloepper need not demonstrate counsel's performance more likely than not altered the outcome of the proceeding. State v. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability the outcome would have been different but for counsel's mistakes, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." Fleming, 142 Wn.2d at 866 (quoting Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

Evidence relating to a defendant's prior criminal conduct is particularly unfair as such evidence impermissibly shifts "the jury's attention to the defendant's propensity for criminality, the forbidden

inference . . . ." State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997); see also State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (prior conviction evidence is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crime."). It is now well accepted, by scholars and courts, that a defendant is far less likely to be acquitted once the jury becomes aware of prior crimes or convictions.[10] See Hardy, 133 Wn.2d at 710-711.

As discussed above, Kloepper's conviction was far from assured. But once jurors learned that Kloepper was already in law enforcement's system and had a booking photo, they were far more likely to conclude that he was the rapist given his criminal propensity. On this additional ground, reversal is required.

3. THE TRIAL COURT ERRED WHEN IT REFUSED TO REMOVE A SITTING JUROR FOR CAUSE.

After the jury had been selected, but prior to opening statements, juror 8 (Dick Cartmell) submitted a note indicating that his parents were long-time friends with D.W.'s parents. Cartmell

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[10] Kloepper's prior convictions were for possession of marijuana. CP 67-68. But jurors did not know this, permitting them to assume the worst.

also knew her parents. Initially, he did not recognize D.W.'s last name, but after speaking with his mother, and telling her he had been selected to serve as a juror in a rape case, Cartmell's mother reminded him of the family connection. RP 55.

The court questioned Cartmell, who indicated he did not believe his relationship with D.W.'s family would prevent him from being fair. RP 57. Cartmell also indicated that he and D.W.'s parents had belonged to the same golf course, although he had not seen them in years and believed they had moved away from the area. And he knew D.W.'s mother had been a Richland City Councilwoman. RP 58.

In response to questions from the prosecutor, Cartmell indicated he would not feel any pressure to find Kloepper guilty based on the family relationship, he had never socialized with D.W. and had not remembered her name, and he probably would not recognize her by sight. RP 59. In response to questions from the defense, Cartmell said he had been to D.W.'s parents' home once or twice when he was young and would have interacted with D.W. But the kids in D.W.'s family were merely acquaintances and not friends. He believed he was five or six years older than D.W. RP 60-61.

Following questioning, defense counsel moved to have Cartmell released for cause, arguing that the long-time relationship between Cartmell's family and D.W.'s family required his removal. RP 62. The prosecution objected, and the court ruled there was insufficient cause. RP 62-63. This was error.

"Under the Sixth Amendment and article 1, section 22 of the state constitution, a defendant is guaranteed the right to a fair and impartial jury." State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988). Dismissal of a sitting juror is also controlled by statute:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110; see also CrR 6.4(c) (any party may challenge a juror for cause).

"Actual bias" is defined as "the existence of a state of mind on the part of the juror in reference . . . to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). "The question for the judge

is whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially." Hough v. Stockbridge, 152 Wn. App. 328, 341, 216 P.3d 1077 (2009) (citing Ottis v. Stevenson-Carson Sch. Dist. No. 303, 61 Wn. App. 747, 812 P.3d 133 (1991)), review denied, 168 Wn.2d 1043 (2010).

A court's decision to remove or retain a juror is reviewed for abuse of discretion. State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), review denied, 143 Wn.2d 1015 (2001).

While Cartmell stated he could put aside his family's connections to D.W.'s family and would not feel any undue pressure to support D.W. by finding Kloepper guilty, the record does not support this assertion. The two families had known each other for decades. They had gone to church together and they had socialized together. Cartmell would naturally have felt additional pressure to find Kloepper guilty, thereby supporting the daughter of his parents' long-time friends. To find otherwise is to ignore human nature.

Where a juror that should have been removed for cause remains and deliberates to a guilty verdict, the remedy is a new trial. State v. Birch, 151 Wn. App. 504, 512, 213 P.3d 63 (2009), review denied, 168 Wn.2d 1004 (2010). That is the remedy here.

4. THE TRIAL COURT ERRED WHEN IT IMPOSED CONSECUTIVE SENTENCES FOR ASSAULT AND RAPE.

Kloepper's convictions for Assault in the First Degree and Rape in the First Degree are classified as serious violent offenses. RCW 9.94A.030(45)(a)(v) and (vii). Whether his sentences for these crimes are concurrent or consecutive is controlled by RCW 9.94A.589, which provides:

> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentencing range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

RCW 9.94A.589(1)(b) (emphasis added).

Under this statute, sentences for serious violent offenses "arising from separate and distinct conduct" must be served consecutively. Otherwise, the sentences are to run concurrently

under the general rule found in RCW 9.94A.589(1)(a) ("Sentences imposed under this subsection shall be served concurrently.").

In holding that Kloepper's sentences for assault and rape must be served consecutively, the court relied – at the State's urging – on Division One's opinion in State v. Brown, 100 Wn. App. 104, 995 P.2d 1278 (2000), aff'd in part, rev'd in part, 147 Wn.2d 330, 58 P.3d 889 (2002), which the court apparently interpreted to mean that assault and rape always involve different intents and, therefore, "separate and distinct criminal conduct" under RCW 9.94A.589(1)(b). CP 219-220; RP (9/23/11) 8-9.

As an initial matter, Division One's opinion in Brown is of dubious value on this issue. The Supreme Court later reversed Brown's convictions for assault and rape and, therefore, never addressed the issue of consecutive sentencing. See Brown, 147 Wn.2d at 341-342. In any event, Division One could not and did not rule as a matter of law that the two crimes involve the same criminal intent in every case.

The pertinent facts from Brown are found in a single paragraph from Division One's opinion:

> Porsche Washington asked Lewis Brown to meet her at a motel in Seattle. Lewis went there at around 2 A.M. At Porsche's request, Lewis removed

> his clothes. Then Jacob Brown, Marshall Harris, and Tesino Barber came out of the bathroom. Jacob hit Lewis in the chest with his fist, and Barber hit Lewis in the face with a gun. They went through Lewis's clothes and took his gun, watch, rings, cell phone, and other personal belongings. Barber then inserted a dildo into Lewis's anus and mouth, and burned Lewis's upper arm with a hot iron. Harris blocked the door to the motel room throughout the incident, and threatened to beat Lewis.

Brown, 104 Wn. App. at 106-107.

Division One held that where two serious violent offenses do not satisfy the test for "same criminal conduct" discussed in RCW 9.94A.589(1)(a)[11] – meaning the same intent, same time and place, and same victim – they necessarily involve "separate and distinct criminal conduct" under RCW 9.94A.589(1)(b) and the sentences must run consecutively. Brown, 104 Wn. App. at 113-115. Notably, the defense did not even contend that Brown's assault and rape involved the same intent. See Id. at 111 ("Brown and Harris argue their offenses nearly satisfy the 'same criminal conduct' exception because they involved the same victim at the same time and place . . . .") (emphasis added).

Not surprisingly, Division One found that the assault and rape involved different intents. Id. at 113. Not only is this

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[11] The Brown Court addressed RCW 9.94A.400, which was later recodified as RCW 9.94A.589. See Laws 2001, ch. 10, § 6.

consistent with the absence in Brown of any contrary defense argument, it also is consistent with the evidence in that case. The act of assaulting Lewis (burning him on the arm with a hot iron) had nothing to do with raping him. It was purely gratuitous.

The evidence in Kloepper's case is quite different and he satisfies all of the requirements for same criminal conduct.

"Same criminal conduct" means crimes that involve the same intent, were committed at the same time and place, and involved the same victim. Id. The test is an objective one that:

> takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective. Also relevant is whether one crime furthered the other.

State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). The issue is reviewed for an abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Both crimes involved the same victim – C.W. Both crimes also involved the same time and place. Our Supreme Court has recognized that "the same time and place analysis applies . . . when there is a continuing sequence of criminal conduct." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); accord State v. Porter, 133 Wn.2d 177, 183, 186, 942 P.2d 974 (1997) (looking for

"continuing, uninterrupted sequence of conduct" and rejecting "simultaneity" requirement); State v Young, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999) ("separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted episode over a short period of time.").

Finally, and contrary to the trial court's ruling, the two crimes involved the same intent. "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). This includes whether the crimes were part of the same scheme or plan and whether one crime furthered the other. Burns, 114 Wn.2d at 318; State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996). Both crimes were part of the same episode and the assault most certainly furthered the rape. Indeed, the intruder could not have committed the rape without first committing the assault. The assault was done to compel sexual intercourse. See RP 129-130 (beating stopped as soon as D.W. submitted to rape).

The sentencing court erred when it found that Division One's decision in Brown compelled consecutive sentences for assault and

rape in Kloepper's case because the evidence shows one intent – an intent to rape – and the assault was merely a means to that end.

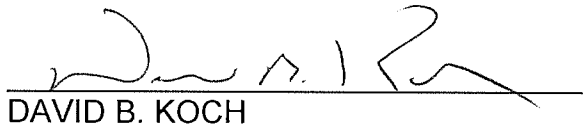
D. CONCLUSION

The trial court erred when it permitted D.W. to identify Kloepper at trial as the rapist and erred when it refused to dismiss juror Cartmell based on his family's long relationship with D.W.'s family. Defense counsel was ineffective for failing to take action once jurors learned that Kloepper had previously been involved with the criminal justice system. Finally, the court erred when it ordered consecutive sentences for Kloepper's assault and rape convictions.

DATED this 21st day of November, 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Cody Kloepper

No. 30294-6-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 20th day of November, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Benton County Prosecuting Attorney
prosecuting@co.benton.wa.us

Cody Kloepper
DOC No. 351638
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

Signed in Seattle, Washington this 20th day of November, 2012.

x Patrick Mayovsky