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SUPREME COURT
STATE OF WASHINGTON
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No. 1005709

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DAHNDRE KAVAUGN WESTWOOD,

Respondent.

ON STATE'S PETITION FOR REVIEW FROM COURT OF APPEALS, DIVISION III, 37750-4-III

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

The Honorable Judge John Knodell

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

At sentencing, Dahndre Westwood argued his convictions for attempted first degree rape, first degree burglary, and first degree assault should be considered same criminal conduct. The trial court disagreed, applying the intent analysis from *State v. Chenoweth*. On appeal, the Court of Appeals concluded this was the wrong legal analysis, and remanded the case for resentencing, to apply the intent analysis from *State v. Dunaway*. On remand, the trial court again applied the intent analysis from *State v. Chenoweth*. Mr. Westwood appealed, and the Court of Appeals remanded the case for resentencing for a second time, again instructing the trial court to apply the intent analysis from *State v. Dunaway*. The Court of Appeals properly applied this Court's precedent governing the same criminal conduct analysis. *State v. Chenoweth* does not apply, and it did not overrule *State v. Dunaway*. This Court should deny the State's petition for review.

B. RESTATEMENT OF ISSUE PRESENTED

Did the Court of Appeals properly apply this Court's precedent governing the same criminal conduct analysis, where *State v. Chenoweth* is limited to the crimes of rape of a child and incest, and this Court has not overruled its same criminal conduct test set forth in *State v. Dunaway*?

C. RESTATEMENT OF THE CASE

Following a jury trial, Dahndre Westwood was convicted of three crimes, committed in 2012 when he was a fourteen year old child: attempted first degree rape, first degree burglary, and first degree assault. (1 CP 423, 426, 428-429, 594-616; 1 RP 661-663, 668-670, 672-676; 2 RP 36-37).[1]

[1] The record from Mr. Westwood's first appeal in this case, COA No. 35792-9-III, was transferred to this appeal. Both the record from his first appeal and this appeal are cited herein. For ease of reference, the Clerk's Papers from his first appeal are referred to herein as "1 CP." The Clerk's Papers for this appeal are referred to herein as "2 CP." The Report of Proceedings are referred to herein as follows: (1) "1 RP" = five volumes, reported by Tom R. Bartunek, containing the jury trial, filed in Mr. Westwood's first appeal on May 7, 2018; (2) "2 RP" = one volume, transcribed by Amy Brittingham, contain various hearings, including sentencing, filed in Mr. Westwood's first appeal on April 9, 2018.

At sentencing Mr. Westwood argued his three convictions should be considered same criminal conduct. (1 CP 445, 455-457; 2 RP 41-44). He argued the first degree burglary and the first degree assault were committed in order to further the attempted first degree rape. (2 RP 41-44). Mr. Westwood argued he cited case law that was not specifically overruled by *State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016). (1 CP 445, 455-457; 2 RP 41-42).

The State did not contest "the notion that the burglary and the assault were committed in order to further the attempted rape." (2 CP 15; 2 RP 44). However, the State argued that each of the three convictions should be counted separately as current convictions in Mr. Westwood's offender score. (1 CP 479-483; 2 RP 37-41, 46-47). The State argued the attempted first degree rape and the first degree assault should not be considered same criminal conduct, because "[u]nder *State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016) the court looks to the mens rea in the statutes in determining different

intents[,]" and the crimes have different statutory mens rea. (1 CP 482-483, 487-488; 2 RP 37-41, 46-47).

The trial court ruled that Mr. Westwood's three convictions were not same criminal conduct, and stated "I'm going to adopt the State's interpretation of Chenoweth." (2 RP 47).

Mr. Westwood appealed. (1 CP 623-624). In an unpublished opinion, the Court of Appeals remanded the case for resentencing for the trial court to determine whether the three convictions involve the same criminal conduct. (2 CP 2-31); *see also State v. Westwood*, No. 35792-9-III, 2020 WL 1650714, at *1-7 (Wash. Ct. App. Mar. 19, 2020). The Court of Appeals held "[a]s *Chenoweth* does not purport to overrule *Dunaway* or its progeny, its holding and rationale are limited to cases of rape and incest arising from a single act." (2 CP 14); *see also State v. Chenoweth*, 185 Wn.2d 218, 224, 370 P.3d 6 (2016); *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987).

The Court of Appeals mandated the case back to the trial court for further proceedings in accordance with its unpublished opinion. (2 CP 1).

On remand, the trial court found Mr. Westwood failed to prove his three convictions constitute the same criminal conduct, and declined to resentence him. (2 CP 63-71, 74-84).

In its written ruling, the trial court acknowledged the Court of Appeals instructed it to apply the same criminal conduct analysis set forth in *Dunaway*. (2 CP 76). However, the trial court then found the intent element of same criminal conduct refers to "the intent element in the statutory definition of any given crime." (2 CP 78). Using this analysis, the trial court found the crimes at issue were not the same criminal conduct. (2 CP 83).

Mr. Westwood appealed. (2 CP 85-86). In a published opinion, the Court of Appeals reversed the trial court's order on resentencing and remanded the case for resentencing. The Court of Appeals held:

> [T]he sentencing court committed legal error (and thereby abused its discretion) when, on remand, it analyzed Mr. Westwood's same criminal conduct argument under *Chenoweth* instead of *Dunaway*. Given this error, we again remand for resentencing pursuant to *Dunaway*.

State v. Westwood, 500 P.3d 182, 187 (Wash. Ct. App. Dec. 16, 2021).

The State now seeks review of this opinion.

D. ARGUMENT

The Court of Appeals properly applied this Court's precedent governing the same criminal conduct analysis, and review is not warranted under RAP 13.4(b).

This Court should deny review under RAP 13.4(b). The Court of Appeals properly applied this Court's precedent governing the same criminal conduct analysis.

RCW 9.94A.589(1)(a) sets forth when two or more current offenses should be counted as one crime for sentencing purposes:

> …whenever 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," as used in this subsection, means two or more crimes that require the [1] same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim . . .

RCW 9.94A.589(1)(a).

In order for the trial court to find same criminal conduct, all three requirements set forth in RCW 9.94A.589(1)(a) must be met. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citing *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994)).

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013).

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Here, the Court of Appeals properly applied this Court's precedent governing the same criminal conduct analysis, and review is not warranted under RAP 13.4(b).

First, the Court of Appeals' decision is not in conflict with a decision of this Court. *See* RAP 13.4(b)(1). The State acknowledges that this Court has not explicitly overruled *Dunaway*. *See* State's Petition for Review, p. 5.

In *Chenoweth*, the defendant was convicted of six counts of third degree rape of a child and six counts of incest, based on six incidents, each involving a single act. *State v. Chenoweth*, 185 Wn.2d 218, 219, 370 P.3d 6 (2016). On appeal to this Court, the defendant "argue[d] that child rape and incest, based on a single act, as a matter of law constitute the same criminal conduct for purposes of calculating his offender score." *Id*. at 221. The only element of the same criminal conduct analysis at issue was whether the two offenses shared the same criminal intent. *Id*.

This Court held "the same act constituting rape of a child and incest is not the same criminal conduct for purposes of sentencing." *Id*. at 224. In reaching this holding, this Court looked to the statutory criminal intents for third degree child rape and incest, stating that "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child." *Id*. at 223. This Court reasoned that the defendant's "single act is compromised of separate and distinct statutory

criminal intents and therefore under RCW 9.94A.589(1)(a) do not meet the definition of 'same criminal conduct.'" *Id*. In reaching its holding, this Court relied upon two other cases involving rape of a child and incest. *Id*. at 221-24 (citing *State v. Bobenhouse*, 166 Wn.2d 881, 896, 214 P.3d 907 (2009); *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995)).

Prior to *Chenoweth*, the test applied to determine whether crimes had the same criminal intent for purposes of the same criminal conduct analysis was whether, when viewed objectively, the criminal intent did not change from one offense to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). "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) (citing *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)). "In determining whether multiple crimes constitute the same criminal conduct, courts consider 'how intimately related the

crimes are,' 'whether, between the crimes charged, there was any substantial change in the nature of the criminal objective,' and 'whether one crime furthered the other.'" *Id*. at 546–47 (quoting *State v. Burns,* 114 Wn.2d 314, 318, 788 P.2d 531 (1990)). The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *Vike,* 125 Wn.2d at 411 (citing *Dunaway,* 109 Wn.2d at 215). When one crime furthers another, same criminal conduct applies. *State v. Garza-Villarreal,* 123 Wn.2d 42, 47, 864 P.2d 1378 (1993); *see also Dunaway,* 109 Wn.2d at 217. And, "if 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).

The standard set forth in *Chenoweth*, looking to the statutory criminal intents for determining whether the two offenses shared the same criminal intent, does not apply in this

case. *See Chenoweth*, 185 Wn.2d at 220-25. The same criminal intent test set forth in *Dunaway* has not been expressly overruled by this Court, and *Chenoweth* applies only to cases involving rape of a child and incest offenses. *See Chenoweth*, 185 Wn.2d at 221-24.

"This court does not take lightly invitations to overturn precedent[;] [i]nstead, this court rejects its prior holdings only upon a clear showing that an established rule is incorrect and harmful." *In re Det. of McHatton*, 197 Wn.2d 565, 572, 485 P.3d 322 (2021). *Chenoweth* contains no discussion of this required showing, and does not mention *Dunaway*. *See Chenoweth*, 185 Wn.2d at 219-225.

Furthermore, as the Court of Appeals found, *Chenoweth* does not implicitly overrule *Dunaway*:

> Given *Chenoweth* did not address or analyze the standard recognized in *Dunaway*, we cannot conclude *Chenoweth* implicitly overruled *Dunaway*. A later holding of the Supreme Court will only overrule "a prior holding sub silentio when it directly contradicts the earlier rule of law." *Lunsford v. Saberhagen Holdings,*

> *Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009). Here, there is no direct contradiction. *Chenoweth* specifically addressed the limited issue of how a trial court should treat the simultaneous commission of child rape and incest. Both parties asserted there was no discretion as to whether the two offenses could be classified as one offense or two. According to the defense, the two offenses must be treated the same; the State argued they had to be treated differently. The Supreme Court sided with the State.

Westwood, 500 P.3d at 187.

Next, Mr. Westwood acknowledges the Court of Appeals' decision here is in conflict with a published decision of the Court of Appeals. *See* RAP 13.4(b)(2).

Published opinions of Divisions One and Three of the Court of Appeals agree that *Chenoweth* is limited to its specific statutory context, cases of rape of a child and incest. *See Westwood*, 500 P.3d at 185-87 (Division Three) (concluding "[w]e agree with Division One of this court that *Chenoweth* is a narrow decision that must be limited to its specific statutory context."); *State v. Hatt*, 11 Wn. App. 2d 113, 138-144, 452 P.3d 577 (2019), *review denied*, 195 Wn.2d 1011, 460 P.3d 176

(2020) (Division One) (concluding "because the Supreme Court did not overrule, or even discuss, the line of case law applying the Dunaway test and has not applied the Chenoweth analysis outside of the context of those particular crimes, we believe Dunaway remains the applicable framework.").

A published opinion of Division Two of Court of Appeals has applied *Chenoweth* to offenses other than its specific statutory context. *See State v. Johnson*, 12 Wn. App. 2d 201, 211-13, 460 P.3d 1091 (2020), *review granted on a different issue*, 196 Wn.2d 1001, 471 P.3d 227 (2020), *aff'd* 197 Wn.2d 740, 487 P.3d 893 (2021) (applying *Chenoweth* to convictions for second degree rape of a child, commercial sexual abuse of a minor, and communication for a minor for immoral purposes).

Nonetheless, review is not warranted here, where the Court of Appeals followed this Court's precedent. *Westwood*, 500 P.3d at 187.

Finally, review is not warranted under RAP 13.4(b)(3) or (4). This case does not involve a significant question of law under the Washington Constitution or the United States Constitution. *See* RAP 13.4(b)(3). Instead, it involves an issue of statutory interpretation. *See* RCW 9.94A.589(1)(a). This case does not involve an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b)(4). As set forth above, the law from this Court on the applicable same criminal conduct analysis is clear; the same criminal intent test set forth in *Dunaway* has not been explicitly or implicitly overruled by this Court, and *Chenoweth* applies only to cases involving rape of a child and incest offenses. *See Chenoweth*, 185 Wn.2d at 221-24; *Dunaway*, 109 Wn.2d at 215. In addition, same criminal conduct is a highly fact-specific inquiry that is unique to each case. *See Graciano*, 176 Wn.2d at 536 (recognizing that "[d]eciding whether crimes involve the same time, place, and victim often involves determinations of fact.").

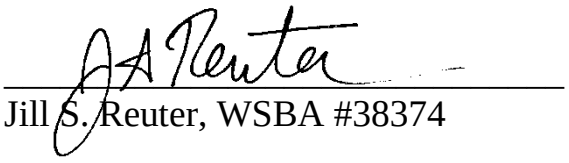
The Court of Appeals properly applied this Court's precedent governing the same criminal conduct analysis, and review is not warranted under RAP 13.4(b).

E. CONCLUSION

For the reasons stated above, this Court should deny the State's petition for review. Alternatively, this Court should affirm the Court of Appeals.

I certify this document contains 2,614 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 7th day of February, 2022.



Jill S. Reuter, WSBA #38374

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Petitioner vs. DAHNDRE K. WESTWOOD Appellant/Respondent	) Supreme Court No.) 1005709)) COA No. 37750-4-III)) PROOF OF SERVICE)

I, Jill S. Reuter, assigned counsel for the Respondent herein, do hereby certify under penalty of perjury that on February 7, 2022, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Answer to Petition for Review to:

Dahndre K. Westwood DOC #403168
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Connell, WA 99326

Having obtained prior permission, I also served a copy on the Petitioner kburns@grantcountywa.gov at using the Washington State Appellate Courts' Portal.

Dated this 7th day of February, 2022.

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