

34535-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

AVERY LATHAM, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. What is the appropriate unit of prosecution for attempted first degree murder, where a defendant utilizes two different techniques, during two separate attempts to slay the same victim, that were differentiated in time, distance, and location?

2. Did the trial court abuse its discretion when it determined the two attempted first degree murder convictions and the first degree kidnapping conviction did not constitute the “same criminal conduct” for sentencing because the crimes did not require the same criminal intent and did not occur at the same time or place?

## **II. STATEMENT OF THE CASE**

### Procedural history.

Avery Latham was charged by information in the Spokane County Superior Court with two counts of attempted first degree murder (one count included a deadly weapon enhancement - a knife), one count of first degree kidnapping, and one count of second degree assault. CP 14-15. All counts involved the same victim, Katelyn Diricco. The case proceeded to a bench trial before the Honorable Maryann Moreno and the court ultimately convicted the defendant as charged. CP 212-18. This appeal timely followed.

Substantive facts.

On December 28, 2014, the victim, Katelyn Diricco, was living with several other tenants at 1719 East Sprague Avenue in Spokane. RP 212. Earlier in the evening, Ms. Diricco had been to a local tavern, consumed several beers, and returned to the residence around 10:00 p.m. RP 213. Ms. Diricco retired to her bedroom for the evening, which was located in the basement of the residence. RP 213-14.

While curled up on the bed, the defendant, Mr. Latham, entered Ms. Diricco's bedroom and sat down on her bed. RP 215, 226. He engaged in small talk with Ms. Diricco, and attempted to touch her several times, including rubbing her upper leg. RP 215, 230. Ms. Diricco did not know the defendant. RP 214. Ms. Diricco felt nervous and informed the defendant that he was giving her the "heebees"<sup>1</sup> and she was going to relocate to the upstairs living room. RP 215-16, 231.

Without provocation, the defendant rolled Ms. Diricco over "face to face," placed both hands around her throat, and began strangling her.

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<sup>1</sup> An apparent reference to "heebee-jeebies" which is an American idiom used to describe a particular type of anxiety related to a person or place. [https://en.wikipedia.org/wiki/Heebie-jeebies\\_\(idiom\)](https://en.wikipedia.org/wiki/Heebie-jeebies_(idiom)) (last accessed August 29, 2017).

RP 216. Ms. Diricco attempted to scream, but was unable to because of the defendant's tight grasp. RP 216. As recalled by Ms. Diricco:

And I was trying to say, "Somebody please help me," but no sound was coming out of my throat. So I kept trying to talk and I could hear no sound. And then I remember him looking at me in the eyes. And he had this cold deadpan look in his eyes, and he was just staring right at me the whole time as he was pressing in my throat. And then I went black.

RP 232.

Approximately 30 seconds to a minute elapsed and then Ms. Diricco lost consciousness. RP 216. Ms. Diricco awoke outside, in some grass, in the area of 1808 East First Avenue, bleeding from a cut, side to side, on her throat. RP 200, 217. She eventually found a neighborhood resident at 1812 East First Avenue around midnight, who summoned medical aid. RP 186-87, 217, 255, 354. Ms. Diricco was losing an excessive amount of blood and appeared to be in shock. RP 187, 190, 196, 199, 218.

Ms. Diricco was transported to Sacred Heart Medical Center. RP 196. Emergency room physician, Dr. Michael Moore, performed surgery on Ms. Diricco at the hospital to repair the throat laceration. RP 315. He described Ms. Diricco's most significant injury as "being a laceration across the neck, primarily across the anterior neck, kind of coming from the angle of the jaw across the windpipe area over to the left side." RP 315. The wound penetrated deep enough that it went through the

superficial muscles of the neck, exposing potential blood vessels and nerves which connect to the brain.<sup>2</sup> RP 315. The doctor expressed that the injury was definitely life-threatening. RP 316. The wound was consistent with being caused by a sharp object such as a knife. RP 317, Ex. 1-3.<sup>3</sup> Additional injuries were later documented by a detective on Ms. Diricco - several abrasions on the left cheek, small abrasion on the chin, bruising on the lower

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<sup>2</sup> More specifically, the doctor stated:

We have a major muscle across the neck that comes from the -- right below your ear to your breastbone called the *sternocleidomastoid* muscle, which is that, when you push against yourself, that's the one that stands out. That's a fairly thick muscle in most people, you know, maybe as much as three quarters of an inch thick. That was nearly cut in half. And immediately underneath that are the carotid vessels to the brain and the jugular vessels that drain the brain, the veins. So those are the ones that are most concerned about. There are many minor vessels supplying the thyroid gland and various glands of the neck.

RP 316 (emphasis in original).

The doctor further elaborated that the wound came within 1/8 of an inch to the jugular vein and carotid artery in the throat. RP 316. A toxicology screen was conducted and no drugs or alcohol were detected in Ms. Diricco's blood. RP 317.

<sup>3</sup> Admitted photographs, Ex. 1-3, of Ms. Diricco's injuries to her throat have been designated for this Court's review, not to sensationalize the material, but rather to illustrate the amount of force used to cause the injury and to demonstrate the determination of the defendant to cause the death of Ms. Diricco.

left leg, small abrasions on left ankle and right knee, and bruising on the left upper chest. RP 258-61.

On January 2, 2015, the defendant was interviewed by Detective Paul Lebsock. Ex. 83 at 2.<sup>4</sup> The defendant admitted he sat down next to Ms. Diricco, with the intention to have sex with her. Ex. 83 at 25-26. The defendant laid down next to Ms. Diricco and attempted to “seduce” her. Ex. 83 at 25-27. He then “snuggled” up to Ms. Diricco and she remarked she was going upstairs. Ex. 83 at 27. The defendant forcefully held Ms. Diricco down on the bed, telling her several times she was going to stay with him. Ex. 83 at 27-28. The defendant then placed his hands around Ms. Diricco’s neck and “choked her and choked her and choked her ... until she stopped moving for the most part and then ... [the defendant] let off of her.” Ex. 83 at 28:1197-1200. He further clarified:

She, I just - I just laid down on her and choked her and choked her and she tried to gasp for air. She said, “I’ll leave, I’ll leave.” And I kept on choking her. She said, “I have family.” That was the last thing she said. I choked her and choked her and choked her. And until she stopped moving for the most part and then- then I let off of her. I thought,

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<sup>4</sup> Exhibits 83 and 84 are transcriptions of two interviews conducted by the detective with the defendant. Each document is successively page numbered at the right-hand top of the margin, with each document commencing on “page 2.”

Before trial, the court conducted a CrR 3.5 hearing and determined the defendant’s statements to law enforcement were admissible at the time of trial. CP 131-35 (findings of fact and conclusions of law); RP 14-171.

well, she gasped. I thought, "Oh, she's gonna- she's gonna tell somebody. I can't - I can't have that." I've just started, I gotta finish it. And so I took my shirt off, I had my hand around her throat. And I wrapped it around her neck. And then I don't know, but I gotta do something with her. So I put her in a sleeping bag, carried her upstairs. Put her in the closest thing available, recycling can. Drug her a couple blocks. Vacant house, I knew it was vacant. I laid her down in the snow, no boots. And then I took out a knife I don't have any more and I cut her throat. I - I took the garbage can back to my friend, (Jeff)'s house.

Ex. 83 at 28:1197-1209.

The detective conducted a follow-up interview several hours later with the defendant. During that interview, the following discussion took place:

[DETECTIVE]: Okay. Did she go unconscious when you were using your hands?

[DEFENDANT]: I think-so. Yeah.

[DETECTIVE]: Okay did- did you think she was dead at that point?

[DEFENDANT]: I wasn't sure, and then she (unintelligible).

[DETECTIVE]: Like a big gasp?

[DEFENDANT]: Yeah.

Ex. 84 at 3:81-89.

[DETECTIVE]: And what exactly did you use that shirt to - to put around her neck after the big gasp?

[DEFENDANT]: Yeah, after the big gasp and s- I - yeah. It didn't seem like she was conscious or. I wasn't sure if she was alive.

[DETECTIVE]: Okay. So you used the sir- shirt to put around her neck?

[DEFENDANT]: Yeah. I wasn't sure if she was still alive.

[DETECTIVE]: And so you're gonna make sure she's dead? Is that right?

[DEFENDANT]: Yeah. Yeah.

Ex. 84 at 4:111-123.

[DETECTIVE]: Okay. So you held the shirt around her neck? Can you demonstrate how you used the shirt...

[DEFENDANT]: I...

[DETECTIVE]: ... with your hands?

[DEFENDANT]: I took it off because I was wearing it and I wrapped it around her neck. I -didn't seem like- I kept on unwrapping it and rewrapping it and unwrapping it and rewrapping it and - and I just held her there, laying on the bed with it wrapped.

[DETECTIVE]: Okay. You don't recall for how long?

[DEFENDANT]: No.

Ex. 84 at 5:138-152.

[DETECTIVE]: Okay. So you put her in a sleeping bag and then - I mean, this was in the basement, right? Where you stayed with - where...

[DEFENDANT]: Yeah it was on the bed.

[DETECTIVE]: Okay. So you put her in the sleeping bag and you took her upstairs?

[DEFENDANT]: And I took her straight outside.

[DETECTIVE]: Which door?

[DEFENDANT]: The back door.

[DETECTIVE]: And all during this time she remained unconscious?

[DEFENDANT]: Yeah she was...

[DETECTIVE]: *Was she dead?*

[DEFENDANT]: *A- as far as I know.*

[DETECTIVE]: *As far as you know, she was dead at that point?*

[DEFENDANT]: *Yeah, as far as I know.*

[DETECTIVE]: *So she gasped a big gasp of air after you used your hands, but then after you used your shirt, that's when she's dead?*

[DEFENDANT]: *Yeah as...*

[DETECTIVE]: *As far as you knew.*

[DEFENDANT]: *As far as I could tell.*

[DETECTIVE]: Okay.

Ex. 84 at 8-9:306-340 (emphasis added).

[DETECTIVE]: So you put her - you put her in the bin. When you - explain how you did it. Did the - was the bin remain upright? Did you lay the bin down on the ground? Did you...

[DEFENDANT]: I put her on the ground and I was going around, trying to figure out what to use, and I saw it and I used it.

[DETECTIVE]: Okay. So when you put her in the bin, did you put the bin down on the ground and...

[DEFENDANT]: Yeah. I dragged...

[DETECTIVE]: Or did you - was it upright?

[DEFENDANT]: I dragged her over to it.

[DETECTIVE]: Okay. And so, once again, was the bin upright when you picked her up and put her in? Or did you put the...

[DEFENDANT]: No I put her- I put it down and put her in it and ...stood it up.

[DETECTIVE]: Stood it up. Okay. And then from there you pushed or pulled the bin somewhere.

[DEFENDANT]: Yeah.

Ex. 84 at 10:384-409.

The defendant placed the body in a sleeping bag, carried it to the upstairs of the residence, and then placed Ms. Diricco inside a recycling bin.

Ex. 84 at 5:154-168; Ex. 84 at 8-9:311-17. The defendant still believed Ms. Diricco was dead at this point in time. Ex. 84 at 9:319-38. He then pushed the recycle bin, which was located in the backyard of the residence, with Ms. Diricco's body stuffed inside, to and down the alleyway, walked southbound to the intersection at First Avenue, and turned into another

alleyway, and then proceeded down the alleyway to a vacant home, several houses inward. Ex. 83 at 28:1197-1209; Ex. 84 at 11-13:448-507. The defendant then removed the body from the receptacle and sleeping bag, turned the body over, and “slit her throat.” Ex. 84 at 13:517-18. With regard to the reason for slashing Ms. Diricco’s throat:

[DETECTIVE]: What was in your thought process at that time?

[DEFENDANT]: At that time? I guess I just wanted to make sure.

[DETECTIVE]: Make sure that she was dead?

[DEFENDANT]: I can’t really remember what I was thinking at that time.

[DETECTIVE]: Okay. Earlier I- I believe you alluded to that you wanted to make sure that she was dead, otherwise- at least that was y- that’s why you wanted to use a shirt.

[DEFENDANT]: That’s k- that’s- yeah that’s- I mean, I mean, I guess- yeah the shirt. That’s twice, three times. Yeah. I didn’t really - I guess I just wanted to make sure. I mean...

[DETECTIVE]: You wanted to make sure that...

[DEFENDANT]: I wanted to make sure that it was done so that she wouldn’t come back and try to point any fingers at me for doing anything. I was just so scared of going to jail and all this stuff.

Ex. 84 at 14-15:581-601.

Of import, the defendant estimated *several hours or more passed* from the time he initially made contact with Ms. Diricco, while under the belief he had killed Ms. Diricco by his several, increasingly aggressive attempts to strangle her, until such time as he removed her body from the residence. Ex. 84 at 22:907-925.

During the investigation, the defendant agreed to show officers where he had hid the knife after the event, which was located behind a bar called the “Checkerboard,” off of Sprague Avenue. RP 241-42. The knife was collected by officers. It was later measured by a witness in the courtroom and the blade was three and one-half inches in length. RP 389; Ex. 46, 48 (photographs of the knife). Washington State Patrol forensic scientist, Alison Walker, conducted DNA testing in the case. RP 342-43. Blood on the knife originated from Ms. Diricco. RP 349. A partial major profile was developed on the handle of the knife which originated from the defendant. RP 350.

### **III. ARGUMENT**

#### **A. THE TWO ATTEMPTED FIRST DEGREE MURDER CONVICTIONS PROPERLY REPRESENTED TWO UNITS OF PROSECUTION, AS EACH CRIME DELINEATED SEPARATE COURSES OF CONDUCT. DOUBLE JEOPARDY DOES NOT BAR THE CONVICTIONS.**

The defendant generally argues the unit of prosecution for attempted first degree murder is defined by a defendant’s overall intent and complete course of conduct to commit murder and that the trial court erred when it permitted convictions for two separate attempts to commit murder. App. Br. at 6-12.

Standard of review.

An appellate court reviews double jeopardy claims de novo. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014).

The Fifth Amendment to the federal constitution provides that no “person be subject for the same offense to be twice put in jeopardy of life or limb.” Similarly, article 1, section 9 of the state constitution expresses, “No person shall ... be twice put in jeopardy for the same offense.” These double jeopardy provisions prohibit, among other things, multiple convictions for the same offense. *State v. Hall*, 168 Wn.2d 726, 729-30, 230 P.3d 1048 (2010).

Accordingly, double jeopardy principles protect an individual from being convicted more than once under the same statute for a single unit of the crime. *State v. Barbee*, 187 Wn.2d 375, 382, 386 P.3d 729 (2017), *as amended* (Jan. 26, 2017). When a defendant is convicted of multiple violations of the same statute, the double jeopardy question depends on the unit of prosecution that is punishable under the statute. *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). “If a defendant is charged with violating the same statutory provision more than once, multiple convictions can withstand a double jeopardy challenge only if each is a separate ‘unit of prosecution.’” *State v. Allen*, 150 Wn. App. 300, 313, 207 P.3d 483 (2009).

To determine the unit of prosecution for a particular crime:

[T]he first step is to analyze the statute in question. Next, [an appellate court] review[s] the statute's history. Finally, [the appellate court] performs a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.

*State v. Mata*, 180 Wn. App. 108, 117, 321 P.3d 291 (2014) quoting *Hall*, 168 Wn.2d at 730. If the legislature's intent is unclear, an appellate court construes the ambiguity in the defendant's favor by applying the rule of lenity. *State v. Graham*, 153 Wn.2d 400, 405, 103 P.3d 1238 (2005).

Here, the statute for first degree murder, RCW 9A.32.030(1)(a) states:

- (1) A person is guilty of murder in the first degree when:
  - (a) 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; or

RCW 9A.28.020, the attempt statute, provides:

- (1) A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.

A "substantial step" for purposes of the criminal attempt statute is defined as conduct that is strongly corroborative of the actor's criminal

purpose.<sup>5</sup> *State v. Newbern*, 95 Wn. App. 277, 287, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999).

Accordingly, attempted first degree murder requires “(1) intent to commit first degree murder and (2) a substantial step toward committing first degree murder.” *State v. Boswell*, 185 Wn. App. 321, 328, 340 P.3d 971 (2014), *review denied*, 183 Wn.2d 1005 (2015).

Here, the defendant argues the unit of prosecution for attempted first degree murder is encapsulated by his continuing course of conduct, from the time he initially strangled the victim several times, until such time as he sliced Ms. Diricco’s throat, claiming that the attempted first degree murder is an inchoate crime which cannot involve separate courses of conduct.<sup>6</sup> Specifically, the defendant argues attempted murder crimes are continuing offenses, notwithstanding there may be distinct acts which could cause death. App. Br. at 8. The defendant attempts to bolster his argument relying

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<sup>5</sup> Conduct strongly corroborative of an actor’s criminal purpose includes, “lying in wait, searching for or following the contemplated victim of the crime,” and “possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances.” *State v. Workman*, 90 Wn.2d 443, 451-52 n.2, 584 P.2d 382 (1978).

<sup>6</sup> Washington law criminalizes three inchoate or “anticipatory” offenses: attempt, solicitation, and conspiracy which are defined in RCW 9A.28.020, .030, .040.

on solicitation and conspiracy cases which have defined the unit of prosecution for those crimes. *See State v. Varnell*, 162 Wn.2d 165, 170 P.3d 24 (2007) (the unit of prosecution for solicitation to commit murder is the act of promoting or facilitating a crime rather than the crime the defendant was soliciting) and *State v. Bobic*, 140 Wn.2d 250, 996 P.2d 610 (2000) (appropriate unit of prosecution for conspiracy is the agreement to engage in a criminal enterprise, not the number of crimes that could be committed in the course of carrying out that criminal enterprise).

The *Boswell* court squarely addressed and rejected the defendant's argument. That court found that: "[c]ontrary to Boswell's assertion, *Varnell* and *Bobic* do not stand for the proposition that the unit of prosecution for *all* inchoate crimes is based on the defendant's intent. Rather, they stand for the proposition that the unit of prosecution for inchoate crimes is the act necessary to support the inchoate offense, not the underlying crime." 185 Wn. App. at 329 (emphasis added).

Once the unit of prosecution is determined, an appellate court next conducts a factual analysis to determine if more than one unit of prosecution exists. *Hall*, 168 Wn.2d at 735. The essential question here is whether the defendant committed separate crimes when he strangled Ms. Diricco, transported her body away from the residence, and subsequently cut her throat. Factors that can be considered in addressing whether each act is a

separate or distinct violation include the method used to commit the crime; the amount of time between the acts; and whether the initial conduct was interrupted, failed, or abandoned. *See Boswell*, 185 Wn. App. at 332.<sup>7</sup>

In *Boswell*, the victim and defendant were involved in a romantic relationship. After a discussion regarding ending the relationship, Bowell attempted to poison the victim with some tea. *Id.* at 324-25. The victim began vomiting and fell asleep on the living room sofa. *Id.* at 325. The victim awakened to a loud ringing in her ears, blood dripping from her head, and Boswell holding a handgun. *Id.* at 325. The State subsequently charged

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<sup>7</sup> Some states have determined the unit of prosecution based on judicial balancing of various factors, many of which are related more to the facts of the crime than to the language of their statutes. *See, e.g., People v. Rodarte*, 190 Ill. App.3d 992, 138 Ill. Dec. 635, 547 N.E.2d 1256, 1261-62 (1989) (“Factors to be considered in determining whether a defendant’s conduct constitutes separate acts or merely distinct parts of a single act are: (1) the time interval occurring between successive parts of the defendant’s conduct; (2) the existence of an intervening event; (3) the identity of the victim; (4) the similarity of the acts performed; (5) whether the conduct occurred at the same location; and (6) prosecutorial intent”); *Harrell v. State*, 88 Wis. 2d 546, 277 N.W.2d 462, 472-74 (1979) (identifying the following factors: (1) the nature of the act; (2) temporal proximity; (3) multiple locations for an assault (including multiple locations on the victim’s body); (4) defendant’s intent; (5) cumulative punishment; (6) number of physical acts, such as pulls of a trigger; (7) number of victims); *see also State v. Fillman*, 43 Kan. App. 2d 244, 223 P.3d 827, 834 (2010) (applying similar factors in conjunction with an analysis of statutory language).

Boswell with two counts of attempted first degree murder for acts occurring on the same date.

Division Two of this court reviewed several cases to determine the unit of prosecution for attempted murder. The *Boswell* court's concern involved the balance between the State arbitrarily charging multiple counts based on each possible step leading up to the commission of the crime, and, on the other hand, permitting the State to hold a defendant accountable for repeated attempts on one victim's life. *See Id.* at 977. To remedy this concern, the *Boswell* court adopted the "continuing course of conduct" test to determine the appropriate unit of prosecution for an inchoate crime. *See Id.*

The *Boswell* court held that the defendant's two convictions for attempted murder did not violate the defendant's protection against double jeopardy because the defendant committed two distinct attempts to murder one victim—poisoning the victim, and then later shooting her. *Id.* More specifically, the court found:

Here, Boswell engaged in two separate distinct courses of conduct in his attempts to take [the victim's] life. First, he attempted to poison her by crushing pills, mixing them in tea, and giving the tea to her. After this attempt on [the victim's] life failed, there was a period of time before Boswell engaged in his second course of conduct. [The victim] was sleeping and Boswell had a period of time to consider his actions after [the victim] fell asleep. Then Boswell acquired the gun and shot [the victim] in the head.

Because Boswell employed different methods of attempting to kill [the victim], the attempts were separated by a period of time and the second attempt began only after the first attempt had failed, Boswell's two convictions properly represent two units of prosecution. Even Boswell's own testimony supports this analysis. Boswell admitted that his first plan to take his own life was limited to using the Tylenol. It was only after that plan failed that Boswell formulated the plan to use the gun. There was no evidence that [the defendant's] original plan included using both the Tylenol and the gun as part of one continuous plan.

*Id.* at 332.

Division Two found that its "course of conduct" framework for the unit of prosecution for attempted murder prevents potential overcharging by the State, but it also permits the State to hold an individual responsible for repeated attempts to take another person's life. *Id.* at 332.

*Hall, supra*, is also instructive. In that case, Hall was convicted of three counts of witness tampering based on 1,200 phone calls made to his girlfriend attempting to convince her not to testify or to testify falsely. 168 Wn. 2d at 729. The trial judge treated each count of witness tampering separately at sentencing. *Id.* Our high court reversed his convictions, holding that Hall's tampering with a single witness for a single trial constituted a single unit of prosecution. *Id.* at 737-38. But, the court

acknowledged that different facts could create additional units of prosecution:

[W]e recognize that the facts of a different case may reveal more than one unit of prosecution. We do not reach whether or when additional units of prosecution, consistent with this opinion, may be implicated if additional attempts to induce are interrupted by a substantial period of time, employ new and different methods of communications, involve intermediaries, or other facts that may demonstrate a different course of conduct.

*Id.* The court also clarified that:

Our determination might be different if Hall had changed his strategy by, for example, sending letters in addition to phone calls or sending intermediaries, or if he had been stopped by the State [of Washington] briefly and found a way to resume his witness tampering campaign. But those facts are not before us.

*Id.* at 737.

In *State v. Chouap*, 170 Wn. App. 114, 125, 285 P.3d 138 (2012), *review denied*, 182 Wn.2d 1003 (2015), Division Two, citing *Hall*, found the crime of attempting to elude a pursuing police vehicle to be one that a defendant could “commit ... anew with each pursuit.” In *Chouap*, the defendant had attempted to elude police in two high speed chases; one in Tacoma, involving Tacoma police, and another in Lakewood, involving Lakewood police. The court found two separate pursuits and two offenses where “the first pursuit ended when the Tacoma police officers stopped

pursuing Chouap because of his dangerous driving,” and he had thereby “successfully eluded the pursuing police vehicle.” *Id.*

In the present case, Judge Moreno specifically ruled on the permissible unit of prosecution regarding the two attempted first degree murder convictions:

Then again, with regards to the two counts of attempted murder -- and there's been much discussion of unit of prosecution and references to several of the cases, the cases of *Villanueva* and *Boswell*. *Boswell* is directly on point at least with regard to what charges were actually discussed in terms of the unit of prosecution. And I read a lot of cases on this. The calculation of unit of prosecution varies depending upon what -- what the act is. And all of the cases seem to reflect upon the fact that it's not the similarity between the charges with regard to the defendant's intent that is the driving factor; it's the act. How many acts does a defendant commit in the course of this whole crime that would support the offense as charged?

The cases also give a little bit of guidance to the court as to what types of factors can be looked at. And they're not exclusive by any means, but they seem to have a common thread. If there's several acts that make up a continuing crime, were there different methods used? Was there a period of time between the first and the second or the second and the third? During that period of time, did the defendant have a chance to consider or reconsider his acts? And is it a situation where the initial attempt failed and was later reconsidered or abandoned and that sort of thing? And that speaks directly to *Boswell*.

Mr. Latham argues that it was his intent to commit first-degree murder and that was his intent from the start, when he first put his hands around her neck until -- until the very end.

The most compelling factor here is the fact that there's such a significant change in the methods that were used. From the initial cutting off of her airway and her ability to breathe, that's distinct, that's separate, that's something that happened in the basement right out of the gate.

We don't really know how much time it took between the original assault and the second piece of it that happened outside. But the second act is so distinctly different than the first act. I suppose if he had choked her again, I don't know, maybe there would have been a stronger argument. But this was an entirely different approach; it was an entirely thought-out approach. As I recall, he -- the knife was in his pocket; he pulled it out; and this time he was not attempting to cut off her airway but he was intending for her to bleed out, something totally different than what he had done before.

And I think that's the distinction here. And I get it that every single thing along the continuum would not support a separate unit of prosecution. But here, like *Boswell* -- *Boswell* was trying to poison his girlfriend and then he shot his girlfriend, two totally distinct acts with a period of time between them, just like we have here. Again, the driving factor for me was the act. And that's what *Boswell* and *Boswell* progeny require as part of the analysis: Are these two distinct acts that support separate prosecutions? And I believe they do in this particular case. So the second assault and the first-degree -- the attempted first are one, and then the other counts are all separate, are all separate crimes.

RP 662-65.

Here, substantial evidence supports the court's findings and conclusions.

The defendant wrapped his hands around Ms. Diricco's neck until she went unconscious. The defendant was uncertain at that point as to

whether he killed Ms. Diricco, so he wrapped his shirt around her neck, and tightened and tightened, to ensure Ms. Diricco was dead. The defendant estimated several hours or more passed from the time he initially contacted Ms. Diricco until he removed her body from the home. Presumably, the defendant waited to transport the body to minimize any exposure with potential witnesses in the home or the neighborhood.

After wrapping Ms. Diricco's body in a sleeping bag, and placing her in a garbage receptacle, and while transporting her body approximately two blocks to dispose of it, the defendant believed Ms. Diricco was deceased. Ex. 84 at 9:323-29, 336-38. Thereafter, upon reaching his destination at an abandoned home some two hours later, the defendant removed a pocketknife and cut Ms. Diricco's throat as a safeguard "*to make sure that it was done* so that she wouldn't come back and try to point any fingers at me for doing anything." Ex. 84 at 14-15:581-601 (emphasis added).

The defendant further argues that allowing punishment for two separate attempted first degree murder crimes incentivizes defendants, in general, to complete the crime in an effort to get a "better bang for the buck," as to minimize his or her potential for lengthier incarceration. *See* App. Br. at 9-10. Notwithstanding the defendant cites no legal authority for this proposition, there is no evidence in this case that the defendant only

intended to “partially kill” the victim or that he intended “just a little bit of a killing.” His original intent was to slay the victim and he believed he did so, but as the dated proverb proclaims: “If at first you don’t succeed, try, try, again.” He had time to reflect and did attempt to kill the victim again. He should not benefit from his proposed “two for one” analogy.

To take the defendant’s proposal to its end, an individual could attempt to unsuccessfully kill his neighbor once a month, using different mechanisms each occasion, for twelve months. Under the defendant’s reading of the statute, the individual could only be prosecuted for one attempted first degree murder for all twelve unsuccessful attempts or acts to take the life of his neighbor. Such a strained reading would lead to an absurd result under the statute, as a defendant would be held unaccountable for numerous, additional criminal acts.

This Court should adopt the *Boswell*’s court’s learned analysis and determine that the “course of conduct” inquiry clearly leads to the most sensible result for determining the unit of prosecution for attempted first degree murder, where there are separate, distinct acts committed in an attempt to kill an individual. Accordingly, the defendant’s two convictions for attempted first degree murder do not violate the constitutional prohibition against double jeopardy. There was no error.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DETERMINED THAT THE TWO ATTEMPTED FIRST DEGREE MURDER OFFENSES AND THE FIRST DEGREE KIDNAPPING DID NOT ARISE FROM THE “SAME COURSE OF CONDUCT” AS THE DEFENDANT’S INTENT CHANGED FROM ONE CRIME TO THE OTHER, AND THE CRIMES OCCURRED AT DIFFERENT TIMES AND PLACES.**

The defendant next argues that his two convictions for attempted first degree murder and the first degree kidnapping constitute the same criminal conduct for sentencing. App. Br. at 13-16.

Standard of review.

A sentencing court’s determination regarding “same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law.” *State v. Aldana Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). A sentencing court abuses its discretion “when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct.’” *Id.* at 537-38. “But where the record adequately supports either conclusion, the matter lies in the court’s discretion.” *Id.* at 538.

Our Supreme Court explained the interplay between determinations of “same criminal conduct” for current offenses and the offender score:

Crimes constitute the “same criminal conduct” when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” [RCW 9.94A.589(1)(a)]. Deciding whether crimes involve the same time, place, and victim often involves determinations of fact.

*Aldana Graciano*, 176 Wn.2d at 536; *see* RCW 9.94A.589(1)(a) (two crimes constitute the same criminal conduct when they “require the same criminal intent, are committed at the same time and place, and involve the same victim”).<sup>8</sup>

Attempted first degree murder and first degree kidnapping are classified as serious violent offenses. RCW 9.94A.030(46)(a)(i), (a)(vi), and (a)(ix). Anticipatory offenses have the same seriousness level as a completed offense, *State v. Weatherwax*, 188 Wn.2d 139, 152, 392 P.3d 1054 (2017), and convictions for attempt crimes are scored as if they were completed offenses. *State v. Jordan*, 180 Wn.2d 456, 464, 325 P.3d 181 (2014).

When a person is convicted of two or more serious violent offenses, the trial court must run the sentences for those offenses consecutively unless the trial court finds that the crimes constituted the same criminal conduct. RCW 9.94A.589(1)(b). At sentencing, it is the defendant’s burden to

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<sup>8</sup> “A double jeopardy violation claim is distinct from a “same criminal conduct” claim and requires a separate analysis. The double jeopardy violation focuses on the allowable unit of prosecution and involves the charging and trial stages. The ‘same criminal conduct’ claim involves the sentencing phase and focuses instead on the defendant’s criminal intent, whether the crimes were committed at the same time and at the same place, and whether they involved the same victim.” *State v. French*, 157 Wn.2d 593, 611-12, 141 P.3d 54 (2006).

establish that his crimes constituted the same criminal conduct. *Aldana Graciano*, 176 Wn.2d at 540. An appellate court construes the statute narrowly to “disallow most claims that multiple offenses constitute the same criminal act.” *Id.* at 540. The defendant’s failure to establish any element (intent, time, place, or victim) defeats his or her claim that the crimes amounted to the same criminal conduct. *Id.* at 540.

Here, the trial court ruled all three crimes constituted separate criminal conduct:

There’s an argument with regard to same course of conduct. There’s a plethora of case law on it. It’s got to be the same victim, which we have here. We’ve got to have the same place and we’ve got to have the same time, and we don’t have those here. We also have some other case law analysis which talks about whether or not the intents changed, whether or not what’s required for one charge is required for the other. And, of course, the intent to kidnap is different than the intents for the attempted murder. So I will find that these are not the same course of conduct.

RP 665.<sup>9</sup>

Same criminal intent.

Two crimes require the same criminal intent if, when viewing them objectively, the defendant’s criminal intent did not change from one crime

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<sup>9</sup> With regard to the second degree assault conviction, the trial court ruled, and the State conceded, it was the same course of conduct for sentencing and merged the second degree assault with the first count of attempted first degree murder. RP 662. The trial sentenced the defendant only on the greater offense of first degree murder.

to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). This analysis requires a court to first “objectively view each underlying statute” to determine whether the intents are the same. *State v. Price*, 103 Wn. App. 845, 857, 14 P.3d 841 (2000). If the intents are the same, an appellate court views the facts available to the trial court at sentencing to determine whether the defendant’s intent was different regarding each count. *Id.*

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). When “an offender has time to ‘pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,’ and makes the decision to proceed, he or she has formed a new intent to commit the second act.” *State v. Munoz-Rivera*, 190 Wn. App. 870, 889, 361 P.3d 182 (2015).

*a. Attempted first degree murders.*

In *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997), after the defendant raped the victim, he “had the presence of mind” to threaten his victim not to tell anyone about the assault, heard her plead with him to take her home, and then “had to use new physical force” by beating and kicking her to accomplish a second rape. *Id.* at 859. Though the two rapes were committed against the same victim, in the same bedroom, and in

short succession, the court did not abuse its discretion by concluding that the two rapes involved separate criminal intent. *Id.* at 859-60. The *Grantham* court held that there was evidence of new objective intent between the two rapes. *Id.* at 859. In so holding, the court reasoned that the defendant had time to reflect on what he did, threaten the victim not to tell, and he then used new force to commit the second rape. *Id.*

In light of *Grantham*, the defendant's two attempts to kill Ms. Diricco involved different, separate criminal intents. After attempting to kill the victim the first time, he waited for two hours or more, placed her presumptively dead body into a sleeping bag, carried her body upstairs in the residence to the outside, placed the body in a garbage receptacle, transported the body approximately two blocks away to an abandoned residence, and then cut her throat to ensure she was dead. The defendant had time to pause, reflect, and either cease his criminal activity after the first attempt to kill Ms. Diricco, or proceed to commit a further criminal act. The defendant chose the latter. It can be reasonably inferred that at some point after he began his journey to the abandoned home to discard the body, the defendant observed evidence that Ms. Diricco was still alive, and formed the criminal intent anew to kill Ms. Diricco for the second time. In addition, the two attempted murders occurred at different times and locations. Under

*Gratham*, the two attempted murders involved different criminal intents, times, and physical locations, and the trial court did not abuse its discretion.

*b. First degree kidnapping.*

As charged in this case, the elements of first degree kidnapping are set forth in RCW 9A.40.020(1)(b) as follows: “(1) A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent: (b) [t]o facilitate commission of any felony or flight thereafter;” CP 14-15. “Abduct” means “to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force.” RCW 9A.40.010(1).

First degree kidnapping requires an intentional abduction with intent to facilitate the commission of a felony; presumably here to commit attempted first degree murder. RCW 9A.40.020(1)(c).<sup>10</sup> Attempted first degree murder requires specific intent to cause another person’s death. RCW 9A.28.020; RCW 9A.32.030. The required criminal intent for first degree kidnapping is different than attempted first degree murder because,

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<sup>10</sup> The kidnapping statute does not require proof of another felony but only proof of intent to commit a felony. *State v. Berg*, 181 Wn.2d 857, 866, 337 P.3d 310 (2014). “[T]he Legislature has not indicated that a defendant must also commit another crime in order to be guilty of first degree kidnapping, and therefore the merger doctrine does not apply.” *Id.* at 866.

although first degree kidnapping may be done with intent to facilitate a felony, it does not equate to a specific intent to cause death.

In addition to not having the same statutory intent, the facts here demonstrate that the intent for the two attempted crimes of first degree murder and first degree kidnapping were not factually formed at the same time. The defendant's initial intent to kill the victim was because he was angry with Ms. Diricco for her rejection of his sexual advances. After several hours passed, the defendant then formed the intent to kidnap the victim and remove her body so that she would not be discovered in the basement area of the residence. There is no evidence the defendant formed the intent to kidnap the victim when he initially formed the intent to kill the victim. At some point during his journey to the abandoned home, the defendant apparently observed signs of life from Ms. Diricco, and, as a precaution, he cut her throat to make certain she was dead, to prevent any future incriminating statements by her.

The defendant formed the intent to commit each crime sequentially, at different times, for different purposes, and at separate places. Accordingly, the first degree kidnapping did not involve the same criminal conduct and the trial court did not abuse its discretion. The defendant's argument fails.

Although the defendant has not assigned error to the sufficiency of the evidence regarding the kidnapping conviction, it is of no consequence that the defendant believed Ms. Diricco was dead when he removed her from the home and transported her body. In *United States v. Davis*, 19 F.3d 166, 169 (5th Cir. 1994), the defendant argued that he could not have “kidnapped” the victim because he thought the victim was dead before he and a codefendant transported the body. Under former 18 U.S.C. § 1201(a),<sup>11</sup> the government had to prove four elements: (1) the transportation in interstate commerce (2) of an unconsenting person who is (3) held for ransom, reward or otherwise, (4) such acts being done knowingly and willfully. 19 F.3d at 169.

In rejecting the defendant’s argument, the Fifth Circuit held:

It is true that under § 1201(a) the defendants must abduct a live person who then moves in interstate commerce. Federal kidnapping does not cover transportation of a corpse across state lines. From this fact, however, it does not follow that a defendant who thinks he has a dead person but who in fact has a live victim does not violate the federal kidnapping provision. If the defendant has abducted an unconsenting live body that then moves in interstate commerce, he has violated the federal kidnapping law, even if he believed the person was dead.

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<sup>11</sup> In 1998, Congress amended the statute to eliminate the requirement that the victim be alive at the moment a state line was crossed. It now applies to any victim who was alive when the transportation began. *See United States v. Singh*, 483 F.3d 489, 493-94 (7th Cir. 2007).

To be sure, [*United States v. Jackson* [, 978 F.2d 903, 910 (5th Cir.1992), *cert. denied*, 508 U.S. 945, 113 S.Ct. 2429, 124 L.Ed.2d 649 (1993)]] suggests that a federal kidnapper has to knowingly and willfully abduct an unconsenting person, which could only mean a live person, but the statute does not require that the kidnapper know that his victim is alive. Instead, it requires only that he overcome the will of a victim who then moves in interstate commerce. *Jackson* did not confront the issue of whether a federal kidnapper must believe his victim is alive, but the question is answered by the express language of the federal kidnapping statute.

*Id.* at 169-70; *but see State v. Stouffer*, 352 Md. 97, 105, 721 A.2d 207, 211 (1998) (one cannot kidnap a corpse); *People v. Hillhouse*, 27 Cal. 4th 469, 498, 117 Cal. Rptr. 2d 45, 40 P.3d 754 (2002) (if one kills the victim, and then moves the body, the evidence is insufficient to establish kidnapping).

Similarly, in Washington, the kidnapping statute does not require that a defendant have knowledge the victim is alive when the victim is “abducted”; the statute only necessitates that he or she intentionally “abduct” “another person.” RCW 9A.40.010(1); RCW 9A.40.020(1). Here, the fact that the defendant believed the victim was dead after his first attempt to kill her is of no consequence to the kidnapping conviction. Furthermore, the defendant became aware at some point the victim was still alive after asportation of the victim began.

In the present case, the trial court did not abuse its discretion when it determined the three different felonies did not constitute the same criminal conduct for sentencing. Defendant’s argument has no merit.

**C. UNLESS DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL.**

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such 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 commissioner or clerk may consider any evidence offered to determine the individual’s current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis added).

The trial court determined the defendant to be indigent for purposes of his appeal. CP 209-10. The State is unaware of any change in the defendant’s circumstances. Should the defendant be unsuccessful on appeal,

the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

#### IV. CONCLUSION

For the reasons stated herein, the State respectfully requests this Court deny the defendant's claims for relief and affirm the judgment and sentence.

Dated this 31 day of August, 2017.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

AVERY LATHAM,

Appellant.

NO. 34535-1-III

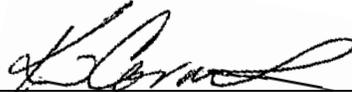
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 31, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart  
andrea@burkhartandburkhart.com

8/31/2017  
(Date)

Spokane, WA  
(Place)

  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**August 31, 2017 - 2:13 PM**

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