

NO. 34531-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

DANTE OLIVER,

Appellant.

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

The Honorable James M. Triplet, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER THE JURY HEARD EVIDENCE LINKING OLIVER TO PRIOR SEXUAL OFFENSES IN VIOLATION OF AN ORDER IN LIMINE

Oliver contends, for reasons set forth more fully in the opening brief, that his right to a fair trial was compromised when the prosecutor elicited through direct examination of a witness that Oliver's photograph had been obtained from the "registered sex offender coordinator[.]" in violation of the order in limine. Brief of Appellant (BOA) at 10-19 (citing RP 437). Because the irregularity was serious enough to warrant a mistrial, the trial court erred in deciding otherwise.

In response, the State "does not dispute that the comment was improper and inadvertently violated the motion in limine." Brief of Respondent (BOR) at 18. Nonetheless, citing State v. Weber,¹ the State argues the violation did not require the trial court to grant a mistrial. BOR at 17-24. Because Weber is factually distinguishable, it does not support the State's argument.

During Weber's trial for attempting to elude a pursuing police vehicle, the police officer who pursued Weber's car testified during direct examination "[t]hat he [Weber] felt that he was in a lot of trouble for not

¹ 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

stopping." Weber, 99 Wn.2d at 160. The trial court sustained defense counsel's objection on the basis that the State had not disclosed the statement before trial. The trial court also instructed the jury to disregard the statement. Id.

The police officer repeated the statement a second time during direct examination. Defense counsel moved for a mistrial on the basis the officer deliberately tainted the jury. The motion for mistrial was denied but the trial court again instructed the jury to disregard the statements. Weber, 99 Wn.2d at 161.

On appeal, Weber argued the trial court erred in denying the motion for mistrial. Weber, 99 Wn.2d at 163. The Supreme Court concluded the trial judge did not abuse her discretion in denying Weber's motion for mistrial. In analyzing the four Escalona² factors, the Court focused primarily on the fact that no prejudice could arise from admission of the statement because the trial court erred in excluding the statement in the first place. Id. at 165. The Court also reasoned that the statement was cumulative to other evidence on the issue the jury had to decide; whether Weber willfully failed to stop. Id. at 165-66.

Unlike Weber, here there is no dispute the testimony about obtaining Oliver's photograph from a "registered sex offender coordinator" was both

² State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987).

properly excluded to begin with, and a violation of the motion in limine when elicited. BOR at 18. Thus, Weber's prejudice analysis has no bearing on what occurred in this case.

Moreover, the statement at issue in Weber dealt directly with the attempting to elude charge, and thus was cumulative of other evidence the jury had to consider in determining Weber's guilt. In contrast, here the jury did not otherwise hear evidence that tied Oliver to prior sexual criminal history. Unlike Weber, the evidence was therefore not cumulative. BOA at 12-14.

The trial court properly ruled in limine that any evidence regarding Oliver's prior sex offenses was inadmissible. There is a reasonable probability that introducing this otherwise inadmissible and highly prejudicial evidence affected the outcome of Oliver's trial. This Court should reverse Oliver's convictions and remand for a new trial.

2. THE TRIAL COURT ERRED IN FAILING TO COUNT THE OFFENSES OF PROMOTING COMMERCIAL SEXUAL ABUSE OF A MINOR AND SECOND DEGREE TRAFFICKING AS THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES

“Same criminal conduct” means crimes that require the same intent, were committed at the same time and place, and involved the same victim. State v. Chenoweth, 185 Wn.2d 218, 222, 370 P.3d 6 (2016). “Intent, 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.”
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).

As addressed fully in the opening brief, Oliver argues that the trial court erred concluding the promoting sexual abuse of a minor and second degree trafficking did not encompass the same criminal conduct. BOA at 19-27.

The State does not dispute that the two crimes at issue involved the same victim. BOR at 28. Instead, without citing authority, the State asserts, “the court could well determine[,]” that the two offenses had different time elements. BOR at 29. This is not proof but post hoc conjecture. The trial court made no such determination as to the time element because it applied the incorrect legal standard. BOA at 22-24. The trial court's entire “analysis” as to whether the crimes involved the same criminal conduct is contained within this single paragraph:

In terms of the merger or same course of criminal conduct, again, there -- it may be subtle, but there are different things that these charges are trying to prohibit. They are in different sections of the statute. They're enacted at different times. I am not going to find that one merges into the other and ignore one for purposes of sentencing...I'm going to not find that they are the same course of criminal conduct and that they do not merge. So I'm treating them separately as crimes, and I'm going to use the offender score of 4.

BOA at 21 (citing RP787-88).

For similar reasons, the State's argument that Oliver's criminal intent in committing the two offenses "was not necessarily the same[.]" also fails. BOR at 30. Oliver argued before the trial court that the crimes involved the same objective criminal purpose: to profit from V.B.'s prostitution. BOA at 24-27. The State did not dispute this, focusing instead on why the crimes did not violate Oliver's right against double jeopardy and therefore should not merge. BOA at 20. See State v. Wilson, 108 Wn. App. 774, 778, 31 P.3d 43 (2002) (recognizing that to argue an issue on appeal, the State must show that it "essentially argu[ed]" the same issue below), aff'd, 149 Wn.2d 1, 65 P.3d 657 (2003).

Even assuming however, that Oliver had different intents for each offense, the trial court's discussion of whether the offense involved the same criminal intent is equally devoid of any "analysis", focusing instead on why the crimes did not merge. Thus, the trial court's failure to consider whether Oliver had the same objective criminal intent is an abuse of discretion

requiring remand.

Finally, the State also suggests any error in finding the two offenses did not encompass the same criminal conduct is harmless because the trial court indicated it would have imposed the same sentence of 147 months regardless. BOR at 31-35. This argument fails for several reasons.

First, the cases relied upon by the State to argue harmless error are distinguishable. See BOR at 34. Each involved a change in the offender score that did not result in a corresponding lower standard range. See e.g., State v. Gonzales, 90 Wn. App. 852, 855, 954 P.2d 360 (1998) ("Remand for resentencing could not result in a lower sentence for Gonzales because he has received the lowest possible end of the standard range."); State v. Bobenhouse, 166 Wn.2d 881, 896-97, 214 P.3d 907 (2007) ("[E]ven if Bobenhouse's current offenses were treated as the "same criminal conduct" for purposes of sentencing, his offender score is greater than 9, which would result in some current offenses going unpunished if an exceptional sentence was not imposed."); State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996) ("Here, Argo concedes that the standard range would remain the same whether his offender score was 16 or 13.");

In contrast, in State v. Brown,³ the Court of Appeals held that

³ State v. Brown 60 Wn. App. 60, 802 P.2d 803 (1990)

remand was necessary because the miscalculation of Brown's offender score "would significantly affect the standard range." 60 Wn. App. 60, 70-71, 802 P.2d 803 (1990) rev. denied, 116 Wn.2d 1025, 812 P.2d 103 (1991) (overruled on other grounds by State v. Chadderton, 119 Wn.2d 390, 397-98, 832 P.2d 481 (1992)). Brown was sentenced based on an offender score of "6". However, the Court of Appeals concluded that Brown's offender score was likely "3" or "4", which would lower the standard range sentence by a minimum of 13 months. Based on the "much lower standard range", the Court could not say that it would not have had any impact on the amount of time imposed on Brown's exceptional sentence. Brown, 60 Wn. App. at 70.

Here, the State does not dispute that a same criminal conduct finding would lower Oliver's offender score from "4" to "2" and that accordingly, the standard range would also be lowered from 129-171 months to 111-147 months. BOR at 32-33. Like Brown, this Court cannot say that a lower offender score would not have had any impact on the amount of time imposed against Oliver. For example, despite the trial judge's remark that he would impose the same sentence of 147 months regardless of Oliver's offender score, the judge also stated that "I normally start with the midpoint" when imposing a sentence. RP 818. With an offender score of "2" instead of "4", the midpoint would change from 150 months to 129 months.

Second, that Oliver would appear before the same sentencing judge for resentencing is far from certain. See State v. Sims, 67 Wn. App. 50, 53, 834 P.2d 78 (1992) (concluding that imposition of sentence on remand by a different judge than the trial judge, even where the trial judge is not strictly unavailable, is not violative of RCW 2.28.030(2)), rev. denied, 120 Wn.2d 1028, 847 P.2d 481 (1993). Moreover, this Court has authority to remand Oliver's case for resentencing before a different judge. See e.g., State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997) (remanding for resentencing before a different judge "in light of the trial court's already expressed views on the disposition.").

Because the two offenses encompassed the same criminal conduct, the trial court erred in concluding the law dictated otherwise. Applying a "same criminal conduct" analysis, Oliver's offender score is "2" instead of "4". This Court should remand for resentencing to score Oliver's promoting sexual abuse and trafficking convictions as a single offense.

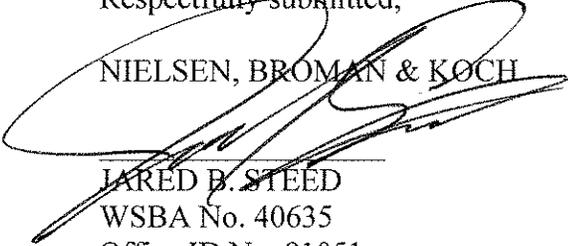
B. CONCLUSION

For the reasons discussed above and in the opening brief, this Court should reverse Oliver's convictions and remand for a new trial. This Court should also remand for resentencing because Oliver's offender score is incorrect. Finally, this Court should also decline to impose appellate costs against Oliver.

DATED this 30th day of August, 2017.

Respectfully submitted,

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