

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34535-1-III

STATE OF WASHINGTON, Respondent,

v.

AVERY QUINN LATHAM, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Avery Latham attempted to kill Katelyn Diricco by strangling her, disposing her body in an abandoned yard, and cutting her throat to “finish it.” In spite of his efforts, Diricco survived. Latham pled not guilty by reason of insanity and, following a bench trial, was convicted of first degree assault, two counts of attempted murder, and one count of kidnapping. The attempted murder charges were based upon Latham’s acts in choking Diricco unconscious, and subsequently cutting her throat. At sentencing, Latham argued that the two attempted murder charges merged or, in the alternative, constituted the same criminal conduct along with the kidnapping. The trial court disagreed and sentenced Latham to consecutive terms for each conviction. Latham now appeals and contends that the trial court erred in sentencing him separately for each attempted murder charge and the kidnapping charge when all occurred during a single course of conduct.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in holding that the two counts of attempted first degree murder did not merge.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in holding that the two counts of attempted first degree murder and the count of first degree kidnapping were not the same criminal conduct.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: What is the unit of prosecution for attempted first degree murder?

ISSUE NO. 2: In evaluating the unit of prosecution for attempted first degree murder, does the court consider each individual “substantial step” taken toward the commission of the crime, or does it consider the attempt as a continuing course of conduct?

ISSUE NO. 3: Did the crimes of attempted first degree murder and first degree kidnapping involve the same intent, occur at the same time and place, and involve the same victim, when each act furthered the objective intent to kill the victim?

IV. STATEMENT OF THE CASE

The underlying incident is summarized accurately in the trial court’s oral ruling delivering the verdict. IV RP 608-22. Katelyn Diricco lived in a basement room in Spokane with her then-boyfriend. IV RP 610. On the night in question, she came home from a tavern and got into bed,

trying to warm up. IV RP 610. A man she had never met before came downstairs, laid down on the bed with her, and made small talk with her. IV RP 610. Twice he attempted to touch her leg, and both times Diricco said no and moved his hand away. IV RP 610-11. The interaction made her very nervous and uncomfortable; Diricco told the man he was giving her “the heebies,” and she tried to get up and go upstairs. IV RP 610, 611. At that moment, the man put his hands around her neck and squeezed until she blacked out. IV RP 611. She awoke some time later in the snow, bleeding, and was found by a good Samaritan on a nearby porch. IV RP 608-09, 611. She was immediately taken to a hospital where doctors discovered her neck was cut from ear to ear by an object similar to a knife. IV RP 608-09, 611.

After leaving the hospital, Diricco was able to identify the man who had come into the basement from a Facebook account. IV RP 611. The man she identified was Avery Latham. IV RP 611.

Police contacted Latham and questioned him. IV RP 611-12. Over the course of two interviews, Latham confessed to the crime and took police to different areas where the crime occurred and where evidence was recovered. IV RP 611-12. He told police that he had choked Diricco with his hands, wrapped his shirt around her neck to cut

off her breathing, placed her in a recycle bin that he wheeled down the street to the back of an abandoned home, and dumped her into the snow. IV RP 612. He then took out his pocket knife and cut her throat. IV RP 612.

The State charged Latham with second degree assault, two counts of attempted first degree murder, one with a deadly weapon enhancement, and one count of first degree kidnapping. CP 14-15. Latham entered a plea of not guilty by reason of insanity and waived his right to a jury trial, electing to be tried by the court. CP 87, 109. At trial, Latham described hearing voices since he was about 15 years old and one of them, whom he referred to as “Quin,” had told him to kill Diricco and “Quin” used his hands to commit the acts because Latham did not want to. IV RP 617-18. A defense psychiatrist diagnosed him as schizophrenic and opined that he was unable to understand the nature and quality of his acts. IV RP 631-33. The State’s expert disagreed, concluding that Latham was malingering. IV RP 628-29.

Ultimately, the trial court concluded that regardless of whether Latham suffered from schizophrenia, he understood the nature and quality of his acts because he understood their outcome. IV RP 639-40.

Accordingly, it rejected the insanity defense and convicted Latham as charged. IV RP 640.

At sentencing, Latham argued that the assault conviction and one attempted murder conviction should be vacated because the multiple convictions violated double jeopardy. CP 148. He also contended that all four convictions comprised the same criminal conduct, and should be scored as a single crime under the Sentencing Reform Act. CP 150. The State and the trial court agreed that the second degree assault conviction merged with the attempted murder conviction when both were premised upon the same act of strangulation. CP 155-56, 191, IV RP 643-44, 665. However, the trial court denied the request to merge the two attempted murder counts because of the different methods used in the two attempts. IV RP 664-65. The trial court further held that the counts did not occur at the same time or place or with the same intent, and declined to treat them as the same criminal conduct. IV RP 665. Accordingly, it imposed a standard range consecutive sentence of 190 months for each attempted murder count, 55 months for the kidnapping, and 24 months for the deadly weapon enhancement for a total sentence of 459 months. CP 180, IV RP 669-70.

Latham now appeals, and has been found indigent for that purpose.
CP 193, 209.

V. ARGUMENT

On both constitutional and statutory grounds, the sentence imposed for the multiple convictions exceeds the permissible maximum. As a matter of double jeopardy, the two attempted murder convictions are part of the same course of conduct and should merge. Under the Sentencing Reform Act's scoring provisions, the attempted murder convictions were part of the same criminal conduct and should not have been counted separately. For these reasons, one of the attempted murder convictions should be vacated and the case remanded for resentencing.

A. Convicting Latham for two separate counts of attempted first degree murder for two acts occurring in a continuing course of conduct violates double jeopardy.

Under the federal and Washington State constitutions, a person cannot receive multiple punishments for the same conviction without running afoul of the prohibition against double jeopardy. U.S. Const. amend. V; Wash. Const. art. I, § 9; *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). Alleged double jeopardy violations

are reviewed *de novo*. *Id.* at 979-80 (citing *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009)).

When a defendant is convicted of multiple counts of the same statutory provision, courts evaluate what unit of prosecution the Legislature intended to be punishable under the statute. *State v. Tili*, 139 Wn.2d 107, 113, 985 P.2d 365 (1999) (quoting *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). The unit of prosecution may be a single act, or a course of conduct. *State v. Morales*, 174 Wn. App. 370, 384, 298 P.3d 791 (2013). When the statute is ambiguous as to the unit of prosecution, the rule of lenity applies and the construction that favors the defendant should be adopted. *Villanueva-Gonzalez*, 180 Wn.2d at 984; *Tili*, 139 Wn.2d at 113; *Adel*, 136 Wn.2d at 364-35.

Here, Latham was convicted of two counts of attempting to commit first degree murder. CP 14-15. First degree murder is codified in RCW 9A.32.030(1)(a), which states:

A person is guilty of murder in the first degree when . . . with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.

Attempts are codified under RCW 9A.28.020(1), which provides:

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act

which is a substantial step toward the commission of that crime.

Thus, for purposes of Latham's case, the question is what unit of prosecution the legislature intended to punish by proscribing the doing of any act which is a substantial step toward causing the death of another, with premeditated intent to cause the person's death.

Of significance to the analysis is the fact that attempted first degree murder is an inchoate offense. In *State v. Varnell*, 162 Wn.2d 165, 170 P.3d 24 (2007), and *State v. Bobic*, 140 Wn.2d 250, 996 P.2d 610 (2000), the court considered the inchoate crimes of solicitation and conspiracy, respectively. Because inchoate crimes are committed regardless of whether the criminal act is completed, they require only the agreement to commit a criminal act (in the case of conspiracy) or an offer of something of value to commit a criminal act (in the case of solicitation), combined with a substantial step toward the commission of the crime. *Varnell*, 162 Wn.2d at 169-70. As such, the court rejected the argument that the legislature intended to separately punish each criminal objective, concluding that the appropriate focus is on the conspiratorial agreement or the solicitation, regardless of the number of possible crimes that would occur if the agreement or solicitation were completed. *Bobic*, 140 Wn.2d at 263, 265-66; *Varnell*, 162 Wn.2d at 171-72.

Applying the logic of *Bobic* and *Varnell* to the inchoate offense of attempted murder, the focus of the analysis is the attempt to take another's life. Thus, the question that determines the unit of prosecution is whether the attempt statute criminalizes each individual act, or a continuing course of conduct. *Morales*, 174 Wn. App. at 384.

In answering this question, the courts have noted that "a unit of prosecution that results in additional charges based on variables that are secondary can result in convictions that are disproportionate to an offender's conduct." *Morales*, 174 Wn. App. at 387-88. In *Morales*, the court concluded that the harassment statute did not create separate units of prosecution for each person who might have heard the threat and repeated it to the victim, reasoning that there would be no meaningful difference in the defendant's conduct "but considerable disparity in the sentence he would face." *Id.*

Likewise here, the prosecutable offense is the attempt to take someone's life. Dividing the attempt into the number of distinct acts that could cause the death results in disparate and absurd results. A person can only be murdered once. Had Latham succeeded in his attempt, he would have been convicted of a single count of first degree murder and faced a sentence of 240-320 months. RCW 9.94A.515 (establishing first degree

murder as a seriousness level XV offense); RCW 9.94A.510 (sentencing grid establishing range for level XV offense with an offender score of 0). But by punishing each separate act constituting the attempt, Latham faced a substantially greater sentence of 180-240 months on each count, required to run consecutively, for a mandatory minimum sentence of 360-480 months. RCW 9.94A.533(2) (range of attempt crime is calculated as 75% of the range for the completed crime); RCW 9.94A.589(1)(b) (two or more serious violent offense are served consecutively to each other); RCW 9.94A.030(46)(a)(ix) (defining attempted first degree murder as a serious violent offense). Thus, treating each act as a separate attempt crime results in a sentence that is significantly higher than Latham would have faced had he succeeded in killing Diricco.

It makes little sense, either as a matter of logic or as a matter of incentivizing behavior through criminal prohibitions, that the legislature would have intended to impose a longer sentence for a failed attempt on someone's life than a successful one. In interpreting statutes, the court presumes that the legislature did not intend absurd results. *State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010). Treating each act in an attempt to take a single life as a separate, punishable offense results in disparate and absurd outcomes, and creates a perverse incentive to complete the killing.

In urging the court to adopt this interpretation despite its facial absurdity, the State relied upon *State v. Boswell*, 185 Wn. App. 321, 340 P.3d 971 (2014). There, the court considered the unit of prosecution for attempted first degree murder and concluded it “should not allow the State to arbitrarily charge an unlimited number of counts based upon each substantial step taken toward the commission of first degree murder,” and instead concluded that the unit of prosecution is analyzed as a continuing course of conduct, rather than distinguishing each act. *Boswell*, 185 Wn. App. at 330. In evaluating whether the course of conduct is continuing, or separate and distinct, the court can consider the method used to commit the crime, the amount of time between the two courses of conduct, and whether the initial course of conduct was interrupted, failed, or abandoned. *Id.* at 331. Washington courts have also identified factors including the length of time over which the acts took place, whether they took place in the same location, the defendant’s intent or motivation for the different acts, whether the acts were uninterrupted or whether there were intervening acts or events, and whether there was an opportunity for the defendant to reconsider his actions. *Villanueva-Gonzalez*, 180 Wn.2d at 985. The determination is fact-specific and based upon the totality of the circumstances. *Id.*

The present case shows that over the course of a short period of time, Latham strangled Diricco unconscious, moved her body a short distance down the street to dispose of it, and cut her throat to “finish it.” III RP 414. From the time he strangled her to the time he cut her throat, he was continuously engaged in the murderous undertaking without interruption. His intent throughout the process was to kill Diricco, and all of his efforts were directed at that outcome without pause. This is not, therefore, the kind of absurd situation contemplated in *Boswell* that would allow a defendant to be released from prison, make a second attempt on the victim’s life, and only be prosecutable for one count. 185 Wn. App. at 330. Rather, it was a single attempt that involved multiple acts aimed at completing the task.

Because Latham’s acts in strangling Diricco and cutting her throat were part of a continuous attempt on her life on a single occasion, the trial court erred in concluding that the acts comprised separate units of prosecution. Rather, the acts were part of a continuing course of conduct that supported a single conviction for attempted first degree murder. Consequently, the multiple convictions for the same conduct violates the constitutional prohibition against double jeopardy. Latham respectfully requests that the court vacate and dismiss one of the attempted first degree murder convictions, and remand the case for resentencing.

B. The specific acts performed in the course of Latham's objective to kill Diricco comprised the same criminal conduct, and the sentences should therefore run concurrently.

Under the Sentencing Reform Act, sentences for serious violent offenses arising from separate and distinct criminal conduct are to be served consecutively. RCW 9.94A.589(1)(b). However, when the multiple offenses are part of the same criminal conduct, they are counted as one offense and sentenced accordingly. RCW 9.94A.589(1)(a); *Tili*, 139 Wn.2d at 124-25. A trial court's ruling as to whether offenses constitute the same criminal conduct is reviewed for abuse of discretion or misapplication of the law. *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993).

To constitute the same criminal conduct, the crimes must involve (1) the same objective criminal intent, considering whether one crime furthered another; (2) the same time and place; and (3) the same victim. RCW 9.94A.589(1)(a); *State v. Vike*, 66 Wn. App. 631, 633, 834 P.2d 48 (1992), *reversed on other grounds*, 125 Wn.2d 407, 885 P.2d 824 (1994). This standard may be met when the defendant commits multiple crimes against the same victim that further the commission of the other crimes. *State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

Additionally, separate incidents may occur at the same time for purposes of the test “when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. *State v. Young*, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999). They are not required to occur simultaneously to comprise the same criminal conduct. *State v. Price*, 103 Wn. App. 841, 856, 14 P.3d 841 (2000) (citing *State v. Porter*, 133 Wn.2d 177, 183, 185-86, 942 P.2d 974 (1997)).

With respect to the intent requirement, the standard evaluates whether the crimes served the same, or separate, criminal purposes. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013); *see also State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (observing there is “one overall criminal purpose” in multiple counts of delivering different controlled substances). The concern is not “the particular *mens rea* element of the particular crime, but rather is the offender’s objective purpose in committing the crime.” *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). The court considers, objectively, the extent to which the criminal intent changed from one crime to the next. *Dunaway*, 109 Wn.2d at 215. In considering this factor, courts may evaluate whether one crime furthered the other. *Vike*, 125 Wn.2d at 411.

Here, all of the acts served the same objective intent, namely, to kill Diricco and dispose of her body. The evidence showed that Latham strangled Diricco, transported her body to a nearby abandoned property, and cut her throat to “finish it.” III RP 414. Both the strangulation and the cutting were done for the same purpose of attempting to end Diricco’s life. The kidnapping, which was premised upon Latham’s actions in moving Diricco’s body to the abandoned yard, furthered his objective of killing and disposing of her in a place where she would not be traced to him or the apartment. Because the objective was the same and each of the crimes furthered it, the intent requirement is met.

Likewise, the events occurred at the same time and place because they were part of a continuous, ongoing episode that occurred without interruption over a short period of time. From the time that he strangled Diricco to the time he cut her, Latham was continuously engaged in the undertaking of killing her and getting rid of her body. That the events did not occur simultaneously or in the exact same location does not preclude them from occurring at the same time and place for purposes of the same criminal conduct analysis. In *Dunaway*, the defendant carjacked the victims, took their money, forced them to drive him to Seattle, and then ordered one of the victims to go into a bank to get more money for him. 109 Wn.2d at 211-12. Despite the fact that these events took place over

time and in different geographic locations, the court held that they constituted the same criminal conduct as to each victim. *Id.* at 217.

Here, as in *Dunaway*, all of the acts were intimately related to the same purpose and connected sequentially without interruption. They certainly involved the same victim. Under the standards set forth above, they also involved the same intent and occurred at the same time and place. Accordingly, it was error to conclude that the convictions for attempted murder and first degree kidnapping were not the same criminal conduct. The sentence should be vacated and the case remanded for resentencing.

C. Appellate costs should be denied if Latham does not prevail.

Latham's Report as to Continued Indigency is attached hereto. He was previously found indigent and appointed counsel on appeal. CP 209. Consistent with this Court's General Order dated June 10, 2016 and RAP 14.2, Latham requests that the court decline to impose appellate costs in this case. He lacks income and assets, has a 9th grade education, carries substantial legal financial obligation debt, and has been sentenced to over 38 years in prison. He will be unable to pay an appellate cost assessment.

VI. CONCLUSION

For the foregoing reasons, Latham respectfully requests that the court VACATE and DISMISS one of his convictions for attempted first degree murder, VACATE his sentence, and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 21 day of June, 2017.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

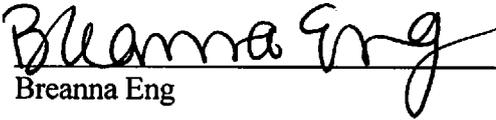
Avery Quinn Latham, DOC #391527
Monroe Correctional Complex – IMU
PO Box 777
Monroe, WA 98272

And, pursuant to prior agreement of the parties, by e-mail to the following:

Brian O'Brien
Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

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

Signed this 21st day of June, 2017 in Walla Walla, Washington.


Breanna Eng

REPORT AS TO CONTINUED INDIGENCY

(in support of motion or request that the court exercise discretion not to award costs on appeal)

Please fill out this report to the best of your ability. While you are not required to answer all of the questions, complete information will help the court determine whether to deny costs on appeal to the State, should it prevail.

I, Avery Latham certify as follows:

1. That I own:

- a. No real property
- b. Real property valued at \$_____.
- c. Real property valued at \$_____, on which I am making monthly payments of \$_____ for the next _____ months/years (circle one).

2. That I own:

- a. No personal property other than my personal effects
- b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at \$_____.
- c. Personal property valued at \$_____, on which I am making monthly payments of \$_____ for the next _____ months/years (circle one).

3. That I have the following income:

- a. No income from any source.
- b. Income from employment: \$_____ per month.
- b. Income of \$_____ per month from the following public benefits:

- Basic Food (SNAP) SSI Medicaid Pregnant Women Assistance Benefits
- Poverty-Related Veterans' Benefits Temporary Assistance for Needy Families
- Refugee Settlement Benefits Aged, Blind or Disabled Assistance Program
- Other: _____

4. That I have:

- a. The following debts outstanding:

Approximate amount owed:

Credit cards, personal loans, or other installment debt:	\$ _____
Legal financial obligations (LFOs):	\$ <u>20,000</u>
Medical care debt:	\$ _____
Child support arrears:	\$ <u>50 per Mo.</u>
Other debt:	\$ _____

Approximate total monthly debt payments:

\$ 60 a Mo.

() b. No debts.

5. That I am without other means to pay costs if the State prevails on appeal and desire that the court exercise discretion to deny costs.

6. That I can pay the following amount toward costs if awarded to the State:

\$ _____.

7. That I am 24 years of age at the time of this declaration.

8. That the highest level of education I have completed is: 9th grade.

9. That I have held the following jobs over the past 3 years:

Employer/job title	Hours per week	Pay per week	Months at job
Command Center	-20-40	\$9.14	2 years

10. That I have received the following job training over the past three years: _____

11. That I have the following mental or physical disabilities that may interfere with my ability to secure future employment: skizofrenia

12. That I am financially responsible for the following dependents (children, spouse, parent, etc.):

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

8-2-16
Date and Place

Avery Lathan
Signature of (Defendant) (Respondent) (Petitioner)

BURKHART & BURKHART, PLLC

June 21, 2017 - 11:53 AM

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