

SSD 640542

64054-2

NO. 64054-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
EDUARDO HALL,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE CATHERINE SHAFFER

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**BRIEF OF RESPONDENT**

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A. ISSUES

1. Two crimes may be considered the “same criminal conduct” if they involve the same criminal intent, were committed at the same time and in the same place, and involved the same victim. Here, the evidence demonstrated (and the jury ultimately found) that Hall engaged in sexual intercourse with B.G. on at least four separate and distinct occasions in various locations. Thus, the time and place for each crime was different. Did the trial court properly exercise its discretion in determining that these crimes constituted separate and distinct conduct?

2. A defendant may not appeal a trial court’s refusal to impose an exceptional sentence below the standard range where the trial court has considered the facts and properly concluded that there is no basis for an exceptional sentence. Here, the trial court found that there was no reliable evidence to support grounds for an exceptional sentence and that Hall’s request was too lenient given the facts and circumstances. Because the trial court properly exercised its discretion in imposing a standard range sentence, is Hall barred from appealing his sentence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Edwardo Hall was charged by Third Amended Information with four counts of rape of a child in the third degree pursuant to RCW 9A.44.079. The first count also alleged an aggravating factor asserting that the defendant caused the pregnancy of the child victim of rape pursuant to RCW 9.94A.535(3)(i). A jury trial on those charges commenced on June 8, 2009 before the Honorable Catherine Shaffer. On June 18, 2009, the jury returned a verdict convicting Hall of all four counts and answering “yes” to the special verdict form regarding the aggravating factor. CP 34-35, 41. At sentencing on July 24, 2009, the trial court denied Hall’s request to treat his four convictions for rape of a child as the same criminal conduct, stating that, “there really isn’t any factual basis, even if I accepted Mr. Hall’s testimony, to find that these events occurred at the same time and place, nor of course, is that what the victim said.” 7RP 38.<sup>1</sup> The court also denied Hall’s request to impose an exceptional sentence of 12 to

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<sup>1</sup> The Verbatim Report of Proceedings consists of seven volumes, referred to in this brief as follows: 1RP (June 8, 2009); 2RP (June 10, 2009); 3RP (June 15, 2009); 4RP (June 16, 2009); 5RP (June 17, 2009); 6RP (June 18, 2009); and 7RP (July 24, 2009).

14 months, noting that it had actually considered imposing an exceptional sentence *above* the standard range. 7RP 39-46. The court ultimately imposed a standard range sentence of sixty months. CP 84-93; 7RP 47-52.

## 2. SUBSTANTIVE FACTS

In July 2006, B.G., then fifteen years of age,<sup>2</sup> met the defendant through a mutual friend/acquaintance on MySpace.com. 4RP 94, 97. Hall was twenty-one. 4RP 106; 5RP 136. The two began to converse electronically, discussing things such as B.G.'s freshman classes, her high school (which Hall had also attended), and her upcoming "sweet sixteen" birthday. 4RP 99-102, 127. Throughout their discussions, B.G.'s date of birth was posted on her MySpace page, and she was similarly aware of Hall's age. 4RP 90, 99, 122.

Not long after they met online, B.G. invited Hall to her home when her parents were at work; based upon their online communications, B.G. believed the two were going to become boyfriend/girlfriend. 4RP 104-05. Within one hour of meeting B.G.,

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<sup>2</sup> B.G. was born February 5, 1991. 4RP 78.

Hall began kissing her, touching her breasts, her buttocks, and put his hand in her pants and inserted his fingers in her vagina.

4RP 107-08. Having never been involved sexually before, this caused pain, and B.G. told him not to touch her there; after a brief attempt to penetrate her again, Hall complied with B.G.'s wishes.

4RP 107-08, 125, 207.

For several months following that initial incident the two continued to see one another, but Hall respected the boundaries B.G. had placed upon him; Hall kissed and fondled B.G. but the two did not engage in sexual intercourse of any kind. 4RP 124-25.

Then, in December 2006, during a visit by Hall to B.G.'s house, Hall engaged in penile-vaginal intercourse with B.G. in the basement of B.G.'s home. 4RP 124, 129-31. For the remainder of the year and into January 2007, every time B.G. and Hall saw one another, the two had penile-vaginal intercourse, both at B.G.'s home and at Hall's apartment. 4RP 133-35. B.G. saw Hall at least twice a week, sometimes skipping school to go visit him. 4RP 133. All told, between December 2006 and January 2007, B.G. estimated that the two had sexual intercourse between ten and twenty times.<sup>3</sup>

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<sup>3</sup> Hall's estimate was between five and eleven separate instances. 5RP 136.

4RP 134. While B.G. believed that the two were boyfriend/girlfriend, Hall admitted he was simply using B.G. for sex. 4RP 107-08, 113, 122; 5RP 154. Either way, in January 2007, B.G. discovered that Hall had another girlfriend (with whom he had a child) and ended her relationship with Hall as a result. 4RP 135-36; 5RP 157-58.

Subsequent to that, in approximately August 2007, B.G. discovered she was seven months pregnant with Hall's child. 4RP 135-52. In September 2007, B.G., with the assistance of her parents, sought prenatal care, and on October 3, 2007, B.G. gave birth to a healthy male infant. 4RP 137, 216; 5RP 11. Hall was definitively determined to be the father of the child. 5RP 87-88.

At trial, Hall did not dispute the elements of the State's charges, but claimed that he did not know B.G. was fifteen; rather, he claimed, she had represented herself as eighteen years of age throughout their relationship and that he had no basis to believe otherwise. 5RP 113-14, 135-37, 146, 172. The jury ultimately rejected this defense in finding Hall guilty, and the trial court at sentencing expressed her disbelief in this claim:

Mr. Hall, I think, knew quite well right from the start how old she was and it didn't bother him a bit. He was forceful with her initially in this relationship in an

effort to get sex immediately. And later, when he was able to have sex with her on multiple occasions, he did it because she was available and for no other reason....I think her age made her appealing.

7RP 37, 42.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY RULED THAT HALL'S FOUR CONVICTIONS FOR RAPE OF A CHILD IN THE THIRD DEGREE DID NOT CONSTITUTE SAME CRIMINAL CONDUCT.

Hall claims that his four convictions for rape of a child in the third degree should constitute the same criminal conduct for felony scoring purposes. This claim should be rejected. Although the crimes involved the same victim and presumably the same intent (sexual intercourse), the jury clearly found that the crimes had occurred on four separate and distinct occasions, and the evidence demonstrated that the crimes occurred in different locations. Accordingly, the trial court did not abuse its discretion in ruling that these crimes should be counted separately.

In sentencing a defendant for two or more current offenses, all current convictions should be counted in calculating the offender score unless the court finds that the current offenses encompass the same criminal conduct. 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.” Id.; State v. Fisher, 131 Wn. App. 125, 133, 126 P.3d 62 (2006). “If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score.” State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

The Legislature intended that courts construe the phrase “same criminal conduct” narrowly. State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). A trial court’s determination of what constitutes “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. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Burns, 114 Wn.2d 314, 317, 788 P.2d 531 (1990).

In the present case, the State agrees that each of the four counts involved the same criminal intent and victimized the same person (B.G.). However, although the charging period was the same for each count, the evidence presented in court demonstrated that Hall engaged in sexual intercourse with B.G. on numerous

separate and distinct occasions, often in different locations. 4RP 107-08, 129, 133-34, 161. For example, B.G. testified to one incident of digital penetration that occurred on July 7, 2006 in her parents' garage, and a separate incident of penile penetration that occurred on December 14, 2006 in her parents' basement. 4RP 107-12, 129. Further, B.G. testified that between December 14, 2006 and when their relationship ended in January 2007, they had sexual intercourse each time they saw one another, both at B.G.'s home and at Hall's. 4RP 133, 161. In fact, Hall agreed that he had engaged in sexual intercourse with B.G. on *at least* five separate occasions. 5RP 136. Importantly, there was absolutely no evidence presented or elicited at trial that suggested multiple sequential instances of intercourse or implied that any one sexual encounter was intertwined with another. Rather, the evidence was that on each separate occasion that B.G. saw Hall, he had sexual intercourse with her and essentially left. 4RP 133; 5RP 154.

Moreover, in instructing the jury, the trial court explicitly stated that for each count the jurors needed to agree on an "*occasion separate and distinct*" from that charged in any other count. CP 52, 57-59 (emphasis added). The trial court also made it clear that each count was to be determined independently from

any other count, and that the verdict on one charge should not control the verdict on any other. CP 6, 12. The plain language of the instructions could not have been more clear, and the jury is presumed to have read and followed the instructions. State v. Willis, 67 Wn.2d 681, 685-86, 409 P.2d 669 (1966). Coupled with the evidence at trial, there is no question that the incidents charged and found here did not constitute same criminal conduct.

Hall's reliance on State v. Dolen, 83 Wn. App. 361, 921 P.2d 590 (1996), is misplaced. In that case, Division 2 found that a charge of child rape and child molestation constituted same criminal conduct under the specific facts of the case because Dolen could have committed both crimes in a single incident. Dolen, 83 Wn. App. at 362. There, the evidence demonstrated that the crimes with which Dolen was charged constituted continuous sexual behavior over a short time in the same location with an incident that began as child molestation and culminated in child rape. That is clearly distinguishable from the facts in the present case, where the evidence demonstrated numerous separate and distinct sexual encounters that each constituted criminal behavior.

Here, a review of the record clearly demonstrates clear support for the trial court's comments at sentencing that there was

no factual basis for a finding of same criminal conduct. 7RP 38.  
Even should this Court disagree, the question is not whether there is a different, reasonable way in which to view the evidence, but rather whether the trial court abused its discretion in ruling the way it did. Hall has failed to so demonstrate and, therefore, his claim must fail.

2. HALL IS BARRED FROM APPEALING HIS SENTENCE BECAUSE THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN IMPOSING A STANDARD RANGE SENTENCE.

Hall next contends that the trial court erred by refusing to grant an exceptional sentence below the standard range because it improperly concluded that there was no legal basis to do so. In reality, however, the trial court found that, while a failed defense may be a legally permissible basis for an exceptional sentence in some cases, neither the facts nor the circumstances here warranted it. Because the trial court did not fail to exercise its discretion in imposing a standard range sentence, Hall is legally barred from appealing the time imposed.

The Sentencing Reform Act (SRA) was designed, in part, to prevent dramatically disparate or disproportionate sentences from being imposed on similarly situated defendants. RCW

9.94A.010(3); State v. Barnes, 117 Wn.2d 701, 710, 818 P.2d 1088 (1991). Generally, when a trial court imposes a sentence within the standard range prescribed by the SRA, a defendant may not appeal that sentence. RCW 9.94A.585(1)<sup>4</sup>; State v. McGill, 112 Wn. App. 95, 99-100, 47 P.3d 173 (2002).

RCW 9.94A.585(1), however, does not constitute an absolute prohibition on the right to appeal a trial court's imposition of a standard range sentence. State v. Garcia-Martinez, 88 Wn. App. 322, 328-29, 944 P.2d 1104 (1997). Rather, "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." Id. at 330; see also State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719 (1986) ("An appellant, of course, is not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed."). When a trial court categorically refuses to impose any exceptional sentence below the standard range, it has refused to exercise its discretion, and a defendant may appeal. Id. On the other hand, so long as a court "has considered whether

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<sup>4</sup> Formerly codified as RCW 9.94A.210(1).

there is a basis to impose a sentence outside the standard range [and] decided that it is either factually or legally insupportable” a defendant may not appeal the ruling. Id.

Here, after considering Hall’s request in light of both the evidence presented at trial and the documents submitted and comments made at sentencing, the trial court found that an exceptional sentence was not appropriate. 7RP 39-44. In fact, in addition to finding that Hall was not credible at trial, Judge Shaffer found that his claim at sentencing that he didn’t know B.G.’s age when he engaged in sexual intercourse with her was nothing short of a fabrication:

In terms of the second argument made to me and, again, I’m going in reverse order, which there was a failed defense here, I don’t disregard what some of the jurors said to the defense here. I’m sure that some of the jurors thought that there might be some truth to what Mr. Hall is saying about the victim representing herself as older than she was and the defendant accepting that for some period of time. But, even if I consider those statements by the jurors, and I think the state has an argument when they say I shouldn’t, I’ll point out all 12 of them decided that Mr. Hall knew her age on four separate occasions when [he] had sex with her...*And [I’ve] come back to my own comments about believability here. My personal view is that there was never a time when Mr. Hall didn’t know this victim’s age. I accept her testimony on this subject for all the reasons I’ve stated. She just didn’t seem to be capable of fabricating even when it didn’t make her look too*

good, while Mr. Hall, as I said, has quite a record here of fabrication.

7RP 40-41 (emphasis added). Contrary to Hall's assertions, the trial court's recognition that the jury rejected Hall's affirmative defense did not form the sole basis for her refusal to impose an exceptional sentence, nor do her comments suggest a misunderstanding of the law or the availability of a failed defense as a mitigating factor. Rather, it is clear that the court considered the jury's rejection of the claim and used it to bolster her own substantial disbelief of Hall's assertions and her finding that his lies did not make him worthy of a lenient sentence. Said differently, instead of finding that a defense that failed at trial would legally prevent the imposition of an exceptional sentence, the trial court simply found that Hall's claim of ignorance as to B.G.'s actual age was *factually* unsupported by the record given Hall's lack of credibility (and B.G.'s believability).

Accordingly, and after also considering the other two bases for the exceptional sentence request, the court found that neither the facts presented by the defendant nor the law warranted Hall's exceptional request for leniency. 7RP 44. In fact, the trial court noted that it had considered imposing an exceptional sentence

above the standard range based upon the aggravating fact that Hall impregnated his child victim of rape. 7RP 45-46. And although the court ultimately elected not to do so, she made her opinion about Hall's actions clear:

I know five years seems like a long time to Mr. Hall, but it's my way of thinking, that this was very predatory behavior that I saw here, for all the reasons I've stated. There's an extraordinary lack of remorse for reasons that I'm not clear on, and there's been an extraordinary level of deceit and blaming of the victim in this case.

7RP 47.

While the trial court may not have exercised its discretion in the manner requested by Hall, there is no question that it did, indeed, exercise its discretion. As in State v. Kantechit, 101 Wn. App. 137, 5 P.3d 727 (2000), "the trial court [here] based its refusal to impose an exceptional sentence on its understanding of the facts and its review of relevant case law....There is nothing in the record to even suggest that the court either refused to exercise its discretion or relied on any impermissible basis in rejecting the request for an exceptional sentence." 101 Wn. App. at 140.

That said, even should this Court disagree, remand for resentencing is not mandated when the reviewing court is confident the trial court would impose the same sentence. McGill, 112 Wn. App. at 100. Unlike the situation in McGill, where the trial court expressed a desire to impose an exceptional sentence but incorrectly concluded that it did not have the power to do so, the court here acknowledged its power to grant an exceptional sentence but held that it would not be appropriate. 7RP 39-44. Moreover, the trial court's comments at sentencing strongly indicate that she would make the same ruling again were the case to be remanded. 7RP 34-37, 41, 47.

Because the trial court considered the facts and concluded that there was no basis for an exceptional sentence, it properly exercised its discretion. Accordingly, Hall is prohibited under the purview of RCW 9.94A.585(1) from appealing his standard range sentence.

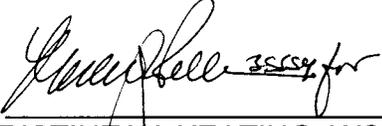
D. CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm Hall's convictions and corresponding sentences for four counts of rape of a child in the third degree.

DATED this 19<sup>th</sup> day of July, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

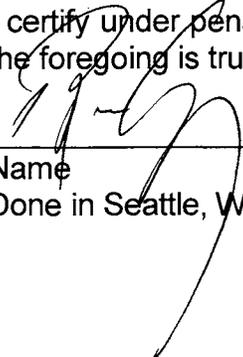
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. EDUARDO HALL, Cause No. 64054-2-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

07-20-10  
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Date