

FILED
Court of Appeals
Division II
State of Washington
12/18/2018 10:28 AM
NO. 51349-8-II

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

STATE OF WASHINGTON, Respondent

v.

HAROLD CURTIS STATEN III, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02020-8

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

TABLE OF CONTENTS

INTRODUCTION 1

RESPONSE TO ASSIGNMENTS OF ERROR..... 4

 I. Staten’s counsel was not ineffective. 4

 II. The trial court has now entered written findings of fact and conclusions of law in compliance with CrR 3.5(c). 4

 III. The State agrees that the judgment and sentence contains a scrivener’s error that must be corrected. 4

 IV. The State agrees that pursuant to State v. Ramirez the DNA fee that was assessed should be stricken upon remand to the trial court. 4

STATEMENT OF THE CASE..... 4

ARGUMENT 5

 I. Staten’s counsel was not ineffective. 5

 A. Same Criminal Conduct 6

 a. Criminal Intent – Statutory and Objective..... 7

 1. Statutory Analysis 10

 2. Objective Facts Analysis..... 11

 b. Same Time and Place 13

 II. The trial court has now entered written findings of fact and conclusions of law in compliance with CrR 3.5(c). 16

 III. Staten’s judgment and sentence contains a scrivener’s error and a fee that should be stricken. 17

 A. Scrivener’s Error 17

 B. DNA Fee..... 18

CONCLUSION..... 19

TABLE OF AUTHORITIES

Cases

<i>In re Mayer</i> , 128 Wn.App. 694, 117 P.3d 353 (2005).....	18
<i>In re Rangel</i> , 99 Wn.App. 596, 996 P.2d 620 (2000).....	9
<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978).....	5
<i>State v. Chenoweth</i> , 185 Wn.2d 218, 370 P.3d 6 (2016).....	7, 8, 11
<i>State v. Classen</i> , 4 Wn.App.2d 520, 422 P.3d 489 (2018).....	10, 11
<i>State v. Coombes</i> , 191 Wn.App. 241, 361 P.3d 270 (2015).....	17
<i>State v. French</i> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	6
<i>State v. Garnier</i> , 52 Wn.App. 657, 763 P.2d 209 (1988).....	14
<i>State v. Graciano</i> , 176 Wn.2d 531, 295 P.3d 219 (2013).....	6, 7, 12, 13
<i>State v. Grantham</i> , 84 Wn.App. 854, 932 P.2d 657 (1999).....	9, 12
<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998).....	16
<i>State v. Hernandez</i> , 95 Wn.App. 480, 976 P.2d 165 (1999).....	8
<i>State v. Larry</i> 108 Wn.App. 894, 34 P.3d 241 (2001).....	9, 11, 14, 15
<i>State v. Lessley</i> , 118 Wn.2d 773, 827 P.2d 996 (1992).....	7
<i>State v. Longuskie</i> , 59 Wn.App. 838, 801 P.2d 1004 (1990).....	12, 13
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	5
<i>State v. Morales</i> , 196 Wn.App. 106, 383 P.3d 539 (2016).....	17
<i>State v. Polk</i> , 187 Wn.App. 380, 348 P.3d 1255 (2015).....	7, 8
<i>State v. Porter</i> , 133 Wn.2d 177, 942 P.2d 974, 979 (1997).....	13
<i>State v. Price</i> , 103 Wn.App 845, 14 P.3d 841 (2000).....	7, 13, 15
<i>State v. Priest</i> , 100 Wn.App. 451, 997 P.2d 452 (2000).....	17
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	4, 18
<i>State v. Ritter</i> , 149 Wn.App. 105, 201 P.3d 1086 (2009).....	16
<i>State v. Rodriguez</i> , 61 Wn.App. 812, 812 P.2d 868 (1991).....	7, 8
<i>State v. Stockmyer</i> , 136 Wn.App. 212, 148 P.3d 1077 (2006).....	14
<i>State v. Thomas</i> , 71 Wn.2d 470, 429 P.2d 231 (1967).....	5
<i>State v. Tili</i> , 139 Wash.2d 107, 985 P.2d 365 (1999).....	8, 9
<i>State v. Vike</i> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	7, 8
<i>State v. Wilson</i> , 136 Wn.App 596, 150 P.3d 144 (2007).....	7
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052 (1984).....	5

Statutes

RCW 43.43.7541	18, 19
RCW 9.94A.589(1)(a)	6, 7, 13, 14, 15
RCW 9A.40.010(1).....	10
RCW 9A.40.010(6).....	11
RCW 9A.40.030(1).....	10
RCW 9A.44.100(1)(a)	11

Rules

CrR 3.5..... 16
CrR 3.5(c) 16
CrR 7.8(a) 17
GR 14.1(a)..... 8, 10, 14
RAP 10.3(b)..... 4

Unpublished Opinions

State v. Baza, 197 Wn.App. 1072, 2017 WL 589189 (2017) 8
State v. Godinez, 191 Wn.App. 1043, 2015 WL 9036740 (2015).. 9, 10, 14
State v. Jones, 186 Wn.App. 1024, 2015 WL 1035914 (2015)..... 9, 10, 14
State v. Ohnemus, 194 Wn.App. 1039, 2016 WL 3514165 (2016) 8
State v. Sadler, 198 Wn.App. 1023, 2017 WL 1137116 (2017)..... 8
State v. Standley, 2 Wn.App.2d 1060, 2018 WL 1342449 (2018) 8
State v. Yusuf, 2 Wn.App.2d 1048, 2018 WL 1168724 (2018) 8

INTRODUCTION

Harold Staten and E.B. met in July of 2015 at Clark College. About a month after meeting the two began having a sexual relationship. This relationship resulted in E.B. becoming pregnant with J.S. During the pregnancy Staten moved to Tacoma and the two began to talk and see each other much less. E.B. described their relationship as “friends with benefits.”

In July of 2016, baby J.S. was born. At the time of his birth, J.S. had “global brain damage and a chromosome missing.” His prognosis was very poor, but he was eventually discharged from the hospital and went home with E.B. Sadly, however, J.S. passed away on September 25. The next day Staten called E.B. to check on his son and she told him the news. Staten and E.B. agreed that he should come down to Vancouver.

Staten drove down that day and contacted E.B. outside her apartment complex where she was smoking. The two conversed and at times both were very emotional. Eventually, E.B.’s mother came outside, which led to a more frustrated and agitated tone amongst the parties. E.B.’s mother told Staten to leave and E.B. returned to inside the apartment.

Staten next sent a text message asking if E.B. wanted to get something to eat and talk, but E.B. texted him back “not tonight but tomorrow.” Hours later E.B. was again outside smoking when she saw Staten drive up. Staten approached E.B. to talk and she noticed that he had been drinking alcohol. The two discussed missing J.S. At some point, Staten remarked “Let’s make another kid. Let’s make another baby.” E.B. did not agree with this idea and when she finished her cigarette she started to head back to her apartment.

At that point, Staten came from behind E.B. and grabbed her arm, told her that he still wanted to talk, and pushed her against his car. Staten opened the door and said “let’s go for a drive,” but E.B. said no and tried to get away from Staten and his car. Staten, however, pushed E.B. towards the open door, down towards the seat, and put her legs into the car. Staten shut the door and tried to drive away, but on multiple occasions E.B. would reopen the door causing Staten to get out and shut the door again. Eventually he was successful in keeping the door closed and driving away with E.B. in the car.

Staten drove to a park about five minutes from E.B.’s apartment and stopped the car. It was now a little after midnight. E.B. refused to go walking through the park with Staten and at some point he stepped away

from the car. E.B. then got out, lit a cigarette, and walked to the corner of the street to attempt to make a phone call to her friend but he did not answer.

Staten then walked up to E.B. and the two started to walk back to the car together. Staten again mentioned having another kid with E.B. and began to make sexual advances. By the time they made it back to the car, Staten was trying to kiss E.B. and was pushing her up against the car as he also attempted to put his hands down her pants. Staten touched E.B.'s vagina under her underwear with his hand and penetrated her with his fingers. E.B. tried to push him off and was telling him "no, stop." Staten did not give up and told E.B. that they should go into the park and try to make another baby.

Next, E.B.'s mother began calling E.B., which caused her phone to ring. E.B. was able to answer one of these calls and speak to her mother and her mother immediately drove over to the park. Upon her arrival, Staten got back into his car and drove off. E.B. got into her mother's car and the two drove home and called the police.

The police found Staten sleeping in his car with its brake lights on. Upon being contacted, and without being asked about the situation with E.B., Staten stated "listen, listen, listen, I didn't force anybody to do

anything.” After the police spoke with Staten about E.B.’s allegations, which he denied, they arrested him.

RESPONSE TO ASSIGNMENTS OF ERROR

- I. Staten’s counsel was not ineffective.**
- II. The trial court has now entered written findings of fact and conclusions of law in compliance with CrR 3.5(c).**
- III. The State agrees that the judgment and sentence contains a scrivener’s error that must be corrected.**
- IV. The State agrees that pursuant to State v. Ramirez¹ the DNA fee that was assessed should be stricken upon remand to the trial court.**

STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), and for the purposes of this responsive brief only, the State is satisfied with Staten’s statement of the case. Staten’s statement of the case accurately summarizes the facts relating to the underlying offenses for which Staten was found guilty as well as the procedural history of the case. The State will discuss any additional facts relevant to deciding the legal issues raised by Staten in the argument section.

¹ 191 Wn.2d 732, 426 P.3d 714 (2018).

ARGUMENT

I. Staten's counsel was not ineffective.

There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant is not guaranteed the successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, the burden of showing ineffective assistance of counsel is the defendant's. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel provided ineffective representation, and (2) that counsel's ineffective representation resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). In order to satisfy the first requirement (deficiency), the defendant must show his or her counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. In order to satisfy the second requirement (prejudice), the defendant must show by a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different. *Id.* at 694.

Accordingly, for Staten’s claim of ineffective assistance of counsel, based on his trial counsel’s failure to argue that his crimes constitute the same criminal conduct, to prevail he must show that his trial counsel’s conduct fell below an objective standard of reasonableness and that had trial counsel made the same criminal conduct argument that there is a reasonable probability that the trial court would have agreed with him.

A. SAME CRIMINAL CONDUCT

When a defendant is convicted of two or more crimes the sentencing court “may enter[] a finding that some or all of the current offenses encompass the same criminal conduct.” RCW 9.94A.589 (1)(a). That said, because a finding of same criminal conduct “favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct,” i.e., the defendant bears the burden “of production and persuasion” on the issue of same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-540, 295 P.3d 219 (2013) A trial court’s conclusion that offenses did not encompass the “same criminal conduct” will be reversed by an appellate court only when there is a clear abuse of discretion or misapplication of the law. *Id.* at 533, 535-38; *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

Two or more crimes may constitute the “same criminal conduct” if they: (1) require the same criminal intent, (2) are committed at the same

time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a). The absence of any one prong prevents a finding of “same criminal conduct.” *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Courts “must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct.” *State v. Price*, 103 Wn.App 845, 855, 14 P.3d 841 (2000); *Graciano*, 176 Wn.2d at 540; *State v. Wilson*, 136 Wn.App 596, 613, 150 P.3d 144 (2007). If the sentencing court finds that the crimes encompass the same criminal conduct, however, “then those . . . offenses shall be counted as one crime.” RCW 9.94A.589(1)(a).

a. Criminal Intent – Statutory and Objective

The first step in determining whether crimes require the same criminal intent is examining the relevant criminal statutes. *State v. Chenoweth*, 185 Wn.2d 218, 221-24, 370 P.3d 6 (2016); *State v. Polk*, 187 Wn.App. 380, 396, 348 P.3d 1255 (2015); *State v. Rodriguez*, 61 Wn.App. 812, 816, 812 P.2d 868 (1991). If the statutorily required intents are different then the analysis is over and the offenses shall count as separate

crimes. *Chenoweth*, 185 Wn.2d at 223-25²; *Polk*, 187 Wn.App. at 396-97, *Rodriguez*, 61 Wn.App. at 816; *State v. Hernandez*, 95 Wn.App. 480, 484, 976 P.2d 165 (1999). Similarly, “[w]here one crime has a statutory intent element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct.” *Hernandez*, 95 Wn.App. at 485-86. On the other hand, where the statutory intents are the same or there are multiple counts of the same crime courts are to look objectively at the facts useable at sentencing to determine whether a defendant’s intent was the same or different for each offense. *Polk*, 187 Wn.App. at 396; *Rodriguez*, 61 Wn.App. at 816; *Hernandez*, 95 Wn.App. at 484.

The relevant question when viewing the facts useable at sentencing in determining whether the relevant offenses require the same criminal intent is “to what extent did the criminal intent, when viewed objectively, change from one crime to the next.” *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (citations omitted). This, in part, can be determined by whether one crime furthered the other. *Vike*, 125 Wn.2d at 411. Where crimes are “sequential, not simultaneous or continuous,” a defendant is

² Unpublished cases addressing same criminal conduct arguments post-*Chenoweth* have readily applied the *Chenoweth* statutory analysis in determining whether offenses require the same criminal intent. See *State v. Baza*, 197 Wn.App. 1072, 2017 WL 589189 at 2 n.8 (2017); *State v. Sadler*, 198 Wn.App. 1023, 2017 WL 1137116 at 5 (2017); *State v. Ohnemus*, 194 Wn.App. 1039, 2016 WL 3514165 at 3 (2016); *State v. Yusuf*, 2 Wn.App.2d 1048, 2018 WL 1168724 (2018); *State v. Standley*, 2 Wn.App.2d 1060, 2018 WL 1342449 (2018). GR 14.1(a) provides that unpublished opinions may be cited as non-binding authorities and “may be accorded such persuasive value as the court deems appropriate.”

generally deemed to have sufficient time to form a new criminal intent. *State v. Grantham*, 84 Wn.App. 854, 859, 932 P.2d 657 (1999); *In re Rangel*, 99 Wn.App. 596, 600, 996 P.2d 620 (2000). This is because when a defendant has time to “pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act[, he] form[s] a new intent to commit the second act.” *Grantham*, 84 Wn.App. at 859. Conversely, a defendant’s criminal intent may not have changed when he or she engages in an “unchanging pattern of conduct, coupled with an extremely close time frame” *Tili*, 139 Wn.2d at 125.

State v. Larry is instructive. 108 Wn.App. 894, 915-16, 34 P.3d 241 (2001) *disapproved of on other grounds by State v. Fisher*, 185 Wn.2d 836, 374 P.3d 1185 (2016). In *Larry*, which involved a discrete robbery and an ongoing kidnapping, this Court concluded, despite the fact that there was some temporal overlap between the two crimes, that the two crimes did not involve the same intent because “comparing the two statutes demonstrates that there are different objective criminal intents for robbery and kidnapping”. *Id.* at 916, 916 n.11; *State v. Jones*, 186 Wn.App. 1024, 2015 WL 1035914 at 7-8 (2015) (discussing and applying *Larry* in another case involving kidnapping and robbery); *see also State v. Godinez*, 191 Wn.App. 1043, 2015 WL 9036740 (2015) (examining the

underlying statutes of attempted murder and kidnapping and determining that they did not share the same intent).³

State v. Classen is also instructive. 4 Wn.App.2d 520, 422 P.3d 489 (2018). In *Classen* this Court determined that kidnapping is a “continuing course of conduct crime” that “continues so long as the victim’s liberty is substantially interfered with.” *Id.* at 532. As a result, a kidnapping terminates when a “victim regains [his or] her liberty” whether by release or escape. *Id.* at 533-34.

Here, Staten did not have the same intent for the kidnapping and indecent liberties whether one employs a *Chenoweth* statutory analysis or objectively looks at the facts useable at sentencing.

1. Statutory Analysis

A person is “guilty of kidnapping in the second degree if he or she *intentionally abducts* another person under circumstances not amounting to kidnapping in the first degree.” RCW 9A.40.030(1) (emphasis added). “‘Abduct’ means to *restrain* a person by . . . secreting or holding him or her in a place where he or she is not likely to be found. . . .” RCW 9A.40.010(1) (emphasis added). And “[r]estrain’ means to restrict a person’s movements without consent and without legal authority in a

³ This Court’s opinions in *Jones* and *Godinez* are unpublished. GR 14.1(a) provides that unpublished opinions may be cited as non-binding authorities and “may be accorded such persuasive value as the court deems appropriate.”

manner which interferes substantially with his or her liberty. Restraint is ‘without consent’ if it is accomplished by [] physical force, intimidation, or deception. . . .” RCW 9A.40.010(6).

A person “is guilty of indecent liberties when he or she *knowingly* causes another person to have sexual contact with him or her or another . . . [b]y forcible compulsion.” RCW 9A.44.100(1)(a) (emphasis added).

Under the *Chenoweth* statutory analysis, the crimes for which Staten was convicted have different criminal intents as kidnapping requires an intentional abduction and indecent liberties requires knowingly causing sexual contact. 185 Wn.2d at 221-24; *Larry* 108 Wn.App. at 915-16. Thus, Staten’s convictions for kidnapping and indecent liberties do not constitute the same criminal conduct.

2. *Objective Facts Analysis*

Here, Staten’s kidnapping of E.B. ended when they arrived at the park. RP 116-18. Because at the park, Staten eventually stepped away from E.B. and she got out of the car, lit a cigarette, and walked away from Staten to the corner of the street where she attempted to make a telephone call, i.e., E.B. had regained her liberty . RP 116-17, 128, 192-93; *Classen*, 4 Wn.App.2d at 532-34. It was only after this attempted call that Staten walked over to E.B. to speak with her and the two walked back towards

the car together. RP 117-18, 193-94. And it was at the car where Staten made sexual contact with E.B. by forcible compulsion. RP 119-125. Consequently, the crimes were “sequential, not simultaneous or continuous,” and Staten had sufficient time to form a new criminal intent. *Grantham*, 84 Wn.App. at 859. More specifically, Staten had the time to “pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act [(the indecent liberties)].” *Id.* Accordingly, when Staten committed the indecent liberties he had formed a new and different criminal intent, and his crimes do not constitute the same criminal conduct.

Staten’s argument to contrary and reliance on *State v. Longuskie* is unpersuasive. Br. of App. at 11-14; 59 Wn.App. 838, 847, 801 P.2d 1004 (1990). *Longuskie* held that the kidnapping of an older child and his subsequent molestation by the defendant at a motel were the same criminal conduct because the defendant’s overall intent was to molest the victim and the kidnapping furthered that objective. *Id.* at 847. But the same criminal conduct issue in *Longuskie* was raised sua sponte by the Court of Appeals, contains no real in depth legal analysis, and likely does not survive newer cases from our Supreme Court such as *Chenoweth* and *Graciano*, which established that “it is the defendant who must establish the crimes constitute the same criminal conduct.” 176 Wn.2d at 538-540.

Furthermore, because courts “must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct” there is no compelling reason to attempt to salvage *Longuskie* and give the case a broad reading in order to support a same criminal conduct finding here where the facts are also materially distinguishable, e.g., E.B. regained her liberty prior to the sex crime in contrast to the young victim in *Longuskie*. *Price*, 103 Wn.App at 855; *Graciano*, 176 Wn.2d at 540.

b. Same Time and Place

The same time and place requirement does not require that crimes happen simultaneously in order for them to be considered to have happened at the same time. *Price*, 103 Wn.App. at 855 (citing *State v. Porter*, 133 Wn.2d 177, 186, 942 P.2d 974, 979 (1997)). Instead, to satisfy the same time requirement the crimes, if not simultaneous, must be part of “a continuing, uninterrupted sequence of conduct” over a very short period of time. *Id.*; *Porter*, 133 Wn.2d at 183 (holding “that immediately sequential drug sales satisfy the ‘same time’ element of the statute”). Nonetheless, even a temporal overlap between two crimes does not mean that the crimes occurred at the same time and place where one crime “occurred over a period of time and in several locations” and the other

crime “occurred at a single time and place.” *Larry*, 108 Wn.App. at 916; *Jones*, 2015 WL 1035914 at 7-8; *Godinez*, 2015 WL 9036740.⁴

Relatedly, multiple crimes occurring at one address does not necessarily mean the crimes occurred in the same place. *State v. Stockmyer*, 136 Wn.App. 212, 220, 148 P.3d 1077 (2006) (holding that “guns found in different rooms in the same house are found in different ‘places’ for purposes of the same criminal conduct test under RCW 9.94A.589(1)(a)”); *State v. Garnier*, 52 Wn.App. 657, 661, 763 P.2d 209 (1988) (holding that each burglary of multiple suites inside one building “was a complete and final act” and did not constitute the same criminal conduct).

Here, the kidnapping and indecent liberties occurred at different places and times. The kidnapping began at E.B.’s apartment complex, continued in Staten’s car, and ended at the park when Staten walked away and E.B. was able to get out and go to the street corner. RP 99-118, 192-94. During this time Staten did not sexually assault E.B. The indecent liberties began at the park, just outside of Staten’s car, but after E.B. had walked to the street corner, attempted to make a phone call, and walked back. RP 116-125, 192-94. The crimes were sequential, but not

⁴ As previously mentioned, this Court’s opinions in *Jones* and *Godinez* are unpublished. GR 14.1(a) provides that unpublished opinions may be cited as non-binding authorities and “may be accorded such persuasive value as the court deems appropriate.”

immediately so, and the gravamen of the kidnapping took place at the apartment complex and on the road when Staten forced E.B. into his car and worked to keep her inside. Thus, that a portion of the kidnapping took place at the same location of the indecent liberties is not legally determinative as to whether they occurred at the same place in a same criminal conduct analysis. On the contrary, based on *Larry* and *Price*, and the facts above, the crimes took place at different places and at different times. 108 Wn.App. at 916; 103 Wn.App. at 855. Thus, in light of the fact that courts “must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct,” this Court should conclude that the kidnapping and indecent liberties do not constitute the same criminal conduct. *Price*, 103 Wn.App at 855.

Furthermore, because the crimes do not constitute the same criminal conduct—different intents, different places, different times—Staten cannot show that his trial counsel performed deficiently when he chose not to argue that they were. And even if that choice was unreasonable and Staten’s counsel should have made that argument, Staten still cannot show that he was prejudiced by the decision. In the trial court, Staten would have had the burden of “production and persuasion” to show that the crimes were the same criminal conduct while the trial court is charged with narrowly construing RCW 9.94A.589(1)(a); as a result, and given the

facts and arguments above, Staten cannot show that there was a reasonable probability that trial court would have found the crimes to be the same criminal conduct had his trial counsel made the argument. Thus, Staten's ineffective assistance claim fails.

II. The trial court has now entered written findings of fact and conclusions of law in compliance with CrR 3.5(c).

After a hearing on the admissibility of a defendant's confession under CrR 3.5 that same rule requires that the trial court "shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." CrR 3.5(c). A trial court's failure to enter these findings is error. *State v. Head*, 136 Wn.2d 619, 622-24, 964 P.2d 1187 (1998). Generally, however, the error is considered to only be "clerical" and "may be corrected after an appeal is filed." *State v. Ritter*, 149 Wn.App. 105, 108, 201 P.3d 1086 (2009). On the other hand, a defendant "may show prejudice by establishing that the belated findings were tailored to meet the issues raised in the appellant's opening brief." *Id.* at 109.

Here, the trial court did not enter findings of fact or conclusions of law following the CrR 3.5 hearing. *See* CP. Staten noted this failure in his brief to this Court. Brief of Appellant at 3, 19-20. Those findings, which

have been signed off on by Staten's trial counsel and the State's trial deputy, have now been entered. Supp. CP 183-86. Staten did not raise any errors regarding the admission of his statements. *See* Br. of App. Therefore, the findings could not have been tailored to the substantive issues raised in his brief. Accordingly, the error was clerical in nature and has been cured.

III. Staten's judgment and sentence contains a scrivener's error and a fee that should be stricken.

A. SCRIVENER'S ERROR

CrR 7.8(a) provides that:

Clerical mistakes in judgments, orders or other parts of the record and errors therein *arising from oversight or omission* may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(emphasis added). Similarly, case law defines a clerical or scrivener's error as one "that when amended would correctly convey the intention of the court based on other evidence." *State v. Priest*, 100 Wn.App. 451, 455-56, 997 P.2d 452 (2000); *State v. Morales*, 196 Wn.App. 106, 117, 383 P.3d 539 (2016) (citation omitted). The remedy for a scrivener's or clerical error in a judgment and sentence is simply the correction of that error. *State v. Coombes*, 191 Wn.App. 241, 255, 361 P.3d 270 (2015)

(citation omitted); *In re Mayer*, 128 Wn.App. 694, 701-02, 117 P.3d 353 (2005).

Here, Staten's judgment and sentence contains a scrivener's error. Section 2.1 of Staten's judgment and sentence indicates that he was found guilty of Kidnapping in the Second Degree and Indecent Liberties by *guilty plea* rather than by *jury verdict*. CP 124. This Court should remand to the trial court to correct this scrivener's error.

B. DNA FEE

Former RCW 43.43.7541 required the imposition of a \$100 DNA fee when a defendant was convicted of a felony regardless of whether the State had previously collected the defendant's DNA as a result of a prior conviction. This year, however, the legislature amended the statute to provide that "[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction*. RCW 43.43.7541 (emphasis added); Laws of 2018, ch. 269 § 18. Staten's conviction occurred while the former version was in place, but his appeal was pending at the time the statute was amended.

In *State v. Ramirez*, our Supreme Court held that the statutory amendments applied prospectively. 191 Wn.2d at 747-750. This means that the amended statute, and the relief it offers, applies to all pending

cases, including those “pending on direct review and thus not final when the amendments were enacted.” *Id.* at 747. Because Staten’s case was “pending on direct review” at the time the amended DNA fee statute was enacted he gets the benefit of that amendment. Accordingly, the DNA fee that was originally imposed as a mandatory fee should be stricken from Staten’s judgment and sentence upon remand because the State “has previously collected the offender’s DNA as a result of a prior conviction.” RCW 43.43.7541.

CONCLUSION

For the reasons argued above, this Court should affirm Staten’s sentence and remand for the correction of a scrivener’s error and the striking of the DNA fee.

DATED this 18 day of December, 2018.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

December 18, 2018 - 10:28 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51349-8
Appellate Court Case Title: State of Washington, Respondent v Harold Curtis Staten, Appellant
Superior Court Case Number: 16-1-02020-8

The following documents have been uploaded:

- 513498_Briefs_20181218102709D2351345_6609.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Brief - Respondent.pdf

A copy of the uploaded files will be sent to:

- steedj@nwattorney.net

Comments:

Sender Name: Ashley Smith - Email: ashley.smith@clark.wa.gov

Filing on Behalf of: Aaron Bartlett - Email: aaron.bartlett@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:
PO Box 5000
Vancouver, WA, 98666-5000
Phone: (360) 397-2261 EXT 5686

Note: The Filing Id is 20181218102709D2351345