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SUPREME COURT NO. 95712-6

NO. 75571-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

YUSEF YUSUF,

Petitioner.

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

The Honorable Monica Benton, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Yusef Yusuf asks this Court to grant review of the court of appeals' unpublished decision in State v. Yusuf, No. 75571-4-I, filed March 5, 2018 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

Is this Court's review warranted under RAP 13.4(b)(1), (b)(2), and (b)(4) to resolve a conflict among Washington courts as to whether the "same criminal intent" requirement for same criminal conduct means the statutory intent of the crimes, as articulated in State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016), or the defendant's objective criminal purpose, as articulated in State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987)?

C. STATEMENT OF THE CASE

In 2016, Yusuf was convicted of two counts of second degree possession of stolen property. CP 205. At sentencing, Yusuf argued two of his prior convictions constituted the same criminal conduct. These prior offenses are at issue here.

Yusuf pled guilty to third degree assault and felony harassment in 2015, originally charged as first degree robbery. RP 480; CP 260-83. The certification of probable cause alleged Yusuf and another man robbed a mobile phone repair store, Blue Cable Wireless, while armed with

handguns. CP 276-77. One of the store clerks, Fitachew Kareta, told police Yusuf pointed a gun at him and told him to put money and phones in a bag. CP 276-77. While Kareta did so, Yusuf started counting down and said, "I will shoot you." CP 277.

In his guilty plea, Yusuf stated than on December 24, 2013, in King County, he caused, with criminal negligence, bodily harm to Kareta and threatened to cause bodily harm by threatening to kill Kareta. CP 272. The original sentencing court did not find the two offenses encompassed the same criminal conduct but did impose concurrent sentences. CP 279-83.

At sentencing on Yusuf's convictions for possession of stolen property, defense counsel argued the Yusuf's prior convictions for assault and harassment of Kareta were the same criminal conduct. CP 250-52; RP 479-84. Counsel asserted Yusuf's criminal intent for both offenses "was to create fear of death in order to overcome any resistance to the taking of [Kareta's] property." CP 252. Likewise, counsel asserted:

> The pointing of the gun was not done specifically to cause the clerk harm. It was done to gain compliance to get the money, which is the exact same reason, exact same victim, for the felony harassment. The threat of, "I'll kill you," was to gain compliance to get the money.

RP 482.

The trial court refused to find the prior assault and harassment constituted the same criminal conduct, rejecting defense counsel's argument on legal grounds:

> I'm satisfied that [defense counsel] is making a novel argument, which I think only the appellate court can answer, and that is, frankly, whether these cases, which are to some degree a fiction or a breakdown of more serious offenses, really should be counted as same criminal conduct in an equitable sense, rather than the application of the current case law. And certainly the application of the current case law defeats defense's motion.

RP 486-87. The trial court accordingly scored the prior convictions as two offenses. CP 205-10, 299-300.

Yusuf raised the same criminal conduct issue on appeal, among other arguments. Br. of Appellant, 36-46. He explained the statutory intent of third degree assault is to, with criminal negligence, cause bodily harm accompanied by substantial pain. RCW 9A.36.031(1)(f). Criminal negligence means failure to be aware of a substantial risk that a wrongful act may occur. RCW 9A.08.010(1)(d). The statutory intent of felony harassment is to knowingly threaten to kill someone. RCW 9A.46.020(1)(a)(i), (2)(b)(ii). Harassment requires words or conduct that place the individual in reasonable fear the threat will be carried out. RCW 9A.46.020(1)(b). A simultaneous assault might legitimize and further a threat to kill, and could go to the reasonableness of the victim's fear. A

threat to kill might also negligently cause bodily harm. Therefore, Yusuf contended, the statutory intents of third degree assault and felony harassment are not necessarily different. Br. of Appellant, 43-44.

Yusuf argued the facts of his prior offenses demonstrated they were committed for the same criminal purpose: to further the robbery. See State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990) (turning to the facts where the statutory intents are unclear). Kareta told police Yusuf threw a bag and pointed a gun at him, and told Kareta to put money and phones in the bag. CP 276-77. As Kareta did so, Yusuf counted down and said, "I will shoot you." Kareta kept his head down, afraid he would be shot. CP 277.

Yusuf asserted these facts demonstrated the assault by pointing a gun at Kareta and the threat to kill were intimately related because they were both intended to gain Kareta's compliance and complete the robbery. A robbery is the unlawful taking of another's property through "use or threatened use of immediate force, violence, or fear of injury to that person." RCW 9A.56.190. The sole purpose of the simultaneous assault and harassment was to threaten use of force, necessary to accomplish the robbery. They were part of the same plan to rob the store of phones and money. Br. of Appellant, 43-44.

In his guilty plea, Yusuf stated he caused bodily harm to Kareta. CP 272. The certification of probable cause does not discuss any harm to

Kareta other than fear of being shot. CP 276-78. Any bodily harm he suffered as a result of that stress was merely incidental to the purpose of the assault, which was to legitimize the threat to kill in order to gain Kareta's compliance to turn over the phones and money. Ultimately, Yusuf argued, his criminal purpose in committing the assault and harassment was the same: to gain Kareta's compliance so Yusuf could complete the robbery. Br. of Appellant, 45.

A majority of the court of appeals panel rejected Yusuf's same criminal conduct argument based on this Court's recent decision in Chenoweth. Majority Opinion, 14-15. The majority concluded that, "[b]ecause the statutory intents are different, the offenses are not the same criminal conduct." Majority Opinion, 15. Judge Spearman wrote a concurring opinion, agreeing with the ultimate result, but disagreeing with the majority's failure to apply the objective criminal purpose test articulated in Dunaway. Concurrence, 1-5. Judge Spearman emphasized Washington courts have long held the statutory intents of the two crimes are not dispositive in analyzing same criminal conduct. Concurrence, 3.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S GUIDANCE IS NECESSARY TO RESOLVE CONFLICT AS TO WHAT CONSTITUTES THE "SAME CRIMINAL INTENT" FOR SAME CRIMINAL CONDUCT PURPOSES.

When a person is sentenced for two or more current offenses, "the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a). "Same criminal conduct" means crimes that involved the same intent, were committed at the same time and place, and involved the same victim. Id.

The current sentencing court must calculate an offender score based on the defendant's "other current and prior convictions." RCW 9.94A.589(1)(a). The sentencing court is bound by an earlier court's finding that multiple offenses encompass the same criminal conduct. RCW 9.94A.525(5)(a)(i). If the previous court did not make this finding, but nonetheless ordered concurrent sentences, the current court must independently evaluate whether those prior convictions involve the same criminal conduct and, if they do, must count them as one offense. Id.; RCW 9.94A.589(1)(a); State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742

(2008), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013).

There is no dispute that Yusuf's 2015 convictions for third degree assault and felony harassment involved the same victim, same place, and same time: Kareta at Blue Cable Wireless on December 24, 2013. Majority Opinion, 14 (noting the parties' agreement on this point). The issue in this case is whether those crimes involved the same criminal intent and the proper test for determining same criminal intent.

Decades ago, this Court held that, in determining whether two offenses involve the same criminal intent, "trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." Dunaway, 109 Wn.2d at 215; see also State v. Lessley, 118 Wn.2d 773, 777-78, 827 P.2d 996 (1992) (noting the Dunaway test is "entirely consistent" with the current same criminal conduct statute). This analysis includes whether the crimes were "intimately related or connected to another criminal event," whether the objective substantially changed between the crimes, whether one crime furthered the other, and whether both crimes were part of the same scheme or plan. Id. at 214-15 (quoting State v. Adcock, 36 Wn. App. 699, 706, 676 P.2d 1040 (1984)); State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Thus, for many years, intent in this context was not the mens rea

element of the particular crime, but rather the individual's objective criminal purpose. State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088 (2014); Adame, 56 Wn. App. at 811.

Over the years, Washington courts have repeatedly found same criminal conduct even where the statutory intents of the crimes differed. See, e.g., State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) (holding defense counsel was ineffective for failing to argue same criminal conduct where intent to rape and kidnap were arguably similar); State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998) (holding assault and kidnapping were the same criminal conduct because the purpose of the assault was to persuade the victim to not resist abduction); State v. Miller, 92 Wn. App. 693, 697-98, 964 P.2d 1196 (1998) (holding attempted theft of a firearm and third degree assault of a police officer were the same criminal conduct where the defendant intended to deprive the officer of his weapon and could not do so without assaulting him); State v. Anderson, 72 Wn. App. 453, 445, 864 P.2d 1001 (1994) (holding first degree escape and second degree assault were the same criminal conduct where the defendant assaulted a corrections officer to further his escape from custody).

However, in Chenoweth, this Court held first degree incest and third degree child rape were not the same criminal conduct because "[t]he

intent to have sex with someone related to you differs from the intent to have sex with a child." 185 Wn.2d at 223. In reaching this conclusion, the Chenoweth court looked to the "statutory criminal intent" of the two crimes. Id. The majority opinion did not address the objective criminal purpose test articulated in Dunaway.

Chenoweth has muddied the same criminal conduct waters and created conflict among court of appeals judges, as well as this Court's decisions. To begin with, child rape is a strict liability offense with no mens rea element. RCW 9A.44.079(1). In other words, it has no statutory criminal intent. This suggests the "same criminal intent" required for same criminal conduct must mean the defendant's criminal purpose rather than the statutory intent, because many crimes do not have statutory intents, like the child rape at issue in Chenoweth. Indeed, the Chenoweth court noted the same criminal conduct analysis is distinct from a double jeopardy analysis, where differing statutory intents would be dispositive. 185 Wn.2d at 222.

Moreover, this Court does not overrule binding precedent sub silentio. Lunsford v. Saberhagen, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009); State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). The objective criminal purpose test established in Dunaway has been the law for over 30 years. See, e.g., Graciano, 176 Wn.2d at 540 (citing Dunaway

for the proposition that courts "look to whether one crime furthered another"); In re Pers. Restraint of Connick, 144 Wn.2d 442, 459-60, 28 P.3d 729 (2001) (applying the "objective criminal intent test" from Dunaway), overruled on other grounds by In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002); Porter, 133 Wn.2d at 183 (same); State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (same). The Chenoweth majority neither discussed nor expressly overruled Dunaway.

The court of appeals' decision demonstrates the need for this Court's guidance as to the proper test for determining same criminal intent. A majority of the panel held that, "under our Supreme Court's analysis in Chenoweth, the offenses do not involve the same statutory intent . . . Because the statutory intents are different, the offenses are not the same criminal conduct." Majority Opinion, 14-15.

Judge Spearman filed a concurring opinion, agreeing with the outcome of the majority opinion, but disagreeing with majority's failure to apply the objective criminal purpose test from Dunaway. Concurrence, 1-5. Judge Spearman noted this Court "has been clear that in applying the Dunaway test, the statutory intent element is not dispositive." Concurrence, 3 (citing Connick, 144 Wn.2d at 459-60; State v. Haddock, 141 Wn.2d 103, 112-13, 3 P.3d 733 (2000)).

Judge Spearman reasoned that Chenoweth applies in the unique circumstance when "two distinct crimes" are "committed through a single act." Concurrence, 3. For instance, the Chenoweth court recognized "the legislature intended to punish rape of a child and incest as separate crimes, even when they are committed through a single act." Concurrence, 3 (citing Chenoweth, 185 Wn.2d at 224).

Judge Spearman emphasized "Chenoweth did not overrule the previous line of case law applying the Dunaway test." Concurrence, 4. Judge Spearman therefore concluded:

> Chenoweth thus applies in the circumstances of that case: where a single act constitutes a violation of two separate criminal statutes, and the legislature has indicated its intent to punish the crimes separately, the crimes are not the same criminal conduct for sentencing purposes. In all other cases, I would apply the Dunaway test in determining whether the offenses encompass the same criminal conduct.

Concurrence, 4. Judge Spearman ultimately concluded, however, that Yusuf failed to establish sufficient facts demonstrating he acted with the same criminal intent. Concurrence, 4-5.

This disagreement between judges at the court of appeals demonstrates the need for clarification from this Court as to the appropriate test for determining same criminal intent, warranting review under RAP 13.4(b)(1), (b)(2) and (b)(4).

E. CONCLUSION

For the aforementioned reasons, Yusuf respectfully asks this Court to grant review under RAP 13.4(b)(1), (b)(2) and (b)(4).

DATED this 4th day of April, 2018.

Respectfully submitted,

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Appendix

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent,	No. 75571-4-I
v.	DIVISION ONE
YUSEF ABDI YUSUF, Appellant.	UNPUBLISHED OPINION
	FILED: March 5, 2018

MANN, J. — Yusef Yusuf appeals his conviction for two counts of possessing stolen property in the second degree. He claims that (1) preaccusatorial delay violated his right to due process, (2) the trial court abused its discretion by denying his CrR 8.3(b) motion to dismiss, (3) his counsel was ineffective for failing to object to prejudicial evidence, (4) prosecutorial misconduct deprived him of his right to a fair trial, and (5) the sentencing court abused its discretion by counting his prior convictions for felony harassment and third degree assault as separate criminal conduct. Because all of Yusuf's claims fail, we affirm his judgment and sentence.

FACTS

On Christmas Eve 2013, Yusuf robbed Blue Cable Wireless, a cellphone store, at gunpoint. Almost a year later, on December 19, 2014, the State charged Yusuf with first

degree robbery. A week later, on December 26, Yusuf was arrested in Seattle on an outstanding warrant for robbery and booked in the King County Correctional Facility. When arrested, Yusuf was carrying stolen property including a pink clutch containing Clair Gilleg's identification, several debit cards, and new iPhone. The property was unrelated to the Christmas Eve 2013 robbery. On December 31, 2014, Yusuf was arraigned on the robbery charge. That same day, the Seattle Police Department referred Yusuf's possession of stolen property case to the King County Prosecuting Attorney's Office.

Yusuf was held on bail on the robbery charge in the King County Correctional Facility from December 26, 2014, to June 2015. On June 8, 2015, Yusuf pleaded guilty to the reduced charges of one count of third degree assault and two counts of felony harassment. On June 26, the trial court sentenced Yusuf to 12 months total confinement with credit for time served. Yusuf was released from incarceration on August 22, 2015, after serving 8 months.

On January 12, 2016, the State charged Yusuf with one count of possessing stolen property in the second degree for possessing one of Gilleg's debit cards on December 26, 2014. Yusuf was arrested on a warrant on January 15, 2016.

On April 21, 2016, the State moved to amend the information to charge Yusuf with a second count of possessing stolen property in the second degree for possessing Gilleg's iPhone. Count II required the State to prove that the property had a "value in excess of $750." The trial court permitted the amendment over Yusuf's objection, but also granted Yusuf an extension in order to investigate the value of the iPhone. On April 26, 2016, the trial court considered Yusuf's motion to dismiss pursuant to CrR

8.3(b), based on the late amendment of the charges. After noting that there were three weeks remaining with the speedy trial period, the trial court denied the motion.

On May 26, the jury found Yusuf guilty of two counts of possessing stolen property in the second degree. Yusuf was given a standard range sentence of 12 months for each count to run concurrently. The court gave Yusuf credit for time served between his arrest on January 15, 2016 and his conviction. Yusuf appeals.

ANALYSIS

Preaccusatorial Delay

Yusuf claims first that preaccusatorial delay violated his right to due process. He asserts that the State's delay in charging him with possessing stolen property prejudiced him because he lost credit for time served on his earlier robbery conviction. Because Yusuf fails to demonstrate that the State's delay violates fundamental conceptions of justice, we disagree.

We review whether preaccusatorial delay violated a defendant's right to due process de novo. We take the entire record into account when determining prejudice. State v. Oppelt, 172 Wn.2d 285, 290, 257 P.3d 653 (2011).

Preaccusatorial delay may result in a due process violation. United States v. Lovasco, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). "But the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" Lovasco, 431 U.S. at 790 (quoting Rochin v. California, 342 U.S.

165, 170 72 S. Ct. 205, 96 L. Ed. 183 (1952)). Our role is to determine whether the action Yusuf complains of, compelling him to stand trial for possession of stolen property after he pleaded guilty to robbery charges for an unrelated crime a year earlier, violates those "'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" Oppelt, 172 Wn.2d at 292 (internal quotation marks omitted) (quoting State v. Calderon, 102 Wn.2d 348, 353, 684 P.2d 1293 (1984)).

Our Supreme Court has established a three-prong test to determine whether delay violated due process: "(1) the defendant must show actual prejudice from the delay; (2) if the defendant shows prejudice, the court must determine the reasons for the delay; (3) the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution." Oppelt, 172 Wn.2d at 295.

Yusuf argues that he was prejudiced because he lost credit for the time he served in jail on the robbery charges—had the State charged him with possessing stolen property at the time he was charged with robbery, he would have been entitled to credit for time served on that charge and the robbery charge.

"[A] person unable to obtain pretrial release may not be confined for a longer period of time than a person able to obtain pretrial release without violating due process and equal protection." State v. Lewis, 184 Wn.2d 201, 205, 355 P.3d 1148 (2015). RCW 9.94A.505(6) implements this constitutional right: "[t]he sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced." RCW 9.94A.505(6).

But here, we do not need to decide if Yusuf was prejudiced because even if Yusuf can establish that he was prejudiced by the State's delay, he cannot demonstrate that the delay was negligent, unreasonable, or unwarranted, and that the delay "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and justice." Lovasco, 431 U.S. at 790 (internal quotations omitted). The charge for possession of stolen property was "purposefully not rush filed so that it could be transferred to the negotiating deputy who had the defendant's pending [robbery] cases. That deputy refrained from filing the case in the hopes that it could be used to leverage a global resolution that would encompass [Yusuf's] two pending cases." The State's reasons for delay do not violate the fundamental conceptions of justice. It does not matter that the State ultimately did not reach a resolution on the possession of stolen property charges. Yusuf cannot demonstrate that the State's choice to use an unfiled and unrelated bargaining chip in negotiating a pending case was an improper exercise of prosecutorial discretion. Nor does Yusuf argue that there is a constitutional right to compel the State to file all charges referred while other cases are pending. Yusuf's claim for preaccusatorial delay fails.

Criminal Rule 8.3

Yusuf claims next that the court abused its discretion by denying his motion to dismiss the charges against him under CrR 8.3. We disagree. Because the State's late amendment occurred within the speedy trial time, we conclude that Yusuf was not prejudiced by the State's late amendment.

We review a trial court's denial of a motion to dismiss under CrR 8.3 for abuse of discretion. Oppelt, 172 Wn.2d at 297.

The State charged Yusuf with one count of possessing stolen property in the second degree on January 12, 2016. On April 21, the State moved to amend its information to add a second count of possessing stolen property in the second degree, including an iPhone, valued over $750. The court granted the motion to amend and a continuance so that Yusuf could investigate the value of the iPhone. On April 26, Yusuf moved to dismiss the case, or alternatively just count II, under CrR 8.3(b). The trial court denied Yusuf's motion on the grounds that he was not prejudiced by the late amendment because it believed that he still had time to investigate the added element of the iPhone's cost and put on a defense: "Inasmuch as there are three weeks remaining within the speedy trial [time], I am satisfied that there is no prejudice, actual prejudice, in this case."

CrR 8.3(b) provides that a court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." First, the defendant must show arbitrary government action or misconduct, which may include simple mismanagement. Second, the defendant must show actual prejudice affecting his right to a fair trial. Oppelt, 172 Wn.2d at 297.

Yusuf argues that the State's late amendment of the information prejudiced him because he was forced to remain incarcerated for another month while his defense counsel investigated the charge. He claims that the State knew the value of the iPhone

long before it decided to add count II. The State responds that Yusuf fails to show how his right to a fair trial was prejudiced by the late amendment.

Here, Yusuf's right to a fair trial was not prejudiced because the court granted Yusuf a three-week continuance so that his lawyer could investigate the added element of the cost of the iPhone. Because this occurred well within the speedy trial time, the trial court did not abuse its discretion.

Ineffective Assistance of Counsel

Yusuf claims next that his trial counsel was ineffective for failing to object to prejudicial testimony and failing to move for a mistrial. We disagree. Because Yusuf cannot show that the result likely would have been different had his trial counsel moved for a mistrial or objected, he cannot establish that his trial counsel was ineffective.

Before trial, Yusuf and the State stipulated that Yusuf's arrest was lawful: "The parties agree by stipulation that Seattle police officers properly initiated contact with the defendant on December 26, 2014 and that he was lawfully detained, searched, and arrested." The court read this stipulation to the jury.

At trial, Officer Jay McNeil testified as to how he contacted Yusuf on December 26, 2014:

> [State]: And can you just sort of describe the circumstances of that contact, beginning with when you first saw [Yusuf]?
>
> [Officer McNeil]: I was driving with my partner in our patrol vehicle down 11th Avenue. And we were looking for the suspect and we—as I passed Pike Street, going southbound, I saw him wearing the clothes. And I recognized him from previous contacts and I saw him on the west side, walking down the middle of the street.[1]

[1] Report of Proceedings (May 23, 2016) at 257-58 (emphasis added).

As McNeil and his partner stopped, Yusuf ran down a dark, narrow walkway between two buildings on Pike Street. McNeil and his partner, now on foot, followed and arrested Yusuf:

> [State]: All right. What did you do?
>
> [Officer McNeil]: We immediately contacted him. We already had reason for arrest.[2]

As Yusuf was being handcuffed, a pink clutch dropped to the ground. Yusuf immediately kicked the clutch away from him, and it fell down into a nearby construction ditch. After recovering the clutch, the officers took Yusuf to their patrol car so that they could search him. As he was being searched, Yusuf claimed that the clutch belonged to his wife: "'That's my wife's stuff. Take care of my'—expletive word." The officers described Yusuf as "intoxicated and belligerent":

> [State]: How was the defendant acting?
>
> [Officer McNeil]: He's—as he usually does when we contact him. He's very angry with police. Makes threats, very belligerent.
>
> [State]: Okay.
>
> [Officer McNeil]: Demanding.[3]

Yusuf did not object to this testimony (objecting only to the question regarding what Yusuf's intent may have been).

Yusuf claims that his counsel was ineffective for failing to object to three statements: (1) that McNeil "recognized [Yusuf] from previous contacts," (2) that he "already had reason [to] arrest" Yusuf, and (3) that Yusuf acted "as he usually does

[2] RP (May 23, 2016) at 259 (emphasis added).
[3] RP (May 23, 2016) at 263-64 (emphasis added).

when [the officers] contact him. He's very angry with police. Makes threats, very belligerent." He also claims that his trial counsel was ineffective for failing to move for a mistrial.

Where the defendant claims ineffective assistance based on counsel's failure to object to the admission of evidence, the defendant must show (1) the absence of a legitimate strategic or tactical reason to object, (2) an objection would likely have been sustained, and (3) the result would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Courts assess a prior conviction's prejudicial effect "against the backdrop of the evidence in the record." Saunders, 91 Wn. App. at 580.

"The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). To determine an irregularity's effect, courts examine "(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." Hopson, 113 Wn.2d at 284.

Here, Yusuf fails to establish ineffective assistance of counsel. Although he can establish that his counsel's performance fell below an objective standard of reasonableness, he cannot show that the result would have been different had the evidence not been admitted. McNeil's statement that "we already had reason for arrest" was well within the scope of the stipulation that the officers "properly initiated contact with" Yusuf. But the statements that McNeil "recognized him from previous contacts"

and about how Yusuf "usually" acts when he is contacted by police were outside the stipulation's scope; there was no tactical reason to not object to these statements. They are irrelevant and prejudicial because they imply that Yusuf had multiple "previous contacts" with the police such that an officer knows how Yusuf "usually" acts while being arrested. This implies that Yusuf has a propensity for crime. Assuming an objection had been made, it would likely have been sustained. See ER 404(b) ("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.").

Yusuf, however, cannot show that the result of his trial would have been different. There was overwhelming evidence that Yusuf possessed stolen property.[4] Yusuf's argument that the court would have granted a mistrial is also unavailing. Here, the irregularity was not that serious. McNeil mentioned previous contacts with Yusuf and that Yusuf acted as he "usually" did while being arrested, but the State and Yusuf stipulated that police officers "properly initiated contact with" Yusuf and that he "was lawfully detained, searched, and arrested." Contrary to Yusuf's argument, the testimony was not similar to cases where prior convictions are admitted into evidence without an objection. See State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (finding that defense counsel's failure to object to admission of evidence of defendant's prior

[4] See, e.g., RP (May 23, 2016) at 267-68 (McNeil testifying that State's Exhibit 1 showed a picture of a clutch and an iPhone taken from Yusuf when he was arrested); RP (May 23, 2016) at 295 (arresting officer testifying that State's Exhibit 1 showed a picture of what she recovered from Yusuf and the items that she returned to Gilleg); RP (May 23, 2016) at 278 (Gilleg testifying that State's Exhibit 1 showed a picture of her clutch, iPhone, and debit card that went missing on December 26, 2014 while she was at a bar called Poquitos); RP (May 23, 2016) at 293 (Officer Shepard testifying that Yusuf was arrested about a block from Poquitos); RP (May 23, 2016) at 284 (testifying that an iPhone was purchased for $949.98 for Gilleg a few days before it went missing).

convictions was not tactical); State v. Escalona, 49 Wn. App. 251, 253, 256, 742 P.2d 190 (1987) (holding that the trial court abused its discretion by failing to grant a mistrial when witness testified that defendant "already has a record and had stabbed someone").

Yusuf counters that because the testimony in this case was short, the result would have been different had his counsel objected to McNeil's statements. This argument fails, however, to account for the strength of the evidence presented at trial. The evidence strongly supported the fact that Yusuf possessed stolen property. The result would not have been different had Yusuf's attorney objected. Yusuf cannot establish a claim for ineffective assistance of counsel.

Prosecutorial Misconduct

Yusuf next contends that the prosecutor committed misconduct in rebuttal that deprived him of a fair trial. Because the prosecutor did not commit misconduct, we reject this claim.

In closing, defense counsel argued at length about the fair market value of the iPhone. Counsel reminded the jury that he had told them in his opening statement that they "would get to see Amazon records, and [] apologize[d] to [them] that [they] don't get to see those." Counsel also argued that the jury should want to see evidence from Amazon and eBay, evidence that was not admitted, regarding the value of the iPhone.

In rebuttal, the prosecutor told the jury that it could only focus on the admitted evidence:

> [State]: Counsel has done a very good job at implying that there was some evidence that was not—that is not before you that you should be

> considering. That is not the law. You are only to consider the evidence that has been submitted and has been admitted.
>
> [Yusuf]: Objection. Misstates the reasonable doubt instruction.
>
> [State]: Counsel has implied that defendant—
>
> [The Court]: Let me rule on it before you go forward.
>
> [Yusuf]: That misstates the reasonable doubt instruction, Your Honor.
>
> [The Court]: Overruled.
>
> [State]: Counsel has implied that the defendant's—that there—you know, he's telling you about these records he promised and how they're not here and he's really sorry that you guys didn't get to see those. And he's implying that Mr. Yusuf did not get a fair shake here.[5]

To establish a claim for prosecutorial misconduct, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Arguments that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt are misconduct. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014).

Jury instruction 1, which was based on the Washington Pattern Instructions Criminal (WPIC) 1.02,[6] explains that "[t]he evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that [the court has] admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict." Jury instruction 3A, which was based on WPIC 4.01, the reasonable doubt

[5] RP (May 26, 2016) at 462-63.

[6] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02 (4th ed. 2016).

instruction, provides, in part, that "[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence."

Yusuf argues that prosecutorial misconduct deprived him of a fair trial when the prosecutor told the jury that it was "only to consider the evidence that has been submitted and has been admitted."

Here, the prosecutor's remark was proper. Contrary to Yusuf's claim, it did not misstate or alter the State's burden to prove Yusuf guilty beyond a reasonable doubt. Arguing that the jury is "only to consider the evidence that has been submitted and has been admitted" is proper. It is a correct statement of the law and was consistent with jury instructions 1 and 3A.

Sentencing

Yusuf claims finally that the trial court abused its discretion by not counting his prior convictions for assault and harassment as the same criminal conduct for purposes of sentencing. Because the trial court followed the law, there was no abuse of discretion.

For the 2013 armed robbery of Blue Cable Wireless, Yusuf pleaded guilty to assault in the third degree (count I) and felony harassment of Fitachew Kareta (count II). Kareta, a clerk who was working when Yusuf robbed the store, told police that Yusuf threw a bag at him, demanded that he put money and cell phones in it, started counting down, and said "I will shoot you." Yusuf admitted that he "caused with criminal negligence bodily harm accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering to Fitachew Kareta" and that he "threatened to cause bodily injury by threatening to kill Fitachew Kareta and [another store clerk]."

The sentencing court in this case found that these convictions were not the same criminal conduct.

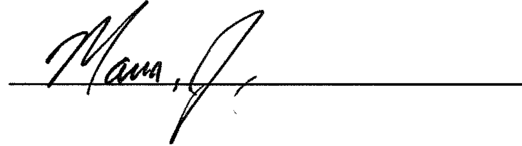
"Whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless they involve the "same criminal conduct." RCW 9.94A.589(1)(a). The sentencing court must determine whether prior felony convictions that resulted in concurrent sentences are the same criminal conduct using the "same criminal conduct analysis" set out in RCW 9.94A.525(5)(a)(i). RCW 9.94A.589(1)(a). Crimes constitute the same criminal conduct when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Unless these elements are met, the crimes are not the same criminal conduct. State v. Chenoweth, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). A sentencing court's determination of same criminal conduct will not be disturbed on appeal unless the court abused its discretion or misapplied the law. Chenoweth, 185 Wn.2d at 220-21.

Yusuf and the State agree that Yusuf committed the two offenses, felony harassment and assault in the third degree, at the same time and place and against the same victim. Whether the offenses constitute the same criminal conduct, then, turns on whether they "require the same criminal intent." RCW 9.94A.589(1)(a). To determine whether the offenses have the same intent, courts look to the offenses' statutory intent. Chenoweth, 185 Wn.2d at 223.

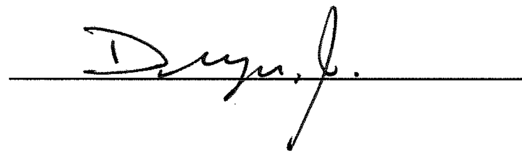
Here, under our Supreme Court's analysis in Chenoweth, the offenses do not involve the same statutory intent. Chenoweth, 185 Wn.2d at 223 (focusing on statutory

criminal elements to determine whether two crimes constitute the same criminal conduct). Third degree assault requires an intent to, with criminal negligence, cause bodily harm accompanied by substantial pain. RCW 9A.36.031(1)(f). Criminal negligence means the failure to be "aware of a substantial risk that a wrongful act may occur." RCW 9A.08.010(1)(d). Felony harassment requires the intent to knowingly threaten to kill someone. RCW 9A.46.020(1)(a)(i), (2)(b)(ii). Because the statutory intents are different, the offenses are not the same criminal conduct. The trial court did not abuse its discretion or misapply the law.

Affirmed.



WE CONCUR:



State v. Yusef Yusuf, No. 75571-4-I

Spearman, J. (concurring) I agree that Yusuf's judgment and sentence should be affirmed. I write separately because, in determining whether Yusuf's convictions constitute the same criminal conduct for sentencing purposes, I would apply the test set out in State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987).

For sentencing purposes, two or more criminal offenses count as one crime if the offenses encompass the "same criminal conduct." RCW 9.94A.589(1)(a). To conclude that multiple offenses encompass the same criminal conduct, the court must find that the offenses were committed at the same time and place, involved the same victim, and shared the same criminal intent. Id. The defendant has the burden to convince the court that this is so. State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). We review the trial court's decision for abuse of discretion. Id. at 536.

The elements of same criminal conduct were first set out in Dunaway, 109 Wn.2d 207. See State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990) (stating that the Dunaway test was codified as former RCW 9.94A.400(1)(a) (1987) (recodified as RCW 9.94A.589 by Laws of 2001, ch. 10, § 6)); State v. Lessley, 118 Wn.2d 773, 777-78, 827 P.2d 996 (1992) (Dunaway test "entirely consistent" with the statute as amended). As to the intent element, Dunaway instructs the sentencing court to "focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next ... part of this analysis will often include the related issues of whether one crime furthered the other . . . ." Dunaway, 109 Wn.2d at 215.

This test has been applied consistently to same criminal conduct claims involving (1) multiple counts of the same offense; (2) similar offenses; and (3) distinct offenses

committed in a series. See State v. Haddock, 141 Wn.2d 103, 113, 3 P.3d 733 (2000) (where the defendant was convicted of possession of stolen property and possession of stolen firearms and defendant obtained possession of all of the stolen items in a single burglary the defendant's criminal intent to possess stolen property "objectively viewed, did not change from one crime to the next."); State v. Tili, 139 Wn.2d 107, 124, 985 P.2d 365 (1999) (three counts of rape shared the same criminal intent when the acts were committed in a continuous series within an extremely short period of time and defendant's "criminal intent, objectively viewed, did not change from one penetration to the next."); State v. Garza-Villarreal, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993) (possession with intent to deliver more than one controlled substance, without more, does not evidence separate criminal intents because "[t]he possession of each drug furthered the overall criminal objective of delivering controlled substances in the future"); Lessley, 118 Wn.2d 773 (rejecting the argument that the defendant's convictions for burglary and kidnapping were the same criminal conduct because the objective intent of the burglary was completed when the defendant broke into the home armed with a deadly weapon and assaulted the residents; a separate criminal intent was evidenced when the defendant moved from the burglary to kidnapping); State v. Burns, 114 Wn.2d 314, 318-20, 788 P.2d 531 (1990) (separate criminal intents exist where defendant possessed cocaine, delivered a portion of it, and retained a portion with intent to deliver it in the future; the criminal objective of each crime was realized independently of the other); Lewis, 115 Wn.2d at 302-03 (four counts of delivery of a controlled substance occurring on different dates did not share the same criminal intent because the

defendant "formed a separate objective intent to execute each act" and the crimes were not part of a recognizable common scheme or plan).

In addition, our Supreme Court has been clear that in applying the Dunaway test, the statutory intent element is not dispositive. In re Connick, 144 Wn.2d 442, 459-60, 28 P.3d 729 (2001); Haddock, 141 Wn.2d at 112-13. "[C]ounts with identical mental elements, if committed for different purposes, would not be considered the 'same criminal conduct.'" Id. at 113. And conversely, as the Connick court noted, two crimes that do not by statute require the same criminal intent may nonetheless share the same objective criminal intent under specific facts. Connick at 459-60. Accordingly, whether considering multiple counts of the same offense, related offenses, or distinct offenses committed in a series, the reviewing court considered the facts of the crimes to determine whether a defendant's "criminal intent, as objectively viewed, changed from one crime to the next." Dunaway, 109 Wn.2d at 215.

The issue in Chenoweth was whether rape of a child in the third degree and incest in the first degree encompassed the same criminal conduct. State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016). Unlike the offenses analyzed in previous cases, these crimes are unique because they are based on a single act: sexual intercourse with a child. As the Chenoweth court noted, legislative history supports the conclusion that the legislature intended to punish rape of a child and incest as separate crimes, even when they are committed through a single act. Id. at 224 (citing State v. Calle, 125 Wn.2d 769, 780, 888 P.2d 155 (1995)). Because these two distinct crimes were committed through a single act, the Dunaway test was not useful: the single act necessarily occurred at one time and place, with the same victim, and with the same

objective intent, to have intercourse with the victim. Thus, to determine whether the offenses should be treated as one crime or two for sentencing purposes, the Chenoweth court looked to the statutory intent element. Id. at 223-24. The court held that, because the offenses had different statutory intents, they were not the same criminal conduct for sentencing purposes. Id.

Notably, however, Chenoweth did not overrule the previous line of case law applying the Dunaway test. Chenoweth thus applies in the circumstances of that case: where a single act constitutes a violation of two separate criminal statutes, and the legislature has indicated its intent to punish the crimes separately, the crimes are not the same criminal conduct for sentencing purposes. In all other cases, I would apply the Dunaway test in determining whether the offenses encompass the same criminal conduct.

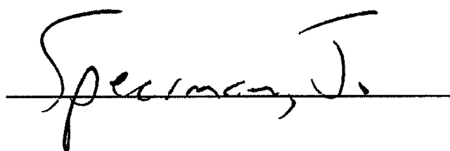
The question in this case is whether Yusuf's convictions for third degree assault and felony harassment shared the same criminal intent. Relying on Chenoweth, the majority looks to the statutory intent element of the two statutes. I would apply Dunaway and consider whether Yusuf met his burden of showing that his offenses shared the same objective criminal intent.

The record contains few facts. Yusuf entered a guilty plea in which he stated that he caused with "criminal negligence bodily harm accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering to Fitachew Kareta." Clerk's Papers at 272. The plea also states that Yusuf "threatened to cause bodily injury by threatening to kill" Kareta and another victim. Id.

Yusuf argued below that his convictions for assault and harassment were both committed with the intent to commit a robbery. But he failed to point out any evidence to support the assertion. Yusuf stated "We don't know exactly what it is that caused the bodily harm or exactly what the assault was." Verbatim Report of Proceedings at 482. Yusuf asked the court to infer from the statement of probable cause that both the assault and the harassment convictions were based on pointing a gun at Kareta. Id.

Yusuf fails to establish any facts relating to the circumstances of his convictions. While a person charged with assault and harassment may have committed both crimes with one criminal intent, Yusuf relied on no facts in the record to demonstrate that this was the case here. See Connick, 144 Wn.2d at 459-60 (holding that, where a defendant fails to establish the facts underlying his convictions, he cannot establish that the offenses encompass the same criminal conduct).

Because Yusuf did not show that his offenses shared the same criminal intent, the trial court did not abuse its discretion in declining to count Yusuf's offenses as the same criminal conduct. Accordingly, although I disagree with the majority's failure to apply Dunaway, I concur in the result.



NIELSEN, BROMAN & KOCH P.L.L.C.

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