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SSUPREME COURT NO. 97971-5
COA NO. 48454-4-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEONEL ROMERO-OCHOA,

Petitioner.

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

The Honorable Stanley J. Rumbaugh, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Leonel Romero-Ochoa asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Romero-Ochoa requests review of the decision in State v. Leonel Romero Ochoa, Court of Appeals No. 48454-4-II (slip op. filed November 13, 2019), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

What is the appropriate test for determining whether the intent requirement is met under the "same criminal conduct" standard and, applying the "objective intent" test, whether the offenses of rape and assault in petitioner's case constitute the "same criminal conduct" in calculating the offender score?

D. STATEMENT OF THE CASE

The relevant facts are set forth in the Supreme Court's previous decision:

The victim woke up at about 3 a.m. to find a strange man (whom she identified at trial as Romero-Ochoa) standing over her bed; when she asked him who he was, he said, "Just be quiet. Don't say anything." 6 VRP (Oct. 20, 2015) at 9. At that point, the victim stood up and ran into her living room, where Romero-Ochoa grabbed her by the hair, pulled her over to the couch, and pressed his hands on her mouth and neck so that she could barely speak. He climbed on top of her, started taking off his pants, and took off her

shorts and underwear. She told him to leave her alone and he told her to be quiet. He kissed her neck and legs for about 2 minutes, telling her, "I like you" and "I'm doing this to you because I like you," and then raped her for about 20 minutes. 6RP at 12. During the rape, the victim was crying and screaming, and Romero-Ochoa repeatedly hit her in the face, covered her mouth, and told her to be quiet.

State v. Romero-Ochoa, 193 Wn.2d 341, 349-50, 440 P.3d 994 (2019).

The victim eventually ran out of her home and screamed for help, but Romero-Ochoa and dragged her back into inside, where he raped her a second time. 6RP¹ 14-19, 54-55. He stopped when police knocked on the door, at which point she ran outside. 6RP 19-20.

A jury convicted Romero-Ochoa of two counts of first degree rape, two counts of second degree rape (vacated to avoid double jeopardy), and one count each of second degree assault, first degree burglary, and unlawful imprisonment. CP 120-26, 128-29, 140-41. The Court of Appeals reversed all but the unlawful imprisonment conviction. State v. Romero-Ochoa, 1 Wn. App. 2d 1059, 2017 WL 6616736 at *1 (2017) (unpublished). The Supreme Court reversed the Court of Appeals, reinstated the convictions, and remanded for the Court of Appeals to

¹ The verbatim report of proceedings is referenced as follows: 1RP - 10/12/15; 2RP - 10/13/15; 3RP - 10/14/15; 4RP - 10/15/15; 5RP - 10/19/15; 6RP - 10/20/15; 7RP - 10/21/15; 8RP - 10/22/15; 9RP - 10/26/15; 10RP - 10/27/15; 11RP - 10/28/15; 12RP - 10/29/15; 13RP - 12/18/15.

address Romero-Ochoa's argument that the trial court erred in failing to treat one of his rape convictions and his assault conviction as the same criminal conduct in calculating his offender score. Romero-Ochoa, 193 Wn.2d at 364. On remand, the Court of Appeals affirmed the trial court's ruling that the first rape and the assault did not constitute the same criminal conduct. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE LAW ON "SAME CRIMINAL CONDUCT" IS IN DISARRAY. REVIEW IS APPROPRIATE TO CLARIFY THE LAW.

There is much confusion over the proper test for determining whether two offenses have the same "intent" under the same criminal conduct analysis. A recent Supreme Court decision, State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016) adds to the bewilderment. Romero-Ochoa's same criminal conduct argument raises an issue of substantial public importance warranting review under RAP 13.4(b)(4). It provides this Court an opportunity to dispel the confusion over the proper test to apply. A decision that potentially affects numerous proceedings in the lower courts warrants review as an issue of substantial public interest where review will avoid unnecessary litigation and confusion on a common issue. State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

a. Review should be granted to resolve the question of whether "objective" intent or "statutory" intent is the proper test.

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.525; RCW 9.94A.530(1). The sentencing court calculates an offender score by adding current offenses and prior convictions. RCW 9.94A.589(1)(a). Offenses that encompass "the same criminal conduct" are counted as one crime for sentencing purposes. RCW 9.94A.589(1)(a). "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).

The Court of Appeals recently issued a decision that thoroughly surveys the various approaches, some overlapping, some at odds with one another, that have been used over the years to determine whether there is same intent to satisfy the same criminal conduct standard. State. v. Swarers, __Wn. App. 2d__, 36066-1-III, 2019 WL 6607149, at *5-26 (slip op. filed Dec. 5, 2019) (unpublished). The takeaway is that case law on same criminal conduct is a mess, causing confusion for litigants and the judges tasked with ruling on the issue.

Romero-Ochoa's petition focuses on the major fault line in the case law: whether same intent is measured by statutory intent or the traditional

"objective intent" standard, which does not rely on the statutory mens rea as dispositive.

The "objective intent" test has been in place for over 30 years, when the Supreme Court held "trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This analysis includes whether the crimes were "intimately related or connected to another criminal event," whether the objective substantially changed between the crimes, whether one crime furthered the other, and whether both crimes were part of the same scheme or plan. Id. at 214-15 (quoting State v. Adcock, 36 Wn. App. 699, 706, 676 P.2d 1040 (1984)); accord State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

Case law interpreting the same intent requirement in RCW 9.94A.589(1)(a) distinguishes it from the statutory 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, 182 Wn.2d 1022, 347 P.3d 458 (2015).

In applying the Dunaway test, the Supreme Court has recognized statutory intent is not dispositive. In re Pers. Restraint of Connick, 144 Wn.2d 442, 459-60, 28 P.3d 729 (2001); State v. Haddock, 141 Wn.2d 103, 112-13, 3 P.3d 733 (2000). "[C]ounts with identical mental elements, if committed for different purposes, would not be considered the 'same criminal conduct.'" Haddock, 141 Wn.2d at 113. Conversely, two crimes that do not by statute require the same criminal intent may nonetheless share the same objective criminal intent under specific facts. Connick, 144 Wn.2d at 459-60.

Division Two, however, has advanced a contrary approach in some cases, requiring two crimes to have the same statutory intent to qualify as same criminal conduct. This error started in State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, review denied, 118 Wn.2d 1006, 822 P.2d 288 (1991), back when courts were just beginning to formulate the standard for determining same criminal conduct. As recognized by Division One, Rodriguez relied on an "element sharing" analysis that has since been rejected by the Supreme Court. State v. Vike, 66 Wn. App. 631, 634-35, n. 5, 6, 834 P.2d 48 (1992) (citing State v. Collicott, 118 Wn.2d 649, 668, 827 P.2d 263 (1992)), rev'd on other grounds, 125 Wn.2d 407, 885 P.2d 824 (1994).

But like a stubborn weed that refuses to die, the error perpetuates itself. See State v. Hernandez, 95 Wn. App. 480, 485-86, 976 P.2d 165 (1999) (citing Rodriguez); State v. Price, 103 Wn. App. 845, 857, 14 P.3d 841 (2000) (citing Hernandez), review denied, 143 Wn.2d 1014, 22 P.3d 803 (2001); State v. Bickle, 153 Wn. App. 222, 234, 222 P.3d 113 (2009) (citing Rodriguez); State v. S.S.Y., 150 Wn. App. 325, 323-34, 207 P.3d 1273 (2009) (citing Price, Hernandez), aff'd, 170 Wn.2d 322, 241 P.3d 781 (2010). The Supreme Court has criticized Division Two's statutory intent approach as contrary to both its precedent and that of Division One and Division Three. State v. S.S.Y., 170 Wn.2d 322, 332-33, n.5, 241 P.3d 781 (2010).²

More recently, though, the Supreme Court in Chenoweth compared the statutory criminal intent requirements of first degree incest and third degree child rape to conclude "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child," thus precluding a same criminal conduct conclusion for a single act. Chenoweth, 185 Wn.2d at 223. The 5-4 majority in Chenoweth did not

² Notwithstanding Division Three's decision in Adame and the Supreme Court's criticism in S.S.Y., Division Three has issued conflicting decisions on the point. Compare State v. Polk, 187 Wn. App. 380, 396, 348 P.3d 1255 (2015) (citing Rodriguez, ignoring Adame) with State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088 (citing Adame), review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014).

purport to overrule the Dunaway line of cases. The Washington Supreme Court does not overrule binding precedent sub silentio. Lunsford v. Saberhagen, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009).

Yet the tension between Dunaway and Chenoweth is causing confusion among courts and practitioners of this state. The only published Court of Appeals decision addressing Chenoweth does not find it represents a change in the law: "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." State v. Hatt, __ Wn. App. 2d __, __ P.3d __, 2019 WL 6122397, at *12 (slip op. filed Nov. 18, 2019); see also State v. Santos, 2 Wn. App. 2d 1044, 2018 WL 1110496, at *3 (2018) (unpublished) (same); State v. McDonough, 3 Wn. App. 2d 1006, 2018 WL 1611616, at *4 (2018) (unpublished) (same), review denied, 191 Wn.2d 1013, 426 P.3d 750 (2018).

Other courts, though, treat Chenoweth as erecting a same statutory intent test, effectively abrogating the Dunaway test. See State v. Yusuf, 2 Wn. App. 2d 1048, 2018 WL 1168724, at *6-8 (2018) (unpublished), review denied, 190 Wn.2d 1029, 421 P.3d 460 (2018) (split decision on proper test, with concurrence contending Chenoweth limited to cases

involving a single act); State v. Smith, 7 Wn. App. 2d 304, 433 P.3d 821 (2019) (unpublished portion), review denied, 193 Wn.2d 1010, 439 P.3d 1065 (2019); State v. Sharlow, 9 Wn. App. 2d 1092, 2019 WL 3731910, at *6-7 (2019) (unpublished); State v. Standley, 2 Wn. App. 2d 1060, 2018 WL 1342449, at *5 (2018) (unpublished); State v. Sadler, 198 Wn. App. 1023, 2017 WL 1137116, at *4-5 (2017) (unpublished), review denied, 189 Wn.2d 1010, 403 P.3d 41 (2017); State v. Baza, 197 Wn. App. 1072, 2017 WL 589189, at *2-3 (2017) (unpublished).

The Court of Appeals in Romero-Ochoa's case, unsure of the proper test, played it safe and concluded the same intent requirement was unsatisfied under either standard. Slip op. at 4-5. This Court should take review so that the lower courts, and the litigants that appear before them, do not have to keep guessing at the proper test for determining same intent under the same criminal conduct standard.

b. The trial court misapplied the law or otherwise abused its discretion in failing to count the first rape and the assault as the same criminal conduct in computing the offender score.

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of law. State v. Graciano, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). The trial court ruled as follows: "Strangulation is not necessary to accomplish unlawful imprisonment or

forcible rape and is a separate and distinct act that was found by the jury to have occurred, and that's what supported the Assault in the Second Degree conviction. So I don't think it is the same criminal conduct, and the offenses don't merge." 13RP 20-21.

The trial court misapplied the law in using a double jeopardy standard in resolving Romero-Ochoa's same criminal conduct challenge. Whether offenses are "separate and distinct" is a double jeopardy question. See State v. Fuentes, 179 Wn.2d 808, 824, 318 P.3d 257 (2014) (for purposes of double jeopardy, "if each count arises from a separate and distinct act, the defendant is not potentially exposed to multiple punishments for a single act."); State v. Borsheim, 140 Wn. App. 357, 367-68, 165 P.3d 417 (2007) (double jeopardy violated where court failed to instruct jury it must find "separate and distinct acts" for convictions). "[I]t is well established that a double jeopardy violation claim 'is distinct from a 'same criminal conduct' claim and requires a separate analysis.'" State v. Thompson, 192 Wn. App. 733, 736 n.1, 370 P.3d 586, review denied, 185 Wn.2d 1041, 377 P.3d 766 (2016) (quoting State v. French, 157 Wn.2d 593, 611, 141 P.3d 54 (2006)).

The trial court found the offenses did not "merge," but "merger" is a double jeopardy concept. State v. Wilkins, 200 Wn. App. 794, 806, 809, 403 P.3d 890 (2017), review denied, 190 Wn.2d 1004, 413 P.3d 10

(2018). According to the Court of Appeals, the trial court found that Romero-Ochoa's act of strangulation was "gratuitous." Slip op. at 5. But this too sounds in double jeopardy. Under a double jeopardy analysis, merger can be defeated by showing one of the offenses was "gratuitous." State v. Freeman, 153 Wn.2d 765, 778-79, 108 P.3d 753 (2005) (offenses that would otherwise merge may still be punished as separate offenses if there is an independent purpose or effect to each).

Further, there is no authority for the proposition that two crimes cannot be same criminal conduct unless one offense is "necessary" to accomplish another. 13RP 20. The question is whether the objective intent is the same. Burns, 114 Wn.2d at 318-19. Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318-19; State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). The trial court

misapplied the law in requiring one offense be "necessary" to accomplish the other offense.

Examination of the facts of Romero-Ochoa's case leads to one reasonable conclusion: the time, place, victim and intent for the first rape and the assault are all the same.

The assault conviction was based on an act of strangulation or suffocation, as found by the jury. CP 78 (to-convict instruction), 130 (verdict).³ The State elected the act of rape that occurred before the victim ran out of the house the first time as the basis for count 1. 11RP 55-56. The offenses at issue in this appeal — the first rape and assault — involved the same time (morning of July 4), the same place (victim's residence) and the same victim (Isidor). None of this was disputed below or on appeal. The issue is whether the offenses shared the same intent. Romero-Ochoa adheres to the Dunaway test regarding objective intent.

The victim testified the first thing Ochoa-Romero told her was "Just be quiet. Don't say anything." 6RP 9. Why? Because he did not want her to alert others of the rape. She ran for the door after seeing him

³ The jury received instruction defining "strangulation" and "suffocation." Instruction 49 defined "strangulation" as "to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." CP 76. Instruction 50 defined "suffocation" as "to block or impair a person's intake of air at the nose or mouth, whether by smothering or other means, with the intent to obstruct the person's ability to breathe." CP 77.

standing next to her bed, at which point he grabbed her and started to choke her. 6RP 9. One hand pressed her neck and the other hand was on her mouth. 6RP 10. She explained "He didn't want me to speak." 6RP 10. He then got on top of her, took off his pants, and took off her clothing. 6RP 11. While taking off clothing, he told her "keep quiet." 6RP 11. He kissed her then raped her. 6RP 12. She cried and screamed for help while being raped. 6RP 12. While she did this, he hit her in the face, told her to be quiet, and covered her mouth. 6RP 13. When she tried to get him off, he covered her mouth and grabbed her around the neck, telling her "to be quiet." 6RP 56.

The evidence shows the assault by strangulation and suffocation was to keep the victim quiet and subdue her so that he could rape her without intervention from her sleeping daughter or anyone else who might otherwise hear her.⁴ In this manner, the assault by strangulation and suffocation furthered the rape.

Consistent with her trial testimony, the victim told police that when she resisted Romero-Ochoa's attempt to force himself on her, he grabbed her around the neck, choked her and raped her. 5RP 80. She told hospital staff that she tried to fight him off and he grabbed her around the neck while on the couch. 6RP 79. Consistent with this testimony, the

⁴ The victim's daughter was sleeping in the bedroom. 5RP 143.

State argued to the jury that the physical force that overcame resistance to the rape was "a continuous course of violence." 11RP 56. The physical force was used to have sexual intercourse with the victim. 11RP 56. "He's pressing down on her neck in order to subdue her." 11RP 69. The evidence allows for only one conclusion: the rape and assault form a fluid course of conduct and are intimately connected.

The jury returned a special verdict that expressly found beyond a reasonable doubt that Romero-Ochoa committed the assault with sexual motivation. CP 129. This jury finding establishes he committed the assault with the objective of committing the rape. The trial court, in making the same criminal conduct determination, was not free to disregard the jury finding on this matter.

Viewed objectively, the assault furthered the first rape and was a part of a single, uninterrupted criminal episode. Romero-Ochoa strangled and suffocated her in the course of raping her, before she was able to escape and run off the first time. He did so to keep her quiet and subdue her so that he could accomplish the rape. See State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998) (simultaneous kidnapping and second degree assault shared same objective intent because assault furthered the kidnapping); Phuong, 174 Wn. App. at 547-48 (counsel ineffective in failing to argue unlawful imprisonment and attempted rape

were same criminal conduct, where defendant restrained victim to accomplish the rape); State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004) (counsel ineffective in failing to argue kidnapping and rape were the same criminal conduct, where the kidnapping was committed to further the rape).

The rape and assault therefore involved the same criminal intent under a same criminal conduct analysis. "[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). The two offenses involved a "continuing, uninterrupted sequence of conduct." State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997).

Alternatively, the two offenses are properly viewed as part of the same scheme or plan. A single intent includes more than one offense "committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). The overarching criminal objective was to rape the victim. The assault by strangulation and suffocation occurred in the midst of the rape. The jury found Romero-Ochoa committed the assault with

sexual motivation. CP 129.⁵ The assault occurred for the purpose of effectuating the rape.

State v. Kloepper, 179 Wn. App. 343, 317 P.3d 1088, review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014) is distinguishable. In that case, the trial court soundly exercised its discretion in not treating the rape and assault as the same criminal conduct because the evidence allowed the court "to view the rape as a crime of opportunity that presented itself after the assault rather than as the object of the attack." Kloepper, 179 Wn. App. at 358. As outlined above, the evidence in Romero-Ochoa's case is not susceptible to that interpretation. The evidence definitively shows the rape was the object of the assault. The assault overcame resistance to the rape and facilitated it. The assault furthered the rape or alternatively was part of the overarching plan to rape.

State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997) is also distinguishable. In that case, two rapes were not continuous and thus failed to qualify as same criminal conduct. Grantham, 84 Wn. App. at 859. There was a gap in time between the two rapes committed by different means, during which time the defendant and the victim argued and the

⁵ The State argued to the jury "the whole point, the whole reason the Defendant was doing this was for the purpose of his sexual gratification." 11RP 70. The State further argued "This is a situation where the 180-pound construction worker is trying to subdue a smaller woman so he can rape her." 11RP 94.

defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." Grantham, 84 Wn. App.at 859. "In Grantham, the evidence supported a conclusion that the criminal episode had ended with the first rape, only to reoccur when a new argument erupted." State v. Palmer, 95 Wn. App. 187, 191-92, 975 P.2d 1038 (1999) (two rapes were same criminal conduct where violence was continuous and patterned and defendant did nothing in between the two rapes that was not related to raping the victim, even though defendant renewed his threats between the two rapes and had an opportunity to reflect).

Unlike Grantham, the facts of Romero-Ochoa's case show the assault and rape were part of a continuous course of conduct. There was no interruption between the assault and the rape during which time Romero-Ochoa paused and reflected on what he was doing. The course of action was fluid and compressed. The assault was done to quiet the victim and overcome her resistance to being raped. The assault furthered the rape. Also, unlike Grantham, here we have a jury finding that Romero-Ochoa committed the assault with sexual motivation, which shows he committed the assault in order to commit the rape. CP 129.

The Court of Appeals affirmed the trial court because, according to its recitation of the testimony, Romero-Ochoa choked the victim "prior to

the first rape and "[n]obody presented evidence that this act of strangulation occurred in response to the victim screaming for help." Slip op. at 5. This is an unduly narrow and artificial assessment of the evidence. The complete picture is set forth above. Under the objective intent test, the assault by strangulation or suffocation need not be in response to screaming. It was preemptively used to prevent screaming and thereby facilitate the rape, as well as to subdue the victim by physical violence to further the rape. That being said, the Court of Appeals inaccurately described the victim's testimony. While she screamed for help, Romero-Ochoa told her to be quiet and covered her mouth. 6RP 12-13.

Romero-Ochoa establishes the assault is the same criminal conduct as the first rape offense because they occurred at the same time and place, involved the same victim, and share the same objective intent. The court misapplied the law or otherwise abused its discretion in failing to treat the assault offense as the same criminal conduct as the rape in count 1. Resentencing is required based on a lower offender score.

F. CONCLUSION

For the reasons stated, Ochoa requests that this Court grant review.

DATED this 12th day of December 2019.

Respectfully submitted,


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Attorneys for Petitioner

November 13, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LEONEL ROMERO-OCHOA,

Appellant.

No. 48454-4-II

UNPUBLISHED OPINION

MELNICK, P.J. — A jury convicted Leonel Romero-Ochoa of two counts of rape in the first degree and one count each of burglary in the first degree, unlawful imprisonment, and assault in the second degree. Romero-Ochoa appealed, and we reversed all but Romero-Ochoa’s unlawful imprisonment conviction. We did not address his claim of sentencing error.

The Supreme Court reversed, reinstated Romero-Ochoa’s convictions, and remanded for us to address Romero-Ochoa’s contention that the trial court erred at sentencing by failing to treat one of his rape convictions and his assault conviction as the same criminal conduct when calculating his offender score. *State v. Romero-Ochoa*, 193 Wn.2d 341, 364, 440 P.3d 994 (2019).

Because the trial court acted within its discretion when determining that Romero-Ochoa’s convictions were not the same criminal conduct, we affirm his sentence.

FACTS¹

On July 3, 2014, the victim fell asleep in her home and around 3 a.m. awoke to a noise. The victim saw Romero-Ochoa standing next to her bed. He told the victim, “Just be quiet. Don’t say anything.” *State v. Romero-Ochoa*, No. 48454-4-II (Wash. Ct. App. Dec. 28, 2017) (unpublished), <http://www.courts.wa.gov/opinions/> (quoting Report of Proceedings (RP) (Oct. 20, 2015) at 9). When the victim attempted to flee her home, Romero-Ochoa grabbed and choked her before she could escape. He then forced her onto a couch, removed her clothing, and vaginally raped her. During the rape, the victim screamed for help while Romero-Ochoa repeatedly slapped her in the face and covered her mouth.

The victim eventually ran out of her home and screamed for help, but Romero-Ochoa grabbed her hair, hit her face, and dragged her back into her home where he raped her a second time.

The State charged Romero-Ochoa with four counts of rape in the first degree, burglary in the first degree, kidnapping in the first degree, and assault in the second degree. The State based its assault in the second degree charge on the allegation that Romero-Ochoa assaulted the victim by strangulation or suffocation. The matter proceeded to a jury trial at which the jury returned verdicts finding Romero-Ochoa guilty of two counts of rape in the first degree, two counts of rape in the second degree as lesser-included crimes, burglary in the first degree unlawful imprisonment as a lesser-included crime, and assault in the second degree.

¹ The facts underlying Romero-Ochoa’s convictions are set forth in our prior opinion and are repeated here only as relevant to his claim of sentencing error. *State v. Romero-Ochoa*, No. 48454-4-II (Wash. Ct. App. Dec. 28, 2017) (unpublished), <http://www.courts.wa.gov/opinions/>.

At sentencing, the trial court accepted the State's concession that Romero-Ochoa's rape in the second degree convictions merged with his rape in the first degree convictions. The trial court also found that Romero-Ochoa's unlawful imprisonment conviction constituted the same criminal conduct as his rape in the first degree convictions. But the trial court rejected Romero-Ochoa's argument that his assault in the second degree conviction constituted the same criminal conduct as his rape convictions, reasoning:

[T]he Assault in the Second Degree conviction wasn't necessary to prove the element of Rape in the First Degree. That was proven by the unlawful entry, not based on causing serious bodily harm to the victim. In fact, there was evidence that after the forensic examination following the assault that there were marks on the victim's neck and it seemed that a strangulation did take place as a separate crime, and it was not necessary to prove strangulation in support of the Rape First Degree conviction.

.....

I distinguish this from the unlawful imprisonment, which basically is the restraint of liberty or a holding of the victim down for the purpose of accomplishing a rape, which is sort of part and parcel of the whole thing.

Strangulation is not necessary to accomplish unlawful imprisonment or forcible rape and is a separate and distinct act that was found by the jury to have occurred, and that's what supported the Assault in the Second Degree conviction. So I don't think it is the same criminal conduct, and the offenses don't merge. So that one will be sentenced separately.

State v. Romero-Ochoa, No. 48454-4-II (Wash. Ct. App. Dec. 28, 2017) (unpublished), <http://www.courts.wa.gov/opinions/> (quoting RP (Dec. 18, 2015) at 18, 20-21).

Romero-Ochoa appealed from his convictions. Based on the procedural history of this case, we address Romero-Ochoa's remaining claim that the trial court erred at sentencing by failing to treat one of his rape in the first degree convictions and his assault in the second degree conviction as the same criminal conduct when calculating his offender score. We conclude that the court did not err.

ANALYSIS

SAME CRIMINAL CONDUCT

We “will reverse a sentencing court’s determination of ‘same criminal conduct’ only on a ‘clear abuse of discretion or misapplication of the law.’” *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) (quoting *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990)). Crimes that encompass the “same criminal conduct” are counted as one crime for purposes of sentencing. Former RCW 9.94A.589(1)(a) (2002). “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.” Former RCW 9.94A.589(1)(a). At issue here is only whether Romero-Ochoa’s first degree rape and assault convictions involved the same criminal intent.

In *State v. Chenoweth*, 185 Wn.2d 218, 223-24, 370 P.3d 6 (2016), the court examined the statutory mens rea elements of child rape and incest and concluded that the crimes could not share the same criminal intent for purposes of a same criminal conduct analysis. *Chenoweth*, however, did not explicitly overrule the objective criminal intent test set forth in *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987). Under the objective criminal intent test, we determine whether multiple crimes encompass the same criminal intent by “focus[ing] on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.” *Dunaway*, 109 Wn.2d at 215. “[T]his analysis will often include the related issue of whether one crime furthered the other.” *Dunaway*, 109 Wn.2d at 215.

Romero-Ochoa argues that the trial court abused its discretion by failing to find that his conduct in assaulting the victim by strangulation furthered his first count of rape. He does not address the statutory mens rea test articulated in *Chenoweth*, 185 Wn.2d at 223-24. Regardless of which test applies, Romero-Ochoa’s claim cannot succeed.

Under the *Chenoweth* statutory mens rea test, Romeo-Ochoa's crimes of assault in the second degree and rape in the first degree cannot share the same criminal intent because assault in the second degree required an intent to assault the victim by strangulation or suffocation whereas rape in the first degree required an intent to engage in sexual intercourse with the victim by forcible compulsion. 185 Wn.2d at 223-24; RCW 9A.36.021(1)(g); RCW 9A.44.040(1)(d).

Romeo-Ochoa's argument also fails under the objective criminal intent test. Here, the trial court found that Romero-Ochoa's act of strangulation was gratuitous and not made for the purposes of furthering the first count of rape. While reasonable minds could disagree as to whether Romero-Ochoa's intent in strangling the victim occurred to further the rape, we cannot conclude that the trial court abused its discretion in finding to the contrary. *See State v. Graciano*, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013) (when record supports multiple same criminal conduct determinations, court does not abuse its discretion by reaching one of those determinations).

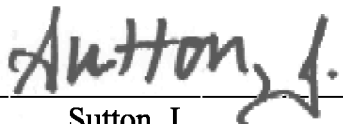
Here, the victim testified that Romero-Ochoa grabbed her as she initially attempted to flee her home. She stated that Romero-Ochoa then grabbed her hair, took her over to a seat, and choked her by placing one hand over her neck, all of which occurred prior to the first rape. Nobody presented evidence that this act of strangulation occurred in response to the victim screaming for help. The trial court's determination that Romero-Ochoa's conduct in strangling the victim was gratuitous and not necessary for the purpose of furthering the first rape was within the trial court's discretion. Accordingly, we affirm Romero-Ochoa's sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

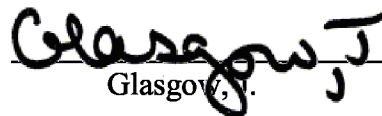


Melnick, P.J.

We concur:



Sutton, J.



Glasgow, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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