

No. 50033-7-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD G. NEIGHBARGER

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 15-1-03789-9

BRIEF OF APPELLANT

WAYNE C. FRICKE
WSB #16550

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue, Suite 302
Tacoma, Washington 98405
(253) 272-2157

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the defendant his due process rights to attack the credibility of J.N.

2. The trial court erred when it allowed the state to introduce 404(b) evidence.

3. The trial court erred when it allowed the state to amend the charges.

4. There was insufficient evidence to convict Mr. Neighbarger of counts I-IV and XI-XIII.

5. Mr. Neighbarger was denied his right to a fair trial due to the multiple errors at trial.

6. The trial court erroneously calculated the offender score as 38

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it refused to allow the defense to present reputation evidence of J.N.'s propensity for dishonesty?

(Assignment of Error #1)

2. Whether the trial court erred when it allowed testimony regarding an alleged sexual encounter between Mr. Neighbarger and J.N. that occurred years after the charges herein and after J.N. was 19 years old?

(Assignment of Error #2)

3. Whether Mr. Neighbarger's due process rights were violated when the state was allowed to orally amend the information during trial.

(Assignment of Error #3)

4. Whether the convictions for counts I-IV and XI-XIII were proved beyond a reasonable doubt.

(Assignment of Error #4)

5. Whether the multiple errors require a new trial if the court found that standing alone, they do not so require.

(Assignment of Error #5)

6. Whether counts I-IV and XIII should have been counted as a single continuing conduct for purposes of the calculation of the offender score?

(Assignment of Error #6)

7. Whether Counts VI through X should have been counted as a single continuing course of conduct for purposes of the calculation of the offender score?

(Assignment of Error #6)

III. STATEMENT OF THE CASE

A. Procedural History

On September 23, 2016 Richard Neighbarger was charged with six counts of rape of a child in the first degree. .CP 3-7. The charges involved allegations made by Mr. Neighbarger's two sons, J.N. and Z.N. On September 23, 2016, the State filed an amended information adding several others charges, including incest in the first degree. CP 11-18.

Prior to trial the defense moved to prevent the state from admitting evidence of an alleged assault of Z.N. at the hands of Mr. Neighbarger that occurred years after the allegations made in the trial. The court ruled the evidence admissible to demonstrate the reasons that the J.N. and Z.N. delayed the reporting of the fear of the victims. Additionally, the defense objected to the admission of any testimony relating to an allegation that Mr. Neighbarger performed oral sex on J.N. years after the allegations herein and when J.N. was 19 years old. The reason for its admission was to show "lustful disposition and the norm within the family that allegedly had been created". RP17:12-17.

During trial, the State orally moved to amend the dates as to counts XI, XII and XIII to expand the dates of the charges after the cross examination of the witnesses. RP 456: 20-24; RP 508: 21-24. The court allowed the amendment as to Count XIII over the defense objection. RP 509: 10 – RP 513:9 This amendment expanded the dates of the allegation to August 9, 2013. RP 513: 10-11.

Additionally, during the trial, the defense attempted introduce into evidence through Ms. Neighbarger that J.N. was less than honest. RP 513: 16- RP 514: 9. The state's objection was based on the evidentiary rules specifically would not allow it. RP 515: 19-20. The court refused to allow this testimony, (RP 515-16) notwithstanding the fact that the state was allowed to

bolster his “credibility” through his own testimony and that of the expert witness, Keri Arnold. Indeed, the state argued that the jury could consider Ms. Arnold’s testimony in evaluating the credibility of the accusers. RP 661: 14- RP 665: 6.

Additionally, the court allowed J.N. to testify as to his desire to protect Z.N. in during the course of the alleged abuse. RP---

During its closing argument, the state set forth its theory of the case as it related to the various counts. In sum, the state argued that counts VI through X were based on a single incident. RP 674: 17-21. It also argued that the for counts I through IV, it was relying, not on specific acts, but the general testimony of J.N. RP 666: 3-25. J.N. testified that the first incident occurred at his grandmother’s house when he was 4 years old and involved anal sex. RP 405: 8-24. The state did not use this as a basis to convict however. RP 665: 8-13. J.N. testified that this occurred when he was between the ages of 6 and 7 and involved both he and his father performing anal sex on each other in the recreation room in the rental house. RP 405: 17-23. He further testified that it occurred in the Puyallup residence while in Middle School and involved oral sex. RP 409: 6-20.

Ultimately, Mr. Neighbarger was convicted of all of the counts and the jury found several aggravating factors. CP 253-278. The court found that the proper offender score was 38 with a guideline range of 240-318 months on the rape charge and 77-102 months on the incest charge. CP 314-331. He was sentenced to an indeterminate exceptional sentence of no less than 480 months in the Department of Corrections. CP 314-331.

B. Facts

J. N. and Z.N. alleged multiple acts of rape and molestation while growing up in the various Neighbarger households. The allegations came forth when Z.N. wrote a paper for one of

his classes and provided it to his teacher. RP 53: 8-17. The teacher then reported it to the principle, who then reported it to the police. RP 63: 1-17. Subsequently, J.N. stated he was molested as well.

While J.N. was vague as to what happened to him, he reported engaging in sexual intercourse with his father on separate occasions between March 7, 2000 and March 6, 2008 by various means and in different locations within the Puyallup residence where the family lived. RP 383: 8-19. He also testified that he in fact engaged in sex with his brother and father on a single occasion after initially denying that it occurred. He further testified that he was in elementary school when it happened in the Puyallup house and that it involved oral sex, but not anal sex. RP 409: 6-RP 410: 17. He left elementary school when he was 11. RP 410: 16-17. J.N. was born on March 7, 1996. RP 366: 6-7. Thus, according to him, this event involving his brother would have occurred no later than 2007. According to him, Z.N. would have been seven years old at the time. RP 410: 18-20.

Conversely, Z.N. described three different encounters, all of which occurred in the Puyallup residence. He stated they ended when he turned the age of 10 after the third encounter when he and his brother were forced to engage in various sexual acts between the three of them. RP 132: 5 through RP 134: 20. He was born on August 10, 2000, thus the last time it occurred would have been in the year 2010. RP 98: 3-4.

While on the face of the testimony, it appears that the two statements coincide with each other, a review of J.N.'s testimony indicates he made up the statement in an attempt to support his brother. He initially told the investigators he could not attest to certain things that his brother had stated, he did tell them if his brother stated certain information, then it was true. RP 429: 21

through RP 430: 13. He then changed his testimony to reflect what his brother had stated. They acts as described by Z.N. are set forth as follows:

Count V: RAPE OF A CHILD IN THE FIRST DEGREE occurring between 2005-07.

In describing what he recounted as the first instance of sexual abuse, Z.N. described that he was 5 years old and went into his father's room, where he was watching child pornography. RP 117: 3-18. At this time he was told to sit on his father's lap and his father proceeded to masturbate him. RP 118: 1-14.

Count VI-X: RAPE OF A CHILD IN THE FIRST DEGREE occurring between 2006-09.

Z.N. described this situation occurring in the living room when he was 7 years old. RP 122: 3-18. He testified that it happened at night and his dad masturbated him while watching a pornography video on "redtube". RP 123: 8-16. He testified that he then performed oral sex on his father, who also performed anal sex on him. RP 126: 7- RP 128: 16.

Count XIII: RAPE OF A CHILD IN THE FIRST DEGREE occurring between 2006-09.

The last act testified by Z.N. involved the situation occurring with him, his brother and his father in the living room when he was 10 years old. RP 132: 5-8. He testified that oral and anal sex occurred with his brother at one point performing anal sex on his father. RP 133: 16-18.

While J.N. seemingly confirmed the accusation made by Z.N. regarding the sexual event between the three individuals, this was done only during his testimony wherein he stated that it occurred. However, he initially told the investigator he had no recollection of this event. RP 430: 6-17. He only stated that if his brother stated it happened then he would believe it happened. RP 430: 6-7. He further stated that he told his attorney, who was the prosecutor in private conversations. RP 430: 14-20. Moreover, the description of the event is entirely inconsistent with that given by his brother as set forth above.

Sarah Neighbarger, mother to J.N. and Z.N., and wife of Richard Neighbarger testified to the events leading up to the disclosure. Through documents demonstrating her and her husband's attendance at a gala on Friday, September 11, 2015, she was able to demonstrate that they had made contact with an author, who had written a book on sex abuse of boys. RP 518: 16- RP 520: 24. Ex. 37,38,41. She then discussed this with both of her sons on Saturday, September 12, 2015, a couple of days prior to the disclosure. RP 521: 3-12.

Additionally, Ms. Neighbarger was able to definitively establish that the flat screen television was purchased on November 10, 2010. RP 523:10-25; Exhibit No. 42.

Finally, Ms. Neighbarger testified to the discipline that was used in the household and the reason and date that Z.N. left the residence. First, she punished the kids by spanking with a belt or by hand. RP 529: 5-13. Conversely, Richard Neighbarger instilled discipline by forcing the boys to do pushups or grabbing them by the back of the neck. RP 529: 18-19. She never witnessed him hitting them with pots and/or pans. RP 529: 20-22.

Ultimately, J.N. joined the reserves. He joined in the fall of 2014 and returned in May 2015. RP 530:1-18. Upon his return he moved back into the Puyallup residence and a written agreement was signed setting forth the rules he needed to live by. RP 531: 1-6. Subsequently, friction developed and he was required to move out of the house in the first part of February 2016. RP 531: 13-20. Z.N. followed him out of the house in May 2016. RP 531: 22-23.

Richard Neighbarger denied all of the allegations. He testified that he served in the military between 1997 and May 5, 2003, when he got out. RP 537: 13-18. Afterward, he started working for T-Mobile, through Connecticom, a temp agency, in August of 2003, while his wife worked for Starbucks. RP 539: 1-14. Subsequently, T-Mobile hired him directly in January 2006. RP 539: 17-20.

Initially, he, his wife, and two sons lived at an apartment on 112th and Golden Given, until moving to the Puyallup residence in April 2004. RP 540: 18-22. J.N. was approximately 4 years old and Z.N. was approximately 8 years old when they moved into the Puyallup residence. RP 543: 21-25. He worked in Kent. He would typically be at the office at about 5:00 a.m. and return home in the evening at about 8:00 p.m. RP 545: 14-24. Because he had been in the military and then was focusing on his career he was not very close to either of his sons. RP 544: 14-25.

Upon receiving a promotion at his work in 2009, the layout of the residence in Puyallup changed. RP 546: 22-24. Prior to this time, the boys shared a single room and there was a separate computer room. Beginning in 2010 the boys had separate rooms. RP 547: 2-8.

IV. ARGUMENT

A. MR. NEGBARGER'S DUE PROCESS RIGHTS TO PRESENT A DEFENSE WERE DENIED WHEN THE COURT WOULD NOT ALLOW THE DEFENSE TO PRESENT EVIDENCE OF J.N.'S REPUTATION FOR DISHONESTY.

'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164, L.Ed.2d 503 (2006)(quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L.Ed.2d 636 (1986)). As stated by the United States Supreme Court:

"...in plain terms the right to present a defense [is] the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

State v. Lizarraga, 191 Wn. App. 530, 552, 364 P.3d 810 (2015)(quoting *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988)(quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L.Ed. 2d 1019 (1967))). And while the rule makers are given broad latitude to establish evidentiary rules excluding evidence from criminal trials they cannot be arbitrary or disproportionate to the purpose they are designed to serve. 191 Wn. App at 553(citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)).

As noted by Division I, per se rules excluding an entire class of testimony may violate a defendant's right to present a complete defense. *State v. Cayetano-Jaimes*, 190 Wn.App. 286, 298, 359 P. 3d 919 (2015)(citation omitted). Indeed, as the court noted, a defendant "...has the right to present relevant evidence, and "[i]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." 190 Wn. App. at 297-98(quoting *State v. Jones*, 168 Wn. 2d 713, 720, 230 P.3d 576 (2010)).

Here, the defense and the state called Sarah Neighbarger to the stand to testify to various facts relevant to the case. However, the defense was precluded from questioning her regarding J.N.'s reputation for veracity. Indeed, the state's argument, which the court accepted, was that the evidentiary rules in essence categorically prohibited the proffered testimony. The state's objection and the court's refusal directly impeded the ability to attack the credibility of the witness and was based on an arbitrary application of the rules. It impeded the defense ability to present a defense and denied his due process rights, while the state was allowed to bolster the witness's credibility and argue it to the jury during closing argument.

The only issue should be whether the exclusion of the testimony was harmless. *Cayetano-Jaimes*, at 303. Error is harmless if beyond a reasonable doubt the jury would have reached the

same result without the error. *Id.* In *Cavetana-Jaimes*, the court found that the error was not harmless where the court did not allow the defendant to proffer certain evidence. In explaining that the error was not harmless, the court noted that:

“...the jury would have heard important testimony from a person outside Cayetano-Jaimes’s immediate family—testimony made more powerful because the witness was the victim’s biological mother. Given the other proof issues in the case, this additional evidence could have raise enough reasonable doubt to cause the jury to reach a different result.

Id.

Likewise, the evidence proffered here was of high probative value, especially considering that it would come from the victim’s biological mother. As it was, the defense was only allowed to resurrect Ms. Neighbarger’s credibility after the state had questioned her veracity relating to attending a gala at the University of Washington. Coupled with the state eliciting from J.N. matters not relevant to the case, but admitted only to support his credibility, the error was prejudicial.

B. THE COURT SHOULD REVERSE THE CONVICTONS BECAUSE THE STATE WAS ALLOWED TO INTRODUCE 404(b) EVIDENCE TO SHOW THAT MR. NEIGHBARGER ACTED IN COMFORMITY WITH THE ALLEGATIONS IN THE CASE.

Generally, evidence of a defendant's prior crimes, wrongs, or acts is not admissible to show that he has a propensity to commit crimes. ER 404(b); *State v. Gunderson*, 181 Wn.2d 916, 921, 337 P.3d 1090 (2014). But such evidence may be admitted for other purposes, such as proof of the defendant's lustful disposition towards the victim or to prove a common scheme or plan. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012); *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991).

When the State offers evidence of a defendant's prior misconduct, before admitting the evidence, the trial court must (1) find by a preponderance of the evidence that the prior

misconduct occurred; (2) identify the purpose for introducing the evidence; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) balance the probative value of the evidence against its prejudicial effect. *Gunderson*, 181 Wn.2d at 923; ER 403; ER 404(b). The trial court must conduct this analysis on the record. *State v. Slocum*, 183 Wn.App. 438, 448, 333 P.3d 541 (2014). Here, the court did not go through the balancing process on the record, which, in and of itself, is error.

Perhaps more importantly, however, the court allowed the evidence for prohibited purposes. *Gunderson, supra*.

1. The Court Erred in Allowing Testimony of an Incident Involving J.N. that Occurred Several Years After He was Sexually Assaulted and After He was Over the Age of Eighteen.

Both J.N. and Z.N. testified about text messages and an alleged incident occurring between Mr. Neighbarger allegedly performed oral sex on Z.N. during the summer of 2015. At the time of the alleged incident Z.N. was 19 years old. He had previously testified that the last time he had been sexually assaulted was when he was no older than 14 years of age. The state requested that the evidence be admitted to show lustful disposition. The court admitted the evidence to show “the norm within the family” and lustful disposition. RP 17: 12-17.

The norm within the family is simply another way of saying it is being admitted to show “propensity”. As the court is aware this is strictly prohibited. The defense concedes that evidence of prior sexual misconduct may be admitted to show the defendant's lustful disposition toward the victim "for the purpose of showing the lustful inclination of the defendant toward the [victim], which in turn makes it more probable that the defendant committed the offense charged." 116 Wn.2d at 547. (internal quotation marks omitted). “The limits of time over which evidence may range lies within the discretion of the trial court." *Id.*

However, in a situation where the evidence is to show his disposition to commit child rape of the victim when the evidence is that the encounter involved consenting adults, the evidence is not relevant. It simply cannot be reasonably argued that any lustful disposition that existed towards an adult makes it more probable that the accused had the same lustful disposition towards the individual when he/she was no more than fourteen years of age. Under these circumstances the evidence was not relevant. Additionally, any probative value was outweighed by the prejudicial effect of the evidence. As a result, it was error to allow for its introduction.

C. THE COURT VIOLATED MR. NEIGHBARGER'S CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN IT ALLOWED THE ORAL AMENDMENT OF THE CHARGING DOCUMENT TO EXPAND THE TIME OF THE OCCURRENCE OF THE ALLEGED SEXUAL ASSAULT ON COUNT XIII.

CrR 2.1(e) provides:

Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

Any amendment within the parameters of CrR 2.1(e) must not violate the restrictions contained within article 1, section 22. During the investigatory phase of a case amendments to the original information are liberally allowed. *State v. Pelkey*, 109 Wn. 2d 484, 490, 745 P.2d 854 (1987). However, as noted in *Pelkey*, the constitutionality of amending an information after trial has already begun presents a different question. As stated therein:

Mid-trial amendment of a criminal information has been allowed where the amendment merely specified a different manner of committing the crime originally charged, *State v. Gosser*, 33 Wn.App. 428, 656 P.2d 514 (1982), or charged a lower degree of the original crime charged, *State v. Brown*, 74 Wn.2d 799, 447 P.2d 82 (1968). A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation against him or her. Such a violation necessarily prejudices this substantial constitutional right, within the meaning of CrR 2.1(e). The trial court committed reversible error in permitting this mid-trial amendment.

Id. at 490-91.

Similarly, the court should reverse the conviction on Count XIII. This was not an amendment to a lesser included charge or changing the manner of the charge. It was allowing the state to change the factual allegation mid way through trial to the detriment of Mr. Neighbarger in violation of his right to notice of the charges against him. As such, the court should reverse the conviction.

D. THE COURT SHOULD REVERSE THE CONVICTIONS FOR COUNTS BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. NEIGHBARGER OF THE CHARGES.

As this court is aware, due process requires the state to prove its case beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). When challenging the sufficiency of evidence, this court must determine:

[w]hether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Weisberg, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). *See also, State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). However, notwithstanding this proposition, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1346 (1971). A challenge to the sufficiency of the evidence is fact sensitive. *State v. Colquitt*, 133 Wn.App.789, 799, 137 P.3d 892 (2006).

Here, the jury was allowed to convict Mr. Neighbarger of Count XI, XII and XIII based on mere speculation. The testimony of both J.N. and Z.N. differed in so many respects that any conviction could only be based on speculation. The dates were inconsistent, the description of the events were inconsistent and, notwithstanding the courts decision to allow the oral amendment of the information, the testimony was so inconsistent from one another, including

J.N.'s initial denial that it ever happened that the conviction was only based on speculation and conjecture.

Likewise, the evidence was insufficient to convict on Counts I-IV.

The Fifth Amendment to the United States Constitution forbids entering multiple convictions for the same offense. *State v. Freeman*, 153 Wn. 2d 765, 770-71, 108 P.3d 753 (2005). Because this involves a question of law, whether an individual has been convicted twice for the same conduct in violation of the double jeopardy clause is reviewed de novo. 153 Wn. 2d at 770. If there is any question that the two convictions arise from the same conduct, the rule of lenity requires that the ambiguity be resolved against allowing a single incident to support multiple convictions. *State v. Tvedt*, 153 Wn.2d 705, 711, 107 P.3d 728 (2005).

Here, the issue arises as to Counts I-IV based on the state's closing argument. Because it argued that the jury could convict Mr. Neighbarger of Counts I-IV, using any conduct as a basis for the conviction, the court cannot be certain that it did not use the very same conduct to convict. While the to convict instruction indicates that different conduct should be used to convict the testimony from J.N. was so vague the conviction could only have been based on speculation.

E. THE COURT SHOULD REVERSE MR NEIGHBARGER'S CONVICTION BECAUSE OF THE CUMULATIVE ERRORS THAT OCCURRED.

Reversal may be required due to the cumulative effects of trial court errors, even if each error standing alone would otherwise be considered harmless. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992). Error may take one of two forms--constitutional and non-constitutional error. *State v. Whelchel*, 115

Wn.2d 708, 728, 801 P.2d 948 (1990); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

Constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *Whelchel*, at 728; *Guloy*, at 425. Non-constitutional error requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Here, the errors argued above unfairly prejudiced Mr. Neighbarger's right to a fair trial. In addition to insufficient evidence to support a conviction on some the counts, Mr. Neighbarger was prejudiced by the erroneous admission of evidence in a case based on credibility where he was prevented from presenting a defense and calling into question the credibility of the witnesses. Together, the errors contributed to deny him a fair trial.

This was a case where the state's evidence was largely inconsistent, and the jury was to consider the credibility of the complaining witnesses and other witnesses, including Mr. Neighbarger. Because it cannot be stated beyond a reasonable doubt that conviction would stand absent the jury receiving, and not receiving, the evidence as outlined above, this Court should reverse his convictions.

F. THE COURT SHOULD REVERSE THE SENTENCE BASED ON THE INCORRECT CALCULATION OF THE OFFENDER SCORE AND HOLD THAT THE CORRECT OFFENDER SCORE IS 14.

As the court is aware, in calculating the offender score, those offenses which encompass the "same criminal conduct", as defined pursuant to RCW 9.94A.589 (1) (a), count as a single offense. The inquiry as to what counts as the "same criminal conduct" is governed by the above

statute and the case law interpreting it. *State v. Haddock*, 141 Wn.2d 103, 109, 3 P.3d 733 (2000). It is within the trial court's discretion to determine whether the offenses constitute the same criminal conduct. *See State v. Graciano*, 176 Wn. 2d 531, 295 P.3d 219 (2012). For purposes of appeal, however, the calculation of the offender score is reviewed de novo, with the determination of what constitutes the same criminal conduct for abuse of discretion or misapplication of the law. *State v. Johnson*, 180 Wn. App. 92, 100, 320 P.3d 197 (2014).

"Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed to same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The only question is whether various counts involve the same criminal intent. This issue was addressed in *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999). In *Tili*, the court held that, in a situation similar to that occurring here, the multiple offenses of rape should constitute the same criminal conduct. The court concluded:

The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next.

...

... Tili's three penetrations of L.M. were continuous, uninterrupted, and committed within a much closer time frame—approximately two minutes. This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration. . . .

... Tili's unchanging pattern of conduct, coupled with an extremely close time frame, strongly supports the conclusion that his criminal intent, objectively viewed, did not change from one penetration to the next. This conclusion is consistent with both *Walden* and *Grantham*. We hold that the trial court, having failed to articulate any other viable basis to find Tili's conduct "separate and distinct," abused its discretion in failing to treat Tili's three first-degree rape convictions as one crime under RCW 9.94A.400(1)(a). Therefore, Tili should be sentenced under RCW 9.94A.400(1)(a), and not under RCW 9.94A.400(1)(b), because Tili's three first-degree rape convictions.

139 Wn.2d 107, 124-5, 985 P.2d 365 (1999)(citations omitted).

In this case there are two groups of charges that should have been considered as a single offense for sentencing purposes, rather than the separate charges found by the trial court.

1. The Court Should Find That Counts VI Through X Consist of the Same Criminal Course of Conduct.

As the State argued, these counts arose out of the same incident. They involved Z.N. As the state argued, "...that's the one incident that happened on the couch..." RP 679: 1-3. And the state continued to argue that it was simply a progression of different types of sexual acts occurring against the same individual during the same assaultive conduct. As in *Tili*, they were continuous, uninterrupted and occurred in a short time frame. Thus, as in *Tili*, they should have only been considered a single offense for sentencing purposes.

2. The Court Should Find That Counts I Through VI and XIII Consist of the Same Criminal Course of Conduct.

For the same reasons, the court should find that these counts should be considered the same course of conduct. As noted above, the defense is of the position that count XIII should be dismissed in its entirety for the reasons stated, however, if the court does not concur, then given the ambiguity as to what the jury relied upon in convicting Mr. Neighbarger of all of these counts, the court should find that they all consisted of the same criminal conduct.

As such, the correct offender score would be a level of 16 and not the 38 that the court concluded was the appropriate score.

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V. CONCLUSION

Based on the files and records herein, Mr. Neighbarger requests that this court grant his appeal in whole or in part.

DATED this 15th day of September, 2017.

HESTER LAW GROUP, INC. P.S.
Attorneys for Appellant

By: 
WAYNE C. FRICKE
WSB #16550

CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this brief to be served on the following in the manner indicated below:

Counsel for Respondent

Kathleen Proctor
Deputy Prosecuting Attorney
930 Tacoma Avenue South, #946
Tacoma, WA 98402

- U.S. Mail
- Hand Delivery
- ABC-Legal Messengers
- Email

Appellant

Richard G. Neighbarger
c/o Sarah Neighbarger
4010 - 9th St. Pl. SE
Puyallup, WA 98374

- U.S. Mail
- Hand Delivery
- ABC-Legal Messengers
- Email

Signed at Tacoma, Washington this 15th day of September, 2017.



KATHY HERBSTLER

HESTER LAW GROUP, INC., P.S.

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