

68263-6

68263-6

NO. 68263-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DAMOAN STEWARD,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

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**BRIEF OF RESPONDENT**

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A. ISSUE PRESENTED

Did the court abuse its discretion in concluding the defendant's three rape convictions were not the "same criminal conduct" for sentencing purposes, where there was a break in the defendant's criminal conduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Damoan Steward with three counts of rape in the second degree (counts I-III) and three counts of attempted rape in the second degree (counts IV-VI). CP 8-10. The jury returned guilty verdicts for all three of the rape in the second degree counts and returned not guilty verdicts on all three of the attempted rape in the second degree counts. CP 119-24.

At the sentencing hearing on February 3, 2012, the defense requested that the court find that the defendant's three separate rapes of the victim be found to be the "same criminal conduct." CP 155-60. The defense argued that the defendant's offender score should be a three. CP 155-60. The State disagreed and held that the defendant's true offender score should be a nine,

given that the three separate convictions should not be considered the "same criminal conduct." 11RP 108, 117-18.

The trial court found that the three separate rapes were not the "same criminal conduct," and therefore the defendant's offender score was a nine. The trial court sentenced Steward to an indeterminate sentence with a standard range of 245 months on each count to run concurrently. 11RP 135. The court stated that there is limited period of time but then goes on to describe more of the factual basis for her ruling. 11RP 134-35.

## 2. TRIAL FACTS

Fairfax is a secured hospital that specializes in dealing with patients with mental illness. 3RP 82. The patients at Fairfax can either enter the facility voluntarily, or be involuntarily committed. 3RP 82-84; 4RP 107-08. Once a patient is admitted to Fairfax they are essentially on lock down and cannot leave the facility without permission from the hospital employees. 3RP 83-84. When patients arrive at Fairfax, the rules are explained and boundaries are given. 3RP 49.

Steward voluntarily admitted himself to Fairfax on June 15, 2009, after being attacked by unknown assailants that landed him in the ER at Valley Medical Hospital. 5RP 23, 25.

The victim, O.P., had been involuntarily committed to Fairfax for a near psychotic break. 4RP 113. On June 20, 2009, she attempted to escape from the hospital. 3RP 20, 63. The hospital staff administered a sedative to her. 4RP 123. She was placed in a single occupant room where she was heavily sedated. 4RP 124.

On that same day, Steward was staying in a room right next to O.P. 4RP 48. Steward was aware that every 15 minutes the staff checked the rooms. 4RP 48. As seen on the surveillance video at approximately 10:07 p.m., Steward entered the victim's room carrying a book. Ex. 7. The victim was still heavily sedated and was laying on a bed in the middle of the room, covered by a blanket. Ex. 7. Steward walked over to the victim and began to fondle her butt and thigh. Ex. 7. Steward then pulled off the blanket and pulled her hospital gown and underwear to the side. Ex. 7. Steward then began to perform oral sex on O.P. Ex. 7. This continued for approximately two minutes, then Steward stood up, covered the victim, grabbed his book, and walked out of the room. Ex. 7. Steward exited the room by leaving through the door and

entered into the hallway at 23:09:10. Ex. 7. The entire contact while Steward was in the room for the first time was the grounds for count I. 11RP 38, 93.

A short time later, 23:09:45, the surveillance tape showed Steward re-enter O.P.'s room. Ex. 7. He immediately pulled off her blanket and pulled aside her hospital gown and underwear and begins to rub and penetrate her vagina with his finger. Ex. 7. She did not move. Ex. 7. Steward again performed oral penetration on O.P. Ex. 7. Shadows of feet by the door appeared and Steward quickly jumped up, immediately covered up the victim, picked up his book, and appeared to try and talk to O.P. while he looked towards the door. Ex. 7. A staff member made contact with Steward while he was in the victim's room. Steward then left with the staff member at 23:11:24. Ex. 7. The entire contact while Steward was in the room the second time, both oral and digital penetration, was the basis for count II. 11RP 38-39, 93.

The same surveillance video shows that Steward opened the victim's door and returned to the victim's room at 23:16:25, about five minutes after he previously left the room. Ex. 7. Steward pushed O.P.'s underwear to the side and penetrated the victim's vagina with his fingers. Ex. 7. As Steward is attempting to move

the victim to a different position, she appears to reach for the covers the defendant pulled off her and she rotated her body into a fetal position, covering herself up with the blanket. Ex. 7. Steward then left the room at 23:18:14. Ex. 7. The entire time the defendant was in the victim's room for the third time was the basis for count III. 11RP 39, 93,

Over the next twenty minutes, Steward entered O.P.'s room on three other occasions. Ex. 7. Those three additional entries were the basis for counts IV-VI. 11RP 93.

The staff members were unaware that Steward was assaulting the victim on that night. 3RP 63-65. It was not until Monday, when the video was reviewed, that the assaults were discovered. 3RP 63-66. Steward was moved to another location and the police were called. 3RP 69. Deputy Christian was the first to arrive and at that time he received a copy of the video from Mr. Petras on a thumb drive. 3RP 139-41. Deputy Christian was able to watch the video. 3RP 140-41.

Detective Johnson arrived at Fairfax and interviewed Steward in a waiting room at the front of the complex. 4RP 11-13. Steward admitted to being in the victim's room, performing oral sex on her, and knowing that he wasn't allowed to be in there.

4RP 40-46. Steward admitted knowing that the hospital staff came around every 15 minutes and that he was not supposed to be in her room. 4RP 41. He admitted that every time he thought it was near that 15-minute mark he would leave the victim's room and go to his room. 7RP 98, 104, 165-66. Steward was coherent when speaking with the detective. 1RP 16-17. He was able to track the conversation and respond appropriately. 1RP 16.

After speaking with Steward, the detective spoke with the victim. 4RP 19. The victim had no recollection of the night or the six times that the defendant entered her room. 4RP 20-21. Even when speaking with the detective, the victim could not comprehend what was going on, what the detective was talking about, or why she was there. 4RP 20-21.

Dr. Nakashima from Western State Hospital opined at trial that Steward did not have diminished capacity and that his mental illness did not affect his perceptions at the time of the offense. 9RP 139; 10RP 42-43, 46-48. Dr. Nakashima opined that Steward engaged in purposeful actions and that the defendant knew what he was doing. 9RP 45, 47. Dr. Nakashima was able to form that conclusion after reviewing Steward's mental health records, the police reports, Steward's statement, and the video. 9RP 15-22.

or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997). If any of these elements is missing, the offenses must be individually counted toward the offender score. State v. Garza-Villarreal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993).

The standard for determining whether two offenses require the same objective criminal intent is “the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Intent, in this context, does not mean the *mens rea* element of the crime, but rather the defendant’s “objective criminal purpose” in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

Courts construe the same criminal conduct provision “narrowly to disallow most claims that multiple offenses constitute the same criminal act.” State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999); State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994).

The appellate courts construe the statute narrowly to disallow most assertions of “same criminal conduct.” State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). A trial court has considerable discretion in deciding whether crimes constitute the same criminal conduct and a reviewing court will reverse a sentencing court’s determination of “same criminal conduct” only upon a showing of a “clear abuse of discretion or misapplication of the law.” State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). A trial court’s determination of what constitutes same criminal conduct for purpose of calculating offender score will be reversed only for abuse of discretion or misapplication of the law. RCWA 9.94A.400(1)(a).

In this particular case, the court did not abuse its discretion when calculating the defendant’s offender score to be a nine and finding that the rapes did not constitute the “same criminal conduct.” The court was in the best position to make that determination after listening to all of the testimony, including testimony from the defendant, as well as watching the video of the rapes.

Two crimes constitute the same criminal conduct only if they share the same (1) criminal intent, (2) time and place, and

(3) victim. RCW 9.94A.589(1)(a). If any one of these elements is missing, the crimes cannot be considered same criminal conduct and must be counted separately in calculating the offender score. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

In Grantham, the Court of Appeals held that two convictions for second-degree rape that involved the same victim did not constitute “the same criminal conduct.” State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997). Grantham lured the victim to an apartment, anally raped her, slapped and threatened her, and then forced her to perform oral sex. Id. Although the two rapes occurred close in time, the court upheld the trial court’s finding that the two rapes constituted separate criminal conduct because Grantham had the opportunity to pause and reflect between the two rapes, and, therefore, the two crimes did not involve the same intent and were not committed at the same time. Id. at 860. The court held that the sequential rapes did not constitute the same criminal conduct because the defendant completed the first rape before commencing the second, had the presence of mind to threaten the victim between the rapes, and used new physical force to accomplish the second rape. Id. The court concluded that during the brief gap in time between the rapes, the defendant had

the “opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” Id. The court held that Grantham formed new criminal intent when he paused long enough on the stairs to reassure his crying children, saying “Daddy don’t do nothing to Mommy,” and to order them “downstair[s].” Id. at 858-59. Like Grantham, Steward had time to pause and reflect between the rapes. Steward left O.P.’s room between the rapes. There was time for Steward to form a new criminal intent when he left the room before re-entering and raping the victim again.

Steward’s case is distinguishable from Palmer, where the court held that two rape offenses that occurred a “few minutes” apart were the same criminal conduct. State v. Palmer, 95 Wn. App.187, 975 P.2d 1038 (1999). In that case, the defendant’s actions occurred without an opportunity for the defendant to pause and reflect on his actions. The rapes occurred all during one period where the defendant performed different acts of rape on the victim. Id. In contrast, Steward left the room and had time to pause and reflect and form a new intent to commit another act of rape.

There is nothing in the record or in the testimony presented that Steward’s first rape furthered the second and third rapes after

the defendant lubricated the victim's vagina. Ex. 7. The defendant completed his acts of rape and then left the room. Ex. 7. The State did not charge the defendant with every act of digital or oral penetration. The State charged the defendant with each time he was in the room. This break in time allowed the defendant to pause and reflect and create a new criminal intent prior to re-entering the room and raping the victim again.

Although the crimes here may have occurred sequentially, they did not occur over a continuous, uninterrupted timeframe. Given Steward's exit and re-entry of the room and the time that he had to pause and reflect between the rapes shows that these acts are separate and distinct and should score individually.

In State v. Tili, the court held that defendant's three convictions for first-degree rape were part of the "same criminal conduct" and, therefore, were to be counted as one crime for sentencing purposes, where offenses involved same victim, occurred at same place and were nearly simultaneous in time, and defendant's three acts of rape involved same objective criminal intent, given the extremely short time frame of two minutes and defendant's unchanging pattern of conduct. State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999). In Steward's case, the separate

incidents happened over a 45-minute period where the defendant repeatedly left the room and re-entered. Ex. 7.

The factual scenario in Steward's case is much different than that in the Porter case. In that case, the court held that "immediately sequential drug sales" satisfy the "same time" element of the same criminal conduct. State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997). "Porter's sequential drug sales occurred as closely in time as they could without being simultaneous. The sales were part of a continuous, uninterrupted sequence of conduct over a very short period of time. The officer never left the scene. Immediately after Porter gave the officer the methamphetamine, he asked her for marijuana. We hold that immediately sequential drug sales satisfy the 'same time' element of the statute." Id. at 182. Steward's case is distinguishable as the rapes were not part of an uninterrupted sequence. The defendant leaves the room between all charged rapes.

In State v. Dolen, the defendant was charged and convicted of one count of rape and one count of child molestation and the court held that, given the inability to separate when the molestation ended and the rape began that those should be treated as one criminal act. State v. Dolen, 83 Wn. App. 361, 921 P.2d 590

(1996). The fact pattern in Dolen is distinguishable from the facts in this case. In this case, the State charged the defendant with each time that the defendant went into the victim's room. The first three counts were for completed rapes and the last three counts were for the attempted rapes. The charging was not for the number of times that the defendant places his fingers or mouth in the victim's vagina or anus. In this case, unlike the Dolen case, there is video evidence to show the clear and separate acts of the defendant. The video in this case shows the defendant entering and leaving the victim's room six times. The video clearly shows that the acts occurred at separate times. The defendant left the room on multiple occasions and had to form intent to re-enter and to re-offend the victim. This court cannot conclude that the trial court's conclusion was an abuse of discretion. Even if this court applies a *de novo* standard of review, the conclusion will be the same. Steward's offender score is a nine given all of the reasons stated above.

D. CONCLUSION

The defendant's offender score was calculated correctly as the three separate rapes are not the "same criminal conduct." The sentence should be affirmed.

DATED this 27 day of November, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DAMOAN STEWARD, Cause No. 68263-6-I, in the Court of Appeals, Division I, for the State of Washington.

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

Holly Gilmore  
Name Holly Gilmore  
Done in Kent, Washington

11/27/2012  
Date 11/27/2012

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