SUPREME COURT NO. 90007-8

NO. 30294-6-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CODY KLOEPPER,

Petitioner.

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

The Honorable Carrie Runge, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Cody Kloepper, the appellant below, asks this Court to review the Court of Appeals published decision referred to in Section B.

B. COURT OF APPEALS DECISION

Kloepper requests review of the Court of Appeals decision in State v. Kloepper, Court of Appeals No. 30294-6-III, filed February 4, 2014, and attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The victim of a rape confidently and repeatedly identified someone else as her rapist and excluded Kloepper as her rapist. Law enforcement later informed her that Kloepper's DNA was found on a key piece of evidence (overstating the evidence while doing so). Over a defense objection, the victim then identified Kloepper as the rapist at trial. Division Three held there was no impermissibly suggestive government behavior because the DNA information was simply "part of an update of the pending case" and, therefore, could not violate due process. Is there a "case update" exception to the rule that due process requires exclusion of impermissibly suggestive identifications resulting from law enforcement's actions?

2. Is review appropriate under RAP 13.4(b)(1)-(3) because Division Three's decision conflicts with other precedent and the case presents a significant constitutional question?

3. At trial, the State theorized that the victim in this case was targeted for rape. Moreover, the trial evidence demonstrated that the assault preceding the rape was done merely for the purpose of facilitating that rape; the assault ceased as soon as the victim stopped resisting. Nonetheless, two of the Court of Appeals judges in Kloepper's case concluded the crimes did not involve the "same criminal conduct" because they involved separate intents. The third judge dissented, finding that no reasonable judge could conclude the crimes involved separate intents. Did the Court of Appeals majority err in this regard?

D. STATEMENT OF THE CASE

1. The Crimes

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.

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 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.

D.W. was taken to a local hospital and then transferred to Sacred Heart Medical Center in Spokane. RP 107, 138, 216, 218. While there,

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.

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

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 (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

[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.

D.W.'s apartment, police had collected what appeared to be the tip of a latex glove. RP 94-95, 345; exhibit 9. 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 is found in 1 of every 440 males in the United States, including Kloepper.[3] RP 582-584, 588. 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).

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 (DVD); VRP of exhibit A. 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." VRP of exhibit A at 3. They told her "there was DNA and it came back to Cody." VRP of exhibit A at 4. They told her "Cody's DNA is on a piece of evidence." VRP of exhibit A at 6. And, referring to the apartment, they told her "we have Cody's DNA inside there now." VRP of exhibit A at 9. In a subsequent interview with detectives, D.W. identified the DNA

[3] 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.

evidence specifically as what changed her mind about the rapist's identity. RP 393-397.

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

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 to seeing him with longer hair, and his hair was shorter in the photo used by police.[4] 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, met with them

twice, and denied the rape. RP 372-373, 385, 530; exhibit 73. Similarly, at trial he took the stand and denied raping D.W. RP 635, 655.

Kloepper was convicted of (count 1) Rape in the First Degree; (count 2) Assault in the First Degree; and (count 3) Burglary in the First Degree, all of which included a deadly weapon enhancement. The court imposed a minimum standard range sentence of 294 months, and Kloepper appealed. CP 57-63, 84-85, 95-97.

2. Argument On Appeal

In the Court of Appeals, Kloepper argued that law enforcement's actions – repeatedly using Kloepper's photo in montages and ultimately telling D.W. that Kloepper's DNA was found on evidence in her apartment – resulted in an impermissibly suggestive procedure and a substantial likelihood of irreparable misidentification. Therefore, D.W.'s in-court identification of Kloepper as her rapist violated Kloepper's due process rights. See Brief of Appellant, at 13-20 (citing, among other cases, Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); Manson v. Braithwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)); Reply Brief of Appellant, at 3-5.

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[4] Kloepper sometimes wore his hair short and sometimes longer. RP 279-284. 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.

Focusing only on the DNA results, the Court of Appeals concluded there had been no impermissibly suggestive procedure because the information was shared with D.W. merely "as part of an update of the pending case." Kloepper, 317 P.3d at 1092. According to the Court, only suggestive behavior intentionally directed at influencing a victim's identification of her assailant, as opposed to such a "case update," potentially violates due process. Id.

Kloepper also challenged the sentencing court's determination that his convictions for rape and assault (both serious violent offenses) involved "separate and distinct criminal conduct" and, therefore, required consecutive sentences. See Brief of Appellant, at 29-34; Reply Brief of Appellant, at 7-8. Two of the three Division Three Judges deciding Kloepper's case rejected the argument, concluding that, although the crimes involved the same time, place, and victim, the two offenses could be interpreted to involve different intents. Kloepper, 317 P.3d at 1094-1096. In a dissenting opinion, Judge Brown found the only reasonable conclusion was that the two crimes involved the same objective intent. Therefore, Kloepper should have received concurrent sentences. Id. at 1096 (Brown, J., concurring in part and dissenting in part).

Kloepper now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THERE IS NO PRECEDENT FOR DIVISION THREE'S NEW "CASE UPDATE" EXCEPTION TO TAINTED IDENTIFICATIONS.

The law on suggestive identification procedures is well established. 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, 10 P.3d 406 (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 impermissibly suggestive. State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001), review denied, 146 Wn.2d 1022, 52 P.3d 521 (2002). 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). Importantly, "what triggers due process concerns is police use of an unnecessarily suggestive identification procedure, whether or not they intended the arranged

procedure to be suggestive." Perry v. New Hampshire, ___ U.S. ___, 132 S. Ct. 716, 721 n.1, 181 L. Ed. 2d 694 (2012).

Once a procedure is shown to be impermissibly suggestive, the court must decide whether there is a substantial likelihood of irreparable misidentification based on several factors. Kinard, 109 Wn. App. at 433 (citing Biggers, 409 U.S. at 199-200). These 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. Finally, "[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself." Id.

Division Three's opinion in Kloepper's case has significantly, and improperly, modified the standard for determining whether police conduct is impermissibly suggestive.

In the Court of Appeals, Kloepper relied on Division One's decision in State v. McDonald, 40 Wn. App. 743, 700 P.2d 327 (1985). 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, Division One 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, argued Kloepper, by informing D.W. that his 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." This, plus the fact Kloepper's photo was included in both sets of photos shown D.W. prior to trial resulted in impermissibly suggestive circumstances. See Brief of Appellant, at 16-17.

In rejecting Kloepper's argument, Division Three reasoned:

> [I]t is a close question whether there was suggestive behavior by the government. The communication of the DNA results by a government agent clearly affected the prior identification and, to that extent, can be seen as suggestive behavior. But, critically in our view, the suggestive behavior was not directed to D.W.'s identification of her assailant. Rather it was made as part of an update of the pending case against Mr. Goering and used to explain to the victim that despite the filing of charges, the investigation was continuing against both men.

> D.W.'s change in her identification occurred 12 weeks after the communication from the detectives.[5] This case is thus distinguishable from *McDonald* where the suggestive communication was made directly in response to the line-up identification. In light of these circumstances, we are not convinced that this truly was a suggestive identification procedure.

Kloepper, 317 P.3d at 1092.

Division Three cites nothing in support of its distinction between "case updates" and information "directed to . . . identification of [an] assailant." Presumably, however, in McDonald, had officers simply waited some period before "updating" the victim on the arrests of the two suspects, in Division Three there would have been no due process violation when the victim then confidently identified both men as the robbers. Not only is this new approach unprecedented, it turns on officer intent, a distinction expressly rejected by the United States Supreme Court. See Perry, 132 S. Ct. at 721 n.1 (intended or not, an unnecessarily suggestive procedure violates due process). Even without intention to change a witness identification, a "case update" can have that impact and did so here.[6]

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[5] It is not clear why Division Three has concluded that D.W. did not change her identification for 12 weeks. This may simply be a reference to the first time in the record her change is documented. In any event, D.W. conceded that she changed her mind because of what she heard about the DNA results. See RP 396.

[6] This is not to say law enforcement should not update victims on the investigation. They may do so. In certain cases, however, this may taint any subsequent identification of the assailant.

In Kloepper's case, Division Three also found that, even if the procedures used had been deemed impermissibly suggestive, there was not a substantial likelihood of irreparable misidentification. Kloepper, 317 P.3d at 1092. The relevant factors and evidence quite clearly show otherwise, however.

Assessing the relevant factors discussed in Manson, for factors (1) and (2) (opportunity to observe and degree of attention), 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) (accuracy of prior descriptions), during the 911 call, D.W. 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) (level of certainty), 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) (time between crime and identification): 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. 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.

Division Three's decision in Kloepper's case departs from, and conflicts with, prior Washington precedent and United State's Supreme Court precedent and presents an important constitutional issue. Review is appropriate under RAP 13.4(b)(1)-(3).

2. AS JUDGE BROWN FOUND, THE SENTENCING 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."). Whether offenses arise from separate and distinct conduct is determined using the "same criminal conduct" standard of RCW 9.94A.589(1)(a). State v. Brown, 100 Wn. App. 104, 112-115, 995 P.2d 1278 (2000), aff'd in part and rev'd in part, 147 Wn.2d 330, 58 P.3d 889 (2002). Offenses involve the "same criminal conduct" where they involve the same intent, same time and place, and same victim. RCW 9.94A.589(1)(a).

In Kloepper's case, the State conceded the assault and rape involved the same time and place and the same victim. Kloepper, 317 P.3d at 1095. The State only disputed 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. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990); State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996).

Notably, the evidence at trial showed that, in the hours before D.W. was raped, Kloepper arranged a sexual encounter with a man whom he made contact with over the internet. That man – Salvador Contreras – testified that when Kloepper arrived at Contreras' home, Kloepper was drunk and reeked of cigarettes, which was a turn off, and the two did not have sex. RP 276-277, 291-298, 319-330, 632-634. Kloepper, however, claimed they did engage in sex. RP 634.

The State's theory at trial was that, having been rejected at his intended sexual encounter with Contreras, Kloepper was still intent on having sex that night and specifically targeted D.W. for sex in her

apartment. See RP 692-693, 739 (D.W. specifically targeted and at a time when she would be home alone); RP 700-701, 749 (Kloepper out looking for sex); RP 743 (with Contreras and again before entering D.W.'s apartment, Kloepper took his shirt off; "maybe the defendant just likes to take off his shirt before he has sex").

On appeal, Kloepper argued that the individual who raped D.W. intended to rape her when he assaulted her; the assault was done to compel sexual intercourse and, therefore, the rapist's objective intent did not change from one crime to the other. This was true not only for the reasons identified *by the State* at trial, it was true based on the other evidence. The rapist stopped physically beating D.W. as soon as she stopped resisting, and there was no more assaultive conduct after the rape, either. See RP 129-130 (beating stopped upon submission to rape). The rapist did, however, threaten to return and – referring to the rape – "finish it off" if D.W. reported what had happened. RP 131.

Despite this, two of the three Division Three judges in Kloepper's case found that the sentencing court did not abuse its discretion in concluding the two crimes involved different intents. For the reasons discussed by Judge Brown in his dissent, however, this was error. This Court should also accept review on this issue and reverse.

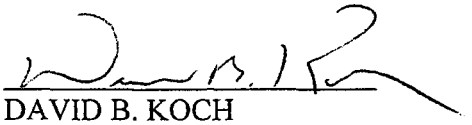
F. CONCLUSION

For the reasons discussed above, Kloepper respectfully asks this Court to grant his Petition and reverse the Court of Appeals' published decision.

DATED this 6th day of March, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. CODY JOSEPH KLOEPPER, Appellant.	)	No. 30294-6-III PUBLISHED OPINION

KORSMO, C.J. — Cody Kloepper challenges his convictions for first degree rape, first degree burglary, and first degree assault, primarily arguing that the victim should not have been allowed to identify him at trial. We affirm the convictions and sentence.

FACTS

D.W. awoke in her fourth floor Richland apartment at 4:00 a.m. to prepare for work. An unknown man with long hair attacked her and struck her repeatedly on the head with a metal bar. The two struggled and D.W. defecated in her pants. When asked why he was attacking her, the man responded "because Obama was elected president." The victim told the man that if he was there to rape her, "just do it and get it over with."

He made D.W. get down on her knees, but was unable to penetrate her with his penis. She then heard a package being opened and what she thought was latex gloves. The man then used his fingers to penetrate her vagina and her anus. He covered her with a blanket and told her that if she told anyone, he would "come back and finish it off." A few minutes later D.W. called 911.

D.W. was taken to a Spokane hospital for treatment of her head injuries. An officer there subsequently showed her a six-person photomontage that included a picture of Mr. Kloepper with short hair; D.W. did not identify anyone in the montage. Five days later she was shown a 23-person photomontage that included the same photo of Mr. Kloepper with short hair. D.W. told officers that she recognized Mr. Kloepper[1] with the short hair, but identified Mr. Karl Goering from the montage as the man who attacked her. She also identified Goering from an in-person line-up. He was arrested and charged for the attack on D.W.

The crime scene investigators found what appeared to be the tip of a latex glove covered in D.W.'s blood. A small amount of male deoxyribonucleic acid (DNA) was recovered and subjected to Y-chromosome Short Tandem Repeat (Y-STR) DNA testing. The result excluded Mr. Goering, but matched 1/440 males in the United States population, including Mr. Kloepper. The police advised D.W. on May 5, 2010, that the

[1] Kloepper worked for the apartment complex where D.W. lived.

DNA "matched" Mr. Kloepper and excluded Mr. Goering. The police also advised that they would continue their investigation and had not ruled Goering out as a suspect.

D.W. returned to the police station on July 28, 2010, and gave a recorded statement that she now believed Mr. Kloepper was the attacker. When asked why she changed her mind, D.W. said, "Well the DNA thing." Mr. Kloepper was charged with the three noted offenses, all of which carried a deadly weapon enhancement. Charges against Mr. Goering were dropped. Mr. Kloepper met the victim's original identification of the assailant far better than Mr. Goering did.

The defense moved to exclude D.W.'s anticipated in-court identification on the basis that her receipt of the DNA information was impermissibly suggestive and had tainted the identification. The trial court denied the motion on the basis that the information went to the weight to be given the testimony rather than its admissibility.

Prior to opening statements, juror 8 indicated by note to the court that his parents were friends of D.W.'s parents while he was growing up. The court did not find a basis for excusal for cause, noting that Juror 8 had not seen D.W. in 40 years and probably would not recognize her.

The jury convicted Mr. Kloepper on all three counts and also found that he was armed with a deadly weapon on each count. The trial court ruled that the rape and assault convictions arose from separate conduct and the sentences would be served consecutively

to each other, while the burglary count would be served concurrently with those counts. Mr. Kloepper then timely appealed to this court.

ANALYSIS

This appeal raises four claims. Mr. Kloepper contends that the trial court erred in denying his motion to exclude the in-court identification and in failing to remove juror 8. He also argues that his trial attorney provided ineffective assistance and that the court was required to have sentenced him to concurrent terms on all three counts. We will address those issues in the noted order.

Identification Testimony

Mr. Kloepper asks us to expand the law concerning impermissibly suggestive identification to include this fact pattern. His argument could effectively prevent a witness from changing an incorrect (or what she perceived as incorrect) prior identification at trial. We conclude that this expansion is inappropriate.

Typically, a trial judge has discretion to admit or exclude evidence at trial. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). 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).

When impermissibly suggestive government behavior results in the substantial likelihood of the misidentification of a suspect, due process of law requires that trial courts exclude the identification. *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct.

967, 19 L. Ed. 2d 1247 (1968); *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). Typically these types of issues concern pretrial identification procedures that allegedly taint a witness' initial and subsequent identifications. *E.g., Vickers*, 148 Wn.2d at 118; *State v. Cook*, 31 Wn. App. 165, 167-71, 639 P.2d 863 (1982). More recently, arguments have been advanced, unsuccessfully, calling for the exclusion of trial identification testimony on the basis that the witness had failed to identify the defendant during pretrial identification opportunities. *E.g., State v. Sanchez*, 171 Wn. App. 518, 288 P.3d 351 (2012), *review denied*, 177 Wn.2d 1024 (2013) (witness did not identify defendant until after seeing his picture on the news permitted to identify him at trial); *State v. Salinas*, 169 Wn. App. 210, 224, 279 P.3d 917 (2012), *review denied*, 176 Wn.2d 1002 (2013) (witness unable to identify defendant in montage permitted to do so at trial).

The argument that Mr. Kloepper raises is similar to that presented by *Sanchez* and *Salinas*, but with a twist—unlike those cases, there was no suggestion of any action by the government to taint the identification—here Mr. Kloepper contends that the sharing of the DNA results tainted the in-court identification. He finds support for his argument in *State v. McDonald*, 40 Wn. App. 743, 700 P.2d 327 (1985). There the police, after the victim identified one of the suspects in a line-up and said that another might be the man, was told that the two men the victim had mentioned were the ones who had been arrested. *Id.* at 744-45. This court concluded that the information was tantamount to telling the

witness that "this is the man." *Id.* at 746. The conviction of the man who had been equivocally identified was reversed. *Id.* at 747-48.

Similarly here, Mr. Kloepper argues with some force that *McDonald* applies and renders D.W.'s in-court identification invalid. When a court finds suggestive government behavior, the court must then determine if there was a substantial likelihood that the resulting identification was erroneous. *Cook*, 31 Wn. App. at 171. If there was no suggestive behavior, then the argument fails and there is no need to consider whether there was a substantial likelihood of misidentification. *Id.*

As to the first factor, it is a close question whether there was suggestive behavior by the government. The communication of the DNA results by a government agent clearly affected the prior identification and, to that extent, can be seen as suggestive behavior. But, critically in our view, the suggestive behavior was not directed to D.W.'s identification of her assailant. Rather, it was made as part of an update of the pending case against Mr. Goering and used to explain to the victim that despite the filing of charges, the investigation was continuing against both men. D.W.'s change in her identification occurred 12 weeks after the communication from the detectives. This case is thus distinguishable from *McDonald* where the suggestive communication was made directly in response to the line-up identification. In light of these circumstances, we are not convinced that this truly was a suggestive identification procedure.

However, we need not decide the case solely on that basis as we also doubt that the changed identification resulted in a "substantial likelihood" of a misidentification. If anything, the change prevented a misidentification. The other evidence in the case pointed to Mr. Kloepper, not Mr. Goering, as the assailant. Besides the DNA, Mr. Kloepper better fit D.W.'s initial description of the attacker as a thin, tall (6'2") man with long hair. Mr. Kloepper stood 6'4" and was thin with long hair at the time of the attack.[2] Additionally, against company policy shortly prior to the assault he accessed the supervisor's office in the middle of the night where keys to the apartments, including D.W.'s, could be accessed. D.W. reported that she had locked her door, but the assailant gained entry without force, a fact suggesting that a key was used.

There was not a substantial likelihood of misidentification. Even without D.W.'s identification, the evidence pointed at Mr. Kloepper as the assailant. The defense was thoroughly able to develop D.W.'s earlier identifications of Goering and the reason for her change of mind in order to attack the reliability of her identification testimony. We believe this comported with due process of law. This court recently noted that the United States Supreme Court has declared that the protection "'against a conviction based on evidence of questionable reliability'" is not exclusion of the evidence, but, rather is "'affording the defendant means to persuade the jury that the evidence should be

[2] In contrast, Mr. Goering stood only 5'10".

discounted as unworthy of credit.'" *Sanchez*, 171 Wn. App. at 572 (quoting *Perry v. New Hampshire*, 565 U.S. ___, 181 L. Ed. 2d 694, 705, 132 S. Ct. 716 (2012)).

As noted, Mr. Kloepper exercised his ability to cross-examine D.W. and argue the reliability of her identification to the jury. In this case he was even able to show why she changed her mind, allowing him to note that the identification testimony was merely derived from the DNA evidence, which was admittedly not very powerful. D.W.'s testimony on this point was effectively impeached.

Under these circumstances, Mr. Kloepper was afforded due process of law. The deficiencies in D.W.'s identification properly went to the weight to be given that information by the jury rather than its admissibility. The trial court did not abuse its discretion in declining the motion to exclude.

Juror 8

Mr. Kloepper also argues that the trial court erred in denying his challenge for cause to juror 8 after it came to light he had once been acquainted with D.W. and her family. Again, we conclude there was no abuse of the trial court's discretion.

RCW 2.36.110 requires a judge to dismiss "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." "'Actual bias' is '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.'" *Hough v. Stockbridge*, 152 Wn. App. 328, 340, 216 P.3d 1077 (2009) (citing RCW 4.44.170(2)). The trial judge has fact finding discretion in determining whether to grant or deny a juror's dismissal based on bias. *State v. Jorden*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000), *review denied*, 143 Wn.2d 1015 (2001). This discretion "allows the judge to weigh the credibility of the prospective juror based on his or her observations." *Id.* Appellate courts defer to the trial judge's decision. *Id.*

After being selected, juror 8 indicated in a note that he had learned that his parents were friends of D.W.'s parents. Juror 8 knew the parents of D.W. and would occasionally see them at the golf course. In response to questioning, juror 8 indicated that he did not have any social activities with D.W., would not know her by sight, and that it had been at least 40 years since he had seen her. He also responded that he felt he could be a fair and impartial juror, and that he could listen with a blank slate.

After hearing argument, the court decided that there was not a sufficient basis to excuse juror 8 for cause:

> He indicated that he was just an acquaintance, that he last saw the victim 40-some years ago. That he probably would not recognize her on site. He's had no contact with her. He is older than her. That the only reason why this even jogged any sort of memory was because he advised his mother that he was on jury duty. From the Court's perspective, there has not been a sufficient showing that this juror needs to be excused for cause.

Report of Proceedings at 63.

These were tenable grounds for denying the challenge for cause. The juror had only a passing acquaintance with D.W. 40 years earlier and indicated that nothing about that fact would affect his ability to serve in this case. The trial court was permitted to credit that information. Nothing in the record of this case suggests that juror 8 was biased in favor of D.W. or against Mr. Kloepper. An acquaintance with D.W.'s family 40 years earlier did not amount to bias as a matter of law.

The trial court did not abuse its discretion in denying the challenge to juror 8.

Ineffective Assistance of Counsel

Mr. Kloepper also argues that his counsel provided ineffective assistance by failing to challenge a detective's statement that Mr. Kloepper's information was in a system used to record contacts with police. Counsel did not err in declining to challenge this passing information.

Well-settled standards govern our review of this argument. The Sixth Amendment guaranty of counsel requires that an attorney perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984). Under *Strickland*, courts apply a two-prong test: 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 690-92. 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).

While defense counsel was cross-examining the lead detective on how the photomontages were constructed, the detective testified that the I-Leads system supplied many of the photos. I-Leads was described as a local system that included booking photos and other police contact information. The detective testified that while most of the montage photos came from I-Leads, the police had used Mr. Kloepper's employment photo. When asked by defense counsel if police had not also had a Department of Licensing (DOL) photo of Mr. Kloepper, the detective responded that police also had an I-Leads photo of Mr. Kloepper, but he was not sure if there was a DOL photo.

Defense counsel did not object to this testimony. Mr. Kloepper now argues that his counsel provided ineffective assistance by failing to object, contending that the information conveyed the fact that he had a criminal history. We do not believe the decision to not challenge the answer established defective performance by counsel.

The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662,

review denied, 113 Wn.2d 1002 (1989).[3] Similarly, our case law recognizes that the decision to decline a limiting instruction for ER 404(b) evidence likewise is a tactical decision not to highlight damaging evidence. *E.g., State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009) (failure to propose a limiting instruction presumed to be a legitimate trial tactic not to reemphasize damaging evidence); *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27 (2005) ("We can presume that counsel did not request a limiting instruction" for ER 404(b) evidence to avoid reemphasizing damaging evidence); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The decision to not object to or seek a cure for damaging evidence is a classic tactical decision. Counsel did not provide ineffective assistance by ignoring the I-Leads comment.

Consecutive Sentences

Mr. Kloepper also argues that the trial court erred in deciding that the assault and rape convictions did constitute "separate and distinct conduct." Although the trial court

[3] "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Madison*, 53 Wn. App. at 763.

could have decided the matter differently, there was no abuse of discretion in the court's ruling.

Mr. Kloepper's convictions for first degree assault and first degree rape are classified as serious violent offenses. RCW 9.94A.030(45). RCW 9.94A.589(1)(b) provides that in sentencing serious violent offenses, the crimes will be sentenced consecutively to each other[4] if they arise from "separate and distinct criminal conduct." That standard is defined to be the same as the "same criminal conduct" standard of RCW 9.94A.589(1)(a). *State v. Brown*, 100 Wn. App. 104, 112-15, 995 P.2d 1278 (2000), *aff'd in part and rev'd in part*, 147 Wn.2d 330, 58 P.3d 889 (2002) (reviewing legislative history). Crimes that do not constitute the same criminal conduct are necessarily separate and distinct offenses. *Id.* at 115.

"Same criminal conduct" means that the offenses occurred at the same time and same place, had the same victim, and have the same criminal intent. RCW 9.94A.589(1)(a). Offenses have the same criminal intent when, viewed objectively, the intent does not change from one offense to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). "Intent, in this context is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in

[4] To mitigate the effects of the consecutive sentences, the other current serious violent offenses are not used in the offender score calculation and the offense(s) having the shorter sentence ranges are scored with an offender score of zero regardless of the offender's criminal history. RCW 9.94A.589(1)(b).

committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Courts have also looked at whether one crime furthers the other or whether the offenses were part of a recognized plan or scheme. *Dunaway*, 109 Wn.2d at 215 (furtherance test); *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990) (same scheme or plan).

The trial court's same criminal conduct ruling is reviewed for abuse of discretion because it involves a factual inquiry. *State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). Thus, "when the record supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result. But where the record adequately supports either conclusion, the matter lies in the court's discretion." *Id.* at 537-38 (citation omitted). This exception "is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

The parties agree that the time, place, and victim elements of the same criminal conduct test were met in this case. They disagree whether the two offenses shared the same criminal intent.[5] Noting that the assault ended when the victim "submitted" to the rape, Mr. Kloepper argues that the assault furthered that crime and, hence, was not a

[5] The trial court also treated the first degree burglary conviction as a separate offense for scoring purposes. Whether it did so on the basis of the same criminal conduct analysis of RCW 9.94A.589(1)(a) or by operation of the anti-merger statute, RCW 9A.52.050 is unclear.

separate and distinct offense. In this view, the assault overcame the anticipated resistance to the rape and was part and parcel of that offense.

The trial court could have viewed the evidence that way. It did not, however, and this court is not in a position to overturn that decision because this incident did not have to be viewed in that manner. For one thing, the assailant never expressed any intent to engage in sexual intercourse until the victim broached the subject. Repeatedly striking a person on the head with a metal bar evinces an intent to cause serious physical injury rather than to facilitate sexual intercourse. More commonly, the threat to use force is at least initially made in order to obtain a victim's cooperation; that did not happen here. Additionally, severe injury also can effectively hinder sexual intercourse as occurred here when the victim defecated. We believe that the trial court was free to view the rape as a crime of opportunity that presented itself after the assault rather than as the object of the attack.

Because we cannot say that the assault and the rape shared the same objective criminal intent, the trial court cannot have abused its discretion in treating the two crimes as separate and distinct offenses.

Affirmed.

Korsmo, C.J.

I CONCUR:

Fearing, J.

No. 30294-6-III

BROWN, J. (concurring in part, and dissenting in part) — I agree with and concur in Cody J. Kloepper's convictions and the resolution of the identification, ineffective assistance, and juror selection issues. I disagree solely with the trial court's consecutive sentencing for first degree assault and first degree rape. In my view, the facts show "same criminal conduct" within the meaning of RCW 9.94A.589(1)(a), not "separate and distinct criminal conduct" under RCW 9.94A.589(1)(b). Our sole focus is "same criminal intent" because the parties agree the facts show the same victim, time, and place. Three parts of the record show Mr. Kloepper's criminal intent from beginning to end was assaulting D.W. to accomplish her rape.

First, at the beginning, soon after his frustrated sexual encounter with a third person in his search for random sex, Mr. Kloepper entered D.W.'s apartment shirtless at 4:00 a.m. on a freezing winter's day and began brutally assaulting her. D.W. described Mr. Kloepper's Obama remark as a "sarcastic" answer to her question why all this was happening. Report of Proceedings (RP) at 137. Mr. Kloepper's criminal intent to rape then became plain to D.W. and objectively explains her submissive response "just do it

[the rape] and get it [the rape] over with." RP at 129-30. D.W.'s explanation regarding Mr. Kloepper's criminal intent is undisputed; D.W. submitted to his rape to end the assault. Thus, according to D.W., the assault furthered the rape. Therefore, any other explanation is unpermitted conjecture.

Second, Mr. Kloepper communicated his true response to D.W.'s question and her submission with nonverbal conduct by immediately abating his assault and making her kneel so he could penetrate her. Mr. Kloepper used latex gloves he brought with him for that exact purpose, further revealing his intent throughout to rape D.W.

Third, at the end of D.W.'s ordeal, Mr. Kloepper threatened if she reported him, he would "come back and finish it off [singularly referring to the brutal rape]." RP at 131. Mr. Kloepper's threat unequivocally establishes the "same criminal intent" throughout D.W.'s assault and rape.

In sum, I would reverse the trial court's consecutively sentencing of Mr. Kloepper for first degree rape and first degree assault because the facts solely support a "same criminal conduct" finding under RCW 9.94A.589(1)(a). Accordingly, I respectfully dissent.

Brown, J.

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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 6th day of May, 2014, I caused a true and correct copy of the **Petition for Review** 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.

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Signed in Seattle, Washington this 6th day of May, 2014.

x Patrick Mayovsky