

NO. 66216-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

REGINALD BREAUX,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Where the trial court incorrectly calculated the defendant's offender score for one of his serious violent offenses, remand is necessary to correct the error.

2. Where the defendant has not cited any statutory or other authority in support of his claim that, on remand, the trial court should score the attempted first degree rape more favorably than the completed first degree rape, does the unsupported claim fail?

3. Where the legislative intent makes clear that offenders shall serve increased punishment for multiple serious violent offenses, is the defendant precluded from invoking the rule of lenity to contravene that intent?

B. RELEVANT FACTS

On July 21, 2010, by amended information, the State charged the defendant, Reginald Breaux, with second degree rape (count 1 – victim T.E.), attempted first degree rape (count 2 – victim A.D.) and first degree rape (count 3 – victim E.H.). CP 141-42. That same day, Breaux pleaded guilty as charged. CP 143-72.

a. Count 1.¹

On June 8, 2008, while T.E. was panhandling, Breaux approached her and said that he did not have any place to go. CP 158. T.E. offered to give Breaux an extra tent and sleeping bag that she had at her campsite. CP 158. As they were walking toward T.E.'s campsite, Breaux suddenly grabbed T.E. and slammed her to the ground. CP 158. T.E. begged Breaux not to hurt her. CP 158. Breaux told T.E. to remove her pants. CP 158. Breaux held T.E. by her hair and violently shook her head. CP 158. Breaux got on top of T.E. and vaginally raped her. CP 158.

Afterward, as Breaux stood over T.E., she tried to move away from him; however, Breaux grabbed T.E. and forced her to fellate him. CP 158. Again Breaux violently shook T.E.'s head. T.E. screamed. Breaux forced T.E. onto her knees, shoved her head into the ground and told her, "This is rape, bitch." CP 158. T.E. struggled. Breaux ordered her to suck his penis again. CP 159. Breaux bit T.E.'s stomach. CP 159. Breaux then vaginally and anally raped T.E. CP 159. Finally, T.E. broke free.

¹ As part of the plea to all counts, Breaux stipulated to the facts set forth in the certifications for determination of probable cause. CP 166.

CP 159. When T.E. ran toward parked cars, Breaux fled in the opposite direction. CP 159.

At Harborview Medical Center (HMC), treatment providers noted multiple abrasions and contusions on T.E. CP 159. T.E. had a bite mark on her abdomen. CP 159. Swabs taken during a sexual assault examination were submitted to the Washington State Patrol (WSP) Crime Lab. CP 159-60. The DNA² profile obtained from the anal swab positively identified Breaux as the individual who raped T.E. CP 160.

Throughout the rape, T.E. thought that she was going to die. CP 159-60.

b. Count 2.

On June 10, 2008, at around midnight, as S.K. drove home from work, he saw a male (later identified as Breaux) "hovering over" a female (later identified as A.D.). CP 161. S.K. thought that Breaux was striking A.D. When S.K. drove to within 15 feet of Breaux and A.D., he saw Breaux punch A.D. in the face. CP 161. S.K. heard Breaux say, "Suck my dick or I'll kill you." CP 161. Breaux's genitals were outside his pants. CP 161. S.K. and a co-worker who had also stopped told Breaux to get off A.D.

² Deoxyribonucleic acid.

CP 161. After Breaux saw that S.K. outsized him, Breaux fled. S.K.'s co-worker unsuccessfully tried to follow Breaux. CP 161.

When medics arrived, A.D. was unresponsive. CP 161. S.K. said that, "She was beat[en] up pretty bad. I don't know how long he'd hit her. I've got a strong stomach but it made me sick." CP 161. A.D. was transported to HMC. A.D. sustained: a right orbital fracture, a laceration on the left side of her forehead that required five stitches to close and swelling and bruising on her face, abdomen and arms. CP 162.

After Seattle Police Detective Leslie Smith had received the DNA results from Breaux's rape of T.E., Smith noticed similarities in the suspect description and the location of the rapes. CP 162. Smith showed S.K. a photo montage. Without hesitation, S.K. positively identified Breaux as the man who had attempted to rape A.D. CP 162.

c. Count 3.

On October 2, 2008, just after midnight, a security guard, E.O., called 911 to request police and medical assistance. CP 163. A woman, later identified as E.H., flagged down E.O.; she was naked and she told E.O. that she had been raped. CP 163.

E.H. told the police that Breaux had raped her at knifepoint. CP 163. E.H. knew Breaux because they “hung out” with the same transients. CP 163. Breaux held a knife against E.H.’s throat and told her, “this was a rape.” CP 163. Breaux told E.H. that if she did not comply, he would bite off one of her nipples or “slice [her] up.” CP 163-64. E.H. believed that Breaux would kill her. CP 165.

Breaux forced E.H. to perform oral sex on him; afterward he vaginally and anally raped E.H. with his penis and his fingers. CP 163. E.H. unsuccessfully tried to break free after she sprayed Breaux with insect repellent. CP 163. E.H. finally escaped—she ran into the street where a man in a vehicle helped her by driving her out of the area. CP 163, 165. Police officers went to the rape site and recovered the knife that E.H. had described. CP 163.

E.H. had a sexual assault examination at HMC. CP 163-64. E.H. had a lot of pain; she had sustained multiple vaginal lacerations. CP 164.

On January 15, 2009, after Detective Smith had obtained the DNA hit in Breaux’s rape of T.E. and after S.K. had positively identified Breaux as A.D.’s rapist, she and another detective interviewed Breaux in jail (where he was held on another incident).

CP 164. Breaux said that he and E.H. had “rough” consensual sex.

CP 164.

The next day, Breaux provided a saliva sample for DNA analysis. CP 164. WSP crime lab identified a male profile on E.H.’s perineal, vaginal and anal swabs. CP 164.

On December 22, 2009, E.H. contacted Detective Smith. E.H. said that before Breaux raped her, he provided her with heroin because she was “dope sick.” CP 164. E.H. emphatically said that she had not agreed to trade sex for drugs. CP 165. E.H. believed that had she not complied, Breaux would have killed her. CP 165.

On January 8, 2010, Detective Smith asked the WSP lab for a more sophisticated DNA analysis. CP 165. On February 22, 2010, Detective Smith got the lab results: Breaux’s profile matched the male DNA recovered from E.H. CP 165.

d. Sentencing Hearing.

On October 8, 2010, the trial court sentenced Breaux on count 1 to a minimum term of 194 months, on count 2 to a minimum of 120 months and on count 3 to a minimum of 216 months. 10/8/10 RP 19; CP 178. The court ordered the time of confinement on counts 2 and 3 to run consecutively, for a minimum term of 336

months, and the time of confinement on count 1 to run concurrently with counts 2 and 3. 10/8/10 RP 19; CP 178. The court imposed the high end of the standard range on each count because the three offenses were “extremely brutal,” and because the court believed that Breaux is “a danger to the community.” 10/8/10 RP 19.

Breaux timely appeals. CP 185.

C. ARGUMENT

- 1. THE STATE MISCALCULATED BREAU’S OFFENDER SCORE ON COUNTS 1 AND 2; HOWEVER, BREAU’S CLAIM THAT ATTEMPTED CRIMES HAVE A “SERIOUSNESS LEVEL” IS INCORRECT.**

Breaux raises two separate but related challenges to his October 8 sentencing. First, he contends that the trial court erred in its calculation of his offender score on count 2, attempted first degree rape. He is correct on this point.³ The State will set forth below the applicable sentencing provisions and the correct computation of his offender scores.⁴ Breaux also contends that, pursuant to the rule of lenity, he is entitled to have the attempted

³ The trial court relied on the State’s calculations and those calculations were wrong.

⁴ Although Breaux has not challenged his offender score on count 1, it, too, is incorrect.

first degree rape scored more favorably than the completed first degree rape. Breaux's argument is built on a false premise—that an attempted crime has the same seriousness level as the corresponding completed crime. It does not. Moreover, Breaux's interpretation contravenes the legislative intent. This Court should accordingly reject Breaux's analysis.

a. The General Rule For Standard Range Sentences.

Under the Sentencing Reform Act (SRA), the standard range sentence is based on the intersection of the seriousness level of the completed offense and the offender score.⁵ RCW 9.94A.510.

The seriousness level for each of Breaux's current convictions is:

Table 1

Seriousness level	Offense	Count
XI	Second degree rape	I
--	Attempted first degree rape	II
XII	First degree rape	III

RCW 9.94A.515.

The offender score is the combination of prior offenses and "other current offenses" as defined by RCW 9.94A.589. RCW

⁵ RCW 9.94A.515 lists the crimes included within each seriousness level.

9.94A.525(1). Anticipatory offenses do not have a “seriousness level”; rather the presumptive sentence is determined by the intersection of the seriousness level of the completed crime and the offender score, and multiplying the range by 75 percent. RCW 9.94A.595. Nonviolent prior or current adult offenses count one point.⁶ RCW 9.94A.525(7). Serious violent and sex offenses use multipliers when scoring other serious violent or sex offenses. RCW 9.94A.525(9), (17). A serious violent offense is a subcategory of violent offenses and includes first degree rape and attempted first degree rape. RCW 9.94A.030(44)(a)(vii), (ix). Sex offense means a felony that is in violation of chapter 9A.44 RCW.⁷ RCW 9.94A.030(45)(a)(i).

Breaux’s undisputed prior adult criminal history is:

Table 2

Offense	Classification
Second degree burglary	Nonviolent offense
Possession of controlled substance	Nonviolent offense
Possession of controlled substance	Nonviolent offense

⁶ A nonviolent offense is an offense which is not a violent offense. RCW 9.94A.030(32).

⁷ Second degree rape, attempted first degree rape and first degree rape are violations of chapter 9A.44 RCW. RCW 9A.44.050; RCW 9A.44.040; RCW 9A.28.020.

CP 181.⁸ The classifications for Breaux's instant convictions are:

Table 3

Offense/Count	Classification
Second degree rape; count 1	Sex offense
Attempted first degree rape; count 2	Serious violent sex offense
First degree rape; count 3	Serious violent sex offense

RCW 9.94A.030(44)(a)(vii), (ix): 030(45)(a)(i).

b. Concurrent Or Consecutive Sentences.

Under the SRA, the general rule is that when a court sentences a person for two or more offenses, the sentences shall be served concurrently. RCW 9.94A.589(1)(a). However, consecutive sentencing applies whenever a court imposes sentences for two or more serious violent offenses. RCW 9.94A.589(b). The statute provides:

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentencing range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent

⁸ A criminal history includes the defendant's convictions in this state or elsewhere. RCW 9.94A.030(11)(a). At sentencing, Breaux challenged his criminal history. CP 324-29; 10/8/10 RP 16-18. Breaux has not appealed the trial court's ruling vis-à-vis his criminal history.

offenses in the offender score and the standard sentencing range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

Applying all of these rules to Breaux's convictions results in the following:

- Count 1, second degree rape (a sex offense), will run **concurrently** with counts 2 and 3. RCW 9.94A.589(1)(a), (b).
- Count 2, attempted first degree rape (a serious violent sex offense), will run **consecutively** to count 3, but concurrently with count 1. RCW 9.94A.589(1)(a), (b).
- Count 3, first degree rape (a serious violent sex offense), will run **consecutively** to count 2, but concurrently with count 1. RCW 9.94A.589(1)(a), (b).

Thus, the only remaining issues are Breaux's offender score for each count and which crime has the highest seriousness level.

c. Breaux's Offender Scores.

Breaux claims that the trial court erred when it calculated his offender score on the attempted first degree rape (count 2) as 3 because, under RCW 9.94A.589(1)(b), it should have been a zero. Breaux is correct on this point. However, the court also erred when

it calculated his offender score on the second degree rape (count 1).⁹ A correct application of RCW 9.94A.589(1)(b) yields an offender score of 9 for count 1.

The calculations below represent Breaux's offender score for each conviction:

i. Count 1: Second degree rape.

Adult History:

3 non-violent felony offenses¹⁰ 3 x 1¹¹ 3 points

Other Current Offenses (counts 2 and 3)

2 serious violent sex offenses: 2 x 3¹² 6 points

Score: 9¹³

Seriousness level: XI¹⁴

Standard range: 210 - 280 months¹⁵, concurrent with counts 2 and 3¹⁶

⁹ CP 210-12; 10/8/10 RP 9-11.

¹⁰ Please refer to Table 2.

¹¹ RCW 9.94A.525(7).

¹² RCW 9.94A.525(17).

¹³ The State incorrectly scored this offense as 6. CP 187, 210.

¹⁴ RCW 9.94A.515.

¹⁵ RCW 9.94A.510.

¹⁶ RCW 9.94A.589(1)(a).

ii. Count 2: Attempted first degree rape.

Score: 0¹⁷

Seriousness level: none

Under RCW 9.94A.589(1)(b), one scores the serious violent offense with the *highest* seriousness level, which in this case is the first degree rape. RCW 9.94A.515. Strictly speaking, an attempt at a crime does not have a “seriousness level.” Completed crimes have a seriousness level, and the sentence for the attempt is a percentage of the sentence for the corresponding completed crime. RCW 9.94A.595. All remaining serious violent current offenses are calculated with an offender score of zero. RCW 9.94A.589(1)(b). Standard range: 69.75 – 92.25 months¹⁸, concurrent with count 1 but consecutive to count 3.¹⁹

iii. Count 3: First degree rape.

Adult History:

3 non-violent felony offenses:²⁰ 3 x 1²¹ 3 points

¹⁷ RCW 9.94A.589(1)(b).

¹⁸ RCW 9.94A.510.

¹⁹ RCW 9.94A.589(1)(a), (b).

²⁰ Please refer to Table 2.

²¹ RCW 9.94A.525(7).

Other Current Offenses:

1 serious violent sex offense: (count 2)	1 x 0 ²²	0 points
1 sex offense: (count 3)	1 x 3 ²³	3 points

Score: 6

Seriousness level: XII²⁴

Standard range: 162 - 216 months²⁵

Thus, applying the law to the instant case, upon remand, the trial court should impose a sentence between 210 – 280 months on count 1 to run concurrently with counts 2 and 3. The court should impose a sentence between 69.75 – 92.25 months on count 2 to run consecutively to count 3. The court should impose a sentence between 162 – 216 months on count 3. Accordingly, the total time imposed should be between 231.75 and 308.25 months.

d. Attempted Crimes Do Not Have A Seriousness Level.

Breaux contends that a crime of attempt has the same “seriousness level” as the corresponding completed crime. This

²² RCW 9.94A.589(1)(b).

²³ RCW 9.94A.525(17).

²⁴ RCW 9.94A.515.

²⁵ RCW 9.94A.510.

Court should reject Breaux's argument because, as stated above, attempted crimes do not have a "seriousness level."

Strictly speaking, crimes of attempt do not have a "seriousness level." Completed crimes have a seriousness level, and the sentence for the attempt is a percentage of the sentence for the corresponding completed crime. See RCW 9.94A.515: .595. In this case, the serious violent offense with the highest seriousness level is the first degree rape. See Tables 1, 3.

Breaux has not cited to any statute or case in support of his contention that crimes of attempt have any seriousness level, much less the identical seriousness level of the corresponding completed crime. The Court should reject this claim.

e. The Rule Of Lenity Is Inapt.

Finally, Breaux argues that RCW 9.94A.589(1)(b) is ambiguous and that, under the rule of lenity, the trial court should score the attempted first degree rape as 6 and the completed first degree rape as 0. This claim fails. The rule of lenity cannot be invoked to contravene legislative intent and, it is clear that the legislature intended to maximize the punishment for offenders with multiple serious violent offenses.

The interpretation of a statute is a question of law that is reviewed de novo. Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). “When statutory language is susceptible to more than one reasonable interpretation, it is considered ambiguous.” Cockle v. Dep’t of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001). However, a statute is not ambiguous merely because more than one interpretation is conceivable. Agrilink Foods, Inc. v. State Dep’t of Revenue, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005) (citing State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)).

The primary goal of statutory construction is to ascertain and give effect to the legislature’s intent and purpose. State v. Williams, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). In discerning and implementing the legislative intent, a court considers the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose a statutory scheme as a whole. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The court may also examine the legislative history to give effect to the legislature’s intent and purpose. See Cockle, 142 Wn.2d at 808.

The rule of lenity requires this Court to interpret the statute in favor of the defendant *absent legislative intent to the contrary*. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005) (italics added); see also In re Personal Restraint of Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994) (“[T]he rule of lenity applies to the SRA and operates to resolve statutory ambiguities, absent legislative intent to the contrary, in favor of a criminal defendant.”). But here, because there is legislative intent to the contrary, the rule of lenity is inapplicable. See State v. Bunker, 169 Wn.2d 571, 581 n.5, 238 P.3d 487 (2010).

It is clear that the legislature intended to maximize the punishment for offenders who have committed multiple serious violent offenses. In 1984, former RCW 9.94A.400(1)(b)²⁶ required imposition of consecutive sentences “whenever a person is convicted of three or more serious violent offenses, as defined in RCW 9.94A.330²⁷, arising from separate and distinct criminal conduct. . . .” LAWS 1984, CH. 209, § 25. In 1990, the legislature amended the rules regarding consecutive sentencing for multiple

²⁶ Recodified as § 9.94A.589 by LAWS 2001, CH. 10, § 6.

²⁷ LAWS 1988, CH. 157, § 5 substituted “9.94A.030” for “9.94A.330.” Currently, RCW 9.94A.030(44) defines “serious violent offenses.”

serious violent offenses by requiring consecutive sentencing for two or more serious violent offenses instead of three. LAWS 1990, CH. 3, § 704. In addition, the list of crimes that qualify as “serious violent offenses” has increased significantly. Compare former RCW 9.94A.330 with RCW 9.94A.030(44). “Thus, it is clear that . . . the Legislature intended to greatly expand application of the serious violent offender rule.” State v. Brown, 100 Wn. App. 104, 115, 995 P.2d 1278 (2000).

Case law interpreting RCW 9.94A.589 supports the State’s argument. For instance, Division Three of this Court held that a defendant who had driven a car from which five shots were fired into a car with five other people, and who was convicted as an accomplice to five counts of first degree assault, was properly sentenced to consecutive sentences. State v. Salamanca, 69 Wn. App. 817, 827-28, 851 P.2d 1242 (1993). The court said that by scoring only one of the serious violent offenses, while the sentence ranges for the other four serious violent offenses were calculated by using an offender score of zero, the sentence ranges of four serious violent offenses were shorter than would otherwise be the case, but the term of incarceration was longer because the sentences are served consecutively. Salamanca, 69 Wn. App. at

827-28. The court stated, “This scheme avoids double counting of convictions while ensuring increased punishment for multiple violent offenses, *a clearly intended result which is consistent with the purposes of the Sentencing Reform Act of 1981.*” Id. (citing D. BOERNER, SENTENCING IN WASHINGTON §§ 5.8(B), 6.20 (1985)) (italics added).

Another amendment to RCW 9.94A.589 demonstrates that the legislature’s purpose and intent was to maximize sentences for serious violent offenders. Commentary in the 2008 Adult Sentencing Guidelines Manual states:

In 1988, the Commission recommended RCW 9.94A.589(1)(b) be clarified to substitute the phrase “prior convictions and other current convictions that are not serious violent offenses” for the term “criminal history.” In the Commission’s review of sentences it was discovered that offenders convicted of multiple serious violent offenses with additional convictions for offenses that were not serious violent offenses (for example, a burglary), the lesser offenses were frequently not calculated into the offender score. The Commission decided the problem was the use of the term “criminal history” because it appeared to only include prior offenses, not additional current offenses. Thus, the new phrase was recommended.

ADULT SENTENCING GUIDELINES MANUAL § II, at 172 (2008). The legislature followed the Commission’s recommendation. See LAWS 1988, CH. 157, § 5 (modifying subsection (1)(b)).

By analogy, double jeopardy jurisprudence supports the State's argument. Division Two of this Court held that a defendant's two convictions for first degree assault violated double jeopardy because the same criminal acts formed the basis of the two attempted murder convictions. State v. Crumble, 142 Wn. App. 798, 801, 177 P.3d 129 (2008). The remedy was to vacate the two assault convictions because they are the offenses carrying the lesser sentence. Id. Here, too, the law should punish Breaux by scoring his multiple serious violent offenses in a manner that imposes the greater sentence.

The legislative amendments to RCW 9.94A.589 (formerly RCW 9.94A.400), the case law interpreting the statute, and analogous cases applying double jeopardy principles by vacating the conviction with the lesser sentence, demonstrate the legislative intent to maximize punishments for offenders with multiple serious violent offenders. As a result, the rule of lenity is inapt.

D. CONCLUSION

The trial court erred when it calculated Breaux's offender score for counts 1 and 2. As a result, Breaux's total term of confinement is incorrect and must be corrected. Accordingly, this Court should remand this matter for resentencing. At the

resentencing, pursuant to the legislative intent of RCW 9.94A.589(1)(b), the trial court should score count 3—the completed first degree rape—as the crime with the highest seriousness level.

DATED this 25 day of July, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. REGINALD BREAUX, Cause No. 66216-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name Wynne Brame
Done in Seattle, Washington

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