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COA NO. 69825-7-I

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

REC'D
JAN 21 2014
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

STEVEN SYMITH,

Appellant.

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

The Honorable Hollis Hill, Judge

REPLY BRIEF OF APPELLANT

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SUPERIOR COURT
KING COUNTY
DIVISION ONE

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A. ARGUMENT IN REPLY

1. THE COURT ERRED IN FAILING TO COUNT CURRENT AND PRIOR OFFENSES AS THE SAME CRIMINAL CONDUCT IN COMPUTING THE OFFENDER SCORE.

a. The Trial Court Misapplied The Law On Same Criminal Conduct For Both The Current And Prior Offenses.

The State does not address Symith's argument that the trial court misapplied the law in relying on a double jeopardy analysis to determine the offenses did not constitute the same criminal conduct. Brief of Appellant at 9, 12-13. Symith presents no further argument on this issue because the State has effectively conceded it. See State v. Ward, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005) (on appeal, State conceded legal argument by failing to respond to it).

b. The Current Offenses Of Felony DUI And Reckless Driving Qualify As Same Criminal Conduct.

The State claims the DUI and reckless driving offenses do not qualify as same criminal conduct because they do not share a statutory mens rea. Brief of Respondent (BOR) at 13-14 (citing State v. Hernandez, 95 Wn. App. 480, 485, 976 P.2d 165 (1999); State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, review denied, 118 Wn.2d 1006, 822 P.2d 288 (1991)). That approach is too simplistic.

Division One case law interpreting the "same criminal intent" language in RCW 9.94A.589(1)(a) distinguishes it from the mens rea element of the particular crime involved. "Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (quoting State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990), review denied, 114 Wn.2d 1030, 793 P.2d 976 (1990)).

The Washington Supreme Court has criticized the contrary approach taken in the Division Two cases cited by the State as conflicting with its precedent. State v. S.S.Y., 170 Wn.2d 322, 332-33, 333 n.5, 241 P.3d 781 (2010) (as examples of errant Division Two cases, citing Hernandez, 95 Wn. App. at 484; Rodriguez, 61 Wn. App. at 816; State v. Price, 103 Wn. App. 845, 857, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014, 22 P.3d 803 (2001)).

The State also claims DUI is a strict liability crime and therefore has no objective intent at all. BOR at 15. No court has ever exempted a DUI offense from a same criminal conduct analysis on the ground that the offense contains no objective intent.

On the contrary, strict liability offenses are deemed to carry an objective intent and are amenable to same criminal conduct analysis. For

example, second degree rape has no statutory intent requirement. It is a strict liability crime. State v. Walden, 67 Wn. App. 891, 894-95, 841 P.2d 81 (1992) (second degree rape criminalizes nonconsensual sexual intercourse regardless of criminal intent or knowledge, so it is a strict liability crime). But it is deemed to have an objective intent for same criminal conduct purposes. State v. Nysta, 168 Wn. App. 30, 52, 275 P.3d 1162 (2012) ("The objective of second degree rape is sexual intercourse."); State v. Stearns, 61 Wn. App. 224, 234, 810 P.2d 41 (1991) (same); see also State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993) (when viewed objectively, the intent of rape is sexual intercourse, and second degree rape and attempted rape in the second degree qualified as same criminal conduct); State v. Collins, 110 Wn.2d 253, 262-63, 751 P.2d 837 (1988) (second degree rape and burglary qualified as same criminal conduct where burglary was committed in furtherance of the rape attack).

The objective of one who commits a DUI offense is to drive while drunk. The reason why DUI is criminalized is because it endangers public safety. It is immediately obvious that driving while intoxicated and reckless driving are intimately related. The DUI furthered the reckless driving by impairing driving ability. And the crimes involved a single, uninterrupted criminal episode. These factors show same objective intent.

See State v. Mehrabian, 175 Wn. App. 678, 711, 308 P.3d 660 (2013) (distinguishing between continuous episode that supports same intent and sequential conduct that does not); State v. Burns, 114 Wn.2d 314, 318-19, 788 P.2d 531 (1990) (intimate relationship and furtherance supports same intent); State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995) (same), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996).

The State contends the DUI did not further the reckless driving because both crimes were committed simultaneously. Aside from conflicting with common sense, that approach conflicts with precedent. A crime committed simultaneously to another is capable of furthering the other crime. See State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998) (defendant entitled to have assault and kidnapping committed simultaneously treated as same criminal conduct where there was no evidence of assaultive behavior during the kidnapping with any purpose beyond furthering the abduction).

B. CONCLUSION

For the reasons set forth above and in the opening brief, Symith respectfully requests that this Court (1) remand for resentencing with a corrected offender score for count I; (2) remand for resentencing on count I to comply with RCW 9.94A.701(9) (3) vacate the suspended sentence and associated probation terms on counts II and III.

DATED this 21~~st~~ day of January 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 69825-7-1
)	
STEVEN SYMITH,)	
)	
Appellant.)	

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 21ST DAY OF JANUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEVEN SYMITH
DOC NO. 299081
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF JANUARY, 2014.

x Patrick Mayovsky

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