

FILED
Court of Appeals
Division III
State of Washington
5/22/2018 3:19 PM

NO. 351289

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

STATE OF WASHINGTON

Respondent

vs.

ASIL LEON HUBLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FROM SPOKANE COUNTY
The Honorable Annette S. Plese

AMENDED APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
Attorney for Appellant
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

II. ISSUE PRESENTED..... 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT.....6

THE SENTENCING COURT ABUSED ITS DISCRETION
WHEN IT REFUSED TO FIND THE THIRD-DEGREE CHILD
MOLESTATION OFFENSE AND THE THIRD-DEGREE
CHILD RAPE CONSTITUTED THE SAME CRIMINAL
CONDUCT, EVEN AFTER THE JURY’S AGGRAVATING
FINDING PROVED THE TWO COUNTS OVERLAPPED
IN TIME.6

V. CONCLUSION 11

BLANK PAGE

TABLE OF AUTHORITIES

Washington State Supreme Court Decisions

<u>In re Pers. Restraint of Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004)</u>	10
<u>State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 749 P.2d 160 (1987)</u>	8
<u>State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013)</u>	6, 7, 8, 9
<u>State v. Hughes, 166 Wn.2d 675, 682-84, 212 P.3d 558 (2009)</u> ...	10
<u>State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)</u>	7, 8

Washington State Court of Appeals Decisions

<u>State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)</u>	8
<u>State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997)</u>	8
<u>State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782 (2013)</u>	10
<u>State v. Munoz-Rivera, 190 Wn. App. 870, 889, 361 P.3d 182 (2015)</u>	8
<u>State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991)</u>	7

Revised Code of Washington

<u>RCW 9A.44.010(1)(c)</u>	10
<u>RCW 9A.44.010(2)</u>	9
<u>RCW 9A.44.079</u>	10
<u>RCW 9A.44.079(1)</u>	9
<u>RCW 9A.44.089</u>	10
<u>RCW 9A.44.089(1)</u>	9

RCW 94A.525.....7

RCW 94A.589(1)(a).....7

I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it found two out of four current offenses, which carried the same criminal intent, were committed at the same time and place, and involved the same victim, did not constitute the same criminal conduct.

2. The trial court miscalculated the offender score when it incorrectly counted two current offenses as separate acts, after a jury found one offense was part of an “ongoing pattern of conduct” that occurred “over a prolonged period of time,” that overlapped in time with the other offense.

II. ISSUE PRESENTED

Whether the sentencing court erred when it refused to find third-degree child molestation and third-degree child rape constituted the same criminal conduct after the jury’s aggravating finding proved beyond a reasonable doubt the third-degree child molestation was part of an “ongoing pattern of conduct” over a “prolonged period of time” that overlapped in time with the third-degree child rape? (Assignment of errors 1 & 2)

III. STATEMENT OF THE CASE

Substantive facts

Asil Leon Hubley (Mr. Hubley) lived with his wife, Simeana and their 9 children, including his then 13-year old daughter L.H. and 7-year old daughter Z.H., in Spokane, until he moved to Tacoma to undergo pelvic and knee surgery. 11/16/16 RP 320. While Mr. Hubley was in Tacoma, Simeana moved with the children to her father’s, Simon DeWater’s (Mr. DeWater), house. 11/16/16 RP

320. Simeana tried to keep the family intact at her parents' home until she and Mr. DeWater got in to a heated argument and he called Child Protective Services (CPS).

Simeana left her parent's house. CPS caught up to her and the children at a local motel and ultimately removed the children from Simeana's care. CPS placed the four older children, including L.H. with Mr. DeWater, and the five younger children, including Z.H. with foster parents. 11/16/16 RP 330; 11/16/16 RP327.

Simeana refused to cooperate with CPS. So, L.H. called Mr. Hubley to ask if he or someone else in the family could take them in. 11/16/16 RP 330. Mr. Hubley called CPS and offered himself as a potential placement for the children. 11/16/16 RP 326.

To be considered a potential placement, Mr. Hubley had to undergo a mental health evaluation along with 10 weeks of drug and alcohol testing and evaluations. He had just about completed everything CPS required and was ready to sign custody papers when his attorney told him L.H. and Z.H. had accused him of molesting them. 11/16/16 RP 333.

Mr. Hubley was shocked by his daughters' accusations and felt certain Mr. DeWater had coerced them to make such claims. His relationship with Mr. DeWater had been strained ever since Mr. DeWater overstayed his welcome at the Hubley house and Mr. Hubley called police to have Mr. DeWater evicted. 11/16/16 RP 340-41. Their relationship worsened when Mr. Hubley ordered Simeana's 16-year old brother and Mr. DeWater's son, also named Simon, to

leave his home, after Simon grabbed L.H.'s breasts and wrestled her to the floor. 11/16/16 RP 338-340. Mr. Hubley was convinced the battle between Simeana and Mr. DeWater for custody of the children turned into a [child molestation] case against him because he was ready to take custody of his children. 2/14/17 RP 446.

In fact, the accusations against Mr. Hubley were especially troubling. L.H. reportedly told Mr. DeWater Mr. Hubley molested her from 2010, when she was 13-years old to 15-years old. She claimed Mr. Hubley would slide his hand over her vagina to "see if she had been with any boys." After he finished his "check," he gave her \$5 and told her to leave. 11/15/16 RP 266-67.

About three days later, he touched her vagina again, the way a doctor would check. Once again, he gave her money after he finished and told her to leave. 11/15/16 RP 268.

She described another incident when Mr. Hubley came into the bathroom while she was taking a shower and told her he was going to check again to see if she had been with any boys. She said Mr. Hubley told her to bend over and when she did, he just started touching her vagina. Then, he started washing her. 11/15/16 RP 268.

L.H. said this happened again in Mr. Hubley's bedroom. But when he touched her vagina that time, she felt a burning sensation. She realized he had used hand sanitizer before he touched her. 11/15/16 RP 269.

L.H. told the court when she turned 14, the touching continued, like every other day when no one was at home. But, Mr. Hubley had progressed from

using his hand on her vagina to using his penis when she was 15. 11/15/16 RP 269-70. She described an incident when Mr. Hubley called her in to his room and told her to lie down and check his phone. She did, and he pulled down her pants and got on top of her. He started to touch her with his hand, and then with his penis. When she felt his penis inside her vagina, she told him it hurt, and he stopped. 11/15/16 RP 271-72.

Around the same time L.H. reportedly made her claims to Mr. DeWater, Z.H.'s foster mother called CPS to make similar claims regarding Z.H. According to the foster mother, one day after a visit with Mr. Hubley, Z.H. told her that he touched her with his hand and with his penis. The foster mother claimed Z.H. told her Mr. Hubley used to make her shower with L.H. and touch her vagina. 11/15/16 RP 244.

Z.H. told the court when she was either 7 or 8 years old, Mr. Hubley touched her "no-no square," her term for vagina, with his "no-no square," her term for penis, and it felt weird. 9/22/16 RP 28-29. According to her foster mother, Z.H. told her this happened multiple times when she and L.H. shared a bed with Mr. Hubley, and she even witnessed Mr. Hubley do the same to L.H. 9/22/16 RP 244.

Procedural facts

The State charged Mr. Hubley with one count second-degree child molestation; one count third-degree child molestation; one count third-degree child rape; and one count first-degree child rape. CP 59-60. In count 1, the State alleged Mr. Hubley engaged in sexual contact with L.H. from July 09, 2010

and July 18, 2011. Count 2 alleged Mr. Hubley engaged in sexual contact with L.H. from July 19, 2011 and August 30, 2012. Count 3 alleged Mr. Hubley engaged in sexual intercourse with L.H., who was 15 years old between August 01, 2012 and August 31, 2012. And count 4 alleged Mr. Hubley engaged in sexual intercourse with Z.H., between June 01, 2012 and December 31, 2012, who was 7 or 8 years old. The State also alleged aggravating factors for counts 1 and 2: that the offense was part of an ongoing pattern of sexual abuse manifested by multiple incidents over a prolonged period of time. CP 59-60.

Mr. Hubley pleaded not guilty to all charges and opted for a jury trial. 9/8/15 RP 3. The jury heard testimony from the nurse practitioner who examined Z.H. and described how her labia and clitoris normal and her hymenal tissue were intact. 11/16/16 RP 295. The jury also heard Mr. Hubley testify that he was not living in Spokane during the time the State alleged these acts occurred. 11/16/16 RP 320-21. Yet, despite this evidence, the jury found Mr. Hubley guilty on all four counts. The jury also found the aggravating factor for count 2, third-degree child molestation. 11/16/16 RP 411-12; CP 146; 148; 150; and 151.

At sentencing, Mr. Hubley argued his offender score should be 6, based on his criminal history, and based on the fact counts 2 and 3 constituted the same criminal conduct. He reasoned the jury's aggravating finding for count 2 proved these offenses occurred at the same time, with one likely furthering the other. And because both charges, albeit one focused on touching and the other

on penetration, involved the same criminal intent, sexual gratification. 2/14/17
RP 434-35.

The State disagreed and argued Mr. Hubley's offender score should be 9. It maintained L.H.'s testimony that Mr. Hubley molested her many, many, many, many times, but raped her once, was enough to prove counts 2 and 3 were separate and distinct acts. 2/14/16 RP 436.

Based on L.H.'s testimony, the court found that even though both incidents overlapped during a short period of time, L.H. had been molested on an ongoing basis before she was actually raped. According to the judge, there was a difference between the two acts and that was probably why the jury found the aggravating factor on count 2. 2/14/16 RP 438. With that, the court ruled counts 2 and 3 did not constitute the same criminal conduct and calculated Mr. Hubley's offender score to be 9. The court sentenced Mr. Hubley to 276 months in prison with lifetime sex offender supervision. 2/14/16 RP 438; 461; CP 192-207. Mr. Hubley appeals his convictions. CP 208-236.

IV. ARGUMENT

THE SENTENCING COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO FIND THE THIRD-DEGREE CHILD MOLESTATION OFFENSE AND THE THIRD-DEGREE CHILD RAPE CONSTITUTED THE SAME CRIMINAL CONDUCT, EVEN AFTER THE JURY'S AGGRAVATING FINDING PROVED THE TWO COUNTS OVERLAPPED IN TIME.

Standard of review

This court will review the trial court's determination of what constitutes the same criminal conduct for an abuse of discretion or misapplication of the law.

State v. Aldana Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013). "Under this

standard, when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” Id. (citing State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991)). “But where the record adequately supports either conclusion, the matter lies in the court’s discretion.” Id.

Analysis

A “same criminal conduct” determination at sentencing affects the standard range sentence by altering the defendant’s offender score, which is calculated by adding a specified number of points for each prior conviction. RCW 9.94A.525; Graciano, 176 Wn.2d at 535–36. For the purposes of this calculation, current offenses are treated as prior convictions. RCW 9.94A.589(1)(a). However, “if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” Id.

Under a section of the Sentencing Reform Act of 1981, chapter 9.94A RCW, two crimes constitute 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). Unless all three of these elements are present, the offenses do not constitute the same criminal conduct and must be counted separately in calculating the offender score. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Deciding whether crimes involved the same time, place, and victim often involves factual determinations. State v. Aldana Graciano, 176 Wn.2d at 536, 295 P.3d 219. Crimes may involve the same criminal intent if they

were part of a continuing, uninterrupted sequence of conduct. State v. Porter, 133 Wn.2d 186. But, 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); State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

When examining intent, the proper focus is “the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.” State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). “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. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Determining if the intent remained unchanged often includes an examination of “whether one crime furthered the other and if the time and place of the two crimes remained the same.” Dunaway, 109 Wn.2d at 215.

For example, in State v. Aldana Graciano, 176 Wn.2d 538–39, 295 P.3d 223 (2013), a jury found the defendant guilty of four counts of child rape and two counts of child molestation. Id. at 534. The trial court expressed confidence that each of the four rapes was separate from the others. Id. However, it noted that the record was unclear whether the defendant once raped and twice molested the victim in a single incident or on different occasions. Id. at 534–35. Because the record failed to establish that these incidents were separate, the court of appeals concluded that the time and place of the crimes were the same. Id. at

538. Thus, the court of appeals held that the two child molestation convictions and one of the child rape convictions constituted same criminal conduct. Id. at 535.

Our Supreme Court found when calculating an offender score, the sentencing court abuses its discretion if it arrives at a contrary result “when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct.’” Aldana Graciano, 176 Wn.2d at 537–38. “But where the record adequately supports either conclusion, the matter lies in the court’s discretion.” Aldana Graciano, 176 Wn.2d at 538. Therefore, where the record is unclear, the trial court does not abuse its discretion in refusing to enter a finding of same criminal conduct. Id. at 541.

Unlike the record in Graciano, the record here is clear counts 2 and 3 constituted the same criminal conduct. L.H. was the alleged victim in both, and according to her testimony, she was molested and raped during a period of time that overlapped. CP 1-2; 59-60.

Granted, child molestation and child rape constitute different acts, but they are the same in fact and in law because all the elements of the rape as proved are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape. See State v. Hughes, 166 Wn.2d 675, 682–84, 212 P.3d 558 (2009) (convictions for second degree rape and rape of a child were the same offense, despite elements that differ facially); In re Pers. Restraint of Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004) (attempted murder and assault were the same offense where both

were proved by a single gunshot directed at the same victim); State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782, 785 (2013).

For example, child molestation requires proof of “sexual contact” with a child. RCW 9A.44.089(1). “Sexual contact” means any “touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2). Child rape requires proof of “sexual intercourse” with a child. RCW 9A.44.079(1). “Sexual intercourse” can be proved with evidence of some form of penetration, but it can also be proved by “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” RCW 9A.44.010(1)(c). Consequently, the criminal intent behind both is the same- sexual gratification with a child. “Where the only evidence of sexual intercourse supporting a count of child rape is evidence of sexual contact involving one person’s sex organs and the mouth or anus of the other person, that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape.” State v. Land, 172 Wash. App. 593, 600, 295 P.3d 782 (2013).

Couple the fact counts 2 and 3, here, involved either sexual contact or sexual intercourse, for the purpose of sexual gratification, RCW 9A.44.089 and RCW 9A.44.079, with the fact the timeframe over which these acts occurred overlapped, along with the jury’s aggravating factor, proves these counts constituted the same criminal conduct.

V. CONCLUSION

For that reason, we ask this court to reverse the sentencing court's ruling and find counts 2 and 3 constituted the same criminal conduct, recognize Mr. Hubley's offender score as 6, and impose a standard prison sentence of 162 months.

As noted above, a sentencing court's determination of same criminal conduct will not be disturbed absent an abuse of discretion or misapplication of the law. Reviewed under this standard, the sentencing judge, here, abused her discretion when she entered a finding that was not supported by the record.

s/Tanesha L. Canzater
Attorney for Asil Leon Hubley
Post Office Box 29737
Bellingham, WA 98228-1737
(360) 362- 2435 (mobile office)
(703) 329-4082 (fax)
Canz2@aol.com

DECLARATION OF SERVICE

I declare under penalty and perjury of the laws of Washington State that on **Tuesday, May 22, 2018**, I filed this **AMENDED APPELLANT'S OPENING BRIEF** with Division Three Court of Appeals and served copies of the same to the following counsel of record and/or other interested parties:

SPOKANE COUNTY PROSECUTORS OFFICE

scpaappeals@spokanecounty.org

*This office accepts service by email.

WASHINGTON STATE PENITENTIARY

Asil Leon Hubley, DOC #395239

1313 North 13th Avenue

Walla Walla, WA 99362

s/Tanesha La'Trelle Canzater

Attorney for Asil Leon Hubley

Tanesha L. Canzater, WSBA# 34341

Post Office Box 29737

Bellingham, WA 98228-1737

(360) 362-2435 (mobile office)

(703) 329-4082 (fax)

Canz2@aol.com

LAW OFFICES OF TANESHA L. CANZATER

May 22, 2018 - 3:19 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35128-9
Appellate Court Case Title: State of Washington v. Asil Leon Hubley
Superior Court Case Number: 13-1-04149-0

The following documents have been uploaded:

- 351289_Briefs_20180522151706D3658146_2238.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was AMENDED Opening Brief Hubley.pdf
- 351289_Motion_20180522151706D3658146_6423.pdf
This File Contains:
Motion 1 - Other
The Original File Name was Motion to Amend Brief Hubley.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Tanesha Canzater - Email: canz2@aol.com
Address:
PO BOX 29737
BELLINGHAM, WA, 98228-1737
Phone: 877-710-1333

Note: The Filing Id is 20180522151706D3658146