

NO. 48541-9

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

JOSEPH JOHN BAZA,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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Appeal from Superior Court of Kitsap County  
Honorable Kevin D. Hull  
NO. 15-1-000874-7

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APPELLANT'S BRIEF

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## **I. INTRODUCTION**

Because Defendant's crimes of Assault, Threat to Kill, and Violation of a No-Contact Order were all part of the "same criminal conduct," this case should be remanded for the crimes to be sentenced concurrently instead of consecutively. They constituted simultaneous and continuous criminal conduct, furthering each other and containing no pause to renew criminal intent. The trial court erroneously applied a double jeopardy analysis instead of the clearly-established principles that must be applied in "same criminal conduct" determinations. In the alternative, this matter should at least be remanded with instructions for the trial court to apply the correct "same criminal conduct" analysis.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred when it determined that the convictions of Assault 2 DV, Violation of Court Order DV, and Harassment-Threat to Kill DV were not the "same criminal conduct" pursuant to RCW 9.94A.589. Appellant argues that they were, and that the time he serves for each crime should therefore be concurrent rather than consecutive.

2. In the alternative, the trial court made an error of law in its analysis of what constitutes "same criminal conduct" and this matter should be remanded for correct application of law. The court erroneously and exclusively applied a double jeopardy analysis, rather than long-established case law regarding "same criminal conduct."

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### **III. STATEMENT OF CASE**

The record was stipulated as to the following: On the night of July 23, 2015, Defendant and victim were drinking at a bar. The victim had a domestic violence protection order in place against Defendant, which he was knowingly violating. They left the bar and proceeded to the Vista Motel where the victim already had a room. While in the room they began to argue. Defendant began choking the victim while stating “you will die.” Police arrived and heard muffled screaming, they knocked down the door and observed Defendant get off from on top of the victim. They observed the victim gasping for air, bleeding from her mouth, and other injuries on the victim consistent with strangulation. No evidence exists in the record as to an exact interval of time between any of the events.

Defendant pled guilty as charged to Assault 2 DV, Violation of Court Order DV, and Harassment-Threat to Kill DV on November 9, 2015. At sentencing on November 16, 2015, after having reviewed double jeopardy briefing from prosecution and defense, the trial court determined that the crimes were not part of the same course of criminal conduct pursuant to RCW 9.94A.589. The trial court issued its decision, after comment, that made it clear the court was exclusively considering the erroneous and irrelevant issue of double jeopardy pursuant to *State v Mandanas*, 168 Wn.2d 84, 228 P.3d 13 (2010). (VRP 20-24.)<sup>1</sup>

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<sup>1</sup> The only cases addressed at sentencing by the trial court, defense, and State were the double jeopardy cases of *Mandanas* (as well as *Orange* and *Freeman* which were cited in *Mandanas*). See VRP 24: the final statement of the court on the issue of ‘same criminal conduct’ was: “THE COURT: I understand that, Mr. Ramsdell. I guess what I’m saying is, having applied what’s indicated in *Mandanas* with the

Defendant appeals, arguing his crimes were part of the same course of criminal conduct, and that his period of incarceration for each crime should be concurrent rather than consecutive.

#### **IV. SUMMARY OF ARGUMENT**

Defendant's crimes were all part of the "same criminal conduct" because they all had the "same criminal intent": to hurt and frighten the victim. Case law is clear that even crimes with different specific, statutorily-defined intents can all have the "same criminal intent" for purposes of determining 'same criminal conduct.' Here, that intent was to hurt and frighten the victim.

Because the trial court applied a somewhat similar but inappropriate double jeopardy analysis, remand is the minimum relief that should be granted.

#### **V. LEGAL ARGUMENT**

##### **A. LAW**

The analysis required for a determination of "same criminal conduct" and the standard of review on appeal are both clearly defined in Washington State:

##### **1. Standard of Review**

An appellate court reviews the trial court's finding that two crimes did not constitute the same criminal conduct for an abuse of discretion or a "misapplication of the law." *State v. Graciano*, 176 Wn.2d 531, 537, 295

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facts in *Mandanas* and comparing those facts to the facts in this case, I see that as being distinguishing."

P.3d 219 (2013). Where the record supports only one conclusion regarding the defendant's conduct, the trial court abuses its discretion when it arrives at a contrary result. *Graciano*, 176 Wn.2d at 537-538. But, if the record before the trial court supports either a conclusion that the defendant's crimes constituted the same criminal conduct or that they did not, the issue lies squarely in the trial court's discretion. *Graciano*, 176 Wn.2d at 538. Appellate courts shall construe the statute narrowly to "disallow most claims that multiple offenses constitute the same criminal act." *Graciano*, 176 Wn.2d at 540 (quoting *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)).

## 2. Statute

When a person is convicted of two or more serious violent offenses, the trial court must run the sentences for those offenses consecutively unless the trial court finds that the crimes constituted the same criminal conduct. RCW 9.94A.589(1)(b). Two 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).

## 3. "Same Criminal Intent" Prong of Statute

The "time," "place," and "same victim" prongs are undisputed in this case: the three crimes Defendant committed were all at the Vista Motel against the same victim on July 23. This leaves only the "same criminal intent" prong in dispute. Because the trial court failed to determine Defendant's intent, this case must be remanded. Furthermore, because Defendant's objective intent was the same for all three offenses, the trial

court should be instructed to treat the crimes as part of the same criminal conduct.

In determining “the same criminal intent”, a “court inquires whether the intent, viewed objectively, changed from each crime to the next.” *State v. Palmer*, 95 Wn.App.187 at 191, 975 P.2d 1038 (1999) (citing *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998)) and *State v Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987). “Simultaneous or continuous” crimes *are* the same course of conduct, but, if a defendant is “able to form a new criminal intent before his second criminal act [then] ... his “crimes were sequential, not simultaneous or continuous.” See, *State v. Grantham*, 84 Wn.App. 854 at 856–57, 859, 932 P.2d 657 (1997). If a defendant “had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,” then his crimes did not have the same criminal intent. *Grantham* at 859.

#### 4. Examples of Same Criminal Conduct

(1) In *State v Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999), the Supreme Court determined that three rapes over two minutes constituted the same criminal intent because they were “simultaneous or continuous.”

(2) In *State v Taylor*, 90 Wn.App. 312, 950 P.2d 526 (1998), Division II held that an assault and a kidnapping were the same criminal conduct because they furthered each other:

In this instance, the assault and kidnapping happened at the same time and place and involved the same victim. This leaves the question of whether the offenses shared the same intent. When determining if two crimes share a criminal intent, we focus on (1) whether the defendant's intent, viewed objectively, changed from

one crime to the next and (2) whether commission of one crime furthered the other. *State v. Grantham*, 84 Wash.App. 854, 858, 932 P.2d 657 (1997).

The evidence established that Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when Taylor and Nicholson entered the car. It ended when the kidnapers exited the car and the abduction was over. And there is no evidence that Taylor or Nicholson engaged in any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction.

Further, because the assault and kidnapping were committed simultaneously, it is not possible to find a new intent to commit a second crime after the completion of the first crime. See *Grantham*, 84 Wn.App. at 859, 932 P.2d 657 (evidence of sequential rapes sufficient to support trial court's finding that defendant formed new intent to commit second act). Thus, this record supports only a finding that the offenses were part of the same criminal conduct and Taylor is entitled to have the two offenses counted as one crime. RCW 9.94A.400(1)(a).

*Id.* at 321, 531.

(3) In *State v. Palmer*, 95 Wn.App. 187, 975 P.2d 1038 (1999),

Division I held that oral rape followed by genital rape, with renewed threats between the two, was the same course of criminal conduct:

The present case is more factually similar to *Walden*. Walden was convicted of a first rape that involved oral/genital contact and a second attempted rape that involved anal penetration. The two rapes were in short succession. In determining whether Walden qualified for the RCW9.94A.400(1)(a) same criminal conduct offender score calculation, we held that the underlying conduct of both charges involved the same objective criminal intent of sexual intercourse.

The fact that Palmer renewed his threats between the two rapes, and had an opportunity to reflect does not alter our analysis. Palmer's threats and use of violence were no different between the

oral/genital rape and the various genital/genital rapes throughout the evening. The facts do not support a conclusion that his objective criminal intent changed.

*Id.* at 192, 1040.

Here, Defendant's objective intent was to re-connect with his victim and frighten and hurt her. As in *Tili*, *Taylor*, and *Palmer*, Defendant's crimes were a continuous execution of the same objective – intent to frighten and hurt.

5. Double Jeopardy Distinguished from Same Criminal Conduct

A double jeopardy analysis is similar to “same criminal conduct” analysis:

Under double jeopardy analysis, we determine whether one act can constitute two convictions. Under the same criminal conduct analysis, we determine whether two convictions warrant separate punishments. Even though they may be separate, albeit similar, analyses, a determination that a conviction does not violate double jeopardy does not automatically mean that it is not the same criminal conduct.

*See: State v Chenoweth*, 185 Wn. App. 1041, (2015).

In *Tili*, *supra*, convictions for three rapes for three penetrations over two minutes did not violate double jeopardy, but the Court did find that it was the “same criminal conduct.” The criminal intent throughout the crimes in this matter is similar to *Tili* – to hurt and frighten the victim in a continuous act that contained no pause for reflection.

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## B. ANALYSIS

1. The trial court erred when it determined that the convictions of Assault 2 DV, Violation of Court Order DV, and Harassment-Threat to Kill DV were not the same criminal conduct pursuant to RCW 9.94A.589. Appellant argues that they were, and that the time he serves for each crime should therefore be concurrent rather than consecutive.

Here, Defendant's assault, threat to kill victim, and violation of a no-contact order constituted simultaneous and continuous criminal conduct because the acts all furthered each other and were continuous, with no pause to renew criminal intent.

### a) *Clarifying "Same Criminal Intent" Analysis*

The mistake made by the trial court and trial counsel appears to be a common one in this State. This Court should reiterate and clarify that, consistent with the case law above, that whether two or more crimes constitute the "same criminal intent" *is not* an inquiry into the tangential issue of double jeopardy.

"Same criminal intent" is also *not* an analysis of whether each crime has the same *specific* intent particular to that crime as it is statutorily defined. In other words, for example, it is easy to erroneously argue that the specific intent to kidnap is always different from the intent to assault: one intent is to abduct, and the other is to frighten/hurt. One could easily conclude then that the two crimes do not have the "same criminal intent" for purposes of RCW 9.94A.589. But as the court in *Taylor* and other cases, *supra*, point out, this is not the correct analysis: kidnapping and assault, or any other crimes, can have the "same criminal intent" for sentencing

purposes. In fact, if one were to apply the erroneous analysis of exclusively relying on the statutorily-defined intents, then there would never be *any* scenario where a defendant's acts constituted a same course of criminal conduct (except when all the charges were for the same crime). Clearly, the Supreme and Appellate Courts of this State have held multiple times that multiple *different* crimes can constitute the same course of criminal conduct, and have the *same* criminal intent. If a defendant's objective intent for multiple crimes remains the same, they constitute the "same criminal conduct."<sup>2</sup>

In sum, "same criminal intent" means the intent to commit criminal activity, *not* the intent exclusive and specific to particular crimes. "Same criminal intent" is the criminal intent which carries through multiple different crimes. As here, if this intent is continuous and unbroken, with no pause for reflection, then it is the "same criminal conduct."

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<sup>2</sup> It may appear that this is contradicted by language the Supreme Court recently used in *Chenoweth* page 9: "Chenoweth argues that his criminal intent was to have sex with his daughter and thus rape of a child and incest required the same intent. However, objectively viewed, under the statutes, the two crimes involve separate intent. The intent to have sex with someone related to you differs from the intent to have sex with a child. Chenoweth's single act is comprised of separate and distinct statutory criminal intents and therefore under RCW 9.94A.589(1)(a) do not meet the definition of "same criminal conduct." However, by "distinct" intent it can be presumed that the Court intended to communicate to the public that incest is so distinct from child rape, and uniquely heinous, that the crimes should never be considered to have the "same criminal intent" for purposes of concurrent sentencing. Kidnapping and assault however, as in *Taylor*, are similar enough to warrant it.

*b) Assault and Threat to Kill*

These two crimes occurred simultaneously, furthered each other, and had the same criminal intent: to frighten and hurt the victim.

The description of the Assault and Threat to Kill crimes provided to the trial court began when police received a third-party 911 call of domestic disturbance. Upon arrival, the officers heard Defendant's threat to kill the victim. There is no indication in the record of the exact time frame between these two events, but the police would have responded immediately so that the assault and threat must have occurred within a matter of minutes, similar to *Tili*. It is extremely improbable, and it is not supported in the record, that Defendant had time to pause during the course of the assault and then to renew his intent to commit a new crime of Harassment-Threat to Kill, then resumed criminal activity. These two crimes were simultaneous and had the same intent: to frighten and hurt the victim.

The act of assault and threats to kill are very similar to the rape and threats that occurred in *Palmer*. The threat to kill was part of, furthered, and was inseparable from the assault that was occurring simultaneously. The assault and threat to kill were the "same criminal conduct" and should be served concurrently.

*c) Violation of No-Contact Order*

The more difficult question is whether the initial violation of the No-Contact Order at the nearby bar was part of the same criminal conduct and intent as the Assault and Threat to Kill.

Again, there is nothing in the record to indicate the time frame between the meet-up at the bar and the assaulting/threats in the Vista Hotel, but it was all on the same night. Because of the proximity of the bar to the hotel, it appears that Defendant's initial intent was to meet, threaten and hurt the victim and the subsequent acts were all part of a continuous criminal act that contained no opportunity for Defendant to pause, reflect, and renew his intent to commit criminal activity.

2. In the alternative, the trial court made an error of law in its analysis of what constitutes "same criminal conduct" and this matter should be remanded for correct application of law. The court erroneously and exclusively applied a double jeopardy analysis, rather than long-established case law regarding "same criminal conduct."

At a minimum, it is clear from the record that the trial court erred in its application of law and this matter should be remanded for a determination of same criminal conduct under the correct standard.

The verbatim record indicates that the presiding judge exclusively considered issues of double jeopardy as laid out in the *Mandanas* case the State offered. As discussed, the double jeopardy analysis was improper and irrelevant to the long-established and clear case law regarding "same criminal conduct." Neither trial counsel, defense or State, mention the applicable case law in their sentencing briefs. All parties appeared to have made the common mistakes outlined above when they incorrectly analyzed the specific intent of each crime pursuant to double jeopardy.

Therefore, the Defendant is at least entitled to a remand with the correct application of law.

**VI. CONCLUSION**

This Court should remand with instructions to sentence Defendant on all three crimes concurrently because they are part of the same criminal conduct and remand for correct application of law.

Respectfully submitted this 16th day of June, 2016.

*/s/ Edward Penoyar* \_\_\_\_\_

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