

NO. 48541-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH JOHN BAZA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00874-7

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Joel Morris Penoyar
Po Box 425
South Bend, Wa 98586-0425
Email: penoyarlawyer@gmail.com

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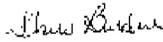
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Office ID #91103 kcpa@co.kitsap.wa.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

I. COUNTERSTATEMENT OF THE ISSUES.....3

II. STATEMENT OF THE CASE.....3

 A. PROCEDURAL HISTORY.....3

 B. FACTS6

III. ARGUMENT.....7

 A. BAZA’S THREE CRIMES DO NOT CONSTITUTE SAME CRIMINAL CONDUCT UNDER RCW 9.94A.589 BECAUSE THE COURT ORDER VIOLATION WAS NOT AT THE SAME TIME AS THE OTHER TWO CRIMES AND BECAUSE THE OTHER TWO CRIMES, ASSAULT SECOND DEGREE AND FELONY HARASSMENT, HAVE DIFFERING INTENT ELEMENTS AND SERVE DIFFERENT LEGISLATIVE PURPOSES.....7

IV. CONCLUSION.....21

TABLE OF AUTHORITIES

CASES

State v. Bobenhouse,
166 Wn.2d 881, 214 P.3d 907 (2009)..... 11

State v. Calle,
125 Wn.2d 769, 888 P.2d 155 (1995)..... 10, 11

State v. Graciano,
176 Wn.2d 531, 295 P.3d 219 (2013)..... 8

State v. Leming,
133 Wn.App. 875, 138 P.3d 1095 (2006)..... 15

State v. Mandanas,
168 Wn.2d 84, 228 P.3d 13 (2010)..... 19

State v. Mutch,
171 Wn.2d 646, 254 P.3d 803 (2011)..... 19, 20

State v. Spencer,
128 Wn.App. 132, 114 P.3d 1222 (2005)..... 17

State v. Tili,
139 Wn.2d 107, 985 P.2d 365 (1999)..... 12, 18

STATUTORY AUTHORITIES

RCW 9.94A.535..... 8

RCW 9.94A.589..... passim

RCW 9.94A.589 (1) (a) passim

RCW 9.94A.589(1)(a) 9

RCW 9A.36.021..... 16

RCW 9A.36.021 (g)..... 16

RCW 9A.46.010..... 16

RCW 9A.46.020 (1) (a) 16

RCW 9A.46.020 (1) (b) 16

RCW 26.50.110. 15

RCW 26.50.110 17

RCW 26.50.210. 15

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the three convictions constitute the same criminal conduct for sentencing purposes?

2. Whether a correct trial court ruling warrants reversal because the trial court considered arguably inapplicable authority in making that ruling?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Joseph John Baza was charged by information filed in Kitsap County Superior Court with assault in the second degree, domestic violence, felony violation of a court order, domestic violence, and felony harassment (threat to kill), domestic violence. CP 1-5. Baza entered a plea agreement with the state. CP 11. Baza agreed to plead guilty as charged. Id. In exchange, the state agreed to recommend standard range sentences for each crime and, significantly, the state agreed to forego further charging, including attempted murder and rapid recidivism and on-going pattern of domestic violence aggravating factors. CP 12. The plea agreement provided, by interlineation, that the defense could argue same criminal conduct at sentencing. Id. That interlineation is the more

significant because otherwise the present appeal would violate the plea agreement. CP 14.

Baza pled guilty. CP 17-26. He avoided admitting the facts of the case by entering an *Alford* plea, allowing the trial court to review police reports and/or certificates of probable cause in order to establish the necessary factual basis for acceptance of his plea. CP 25. At sentencing, the defense asserted its opportunity to argue same criminal conduct. Regarding that issue, the state filed a brief that cited cases which apply double jeopardy analysis or which considered the RCW 9.94A.589 same criminal conduct test only tangentially. CP 27. The defense filed a brief which cited RCW 9.94A.589 (1) (a), which is the correct statute to consider in a same criminal conduct argument. CP 33. However, the defense brief cited no cases that analyze the statutory language. Without case support, the defense argued that Baza's three crimes were done with "the same overarching criminal intent." CP 36. Interestingly, the defense never articulates to the trial court what exactly this overarching intent was. Rather, the defense argued that the various crimes were part of the "same criminal enterprise." CP 34.

At the sentencing hearing, the trial court acknowledged receipt of the briefing and invited argument on the same criminal conduct issue. RP

3.¹ The state argued the difference in the intent elements of the crimes of conviction. RP 4 *et seq.* The state asserted that

while the allegations now proven took place all over the course of essentially an event that day, there are different intents for each of those offenses, and they should be treated separately for purposes of sentencing.

RP 6. The defense argued, correctly, that if the three are same criminal conduct, or if any two of them together are, Baza would have a reduced offender score and a lower standard range. RP 9. The defense observed that the state's primary authority, *State v. Mandanas*, is a merger case and that the defense was not arguing merger. RP 10. However, the defense again argued no authority regarding same criminal conduct and held forth on the facts and analysis in *Mandanas* in making its argument. RP 11-12.

The upshot of this recitation is that neither party provided the trial court with decisional authority directly addressing RCW 9.94A.589 (1) (a). The trial court recessed the hearing in order to review the *Mandanas* case "that was argued in detail by the lawyers." RP 18. In ruling, the trial court found the case "informative" on the issue presented. RP 19. The judge found the state's presentation persuasive, but this with regard to the double jeopardy implications of the simultaneous conduct of Baza. *Id.* The trial court ruled that the individual counts do not represent same criminal conduct. RP 21. Baza was sentenced accordingly with each of

¹ All RP references are to the transcript of November 16, 2015.

the crimes being counted in the offender score for a total of eight. CP 41. The assault second degree generated the highest standard range: Baza was sentenced to the top of that range to 70 months with the other two crimes ordered to be served concurrently therewith. CP 41-42. A notice of appeal was timely filed. CP 52.

B. FACTS

The substantive facts are drawn from the police reports, endorsed by Baza in his *Alford* plea, that were submitted to establish probable cause. CP 25 (stipulation); CP 6-10 (certificates and reports).

Port Orchard police responded to a physical domestic call at the Vista Motel in Port Orchard. CP 6. At the room door, police could hear a struggle and a muffled scream coming through the door. *Id.* There was no response to the officer's knock. *Id.* Still hearing a struggle inside, the officer kicked in the door. *Id.*

Entering, the officer discovered Baza getting up off of a woman, Amber Quichocho. CP 6. She was gasping for air and bleeding heavily from her mouth. *Id.* She complained of pain in her side from Baza repeatedly kicking her. *Id.* Baza had repeatedly strangled her with his hands, arms, and legs. CP 7. While doing so, he told her that she would die. *Id.* There was an active protection order in place that restrained Baza from having contact with Ms. Quichocho. *Id.*

III. ARGUMENT

A. BAZA'S THREE CRIMES DO NOT CONSTITUTE SAME CRIMINAL CONDUCT UNDER RCW 9.94A.589 BECAUSE THE COURT ORDER VIOLATION WAS NOT AT THE SAME TIME AS THE OTHER TWO CRIMES AND BECAUSE THE OTHER TWO CRIMES, ASSAULT SECOND DEGREE AND FELONY HARASSMENT, HAVE DIFFERING INTENT ELEMENTS AND SERVE DIFFERENT LEGISLATIVE PURPOSES.

Baza argues that the trial court erred in finding that his three offenses do not constitute same criminal conduct for sentencing purposes. He also argues that he should be resentenced because the trial court considered the wrong authority in making that ruling. This claim is without merit because the court order violation, although continuous, includes an assault at a specific time which elevates it to a felony and therefore included a time not the same as the time period during which the assault second degree and harassment took place. Further, the assault and the harassment convictions have different *mens rea* elements and are found in separate and distinct sections of the Revised Code, which serve different legislative purposes. And, finally, despite the specific authority considered by the trial court in making its ruling, that ruling is correct and is supported by the record.

RCW 9.94A.589 (1) (a) provides,

(1)(a) Except as provided in (b), (c), or (d) of this subsection, 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: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

Baza must establish all the elements: time, place, victim and intent must all be the same. *State v. Chenoweth*, 185 Wn.2d 218, paragraph 3, 370 P.3d 6 (2016).² If they are all the same, Baza would have a reduced offender score and a lower standard range for sentencing. If they are not, each offense is counted with the result in this case being that Baza had a score of eight and a top end standard range of 70 month.

The trial court's decision on same criminal conduct includes factual determination with regard to time, place and victim. *Id.* The standard of review is abuse of discretion or misapplication of the law. *Id.* RCW 9.94A.589 (1) (a) is to be narrowly construed and should disallow

² The Westlaw copy of the decision has no Wn.2d pagination; citation herein is to the paragraph number.

most claims that multiple offenses are the same criminal conduct. *See State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). As noted, the defendant has the burden of proof:

The scheme—and the burden—could not be more straightforward: each 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.* The decision to grant or deny this modification is within the sound discretion of the trial court and, like other circumstances in which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion.

Id. at 540.

In *Chenoweth, supra*, the Washington Supreme Court reconciled competing analyses on the same criminal conduct question. There, Chenoweth was convicted of six counts of child rape and six counts of incest arising out of six separate single acts. *Id.* at para. 2. As is often the case in such an inquiry, the time, place, and victim elements were easily decided as matters of fact. But, as is also often the case, the intent element of the test was at issue. Chenoweth argued that the six single acts must be considered as same criminal conduct as a matter of law. *Id.* at para. 4. He argued that his singular intention on each of the six occasions was to have sex with his daughter. *Id.* at para. 10.

The Supreme Court rejected this argument. The Court held

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.”

185 Wn.2d para. 10. Thus, the intent analysis under RCW 9.94A.589 focuses on an objective consideration of the statutory intent elements. And, these crimes were not same criminal conduct even though the two statutes involve the same act, sexual intercourse. Child rape occurs when the defendant “has sexual intercourse” with the child and incest when the defendant “engages in sexual intercourse” with a relation.

In reaching this result, the Supreme Court considered that precedent has held that the legislative intent was to punish incest and rape separately. *Id.* at para. 12, *citing State v. Calle*, 125 Wn.2d 769, 778-80, 888 P.2d 155 (1995). Interestingly, *Calle* is a multiple conviction for one act double jeopardy case. The single act, as above in *Chenoweth*, was sexual intercourse. The Supreme Court, in doing double jeopardy analysis, considered legislative intent—whether the legislature intended to punish each crime separately. *Id.* at 776. In doing so, “we start with the language of the statutes themselves.” *Id.* Finding that the rape and incest statutes do not “expressly allow for convictions for each arising out of the same act of intercourse” the Court turned to statutory construction. *Id.* at 777. This included that the two statutes “serve different purposes.” *Id.* at 780.

The reference to the *Calle* decision in *Chenoweth* adds to the arguably complete same criminal conduct decision. That is, having determined that the rape and incest convictions do not constitute same criminal conduct when objectively viewing the statutory intent elements of the two crimes, it seems superfluous to observe that that decision is supported by a separate double jeopardy analysis. The more interesting because in *Chenoweth* both the trial court and the Court of Appeals had relied on *State v. Bobenhouse*, 166 Wn.2d 881, 214 P.3d 907 (2009), a case that relied on *Calle*, and held that separate convictions for rape and incest are not same criminal conduct. 166 Wn.2d at 896. Thus, double jeopardy type analysis of the legislature's intentions is found in *Chenoweth* and the precedents that case discusses. Following *Chenoweth*, then, we find that the focus of the inquiry regarding the intent element of the same criminal conduct test is on the statutory law involved.

After *Chenoweth*, the focus of the inquiry should no longer be a consideration of a judicially created overarching criminal purpose. This latter approach is what Baza argues herein, arguing that this Court should import an overarching intention to "hurt and frighten" Ms. Quichocho, find that this overarching purpose controls, and find therefore that all three crimes are same criminal conduct. This, however, is the approach championed by the dissent in *Chenoweth*. The dissent took issue with the

majority's focus on the statutory intent elements. The dissent preferred to judicially create an "objective criminal purpose." 185 Wn.2d at para. 16. Thus, "[i]ntent, 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." *Id.* (citation omitted). The dissent wants to consider concepts like "how intimately related the crimes are," "whether, between the crimes charged, there was any substantial change in the nature of the criminal objective," and "whether one crime furthered the other." *Id.* In short, the dissent would perpetuate this sort of attempt to divine some overarching purpose in the defendant's intentions with concepts that are neither found in RCW 9.94A.589 (1) (a) nor in the statutory *mens rea* elements of the crimes being considered. This leads to nice distinctions as to whether separate crimes are "sequential, *not simultaneous* or continuous" or whether the crimes are "continuous, uninterrupted" evincing an "*unchanging pattern of conduct.*" *Id.* at para. 20-21, *citing, inter alia, State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999) (emphasis by the court). Moreover, this approach clearly conflates the time element of the test with the intent element of the test: simultaneity and the like are time considerations which simply do not answer the question of whether or not a particular defendant intended the commission of multiple separate crimes within a compressed amount of time. This is a conceptual difficulty that does not attend the straight-forward approach of the

Chenoweth majority.

The majority approach and holding cannot be reconciled with the dissent's importation of the time element into the intent element. In the case, since Chenoweth committed child rape and incest *simultaneously*, the dissent would give him one uncounted crime by finding that the same time element controls the same intent element:

Because only a single act occurred, the corresponding incest and rape crimes necessarily occurred simultaneously and each crime was based on the same (unbroken, continuous, and unchanging) conduct. Objectively viewed, the criminal intent of the conduct comprising each pair of charges for each of the six incidents was the same.

The time element controls the intent element and the singular nature of the act is seen as important, which does not follow since the question in the first instance is whether or not multiple acts, simultaneous or temporally close to one another, have the same intent. The intent element of the test need not even be reached if close temporal proximity does not obtain.

In the present case, it is questionable whether Baza would have relief even under the *Chenoweth* dissent. Baza sides with the dissent in arguing that the inquiry is not focused on the statutory intent element. Brief at 8. He erroneously focusses on the simultaneity of the assault and harassment crimes. Brief at 10. Baza in fact shows us that two separate intents were occurring in arguing that he intended to both "frighten and hurt" Ms. Quichocho. His intent to "frighten" her is part and parcel of the

harassment conviction. His intent to “hurt” her is part and parcel of the assault (by battery) conviction. Baza invents, as the *Chenoweth* dissent would, an overarching intention containing multiple separate intentions—“to meet, threaten, and hurt the victim.” Brief at 11. Then, as the *Chenoweth* dissent would, Baza imports the time element into the intent element, arguing that the closeness in time means that his alleged overarching intent is controlling. No pause is taken to consider that in reality Baza’s intent to violate the no-contact order could easily have occurred well before an argument that resulted in his intent to assault and that while proceeding to intentionally assault he knowingly, and independently, decided to threaten her life.

Moreover, one difficulty found in the rape and incest cases is not present. There, one act constituted both crimes causing the difficulty that the *Chenoweth* dissent has in applying the simultaneity time consideration to the question of intent. But here there are multiple acts: knowingly violating the no-contact order by the act being in Ms. Quichocho’s presence at the bar and committing an assault that elevated that charge to a felony, intentionally assaulting her by the act of strangulation, and knowingly threatening her life by the act of uttering the words. Given these three distinct acts (and the three distinct intentions that Baza identifies as to each of the acts), Baza’s claim that they constitute same

criminal conduct is diminished. These are separate crimes with separate criminal intentions that all happened to the same victim and happened in places and at times near to one another.

As *Chenoweth* requires, the actual statutory crimes that Baza committed are to be considered without reference to an invented overarching criminal purpose. Baza’s violation of order is under RCW 26.50.110. Title 26 RCW is the domestic relations statute and subsection 26.50 is specific to domestic violence prevention. The legislature has provided that under the domestic violence statute “any proceeding” is “in addition to other civil and criminal remedies.” *See State v. Leming*, 133 Wn.App. 875, 886, 138 P.3d 1095 (2006), *citing* RCW 26.50.210. A crime is committed when a restrained person who “knows of the order” violates any of the restraining provisions of the order. In general, this “knows of the order” clause is the only mental element of the crime.³ In Baza’s case, his plea of guilty entails that he knew of the order. Knowledge, then, is the primary *mens rea* requirement of the statute. Here, however, the matter was elevated to a felony by the allegation that there was an assault in violation of the order. Thus in this case another mental state is added to the intent stew—that Baza intentionally assaulted Ms. Quichocho in violation of the order.

³ Subsection (1) (a) (iii) prohibits “knowingly” being within a proximity to the protected

Similarly, the crime of harassment is found when a person “knowingly threatens” another person, RCW 9A.46.020 (1) (a), and “places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020 (1) (b). By subsection (2) (b) (ii) (threat to kill) the crime is elevated to a felony. Harassment, 9A.46, has its own section of the criminal code. The legislature specifically found that “prevention of serious, personal harassment is an important government objective.” RCW 9A.46.010.

Assault in the second degree is found in a separate section of the criminal code. RCW 9A.36.021. One alternative means of committing assault second is “strangulation or suffocation.” RCW 9A.36.021 (g). An assault requires intentional conduct. *See* WPIC 35.50. Thus, in this event, the two crimes, assault and harassment, that occurred at the same time, have different statutory intents—knowingly and intentionally. With regard to the test for same criminal conduct, harassment and assault do not have the same intent. That piece of the RCW 9.94A.589 test fails in this case.

Coming back to the court order violation count, in the police reports stipulated to by Baza, Ms. Quichocho tells the responding officers about the details of the incident. CP 8-9. She indicates that she had

person that is proscribed by the order.

checked into the Vista Motel and Baza had met her there. CP 9. The two then visited two drinking establishments before returning to the Motel where the assault and harassment occurred. *Id.* Thus the facts indicate that Baza committed the crime of violation of a court order well before the other two crimes were committed. It should also be noted that by his plea of guilty Baza accepted the element of that charge that elevated the violation to a felony. Specifically, he accepted that there was another assault, not amounting to assault second degree, in violation of the court order. *See* RCW 26.50.110 (requiring that the assault in violation not amount to assault first or second degree). And, the record does not reflect when and where this additional assault occurred. But on the available record, it seems clear that that crime had been committed before the assault second and harassment. *But see State v. Spencer*, 128 Wn.App. 132, 114 P.3d 1222 (2005) (holding that violation of a court order is a continuing offense). The offense of violation of a court order may continue but the fact, assault, elevating the violation to a felony must have occurred before the assault second and the harassment. The record does bear this out because the arrival of the police occurred while the assault second was happening. Thus the time element of the test is not met: Baza's violation of the court order occurred at a different time than the other two offenses. A contrary holding, based on the continuing nature of the crime of violation of a court order, would allow a defendant to avoid

punishment for a crime committed while the order violation continued. This in turn would violated the above noted legislative intention that such a domestic violence crime be “in addition to other civil and criminal remedies.”

On this record, or lack thereof, the court order violation is temporally separate from the other two crimes and therefore the time element of the test is not met. Further, the two simultaneous offenses have different *mens rea* elements and serve different legislative purposes. As a result, this case falls squarely within the rule that same criminal conduct under RCW 9.94A.589 is to be narrowly construed to disallow most such claims. The result the trial court reached was correct. There was no abuse of discretion and no error.

But Baza claims that it matters that the trial court reached the right destination by taking the wrong path. Since the trial court referred to a double jeopardy case in making its statutory same criminal conduct decision, Baza claims that he should be given another sentencing hearing. First, it should be noted that the Supreme Court in *Chenoweth* did what the trial court did in the present case: both courts took account of cases applying a closely related concept. The Supreme Court’s RCW 9.94A.589 analysis included the double jeopardy case, *Tili*, for the obvious reason that that case includes an analysis of the same substantive crimes. And

with an analysis that is focused on the statutory elements of those substantive crimes, it is perfectly reasonable to consider a previous, and closely related, take on the meaning of those elements with regard to the same criminal conduct test. The trial court did just that in considering *State v. Mandanas*, 168 Wn.2d 84, 228 P.3d 13 (2010).

The *Mandanas* case deals with “felony assault and felony harassment.” *Id.* The precise question addressed was whether or not multiple firearms enhancements are to be served concurrently or consecutively when the underlying offense constitute same criminal conduct. *Id.* at 86. *Mandanas* argued that the latter result, consecutive sentencing, would also violate double jeopardy. *Id.* But this issue was not considered by the Court because beyond the scope of the grant of review. *Id.* at 90. The Court ultimately held that even with a finding of same criminal conduct, the multiple firearms enhancements are to be served consecutively. *Id.* RCW 9.94A.589 (1) (a) is considered as it applies to the enhancement issue only. *Id.* at 89.

We are not told in the record why the trial court found the case helpful on the issue. But it is the correct result that matters. In *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011), sentencing for five counts of second degree rape and one count of kidnapping was reviewed. *Id.* at 651. Among other things, *Mutch* argued that the five rape convictions were

miss-scored and thus miss-sentenced because not scored as same criminal conduct. *Id.* at 654. The Supreme Court affirmed the finding that the five counts are not same criminal conduct. *Id.* at 655-56. However, this affirmance was based on the Supreme Court's independent review of the facts of the case because "although there was some argument at the resentencing hearing, the court's analysis is not evident from the record." *Id.* at 654. But, "[n]evertheless, there is sufficient evidence in the trial court record to sustain a finding that the multiple rapes should be treated separately for sentencing purposes." *Id.* And, "[w]hile the trial court should have done this analysis on the record, the trial record is sufficient to sustain the ultimate finding that Mutch's five rape counts are not the same criminal conduct for sentencing purposes." *Id.* at 655-56.

The trial court in *Mutch* could have based its ruling on any number of unknown criteria. But the path the trial court took to reach the result that was supported by the record had no consequence on appeal. What matters is the destination: that the ruling was correct under the law and supported by the facts in the record. In the present case, this Court may take issue with the trial court's approach to its ruling but this does not change that the ruling is correct and supported by the record. Remand would be an empty gesture because the result would be the same. There was no error and Baza's sentence should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Baza's sentence should be affirmed.

DATED August 15, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney

Office ID #91103
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR

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