Supreme Court No. 101017-6
Court of Appeals No. 82858-4-I

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

---

STATE OF WASHINGTON,
Respondent

v.

ALEXSAIR FARIAS-SOLORIO,
Appellant

---

# PETITION FOR REVIEW

---

SUZANNE LEE ELLIOTT
Washington Appellate Project
Suite 610, 1511 Third Ave.
Seattle WA 98101
206-587-2711

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Rules



### Treatises

## I. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Alexsair Farias-Solorio seeks review of the unpublished opinion in *State v. Farias-Solorio,* #82858-4-I. See Appendix I.

## II. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review to affirm its holding in *State v. Tili,* 139 Wash. 2d 107, 985 P.2d 365 (1999), that unconsented sexual intercourse in a continuous, uninterrupted sequence of conduct is the "same criminal conduct" for purposes of determining an offender score?

2. Should this Court accept review and find that emotional testimony from a witness that Mr. Farias-Solorio was a "rapist," was not harmless beyond a reasonable doubt?

## III. STATEMENT OF THE CASE

"There is one clear category of cases where two crimes will encompass the same criminal conduct: the repeated commission of the same crime against the same victim over a short period of time." Fine, Seth, 13B Wash. Prac., Criminal Law § 43:12 (3d 2021). Here, CL told the State from the outset that the rape took place at the same time and place and Mr. Solorio had a consistent intent to have sexual intercourse. Nonetheless, on the day of trial, the State

added a second count of third degree rape. At trial the testimony from both CL and Mr. Solorio clarified that Mr. Solorio's acts of penetration were merely sequential, or part of a continuous, uninterrupted sequence of conduct. But the sentencing judge erred as a matter of law when she concluded the two counts should be included in his offender score because during the encounter Mr. Solorio "had time to pause and reflect on his criminal act."

Mr. Solorio and CL met while both were working as actors in Seattle musical theater. RP 712-13, 1095. They were friends. RP 1097-1100. On more than one occasion before March 2018, the two engaged in kissing, foundling and oral genital contact while partially unclothed. RP714-15, 1100. Both agree that on those previous occasions CL did not want Mr. Solorio to put his penis in her vagina. RP 1721, 102.

The friendship waned and CL dated another person. RP 722-23, 1105. But when that relationship fell apart in March 2018, CL texted Mr. Solorio RP 726, 1105-06. The two agreed to meet and talk. RP 729-735. They met and had coffee in downtown Seattle. RP 1109. After coffee the two went to Mr. Solorio's car in the parking garage and began "making out." RP 743-45, 1113.

Mr. Solorio agreed to give CL a ride home. When they arrived, the two got into the back seat again. RP 754. At this point the testimony diverged. CL said that she told Mr. Solorio she did not want to have sexual intercourse but

Mr. Solorio proceeded. RP 763. Mr. Solorio said that CL consented to the intercourse. RP 1119-1123.

Both agreed that Mr. Solorio ejaculated and then attempted penetration a second time. RP 769. After than second attempt CL left the car and went into her home. Mr. Solorio left in his car. CL contacted the police and told them Mr. Solorio raped her.

The State charged Mr. Solorio with one count of third degree rape. CP 1-9. On the day of trial, the State added a second count. CP 27-28. The State said the amendment "more accurately reflects the defendant's conduct." Supp. CP, Sub. 60, Motion to Amend the Information, filed 4/21/21. The jury convicted Mr. Solorio of both counts. CP 55-56.

At sentencing Mr. Solorio argued the two counts were the same criminal conduct. RP 1309-11. The prosecutor argued "what is important in the case law is whether or not the defendant had time to pause and reflect on his actions and then whether he had time, faced with the chance of either abandoning his criminal activity or proceeding to commit a new criminal act, he made a conscious decision to do the latter." RP 1313. The prosecutor went further and said:

> The inquiry for the court is whether or not there was time for the defendant to form new intent to commit a second act, even if it is the exact same type of act and the exact same type of crime with the same victim and the same place.

RP 1314.

The sentencing judge refused to find the two counts were the same criminal conduct. She said: "Mr. Farias-Solorio indeed had time to pause and reflect on his criminal act." RP 1315. She sentenced him to 17 months in prison. CP 68-80.

## IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Where the evidence is that the unconsented sexual intercourse was a continuous, uninterrupted sequence of conduct, the sentencing judge erred as a matter of law when she included both rapes in Mr. Solorio's offender score because he "had time to pause and reflect on his criminal act."

The State added the second count of third degree rape olely as a "trial penalty" – that is the State added the count on the eve of trial because Mr. Farias-Solorio would not plead guilty. Mr. Farias-Solorio argued the two counts were the same criminal conduct.

The Court of Appeals erred in failing the address the main question presented - whether Mr. Farias-Solorio's intent the same as to both counts. Rather than considering this Court's controlling authority in *State v. Tili*, supra, the appellate court relied on its own decision in *State v. Grantham*, 84 Wash. App. 854, 932 P.2d 657 (1997). Grantham, decided 25 years ago, was distinguished and undermined by the subsequent decision in *Tili*. As a result, review is merited under RAP 13.4(b)(1).

The Court's application of *Grantham* is incorrect. The proper focus is "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, 749 P.2d 160 (1987). The question is not whether the defendant had time to reflect upon his conduct. "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. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

In *Tili*, this Court found that while the unit of prosecution for rape is any penetration, the multiple counts in that case constituted the same criminal conduct for sentencing purposes. The Court concluded that Tili's three counts of rape occurred over approximately two minutes, so the court found it "unlikely that Tili formed an independent criminal intent." *Id*. at 124, 985 P.2d 365. The distinction turned on the objective formation of criminal intent by the defendant between the multiple counts of rape. *Id.* at 123.

Other published appellate court cases conflict with the opinion here as well. In *State v. Palmer*, 95 Wn. App. 187, 191, 975 P.2d 1038 (1999), the State charged two counts of second degree rape. Palmer forced his victim's legs apart and performed oral sex on her. The victim continued asking him to stop while Palmer continued the contact.

> Palmer then took off his clothes and told K.P. to straddle him. K.P. was crying and told Palmer that she did not want to do that. Palmer began to count down and when K.P. did not move, he grabbed her by the hair, choked her and then he continued to ask K.P. if she "was going to do what he wanted [her] to do." Out of fear, K.P. straddled Palmer for "maybe ten minutes" while Palmer vaginally raped her. Twice more, Palmer moved K.P. into a different position and reinserted his penis, finally ejaculating.

The trial court rejected Palmer's argument the two counts were the same criminal conduct.

The appellate court reversed correctly stating the critical inquiry was whether Palmer had the same criminal intent throughout the encounter. The Court said:

> The fact that Palmer renewed his threats between the two rapes, and had an opportunity to reflect does not alter our analysis. Palmer's threats and use of violence were no different between the oral/genital rape and the various genital/genital rapes throughout the evening. The facts do not support a conclusion that his objective criminal intent changed.

*Id.* at 192.

In *State v. Walden*, 69 Wash. App. 183, 847 P.2d 956, 957 (1993), the defendant was convicted of one count of second degree rape and one count of attempted second degree rape. Walden had forced his victim to masturbate and then perform fellatio upon him. Walden also unsuccessfully attempted to perform anal intercourse. The appellate court found the sentencing judge erred when he did not treat the two counts as the same criminal conduct.

> When viewed objectively, the criminal intent of the conduct comprising the two charges is the same: sexual intercourse.

> Accordingly, the two crimes of rape in the second degree and attempted rape in the second degree furthered a single criminal purpose. In addition, one victim was involved and the time and place of the crimes remained the same.

*Id*. at 188.

The testimony of both CL and Mr. Solorio establish this event was continuous. Mr. Solorio did nothing between the two penetrations that was not related to having sex with CL. As in *Tili, Palmer* and *Waldon* the trial incorrectly counted these offenses separately. The decision also ignores the limits the "same criminal conduct" inquiry places on the prosecutor's otherwise unbridled charging discretion. As the charging decision in this case reflects, to the extent there is any pause in penetrations, the State can charge a separate count of rape. This allows the State manipulate the sentence in a manner inconsistent with the SRA. This Court should accept review to eliminate this charging practice.

> 2. Was Lizamie Bustillo's emotional testimony that Mr. Farias-Solorio was a "rapist," harmless beyond a reasonable doubt?

The State called CL.'s mother, Lizamie Bustillo, as a witness. RP 869. Three times during her emotional testimony she referred to "the rape" of CL or called Mr. Farias-Solorio a "rapist." RP 870, 873, 877. Defense counsel objected but was overruled on each occasion. The Court of Appeals agreed this was impermissible opinion testimony implicating the defendant's constitutional right to a jury trial and the objections should have been sustained.

Calling Mr. Farias-Solorio a rapist and characterizing his actions as rape was Ms. Bustillo's statement that Mr. Farias-Solorio was guilty. The only question before the jury in this case was who was telling the truth; Mr. Farias-Solorio, who testified CL consented to the sexual contact, or CL who testified she did not consent. In calling Mr. Farias-Solorio a "rapist" or referring to his actions with her daughter as "rape," she was also commenting on her belief that her daughter was telling the truth and Mr. Farias-Solorio was not.

The Court of Appeals also agreed the State had the burden of establishing the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). But the Court erred in finding the State had satisfied that high burden. The State's case against Mr. Farias-Solorio was not strong. It was a credibility contest. CL said she did not consent to sexual contact. Mr. Farias-Solorio testified that she did. CL and he had engaged in sexual contact before she accused him of rape. And her statements about the events on March 13, 2018 changed over time and were inconsistent. The Court of Appeals argued that Ms. Bustillo's statements were " a demonstration of her support and belief in daughter." Slip Opinion at 6. But the statement of "belief" in her daughter *was* the harm. The entire question was who the jury should believe. Ms. Bustillo improperly told the jury that her daughter was credible and Mr. Farias-Solorio was the rapist. The State cannot show this improper testimony was harmless beyond a reasonable doubt.

## V. CONCLUSION

This Court should grant review.

This document complies with RAP 18.17 and contains 2,010 words.

RESPECTFULLY SUBMITTED this 13th day of June 2022.

/s/Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Alexsair Farias-Solorio

FILED
5/16/2022
Court of Appeals
Division I
State of Washington

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

| | | |
|---|---|---|
| THE STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ALEXSAIR FARIAS-SOLORIO,<br><br>Appellant. | ) | No. 82858-4-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION |

MANN, J. — Alexsair Farias-Solorio appeals his conviction for two counts of third degree rape. Farias-Solorio argues that the trial court erred in concluding that the two counts of third degree rape were not the same criminal conduct. Farias-Solorio also raises several issues in his statement of additional grounds (SAG). We affirm.[1]

FACTS

Farias-Solorio and C.L. became friends after performing together at the Fifth Avenue Theater. In March 2018, C.L., then 17, sought advice from Farias-Solorio, then 18, about a recent breakup with her boyfriend. On March 13, 2018, Farias-Solorio and

[1] On January 5, 2022, Farias-Solorio moved to remand to the trial court to set bail on appeal. Farias-Solorio's motion argues in large part that were he not granted an appeal bond then he may serve a longer sentence than would be imposed for a single count of third degree rape. Because we affirm the trial court's conviction for both counts of third degree rape and the corresponding sentence, we deny Farias-Solorio's motion for remand.

Citations and pin cites are based on the Westlaw online version of the cited material.

C.L. met at a Starbucks in downtown Seattle. After meeting, Farias-Solorio offered C.L. a ride home.

C.L. testified to the following: Farias-Solorio parked on the street near C.L.'s home and, after asking if she was on birth control, coaxed her into the backseat of his vehicle where they began to kiss. C.L. told Farias-Solorio that she did not want to have sex, but he removed her clothing and put his fingers inside her vagina. C.L. told Farias-Solorio no, but he put his penis inside her, his hands on her throat and, despite C.L. struggling, ejaculated inside her.

After Farias-Solorio withdrew his penis, C.L. told him "I said no. I said no," to which he responded, "you said no, but your body told me yes." Farias-Solorio put his pants and shirt back on and C.L. put on her shirt. Farias-Solorio asked if C.L. wanted to have sex again so that she could say yes; C.L. declined. After some conversation, Farias-Solorio held C.L.'s hands above her head, telling her that what he was about to do would make her feel better. Farias-Solorio put his penis inside C.L. a second time, maintaining her hands above her head while she told him no. Farias-Solorio eventually stopped, withdrew his penis, and handed C.L. her clothes. C.L. returned to her home where she received a text message from Farias-Solorio saying, "I'm sorry. It's not your fault. We'll never do that again."

The State charged Farias-Solorio with third degree rape under RCW 9A.44.060(1)(a). Before trial, the State amended the information to include a second count of third degree rape. A jury found Farias-Solorio guilty as charged. The sentencing court imposed a sentence of 17 months on each count to run concurrently.

Farias-Solorio appeals.

## ANALYSIS

### A. Same Criminal Conduct

Farias-Solorio argues that the trial court erred in concluding that the two counts of third degree rape were not the same criminal conduct. We disagree.

We review a sentencing court's resolution of a same criminal conduct claim for an abuse of discretion or misapplication of the law. State v. Graciano, 176 Wn.2d 531, 535, 295 P.3d 219 (2013). Crimes constitute the "same criminal conduct"[2] when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a); Graciano, 176 Wn.2d at 536; see also State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997) (affirming the trial court's conclusion that two crimes were committed when the defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act."). It is Farias-Solorio's burden to prove that the two counts of third degree rape comprise the same criminal conduct. Graciano, 176 Wn.2d at 539. Farias-Solorio fails to meet this burden.

In resolving Farias-Solorio's same criminal conduct claim, the trial court stated:

> Farias-Solorio indeed had time to pause and reflect on his criminal act. In fact, he even had a conversation with [C.L.] about the first rape, justifying his actions. And it is abundantly clear that . . . Farias-Solorio was faced with a choice in that moment of either ceasing the activity or proceeding, and he made the choice to proceed, thus forming a new intent and committing a new criminal act.

[2] A "same criminal conduct" determination affects Farias-Solorio's standard range sentence by altering his offender score, which is calculated by adding a specified number of points for each prior offense. RCW 9.94A.525. For purposes of this calculation, current offenses are treated as prior convictions. RCW 9.94A.589(1)(a). If the sentencing court enters a finding that some or all of the current offenses encompass the same crime, however, then those current offenses are counted as one crime for calculating the offender score. RCW 9.94A.589(1)(a).

The trial court did not abuse its discretion. The record shows that Farias-Solorio indeed had time to reflect on his actions between sexual assaults, thus forming a new intent. After Farias-Solorio ejaculated inside C.L., she told him that she had not wanted the sexual contact—to which he replied that her body said she did. The two put their clothes back on and sat in the seat talking; Farias-Solorio also changed body positions. Farias-Solorio took the time to remove his pants again, telling C.L. that additional intercourse would make her feel better before holding C.L.'s hands above her head throughout the second assault. The elapsed time and Farias-Solorio's actions show that he formed a new intent to commit a new criminal act; the trial court did not abuse its discretion in coming to this conclusion.

B. Statement of Additional Grounds

Farias-Solorio raises several issues in his SAG, including: the jury wasn't paying attention on Zoom during voir dire, the prosecutor committed misconduct, the officer who examined C.L. did not photograph the full text message exchange between Farias-Solorio and C.L., the jury should have been allowed to consider that Farias-Solorio had committed no prior crimes, and C.L.'s mother was permitted to offer testimony in the form of an opinion regarding his guilt. None but Farias-Solorio's argument concerning the testimony of C.L's mother have merit.

Farias-Solorio asserts that C.L.'s testimony constituted an impermissible opinion on guilt and the trial court erred by overruling defense counsel's objections. We agree, but conclude that the error was harmless.

Under ER 704, "opinion testimony is not objectionable merely because it embraces an ultimate issue that the jury must decide." City of Seattle v. Levesque, 12

Wn. App. 2d 687, 708, 460 P.3d 205 (2020) (quoting State v. Quaale, 182 Wn.2d 191, 197, 340 P.3d 213 (2014)). Generally, however, "no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." Levesque, 12 Wn. App. 2d at 708 (quoting State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). "When opinion testimony that embraces an ultimate issue is inadmissible in a criminal trial, the testimony may constitute an impermissible opinion on guilt." Quaale, 182 Wn.2d at 197. To determine if testimony is an impermissible opinion on guilt, we weigh the following factors: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (quoting Demery, 144 Wn.2d at 759). Admission of impermissible testimony on guilt may result in constitutional error and support reversal. Quaale, 182 Wn.2d at 201-02.

Here, C.L.'s mother's testimony was an impermissible opinion on guilt. C.L.'s mother made multiple statements referring to Farias-Solorio as a rapist, and the incident in his backseat as a rape including: "so the weekend that [C.L.] got raped; because [C.L.] had been raped; of course I wasn't in the car while [Farias-Solorio] raped [C.L.]." These statements were made by the victim's mother and were accusatory of Farias-Solorio's actions and presumptive of the crime. The allegations of third degree rape were serious, and Farias-Solorio's defense was that his interactions with C.L. were consensual. While there was additional evidence in front of the jury, the circumstances

surrounding the testimony lead us to conclude that the testimony was an impermissible opinion on guilt. Demery, 144 W.2d at 759.

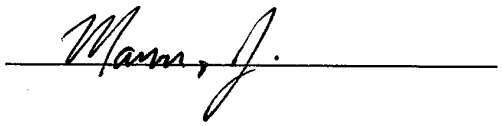
Because C.L.'s mother's testimony invaded the province of the jury to determine Farias-Solorio's guilt and thus violated his constitutional right to a fair trial, "we apply the constitutional harmless error standard." State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009). In a constitutional harmless error analysis, we presume prejudice. Hudson, 150 Wn. App. at 656. A "constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." Quaale, 182 Wn.2d at 202.

The admission of the mother's testimony was harmless. Primarily, the mother's opinion on guilt likely carried little weight with the jury. The record is clear that she had no direct knowledge of what happened during Farias-Solorio and C.L.'s interaction. On cross-examination, C.L.'s mother conceded that she did not witness the assault, nor was she in Farias-Solorio's vehicle when it occurred. C.L.'s mother's comments on Farias-Solorio's guilt were a demonstration of her support and belief in her daughter; they otherwise contained no personal knowledge of the alleged crime. The State has established beyond a reasonable doubt that the jury would have reached the same result absent the admission of this testimony.

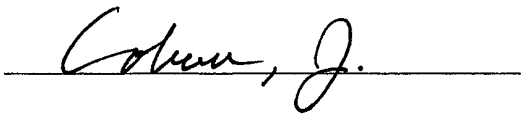
The remainder of Farias-Solorio's claims lack support. While RAP 10.10(c) does not require a SAG to include references to the record and citations to authorities, the rule also states that we will not consider a SAG for review if it does not inform us of the nature and occurrence of the alleged errors. RAP 10.10(c). Further, we are not obligated to search the record in support of Farias-Solorio's claims. RAP 10.10(c);

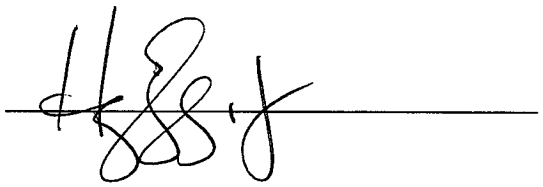
State v. Griepsma, 17 Wn. App. 2d 606, 623, 490 P.3d 239 (2021). Farias-Solorio fails to explain and support the remainder of his claims.

Affirmed.



WE CONCUR:





**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82858-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Scott O'Toole, DPA
[scott.otoole@kingcounty.gov]
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: June 13, 2022

## WASHINGTON APPELLATE PROJECT

## June 13, 2022 - 4:28 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 82858-4 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Alexsair Farias-Solorio, Appellant |

**The following documents have been uploaded:**

- 828584_Petition_for_Review_20220613162810D1884591_7804.pdf
  This File Contains:
  Petition for Review
  *The Original File Name was washapp.061322-03.pdf*

**A copy of the uploaded files will be sent to:**

- karim@suzanneelliottlaw.com
- paoappellateunitmail@kingcounty.gov
- scott.otoole@kingcounty.gov

**Comments:**

---

Sender Name: MARIA RILEY - Email: maria@washapp.org
**Filing on Behalf of:** Suzanne Lee Elliott - Email: suzanne@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

**Note: The Filing Id is 20220613162810D1884591**