

No. 64418-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT M. RISE,

Appellant.

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

The Honorable Michael C. Hayden

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Rise's right to notice under article I, section 22 of the Washington Constitution when it allowed the State to amend the information on the eve of trial to add an additional count.

2. Mr. Rise's attorney rendered deficient representation that prejudiced him when counsel failed to argue the second degree child rape convictions and child molestation conviction was the same criminal conduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under article I, section 22 of the Washington Constitution, a defendant has a constitutional right to notice of the charges against him. Where prejudice to the defendant results from the tardy amendment of the information at trial, the order granting the amendment violates the right to notice and must be reversed. Here, on the first day of trial, the court allowed the State to amend the information to add a count of child molestation to the already charged counts of rape of a child in the second degree (2 counts) and rape of a child in the third degree (1 count). Did the court's amendment violate Mr. Rise's right to notice requiring this Court to reverse the child molestation conviction?

2. A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant who is denied the effective assistance of counsel and is prejudiced by that failure at sentencing is entitled to a new sentencing hearing. Here, counsel failed to argue the two second degree child rape convictions and the child molestation conviction were the same criminal conduct under *State v. Dolen*, 83 Wn.App. 361, 921 P.2d 590 (1996). Was Mr. Rise prejudiced by his attorney's deficient representation thus requiring reversal of his sentence and remand for resentencing?

3. Multiple concurrent offenses must be counted as a single offense in the defendant's offender score where the offenses constitute the same criminal conduct. Offenses are the same criminal conduct where they are committed against the same victim, occurred at the same time, and shared the same intent. Where the two second degree child rape counts and the child molestation count involved the same victim, J.P., involved the same intent, and the State failed to prove the acts occurred at different times, were the convictions the same criminal conduct?

C. STATEMENT OF THE CASE

Several years ago, Robert Rise befriended J.P., a young man from a very dysfunctional family. 8/31/09 220-24, 9/2/09RP 177-81. At the time, J.P. was in the fourth grade and attended the same day care as Mr. Rise's son and daughter. 9/3/07RP 367-70. Over the years, Mr. Rise became a surrogate father for J.P., with J.P. spending many days and nights at Mr. Rise's home with Mr. Rise and his children. 8/31/09RP 12-17. J.P. referred to Mr. Rise as his father. 8/31/09RP 24-25, 9/3/09RP 379.

In 2008, J.P. was living with his mother when he ran away from home. 8/31/09RP 66. J.P. was discovered at Mr. Rise's residence. 8/26/09RP 37-38. J.P. was detained by police officers alerted that J.P. was at Mr. Rise's home. 8/26/09RP 44. During this detention, J.P. told his aunt, an Edmonds Police officer, that he had been sexually assaulted for several years by Mr. Rise. 9/2/09RP 241-46. As a result of these disclosures, Mr. Rise was charged with two counts of second degree child rape and one count of third degree child rape. CP 1-2. On the first day of trial, the State was allowed to amend the information to allege a count of second degree child molestation covering the same charging period as the second degree child rape counts. 8/25/09RP 32-46.

Following a jury trial, Mr. Rise was convicted as charged. CP 71-74.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO AMEND THE INFORMATION TO ADD AN ADDITIONAL COUNT OF CHILD MOLESTATION

On August 25, 2009, the first day of trial, the State moved to amend the information to add a count of child molestation in the second degree during the same time period encompassing the two child rape counts. 8/25/09RP 32. Mr. Rise objected, noting that the charging period had been extremely broad and he had previously unsuccessfully sought a Bill of Particulars attempting to flesh out the acts and approximate dates of occurrence. 8/25/09RP 33-34. Mr. Rise noted the court denied the Bill of Particulars because Mr. Rise had not yet interviewed J.P., and the assumption was the interview would cure the lack of specificity. 8/25/09RP 33-34. Mr. Rise noted that the interview cured nothing because J.P. was extremely vague during the interview about dates of the alleged incidents and about the number of alleged incidents. 8/25/09RP 39-42. Mr. Rise noted the prejudice he would suffer if the amendment were allowed:

I think the prejudice to my client is manifest, we can't at this late date go forward. In the alternative, we could sever that count and do that at a later date.

But, otherwise, my client is going to be substantially prejudiced. I can't possibly prepare a defense on that, and I think the matter of these other possibilities as a basis – as a real basis for the addition of this count also adds further prejudice that I didn't really have adequate notice of, given the record that we have before us.

The record is so ambiguous and so unclear, [J.P.] can't remember anything that happened or when it happened, and he confuses the dates so much that it's impossible for us to be able to go forward and present a defense to yet new charges, so we submit it on that basis.

8/25/09RP 45-46. Without explanation, the court granted the State's motion to amend the information to add the new count: "Motion to Amend is granted." 8/29/09RP 46.

a. The court may allow an amendment to the information before trial only where it does not prejudice the defendant. It is fundamental that an accused must be informed of the charge he is to meet at trial and cannot be tried for an offense not charged. *State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); *State v. Lutman*, 26 Wn.App. 766, 767, 614 P.2d 224 (1980). Pursuant to CrR 2.1(d), a trial court may allow the amendment of the information at any time before the verdict as long

as the “substantial rights of the defendant are not prejudiced.”

While the rule permits liberal amendment, it is tempered by article I, section 22 of the Washington Constitution which requires that the accused be adequately informed of the charge to be met at trial. *State v. Pelkey*, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987). A trial court's decision to allow the State to amend the charge is reviewed for abuse of discretion. *State v. Haner*, 95 Wn.2d 858, 864, 631 P.2d 381 (1981).

Where the amendment is sought prior to trial, the defendant has the burden of demonstrating prejudice under CrR 2.1(d). *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988); *State v. Hakimi*, 124 Wn.App. 15, 26-27, 98 P.3d 809 (2004).

b. Mr. Rise was prejudiced by the State's late amendment to the information to add an additional count.

Instructive of the prejudice suffered by a defendant by a dilatory amendment to the information is the decision in *State v. Ziegler*, 138 Wn.App. 804, 158 P.3d 647 (2007). In *Ziegler*, the defendant was charged prior to trial with two counts of first degree rape of a child and two counts of first degree child molestation arising out of alleged acts involving two victims. Following the victims' testimony, the State moved to amend the information to substitute first degree

child molestation for the child rape involving one victim and to add two counts of first degree rape of a child as to the other victim. 138 Wn.App. at 807. On appeal, the defendant challenged the tardy amendment as a violation of his constitutional right to notice. *Id.* This Court agreed as to the additional rape of a child counts, noting the defendant had proven sufficient prejudice:

This was not merely the amendment from one crime to a similar charge. Nor was this an amendment that changed the means of a crime already charged. Adding two child rape charges during trial affected Ziegler's ability to prepare his defense. His trial strategy and plea negotiations with the State would likely have been different had he known there would be two additional child rape charges. The addition of the two child rape charges was a violation of Ziegler's right to know of and defend against the State's charges.

Ziegler, 138 Wn.App. at 811.

While *Ziegler* involved an amendment to the information during trial, there is no meaningful difference between *Ziegler* and Mr. Rise's matter since the amendment here was allowed on the first day of trial. As in *Ziegler*, this was not merely the amendment from one crime to a similar charge, nor was it an amendment that changed the means of a crime already charged. As submitted by Mr. Rise before the trial court, and as in *Ziegler*, adding the child molestation charge affected his ability to prepare his defense. His

trial strategy and plea negotiations with the State would likely have been different had he known there would be the additional child molestation charge. Thus, as in *Ziegler*, addition of the child molestation charge was a violation of Mr. Rise's right to know of and defend against the State's charges. *Ziegler*, 138 Wn.App. at 811; *citing Carr*, 97 Wn.2d at 439. Mr. Rise is entitled to reversal of the child molestation count and remand for resentencing. *Id.*

2. MR. RISE'S TRIAL ATTORNEY RENDERED CONSTITUTIONALLY DEFICIENT REPRESENTATION WHEN HE FAILED TO MOVE THE COURT TO FIND THE OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT

At sentencing, Mr. Rise's attorney failed to move the court to consider the two rape counts (counts 1 and 2) and one child molestation count (count 4) as the same criminal conduct despite controlling caselaw which compelled this conclusion. Mr. Rise contends these counts constituted the same criminal conduct and, as a result, his attorney rendered constitutionally deficient representation by not so moving.

a. Mr. Rise had the right to the effective assistance of counsel. A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942). If he does not have funds to hire an attorney, a person accused of a crime has the right to have counsel appointed. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel

claim, the defendant must meet the requirements of a two prong-test:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

While a challenge to the failure to find counts to be the same criminal conduct cannot be raised for the first time on appeal, *State v. Nitsch*, 100 Wn.App. 512, 523-25, 997 P.2d 1000 (2000), the issue can be raised for the first time on appeal where such a failure is due the deficient representation of defense counsel and a sufficient record exists for the court to determine whether the counts are the same criminal conduct. *State v. McFarland*, 127 Wn.2d 322, 337-38 n.5, 899 P.2d 1251 (1995).

b. Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense. A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. RCW 9.94A.589 (1)(a). Same criminal conduct

“means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” *Id.* The State has the burden to prove the crimes did not occur as part of a single incident. *State v. Dolen*, 83 Wn.App. 361, 365, 921 P.2d 590 (1996) (“If the time an offense was committed affects the seriousness of the sentence, the State must prove the relevant time.”).

The “same criminal intent” element is determined by looking at whether the defendant’s objective intent changed from one act to the next. *Dolen*, 83 Wn.App. at 364-65. The mere fact that distinct methods are used to accomplish sequential crimes does not prove a different criminal intent. *State v. Grantham*, 84 Wn.App. 854, 859, 932 P.2d 657 (1997). The “same time” element does not require that the crimes occur simultaneously. *State v. Porter*, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); *Dolen*, 83 Wn.App. at 365. Individual crimes may be considered same criminal conduct if they occur during an uninterrupted incident. *Porter*, 133 Wn.2d at 185-86; *Dolen*, 83 Wn.App. at 365, *citing State v. Walden*, 69 Wn.App. 183, 188, 847 P.2d 956 (1983) (court found a defendant’s convictions for second degree rape and attempted second degree rape, committed by forcing the victim to submit to oral and

attempted anal intercourse during one continuous incident, to be same criminal conduct).

The *Dolen* court looked at the evidence presented (six different incidents in which Mr. Dolen engaged in sexual intercourse and/or sexual contact with a child) and determined it was unclear from the record whether the jury convicted him of the two offenses in a single incident or in separate incidents. *Dolen*, 83 Wn.App. at 365. The Court reasoned that if Mr. Dolen had been convicted of two offenses from a single incident, then they would have encompassed the same criminal conduct. *Id.* The court held: “the State failed to prove that [Mr.] Dolen committed the crimes in separate incidents[,] [c]onsequently, the trial court's finding that the two convictions did not constitute the same criminal conduct is unsupported.” *Id.*

c. The two offenses shared the same intent, were committed at the same time, and involved the same victim. As in *Dolen*, the three counts of which Mr. Rise was convicted involved the same intent (his sexual gratification) occurred during the same charging period, and involved the same victim, J.P. Thus, as in *Dolen*, all three counts constituted the same criminal conduct. See *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (multiple

offenses against the same victim constitute the “same criminal conduct.”).

Mr. Rise’s case is almost identical to *Dolen*. Although the testimony showed different means of committing the rape and molestation, and different dates, it is unclear from the record whether the jury convicted Mr. Rise for committing three offenses in a single incident or in separate incidents. J.P. testified Mr. Rise inappropriately touched him and also made him touch Mr. Rise inappropriately on many occasions during the two year charging period, but was unable to specify the time and place.

The State’s closing argument does not help in assessing the basis of the jury’s verdict. In fact, the State’s argument makes the analysis even more unclear:

I’m not suggesting that you need to pick the actual acts that I’ve just told you in order to find the defendant guilty of each count.

I’m just giving you suggestions, and it’s really up to you when you get back there in the jury room and deliberate as to which acts you feel the defendant actually committed against [J.P.].

...

And so, of course, it’s difficult for [J.P.] to come up with dates, pin-point exact times that things happened

9/8/09RP 84, 87 The evidence presented does not eliminate the circumstance of the acts occurring during a single incident. *Dolen*,

83 Wn.App. at 365. Without a special verdict setting out the specific times and places, it is impossible to find the State had proven the acts all occurred at different times.

To avoid the same criminal conduct issue, the State needed to show the incidents occurred at different times. *Id.* The fact the Court gave the unanimity instruction does not provide assurance that the offenses occurred at separate times. CP 65; *State v. Petrich*, 101 Wn.2d 566, 572-73, 683 P.2d 173 (1984). All that the *Petrich* instruction guaranteed is that the jury agreed the acts were separate acts. It did not eliminate the fact the acts could have occurred during a single incident as in *Dolen*. 83 Wn.App. 365.

In sum, “the record [here] does not tell us whether the jury convicted [Mr. Rise] of committing the two offenses in a single incident or in separate incidents.” *Dolen*, 83 Wn.App. at 365. “[T]he State [then] failed to prove that [Mr. Rise] committed the crimes in separate incidents.” *Id.* Thus, the trial court erred in failing to count Mr. Rise’s convictions for second degree rape of a child and second degree child molestation as the same criminal conduct.

d. Mr. Rise is entitled to remand for resentencing.

The remedy for an incorrect offender score is reversal of the sentence and remand to the trial court for resentencing with a corrected offender score. *State v. Williams*, 135 Wn.2d 365, 366-67, 957 P.2d 216 (1998).

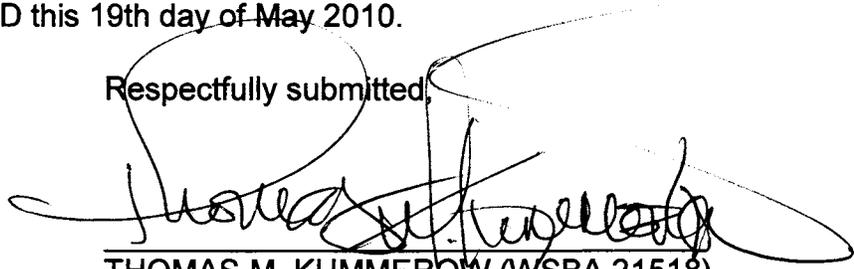
In the instant matter, counsel's deficient performance resulted in prejudice to Mr. Rise; an incorrect offender score. As a result, this Court must reverse his sentence and remand for resentencing.

E. CONCLUSION

For the reasons stated, Mr. Rise submits this Court must reverse his child molestation conviction, and/or reverse his sentence and remand for resentencing.

DATED this 19th day of May 2010.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)
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 Respondent,)
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 v.)
)
 ROBERT RISE,)
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 Appellant.)

NO. 64418-1-I

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF MAY, 2010, I CAUSED THE ORIGINAL **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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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF MAY, 2010.

X _____ 

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