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Division II
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NO. 51349-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

HAROLD STATEN,

Appellant.

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

The Honorable Gregory Gonzales, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE SECOND DEGREE KIDNAPPING WITH SEXUAL MOTIVATION AND INDECENT LIBERTIES CONSTITUTED THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES.

The State does not dispute that the kidnapping and indecent liberties involved the same victim. Instead, the State asserts that Staten's criminal intent in committing the two offenses is not the same. Brief of Respondent (BOR) at 10-13. Relying on State v. Chenoweth, 185 Wn.2d 218, 223, 370 P.3d 6 (2016), the State first argues that under a "statutory analysis" the offenses does not constitute same criminal conduct because they have different criminal intents. BOR at 10-11.

As addressed fully in the opening brief however, the holding of Chenoweth does not change the objective criminal purposes standard articulated in State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Brief of Appellant (BOA) at 16-17. In any event, case law interpreting the "same criminal intent" language in RCW 9.94A.589(1)(a) distinguishes it from the mens rea element of the particular crime involved. The inquiry in this context is not whether the crimes share a particular mens rea element but whether the offender's objective criminal purpose in committing both crimes is the same. State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (quoting State v. Adame, 56 Wn. App.

803, 811, 785 P.2d 1144 (1990)), rev. denied, 182 Wn.2d 1022, 347 P.3d 458 (2015). This includes whether the crimes were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995). “The test takes into consideration how intimately related the crimes committed are” and whether one crime furthered the other. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Here, the kidnapping with sexual motivation furthered the indecent liberties offense.

The State next argues that under an "objective facts analysis" Staten's kidnapping of E.B. ended when they arrived at the park and therefore when he committed the indecent liberties he had formed a "new and different criminal intent[.]" BOR at 11-12. This argument fails for several reasons.

First, it wholly ignores the State's theory of the case at trial in which the prosecutor argued to the jury that Staten's overall intent in kidnapping E.B. was to facilitate sexual contact. BOA at 13 (citing RP 297-98). It also ignores the jury's finding that Staten committed the kidnapping with sexual motivation. BOA at 12-13 (citing CP 94-95; RP 345). The jury's unequivocal finding shows that Staten committed the kidnapping to accomplish the objective of sexual contact with E.B.

Second, the State's attempt to distinguish State v. Longuskie, 59 Wn. App. 838, 847, 801 P.2d 1004 (1990), by arguing that the kidnapping of E.B. ended upon arrival at the park is not supported by the evidence.

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

The offenses involved a “continuing, uninterrupted sequence of conduct.” State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997). The indecent liberties occurred in the midst of the kidnapping. The kidnapping occurred for the purpose of effectuating sexual contact. As E.B. explained,

from the moment Staten arrived at her house and put her in the car, his goal was to "make another baby." RP 101, 119-21, 124-25, 185.

The State's reliance on State v. Larry¹ and State v. Classen² to suggest otherwise is unpersuasive. Larry involved a conspiracy to rob a Burger King. 108 Wn. App. at 898-99. Rather than commit the robbery during the two hours they waited outside the restaurant, Larry and his co-defendant followed the restaurant manager, Jorge Rivera, to a nearby gas station where they put him in the backseat of their car at gunpoint. They then stopped at another gas station where they used Rivera's money to pay for gas. Only after these two stops did Larry and his co-defendant return to the Burger King with Rivera, where Larry and his co-defendant stole \$2,500. Larry and his codefendant did not release Rivera once the robbery was complete. Instead they drove him to a friend's house where they attempted to watch surveillance tape from the Burger King. When unsuccessful they drove Rivera to a dead-end street, stopped the car, and pulled Rivera out of the car. They then shot Rivera before driving away. Id. at 899.

The Court of Appeals rejected the argument that the robbery and

¹ 108 Wn. App. 894, 34 P.3d 241 (2001), rev. denied, 146 Wn.2d 1022, 52 P.3d 521 (2002), disapproved of on other grounds by State v. Fisher, 185 Wn.2d 836, 374 P.3d 1185 (2016).

² 4 Wn.App.2d 520, 422 P.3d 489 (2018).

kidnapping encompassed the same criminal conduct. Larry, 108 Wn. App. at 916. Significantly, the Court noted that there were two different victims for the two robberies: Rivera and Burger King. Id. And while the Court acknowledged that the kidnapping and robbery of Rivera involved the same victim, the robbery at the gas station occurred at a single time and place. In contrast, the kidnapping occurred over a period of time and in several distinct locations. Id.

Unlike Larry, the facts of Staten's case show the kidnapping and indecent liberties were part of a continuous course of conduct. There was no interruption between the kidnapping and indecent liberties during which time Staten paused and reflected on what he was doing. As the prosecutor argued at trial, and E.B. acknowledged, Staten's overall objective remained the same throughout: sexual contact with E.B. The kidnapping furthered the indecent liberties, or alternatively, was part of the overarching plan to engage in sexual contact with E.B.

Also unlike Larry, here we have a jury finding that Staten committed the kidnapping with sexual motivation, which shows he committed the kidnapping in order to commit the indecent liberties. A single intent includes more than one offense "committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). The criminal

objective was sexual contact with E.B., and the kidnapping was done to accomplish that objective.

What occurred in State v. Classen is even more attenuated from what occurred here. Classen involved a first degree kidnapping and attempted first degree kidnapping of the same complaining witness. 4 Wn.App.2d at 527-28, 530. On appeal, Classen challenged the two convictions on double jeopardy grounds, arguing they constituted a single unit of prosecution. Classen, 4 Wn.App.2d at 530-34. Thus, Classen does not involve a same criminal conduct analysis and has no bearing on the issue currently before this Court.

Nonetheless, the State cites Classen for the proposition that "a kidnapping continues until a victim regains her liberty." BOR at 10 (citing Classen, 4 Wn.App.2d at 533-34). As discussed above however, Staten continually restricted E.B.'s movements in a manner which substantially interfered with her liberty. E.B. had not regained her liberty at the time the indecent liberties incident occurred. Rather, E.B. did not regain her liberty until after the indecent liberties incident ended and her mother showed up at the park.

Finally, the State also suggest that the two offense did not occur at the same time and place because the kidnapping began before the indecent liberties offense. BOR at 13-16. But sequential crimes qualify as "same

criminal conduct" when one furthers the other and the offenses involve the same victim, time and place. Porter, 133 Wn.2d at 183. Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

The legal standard for showing same objective intent for same criminal conduct does not change from one set of crimes to another. It applies to all. See State v. Palmer, 95 Wn. App. 187, 191-92, 975 P.2d 1038 (1999) (two rapes were same criminal conduct where violence was continuous and patterned); Longuskie, 59 Wn. App. at 847 (kidnapping furthered child molestation); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996) (child molestation furthered child rape), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013); Phuong, 174 Wn. App. at 547-48 (counsel ineffective in failing to argue unlawful imprisonment and attempted rape were same criminal conduct, where defendant restrained victim to accomplish the rape); State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004) (counsel ineffective in failing to argue kidnapping and rape were the same criminal conduct, where the kidnapping was committed to further the rape).

Here, the evidence demonstrates that sexual contact was the object of the kidnapping and thus the offenses constitute the same criminal

conduct. Defense counsel was ineffective in failing to argue at sentencing that the kidnapping with sexual motivation and indecent liberties constituted the same criminal conduct. Remand for resentencing is required.

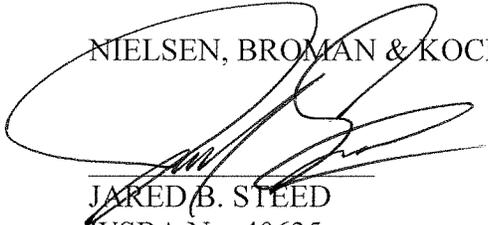
B. CONCLUSION

For the reasons discussed above, and in the opening brief, this Court should remand Staten's case for resentencing, and to correct the scrivener's error in the judgment and sentence. This Court should also remand for the \$100 DNA fee to be stricken.

DATED this 19th day of February, 2019.

Respectfully submitted,

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A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

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