

68263-6

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COA NO. 68263-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAMOAN STEWARD,

Appellant.

REC'D

AUG 31 2012

King County Prosecutor  
Appellate Unit

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

The Honorable Cheryl Carey, Judge

BRIEF OF APPELLANT

RECEIVED  
KING COUNTY PROSECUTOR  
APPELLATE UNIT  
AUG 31 2012

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A. ASSIGNMENT OF ERROR

The court erred in failing to count the three current offenses as "same criminal conduct" in calculating the offender score.

Issue Pertaining to Assignment of Error

Did appellant's three rape convictions constitute the "same criminal conduct" for sentencing purposes because each offense involved the same time, same place, same victim and same objective intent?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Damoan Steward with three counts of second degree rape (counts I - III) and three counts of attempted second degree rape (counts IV - VI) against Olivia Price. CP 8-10. A jury returned guilty verdicts for the three rape counts and acquitted Steward on the three attempted rape counts. CP 119-24.

At sentencing, defense counsel argued the three rape offenses should be counted as same criminal conduct for scoring purposes, resulting in a score of "3" for each offense. CP 155-60; 11RP<sup>1</sup> 111-13.

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 7/29/11, 8/8/11, 8/23/11, 8/29/11, 9/22/11, 9/26/11; 2RP - 10/19/11, 10/20/11, 10/24/11, 10/25/11, 10/26/11, 10/31/11; 3RP - 11/1/11; 4RP - 11/3/11; 5RP - 11/8/11, 11/9/11; 6RP - 11/14/11; 7RP - 11/15/11, 11/16/11; 8RP - 11/16/11; 9RP - 11/17/11; 10RP - 11/21/11; 11RP - 11/22/11, 11/23/11, 2/3/11.

The State contended the offenses should be counted separately. Supp CP \_\_\_ (sub no. 163, State's Response to Presentence Report, 2/3/12); 11RP 108, 117-18. The court ruled the offenses did not qualify as same criminal conduct, resulting in an offender score of 9 for each offense. 11RP 134-35; CP 171. In ruling on the issue, the trial court acknowledged, "We have a limited period of time, I would agree with that." 11RP 134. But after summarizing the facts, the court concluded the offenses were not the same criminal conduct without further elaboration. 11RP 134-35. The court imposed an indeterminate sentence consisting of a minimum 245 months in confinement on each count. CP 174. This appeal follows. CP 182.

## 2. Trial

Fairfax Hospital is a mental health hospital. 3RP 82. Steward and Price were patients there. 4RP 113; 5RP 23-24. Price was medicated after an escape attempt on the evening of June 20, 2009. 3RP 20, 63. The medication was given to sedate and calm. 4RP 123. Drowsiness or sleep is a side effect. 3RP 132, 135; 4RP 126; 5RP 72-73. One doctor opined Price was unconscious as a result of the medication. 7RP 30-31.

A surveillance video showed Steward entering Price's room at 23:07:40 with a book in his hand.<sup>2</sup> Ex. 7. Price was on her bed, not appearing to move. Ex. 7. Steward placed his book on the bed, pulled back the bed sheet, pulled Price's underwear aside, and initiated sexual contact at 23:08:10 by placing his mouth to her vaginal area. Ex. 7. At one point he wet his fingers with his mouth and touched her vagina before resuming oral contact. Ex. 7. He ended oral contact at 23:09:10, picked up his book, and left the room. Ex. 7. Price did not move during the encounter. Ex. 7. This event formed the basis for count I. 11RP 38, 93.

Steward entered the room again at 23:09:45 with a book in his hand. Ex. 7. He placed the book on the bed, pulled back the bed sheet, pulled Price's underwear aside, and began to insert his finger into Price's vagina at 23:09:55. Ex. 7. He then made oral contact with her vagina from 23:10:40 to 23:11:15. Ex. 7. He then abruptly stood up, covered Price with the bed sheet, picked up his book, and shook Price's shoulder while looking toward the door. Ex. 7. A staff member came to the door. Ex. 7; 3RP 66-67. Steward left the room at 23:11:25 while the staffperson waited by the door. Ex. 7. Price did not move during the encounter. Ex. 7. This event formed the basis for count II. 11RP 38-39, 93.

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<sup>2</sup> The video does not include an audio component. The time is embedded in the video screen.

Steward entered the room again at 23:16:25, pulled the bed sheet aside, pulled Price's underwear aside, and began inserting his finger into her vagina at 23:16:40. Ex. 7. He wet his fingers with his mouth a number of times in the midst of digitally penetrating her vagina. Ex. 7. He stopped the digital penetration at 23:17:35. Ex. 7. A few seconds later, he appeared to prepare for further digital penetration when Price moved and lifted her head. Ex. 7. Steward picked up his book. Ex. 7. Price covered herself with the sheet while they interacted. Ex. 7. Steward left the room at 23:18:15. Ex. 7. This event formed the basis for count III. 11RP 39, 93.

Steward entered and left the room three more times between 23:18:50 and 23:39:35. Ex. 7. These latter events formed the basis for counts IV through VI. 11RP 93.

The video does not show penetration or sexual contact during this ensuing time period. Ex. 7. Steward first placed himself under the sheet next to Price and moved his arm. Ex. 7. After leaving and then returning, he knelt down near Price's buttocks and rubbed them. Ex. 7. After he left and returned a final time, Steward placed himself under the sheet next to Price and moved his arm, partially uncovered Price's lower half, moved her underwear aside, and made a movement with his arm. Ex. 7. Price

batted his hand away. Ex. 7. Steward placed himself under the sheet next to Price. Ex. 7.

Hospital staff came to the room and interrupted events at 23:39:35. Ex. 7; 3RP 23, 38. Steward abruptly jumped up before staff arrived, grabbed his book, momentarily went to a corner of the room and then walked to the doorway upon staff arrival. Ex. 7. Steward left the room. Ex. 7. Steward told staff that Price was his "home girl" and that they were just reading a book. 3RP 38, 94.

Steward subsequently told a detective during interrogation that he and Price were flirting with one another and agreed he would go to her room that night. 4RP 40-41, 46. Steward said he told her that he would only be able to go into her room when the guards were not there and he would need to wait for the right time to enter. 4RP 41. He told the detective he "went down on her." 4RP 42-43. Steward said she was awake and that the activity was consensual. 4RP 49, 62.

Steward knew staff made bed checks around every 15 minutes. 7RP 98, 104, 165-66. This awareness was the reason for him leaving and then re-entering the room a number of times. 4RP 43, 47, 62-63; 7RP 166-67. He was aware of the amount of time he could spend in Price's room and was afraid of being caught. 4RP 62-63; 9RP 102.

Price remembered falling asleep upon being taken to her room following her escape attempt. 6RP 16, 18. Price did not remember what happened between her and Steward that night. 6RP 18-19, 53-54, 68. She did not remember Steward at all, but maintained she did not consent to having sex with him and did not give him permission to come into her room. 6RP 19, 24, 59-60, 69. On the other hand, she acknowledged it was possible that she could have talked with Steward about sneaking into her room and having sex but did not remember that conversation. 6RP 68-69.

At trial, Steward admitted he had sexual contact with Price but believed he had permission or consent to have that contact with her. 7RP 68, 110, 162. According to Steward, they flirted and Price agreed to "hook up" with him inside the facility. 7RP 97, 99. Steward went to her room later that night when she was in her room after the escape attempt. 7RP 102-03. Steward insisted that Price spoke with him and agreed to sexual activity. 7RP 103, 105-08.

The defense for all counts was that Steward believed Price was not mentally incapacitated or physically helpless. 2RP 90. The additional defense for the attempted rape counts was diminished capacity. 2RP 90.

Defense expert Dr. Breen, a clinical neuropsychologist, opined Steward's perception that Price interacted with him was a manifestation of

his mental illness and that he did not have a rational understanding of the nature of his relationship with Price. 7RP 176; 9RP 15-19, 118. In support of the diminished capacity defense, Dr. Breen opined Steward was unable to formulate an intention to commit the attempted rapes due to a psychiatric disorder. 9RP 27-31, 122. State expert Dr. Nakashima, a psychologist, opined 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.

C. ARGUMENT

1. THE COURT ERRED IN FAILING TO COUNT THE THREE OFFENSES AS "SAME CRIMINAL CONDUCT" IN CALCULATING THE OFFENDER SCORE.

The court erroneously lengthened Steward's sentence by classifying the three counts of rape as separate criminal conduct, resulting in an offender score of 9 instead of 3. Contrary to the trial court's conclusion, the three rape offenses shared the same objective intent, occurred at the same time, and otherwise qualified as "same criminal conduct" under the requisite legal standard. Remand for resentencing with an offender score of 3 for each count is required.

a. The Legal Test For Whether Offenses Qualify As Same Criminal Conduct.

The offender score establishes the standard range term of confinement for an offense. RCW 9.94A.530(1) ("The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range."); RCW 9.94A.525 (scoring rules). A proper "same criminal conduct" determination is essential to the accurate calculation of an offender score. RCW 9.94A.589(1)(a) provides:

[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.

"Same criminal conduct" is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). "Although the statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act, there is one clear category of cases where two crimes will encompass the same criminal conduct — 'the repeated commission of the same crime against the same victim over a short period of time.'" State v. Porter, 133 Wn.2d 177, 181,

942 P.2d 974 (1997) (quoting 13A Seth Aaron Fine, Washington Practice § 2810 at 112 (Supp. 1996)).

b. Standard Of Review

A trial court's same criminal conduct determination is said to be reviewed for an abuse of discretion or misapplication of the law. See, e.g., State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). Not all courts agree. See State v. Torngren, 147 Wn. App. 556, 562-63, 196 P.3d 742 (2008) (de novo standard of review of "same criminal conduct question is more appropriate). The issue of the proper standard of review is currently pending in the Washington Supreme Court in State v. Graciano (No. 86530-2).<sup>3</sup>

The de novo standard makes more sense because the appellate court is in as good a position as the trial court to apply the facts to the law. Torngren, 147 Wn. App. at 562-63. Correctly understood, whether two or more offenses qualify as "same criminal conduct" under RCW 9.94A.589(1)(a) is made by a process of applying the facts to the governing legal standard. Through that process of legal reasoning, the

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<sup>3</sup> The issue is described as "Whether in considering whether multiple crimes constitute the 'same criminal conduct' for sentencing purposes, an appellate court reviews the trial court's decision for abuse of discretion or considers the issue de novo." [www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues.display&fileID=2012May](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2012May) (accessed August 15, 2012). Oral argument took place on May 24, 2012.

conclusion of law that offenses do or do not meet the legal standard of "same criminal conduct" is reached. See State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994) ("When the trial court bases an otherwise discretionary decision solely on application of a court rule or statute to particular facts, the issue is one of law, which is reviewed de novo on appeal."); State v. Welchel, 97 Wn. App. 813, 817, 988 P.2d 20 (1999), ("The choice of law applicable to facts, its interpretation, and its application to the facts are matters of law reviewed de novo."), review denied, 140 Wn.2d 1024, 10 P.3d 405 (2000); Lobdell v. Sugar 'N Spice, Inc., 33 Wn. App. 881, 887, 658 P.2d 1267 (1983) ("Whether a statute applies to a factual situation is a question of law and fully reviewable upon appeal.").

If a determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law. State v. Niedergang, 43 Wn. App. 656, 658–59, 719 P.2d 576 (1986). Whether two or more offenses constitute the same criminal conduct is a conclusion of law because the determination is made by the process of reasoning whether the facts meet the requisite legal standard under RCW 9.94A.589(1)(a). Conclusions of law are reviewed de novo. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Steward requests this Court to apply a de novo standard of review. But even under the abuse of discretion or misapplication of the law standard, the trial court erred in failing to conclude the three rapes should be counted as separate offenses in calculating the offender score. A trial court necessarily abuses its discretion when it applies an incorrect legal analysis. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). "Discretion also is abused when it is exercised contrary to law." American States Ins. Co. ex rel. Kommavongsa v. Nammathao, 153 Wn. App. 461, 466, 220 P.3d 1283 (2009) (citing State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007)). As set forth below, application of a correct legal analysis shows the three offenses in Steward's case satisfy the same criminal conduct test under RCW 9.94A.589(1)(a).

c. The Offenses Involved The Same Victim and Same Place.

The three offenses have the same victim (Price) and occurred in the same place (Price's room at Fairfax Hospital). Steward does not anticipate any dispute from the State on this point.

d. The Offenses Occurred At The Same Time.

The trial court agreed there was "a limited period of time" involved. 11RP 134. But it is unclear from the court's oral ruling whether it

concluded the same time requirement was met. The court's ruling is opaque.

In any event, the "same time" element is met when one applies the facts to the controlling legal standard. About 45 seconds passed between the end of the first sexual contact forming the basis for count I and the initiation of the second sexual contact forming the basis for count II. Ex. 7. About five and a half minutes passed between the end of the second sexual contact forming the basis for count II and the beginning of the third sexual contact forming the basis for count III. Ex. 7.

Offenses need not be simultaneous to satisfy the "same time" element. Porter, 133 Wn.2d at 182-83. Ten minutes separated the two drug deliveries in Porter. Id. at 180. The Supreme Court held "immediately sequential drug sales" satisfied the "same time" element of the same criminal conduct statute. Id. at 183.

The breaks in time in Steward's case are far shorter than the 10 minutes in Porter. The same time element is satisfied here. See also State v. Palmer, 95 Wn. App. 187, 191, 975 P.2d 1038 (1999) (few minutes between the rapes sufficiently close to satisfy time prong); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (three separate penetrations during two minute time frame were "nearly simultaneous" and deemed to be at the "same time"); State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d

1003 (1995) (two check forgeries occurring on same day satisfied same criminal conduct test), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996).

The court made a factual error in its ruling on the same criminal conduct issue. The court maintained Steward, after leaving the room the first time, returned "several minutes later". 11RP 135. This is incorrect. The video shows about 35 seconds passed between the time Steward first left the room and his return. Ex. 7 (23:09:10 to 23:09:45).

e. The Offenses Involved The Same Objective Intent.

Multiple factors inform the same intent determination, including (1) how intimately related the crimes are; (2) whether there was any substantial change in the nature of the criminal objective; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318-19, 788 P.2d 531 (1990); State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); Calvert, 79 Wn. App. at 577-78. The test is an objective one. Burns, 114 Wn.2d at 318.

One clear category of cases where two crimes encompass the same criminal conduct is the repeated commission of the same crime against the same victim over a short period of time. Porter, 133 Wn.2d at 181. That

is precisely what we have here. Steward repeated the same crime of rape against the same victim over a short period of time.

When viewed objectively, the intent of rape is sexual intercourse. State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993) (rape and attempted rape qualified as same criminal conduct). Accordingly, the three crimes of rape in Steward's case manifested a single criminal purpose. Walden, 69 Wn. App. 188.

In determining intent, courts look objectively at whether "there was a *substantial change* in the *nature* of the criminal objective." Saunders, 120 Wn. App. at 824 (emphasis added). In Steward's case, the nature of the criminal objective remained the same for all three rapes: sexual intercourse. There was no substantial change in the nature of the criminal objective. There is a single intent.

The three offenses were part of an overarching plan to engage in sexual intercourse with Price. See State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990) (a single intent includes "numerous offenses committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective."). The planned aspect of the offenses is shown by the fact that Steward brought a book with him when he went into the room so as to have an excuse to be there if discovered by staff. Ex. 7; 3RP 38, 94. Moreover, he was aware that staff made periodic rounds and attempted to

time his contacts to avoid discovery by staff. He left and returned to the room in order to avoid detection while continuing the sexual contact. 4RP 41, 43, 47, 54-55, 62-63; 7RP 98, 104, 165-67; 9RP 102.

Moreover, when objectively viewed, the first rape consisting mostly of oral intercourse furthered the second and third rapes consisting primarily of digital penetration. The oral intercourse, which involved Steward licking Price's vagina, served as preparation for the ensuing digital penetrations. Ex. 7. The oral intercourse served as an attempt to lubricate the vagina and enable or facilitate the subsequent digital penetrations. In addition, the oral intercourse served as preparation for the digital penetrations by confirming that Price was sleeping or physically helpless and unable to respond. "[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

In arguing the offenses did not constitute the same criminal conduct, the State relied on State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997). In that case, Division Two addressed whether the trial court abused its discretion in ruling two completed rapes, consisting of intercourse by different methods, were not the same criminal conduct.

Grantham, 84 Wn. App. at 858-60. Grantham completed one rape before he commenced the second rape. Id. at 859. After the first completed rape consisting of anal intercourse and before the second rape consisting of oral intercourse, Grantham "had the presence of mind to threaten L.S. not to tell; that in between the two crimes L.S. begged him to stop and to take her home; and that Grantham had to use new physical force to obtain sufficient compliance to accomplish the second rape." Id.

Division Two recognized the two rapes did not occur simultaneously but took place "relatively close in time." Id. at 858. The court framed the question as "whether the *combined evidence* of a gap in time between the two rapes and the activities and communications that took place during that gap in time, and the different methods of committing the two rapes, is sufficient to support a finding that the crimes did not occur at the same time and that Grantham formed a new criminal intent when he committed the second rape." Id. (emphasis added).

The court opined "Based on this evidence, the trial court could find that Grantham, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous. The evidence also supports

the trial court's conclusion that each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other." Id. at 859.

Grantham is distinguishable. The Supreme Court in Porter cited Grantham for the proposition that "multiple rapes against the same victim do not constitute same criminal conduct where other activities occurred between each rape and each rape was committed by a different means." Porter, 133 Wn.2d at 182.

Unlike Grantham, no activity or communication took place between the three rapes here. Price was sleeping or unconscious or otherwise made no visible response to Steward's sexual contact. Unlike Grantham, there is overlap between the means used to commit each rape here. The first rape consisted mostly of oral intercourse, but included digital penetration. The second rape consisted primarily of digital penetration but include repeated instances of oral intercourse. The third rape consisted of digital penetration. Ex. 7; see 11RP 40 (prosecutor argued to jury: "Sexual intercourse with Olivia, count 1, he placed his tongue and his fingers in the -- in her vagina. Count 2, tongue and fingers in her vagina. And count 3, his fingers in her vagina.").

Moreover, as argued above, the first rape furthered the subsequent two rapes and the multiple offenses were part of a plan. These features are missing from Grantham as well.

Steward's case is closer to Palmer, where this Court held the trial court erred in not treating two rape offenses that occurred "a few minutes" apart as the same criminal conduct. Palmer, 95 Wn. App. at 189, 191-92. Palmer forced K.P.'s legs apart and started to perform oral sex on her. Id. at 190. Palmer then took off his clothes and told K.P. to straddle him. Id. K.P. told Palmer that she did not want to do that. Id. Palmer began to count down and, when K.P. did not move, grabbed her by the hair, choked her and then he continued to ask K.P. if she "was going to do what he wanted [her] to do." Id. K.P. acquiesced out of fear and straddled Palmer for ten minutes while Palmer vaginally raped her. Id. Twice more, Palmer moved K.P. into a different position and reinserted his penis twice. Id. Palmer was convicted of one count for the oral/genital rape, and a second count for the penile/vaginal rapes. Id.

In Palmer, the State relied on Grantham to support its argument that there were two different intents because the two rapes were relatively close in time but not simultaneous. Id. at 191. The Court rejected the State's argument, pointing out the evidence in Grantham "supported a conclusion that the criminal episode had ended with the first rape, only to

reoccur when a new argument erupted." Id. In contrast to Grantham, "Palmer's violence towards K.P. was continuous and patterned. Palmer did not do anything between the oral/genital rape and the first genital/genital rape that was not related to raping K.P." Id. at 191-92.

Steward likewise did not do anything between the rapes that were not related to raping Price. No argument or any other communication occurred between rapes. Steward left the room and re-entered to continue the process of raping Price with patterned behavior. Price did not move or offer any resistance until the end of the third encounter. The only reason he left the room at all between the rapes was because he was aware that hospital staff periodically checked on the rooms at night. From an objective standpoint, the three rapes formed one criminal episode.

Whether Steward had an opportunity to pause and reflect between the rapes does not control the question of whether the nature of the objective intent of rape remained the same. In Palmer, the fact that the defendant "renewed his threats between the two rapes, and had an opportunity to reflect" did not change the conclusion that Palmer had the same intent for both rapes. Id. at 192. The Court reasoned, "Palmer's threats and use of violence were no different between the oral/genital rape and the various genital/genital rapes throughout the evening. The facts do not support a conclusion that his objective criminal intent changed." Id.

Palmer demonstrates a break in time between two rapes and the opportunity to reflect before committing a subsequent rape does not take multiple rapes outside the same criminal conduct ambit.

The Supreme Court's decision in Porter is also instructive. In that case, two counts of delivery of a controlled substance "stemmed from one incident where an undercover officer purchased methamphetamine from Porter (count 1) and immediately thereafter purchased marijuana from Porter (count 2)." Porter, 133 Wn.2d at 179. Two controlled buys were involved. Id. A detective made contact with Porter inside her residence. Id. The detective gave Porter \$125.00 and received methamphetamine in return. Id. After the methamphetamine transaction was completed, Detective David asked Porter if she had any marijuana for sale. Id. Porter agreed to sell Detective David marijuana. Id. He gave her \$40.00 and received marijuana from Porter in return. Id. The detective was at the residence for approximately 25 minutes. Id. at 180. The methamphetamine was delivered at 11:49 and the marijuana was delivered at 11:59 — 10 minutes apart. Id.

Porter argued at sentencing that the incidents satisfied the "same time" element because the deliveries occurred back to back within a 10-minute period. Id. at 182. The sentencing court treated the sales as

separate criminal conduct on the basis that the deliveries occurred "distinctly in time." Id.

The Court rejected the sentencing court's conclusion: "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." Id. at 183. The officer asked Porter for marijuana immediately after Porter gave the officer the methamphetamine. Id. The Court held "immediately sequential drug sales" satisfy the "same time" element of the same criminal conduct statute. Id.

Significantly, the Court described the two deliveries as "immediately sequential," "continuous," and "uninterrupted" even though the deliveries occurred ten minutes apart. Again, the first and second rape in Steward's case occurred 45 seconds apart. The second and third rape occurred five and a half minutes apart. If the two deliveries at issue in Porter were "immediately sequential" even though they occurred 10 minutes apart, then the three rapes in Steward's case involving far shorter breaks in time must likewise be deemed immediately sequential.

In Porter, the Court's discussion of the "same time" element set up its discussion of the same intent element. The Court determined Porter had the same objective intent for both deliveries, holding her criminal

intent could not be segregated into distinct present and future intents to commit criminal activity. Id. at 184. Instead, her intent, objectively viewed, was to sell both drugs in the present as part of an ongoing transaction. Id. at 184-85.

The State argued Porter's criminal intent necessarily changed from one delivery to the next because the sales were sequential. Id. at 185. The Court criticized the State for intermingling the "same time" and "objective intent" elements in its analysis. Id. Porter's objective intent remained the same from one delivery to the next because they were "part of a continuing, uninterrupted sequence of conduct." Id. at 186.

Porter clearly had an opportunity to pause and reflect on whether she wanted to commit another crime. 10 minutes passed between the completed first delivery of one drug and the second delivery of a different drug. Id. at 180. 10 minutes passed from when the detective asked if Porter had marijuana for sale and the delivery of that marijuana. Id. at 183 (officer asked Porter for marijuana immediately after Porter gave officer methamphetamine). Yet the Supreme Court held the two deliveries shared the same objective criminal intent. Id. at 184-86.

The result should be the same in Steward's case. The fact that the rapes were not simultaneous and that Steward left and reentered the room to continue the rapes does not substantially change the nature of the

objective criminal intent of engaging in sexual intercourse with Price. The rapes may be described as "sequential," but Porter demonstrates two or more offenses may be sequential yet still satisfy the same time and intent requirements. Id. at 183, 186.

Proper calculation of the offender score holds significant consequences for an offender. See In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 6, 100 P.3d 805 (2004) ("The difference of a single point may add or subtract three years to an offender's sentence. Therefore, the accurate interpretation and application of the SRA is of great importance to both the State and the offender."). Steward's case is a good illustration. With an offender score of 9, the standard range for each count is 210-280 months. With an offender score of 3, the standard range is 102-136 months. See RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (second degree rape has seriousness level of XI); RCW 9.94A.525(17) (count three points for each adult prior sex offense conviction); RCW 9.94A.589(1)(a) (current offenses treated as prior convictions for the purpose of the offender score if current offenses not same criminal conduct).

The three rape convictions should be counted as the same criminal conduct in determining Steward's offender score. Remand for resentencing with an offender score of 3 for each count is required.

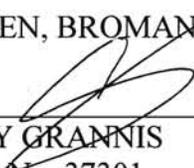
D. CONCLUSION

For the reasons stated, Steward requests remand for resentencing with an offender score of 3.

DATED this 31<sup>st</sup> day of August 2012

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
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Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68263-6-I
	)	
DAMOAN STEWARD,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF AUGUST 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAMOAN STEWARD  
DOC NO. 842658  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF AUGUST 2012.

x *Patrick Mayovsky*