NO. 302946-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

CODY JOSEPH KLOEPPER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-01156-4

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The Crimes:

On December 5, 2009, D.W. got up at 4:00 a.m., in her fourth-floor apartment, planning on going to work. (RP[1] 123, 126). D.W. went about her usual morning routine by making coffee, when she heard someone behind her. (RP 126). A man was running at her with a bar. (RP 127).

The man began hitting D.W. with the bar. (RP 128.) D.W. asked him why he was doing this to her. (RP 127). He replied, sarcastically, that it was because Barack Obama had been elected president. (RP 127).

D.W. tried to block the blows to her head with her arms, and ran into the living room. (RP 128). Eventually, hoping that he would stop the assault, D.W. told the attacker, "If you're here to rape me, just do it and get it over with." (RP 129-30).

The perpetrator told D.W. to get on her knees. (RP 130). Possibly because D.W. had lost control of her bowels[2], he was unable to penetrate her with his penis. (RP 130). D.W. heard a package of latex gloves being

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[1] Unless dated, "RP" references the Verbatim Report of Proceedings Volumes 1-8.

[2] The loss of bowel control is common due to terror or fear. (RP 210).

opened, and the perpetrator inserted his fingers in her vagina and anus. (RP 130-31).

The perpetrator told D.W., "If you tell anyone I did this, I'm gonna come back and finish it off." (RP 131). He put a blanket over D.W.; she waited and called 911. (RP 132).

The police found D.W. covered in blood, from her head, hands, shoulders, and hair. (RP 91). The police also noted a large pool of blood in the living room, blood on the living room east wall, blood on a lampshade, blood at the base of a coffee table, blood on the kitchen floor, blood on the kitchen counter, blood spatter on the couch, and hair strands in the kitchen sink. (RP 92, 99-100, 102, 105, 489, 492, 499, 501, 509). A piece of a rubber glove was in the large pool of blood in the living room. (RP 94, 502-03).

Detective Shepherd, who has extensive training in blood spatter evidence, concluded that the blood drops show the perpetrator entered through the front door. (RP 507, 511). The initial assault was in the kitchen by the sink. The assault continued around the pantry and then went into the living room. (RP 511).

Kadlec Emergency Room Dr. Fermin Godinez treated D.W. (RP 206). He found that D.W. had intercranial hemorrhages in several areas of her brain, multiple fractures in her left hand, multiple fractures in her right

forearm, an open fracture on her right wrist, a shattered middle finger on her left hand, a complex trauma to her scalp, and lacerations behind both of her ears. (RP 212-14, 216, 222, 225). D.W. needed 43 staples in her head to close the wounds. (RP 153).

D.W.'s initial description of the perpetrator:

D.W. in her 911 call said the perpetrator "looked familiar. He looked like one of the Villa people. The Villas' maintenance people." (CP 174). "The Villas" is the name of D.W.'s apartment complex. (RP 86). D.W. stated that he was tall, at least six feet, maybe six feet-two, thin, with shaggy brown hair. (CP 176).

An important clue was contained in the following exchange:

"911: Did he just break into your apartment or what happened?

D.W.: He said he — he said I left my door open. I know I didn't. **I always lock my door and I just checked it.**" (Emphasis added.) (CP 174).

D.W. told EMT Lance Greenwood that she thought the perpetrator may have been one of the maintenance employees for the apartment complex because those employees could get a key to her residence. (RP 195).

D.W. initially identifies Karl Goering and rules out the defendant as the perpetrator.

The police showed D.W. a series of twenty-three photographs of possible suspects on December 10, 2009, while she was still in Sacred Heart Hospital in Spokane. (RP 140, 521-22). The defendant was on the maintenance staff of D.W.'s apartment complex, and the manager gave the police a photo showing the defendant with short hair. (RP 334, 416, and EX. 27).

D.W. testified that she did not select the defendant because his hair was short in the photo and did not match the perpetrator. (RP 140). D.W. did positively identify a Karl Goering as the perpetrator, both via the photo and in an in-person lineup. (RP 143, 44). Although Mr. Goering was only five feet-ten inches and did not have access to a key to D.W.'s apartment, based on D.W.'s positive identification, the State arrested and charged him with the crimes. (RP 338-39).

The case against Karl Goering collapses.

The police took a number of items from Mr. Goering, with the following results:

A sweatshirt: No blood found. (RP 540, 573).

Jeans: No blood found. (RP 540, 574).

T-Shirt and socks: No blood found. (RP 540, 574).

White socks and shoes: No blood found. (RP 540, 574).

Timex watch: No blood found. (RP 540, 574).

Mr. Goering was excluded as a contributor to deposits under D.W.'s fingernails. (RP 578).

Finally, Lorraine Heath, forensic scientist with the Washington State Patrol Crime Laboratory, found that the tip of the rubber glove found in the blood pool in D.W.'s living room was a mixture of D.W.'s blood and not Mr. Goering's, but the defendant's. (RP 269, 616-17). The expected frequency of a random match with the defendant's DNA is one in 440, while the expected frequency of a random match with D.W.'s DNA is one in 8.6 quadrillion. (RP 583, 615).

D.W. came to doubt her identification of Mr. Goering because of the lack of a DNA connection between him and the physical evidence. (RP 158). Based on this, the police reviewed the defendant as a suspect. (RP 526).

The case against the defendant.

In addition to the DNA evidence stated above, there was the following evidence:

The crime was committed by someone who opened D.W.'s door with a key.

D.W., a single female living alone, always locked her door. (RP 124). Her fourth-floor apartment was not accessible via the balcony. (RP 124, 410). Everyone, from the first police officer on the scene to the EMT, to the apartment maintenance supervisor, stated there were no signs of forced entry. (RP 93, 190, 452).

The defendant, and only the defendant, in the morning hours of December 5, 2009, accessed a lock box which had D.W.'s apartment key.

A spare set of keys for the tenants of The Villas apartment complex is kept in a locked box in the manager's office. (RP 413). The manager's office is locked after hours. (RP 412). The defendant was one of the few individuals who could access the manager's office after hours and who could also access that lock box. (RP 413).

The defendant admitted that he did use his key to unlock the manager's office, unlocked the lock box, and took a key to an apartment on the night of the crime. (RP 646). He was the only one who did so. (RP 647).

The early morning of December 5, 2009, was the only time that the defendant violated the rules of the apartment complex by accessing the spare keys in the lock box or going onto the property after hours.

Employees of the apartment complex are not allowed to stay on the premises overnight and are not allowed to stay in vacant apartments. (RP 420). The defendant admitted he violated both rules by going onto the premises and getting a key to a vacant apartment. (RP 646). He further admitted this was the only occasion he had done so.

The defendant lied two times to the police about his whereabouts on the night and early morning of the crime.

The police questioned the defendant on the afternoon of December 5, 2009. He stated that he left work at about 4:00 p.m., and went to a bar in Richland with a friend, Jeramie Morrow. (RP 517). He and Mr. Morrow left around midnight. (RP 517). To make sure that Mr. Morrow got home safely, the defendant followed him to Morrow's Kennewick residence. (RP 518). As he was driving back to his Richland residence, the defendant realized he was too intoxicated and decided to spend the night at The Villas apartment complex. (RP 518). The defendant repeated this version in an interview with Det. Shepherd on May 4, 2010. (RP 526).

This version was not truthful: Mr. Morrow left the bar at about 8:31 p.m. (RP 245). His wife drove him home. (RP 245). The defendant did not follow him home. (RP 245-6). Rather, the defendant went to his Richland residence at about 11:00 p.m. (RP 276). He began checking

Craigslist ads for a tryst with a stranger. (RP 632). Cell phone records show that he drove to an area in south Kennewick at around 12:43 a.m. (RP 352).

The defendant's statements about staying at The Villas were inconsistent and not reasonable.

The defendant's statement about his whereabouts in the early morning of December 5, 2009, include:

- To Jeramie Morrow: He met a girl and went to a motel with her. (RP 250).
- To Heather Morrow and Katherine Colleran (his significant other): He stayed in the rec room of the apartment complex, not a vacant apartment. (RP 258, 289).
- To Linda Metz, the apartment manager: He slept in a vacant apartment in the "D" building of the complex. (RP 458).

However, Ms. Metz stated that particular vacant apartment was "dirty" and "nasty" and the carpet had to be changed due to pets. (RP 430, 458). The police did not see any signs that the vacant apartment had been slept in. (RP 480).

The defendant matched D.W.'s description of the perpetrator, and tried to alter his appearance by cutting his hair.

The defendant is six feet-four inches, and thin. (RP 651). At least as of November 2009 or December 2009, he had shoulder-length hair, which he wanted to grow longer. (RP 421). Detective Murstig and Detective Shepherd both noted the defendant's hair length was short on the afternoon of December 5, 2009. (RP 335, 516). Ms. Metz and another co-worker, Jordan Schlenker, noted that the defendant had cut his hair sometime before his return to work on December 7, 2009. (RP 421-22, 467). The defendant told Mr. Schlenker that he cut his hair because he looked like the suspect. (RP 467).

The charges and verdicts:

The defendant was charged with Count I: Rape in the First Degree, by either use of a deadly weapon, or infliction of serious bodily physical injury or felonious entry of a building; Count II: Assault in the First Degree, by use of a deadly weapon or infliction of great bodily harm; Count III: Burglary in the First Degree, by being armed with a deadly weapon or an intentional assault. (CP 14-16).

The defendant was found guilty of all counts under all the alternatives listed above. (CP 57-63).

II. ARGUMENT

1. RESPONSE TO DEFENDANT'S ARGUMENT NO. 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."

A. Standard on review:

1. The suggestiveness of an identification procedure is not reviewed de novo, but is subject to the sound discretion of the trial court.

As held in *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001), the determination by the trial court whether an identification procedure meets due process requirements is reviewed subject to the sound discretion of the trial court. "[T]he test, a deferential test, is whether there are tenable grounds or reasons for the trial court's decision." *Id.*

Here, the trial court heard the recording of the meeting between the detective, deputy prosecutor, and victim, in which D.W. was told that the defendant's DNA was on a piece of evidence found in her apartment. (CP 78). The trial court also heard the testimony of D.W. Based on all evidence, the court found, "The police did not lead (D.W.) or otherwise encourage her to state that the defendant was the perpetrator." (CP 79, No. 15).

The issue is whether the trial court properly used its discretion to allow D.W. to testify about who the perpetrator was.

2. The defendant has the burden to establish to the trial court that the identification procedure was impermissibly suggestive and the subsequent identification was unreliable.

The defendant bears the burden of first showing that the out-of-court identification procedure was so impermissibly suggestive that it created a substantial likelihood of irreparable misidentification. When a defendant fails to show impermissible suggestiveness, the inquiry ends. If a defendant has established that the identification procedure was impermissibly suggestive, the issue is then whether the witness's identification was nevertheless reliable. *State v. Vickers*, 107 Wn. App. 960, 29 P.3d 752 (2001).

The reliability of an out-of-court identification procedure is generally a question for the jury. *Id.*.

B. The trial court properly found that the defendant had not met his burden, and allowed D.W. to identify the defendant as the perpetrator.

1. The trial court properly found that the police did not use suggestive identification procedures.

a. *Finding of Fact No. 15 was supported in the record. "The police did not lead [D.W.] or otherwise encourage her to state that the defendant was the perpetrator."*

The meeting with D.W., the deputy prosecutor, and the lead detective, Roy Shepherd, lasted a total of 12 minutes. (RP of EX A at 2, 10). The purpose of the meeting was to update D.W. on the developments in the case. (RP of EX A at 3). At that point, Karl Goering was charged with the crimes.

Detective Shepherd began by stating that "a piece of evidence has come back with DNA and the DNA matched Cody Kloepper, the maintenance man. Okay, I don't want to get into the specifics on that." (RP of EX A at 3). The deputy prosecutor and detective told D.W. that the defendant was not charged and not in custody, that Karl Goering remained charged with the crime, that there were additional forensic tests to be completed at the crime lab, that they had not ruled out Goering as a suspect, nor had they ruled out the defendant, and that they were looking at all possible ways the defendant's DNA could have been found at D.W.'s apartment. (RP of EX A at 4, 6, 9).

The defendant's reliance on *State v. McDonald*, 40 Wn. App. 743, 700 P.2d 327 (1985) is misplaced. In that case, after the victim failed to identify one suspect at a lineup, the detective told the victim that the person in position number three was arrested after the crime. At trial, the

victim later identified the defendant, the person in position number three, as the perpetrator. The Court noted that the detective's statement literally told the victim who the suspect was. *Id.* at 746.

Nothing like that happened here. The prosecution team did not suggest, either directly or indirectly, that D.W. had selected the wrong individual or that she should change her identification of the perpetrator. In fact, the prosecution team emphasized that Mr. Goering was still charged with the crime and was in custody, while Mr. Kloepper had not been charged.

There is substantial evidence in support of this Finding of Fact.

b. The defendant's argument is simply that the police "overstated those (the DNA) results" when speaking with D.W.

Here, the defendant agrees that the police properly updated the victim on the status of the case, and that they shared the DNA result with her. (App. brief at 17-18). However, the defendant argues that the police "overstated" the DNA results. (*Id.* at 18). Specifically, the defendant argues "the DNA evidence was far less powerful than usual, limited to population frequencies associated with the Y chromosome." (Id. at 20). There are several problems with this argument.

First: The DNA at the crime scene does *match* the defendant's DNA. That is the proper term according to forensic scientist Lorraine Heath. (RP 619). Detective Shepherd stated, "the DNA matched Cody Kloepper, the maintenance man." (RP of EX A at 3). Detective Shepherd used the correct, scientific, terminology.

Second: the match was significant. Assume an area with a population of 250,000, which is roughly the population of the Tri-Cities area. If the DNA found at the crime scene could be expected to match 1 in 440 men, it would eliminate all but 284 men. Det. Shepherd did not overstate the significance of this match.

Third: Detective Shepherd at trial used the same phrase concerning the defendant's DNA match without objection. ("[the bloody glove tip]...came back with Cody Kloepper's DNA"). (RP 527).

Fourth: The day before the meeting with D.W., Detective Shepherd interviewed the defendant who eliminated the possibility of one of his male relatives being the source of the DNA on the glove tip. (RP 528). While it may theoretically be possible that a male relative could have a similar DNA profile as the defendant, Detective Shepherd's interview discounted this possibility.

c. *The DNA results affected D.W.'s confidence in her identification of Karl Goering, but did not affect her identification of the defendant.*

D.W. had the following exchange with the defense attorney:

> Q: Am I correct? That's (two months after March, 2010) when you were told about the DNA evidence:
> A: I was told that the DNA evidence said that Karl Goering was not the man.
> Q: They did not give you the report, the DNA report itself, did they?
> A: (Shakes head from side to side).
> Q: Did they simply tell you, Karl Goering - - we didn't find - - when the DNA came back to Karl Goering?
> A: I don't exactly remember what they said.
> Q: They basically told you the DNA said it's Cody?
> A: No, they didn't.
> Q: What did they say to you?
> A: They said that it was not a match for Karl Goering.
> Q: Okay.
> A: It could possibly be a match - - or it's a one in some sort of a chance.
> Q: For?
> A: For Cody.
> Q: For Cody?
> A: But it was not a match for Karl.

(RP 157-8).

D.W. told the police that she may have repressed her identification of the defendant because he had previously been friendly with her and she could not imagine him making such a brutal attack on her. (CP 105).

The defendant has not proved that the prosecution team even influenced her to identify him as the perpetrator, much less than proving

that the May 5, 2010, interview resulted in a substantial likelihood of irreparable identification.

C. The defendant also did not meet his burden to show that D.W.'s testimony was unreliable.

> The factors regarding reliability of a witness's identification are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation.

State v. Cook, 31 Wn. App. 165, 172, 639 P.2d 863 (1982).

D.W.'s opportunity to view the perpetrator, her attention during the attack, and the consistency of her description cannot be attacked. Indeed, D.W.'s description of the perpetrator never wavered: Tall, thin, long hair. The photo she was shown of the defendant at the hospital showed him with short hair. In the May 5, 2010, interview D.W. referred to the fact that the photo of the defendant showed him with short hair. (RP of EX A at 4). D.W. may have misidentified her attacker simply because she was shown a photo of the defendant which did not accurately show how he looked. The defendant has not proven otherwise.

2. RESPONSE TO ARGUMENT 2
"Defense counsel was ineffective for failing to act once jurors learned Kloepper had a criminal history."

A. Standard on review:

To establish ineffective assistance of counsel, the defendant must show that 1) the defense attorney's performance fell below an objective standard of reasonableness, and 2) but for the deficient performance, there is a reasonable probability that the outcome would have differed. There is a strong presumption that the defense counsel was effective. If the defense attorney's conduct can be characterized as a legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009).

B. The defendant's argument fails on both counts: The defense attorney's performance was not deficient and there is no probability that the outcome would have changed.

1. The defense attorney may have legitimately believed that asking for a limiting instruction or requesting that Det. Shepard's "I-Leads response" be stricken would draw more attention to the comment.

It is a legitimate trial tactic not to reemphasize damaging evidence by choosing not to request a curative instruction. *Yarbrough,* at 90, supra (appropriate for defense attorney not to seek limiting instruction regarding gang-related evidence), and *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 defense attorneys could have requested that the trial court tell the jurors something like this: "Remember when Detective Shepard said there was an I-Leads photograph of the defendant. Well, that testimony is stricken; please disregard that statement." However, this may have created more of a problem by drawing attention to the statement. This Court should find that the defense attorneys did not fall below any reasonable standard by choosing not to draw attention to Detective Shepard's remark.

2. There is no reasonable probability that the outcome would have changed.

First, the evidence against the defendant was overwhelming. He was convicted because he is the only person who had access to D.W.'s apartment key during the crimes, was in the vicinity of her apartment when the crimes occurred, matched the physical description of the perpetrator given by D.W. immediately after, changed his appearance soon after the crime, lied about his whereabouts leading up to the crime, and left his DNA, at a 1 in 440 probability, at the crime scene.

Second, the defendant has overstated the testimony. Detective Shepherd did not state that I-Leads consists only of police data. Detective Shepherd testified that most, but not all, data in I-Leads is from police contacts. (RP 549). He further testified that booking photos or other police contact short of a criminal conviction could be in I-Leads. The defendant's argument that counsel was ineffective for failing to act once jurors learned Kloepper had a criminal history is inaccurate. Jurors could not conclude from the above record that Kloepper necessarily had contact with the police, let alone a criminal conviction.

3. RESPONSE TO DEFENDANT'S ARGUMENT NO. 3

"The trial court erred when it refused to remove a sitting juror for cause."

A. Standard on Review:

The trial court's decision whether or not to dismiss a juror is reviewed by an abuse of discretion standard. *State v. Jorden,* 103 Wn. App. 221, 11 P.3d 806 (2000). As stated in *Jorden*:

> Here, the judge's function was similar to his function in a challenge for cause; i.e., he was a witness and a decision-maker. In deciding whether to grant or deny a challenge for cause based on bias, the trial judge has 'fact-finding discretion.' This discretion allows the judge to weigh the credibility of the prospective juror based on his or her observations. As with other factual determinations made by the trial court, we defer to the judge's discretion.

(Citations omitted). *Id.* at 229.

B. The trial court did not abuse its discretion in not dismissing Mr. Cartmell.

The question for the judge on a motion to dismiss a juror for bias is whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially. *Hough v. Stockbridge*, 152 Wn. App. 328, 216 P.3d 1077 (2009). Mr. Cartmell stated the acquaintance of his parents with D.W.'s parents would not prevent him from being fair. (RP 57). He further stated that he could be a blank slate and listen only to the evidence presented in court. (RP 57-58).

The colloquy with Mr. Cartmell by the court, the defendant, and the prosecution support this statement:

- Mr. Cartmell's mother alerted him that *she* knew the victim. (RP 55).
- Mr. Cartmell's parents were friends with the victim's parents; he was not a direct friend with the victim, her siblings, or her parents. (RP 57, 60).
- Mr. Cartmell did not recognize the victim's name. (RP 57).
- Mr. Cartmell had not seen the victim in 40 years. (RP 59).
- Mr. Cartmell would not know her on sight. (RP 59).
- As children, Mr. Cartmell did not socialize with the victim. (RP 59).
- Mr. Cartmell also did not socialize with the victim's siblings. (RP 60).
- Mr. Cartmell was five to six years older than the victim. (RP 61). He was three years older than the victim's older brother, he

remembered that individual's name, but did not remember the names of the victim's other siblings. (RP 59, 61).

- Mr. Cartmell did not see the victim or her siblings in church or at recreational activities such as golf. (RP 61).
- Mr. Cartmell thought the victim's family had moved to Seattle and was not sure if they were still in the Tri City area. (RP 58).

Mr. Cartmell's contact with the victim was minimal. As a possible balance to his knowledge of D.W., Mr. Cartmell also knew the defendant's significant other, Katie Colleran, who testified at trial, because his aunt and her mother are good friends. (RP 314 -15).

Jurors sometimes know witnesses by a first name or by face, rather than a full name, and frequently tell the court of an acquaintanceship after a witness testifies. That happened two other times in this case. Juror Number 4, Duane Dustin, also recognized EMT Lance Greenwood after he testified. (RP 205). Both times the jurors stated that the acquaintanceship would not bias them and there was no request that they be removed. Likewise, there was no basis to remove Mr. Cartmell simply because his parents knew the victim's parents forty years ago.

4. RESPONSE TO ARGUMENT NUMBER 4. "The trial court erred when it imposed consecutive sentences for assault and rape."

A. The standard on review is abuse of discretion and RCW 9.94A.589(1)(a) is construed narrowly to disallow most assertions of same criminal conduct.

RCW 9.94A.589(1)(b) provides that "serious violent offenses arising from separate and distinct criminal conduct, . . . shall be served consecutively to each other." Rape in the First Degree and Assault in the First Degree are "serious violent offenses" as defined in RCW 9.94A.030(45). There is no distinction between "separate and distinct criminal conduct" and "same criminal conduct" as used in RCW 9.94A.589(1)(a). *State v. Brown*, 100 Wn. App. 104, 115, 995 P.2d 1278 (2000). So, the issue is whether the Rape in the First Degree and Assault in the First Degree convictions were committed in the same course of criminal conduct. That turns on whether the crimes involve the same criminal intent.

Here, the trial judge found that the defendant had different criminal intents in committing the rape and assault. (RP 09/23/11, 8-9). An Appellate Court will reverse a sentencing court's determination of "same course of conduct" under RCW 9.94A.589(1)(a) only if it finds a clear abuse of discretion or misapplication of law. *State v. Price*, 103 Wn. App. 845, 855, 14 P.3d 841 (2000).

In addition, RCW 9.94A.589(1)(a) is construed narrowly to disallow most assertions of "same criminal conduct." *State v. Wilson*, 136 Wn .App 596, 613, 150 P.3d 144 (2007).

B. The trial court did not abuse its discretion in finding that the rape and assault had different criminal intents, and were therefore not committed in the same course of criminal conduct.

To determine criminal intent for purposes of calculating an offender score, the court examines two questions. First, is the intent required in the statutes different or the same for each count? Second, if the statutory intents are the same, did the defendant's intent, viewed objectively, differ from one crime to the next? The second question is determined by focusing on whether the defendant's intent changed from one crime to the next and whether the commission of one crime furthered the other. *State v. Bickle*, 153 Wn. App. 222, 222 P.3d 113 (2009).

On both questions, both statutorily and objectively, the intent was different.

1. The statutes do not require the same intent: The defendant committed Rape in the First Degree by feloniously entering the victim's apartment and engaging in sexual intercourse by forcible compulsion, while he accomplished the Assault by use of a deadly weapon and/or inflicting great bodily injury.

To decide whether two crimes involve the same criminal intent, the reviewing court must examine and compare each statute underlying each

crime to determine whether the required intents are the same. *State v. Wilson*, 136 Wn. App. 596, 612, 150 P.2d 144 (2007).

The defendant was charged with committing the crime of Rape in the First Degree in pursuant to RCW 9A.44.040(1)(a)(c) and (d). (CP 15). RCW 9A.44.040 provides:

> (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:
>
> (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or
>
> (b) Kidnaps the victim; or
>
> (c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or
>
> (d) Feloniously enters into the building or vehicle where the victim is situated.

(Emphais added).

In addition to the first two means, the jury found that the defendant committed the crime of Rape in the First Degree by feloniously entering into the building where the victim was situated and engaging in sexual intercourse with her by forcible compulsion. (CP 58). The defendant's intent to "feloniously enter a building where the victim is situated" to engage in sexual intercourse by forcible compulsion is separate and distinct from an intent to assault the victim.

The defendant committed Rape in the First Degree by entering the victim's apartment and engaging in sexual intercourse by forcible compulsion. "Forcible compulsion" means physical force which overcomes resistance or a threat that places the victim in fear of physical injury. RCW 9A.44.010(6). The defendant could have accomplished this by displaying a weapon or threatening the victim and then penetrating her. On the other hand, the Assault in the First Degree requires an intent to inflict great bodily harm and either the use of a deadly weapon or the infliction of great bodily harm. The assault statute has nothing about an intent to feloniously enter a building where the victim is situated.

2. In addition, the facts of the crimes also show the defendant had different intents in committing the assault and the rape.

The victim, D.W., described waking up at 4:00 a.m., going about her daily routine when an intruder in her apartment came running at her from behind. (RP 126). The man hit her in the head with a bar. (RP 127). She asked him why he was doing this to her, and he replied with a sarcastic comment about President Obama's election. (RP 127, 137). The man continued to hit her in the head; she tried to block the blows with her arms. (RP 128). She ran from her kitchen into the living room. (RP 128). He continued to hit her with the bar. (RP 129). She struggled with him over the bar and sliced her hand. (RP 129).

D.W. was beaten so severely that she thought she could die. (RP 130). She made the decision to tell the defendant to rape her, "just do it and get it over with. I thought maybe he would quit beating me." (RP 129-30). At this point, the defendant had not tried to have sexual contact with D.W. He had not told her he wanted to have sexual contact with her. He had not tried to remove her clothing. He had not tried to manipulate D.W. in order to have intercourse. He had simply, and repeatedly, struck her with a metal bar. In response to D.W.'s statement, the defendant told D.W. to get on her knees and he penetrated her with his hand. (RP 130).

The defendant's brief on this point makes several assumptions which are not supported.

> 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 the rape).

(App. brief at 33). The defendant may have been able to compel the sexual intercourse by displaying the metal bar and verbally threatening D.W. He never gave D.W. a chance to avoid a beating. The assault may have been done for whatever reason one person assaults another; i.e., anger, personal failings, an intent to injure another, etc. The sexual assault may have occurred as a result of D.W.'s request that he stop hitting her in the head and "just do it (rape her) and get it over with." Before then, it is

not accurate to say that D.W. resisted being raped; the defendant had made no effort to try to rape her.

State v. Brown, 100 Wn. App. 104, 995 P.2d 1278 (2000), affirmed in part, reversed in part by 147 Wn.2d 330, 58 P.2d 889, is on point. The Court found that the defendants' severe beating of the victim (one person hitting the victim in the chest, another hitting the victim in the face with a gun and burning his upper arm with a hot iron) followed by a sexual assault manifested an intent to assault and an intent to rape. Likewise, here the severity of the beating and the lack of sexual motivation during the beating shows the defendant had two different intents: to badly injure the victim and to sexually assault her.

The defendant's suggestion that *Brown* is no longer good law is inaccurate. While the Supreme Court reversed the Court of Appeals on other grounds, it did not reverse the holding that the rape and assault convictions were not in the same course of criminal conduct.

The facts in this case are in contrast to *State v. Collins*, 48 Wn. App. 95, 737 P.2d 1050 (1987), where the defendant used a ruse to gain entrance into the residence of two women, ages 72 and 84. Once inside, he grabbed both women, stated he was going to rape them and forced them into a bedroom. The Court held that the rape and assault were "intimately related and committed as part of an ordered or continuing sequence or

under any recognizable scheme or plan." *Id.* at 101. Here, during the assault, the defendant did not try to disrobe D.W., did not himself remove his clothing, did not try to maneuver her into a bedroom, did not try to have sexual contact with her, and did not make sexually related comments to her.

There were at least three acts to the crimes of rape and assault. Act One was the defendant's felonious entry into the victim's apartment. Act Two was his assault of the victim with a deadly weapon, inflicting great bodily injury. Act Three was his digital penetration of the victim after she told him to quit hitting her with the bar and to rape her. The trial judge was well within her discretion to find that the assault and rape involved different criminal intents. The defendant's felonious entry into the victim's apartment involved a different intent than the assault. Further, the facts of the assault and rape show they were committed with different intents.

The trial judge properly held, and certainly did not abuse her discretion in holding, that the assault and rape had different intents.

III. CONCLUSION

The convictions and the sentence should be affirmed.

RESPECTFULLY SUBMITTED this 12th day of February 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on February 12, 2013.

Pamela Bradshaw
Legal Assistant