

FILED
SUPREME COURT
STATE OF WASHINGTON
6/20/2018
BY SUSAN L. CARLSON
CLERK

95983-8

JUN 15 2018

NO. 337219

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

ZACHARY JOSEPH BIGGS,

Defendant/Petitioner

Asotin County Superior Court Cause
NO. 14-1-00008-3

PETITION FOR REVIEW

Submitted by

Reginald Bell, Sr.,
Inmate Lgal Advisor

A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4(b) and RAP 17.4(a), Mr. Bigg's respectfully request review be accepted of the Court of Appeals decision in State v. Bigg's, 14-1-00008-3. The decision affirmed the trial court judgment and sentence.

B. DECISION

On April 10, 2018, in an unpublished opinion, the Court of Appeals affirmed the conviction and consecutive sentences of two counts of first degree rape. A copy of the opinion is attached in the Appendix.

Pursuant to RAP 12.4(a) Mr. Bigg's asked the court to reconsider its decision affirming the trial courts consecutive sentence pursuant to RCW 9.94A.589(1)(b). On May 22, 2018, the Court of Appeals denied the motion to reconsider. A copy of the decision denying Mr. Bigg's motion to reconsider is attached in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals Err when it found because there were two separate penetrations, e.g., vaginally and orally, Mr. Bigg's formed two independent criminal intents which justified a finding that the trial court did not abuse its discretion in finding that two separate crimes were of rape in the first degree were committed?
2. Did the appellate court err in finding Mr. Bigg's counsel was not ineffective when failed to pursue a diminished capacity defense?
3. Did counsel violate Mr. Bigg's jury trial right without his consent?

D. STATEMENT OF THE CASE

On December 10, 2013, Stacey Bigg's came over to see Mr. Bigg's mother's house where he was staying to bring Mr. Bigg's a box of food. VRP190. As she approached the back door Mr. Bigg's opened the door and when she entered the house, he asked her what she was doing and whether the children were with her. VRP191. When Stacey replied the children were not with her, he grabbed her around the neck and threw her to the ground. VRP191 He then forced her into his room and shut and locked the door behind them. VRP191 Mr. Bigg's threw her on the bed and held her head down on the bed with his forearm across her neck. VRP192-93.

At some point Mr. Bigg's claimed that people in masks were impersonating other people and he began pulling and pushing on the skin of Stacey's face. VRP 196-97. He told her that he has seen her on the internet performing fellatio on other men. VRP 197. Mr. Bigg's then forced Stacey to perform fellatio to him, grabbing her hair and forcing her mouth onto his penis. VRP 202. He then pushed her onto the floor and told her she was going to make love to him like his wife or h would stab her. VRP 203. Mr. Bigg's began to vaginally raping her on the floor. VRP 203 The entirety of the attack occurred over a three hour period. VRP 206. Appellant was ultimately charged with two count of rape in the first degree. CP. 132-34.

The court ordered a competency examination for Mr. Bigg's at Eastern State Hospital. CP 45-49. He was found competent to stand trial. CP 56-66,67-68.

On April 7, 2015, Mr. Bigg's plead guilty to a single count of second degree rape, but he was allowed to withdraw his guilty plea on June 15, 2015. VRP 95,06-98.

On July 6, 2015, while Mr. Bigg's was not in the court room, the court heard discussion from the prosecution and Mr. Bigg's attorney regarding whether a jury or bench trial would be held. VRP 99. Mr. Bigg's counsel represented the following the court.

" it was my position and I've talked to Mr. Liedkie about this, that the effect of Mr. Bigg's withdrawal of guilty plea is to place him, minus speedy trial, back in the position he was in before the motion, and since he had already waived jury trial in this case at that time, he would still be on for bench trial "

VRP 100

The Court proceeded with a bench trial without questioning Mr. Bigg's to determine whether he wished to waive his right to jury trial or proceed with a trial by jury. The Court subsequently found Mr. Bigg's guilty of both counts and entered findings of fact and conclusions of law. CP 182 CP 186-87. At sentencing defense argued that the first degree rape charges were same criminal conduct but the court disagreed and sentence Mr. Bigg's to consecutive sentences of the rape convictions. CP 223.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

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 the 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 a issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

1. The two Rape Convictions Constitute the Same Criminal Conduct pursuant to RCW 9.94A.589(1)(a) the Court of Appeals Erred

The general rule in Washington is that sentences for multiple current offenses will run concurrently. RCW 9.94A.589(1)(a). But RCW 9.94A.589(1)(b), provides an exception. Sentences for serious violent offenses arising from separate and distinct criminal conduct must run consecutively. *State v. Weatherwax*, 188 Wash.2d 139, 392 P.3d 1054 (2017). For multiple crimes to be treated as the same criminal conduct at sentencing, the crimes must have (1) been committed at the same time and place, (2) involved the same victim, and (3) involved the same criminal intent. *State v. Tili*, 139 Wash.2d at 123, 985 P.2d at 374. See also RCW 9.94A.589(1)(a).

"The absence of any one of these three prongs prevents a finding of same criminal conduct ." State v. Porter, 133 Wash.2d 177, 181, 942 P.2d 974 (1997) see also State v. Vike, 125 Wash.2d 407, 410-11, 885 P.2d 824 (1994) (The relevant inquiry is the extent to which the criminal intent, objectively viewed, changed from one crime to the next . . . this, in turn, can be measured in part by whether one crime furthered the other").

Below, Mr. Bigg's relied upon State v. Tili for the proposition his criminal intent, when viewed objectively, did not change from one rape to the next. He contended, like Tili, he did not form new criminal intent between the first and subsequent penetrations such that the rapes were not sequential but rather simultaneous or continuous. Tili, 139 Wash.2d at 124, 985 P.2d at 375. The Court of Appeals believed that Mr. Bigg's rapes parallel the misconduct of Grantham, not the misbehavior of Tili. It concluded that Mr. Biggs paused the attacks and gained an opportunity to reflect and either cease criminal activity or proceed when moved from the bed to the floor.

The Court of Appeals erred because, Mr. Bigg's objective intent in committing the rapes did not change from one to another and each crime did in fact further another. Tili, 139 Wn.2d at 123-24: In re Holmes, 69 Wn.App. at 290. After oral sex, he proceeded

to have vaginal intercourse with Ms. Bigg's and only when she said her back hurt was when they went to the bed. But nothing else changed. This was a continuous offense that was ongoing in short succession. Walden, 69 Wn.App at 184-85. The sole objective intent was to have sex with Ms. Bigg's. How they had sex had nothing to do with that intent, which stayed the same. He neither had the time to pause and reflect for his intent to change nor the opportunity to cease the criminal activity. Grantham, 84 Wn.App. at 856-57. By misapplying the law, the court abused its discretion by not finding the two rapes were the same criminal conduct and the court of appeals compounded that error.

2. Mr. Bigg's counsel was ineffective when he failed to raise the defense of diminished capacity

In order to prove counsel performance was ineffective Mr. Bigg's must show the absence of a legitimate tactical or strategic reason for the challenged conduct, i.e., the failure to pursue a diminished capacity defense. State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2002). As reflected in the trial testimony and the court's finding of fact, the record contains more than sufficient evidence of Mr. Bigg's inability to distinguish between what he thought and what happened.

Diminished capacity is an argument that a specific element of the offenses, intent or mens rea,

has not been proved beyond a reasonable doubt. State v. Gough, 53 Wn.App. 619, 622, 768 P.2d 1028, review denied, 112 Wn.2d 1026 (1989). To show diminished capacity, a defendant must produced expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Although rape requires no specific intent, there still must be an culpable mental state to make Mr. Brigg's actions a crime. see State v. Walden, 69 Wn.App. 183, 847 P.2d 956 (1993).

The Court of Appeals believed because diminished capacity does not constitute a defense of first degree rape, counsel was not ineffective. The Court of Appeals erred because, as counsel argued, although there is not an intent element in first degree rape, there is a mental culpable mental state and based upon the evidence in the record trial counsel was obligated to retain an expert showing his client had a mental disorder, not amounting to insanity, that impaired his ability to form the culpable mental state to commit this crime. Atsbeha, 142 Wn.2d at 914. But he not. In these circumstances, counsel had no legitimate tactical or strategic reason for not presenting the defense. In deed, the court itself was troubled by it.

3. The trial court violated Mr. Bigg's right to jury trial by allowing his counsel to waive his right without questing Mr. Bigg's

The Fourteenth Amendment to the United States Constitution provides in pertinent part no state shall deprive any person of life, liberty, or property, without due process of law. The federal constitution under the Sixth Amendment also guarantees an accused person the right to a public trial by an impartial jury.

A state conviction based on trial by court resulting in a life sentence is reversable error under the due process clause of the fourteenth amendment where the record discloses defendant did not voluntarily and willingly enter a waiver to his right to trial by jury. To be an legitimant waiver, the record must show or there must be an allegation and evidence which shows Mr. Bigg's had a right to jury trial and he knowingly and intelligently waived that right. see cases cited in Statement of Additional Grounds for relief.

F. CONCLUSION

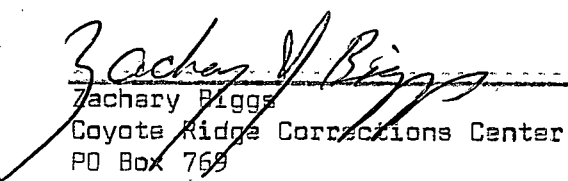
For the reasons above this court should accept review

Dated this 13 day of June, 2018.


ZACHARY BILES/PETITIONER

CERTIFICATE OF SERVICE

I, the undersigner, certify under penalty of perjury under the law of Washington State that the foregoing is true and correct and that on June 13, 2018, I deposited a copy of Motion to seek Discretionary Review in the mail at Coyote Ridge Correction Center thereby serving the Motion to the Court of Appeals of the State of Washington Division III at 500 N Cedar ST, Spokane, WA 99201-1905.


Zachary Pigg
Coyote Ridge Corrections Center,
PO Box 759
Connell, WA 99236

FILED
MAY 22, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON


STATE OF WASHINGTON,)	No. 33721-9-III
)	
Respondent,)	
)	
v.)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
ZACHARY JOSEPH BIGGS,)	
)	
Appellant.)	

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of April 10, 2018, is hereby denied.

PANEL: Judges Fearing, Siddoway, Pennell

FOR THE COURT:


ROBERT LAWRENCE-BERREY, Chief Judge

Renee S. Townsley
Clerk/Administrator

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*The Court of Appeals
of the
State of Washington
Division III*



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May 22, 2018

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Zachary Joseph Biggs
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PO Box 769
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CASE # 337219
State of Washington v. Zachary Joseph Biggs
ASOTIN COUNTY SUPERIOR COURT No. 141000083

Dear Counsel and Mr. Biggs:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:sh
Attachment

FILED
APRIL 10, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 33721-9-III
Respondent,)	
)	
v.)	
)	
ZACHARY JOESPH BIGGS,)	UNPUBLISHED OPINION
)	
Appellant.)	

FEARING, J. — Zachary Biggs appeals his convictions for two counts of rape and his sentence for the two convictions. We affirm the convictions and the sentence, except that we remand for a determination of legal financial obligations.

FACTS

This prosecution involves a rape of a wife by her husband. Zachary and Stacey Biggs were married with children. In November 2013, Stacey separated from Zachary from concern for her husband's aberrant behavior. Zachary had recently lied to the Biggs' neighbors and informed them that Zachary, Stacey, and their newborn baby had recently been raped.

In December 2013, Stacey Biggs filed for divorce and procured a protection order to preclude Zachary from contacting her. Zachary then moved to his mother's abode. Stacey occasionally saw Zachary thereafter. Zachary behaved normal and polite during these encounters. Stacey saw Zachary at a gas station, and, to her surprise, he acted gentlemanly. At the filling station, Zachary told Stacey that Zachary's mother had fallen ill and that he consequently had not been eating.

On the afternoon of December 10, 2013, Stacey Biggs delivered her child to Zachary's mother's house. Stacey noted that Zachary's mother presented in fine health, contrary to Zachary's claim, but the home lacked for food. Stacey left but confronted guilt for not bringing spare groceries to Zachary. Stacey returned to her mother-in-law's home bearing groceries. In the meantime, Zachary's mother had departed the house for work.

Stacey Biggs arrived at her mother-in-law's residence at 8:00 p.m. on December 10. As Stacey approached the back door, Zachary opened the door. Zachary inquired of Stacey: "What are you doing here?" Report of Proceedings (RP) at 191. Stacey replied: "Oh, I brought you some food." RP at 191. Zachary interjected: "Are the boys with you?" RP at 191. Stacey responded: "No." RP at 191. Zachary instantly placed a chokehold on Stacey's neck and threw her to the floor. He pounced on Stacey and yelled in her face: "Why are you here?" RP at 191. "Who sent you?" RP at

191. Zachary demanded Stacey enter his room. Once there, Zachary shut and locked the door.

Zachary Biggs flung Stacey on the bed and repeatedly instructed her to remain silent. Zachary, with his forearm, applied pressure to Stacey's neck while she lay trapped on the bed. Zachary held a machete and again interrogated Stacey as to who sent her to his mother's home. He repeatedly threatened her. Stacey pleaded with Zachary to let her go home. In trial testimony, Stacey recalled Zachary menacingly sneering:

You ain't going home. I'm going to kill you. I'll have the kids. I'll hide your body before this is all over and done with, and, before anybody knows you're missing, I'll be gone and so will you.

RP at 194.

While entrapping Stacey Biggs on the bed, Zachary claimed that individuals in masks had impersonated him. Zachary pushed and pulled on Stacey's lips, nose, and eyes, and dug into her face. Zachary declared that he needed to confirm the body he attacked was Stacey. Zachary also averred that he witnessed Stacey performing oral sex on other men. Zachary claimed to have been raped three times, and he informed Stacey that she would be dead by night. Zachary then held a large sharpening stone in his right hand and threatened to bash Stacey's face if she did not cooperate with him.

Zachary Biggs demanded sex from Stacey while holding a machete to her neck. Zachary grabbed Stacey's hair and forced her face to his groin. Stacey performed oral sex until nearly retching. During the sexual assault, Zachary named the women with

whom he engaged in sexual conduct during the couple's separation. Zachary released Stacey.

After releasing Stacey from his grip, Zachary Biggs carped to Stacey: "'[y]ou're not doing it like I showed you.'" RP at 202. Zachary regrabbed Stacey by her hair and placed her on the hard floor. Zachary uttered: "'[i]f you don't make love to me like my wife I'm going to stab you.'" RP at 203. Zachary then vaginally raped Stacey on the floor. Zachary reached to retrieve his machete. Stacey pleaded with him that she had been in a car accident and intercourse on a hard floor hurt her back. She cried in pain. After threatening her again, Zachary allowed Stacey to move to the bed.

Stacey Biggs submitted to Zachary again while the two lay on the bed a second time. Stacey did not think she would leave the bedroom alive.

After nearly three hours, Zachary Biggs ended the assault and allowed Stacey to dress. Zachary asked Stacey to drive him to a store so he could purchase a cigar. Stacey complied. At the store, Zachary threatened Stacey with death if she reported his conduct. He then acted as if checking his watch, although not wearing one, and remarked:

Yeah, about this time tomorrow I'll probably be in jail. And that's all right; I'll do my time. 'Cause when I get out I'll come find you, I'll sneak in the middle of the night and I'll slice your throat. Or I'll come out to your work, wait for you to get off and run your ass and your car into the river and I'll kill you.

RP at 209-10.

On December 11, 2013, Stacey Biggs told coworkers of the rape after her

colleagues inquired about her disquietude. Coworkers reported the rape to law enforcement.

PROCEDURE

The State of Washington charged Zachary Biggs with two counts of rape in the first degree and one count of felony violation of a domestic violence court order. The charges alleged that Biggs bore a deadly weapon when committing the crimes against a family or household member.

Dr. Daniel Lord-Flynn of Eastern State Hospital conducted a competency examination of Zachary Biggs and determined that Zachary possessed capacity to understand the court proceedings and participate in his own defense. Dr. Lord-Flynn diagnosed Zachary with a personality disorder. Clerk's Papers (CP) at 63.

Zachary Biggs defended the charges on the ground that Stacey engaged in consensual sex and lied about a rape. Biggs waived his right to a jury trial. The trial court convicted Biggs on all three counts.

During sentencing, the trial court ruled the two counts of rape to be distinct acts of criminal conduct and ordered the sentences for the two counts of rape to run consecutively pursuant to RCW 9.94A.589(1)(b). The trial court distinguished from the assault on the hard floor and the assault later on the bed. According to the trial court, Zachary Biggs, after releasing Stacey from the floor, possessed the opportunity to end his

attack, but renewed the assault on the bed. The trial court sentenced Biggs to 309 months' confinement.

At sentencing, the trial court imposed a \$500 crime victim assessment, \$1,830 in court costs, \$750 in fees for a court appointed attorney, a \$100 domestic violence assessment, a \$100 DNA collection fee, and a \$1,000 fine for a total of \$4,280. Before assessing the legal financial obligations, the trial court did not inquire about Zachary Biggs' income, assets, and debts.

LAW AND ANALYSIS

On appeal, Zachary Biggs raises three assignments of error. First, his trial counsel performed ineffectively by failing to raise a defense of diminished capacity. Second, the trial court committed error when refusing to consider the two counts of rape as the same criminal misconduct for purposes of sentencing. Third, the trial court failed to conduct an individualized inquiry as to his ability to pay discretionary legal financial obligations.

Ineffective Assistance of Counsel

Zachary Biggs first argues that counsel neglectfully failed to raise a diminished capacity defense. Diminished capacity allows a defendant to undermine a specific element of the offense, a culpable mental state, by showing that a given mental disorder had a specific effect by which his ability to entertain that mental state was diminished. *State v. Clark*, 187 Wn.2d 641, 650, 389 P.3d 462 (2017). The defendant must raise the defense of diminished capacity before trial. CrR 4.7(b)(1), (2)(xiv); *State v. Clark*, 187

Wn.2d at 651. The defense must obtain a corroborating expert opinion and disclose that evidence to the prosecution pretrial, thereby giving the State a reasonable opportunity to decide whether to obtain its own evaluation. CrR 4.7(b)(1), (b)(2)(viii), (g); *State v. Clark*, 187 Wn.2d at 651. Diminished capacity requires an expert diagnosis of a mental disorder and expert opinion testimony connecting the mental disorder to the defendant's inability to form a culpable mental state in a particular case. *State v. Clark*, 187 Wn.2d at 651.

If specific intent or knowledge is an element of the charged crime, the trier of fact may consider diminished capacity in determining whether the defendant had the capacity to form the requisite mental state. RCW 9A.44.040; *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004). First degree rape contains no mens rea element. *State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003). Therefore, Zachary Biggs did not have diminished capacity available as a defense.

Zachary Biggs argues that *State v. Walden*, 69 Wn. App. 183, 847 P.2d 956 (1993) stands for the proposition that he must still possess a culpable mental state to render his conduct a crime. Nevertheless, *Walden* involves attempted rape and rape in the second degree. John Walden did not raise diminished capacity. *Walden* lacks relevance.

Courts apply a two-pronged test to determine if counsel provided effective assistance: (1) whether counsel performed deficiently, and (2) whether the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 690-92,

No. 33721-9-III

State v. Biggs

104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a defendant fails to establish one prong of the test, this court need not address the remaining prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Since diminished capacity does not constitute a defense in a first degree rape charge, Zachary Biggs' trial counsel could not have performed ineffectively. We also note that the expert who examined Biggs never concluded Biggs suffered from diminished capacity.

Same Criminal Conduct

Zachary Biggs does not argue that he could not be convicted of two counts of rape. He contends, however, that his convictions for two counts of rape in the first degree constituted the same criminal conduct for purposes of sentencing.

RCW 9.94A.589(1)(a) and (b) declare:

(1)(a) Except as provided in (b), (c), or (d) of this subsection, 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. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. . . .

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under

RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under this subsection (1)(b) shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

Since the trial court convicted Zachary Biggs of two violent crimes, he remained subject to consecutive sentences, but, if the two crimes constituted the same criminal conduct, we would lower his offender score.

RCW 9.94A.589(1)(a) demands that the two crimes constitute the same criminal intent, entail the same time and place, and involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The defendant must establish that the crimes constitute the same criminal conduct because a finding by the sentencing court of same criminal conduct always favors the defendant. *State v. Johnson*, 180 Wn. App. 92, 104, 320 P.3d 197 (2014). A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. *State v. Walden*, 69 Wn. App. at 188 (1993).

The two rape charges against Zachary Biggs covered the same victim, time, and place. Zachary Biggs contends that the two crimes also comprised the same continuous criminal intent to rape. Zachary Biggs cites *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). According to *State v. Tili*: "[t]he relevant inquiry for the intent prong is to

what extent did the criminal intent, when viewed objectively, change from one crime to the next.” 139 Wn.2d at 123.

In *State v. Tili*, Fonotaga Tili broke into the victim’s home and violently beat her with a metal pan. Tili threw his victim to the floor and anally, vaginally, and digitally raped her. The attack lasted two minutes. The trial court convicted the defendant of three counts of rape and ruled that each count constituted separate criminal conduct for purposes of RCW 9.94A.589. The Supreme Court reversed and held that Tili’s intent remained the same throughout the attack. We distinguish Fonotaga Tili’s rapes from Zachary Biggs’ rapes. Tili attacked his victim for two minutes. Biggs variously controlled his wife with two different weapons for three hours.

The Supreme Court, in *State v. Tili*, distinguished its facts from *State v. Grantham*, 84 Wn. App. 854, 932 P.2d 657 (1997), wherein this court ruled a rape to not be the same criminal conduct. The *Tili* court reasoned:

[t]he evidence in *Grantham* supported a conclusion that the criminal episode had ended with the first rape: “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.” . . .

In contrast to the facts in *Grantham*, Tili’s three penetrations of L.M. were continuous, uninterrupted, and committed within a much closer time frame—approximately two minutes. This extremely short time frame, coupled with Tili’s unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration.

State v. Tili, 139 Wn.2d at 123-24 (citing *Grantham*, 84 Wn. App. at 856-57).

Zachary Biggs' rapes parallel the misconduct of James Grantham, not the misbehavior of Fonotaga Tili. Grantham and Biggs paused the attacks and gained an opportunity to reflect and either cease criminal activity or proceed. At the onset of his attack, Zachary physically forced Stacey to orally copulate until Stacey nearly vomited. Zachary released her and, after pausing, directed Stacey to the floor by threatening to kill her. He placed the machete on the bed. When Stacey lay on the floor, Zachary raped her vaginally. When Stacey complained of back pain, Zachary released her once again. He paused and could have ended the assault. He directed Stacey to the bed where he raped her again. The State could have charged and convicted Biggs of three separate criminal acts of rape. The trial court did not abuse its discretion in finding the two counts of rape to constitute dissimilar criminal conduct.

Legal Financial Obligations

The trial court imposed a \$500 crime victim assessment, \$1,830 in court costs, \$750 in fees for a court appointed attorney, a \$100 domestic violence assessment, a \$100 DNA collection fee, and a \$1,000 fine for a total of \$4,280. \$3,580 of this sum constitutes discretionary legal financial obligations. Zachary Biggs claims the trial court failed to consider his ability to pay before imposing legal financial obligations. He did not object to the imposition of any of the obligations at sentencing.

RAP 2.5 allows this court to refuse review of any claim of error not raised in the trial court. The Supreme Court, however, in *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015), bestowed discretion on this court to address the imposition of discretionary legal financial obligations despite no objection before the trial court.

The record must reflect that the trial court made the individualized inquiry into the defendant's current and future ability to pay. *State v. Blazina*, 182 Wn.2d at 838. This inquiry should address a defendant's incarceration, job status, debts, or other indicators of ability to pay. *State v. Malone*, 193 Wn. App. 762, 766, 376 P.3d 443 (2016). The State concedes that the sentencing court did not inquire into Zachary Biggs' financial situation prior to imposition of obligations. For this reason and because of the amount of the obligations imposed, we remand to the trial court to reconsider assessment of discretionary legal financial obligations.

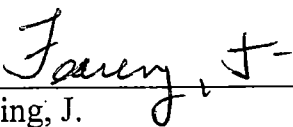
Statement of Additional Grounds

Zachary Biggs filed additional grounds for this court's review and contends that the trial court violated his right to a jury trial. He asserts that he never agreed to a bench trial and his counsel never discussed with him the signing of waiver of a jury trial. The record shows Biggs affirmatively waived his right to a jury trial. The record does not intimate that his counsel failed to properly advise him before waiving the right.

CONCLUSION


Zachary Biggs' counsel did not ineffectively represent Biggs. We affirm Biggs' convictions for rape. We also affirm his sentence for two separate acts of rape, but remand for reassessment of legal financial obligations.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.




Fearing, J.

WE CONCUR:



Siddoway, J.



Pennell, A.C.J.