SUPREME COURT NO. 97407-1

NO. 51349-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

HAROLD STATEN,

Petitioner.

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

The Honorable Gregory Gonzales, Judge

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# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Harold Staten, the appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Staten, ___ Wn. App. ___, ___ P.3d ___, 2019 WL 2437950 (No. 51349-8-II, filed June 11, 2019).[1]

B. ISSUE PRESENTED FOR REVIEW

The conduct leading to Staten's convictions for second degree kidnapping with sexual motivation and indecent liberties, involved the same time, same place, same complaining witness, and same intent. Yet, at sentencing, these crimes were treated as separate offenses when calculating Staten's offender score and standard range sentences because defense counsel failed to argue the crimes constituted the same criminal conduct. Should review be granted under RAP 13.4(b)(2) and (b)(3) where the Court of Appeals noted that Staten presented a "reasonable argument[]" that his crimes constituted same criminal conduct, yet nonetheless inconsistently concluded that he could not show ineffective assistance of counsel because he could not establish a reasonable probability that the trial court would have concluded the two crimes involved the same criminal intent if defense counsel had raised the issue?

[1] A copy of the opinion is attached as an appendix.

C. STATEMENT OF THE CASE

1. Trial Testimony.

Staten and E.B. were the parents of a child who was born critically ill in June 2016. RP[2] 84, 88-89, 184. Sadly, their son died just three months later. RP 90, 184. The day after their son passed away, E.B. called Staten and asked him to come down and visit her in Vancouver, Washington. RP 90-91, 184-85.

Staten drove down to Vancouver and spoke with E.B. Staten talked with, consoled, and occasionally cried with E.B. as they mourned the loss of their son. Staten's tone and demeanor during their conversation was normal. RP 95-96, 184-85. During their conversation, E.B.'s mother, Cynthia, came out of the house she shared with E.B. and told Staten to leave. RP 97-98, 185-86, 221, 234. The conversation between Staten and E.B. ended when E.B. followed Cynthia inside the house. RP 97-98.

Staten text messaged E.B. later that same evening and asked her to get something to eat with him. E.B. refused but offered to meet Staten the following day. RP 98, 186.

When E.B. went outside to smoke a cigarette several hours later that night she saw Staten parking his car. RP 98-99, 186. E.B. could smell alcohol on Staten when he approached her. RP 99-100. E.B. spoke

[2] This petition refers to the consecutively paginated verbatim reports of proceedings as follows: July 10, 11, 12, 2017 and December 12, 2017.

with Staten who remarked, "let's make another baby." RP 101, 185. E.B. refused and started to head inside the house. RP 101-02. Staten grabbed E.B. by the arm, pushed her against the car, and said "let's go for a drive." RP 103. E.B. told Staten no and tried to pull away. RP 103.

Staten pushed E.B. into the car seat and closed the car door. RP 103-05, 189-90. Staten closed the car door again when E.B. tried to open it. RP 104-05, 190. Staten told E.B. he was going to drive the car to a place where Cynthia could not see it. RP 105.

E.B. tried to open the car door as Staten was driving. E.B. pulled the car over and said he would take E.B. home. RP 106-07, 191. Instead of then driving E.B. home however, Staten then said he was taking her to a motel where they used to have sexual intercourse. RP 84, 107-08, 191.

Instead of stopping at the motel however, Staten drove the car to a park. RP 113-15. After parking the car, Staten retrieved a pair of shoes from the trunk and told E.B. to put them on so they could take a walk. RP 115-16, 192. No one else was in the park at the time. RP 116. E.B. told Staten no and instead walked to a corner of the park and called a friend she had previously text messaged to ask for help. RP 110-13, 117-18, 191-94, 208.

Staten approached E.B. and they began walking back toward the car. RP 118. Staten made a remark about having another baby and then

began kissing E.B. RP 118-120, 209. Staten put his hand down E.B.'s pants and penetrated her vagina with his fingers. RP 119-20, 124, 210-11. E.B. tried to push Staten away and told him to stop. RP 121. Staten asked E.B. to go into the park with him and make a baby. RP 119-21, 124-25. Staten did not show E.B. a weapon or threaten to harm her. RP 217.

About this time Cynthia called E.B. E.B. did not answer the call knowing that Cynthia would recognize something was wrong. E.B. answered a second telephone call from Cynthia however and told her mother where she was. RP 121, 125-26, 194-96, 213, 223-25. Cynthia could hear Staten hollering in the background. RP 236-39. E.B. told Cynthia that Staten had taken her and asked her mother to come and get her. RP 224-26, 237. Cynthia told E.B. she would call 911 and then headed toward the park. RP 195-96, 227.

When Cynthia arrived at the park, Staten got into his car and pulled up alongside her. RP 12-29, 196, 228. Cynthia threatened to call the police if Staten did not stay away from E.B. RP 129, 196, 228, 239. E.B. did not tell Cynthia what had happened. RP 130, 197, 230.

Cynthia called 911 when they arrived back at the house. RP 130-31, 139-43, 232-33. E.B. did not tell police that Staten had put his hands down her pants or penetrated her vagina. RP 198-200, 241. E.B. acknowledged that she did not feel great about calling 911 because she

believed what had happened with Staten was just his way of processing their son's death. RP 148.

E.B. told police where she thought Staten might have headed from the park. RP 233. When police arrived at the address provided by E.B. they saw a car parked out front with its brake lights on. RP 242-43. Staten was sleeping in the driver's seat of the car. RP 244-45. After being woken up, Staten denied forcing E.B. to have sexual contact with him. RP 245-49. As Staten explained, he drove down from Tacoma to provide moral support to E.B. RP 247-48. Staten denied forcing E.B. into the car, preventing her from leaving, or making her do anything she did not want to do. RP 245-49.

E.B. text messaged Staten the following day and asked him whether they were still going to meet up to get something to eat. RP 200-01. E.B. also sent Staten a couple pictures of their deceased son. RP 146, 201. Staten did not respond, but E.B. received a response from his brother that indicated Staten was in jail. RP 148, 201. E.B. text messaged Staten and told him to get in touch with her when he got his phone back. RP 201-04. Several weeks later, E.B. text messaged Staten and told him, "I need you right now." RP 204.

Based on this evidence, the State charged Staten with one count each of first degree kidnapping, second degree kidnapping, second degree

rape, and indecent liberties with forcible compulsion. The State further alleged that the kidnappings were committed with sexual motivation and that each of the charged offenses was committed against a family or household member. CP 8-11; RP 29-30.

A jury found Staten not guilty of first degree kidnapping and not guilty of second degree rape. CP 91-92; RP 344-45. Staten was convicted of second degree kidnapping and indecent liberties by forcible compulsion. CP 90, 93; RP 344-45. The jury also returned special verdicts finding that the kidnapping was committed with sexual motivation and that Staten and E.B. were members of the same family or household. CP 94-95; RP 345.

Based on an offender score of 10, Staten was sentenced to concurrent prison sentences of 114 months on the second degree kidnapping conviction and 149 months on the indecent liberties conviction. CP 124-44; RP 393-96. The trial court also imposed a consecutive 18 month sexual motivation enhancement for a total prison sentence of 167 months. CP 124-44; RP 402-03.

2. Court of Appeals Opinion.

Staten appealed, arguing in part that he received ineffective assistance of counsel because his trial attorney failed to argue that the second degree kidnapping with sexual motivation and indecent liberties

constituted the same criminal conduct for sentencing purposes. Brief of Appellant (BOA) at 8-19.

The Court of Appeals noted "there are reasonable arguments on both sides of the same criminal conduct issue." Appendix at 7. The Court nonetheless rejected Staten's argument, concluding that he could not meet his burden of showing a reasonable probability that the trial court would have found the two crimes involved the same criminal intent had defense counsel raised the issue at sentencing. Appendix at 7-8. The Court of Appeals failed to reach the issue of whether the crimes occurred at the same time and place. Appendix at 8, n. 2.

Staten now asks this Court to accept review and reverse the Court of Appeals.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

REVIEW OF WHETHER STATEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IS APPROPRIATE UNDER RAP 13.4(b)(2) and (b)(3).

The state and federal constitutions guarantee criminal defendants reasonably effective representation by counsel at all critical stages of a case. U.S. Const. amend. 6; Wash. Const. art. 1 § 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Sentencing is a

critical stage of a criminal case. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997).

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must show that: 1) counsel's performance was deficient "and not a matter of trial strategy or tactics;" and 2) the deficient performance prejudiced the defendant's case. State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003) (citing State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) and Strickland, 466 U.S. at 687-89). A tactical decision will be found deficient if it is not reasonable. Hendrickson, 29 Wn.2d at 77-78; Roe v. Flores-Ortega, 528 U.S. 470, 481, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000).

a. Kidnapping with Sexual Motivation and Indecent Liberties Constitute the Same Criminal Conduct and Counsel's Failure to Argue this Point at Sentencing was Deficient.

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). Offenses that encompass "the same criminal conduct" are counted as one crime for sentencing purposes. RCW 9.94A.589(1)(a). "Same criminal conduct" means crimes that

involved the same victim, were committed at the same time and place, and involved the same criminal intent. Id.

In making this determination, "trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). 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, "'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 committing the crime.'" State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (quoting State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)), rev. denied, 182 Wn.2d 1022, 347 P.3d 458 (2015). But see State v. Chenoweth, 185 Wn.2d 218, 223, 370 P.3d 6 (2016) (comparing statutory intents to preclude same criminal conduct finding).

Counsel provides ineffective assistance of counsel when he or she fails to argue two or more offenses constitute the same criminal conduct

where the argument is factually and legally supported. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

The Court of Appeals properly recognized the offenses involved the same victim: E.B. Appendix at 5. And while the Court of Appeals acknowledged the issue before it necessarily required it to resolve whether the two offenses involved the same criminal intent and occurred at the same time and place, it inexplicably failed to address these issues. Appendix at 5, 8, n.2. Instead, the Court of Appeals noted "there are reasonable arguments on both sides of the same criminal conduct issue." Appendix at 7. The Court nonetheless concluded that Staten could not meet his burden of showing a reasonable probability that the trial court would have found the two crimes involved the same criminal intent had defense counsel raised the issue at sentencing. Appendix at 7-8.

Contrary to the Court's conclusion, had defense counsel argued that the kidnapping with sexual motivation and indecent liberties constituted the same criminal conduct the trial court would have been compelled to find, as demonstrated below, that the offenses constituted the same criminal conduct for sentencing purposes.

The jury convicted Staten of the indecent liberties against E.B. for the alleged touching that occurred while he was secreting E.B. The crimes therefore occurred at the same time and place: at the park between

September 26 and 27, 2016. The kidnapping only ended, and E.B. only regained her liberty, when Cynthia arrived at the park, E.B. got insider her car, and Staten drove away. The kidnapping did not end at the point E.B. walked to a corner of the park and called a friend to ask for help. RP 110-13, 117-18, 191-94, 208. Shortly thereafter, while still in the park, Staten approached E.B. and walked her back toward the car. RP 118. Staten made a remark about having another baby and then began kissing E.B. RP 118-120, 209. Staten put his hand down E.B.'s pants and penetrated her vagina with his fingers. RP 119-20, 124, 210-11. E.B. tried to push Staten away and told him to stop. RP 121. Staten asked E.B. to go into the park with him and make a baby. RP 119-21, 124-25. It was around this time that E.B. answered a telephone call from her mother, Cynthia, and told her that Staten had taken her and asked her mother to come and get her. RP 224-26, 237. What E.B.'s statements to her mother, as well as, the trial evidence demonstrates, is that the kidnapping continued for the entirety of the time Staten and E.B. were alone together in the park.

The offenses also necessarily involved the same criminal 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). Stated differently, "if one crime furthered another, and if the time and place of the crimes remained the same, then

the defendant's criminal purpose or intent did not change, and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). See, e.g., State v. Anderson, 72 Wn. App. 453, 464, 864 P.2d 1001, rev. denied, 124 Wn.2d 1013 (1994) (same criminal conduct where defendant assaulted officer in order to escape custody); State v. Longuskie, 59 Wn. App. 838, 847, 801 P.2d 1004 (1990) (same criminal conduct where defendant kidnapped victim in order to molest her).

Here, the kidnapping and indecent liberties offenses involved a "continuing, uninterrupted sequence of conduct." State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997); see also State v. Mandanas, 168 Wn.2d 84, 86-87, 228 P.3d 13 (2010) (second degree assault and felony harassment were same criminal conduct were defendant punched victim in the face, hit him in the head with a gun, and then pointed the gun at him and threatened to kill him). The offenses were based on the same set of circumstances between Staten and E.B. Staten's intent did not change from when he arrived at E.B.'s residence, to when he put her in his car, to when he drove her to the park. Indeed, as E.B. explained, from the moment Staten arrived at her house the second time, Staten's goal was to "make another baby." RP 101, 119-21, 124-25, 185. The indecent liberties occurred in the midst of the kidnapping. The kidnapping occurred for the purpose of effectuating

sexual contact. Put differently, Staten's overarching criminal objective was sexual contact with E.B.

Consistent with this theory, the State argued to the jury that Staten's intent in kidnapping E.B. was to facilitate sexual contact:

> The question is, when he kidnapped -- when he intentionally abducted [E.B.], did he, in his mind, have the intent to facilitate the rape in the third degree? Nonconsensual sexual intercourse. Yes. By the time he put her in that car she had told him, no, I don't want to make another baby.
>
> Her testimony yesterday was they were sitting outside the apartment the second time he came at 11 o'clock. They're talking, all of sudden he says, "Let's go make -- I want to go make another baby." And she says, "No that's it. I'm going back inside." And it's at that point that he grabs her.
>
> And even so, when he's at the park, when he has still got her at the park where no one else is, he's saying, "Let's go into the park, let's make another baby." His intent was clear. His intent was expressed by words and his conduct. And eventually he physically starts down that road of making another baby, at least in his mind, by putting his down -- hands down her pants and kissing her.

RP 297-98.

As further evidence that Staten's offenses of kidnapping and indecent liberties offenses involved the same criminal conduct, Staten cited State v. Longuskie. BOA at 13-14. Longuskie was convicted of first degree kidnapping and molesting one of his students, 12-year-old J.D. The state's evidence showed that on the same day Longuskie took sick leave from school, J.D.'s grandmother reported J.D. missing. During the

next week, Longuskie and J.D. stayed at several hotels including the Starlite Motel, where J.D. later claimed sexual contact occurred. Longuskie, 59 Wn. App. at 841, 844.

On appeal, the Division Three held the offenses should have been calculated as same criminal conduct:

> Here, child molestation was the objective intent. The kidnapping furthered that criminal objective and the crimes were committed at the same time and place. As noted in [State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1989)], it is the underlying felony which enables the State to elevate the kidnapping charge to first degree. Thus, the child molestation and first degree kidnapping should be treated as one crime for determining the offender score.

Longuskie, 59 Wn. App. at 847.

Just as child molestation was the objective intent in Longuskie, sexual contact was the objective intent here. As in Longuskie, here the kidnapping furthered that criminal intent, and the crimes were committed at the same time and place. But, the Court of Appeals failed to cite Longuskie, much less address its similarity to Staten's case. Because the Court of Appeals opinion is not supported by the record, involves questions of a constitutional error, and conflicts with prior precedent from the Court of Appeals, review is appropriate under RAP 13.4(b)(2) and (b)(3).

b. The Failure to Argue Same Criminal Conduct at Sentencing Prejudiced Staten.

Counsel's deficient performance also prejudiced Staten because there is a reasonable likelihood the trial court would have found same criminal conduct had counsel made the argument above.

Here, the Court of Appeals conclusion that Staten could not meet his burden of showing a reasonable probability that the trial court would have found the two crimes involved the same criminal intent had defense counsel raised the issue at sentencing, is entirely inconsistent with existing legal authority and the Court's own acknowledgement that "there are reasonable arguments on both sides of the same criminal conduct issue." Appendix at 7.

The convictions for second degree kidnapping with sexual motivation and indecent liberties with forcible compulsion each counted as three points toward each other pursuant to RCW 9.94A.525(17). RP 378-79, 391-92, 394-95. Thus, for each offense, Staten's offender score rose from 7.5 to over 10. A finding of same criminal conduct would have lowered the applicable standard range sentence, for second degree kidnapping from 72-96 months to 51-68 months. It would also have lowered the standard range sentence on indecent liberties from 149-198 months to 108-144 months. RCW 9.94A.525. There was no legitimate reason for defense counsel not to

pursue a lower offender score for Staten, which a same criminal conduct finding would achieve.

Given the facts of this case, and the supporting legal authority, there is a reasonable probability that the trial court would have found the two current offenses encompassed the same criminal conduct. Similarly, given the trial court's imposition of a sentence at the low end of the standard range sentence, there is a reasonable probability that Staten's prison term would have been shortened by 41 months. As the trial court explained when imposing the standard range sentence:

> So we just proved nine-plus points. And I don't make up the law. I follow the law. If there's facts that would support a deviation, I would obviously grant a deviation. In my heart I wish I could do more for you, but I can't. that's the problem I have. I can assure you that if it was -- if there was no standard range based upon the facts, I would probably take a look at it a bit differently, but I can't.

RP 392.

Applying "same criminal conduct" analysis, Staten's offender score is 7.5 instead of 10. This Court should accept review and hold that counsel was ineffective for failing to argue same criminal conduct and remand for resentencing. Saunders, 120 Wn. App. at 825. Review is appropriate under RAP 13.4(b)(2) and (b)(3).

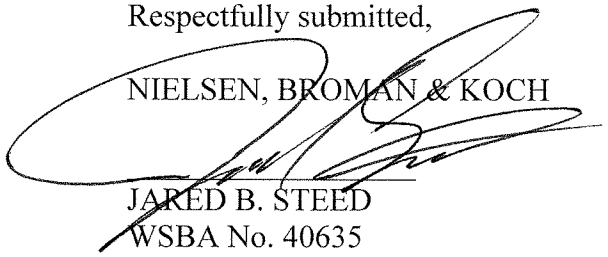
E. CONCLUSION

Because Staten satisfies the criteria under RAP 13.4(b)(2) and (b)(3), this Court should grant review and reverse the Court of Appeals.

DATED this 10th day of July, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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# APPENDIX

Filed
Washington State
Court of Appeals
Division Two

June 11, 2019

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>HAROLD CURTIS STATEN III,<br><br>Appellant. | No. 51349-8-II<br><br>UNPUBLISHED OPINION |

MAXA, C.J. – Harold Staten appeals his sentence imposed for convictions of second degree kidnapping and indecent liberties with forcible compulsion arising out of an incident with a person with whom he previously had a sexual relationship. He argues that he received ineffective assistance of counsel when trial counsel failed to argue at sentencing that his second degree kidnapping and indecent liberties convictions constituted the same criminal conduct.

We hold that (1) Staten's claim of ineffective assistance of counsel fails because he cannot show that he was prejudiced by defense counsel's failure to argue same criminal conduct; (2) as the State concedes, the DNA collection fee imposed as a mandatory legal financial obligation (LFO) must be stricken and a scrivener's error in the judgment and sentence must be corrected; and (3) Staten's claims asserted in a statement of additional grounds (SAG) are not specific enough to be considered.

Accordingly, we affirm Staten's sentence, but remand for the trial court to strike the DNA collection fee and correct a scrivener's error in the judgment and sentence.

## FACTS

Staten and EB began a sexual relationship in 2015. EB became pregnant and gave birth to a child in 2016. The child was born medically fragile and died on September 25, 2016.

The next day, Staten called EB to check on the health of their child and EB told him that the child had passed away. Staten met EB outside her apartment building in Vancouver that evening. Staten left but later sent EB a text message asking if they could get something to eat and talk together. EB said no but agreed that they could meet the next night.

Later that evening, Staten pulled up as EB was smoking a cigarette outside her apartment building. They sat and talked about their son. Staten told EB that he wanted to make another baby. EB started to go back into her apartment. Staten grabbed EB by the arm and told her that he wanted to keep talking. Staten pushed EB against the car and then shoved her into the passenger seat of his car and closed the door. EB opened the door but Staten closed it again and prevented her from reopening it.

Staten told EB that he was going to take her to a motel where they had sex in the past. Instead, he drove her to a nearby park. Staten told EB to put on a pair of shoes that he had in his car so they could walk through the park. EB said no and got out of the car to smoke a cigarette. She walked to the corner to get some distance from Staten and made a phone call to a friend to ask for help. The friend did not answer.

Staten then walked over to EB and they walked back to the car together. EB had her back to the car and Staten was directly in front of her. Staten again brought up having another baby and tried to kiss EB and made sexual advances. He also tried to convince her to have sex

with him. Staten pulled his penis out of his pants and pressed it against EB's arm as he was kissing her. He then put his hand inside the front of EB's pants and touched her vagina. EB told him to stop and tried to push him away. Staten suggested that they go into the park and have sex and try to make another baby.

EB then got a series of calls from her mother. EB eventually answered and told her mother that she was at the park with Staten. EB's mother came to the park to get EB and then called 9-1-1.

The State charged Staten with first and second degree kidnapping with sexual motivation, second degree rape, and indecent liberties with forcible compulsion. At trial, the jury convicted Staten of second degree kidnapping and indecent liberties with forcible compulsion but acquitted him of first degree kidnapping and second degree rape. The jury also found that Staten had committed the second degree kidnapping with a sexual motivation.

At sentencing, defense counsel did not argue that the second degree kidnapping and indecent liberties constituted the same criminal conduct. The trial court imposed the DNA collection fee as a mandatory LFO. In addition, the judgment and sentence erroneously noted that Staten had pleaded guilty.

Staten appeals his sentence and the imposition of the DNA collection fee.

## ANALYSIS

### A. INEFFECTIVE ASSISTANCE OF COUNSEL

Staten argues that he received ineffective assistance of counsel when defense counsel failed to argue at sentencing that second degree kidnapping with a sexual motivation and indecent liberties constituted the same criminal conduct. We hold that Staten's claim fails

because he cannot prove that the trial court would have found that the offenses constituted the same criminal conduct if defense counsel had raised the issue.

1. Legal Principles

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). Defense counsel's obligation to provide effective assistance applies at sentencing. *State v. Rattana Keo Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013). We review ineffective assistance of counsel claims de novo. *Estes*, 188 Wn.2d at 457.

To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced him or her. *Id.* at 457-58. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 458. Prejudice exists if there is a reasonable probability that, except for counsel's error, the result of the proceeding would have been different. *Id.* It is not enough that ineffective assistance conceivably impacted the case's outcome; the defendant must affirmatively show prejudice. *Id.*

Failure to argue same criminal conduct at sentencing may constitute ineffective assistance of counsel. *Rattana Keo Phuong*, 174 Wn. App. at 547. To establish that defense counsel provided ineffective assistance by failing to argue same criminal conduct, Staten must demonstrate that there is a reasonable probability that the trial court would have found same criminal conduct and that such a finding would have affected his sentence. *See State v. Munoz-Rivera*, 190 Wn. App. 870, 887, 361 P.3d 182 (2015); *Rattana Keo Phuong*, 174 Wn. App. at 547-48.

2. Same Criminal Conduct – Background

For purposes of calculating a defendant's offender score, multiple offenses that encompass the same criminal conduct are counted as one offense. RCW 9.94A.525(5)(a)[1]. Under RCW 9.94A.589(1)(a), two or more offenses 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." If any of these elements is not present, the offenses are not the same criminal conduct. *State v. Reyna Valencia*, 2 Wn. App. 2d 121, 125, 416 P.3d 1275, *review denied*, 190 Wn.2d 1020 (2018). And the definition of "same criminal conduct" generally is applied narrowly to disallow most same criminal conduct claims. *Id.*

The defendant bears the burden of establishing that two or more offenses encompass the same criminal conduct. *Id.* " '[E]ach of a defendant's convictions counts toward his offender score *unless* he convinces the court that they involved the same criminal intent, time, place, and victim.' " *Id.* (quoting *State v. Aldana Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013)).

Here, the kidnapping occurred when Staten forcibly pushed EB into the car and drove her to a park. At the park, EB got out of the car without interference from Staten and walked a short distance away to make a phone call. The indecent liberties offense occurred a few minutes later when Staten put his hand inside the front of EB's pants. The two offenses involved the same victim. The question for this court is whether the two offenses involved the same criminal intent and occurred at the same time and place.

[1] RCW 9.94A.525 was amended in 2017. Laws of 2017, ch. 272, § 3. Because those amendments do not affect our analysis, we cite to the current version of the statute.

3. Same Criminal Intent Requirement

a. Applicable Law

The Supreme Court first articulated the appropriate analysis for determining whether two offenses meet the intent prong of the same criminal conduct analysis in *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987). Under the *Dunaway* approach, we examine the extent to which the criminal intent, viewed objectively, changed from one crime to the next. *State v. Wright*, 183 Wn. App. 719, 734, 334 P.3d 22 (2014). The question is whether " 'there was any substantial change in the nature of the criminal objective.' " *Rattana Keo Phuong*, 174 Wn. App. at 546-47 (quoting *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990)). We do not examine the mens rea elements of the criminal offenses but look at the defendant's criminal purpose in committing the offense. *Rattana Keo Phuong*, 174 Wn. App. at 546.

Courts have adopted guidelines for assessing whether the criminal intent is the same for two crimes. First, whether the defendant's objective criminal purpose changed " 'can be measured in part by whether one crime furthered the other.' " *Wright*, 183 Wn. App. at 734 (quoting *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Second, "[c]rimes may involve the same criminal intent if they were part of a continuing, uninterrupted sequence of conduct." *State v. Latham*, 3 Wn. App. 2d 468, 479, 416 P.3d 725, *review denied* 191 Wn.2d 1014 (2018). Third, if an offender "has time to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act, and makes the decision to proceed, he or she has formed a new intent to commit the second act." *Id.* at 479-80.

Most recently, the Supreme Court in *State v. Chenoweth* applied a statutory elements analysis to determine if two convictions could constitute the same criminal conduct. 185 Wn.2d 218, 221-24, 370 P.3d 6 (2016). In *Chenoweth*, the defendant was convicted of six counts of

third degree child rape and six counts of first degree incest for raping his daughter. *Id.* at 219. The court stated that where the defendant committed only one act giving rise to more than one conviction, the court should examine the intent elements of the relevant statutes to determine if the convictions constitute the same criminal conduct. *Id.* at 221. The court concluded that third degree rape and first degree incest were not the same criminal conduct because the intent to have sex with a child is different than the intent to have sex with a close relative. *Id.* at 223-24.

b. Analysis

Here, there are reasonable arguments on both sides of the same criminal conduct issue. Staten argues that (1) EB's testimony shows that there was no change in his objective criminal purpose – to have sex with EB to make another baby – from the time he arrived at EB's apartment building to when he drove to the park and made sexual advances; (2) the kidnapping and indecent liberties involved a continuing, uninterrupted sequence of conduct that started when he pushed EB into the car and ended when he put his hand inside her pants; and (3) the kidnapping furthered the sexual contact that resulted in the indecent liberties conviction.

The State argues that (1) under *Chenoweth*, kidnapping and indecent liberties cannot be the same criminal conduct because the statutory intent required for the two crimes is different; (2) the kidnapping ended when EB left the car and walked to the corner because at that point she regained her liberty; and (3) this interruption in the events allowed Staten to pause and form a new criminal intent.

However, for his ineffective assistance of counsel claim, Staten has the burden of establishing a reasonable probability that the trial court would have found that the two crimes involved the same criminal intent if the issue had been argued. And we cannot ignore the

general rule that the definition of "same criminal conduct" generally is applied narrowly to disallow most same criminal conduct claims. *Reyna Valencia*, 2 Wn. App. 2d at 125.

We conclude that Staten cannot sustain his burden of showing a reasonable probability that the trial court would have found that the two crimes involved the same criminal intent if defense counsel had raised the issue. As a result, Staten cannot show that the alleged deficient performance prejudiced him. Accordingly, we hold that Staten's ineffective assistance of counsel claim fails.[2]

B. DNA COLLECTION FEE

Staten argues, and the State concedes, that the DNA collection fee that the trial court imposed as a mandatory LFO must be stricken. We agree.

In 2018, the legislature amended RCW 43.43.7541, which now states that the DNA collection fee no longer is allowed if the offender's DNA previously had been collected because of a prior conviction. The Supreme Court in *State v. Ramirez* held that the 2018 amendments to LFO statutes apply prospectively to cases pending on direct appeal. 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018).

Here, the State concedes that Staten's DNA had been collected previously because of a prior conviction. We hold that the DNA collection fee imposed on Staten must be stricken.

C. SCRIVENER'S ERROR

Staten argues, and the State concedes, that his judgment and sentence contains a scrivener's error. Staten was convicted by a jury verdict, but the judgment and sentence stated that he pleaded guilty. We agree that the trial court erred.

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[2] Because of our holding, we do not address whether the two crimes occurred at the same time and place.

The appropriate remedy for a scrivener's error in a judgment and sentence is to remand for the trial court to correct the error. *See State v. Calhoun*, 163 Wn. App. 153, 170, 257 P.3d 693 (2011). Because we remand for the trial court to strike the DNA collection fee, the court will be able to correct this scrivener's error in the judgment and sentence at that time.

D. SAG CLAIMS

Staten seems to assert that he received ineffective assistance of counsel when defense counsel failed to present certain evidence or address certain issues. He also seems to assert other trial errors. However, Staten does not explain the nature of the alleged errors or how they prejudiced him. Therefore, we decline to consider Staten's SAG claims because they are not specific enough for us to understand the nature of the claims. RAP 10.10(c).

CONCLUSION

We affirm Staten's sentence, but we remand for the trial court to strike the DNA collection fee and correct a scrivener's error in the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, C.J.
MAXA, C.J.

We concur:

Melnick, J.
MELNICK, J.

Sutton, J.
SUTTON, J.

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

**July 10, 2019 - 8:56 AM**

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| **Appellate Court Case Title:** | State of Washington, Respondent v Harold Curtis Staten, Appellant |
| **Superior Court Case Number:** | 16-1-02020-8 |

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