

No. 63229-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL NELSON RYTHER,

Appellant.

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

The Honorable Jeffrey Ramsdell

BRIEF OF APPELLANT

2009 JUL 3 PM 4:40
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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A. ASSIGNMENTS OF ERROR

1. The admission at trial of a non-testifying codefendant's confession which specifically referenced Mr. Ryther violated his right to confrontation under the Sixth Amendment and article I, section 22.

2. The trial court erred in failing to find the robbery, theft and unlawful imprisonment convictions to be the same criminal conduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution bar the admission at a joint trial of a non-testifying codefendant's statement which directly references the defendant. Codefendant Clifford Barkhoff's taped admission to the police was introduced at the joint trial of Barkhoff and Mr. Ryther. Did the trial court violate Mr. Ryther's right to confrontation when it admitted Barkhoff's statement despite its overt reference to Mr. Ryther entitling him to reversal of his convictions and remand for a new trial?

2. All offenses involving the same victim, the same intent, and occurring at the same time and place are the same criminal conduct and are counted at sentencing as a single offense. The robbery, theft, and unlawful imprisonment counts involved the same

victim, shared the same intent, and occurred at the same time and place. Did the trial court err in ruling the offenses were not the same criminal conduct?

C. STATEMENT OF THE CASE

E.H., a resident of the Queen Anne neighborhood of Seattle, wished to have a sexual rendezvous with a man and consulted Craigslist. RP 28-29. Mr. H. contacted co-defendant, Clifford Barkhoff, and the two negotiated a date. RP 32. As negotiated by the two men, Barkhoff came to Mr. H.'s residence and the pair engaged in a sexual act. RP 33-35. The two men negotiated a second "date," and pursuant to Mr. H.'s request, Barkhoff agreed to bring a friend. RP 37.

As occurred on their first assignation, Barkhoff met Mr. H. at H.'s residence. RP 42. This time Barkhoff brought Michael Ryther, a person he met at his place of employment. RP 24, 42-47, 132. Mr. H. gave Mr. Ryther the negotiated \$200 fee. RP 47. Barkhoff immediately put Mr. H. in a chokehold and a struggle ensued. RP 48-49. At this point, a third individual, Leon Williams arrived and was admitted by Barkhoff and Mr. Ryther. RP 49-50. Williams also had become acquainted with Barkhoff and Mr. Ryther at their shared place of employment. RP 24, 132. Mr. H.'s struggle ended

when he was struck in the face by Mr. Ryther and Williams. RP 50-51.

Mr. H.'s car was stolen along with his automatic teller machine (ATM) card and his personal identification number (PIN), as well as two laptop computers. RP 63, 65, 69. In addition, \$300 was taken from Mr. H.'s bank account. RP 80. Mr. H. was bound and placed in his basement, from which he ultimately escaped and was discovered by his neighbors. RP 23, 81-84.

Barkhoff was arrested by the police and gave a taped confession. CP Supp ____, Sub No. 54, Exhibit 31. Mr. Ryther was charged with first degree robbery, first degree burglary, second degree kidnapping, second degree theft, second degree taking of a motor vehicle, and unlawful imprisonment. CP 61-64. Mr. Ryther and Barkhoff were tried in a joint trial at which Barkhoff did not testify but his taped confession was admitted and played to the jury. CP Supp ____, Sub No. 54, Exhibit 31; RP 103-104.¹ The taped confession was redacted to purge any mention of Mr. Ryther, but during the playing of the recording to the jury, it was readily apparent that Mr. Ryther was referred to by name. RP 109. Mr.

¹ Mr. Ryther had initially moved to sever his trial from Barkhoff's because of the hearsay confession. CP 10-60. After redactions by the State to Barkhoff's confession, Mr. Ryther agreed the redactions vitiated the need for the severance motion. 12/1/08RP 7.

Ryther immediately moved for a mistrial. 12/11/08RP 110, 12/15/08RP 5. The trial court denied the mistrial motion, opining that it was unlikely the jury heard the reference to Mr. Ryther. 12/15/08RP 8.

Mr. Ryther was convicted as charged. CP 65-66.² At sentencing, Mr. Ryther argued all or some of the convictions should be considered the same criminal conduct and not factored into his offender score. CP 67-70, 12/13/08RP 3-7. The court denied Mr. Ryther's motion and counted all of the convictions separately. CP 79, 85; 12/13/08RP 9.

D. ARGUMENT

1. THE ADMISSION OF BARKHOFF'S
CONFESSION AT THE JOINT TRIAL
VIOLATED MR. RYTHUR'S RIGHT TO
CONFRONT BARKHOFF

a. A non-testifying codefendant's confession may not be admitted at a joint trial where it directly refers to the defendant.

The confrontation clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI.

² Mr. Ryther was also alleged to have used a deadly weapon, a knife, during the commission of the robbery, burglary, kidnapping and unlawful imprisonment. CP 61-64. The jury was deadlocked on the special verdict and the court ultimately declared a mistrial on the enhancement. 12/18/08RP 11-13.

Similarly, Article I, section 22 of the Washington State Constitution provides that “[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face.” In *Crawford v. Washington*, the United States Supreme Court held that the confrontation clause “applies to ‘witnesses’ against the accused - in other words, those who ‘bear testimony.’ “ 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), *quoting* 1 N. Webster, *An American Dictionary of the English Language* (1828). The State can therefore present prior testimonial statements of an absent witness only if the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. Statements made during police interrogations are testimonial where “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

In *Bruton v. United States*, the United States Supreme Court recognized that admitting a non-testifying codefendant's confession that implicates the defendant may be so damaging that even instructing the jury to use the confession only against the codefendant is insufficient to cure the resulting prejudice. 391 U.S.

123, 126, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). In *Bruton*, the Supreme Court held that the defendant was deprived of his confrontation rights when he was “powerfully incriminat[ed]” by a pretrial statement of his co-defendant, Evans, who did not take the stand at trial. *Bruton*, 391 U.S. at 135-36. Although the trial court gave the jury a limiting instruction that it could consider the confession only against Evans, the Supreme Court held that “the introduction of Evans'[s] confession posed a substantial threat to [Bruton's] right to confront the witnesses against him, and this is a hazard [the Court] cannot ignore.” *Id.*, 391 U.S. at 137.

The Supreme Court subsequently refined the *Bruton* rule when it held that a confession redacted to omit all references to the codefendant falls outside *Bruton's* prohibition because such a statement is not “incriminating on its face” and becomes incriminating “only when linked with evidence introduced later at trial.” *Richardson v. Marsh*, 481 U.S. 200, 208, 107 S.Ct. 1702, 95 L.Ed.2d. 176 (1987).³

³ In a subsequent decision, the Supreme Court found a *Bruton* violation where the State redacted the defendant's name from codefendant's confession but all other references to the defendant remained. *Gray v. Maryland*, 523 U.S. 185, 192, 181 S.Ct. 1151, 140 L.Ed.2d 294 (1998). The Supreme Court held that “[t]he blank space in an obviously redacted confession also points directly to the defendant, and it accuses the defendant in a manner similar to Evans'[s] use of Bruton's name or to a testifying codefendant's accusatory finger.” *Gray*, 523 U.S.

The rule gleaned from the *Bruton* line of cases is that a codefendant's confession which is inadmissible if it directly implicates the defendant and the codefendant does not testify.

b. The reference to "Mike" in Barkhoff's "redacted" confession was a direct reference to Mr. Ryther. The redacted version of Barkhoff's confession was to have deleted all references to Mr. Ryther. The confession consisted of Mr. Barkhoff explaining what occurred at Mr. H.'s residence and contained questions by Seattle Police Detective Mike Magan designed to prod Barkhoff to provide more details. In one such question, Magan refers to "Mike," meaning Mr. Ryther. This was a direct reference to Mr. Ryther and violated the clear rule announced in *Bruton* and its progeny. The court erred in concluding the reference did not violate Mr. Ryther's right to confrontation.

c. The court's error in admitting Barkhoff's confession in violation of Mr. Ryther's constitutionally protected right to confrontation was not harmless error. Where there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is required. *Schneble v. Florida*, 405 U.S. 427, 432, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); *Chapman v. California*,

at 194. Thus, the confession also fell "within the class of statements to which *Bruton's* protections apply." *Gray*, 523 U.S. at 197.

386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). Under this standard, the State bears the burden of proving beyond a reasonable doubt that Barkhoff's confession referencing Mr. Ryther did not contribute to Mr. Ryther's conviction. *Id.* See also *State v. Anderson*, 112 Wn.App.828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003) ("State must prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error").

The assumption by the trial court was that the jury most likely never heard the reference in Barkhoff's taped confession to Mr. Ryther. 12/15/08RP 8. But it is the State's burden here to prove beyond a reasonable doubt the jury did not hear the reference and that the reference did not enter into its deliberations. On the record before this Court the State cannot carry its burden. Mr. Ryther is entitled to reversal of his convictions and remand for a new trial.

2. THE COURT ABUSED ITS DISCRETION IN FAILING TO FIND THE ROBBERY, THEFT, AND UNLAWFUL IMPRISONMENT CONSTITUTED THE SAME CRIMINAL CONDUCT

At sentencing, Mr. Ryther contended some or all of the counts constituted the same criminal conduct and counted as a single point since the robbery, unlawful imprisonment and theft occurred at the same time and place, the same victim, and same intent. 3/13/09RP 3-7. The trial court disagreed and counted all of the offenses as separate offenses. 3/13/09RP 8-9.

a. Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense. The trial court calculates the offender score by adding together the defendant's prior convictions for all felonies and current offenses. RCW 9.94A.589(1)(a); *State v. Haddock*, 141 Wn.2d 103, 108, 3 P.3d 733 (2000); *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). This Court reviews a sentencing court's calculation of an offender score *de novo*. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007), *citing State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

Whenever a person is to be sentenced for two or more current offenses, the court determines the sentence range for each

current offense by counting all other current and prior convictions as if they were prior convictions for the purpose of the offender score. RCW 9.94A.589 (1)(a). Where concurrent offenses encompass the same criminal conduct, the crimes are treated as one offense for sentencing purposes. RCW 9.94A.589 (1)(a),⁴ *State v. Deharo*, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

A court should find that two or more crimes constitute the same criminal conduct if the crimes (1) required the same criminal intent, (2) were committed at the same time and place, and (3) involved the same victim. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

Here, there can be no dispute that all the offenses involved the same victim, Mr. H.. Thus, the only remaining issues to be determined are whether the robbery, theft, and unlawful imprisonment occurred at the same time and place, and whether the offenses shared the same intent.

⁴ RCW 9.94A.589(1)(a) states in relevant part:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That 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.

b. The robbery, theft, and unlawful imprisonment all occurred at the same time and place. Regarding “same time,” the Washington Supreme Court has expressly disavowed the requirement that the crimes occur simultaneously to be considered the “same criminal conduct.” *State v. Porter*, 133 Wn.2d 177, 182, 942 P.2d 974 (1997), *citing Vike*, 125 Wn.2d at 412. The crimes do not need to be committed simultaneously to be committed at the same time, but they must at least be closely sequential in time. *Porter*, 133 Wn.2d at 183. Separate incidents may satisfy the same time element 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). In *Porter*, the Supreme Court found that sequential narcotics sales “were part of a continuous, uninterrupted sequence of conduct over a *very short period of time.*” (Emphasis added.) *Id.* at 182.

Here, the unlawful imprisonment occurred at the same time as the robbery. The unlawful imprisonment allowed Mr. Ryther to keep the \$200 Mr. H. had given him in anticipation of the sexual services. The unlawful restraint also allowed Williams to ransack Mr. H.’s residence and take the laptop computers. Further, all three

offenses “were part of a continuous, uninterrupted sequence of conduct over a very short period of time.” *Porter*, 133 Wn.2d at 182.

The trial court ruled the theft occurred at a different time and place because it involved the taking of money from a bank using Mr. H.’s ATM card and PIN. 3/13/09RP 8. But, the theft actually occurred when Barkhoff and the others took Mr. H.’s ATM card and forced him to disclose his PIN, thus enabling the taking of the money from the account. Without the ATM and PIN, the intruders would have never been able to access Mr. H.’s account. All the offenses occurred at the same time and place.

c. The offenses shared the same intent. The trial court ruled the intent changed once the three individuals entered Mr. H.’s residence; thus none of the subsequent acts constituted the same criminal conduct. 3/13/09RP

While appellate courts generally construe the term “same criminal conduct” narrowly to disallow most assertions of same criminal conduct, *State v. Hernandez*, 95 Wn.App. 480, 485, 976 P.2d 165 (1999), there is an exception to this general rule when the defendant commits the same crime against the same victim over a short period of time. *Porter*, 133 Wn.2d at 181. Multiple offenses

against the same victim constitute the “same criminal conduct.” *Tili*, 139 Wn.2d at 123. To determine intent, the sentencing court must determine “the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998), quoting *Vike*, 125 Wn.2d at 411.

When determining if two or more crimes share a criminal intent, we focus on (1) whether the defendant's intent, viewed objectively, changed from one crime to the next and (2) whether the commission of one crime furthered the other. *State v. Grantham*, 84 Wn.App. 854, 858, 932 P.2d 657 (1997). When dealing with sequentially committed crimes, this inquiry can be resolved merely by determining whether one crime furthered the other. *Vike*, 125 Wn.2d at 411-12. If a defendant kidnaps a victim for the sole purpose of furthering an additional crime, such as robbery, the two crimes are the same criminal conduct. *State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237, 749 P.2d 160 (1987); *State v. Longuskie*, 59 Wn.App. 838, 841, 801 P.2d 1004 (1990) (kidnapping and child molestation are the same criminal conduct when defendant abducts victim to molest him and stays in several different motels during the course of the crime).

Here, the overarching intent was to take advantage of Mr. H.'s weakness in meeting two complete strangers at his residence for sexual favors. Barkhoff and Mr. Ryther decided that it was unlikely Mr. H. would call the police once they made their demands, thus their intent was to steal money and anything else they could grab once they entered the house. The unlawful imprisonment of Mr. H. furthered the robbery and theft because it provided time to allow Barkhoff and Mr. Ryther to ransack his house and demand his PIN, which allowed them to access his account and take his money.

While factually dissimilar to Mr. Ryther's case, the decision in *State v. Taylor*, 90 Wn.App. 312, 950 P.2d 526 (1998), nevertheless provides some guidance. Mr. Taylor was convicted of kidnapping and assaulting one Mr. Murphy and argued at sentencing the two offenses should have been found to be the same criminal conduct. It was conceded that the offenses happened to the same victim at the same time and place, thus the issue to be resolved was whether the two offenses shared the same intent. The Court of Appeals ruled they did, finding:

The evidence established that Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his

objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when Taylor and Nicholson entered the car. It ended when the kidnapers exited the car and the abduction was over. And there is no evidence that Taylor or Nicholson engaged in any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction.

Taylor, 90 Wn.App. at 321-22. Similarly, the goal of Barkhoff and Mr. Ryther in unlawfully detaining Mr. H. was to restrain him so he would not, or could not, resist the robbery and theft. Thus, their *objective* intent never changed: the intent was a home invasion robbery where they could detain and rob Mr. H.. As such, all three offenses shared the same objective intent.

d. Remand for resentencing is required. Where the trial court incorrectly concludes a series of crimes which were not the same criminal conduct, the remedy is reversal of the sentence and remand to the trial court for resentencing with a corrected offender score. *Williams*, 135 Wn.2d at 366-67.

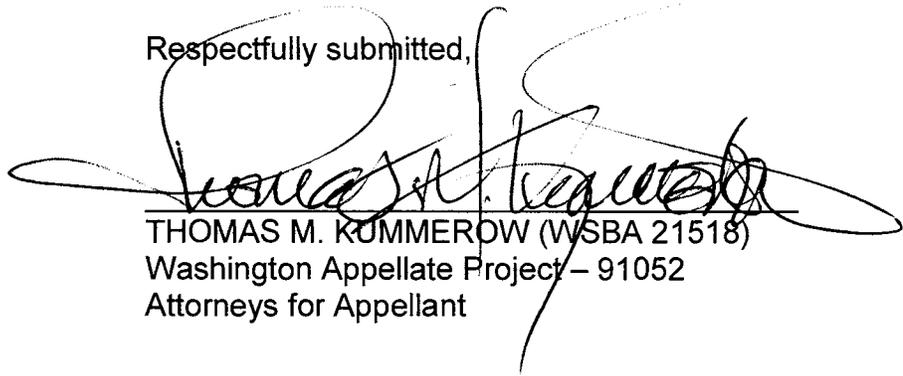
In the instant matter, the trial court incorrectly failed to find the unlawful imprisonment, theft, and robbery counts to be the same criminal conduct. Accordingly, this Court must reverse Mr. Ryther's sentence and remand for resentencing.

E. CONCLUSION

For the reasons stated, Mr. Ryther submits this Court must either reverse his convictions and remand for a new trial or reverse his sentence and remand for resentencing.

DATED this 3rd day of December 2009.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and title. The signature is highly cursive and extends across the width of the typed text.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

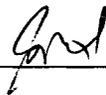
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 63229-9-I
)	
MICHAEL RYTHER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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