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NO. 36066-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS SWARERS,

Appellant.

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

The Honorable Alexander Ekstrom & Bruce A. Spanner, Judges

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REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE STATE'S ARGUMENTS ARE BASED ON A MISUNDERSTANDING OF THE LAW.

Swarers was deprived of his right to effective assistance of counsel at sentencing when his attorney failed to recognize and argue Swarers' two convictions constitute "same criminal conduct" for purposes of sentencing. This would have reduced Swarers' offender score to zero and sentence by at least 15.75 months. Brief of Appellant (BOA) at 5-12.

In response, the State asserts that because the evidence shows Swarers' actual intent was to have sex separately with a 6-year-old girl and an 11-year-old girl, his attempt convictions count as separate offenses for sentencing. Brief of Respondent (BOR) at 9-20. This argument is based on a misunderstanding of the relevant law and should be rejected.

The State's argument is based on looking to Swarers' actual subjective intent. BOR at 11. That is not the correct standard. Under RCW 9.94A.589(1)(a); "Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Emphasis added. "Intent, in this context, is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime.'" State v. Phuong, 174

Wn. App. 494, 546, 299 P.3d 37 (2013) (quoting State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)), review denied, 182 Wn.2d 1022 (2015)) (emphasis added). “Thus, for example, the intent of robbery is to acquire property, and the intent of attempted murder is to kill someone.” Adame, 56 Wn. App. at 811.

Here, Swarers’ objective criminal purpose was to have sex with young girls. That he may have gone to the apartment actually intending to have sex with two girls under the age of 12 is not relevant under the “same criminal conduct” analysis under RCW 9.94A.589(1)(a). See State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (“The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” Emphasis added.). Here, Swarers’ objective criminal intent did not change from one crime to the next. Under the correct legal standard, Swarers’ “objective criminal purpose” was to have sex girls under 12 years of age. Phoung, 174 Wn. App. at 546. The State’s attempt to rely on his subjective actual intent to argue his crimes do not constitute “same criminal conduct” for purposes of sentencing is misguided and should be rejected.

2. THE STATE'S ATTEMPT TO MANUFACTURE SEPARATE VICTIMS ON APPEAL SHOULD BE REJECTED.

In an attempt to create a separate victim for each of Swarers' crimes of conviction, the State starts by admitting the definition of "victim" under RCW 9.94A.030(54) supports Swarers' argument. BOR at 13. But it then ignores this statutory definition in favor of a new and broader definition that would include, "every 6-year-old girl and her parents or caregivers" and "every 11-year-old girl and her parents or caregivers." Id. Notably, the State fails to cite any authority in support. The State does cite to State v. Johnson, 180 Wn. App. 93, 104, 320 P.3d 197 (2014), for the proposition that the "same criminal conduct" analysis should be narrowly construed, but nothing in Johnson supports the assertion that "victim" should be construed more broadly than its statutory definition. BOR at 13-14, 17-20.

Nor does State v. Luther, 157 Wn.2d 63, 134 P.3d 205 (2006) advance the State's argument. BOR at 14-15. The most obvious reason Luther is irrelevant is because it has nothing to do with the proper analysis under RCW 9.94A.589(1)(a). Instead it involves a challenge to the constitutionality of the prohibition on attempted possession of child pornography. 157 Wn.2d. at 70. The discussion in Luther about who are victims to that crime is in the context of why the statute criminalizing such

behavior is not overly broad. As the Washington Supreme Court makes clear, it is the offender's "actual intent" (also his "bad intent") to possess actual child pornography that renders him guilty of the attempted possession, even though what was actually possessed was not child pornography. 157 Wn.2d at 71-73.

The part of Luther relied on by the State to argue for a broader definition of "victim" is a footnote noting the government has a "legitimate interest in drying up the child pornography market." BOR at 14 (citing Luther, 157 Wn.2d at 74 n.8). Swarers does not contest such an interest exists. But that interest does not mean the definition of "victim" must be more broadly construed than defined by statute when engaging in the "same criminal conduct" analysis under RCW 9.94A.589(1)(a). Like Johnson, Luther has no bearing on Swarers' challenge to his counsel's deficient performance at sentencing.

3. THE STATE'S CLAIM SWARERS' TRIAL COUNSEL'S DEFICIENT PERFORMANCE SHOULD BE EXCUSED BECAUSE THE PROSECUTOR ALSO FAILED TO RECOGNIZE THE CRIMES CONSTITUTED "SAME CRIMINAL CONDUCT" SHOULD BE REJECTED.

Without citation to any supporting authority, the State argues that even if Swarers' arguments on appeal are technically correct, his trial counsel's performance was not deficient because it was reasonable for counsel to rely on the prosecutor's determination of Swarers' correct

offender score. The State notes a prosecutor has a “quasi-judicial role” that requires ensuring defendants are “accorded procedural justice.” BOR at 21 (citing RPC 3.8, comment 1). The State also implies that “a reasonable, professional attorney” would be unlikely to ‘have spotted the issue[.]’ Id.

This Court should not consider argument that are not supported by citation to legal authority. Johnson Forestry Contracting, Inc. v. Washington State Dep't of Nat. Res., 131 Wn. App. 13, 25, 126 P.3d 45, 51 (2005), as amended (Jan. 4, 2006) (citing In re Marriage of Wallace, 111 Wn. App. 697, 705, 45 P.3d 1131 (2002), review denied, 148 Wn.2d 1011, 64 P.3d 650 (2003); RAP 10.3(a)(5); State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); In re Request of Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

This Court should also reject this argument because it is absurd. The State’s claim is that in our adversarial criminal justice system a criminal defense attorney provides the constitutionally mandated effective assistance of counsel by relying on the opposing prosecutor’s incorrect understanding of the law. If this absurd claim is correct, criminal defendants do not need counsel at all because prosecutors, in their “quasi-judicial role,” will always insure the defendant received “procedural justice.” But we know this is not true. The plethora of convictions

reversed on the basis of egregious prosecutorial misconduct alone defeats the State's claim. See e.g., State v. Pinson, 183 Wn. App. 411, 419, 333 P.3d 528 (2014) (argued defendant's silence was evidence of guilt); State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005) (in closing prosecutor focuses on facts outside the record); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (flagrant and ill-intentioned misconduct during closing argument). This Court should reject the State's argument as not supported by legal authority and because it is directly at odds with our criminal justice system.

4. THIS COURT SHOULD ACCEPT THE STATE CONCESSION THAT THE \$200 CRIMINAL FILING FEE SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE.

The State properly concedes the trial court erred by imposing a \$200 criminal filing fee as part of Swarers' judgment and sentence. BOR at 22. This Court should accept that concession because the decision in State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), mandates this result.

B. CONCLUSION

For the reason stated here and in the opening brief, this Court should reverse Swarers' judgment and sentence and remand for resentencing.

DATED this 5<sup>TH</sup> day of February 2019.

Respectfully submitted,

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