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Court of Appeals
Division III
State of Washington

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to declare a mistrial after a State witness violated a pre-trial order prohibiting testimony that appellant had prior criminal sexual history.

2. The trial court erred in denying appellant's argument that his convictions for promoting commercial sexual abuse of a minor and second degree trafficking constituted the same criminal conduct and should have been scored as a single offense for sentencing.

Issues Pertaining to Assignments of Error

1. The court precluded the State from eliciting evidence that appellant had prior sexual offenses. Despite the court's ruling, a prosecution witness testified that she had obtained appellant's photograph from a "registered sex offender coordinator". Although the trial court sustained defense counsel's objection to the testimony, appellant's motion for a mistrial based on the violation of the order in limine was denied. Where no instruction was capable of curing the witness's testimony that identified appellant as a prior sex offender, did the trial court's refusal to grant a mistrial deny appellant a fair trial?

2. The conduct leading to appellant's convictions for promoting sexual abuse of a minor and second degree trafficking involved the same time, same place, same complaining witness, and same intent.

Yet, at sentencing, these crimes were treated as separate offenses when calculating appellant's offender score and standard ranges. Given that these crimes should have been scored as a single offense under the "same criminal conduct" provisions of RCW 9.94A.589(1)(a), did the trial court err in denying appellant's motion to count them as a single offense?

B. STATEMENT OF THE CASE

1. Procedural History

The Spokane county prosecutor charged appellant Dante Oliver by amended information with one count each of promoting sexual abuse of a minor, second degree trafficking, and felony violation of a domestic violence no contact order. RP¹ 359-62; CP 48-49. A jury found Oliver guilty as charged. RP 747-50; CP 85, 87-88.

At sentencing, Oliver argued the promoting sexual abuse and second degree trafficking offenses constituted same criminal and his offender score should therefore be two. RP 771-76; Supp. CP ____ (sub no. 61, Defendant's Motion for Sex Offender Sentencing Alternative Examination for Eligibility, filed 3/28/16). The trial court disagreed and sentenced Oliver based on an offender score of four. RP 787-88. The trial court sentenced Oliver to concurrent prison sentences of 147 months for the promoting and

¹ This brief refers to the consecutively paginated verbatim reports of proceedings as follows: RP – February 16, 17, 18, 22, and 23, 2016 and June 23, 2016.

trafficking convictions, and 29 months imprisonment for the felony violation of a no contact order. The court also imposed 36 months of community custody. RP 819; CP 115-30.

The trial court imposed only mandatory legal financial obligations, agreeing that Oliver was "indigent". RP 819-20; CP 122-24. Oliver timely appeals. CP 95-114.

2. Trial Testimony

During the summer of 2014, 16-year-old V.B., ran away from her parent's home. RP 263, 293. While away, she consumed cocaine and methamphetamine and engaged in prostitution. RP 194-95, 215, 302-04, 336. V.B. explained that she ran away because her mother was strict and she wanted to spend time with her friends and go to parties. RP 294.

When V.B. returned to her parent's house, she created a Facebook profile using a false name and other false identifying information. RP 191-92, 298, 315-17, 434-36, 443-44, 458. V.B. did this because she did not want her parents to discover she was on Facebook. RP 192, 317. V.B. mentioned on Facebook that she was "young" and had previously engaged in prostitution. RP 198-99.

V.B. began corresponding on Facebook with Rosie Williams. RP 193-94. V.B. eventually fell in love with Williams. RP 320. In November 2014, V.B. packed some clothes and makeup and took a bus to

Williams' house. RP 199-200, 308, 380, 385. V.B. planned on staying with Williams as long as she could. RP 200, 309-10.

V.B. met Oliver about one week after arriving at the house. RP 204, 217, 312. V.B. understood that Williams and Oliver were in a relationship and also engaged in prostitution together. RP 204-07, 311. V.B. also had a sexual relationship with both Oliver and Williams. RP 208. V.B. told Williams and Oliver that she was 17-years-old. RP 213, 312-13. V.B. did not provide Oliver with identification when he asked for it. RP 261, 301.

Three days after meeting V.B., Oliver posted an advertisement for her on backpage, a website linked to prostitution. RP 213-14, 217, 512-13, 520-22, 605. Instead of posting pictures of herself, V.B. and Oliver would post pictures of women who looked similar, to avoid V.B.'s parents from finding the advertisements. RP 209, 527, 534-35. Nothing in the advertisement photo specifically identified V.B. as being 16-years-old. RP 549. V.B.'s age was listed as 19-year-old. RP 529. The advertisement was posted a total of 12 times. RP 528-29. No direct evidence connected Oliver to the online advertisements. RP 619-20.

V.B. began seeing clients the same day the first advertisement was posted. RP 217. V.B. explained that Oliver set the prices for the sexual acts. RP 214. Oliver would leave the house so V.B. could bring her

clients to the house. RP 218. Oliver also provided V.B. with condoms for the sexual acts, which included oral and vaginal intercourse. RP 219-20. V.B. provided Oliver with all the money she made. RP 222. V.B. estimated she made several thousand dollars from the 10 to 15 clients she saw. RP 220-21, 322-23.

Oliver was arrested on December 10, 2014. RP 224-25. Shortly thereafter, V.B. called her father's girlfriend to pick her up. RP 225-26. V.B. stayed with her father for about one month before she again ran away to live with Williams in January 2015. RP 228-31, 405-17, 421, 423, 425-26, 431.

V.B. received a letter from Oliver after his arrest. RP 450-54, 533, 600-01, 610. Oliver told V.B. to make at least \$200 per day and keep the money for him. RP 243, 262. The letter also said that V.B. and Williams should continue posting advertisements on backpage and earn \$2,800 per week. RP 243-44. V.B. and Williams continued meeting clients in Oliver's house and hotels. RP 231-32. Nothing in the letter identified or acknowledged that V.B. was less than 18-years-old. RP 614.

Eventually, V.B. returned to her mother's house permanently. RP 232-33. V.B.'s mother obtained protection orders against Oliver and Williams in January 2015. RP 387-90, 395. Police also became aware

that Oliver had two prior orders prohibiting contact with Williams from September 2014 and 2016. RP 594-600.

Police interviewed V.B. after she returned to her mother's house. RP 582-83. Police also searched three phones used by V.B. RP 585, 621-22. The phones contained text messages and other information consistent with prostitution. RP 586, 623. At least one text message suggested Oliver might not have known V.B. was less than 18-years-old. RP 630, 636-37. Police also listened to telephone conversations Oliver made from jail to V.B. RP 592. The calls included instructions from Oliver to V.B. RP 93. Police collected no identifying documentation from V.B. which established her age. RP 640.

3. Mistrial Motion

Defense counsel moved in limine to prevent the State from introducing evidence that Oliver had prior sexual offense convictions. RP 179. Counsel explained Oliver had a misdemeanor conviction from Nevada for "statutory sexual seduction," and a Washington conviction for failing to register as a sex offender. RP 179.

In response, the State acknowledged it did not intend to elicit Oliver's prior sex offenses. The prosecutor assured counsel and the trial court that she would admonish State witnesses not to mention Oliver's prior sexual history. RP 179-80. The trial court granted the defense

motion in limine and excluded any evidence concerning Oliver's prior sexual history. RP 180.

On the third day of trial, the State called Erica Rivas to the stand. RP 429. Rivas worked as a technical assistant in the major crimes and sex crimes division of the Spokane County Sheriff's Office, and was in charge of locating juvenile runaways and missing persons. RP 430. In this role, Rivas was tasked with trying to locate V.B. pursuant to a runaway report filed in January 2015. RP 430-31. During her investigation, Rivas located a Facebook profile and tried to match the profile photo to a known photo of Oliver. The prosecutor asked Rivas if she obtained a photo of Oliver. Rivas responded, "not at that -- I didn't have a SPRS photo. I got that photo from the registered sex offender coordinator." RP 437.

Defense counsel immediately objected and requested a limiting instruction. RP 437. The court sustained the objection, and struck everything following Rivas' answer "not at that time". The court instructed the jury to disregard the remaining portion of Rivas' answer. RP 437-38. Rivas' testimony then continued to its conclusion.

After the jury was dismissed for the lunch recess, defense counsel moved for a mistrial. Counsel noted that although the prosecutor may not have intentionally elicited testimony about Oliver's status as a registered sex offender, Rivas' testimony nonetheless violated the order in limine.

RP 471. Citing State v. Gresham² and State v. Saltarelli,³ counsel noted that given the sexual charges at issue, Rivas' testimony about Oliver's status as a registered sex offender was especially prejudicial. RP 471-72, 480-81,493. Counsel argued that as a result, even the court's curative instruction was not enough to extricate that prejudicial information from the jury's consideration. RP 474, 481, 493.

The prosecutor maintained the information elicited from Rivas' testimony was unintentional, but that, regardless it was not so unduly prejudicial as to warrant a mistrial. RP 475-77, 482. The court questioned the prosecutor on whether she had instructed her witnesses about the order in limine. RP 477-78. The prosecutor represented that she had admonished Rivas during her pretrial interview not to discuss Oliver's status as a registered sex offender. The prosecutor acknowledged she could not recall whether she discussed the issue with Rivas again after the order in limine. RP 480.

Defense counsel reiterated that the only logical conclusion for the jury to draw based on the elicited testimony was that Oliver was a registered sex offender. Counsel noted that the proper inquiry was not whether the testimony was intentionally elicited, but rather, what

²State v. Gresham 173 Wn.2d 405, 269 P.3d 207 (2012).

³ State v. Saltarelli 98 Wn.2d 358, 655 P.2d 697 (1982).

prejudicial effect it had on the jury. RP 481. Counsel maintained that based on the evidence introduced and the nature of the charges, the court could not "unring that bell," and ensure a fair trial for Oliver with the current jury. RP 481.

The court noted that Rivas' testimony did "to -- at least a certain extent -- violate the motion in limine not to raise any issues about Mr. Oliver being a registered sex offender[.]" RP 484. The court also acknowledged, that "there's some real compelling language that *Salteralli* looked at and concluded that especially in sex offense cases, bringing in evidence of prior bad sex acts is highly prejudicial." RP 489.

The trial court nonetheless denied the mistrial motion, concluding that the prejudice was not so egregious that a mistrial was warranted. RP 491. The court explained that the prejudice to Oliver was diminished by his defense that he was uncertain as to V.B.'s age; not a denial that he was participating in the sex trade. RP 489-92. The court further explained:

The witness aid that they found -- that they got a photo from the registered sex offender coordinator. Now, is it possible that a jury may connect dots and in their mind conclude that Mr. Oliver is a registered sex offender? I certainly suppose that is possible. I don't know that that's necessarily the most logical conclusion, but it's possible.

RP 490.

After denying the motion for mistrial, the court asked defense counsel whether he would like a further limiting instruction. RP 492, 495. Counsel declined, reiterating that no curative instruction would fix the error. RP 493. The trial court noted that in its opinion a further curative instruction would draw attention to the violation of the order in limine. RP 493.

C. ARGUMENT

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

The court ruled in limine that evidence of Oliver's prior sex offenses was excluded. RP 179-80. The prosecutor subsequently elicited through direct examination of a witness that Oliver's photograph had been obtained from the "registered sex offender coordinator[.]" RP 437. The irregularity was serious enough to warrant a mistrial. The court erred in deciding otherwise.

A criminal defendant is guaranteed the right to a fair trial by article I, sections 3 and 22 of the Washington Constitution as well as the Sixth and Fourteenth amendments of the U.S. Constitution. State v. Mullin-Coston, 115 Wn. App. 679, 692, 64 P.3d 40 (2003), aff'd, 152 Wn.2d 107 (2004). "The purpose for a motion in limine is to dispose of legal matters

so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." State v. Evans, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981). The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

The trial court's decision to deny a motion for a mistrial is generally reviewed for an abuse of discretion. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). A trial court must grant a mistrial where a trial irregularity may have affected the outcome of the trial, thereby denying an accused his right to a fair trial. Escalona, 49 Wn. App. at 254. In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was capable of curing the irregularity. Escalona, 49 Wn. App. at 255. When testimony is improper because it violates a pretrial order excluding certain evidence, the question is whether the improper testimony, when viewed in the context of all the evidence, deprived the defendant of a fair trial. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010) (citing State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006)). When a defendant's constitutional right to a fair trial has been violated and he moves for mistrial, the motion should be granted. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

An examination of the above criteria reveals the trial court abused its discretion in failing to declare a mistrial. First, the irregularity in Oliver's case is serious. Violation of a pre-trial order is a serious trial irregularity. Gamble, 168 Wn.2d at 178. "It is the duty of every trial advocate to prepare witnesses for trial," including prepping a witness so as to avoid violation of a pre-trial ruling. State v. Montgomery, 163 Wn.2d 577, 592, 183 P.3d 267 (2008).

Admission of evidence relating to a defendant's prior criminal conduct impermissibly shifts the jury's attention to the defendant's propensity for criminality. State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997). Such evidence can be improperly used by a jury to infer a propensity to commit the charged crimes. State v. Acosta, 123 Wn. App. 424, 433, 98 P.3d 503 (2004); State v. Sanford, 128 Wn. App. 280, 286-87, 115 P.3d 368 (2005) (admission of Sanford's booking photo constituted reversible error; the photo's presence in the police computer system clearly implied that he had previously been arrested for some other crime and raised a prejudicial inference of criminal propensity); see also State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 907 (2000) (prosecutor's suggestion that defendant had previously been arrested or convicted on another charge was misconduct (citing United States v. Fosher, 568 F.2d 207, 213 (1st

Cir. 1978) ("[M]ug shots from a police department 'rogues gallery' are generally indicative of past criminal conduct and will likely create in the minds of the jurors an inference of such behavior.")).

Here, both the trial judge and the parties understood that any reference to Oliver's prior sexual history was prejudicial and therefore forbidden pursuant to the order in limine. Nonetheless, through Rivas' testimony, the jury heard evidence that Oliver's photo was obtained from a registered sex offender coordinator. This allowed the jury to infer that Oliver was a registered sex offender and therefore previously involved in criminal activity that was similar to the activity with which he was charged. As the trial court recognized, it was "certainly...possible" that the jury reached this conclusion. RP 490. While the prosecutor did not intentionally elicit the problematic evidence, "the judge should not consider whether the statement was deliberate or inadvertent. That inquiry diverts the attention from the correct question: Did the remark prejudice the jury, thereby denying the defendant his right to a fair trial?" State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In the context of the evidence as a whole, it was clear that Oliver's status as a registered sex offender was not part of the criminal activity charged in this case. The only inference was that Oliver had a proclivity to engage in sexual offenses as part of criminal activity not charged in this case.

The second factor in assessing the effect of an irregularity is whether the statement in question was cumulative of properly admitted evidence. Escalona, 49 Wn. App. at 254. The jury did not otherwise hear that Oliver was a registered sex offender or had prior sexual criminal history. The evidence was therefore not cumulative. This factor weighs in favor of a mistrial. The improper testimony is a singularity, not something that jurors would have heard anyway in another form.

The third factor is whether the irregularity could be cured by an instruction to disregard the remark. Id. The court here gave such an instruction, but some errors simply cannot be fixed in this manner. RP 437-38; see Dunn v. United States, 307 F.2d 883, 887 (5th Cir. 1962) ("If you throw a skunk into the jury box, you can't instruct the jury not to smell it."); Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring) ("the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").

While jurors are presumed to follow the court's instructions to disregard testimony, "no instruction can remove the prejudicial impression created by evidence that is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 70-71, 436 P.2d 198 (1968)).

"Although we ordinarily assume that instructing the jury to disregard extraneous evidence sufficiently ensures that inadmissible evidence will not influence the jury . . . where the extrajudicial statement concerns a defendant's prior criminal acts, the efficacy of such instructions is subject to serious doubt." Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988).

As courts have recognized, there are times when jurors cannot reasonably be expected to insulate themselves from a prejudicial reference. Rivas' testimony falls into this category. Escalona and Miles are instructive in this regard.

Escalona was charged with second degree assault with a knife. Before trial, the court granted a defense motion in limine to exclude any mention of Escalona's prior conviction for the same crime. Escalona, 49 Wn. App. at 252. During cross-examination however, the complaining witness testified that Escalona "already has a record and has stabbed someone." Defense counsel immediately objected and asked that the testimony be stricken. The trial court ordered the statement stricken and told the jury to disregard the remark. Defense counsel moved for a mistrial based on the violation of the order in limine. The motion was denied. Escalona, 49 Wn. App. at 2523.

On appeal, Escalona argued that the trial court erred in denying the mistrial because the testimony violating the order in limine denied his

right to a fair trial. Escalona, 49 Wn. App. at 254. The Court of Appeals agreed. The Court noted that evidence Escalona had stabbed someone previously was "inherently prejudicial." Escalona, 49 Wn. App. at 255. The Court reasoned the improper testimony was of a nature likely to "impress itself upon the minds of the jurors" despite the curative instruction, because although not "legally relevant", it would appear to jurors as "logically relevant" evidence. Accordingly, the Court recognized the jury undoubtedly used the evidence for the improper purpose of concluding that Escalona acted in conformity with the assaultive character he had previously demonstrated. Escalona, 49 Wn. App. at 256 (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)).

Despite the curative instruction, the Court concluded reversal was required because the seriousness of the irregularity deprived Escalona of his right to a fair trial and the trial court abused its discretion in denying the motion for mistrial. Escalona, 49 Wn. App. at 256.

In Miles, the Court of Appeals reversed a conviction for robbery after a police officer testified he received a message indicating that a future robbery was planned in the same manner as the one charged. Miles, 73 Wn.2d at 71.

During trial, defense counsel objected to the testimony of a police officer who explained the contents of a message received by his police

department. The objection was overruled. The officer who arrested Miles then testified about a teletype message received from the Yakima County Sheriff's Office which described two wanted persons, their car, and the fact they were headed to Spokane to duplicate the robbery they were charged with. Miles, 73 Wn.2d at 68. Defense counsel moved for a mistrial. The trial court denied the motion but instructed the jury to disregard the testimony about the future robbery. Miles, 73 Wn.2d at 68-69.

On appeal, Miles argued the testimony was too prejudicial to be cured by an instruction to the jury. Miles, 73 Wn.2d at 69. The Court of Appeals agreed, explaining, "this testimony was calculated to and undoubtedly did implant in the minds of the jury the idea that the defendants had committed other robberies of this type and were therefore most likely to have committed the one charged." Miles, 73 Wn.2d at 70. Concluding Miles was denied a fair trial, the Court reversed his conviction. Miles, 73 Wn.2d at 71.

As Escalona and Miles illustrate, evidence establishing that the accused previously committed acts similar to the current charge is especially prejudicial because it allows the jury to shift focus from the merits of the current charge and instead focus on past behavior. State v. Trickler, 106 Wn. App. 727, 733-34, 25 P.3d 445 (2001). The prejudice

potential of prior bad acts evidence is at its highest in sex abuse cases. State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise. Saltarelli, 98 Wn.2d at 363.

Here, the inadmissible testimony of Rivas established that Oliver was a convicted sex offender, suggesting an "abnormal bent" and propensity to commit sexual crimes, and therefore making it more likely that he committed the promoting sexual abuse of a minor and second degree trafficking. It is now well accepted, by courts and scholars, that the probability of conviction increases dramatically once the jury becomes aware of prior crimes. See State v. Hardy, 133 Wn.2d 701, 710-11, 946 P.2d 1175 (1997) (criminal history is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes").

Despite the court's limiting instruction, given the charges at issues, the testimony about Oliver's status as a registered sex offender no doubt left a significant impression in the jurors' minds. They could not likely ignore or forget such probative evidence. State v. Slocum, 183 Wn. App. 438, 333 P.3d 541 (2014) (recognizing evidence of prior misconduct is probative but inadmissible because "it is said to weigh too much with the jury and to so

overpersuade them” (quoting Michelson v. United States, 335 U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168 (1948)). This prejudicial evidence significantly undermined Oliver's defense that he did not have actual knowledge that V.B. was less than 18-years-old. RP 267, 284-86.

The court ruled in limine that evidence of Oliver's prior sex offenses was excluded. 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

When a person is 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” unless the crimes involve the “same criminal conduct.” RCW 9.94A.589(1)(a). “Same criminal conduct” means crimes that involved the same victim, were committed at the same time and place, and involved the same criminal intent. Id.

At sentencing, Oliver's counsel asked the trial court to find the promoting sexual abuse of a minor and second degree trafficking were the

same criminal conduct. RP 771-76; Supp. CP ____ (sub no. 61, Defendant's Motion for Sex Offender Sentencing Alternative Examination for Eligibility, filed 3/28/16). Counsel asserted, "the overall criminal intent that was shown was Mr. Oliver was causing [V.B.] to engage in prostitution and that he was profiting from that." RP 774.

In response, the State focused instead on arguing that the two crimes did not violate Oliver's right against double jeopardy and therefore should not be merged at sentencing. RP 776-79; Supp. CP ____ (sub no. 69, State's Sentencing Brief: Double Jeopardy, Et. Al., filed 6/14/16). As the prosecutor explained, "so proof of the promoting is not necessary to prove trafficking; proof of trafficking is not necessary to prove promoting, just like in *Clark*.^[4] So that's why merger doesn't apply, either, in the State's mind." RP 779. When the trial court asked the prosecutor to address Oliver's same criminal conduct analysis, the prosecutor responded, "that's the merger analysis, essentially." RP 779.

Defense counsel disputed that a merger and same criminal conduct analysis were one in the same. As counsel correctly explained, a merger finding required the court to actually vacate a conviction, whereas a same

⁴ *State v. Clark*, 170 Wn. App. 166, 283 P.3d 1116 (2012), rev. denied, 176 Wn.2d 1028, 301 P.3d 1048 (2013).

criminal conduct finding required only that the court "ignore" one of the convictions in calculating Oliver's offender score. RP 780.

The trial court nonetheless rejected the same criminal conduct argument. The court explained its reasoning as follows:

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.

RP 787-88.

The trial court's conclusion was error. Whether two crimes constitute the same criminal conduct involves a determination of fact as well as the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000 (2000). A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003). Use of an incorrect legal standard in making a discretionary decision also constitutes an abuse of discretion. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003, 914 P.2d 66 (1996). Here, the trial court's determination that the crimes did not

encompass same criminal conduct was an abuse of discretion for two separate reasons.

- a. The trial court's analysis applied the incorrect legal standard.

The trial court expressed its belief that it could not find the offenses "merged" for sentencing purposes because each crime included "different things" that the other did not. RP 787. This was not the proper analysis, however. Double jeopardy and same criminal conduct analysis are not the same. See State v. Chenoweth, 185 Wn.2d 218, 222, 370 P.3d 6 (2016) (reaffirming prior decisions that double jeopardy determinations are not dispositive of "same criminal conduct" determinations).

"Same criminal conduct" means crimes that require the same intent, were committed at the same time and place, and involved the same victim. Id. "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). But see Chenoweth, 185 Wn.2d at 223 (comparing statutory intents to preclude same criminal conduct finding). 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).

In contrast, merger is a tool for determining legislative intent in the double jeopardy context. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). Two offenses merge if, to elevate a crime to a higher degree, the State must prove the crime “was accompanied by an act which is defined as a crime elsewhere in the criminal statutes[.]” Freeman, 153 Wn.2d at 778 (citing State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)). When determining merger, courts view the offenses as charged, not how they could have been charged. Freeman, 153 Wn.2d at 777.

Here, defense counsel's argument that the offenses were the same criminal conduct correctly focused on the purpose of Oliver's overall criminal intent: profiting from V.B.'s prostitution. RP 774. Counsel's same criminal conduct argument did not turn on whether the same underlying conduct elevated the degree of either crime, because that is a separate double jeopardy analysis. Because the trial court applied the wrong legal standard, it abused its discretion. Had the trial court applied the correct standard, as demonstrated below, it would have been

compelled to find the promoting sexual abuse of a minor and second degree trafficking constituted the same criminal conduct.

- b. Promoting commercial sexual abuse and second degree trafficking constitute the same criminal conduct.

There can be no dispute that Oliver's promoting sexual abuse of a minor and second degree trafficking constituted the same victim: V.B. The crimes also occurred at the same time and place: at Oliver's residence during the identical charging periods of November 20, 2014 through February 13, 2015.

The two offenses also involved the same criminal intent. “The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In applying this test, courts consider whether the crimes are linked, whether one crime furthered the other, and whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Crimes may involve the same criminal intent if they were part of a “continuing, uninterrupted sequence of conduct.” State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997). Intent in this context is the offender’s objective purpose in committing the

crime, not the mens rea element of the particular crime.⁵ State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088, rev. denied, 180 Wn.2d 1017, 327 P.3d 55 (2014).

Here, the promoting and trafficking offenses involved the same intent, whether one looks at Oliver's statutory intent or objective intent. The statutory intent of promoting commercial sexual abuse of a minor is knowingly advancing commercial sexual abuse or profiting from the minor engaged in sexual conduct. CP 62 (instruction 8); RCW 9.68A.101. Similarly, second degree trafficking requires that a person knowingly or in reckless disregard of the fact, recruits, harbors, obtains, or receives a person under 18 engaged in a commercial sexual act, or benefits financially from said person's commercial sex act. CP 75 (instruction 21); RCW 9A.40.100(3)(a). A person knows or acts knowingly when he or she is aware of a specific fact, circumstance or result. CP 64 (instruction 10); RCW 9A.08.010(1)(b), (2). "When recklessness as to a particular result

⁵ The supreme court's recent decision in State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016), does not change the objective criminal intent standard. There, the court held first degree incest and third degree child rape were not the same criminal conduct because "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child." Id. at 223. But those crimes are strict liability offenses with no mens rea elements. RCW 9A.64.020(1)(a); RCW 9A.44.079(1). The Chenoweth court therefore did not create a new rule that courts must look to the statutory mens rea elements in determining criminal intent for the purposes of same criminal conduct.

or fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result or fact." CP 78 (instruction 24); RCW 9A.08.010(1)(c), (2).

Thus, under the Supreme Court's recent decision in Chenoweth, Oliver's statutory intent in committing the promoting and trafficking offenses was the same. 185 Wn.2d at 223 (looking to the "statutory criminal intent," the court held the strict liability offenses of first degree incest and third degree child rape were not the same criminal conduct because "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child).

The facts of Oliver's offenses demonstrate they were also committed with the same objective criminal purpose: to profit from V.B.'s prostitution. V.B. testified that Oliver posted the online ads promoting prostitution, set the prices V.B. was to charge for sexual encounters, provided supplies such as condoms, and provided a place for the sexual acts to occur. V.B. also gave the money earned to Oliver.

The offenses involved a "continuing, uninterrupted sequence of conduct." Porter, 133 Wn.2d at 186; see also State v. Mandanas, 168 Wn.2d 84, 86-87, 228 P.3d 13 (2010) (second degree assault and felony harassment were same criminal conduct were defendant punched victim in the face, hit him in the head with a gun, and then pointed the gun at him and threatened

to kill him). Oliver's intent did not change from when he met to V.B., to when he posted the ads online, to the end of his relationship with V.B. The offenses were based on the same set of circumstances between Oliver and V.B. Oliver's entire relationship with V.B. was in service of the goal of profiting from her prostitution.

Because the two offenses encompassed the same criminal conduct, the trial court erred in concluding the law dictated otherwise. Applying “same criminal conduct” analysis, Oliver's offender score is 2 instead of 4. Supp. CP ____ (sub no. 61, Defendant's Motion for Sex Offender Sentencing Alternative Examination for Eligibility, filed 3/28/16). This Court should remand for resentencing to score Oliver's promoting sexual abuse and trafficking convictions as a single offense. State v. Dunaway, 109 Wn.2d 207, 217-18, 743 P.2d 1237 (1987).

3. APPEAL COSTS SHOULD NOT BE IMPOSED⁶

The trial court found Oliver was entitled to seek review at public expense, and therefore appointed appellate counsel. CP 131-37. If Oliver does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by

⁶ RAP 14.2 now provides, with regard to appellate costs:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The trial court found Oliver indigent for purposes of the appeal. CP 131-37. That finding remains in effect.

conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Oliver's ability to pay must be determined before discretionary costs are imposed.

The existing record establishes that any award of appellate costs would be unwarranted in this case.⁷ The record is replete with evidence of indigency. The trial court waived all non-mandatory fees, finding that Oliver was indigent and unable to pay non-discretionary LFOs. CP 122-23; RP 820. Notwithstanding this finding, Oliver is still liable for over \$5,000 in mandatory LFOs associated with the convictions at issue. CP 122-23; RP 820.

Without a basis to determine that Oliver has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

⁷ Pursuant to this Division’s General Order of June 10, 2016, Oliver's Report as to Continued Indigency is filed contemporaneously with this opening brief of appellant.

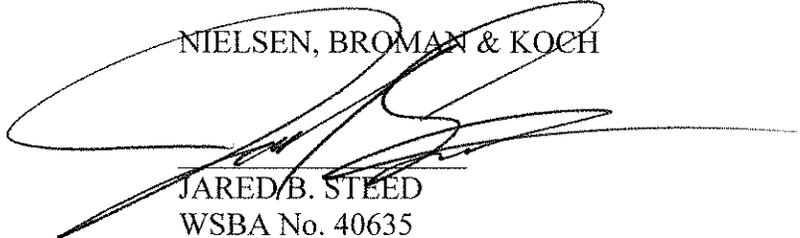
D. CONCLUSION

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 exercise its discretion and deny appellate costs.

DATED this 31st day of March, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over the printed name and extends across the page.

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No. 34531-9-III

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Re: Oliver
Cause No., 34531-9-III in the Court of Appeals, Division III, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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03-31-2017
Date
Done in Seattle, Washington