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65527-2)

No. 65527-2-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

HECTOR SALINAS, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying defendant's motion to suppress the wallet and clothing where defendant was in custody on investigation of rape and was formally arrested on a probation violation warrant and was searched incident to arrest on the rape and warrant.
2. Whether the seizure of defendant's clothing exceeded the scope of a search of a person incident to arrest where the defendant was wearing the clothing at the time that he was taken into custody and the clothing was seized as soon as practicable at the police station and where a search of a person incident to arrest is not limited to an officer safety search or search for evidence of the crime of arrest.
3. Whether law enforcement was justified in seizing defendant's wallet and the identification cards in it under Terry where defendant provided law enforcement with a name that could not be verified by records check and where a different name came back, the physical characteristics for which appeared to match the defendant, and where there was a need to identify the defendant for the rape investigation.
4. Whether probable cause for rape and exigent circumstances justified the seizure of defendant's clothing at the police station after he was formally arrested on a warrant where the defendant was wearing the clothing, which matched the general description of the attacker's clothing, at the time he was arrested, soon after the rape occurred and where defendant could have attempted to alter and/or destroy evidence contained within the clothing if he were permitted to continue wearing the clothing.

5. Whether the testing of defendant's clothing by the State Crime Lab without a warrant violated defendant's constitutional rights where defendant had no reasonable expectation of privacy in the clothing after it was seized by police.
6. Whether evidence of defendant's clothing and the testing thereof should have been suppressed because the defendant was not provided an opportunity to post bail on the probation violation warrant pursuant to RCW 10.31.030 where RCW 10.31.030 only applies to inventory searches at the time of booking and where defendant's clothing was seized incident to arrest before he was booked into jail.
7. Whether the trial court abused its discretion in admitting evidence of the dog track where the State presented a sufficient foundation under State v. Loucks and where the track was started around 30 minutes after the rape occurred and where the dog had been found to be reliable in pursuing humans on prior actual tracks.
8. Whether defense counsel's failure to request an instruction cautioning the jury regarding the use of dog track evidence affected the outcome of the case where there was other significant evidence identifying the defendant as the rapist, including an in-court identification by the victim, DNA evidence and corroborating circumstantial evidence.
9. Whether the trial court erred in ruling that the victim would be permitted to make an in-court identification if the State could lay the foundation for such an identification, where defense did not allege taint from a prior impermissibly suggestive identification procedure, and where the victim testified at trial that she had seen the defendant in the park before the night she was raped and that she recognized him in court.
10. Whether imposing sentence on the kidnap conviction violated double jeopardy where the kidnap conviction merged with the first degree rape conviction, although the

kidnap conviction wasn't used to prove defendant's persistent offender sentence.

11. Whether defendant waived the issue of whether two of the rape convictions were the same course of criminal conduct as the third one where defense did not request the trial court to make such a discretionary factual finding at sentencing, and/or whether the issue is moot where defendant was sentenced as a persistent offender.
12. Whether the defendant had a Sixth or Fourteenth Amendment right to have a jury determine his persistent offender sentence beyond a reasonable doubt where previous Washington cases have held to the contrary.
13. Whether the Legislature's failure to classify the defendant's "persistent offender" status as an element violated his equal protection rights where prior Washington law has held it does not.
14. Whether taking the evidence in the light most favorable to the State, the evidence was sufficient by a preponderance of the evidence to prove that defendant was the person convicted of the 1994 robbery where the booking photos from both prior convictions looked remarkably like the defendant at sentencing, the robbery victim identified the defendant in court, and where the plea and judgment and sentence documents supported such a finding.

C. FACTS

1. Procedural Facts.

Appellant Hector Salinas was charged with three counts of Rape in the First Degree, in violation of RCW 9A.44.040(1), and one count of Kidnapping in the First Degree, in violation of RCW 9A.40.020(1), all while armed with a deadly weapon under RCW 9.94A.602, and was

provided notice in the information that if he been convicted twice previously of most serious offenses, the mandatory penalty was life in prison without parole, in accord with RCW 9.94A.120(4) and RCW 9.94A.570. CP 127-29. Salinas was tried by a jury and found guilty of all four counts. CP 40-41. During the trial the State moved to withdraw the deadly weapon enhancement allegation. TRP 308¹. A sentencing hearing was held, at which testimony was taken and exhibits entered, and the court found that Salinas was a persistent offender and imposed life without possibility of release. CP 6, 9.

2. Substantive Facts.

a. CrR 3.6 hearing

At the time the K-9 team and Officer Bennett contacted Salinas in his sleeping bag, the officers were aware that a victim had reported that she had been raped, dragged into the park and raped again at knifepoint. Supp CP __, Sub Nom. 190 (Appendix A); FF 1, 2, 3; 3/8/10 PTRP 23-25. The victim, who appeared to have suffered from such an attack, had described her attacker as a Hispanic male, who did not speak English, with a mustache and possible chin hair. FF 2, 3, 4; 3/8/10 PTRP 22-24, 26,

¹ TRP refers to the verbatim report of proceedings for the trial, the court reporter's Vol. I-IX, and SRP for the sentencing transcript. Other transcripts are referenced to by their date.

142. She also told them that he had used a knife, had a dark jacket, and a black cap. FF 4; 3/8/10 PTRP 25, 27.

The K-9 team then conducted a dog track in close proximity in both time and place, starting from the scene of the initial rape. FF 5, 6, 7, 11; 3/8/10 PTRP 42, 45-46, 143. During the track they encountered some transients who reported that they had heard a woman scream about 30 minutes before and that a Hispanic male with a black hat and a dark jacket had walked by them about 15 minutes before and had headed towards the area where the restrooms were. FF 8, 9; 3/8/10 PTRP 47-50. The dog track then continued in a direction towards the restrooms and ultimately to the creek area where Salinas was found lying inside his sleeping bag. FF 1, 10, 11; 3/8/10 PTRP 51-54.

Upon contacting Salinas, the officers identified themselves as “Bellingham Police K-9” and directed him to show his hands. Salinas did not comply with the command, but eventually stood up, pulled the sleeping bag over his head, grabbed his jacket and backpack and ran away from them. FF 12, 14; 3/8/10 PTRP 55-57; 3/9/10 PTRP 22-23. When the officer shined a flashlight on Salinas while he was in the sleeping bag, the officer saw Salinas’s face, which matched the general description the victim had given. FF 13; 3/8/10 PTRP 48, 54-55, 65, 92-93; 3/9/10 PTRP 12. When the officers found Salinas hiding, they noted again that he

matched the description. FF 15; 3/8/10 PTRP 59, 144; 3/9/10 PTRP 28.

When he was found he was wearing a dark jacket and a black hat was on top of the maroon backpack next to him in plain view. FF 15; 3/8/10 PTRP 144-46, 148.

Salinas did not comply with the officers' commands to lie down on the ground when he was found and kept trying to stand up, so the dog was released and permitted to give a minor bite on Salinas's shin in order to get Salinas to comply. 3/8/10 PTRP 59-61, 147-48; 3/9/10 PTRP 12. Salinas then complied, was handcuffed and taken into custody. FF 16; 3/8/10 PTRP 61-62, 147-48; 3/10/10 PTRP 12. When the officer asked him his name, Salinas gave him the name that was on his identification cards, the one he uses in Mexico, not the name that he has used in the United States before. 3/9/10 PTRP 29. After Salinas gave Officer Kolby his name and identification cards with different names and dates of birth on them², another officer ran a computer records check and ultimately was able to confirm the name of Hector Serano Salinas and matched that to Salinas based on identifying scars and tattoos. FF 17, 18; 3/8/10 PTRP 109-12; 3/9/10 PTRP 30. A felony warrant out of Wenatchee also came back on the records check. FF 17, 18; 3/8/10 PTRP 109-12; 3/9/10 PTRP

² The report of Officer Kolby, who was on military leave time at the time of the hearing, indicated that the wallet was located in Salinas's right pants pocket. 3/8/10 PTRP 148, TRP 349.

31. Salinas admitted the warrant was his and was related to a probation issue he had out of Wenatchee. FF 18; 3/9/10 PTRP 30-31. After he was arrested on the warrant, he was searched incident to arrest. 3/8/10 PTRP 113. He was then transported to the police station where his clothes, including the jacket he had been wearing, were seized by the officer incident to his arrest and as evidence of the rape. 3/8/10 PTRP 129-30, 133, 136-37; 3/9/10 PTRP 12. He was then taken to immigration and then transported back to the jail where he was booked into jail. 3/8/10 PTRP 204; 3/9/10 PTRP 3, 5.

b. Trial

At trial Salinas did not contest that D.P. was raped or the facts of the incident, he only challenged the identity of the person who did it.

On June 28, 2008 while on patrol around 2 a.m., Officers Wubben and Bennett saw a woman flagging them down by the side of the road on Dupont St., above Maritime Heritage Park in Bellingham TRP 181-82, TRP 330-331. After they stopped the woman limped up to the officers. She was so traumatized she could barely speak. TRP 183, TRP 232-33. She had cuts on her nose that were bleeding, her cheek was red and swollen, her right eye was nearly swollen shut and she had dirt and pine needles on her shirt and in her hair. TRP 219, 184-85, TRP 332. While trying to catch her breath, she whispered to the officers, "Help me," and

then a couple seconds later she said “I was raped.” TRP 183, TRP 333. The officers had difficulty getting a coherent statement from her because she could barely talk and would only speak two to three words at a time in a whisper. TRP 188-89. The initial description they got was that it was a Hispanic male with a stocking cap. TRP 187. The officers called for aid, arranged for a K-9 unit to come, and set up a perimeter. TRP 28-30, TRP 183.

The victim, D.P., was homeless and took them to her campsite in the park where it happened. TRP 183, TRP 332. She told the officers he had threatened to kill her with a knife, had hit her with his fist, and then had dragged her into Maritime Park. TRP 189-91, TRP 333. When the officers asked her what happened in the park, she said, “He wanted more,” and told them that he raped her again after dragging her into the park. TRP 186; TRP 333. She told them that he had ejaculated inside her and had used a tissue to wipe himself and her off after he raped her the second time in the park. TRP 189, TRP 33-34. She said he also gave her \$10. TRP 334.

After D.P. was transported to the hospital she continued to be traumatized and continued to cry. TRP 192-93. She was able to provide some additional information about the attack: she said that the guy had a black wallet from which he had given her the \$10, that he had a mustache

and some chin hair and that she thought the knife was a Swiss Army knife.

TRP 193.

Within 30 minutes of the time D.P. contacted police, the K-9 team, Officer Woodward and Justice, a dog trained to track humans, started tracking from the campsite with Officer Bennett providing cover. TRP 336-41, 352, 396-97, 399, 403. The track led them into the park and down towards the water in an area consistent with what D.P. had described.

TRP 341-45. Around 15 minutes into the track, they encountered a transient couple³ who told them they had seen a Hispanic male, with a black hat, about 15 minutes before walk by them in the same direction they were tracking. TRP 342, 365, 410-12. The K-9 team continued to track over a bridge they had previously crossed, past some buildings and down toward Holly St. along the creek. TRP 344-45, 413-18. The dog alerted to a person in a sleeping bag by barking. TRP 344, 423-24.

At the time they tracked to Salinas, they were looking for a Hispanic male with a mustache, wearing dark clothing and a black stocking cap or hat, who had a knife. TRP 345, 412, 423. When Justice tracked to within 10 feet of the person in the sleeping bag and alerted, the officers observed via their flashlight that the person was Hispanic, with a dark complexion and mustache. TRP 345, 423. At the time they

³ The male of the transient couple was not Hispanic and the dog did not alert to him. TRP 410.

contacted Salinas, there hadn't been any breach of the perimeter. TRP 30. No one else appeared to be in the area. TRP 345, 408, 459, 872.

When Officer Woodward yelled at him to show his hands, Salinas hunkered down, but then stood up, put his sleeping bag over his head and face, turned and started walking away. TRP 246, 424-25. After continuing to command him to show his hands, Salinas took the sleeping bag off and started running away towards the bay. TRP 345-46, 424-25. He was next seen hunkered down in a grassy area TRP 347-48. Officers found him hiding near a building and commanded him to lie down on the ground, but he didn't comply with the commands. TRP 431. After warning him that Justice would be released if he didn't comply, Justice was released and permitted to bite Salinas on his shin in order to get him to comply, which he did after he was bitten. TRP 432-33. He was then handcuffed. Id.

When he was found, Salinas was wearing a dark colored jacket, blue jeans, brown boots, and a blue shirt. TRP 32, TRP 439-40. Officers determined that Salinas matched the description of D.P.'s attacker: he was wearing a dark colored jacket, was a Hispanic male with a thick Spanish accent and mustache. TRP 32, TRP 350, 423. Salinas had a maroon backpack with him that had a black baseball-style hat made out of knit stocking cap material, a knife sheath and toilet paper in it. TRP 1038-41,

1047. Salinas also had a wallet with \$28 in it. TRP 1042, 1047. Officer Woodward went back to where Salinas had left his sleeping bag and retrieved a black backpack that Salinas had left there. TRP 441.

At the hospital, oral, rectal and vaginal swabs were taken from D.P. TRP 134. All of the swabs and evidence taken at the hospital were carefully obtained to avoid any cross contamination. TRP 123-24, 130, 145. D.P. told the nurse that her attacker was a Spanish speaking male. TRP 143. The \$10 bill Salinas had given D.P. was found in her sweatpants. TRP 622.

Officers found the site of the second rape the next day. TRP 633-35, 819-21, 1024. The ground was disturbed and there were a number of tissues scattered about the area. TRP 636-37, 1025.

D.P. was shown a photo montage with Salinas's photo in it. TRP 1000-1001. At the time she was still emotionally distraught, crying, her right eye was swollen shut and her left eye was watering, and she was not wearing her glasses. TRP 96-97, TRP 1002-02, 1080. Although she was able to describe her attacker as a Hispanic male with a mustache and chin hair who was wearing blue jeans and a dark stocking hat, a jacket and a dark colored shirt, she was not able to identify Salinas from the montage. TRP 1006, 1011. She told the detective that she had been raped orally, anally and vaginally, and that it had happened first at her campsite and

then he dragged her to another location in the park, raped her again there and then wiped himself off. TRP 1012.

At trial D.P. testified on June 30, 2008 she was homeless and had been camping at Maritime Heritage Park at Dupont Street. TRP 36-38. She had gone to sleep while it was still light out and had been asleep for a while when the smell of a person's body odor woke her up. TRP 39, 45. She woke up to find a man sitting close to her, he was Hispanic and dark-skinned and had a dark colored stocking cap on his head. TRP 45-47. He had a mustache and a goatee and was wearing a dark colored jacket, blue jeans and a pair of dark boots. TRP 48. When she sat up, he reached over and kissed her and she immediately stood up. TRP 49, 51. He stood up too, grabbed her shirt, and hit her three to four times in the face with a closed fist. TRP 51-52. His fist had a knife in it. TRP 51. At some point he showed her his black wallet in which she could see a \$20 and a \$10. TRP 49-50. He was speaking angrily in Spanish. TRP 52. He hit her hard, shoved her over, took off her shoes and pants, knelt between her legs, unbuckled his belt, pulled down his boxers and jeans and made her perform oral sex. TRP 53-57. He held her back down with his hand and then penetrated her anally. TRP 58-59. She yelled as loud as she could for someone to help her. TRP 59. Then he attempted to penetrate her vaginally two to three times, but D.P.'s vagina had been surgically closed

from cervical cancer. TRP 60-62. When she tried to tell him she was too narrow, he didn't appear to understand and licked her vagina. TRP 62-65.

He then pulled his pants back on, grabbed her arm and dragged her down the concrete stairs. TRP 65-67. D.P. told him she had grandchildren because she was afraid he was going to kill her. TRP 67. At the bottom of the stairs he made her stand up and walked her across the bridge to an area where the trails were closed. TRP 68. They went under the signs around some machinery along the dirt until they came to some trees that he made her crawl underneath. TRP 68-69.

He took off his dark jacket and made her sit on the inside of it, then lifted her shirt and licked her breast. TRP 69. He undid his belt, pulled his jeans down to his knees and had a knife on the ground. TRP 69-71. When he was done with her, he put the knife away and wiped himself off with toilet paper and then attempted to bury the toilet paper. TRP 69-70. He asked her if she needed money, and she nodded yes, but she didn't mean she wanted his money. TRP 70. He then gave her a \$10 bill from the wallet. TRP 70-71. D.P. then tried to find her way back up to Dupont Street but had difficulty because her eye was so blurry and dysfunctional. TRP 73-74.

D.P. testified that she had seen the man who raped her walking in the park before and was able to identify Salinas in court. TRP 81-82.

When the clothing, rape kit swabs and DNA samples were tested at the Washington State Patrol Crime Lab, it was determined that the DNA profile on the outside of Salinas's jacket, a single source, matched D.P.'s. TRP 712, Supp CP __, Ex. 113. The DNA found on the inside of the jacket was a mixed source and it was determined that D.P.'s DNA profile was consistent with being the main source of the DNA, and Salinas could not be excluded as the source for the minor DNA. TRP 713-14, Ex. 113. The probability that the DNA profile was someone other than D.P. was 1 in 530 trillion. Ex. 113.

The boxers and briefs both showed mixed DNA profiles. TRP 725-28, Ex. 113. The briefs' profiles were consistent with a mixture of D.P.'s and Salinas's DNA, and the probability that DNA profile found on the briefs was someone other than D.P. was 1 in 23 trillion. TRP 726-27, Ex. 113. The probability that the DNA profile found on the boxers was someone other than D.P. was 1 in 530 trillion. TRP 728, Ex. 113.

The perineal/vaginal swab was also examined, and it was determined to have a DNA profile that matched Salinas's. TRP 783-87, Supp CP __, Ex. 114. The probability that someone else had that same DNA profile was one in 15 trillion. TRP 787-88, Ex. 114.

At trial Salinas testified that he had gone to a church near the mission shelter in the evening and had left around 8 p.m. TRP 1208-09.

Around 9 p.m. he got to the train tracks and stayed until the officers found him sleeping there. TRP 1212-13. Around 10 p.m. that night he claimed two persons asked him for cigarettes. TRP 1213. He testified he had found a bag with clothing and other items in it earlier in the evening. TRP 1214-15. He testified he took the black bag and put on some of clothing, a pair of jeans and jacket, that was in it. TRP 1215, 1230. He said he put the jeans on even though he had a clean pair of khakis in his maroon backpack. TRP 1228, 1266. He said he did not go up into the park and woke up to someone yelling at him, he didn't know it was the police. TRP 1217. He walked away from the people because he thought it was the persons who had asked for a cigarette before. TRP 1218. Although he claimed the boxers he was wearing weren't his, he did admit that the briefs were. TRP 1237. While he claimed the black bag from which he took the other clothing was not his, he could not explain how his special skin cream was inside it and admitted that some other items in the black backpack were his. TRP 1238, 1245, 1266.

D. ARGUMENT

Salinas contends that his constitutional rights under both the state and federal constitutions were violated when the officers seized and searched his wallet and clothing. The search and seizure of those items were both valid as a search incident to arrest of his person. Salinas

attempts to apply post *Gant* cases to a search incident to arrest of a person, but they are inapposite, and Washington case law has previously held that the search incident to arrest of a person under the state constitution is coextensive with the federal constitution. Alternatively, the search/seizure of the wallet was valid pursuant to *Terry*, and the search and seizure of the clothing valid pursuant to probable cause and exigent circumstances. Even if Salinas had been successful with his motion to suppress below, it would not have resulted in suppression of the perineal/vaginal swab from the rape kit, which when tested was determined to have a DNA profile in it that matched Salinas's.

Salinas also asserts that the officers violated RCW 10.31.030 in not permitting him to post bail on the probation violation warrant, and that any evidence related to his clothing should therefore be suppressed. The clothing, however, was seized pursuant to his arrest on the probation violation warrant and the rape investigation, *before* he was booked into jail. RCW 10.31.030 only applies to booking inventory searches. Therefore, the statute doesn't provide a basis to suppress the clothing evidence.

Contrary to Salinas's assertion, the trial court did not abuse its discretion in determining that the State had met the foundational requirements to admit the testimony regarding the dog track. While

defense counsel could have requested an instruction on the dog track evidence, the outcome of the case would not have been any different if he had. The dog track evidence was but one piece of the evidence presented regarding identity: there was D.P.'s in court identification, the DNA evidence and the corroborating circumstantial evidence regarding his clothing and physical characteristics.

The court also did not abuse its discretion in ruling that D.P. would be permitted to make an in-court identification if the State could lay a foundation for her to do so. D.P. testified that she had seen Salinas in the park before that night and that she recognized him in court. She then identified Salinas in court. Any issues regarding the credibility of her in-court identification were properly left to the jury, as the trial court decided.

Salinas raises a number of issues related to his persistent offender sentence. The procedure for determining a persistent offender sentence and the standard of proof required have previously been addressed by Washington courts. The evidence the State presented was sufficient to prove by a preponderance and even, as the judge found, beyond a reasonable doubt that Salinas was the person who had been convicted of the 1994 first degree robbery. The State concedes that the kidnapping conviction should be vacated as it merged with the first degree rape conviction. Finally, if the Court determines that the issue of same course

of criminal conduct is not moot given Salinas's persistent offender sentence or waived, the State requests that this Court remand the matter to the trial court for that determination and a determination regarding his offender score.

- 1. The seizure of the wallet and clothing, and subsequent search of those items, did not violated Salinas's state or federal constitutional rights.**

While the focus of the defense motion below was that there was not a sufficient basis to detain Salinas under *Terry* and no probable cause to arrest him, on appeal Salinas does not appear to contest either issue. CP 82-86, 98-111. Instead, he asserts that the seizure and search of his wallet violated his constitutional rights because he was not under arrest at the time. Second, he asserts that the seizure of his clothing violated the post-*Gant* cases limiting the search of a car incident to arrest to evidence of the crime for which the person is arrested. He also asserts that even if there were a basis to seize the clothing, the subsequent testing of the clothing violated his constitutional rights. The search and seizure of the clothing and wallet were pursuant to well-established exceptions to the warrant requirement and therefore neither his state or federal constitutional rights were violated.

A trial court's decision regarding a CrR 3.6 motion is reviewed on appeal to determine whether substantial evidence supports the findings of fact, and then whether those findings of fact support the trial court's conclusions of law. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Challenged findings of fact supported by substantial evidence are binding. O'Neill, 148 Wn.2d at 571. Substantial evidence is evidence in the record sufficient "to persuade a fair-minded, rational person of the truth of the finding." Hill, 123 Wn.2d at 644. A court's oral findings can be used to supplement the court's written findings as long as they don't contradict the written findings. State v. Bynum, 76 Wn. App. 262, 266, 884 P.2d 10 (1994), *rev. den.*, 126 Wn.2d 1012 (1995).

In general a trial court's conclusions of law on a motion to suppress are reviewed de novo. State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2010). Credibility determinations, however, are left to the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A trial court's decision on the validity of a warrantless search is reviewed de novo. State v. Kypreos, 110 Wn. App. 612, 616, 39 P.3d 371, *remanded on other grounds*, 147 Wn.2d 1001 (2002). The State bears the burden of proving that a search was

reasonable, or an exception to the warrant requirement applies, if a valid warrant did not authorize the search. State v. Hopkins, 113 Wn. App. 954, 958, 55 P.3d 691 (2002). A trial court's determination regarding custody is reviewed de novo. State v. Gering, 146 Wn. App. 564, 567, 192 P.3d 935 (2008).

a. search incident to arrest

A search incident to arrest is a well-established exception to the warrant requirement. State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992).

“Searches incident to a lawful custodial arrest are lawful under a recognized exception to the warrant requirement, even under the broader protection provided by article I, section 7 of the Washington Constitution.

State v. Craig, 115 Wn. App. 191, 194-95, 61 P.3d 340 (2002). A “valid custodial arrest is a condition precedent to a search incident to arrest as an exception to the warrant requirement under article I, section 7.” O’Neill, 148 Wn.2d at 585. An officer may not search pursuant to a non-custodial arrest. Craig, 115 Wn. App. at 195.

In order to determine whether a person is under custodial arrest versus non-custodial arrest, a court considers the objective manifestations of law enforcement and not their subjective beliefs. Gering, 146 Wn. App. at 567; *accord*, State v. Radka, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004).

“A suspect is in custody if a reasonable person in the suspect’s circumstances would believe his movements were restricted to a degree associated with formal arrest,” or “a reasonable detainee would consider himself or herself under full custodial arrest.” Gering, 146 Wn. App. at 567. The fact that a suspect is not told that he is under arrest does not preclude a finding that the suspect was under custodial arrest. *See, Gering*, 146 Wn. App. at 567 (person suspected of driving while license suspended was under custodial arrest where, after he had been observed driving and parking the car, officer approached him in store and asked him to step outside, arrested him and handcuffed him although suspect may not have been told he was under arrest).

The scope of a search of a person incident to their arrest is not limited to a search for weapons or for evidence of the crime of arrest.

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, ...

State v. McIntosh, 42 Wn. App. 573, 578, 712 P.2d 319, *rev. den.*, 105 Wn.2d 1015 (1986) (*quoting United States v. Robinson*, 414 U.S. 218,

235, 94 S.Ct. 467, 38 L.Ed.2d 456 (1973)). This same standard applies under the Washington Constitution. State v. LaTourette, 49 Wn. App. 119, 127-29, 741 P.2d 1033 (1987), *rev. den.*, 109 Wn.2d 1025 (1988); *see also*, State v. Parker 139 Wn.2d 486, 499-500, 987 P.2d 73 (1999). The search of a person incident to arrest, permits a rather extensive search of the person and is differentiated from the search permitted in a *Terry* stop:

‘[A search incident to arrest], although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, is also justified on other grounds, and can therefore involve a relatively extensive exploration of the person. A search for weapons *in the absence of probable cause to arrest*, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a “full” search, even though it remains a serious intrusion.

‘... An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person.’

Parker, 139 Wn. 2d at 499-500 (*quoting Robinson*, 414 U.S. at 227–28)

(emphasis added). The difference in scope of search is due to the fact that

once arrested, a person has a diminished expectation of privacy of the person, including personal possessions closely associated with the person's clothing. State v. White, 44 Wash. App. 276, 278, 722 P.2d 118, *rev. den.*, 107 Wn.2d 1006 (1986). The scope of a search incident to arrest does not depend upon whether it is based on a warrant or probable cause. State v. Jordan, 92 Wn. App. 25, 27, 30-31, 960 P.2d 949 (1998), *rev. den.*, 137 Wn.2d 1006 (1999).

A search incident to arrest extends to the pockets of the arrested person's clothing no matter whether the item was immediately recognizable as contraband or not. *See, Jordan*, 92 Wn. App. at 30-31 (searches of defendant's pockets which revealed closed containers containing unlawful drugs pursuant to search incident to arrest on warrants did not exceed the scope of a search incident to arrest); State v. Gammon, 61 Wn. App. 858, 863, 812 P.2d 885 (1991) (officer's search of pill vial with defendant's name on it found in defendant's pocket permissible as search incident to arrest on shoplifting); White, 44 Wn. App. 276.; LaTourette, 49 Wn. App. at 129 ("Here the warrantless search of LaTourette's person, including his pants pocket, incident to a lawful arrest was reasonable."); *see also, State v. Whitney* 156 Wn. App. 405, 409-10, 232 P.3d 582, *rev. den.*, 170 Wn.2d 1004 (2010) (officer's search of pill bottle found on defendant's person after searching him incident to arrest

was valid search incident to arrest under Fourth Amendment). Law enforcement is also entitled to seize a defendant's clothing as evidence of the crime pursuant to a search incident to arrest. United States v. Edwards, 415 U.S. 800, 804-05, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974). It may do so even if there is a substantial lapse in time between the arrest and the subsequent seizure of the clothing at the police station or jail. *Id.* at 807-08.

The court here determined that the seizure and search of the wallet and clothing were permissible as incident to Salinas's arrest on probable cause for the rape and on the warrant. CL 4, 7. The court found that Salinas was under custodial arrest, based on probable cause for assault and rape, when he was found hiding and apprehended. CL 2, 3. Salinas, in fact, believed himself to be in custody at that time. 3/10/10 PTRP 12. There can be little doubt that a reasonable person in Salinas's position at that time would believe that he was under full custodial arrest. He had been pursued after fleeing, he was commanded to stay on the ground, the dog was released in order to get him to comply and he was handcuffed. Salinas was actually in custody on the rape charge at the time he was apprehended, before anything was seized or searched.

Even if this Court were to determine that Salinas was not under custodial arrest on the rape charge, law enforcement still had the ability to

use the clothing seized after his formal arrest on the warrant to prosecute him for the rape offense. “Evidence seized incident to a lawful arrest may be used to prosecute the person for a crime other than that for which he was initially apprehended.” LaTourette, 49 Wn. App. at 129; *accord*, White, 44 Wash. App. at 278; United States v. Lester, 647 F.2d 869 (8th Cir. 1981)⁴.

(i) Automobile search cases under the State constitution do not apply in this context.

Salinas asserts that under the recent automobile search cases that a search incident to arrest is limited to an officer safety search and a search for evidence of the crime of arrest. He, however, has failed to provide any *Gunwall*⁵ analysis in this context and cannot rely upon the automobile search incident to arrest cases as a basis for providing greater protection in

⁴ In United States v. Lester, 647 F.2d 869 (8th Cir. 1981), the court determined that the seizure of defendant’s clothing as evidence for the crime of assault/murder after he was placed in jail for detoxification did not violate the Fourth Amendment. In that case, federal officers were informed of a beating incident that occurred on tribal land. While contacting one of the suspects, an officer noticed blood on the suspect’s pants. The suspect, however, appeared intoxicated and the officer placed him in custody for detoxification per tribal statute. *Id.* at 871-72. At the jail, the suspect was placed in a cell after being searched. About 30-45 minutes later his clothing was taken and he was given coveralls. *Id.* at 872. The officer who seized the clothing observed blood on them and then transferred the clothing to the FBI for the murder investigation. *Id.* Applying the Fourth Amendment, the court initially determined that the validity of the search did not depend upon the officer’s stated grounds for the arrest, that the issue was whether the officers had actual probable cause to arrest the suspect on murder at the time he was arrested. *Id.* at 873. Noting that the clothing was in plain view and subject to seizure under that rationale, the court held that the clothing was lawfully seized as incident to the suspect’s custodial arrest. *Id.* at 873-74. “[T]he search and attendant seizure of appellant’s clothing was valid and reasonable under the circumstances, and the evidence seized therefrom admissible even though it was unrelated to the rationale for which Lester was initially arrested.” *Id.* at 874.

⁵ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

the context of search of person cases. Absent a *Gunwall* analysis an appellate court generally will not address an independent state constitutional ground. State v. Olivas, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993) (“under criteria announced in *Gunwall*, six nonexclusive factors must be briefed before this court will consider an independent state constitutional claim”). Absent a previous analysis specific to the situation or circumstances, or an analysis within the appeal, the reviewing court is to apply federal constitutional law. Olivas, 122 Wn.2d at 85-86 (J. Owens concurring).

While Art. 1, Section 7 does provide greater protection than the Fourth Amendment in some contexts and circumstances, not every “right” under Art. 1, Section 7 qualifies as a “private affair.” State v. Surge, 160 Wn.2d 65, 73, 156 P.3d 208 (2007). A person’s Art. I, Section 7 rights can depend upon the person’s status at the time of the asserted interest, e.g., arrestee, probationer, etc. *Id.* at 74. In fact, in Surge the majority noted that it had previously held that an arrestee loses any expectation of privacy under Art. 1, Section 7 in personal items that have already been exposed to police view. *Id.* at 73. Washington courts have previously concluded that the state constitution affords no greater protection than the Fourth Amendment in the context of warrantless bodily searches. *See*, State v. Audley, 77 Wn. App. 897, 894 P.2d 1359 (1995) (in context of

statutory provision regarding warrantless strip searches); State v. Curran, 116 Wn.2d 174, 804 P.2d 558 (1991), *abrogated on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997) (in context of statutory provision regarding warrantless involuntary blood draws). In Parker the court noted that Washington's Art. I, section 7 precedent regarding searches incident to arrest was in accord with the Fourth Amendment analysis and approach under United States v. Robinson, *supra. Parker*, 139 Wn. 2d at 500.

Division III of the Court of Appeals recently addressed whether the Gant limitations on a search of an automobile incident to arrest could be extended to searches of a person incident to arrest and found they did not. Whitney, 156 Wn. App. at 405. The court drew a clear distinction between automobile searches and searches of a person incident to arrest. *Id.* at 409. It cited to prior Washington caselaw, White and Gammon, which had clearly held searches of persons incident to arrest were not limited to searches for evidence of the crime of arrest, noting a person's diminished expectation of privacy in a search of a person incident to arrest. *Id.* 409-10. Ringer⁶, Washington's pre-Stroud⁷ case holding that searches of automobiles incident to arrest were limited to officer safety

⁶ State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983), *overruled by State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986).

⁷ State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), *overruled by State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009).

purposes and to search for evidence of the crime of arrest, was determined not to apply to searches of persons incident to arrest in Gammon and LaTourette. Gammon, 61 Wn. App. at 862; LaTourette, 49 Wn. App. at 127, 129. Recent caselaw regarding searches of automobiles incident to arrest do not apply to searches of persons incident to arrest.

b. Seizure & search of wallet permissible under Terry

Any seizure of Salinas's wallet can also be upheld under the alternative basis of *Terry*. See, State v. Bobic, 140 Wn.2d 250, 257-258, 996 P.2d 610 (2000) (trial court's denial of a motion to suppress may be upheld on an alternative ground supported by the record).

When police officers have a "well-founded suspicion not amounting to probable cause" to arrest, they may nonetheless stop a suspected person, identify themselves, and ask that person for identification and an explanation of his or her activities.

State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). Law enforcement may also conduct a warrants check during the investigatory stop. State v. Rowell, 144 Wn. App. 453, 182 P.3d 1011 (2008), *rev. den.*, 165 Wn.2d 1021 (2009); *see also*, State v. Perea, 85 Wn. App. 339, 932 P.2d 1258 (1997) (officers may temporarily detain a suspect pending results of radio check).

At the CrR 3.6 hearing, Salinas testified he gave the officer his name and his identification cards. Salinas testified that he didn't give the officer the name of Hector Serano Salinas, but Isaac Zacharias Salinas. "Isaac Salinas" didn't come back with any computer record but Hector Salinas did. Therefore it would have been reasonable in the scope of a *Terry* detention to obtain further identification from Salinas in order to determine his identity.

Even if Salinas had not voluntarily provided his name and/or identification cards, law enforcement could have demanded them as part of the *Terry* stop. "[D]etermining a suspect's identity is an important aspect of police authority under *Terry*. United States v. Christian, 356 F.3d 1103, 1106 (9th Cir. 2004), *cert. denied*, 543 U.S. 933 (2004).

To preclude police from ascertaining the identity of their suspects would often prevent officers from fully investigating possible criminal behavior. Narrowly circumscribing an officer's ability to persist until he obtains the identification of a suspect might deprive him of the ability to relocate the suspect in the future. In other words, if he lacked probable cause to arrest a suspect on the spot, the officer would have to "simply shrug his shoulders and allow a crime to occur or a criminal to escape." ... To require this all-or-nothing response would undermine *Terry's* goal of allowing police "to adopt an intermediate response."

Learning a suspect's identity also drives *Terry's* other important policy—protecting the officer from harm. On learning a suspect's true name, the officer can run a background check to determine whether a suspect has an outstanding arrest warrant, or a history of violent crime. This

information could be as important to an officer's safety as knowing that the suspect is carrying a weapon.

Id. at 1106-07 (internal citation omitted). Police may demand a suspect's identification during a *Terry* stop as long as the request is reasonably related to the detention. Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 542 U.S. 177, 188-89, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). "The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop." Id. at 187.

Here, if the officer had demanded the identification, it would have been reasonably related to the stop. The victim did not know the name of the person who raped her. Based on the information available to officers, Salinas appeared to be a transient and had fled upon being contacted by police. While Salinas gave the officers a name, no computer record came back to that name. Even if the officer did remove Salinas's wallet and removed the identification cards, he was permitted to do so since there was a need to determine his identity as part of their investigation into the rape. See Christian, 356 F. 3d at 1107-08 (while investigating report of man, known as "Mr. James" by the victim, who had brandished a gun, when routine records check revealed no person with the name provided by defendant, officers "continued pressing" of defendant for his true identity was reasonably related to the scope of the *Terry* stop).

c. *Seizure of clothing was permissible based upon probable cause and exigent circumstances*

The seizure of Salinas's clothing can also be upheld under the alternative basis of probable cause plus exigent circumstances. Under Art. 1 §7 of the Washington Constitution, exigent circumstances is one of the limited and well-recognized exceptions to the warrant requirement where probable cause exists. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). The exigent circumstances exception applies where "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." *Id.* at 370. Previous examples recognized by Washington courts include: "1) hot pursuit; 2) fleeing suspect; 3) danger to arresting officer or to the public; 4) mobility of the vehicle; and 5) mobility or destruction of the evidence." *Id.* In determining whether exigent circumstances existed, a court looks at the totality of the circumstances. *Id.*

In State v. Smith, 88 Wn.2d 127, 59 P.2d 970 (1977), the court upheld the seizure and search of the defendant's clothing that he had worn earlier that day when his son drowned. At the time the defendant's clothing was seized defendant was in the hospital and the clothing was located in a public area within the hospital. *Id.* at 139. The court found

that there was probable cause to believe that the defendant had been involved in the death of his son by strangulation and drowning.⁸ *Id.* The court further found that exigent circumstances justified the seizure of defendant's clothing by law enforcement and the subsequent search of that clothing. *Id.* at 141-42. The court found that the wetness of the pants, with the sand and mud on them, presented law enforcement with an exigent circumstance since the pants could have lost their significance as evidence if they had been washed and/or permitted to dry. *Id.* at 142.

In this case, Salinas does not contest that there was probable cause to arrest him on a rape charge⁹. If the seizure of his clothing was not valid pursuant to a search incident to his arrest, the exigent circumstance that justified a warrantless seizure of his clothing was that Salinas could have attempted to destroy the evidence the clothing contained because he was wearing them. In order to prevent the destruction of the evidence that was still under his control, law enforcement was entitled, as it was in Smith, to seize the clothing.

⁸ The court also found that the hospital had joint control over the defendant's clothing and that the defendant had no reasonable expectation of privacy in the physical condition of his clothes. *Id.* at 139-40.

⁹ "Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed." State v. Huff, 64 Wn. App. 641, 646, 826 P.2d 698, *rev. den.*, 119 Wn.2d (1992). An officer's subjective belief that an offense has been committed will not render an arrest without probable cause lawful, and an arrest supported by probable cause is not made unlawful by an officer's subjective belief or announcement of an offense different than the one for which there was probable cause. *Id.*

d. Testing of clothing

Salinas also asserts that even if there was a basis to seize the clothing there was no justification for testing the clothing absent a warrant. Under the Fourth Amendment, items lawfully seized may be transferred and subject to testing at a laboratory without a warrant. Edwards, 415 U.S. at 803-04. In the context of an inventory search of clothing at the time of booking, the court in Cheatam held under Art. I, Section 7 of the Washington Constitution:

Once police have conducted a valid inventory search of an inmate's clothing and other effects at booking, and have placed them in storage for safekeeping in accord with a proper inventory procedure, the inmate has lost any privacy interest in those items that have already lawfully been exposed to police view. He or she is no longer entitled to hold a privacy interest in the already searched items free from further governmental searches. It makes no difference, as other courts have held under the Fourth Amendment and state constitutions, that an investigation is being conducted into a different crime than the one the inmate was arrested for, because one's privacy interest does not change depending on which crime is under investigation once lawful exposure has already occurred.

State v. Cheatam, 150 Wn. 2d 626, 642, 81 P.3d 830 (2003). Evidence legally obtained by one police agency may be made available to other law enforcement agencies without a warrant, even for a use different from that for which it was originally taken. United States v. Lester, 647 F.2d 869 (1981).

At the time that Salinas's clothes were sent to the Washington State crime lab, he no longer had an expectation of privacy in the clothes as they were already in the custody of law enforcement, and therefore the subsequent testing of the clothes did not violate either his Fourth Amendment or Art. I, Section 7 rights.

2. RCW 10.31.030 does not apply to searches or seizures incident to arrest.

Salinas next asserts that his clothing should not have been searched because he was not advised of his right to post bail on the probation violation warrant under RCW 10.31.030. RCW 10.31.030 does not apply to searches incident to arrest, but only to inventory searches conducted prior to booking defendants into jail. Jordan, 92 Wn. App. at 28, *accord*, State v. Ross, 106 Wn. App. 876, 883, 26 P.3d 298 (2001), *rev. den.*, 145 Wn.2d 1016 (2002). The seizure of Salinas's clothing occurred incident to his arrest. While it was conducted at the police station, it occurred as soon as practicable after his arrest because it would have been unreasonable for law enforcement to seize his clothing at the time he was arrested on the street. RCW 10.31.030 would have only applied to the inventory search that was conducted at booking. Salinas's clothing had already been seized at the time of booking, and therefore that statutory provision does not apply to this case. While the trial court found that the statute as construed

in State v. Smith, 56 Wn. App. 145, 783 P.2d 95 (1989), *rev. den.*, 114 Wn.2d 1019 (1990), didn't apply to the case because a more serious, felonious, crime was involved here than the misdemeanor at issue in Smith, the trial court also found that the statute providing for an opportunity to post bail and be released did not apply to the search incident to arrest. The court did not err in denying the motion to suppress on this basis.

3. The trial court did not abuse its discretion in admitting evidence of the dog track evidence.

Salinas next asserts that the trial court erred in admitting evidence of the K-9 track to him. A trial court's determination regarding the admissibility of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. den.*, 518 U.S. 1026 (1996). Evidence of a dog-track is admissible if a proper foundation is laid showing the qualifications of the handler and dog. State v. Loucks, 98 Wn. 2d 563, 566, 656 P.2d 480 (1983). In order to meet the foundation to admit evidence of a dog-track, the State must show:

(1) the handler was qualified by training and experience to use the dog, (2) the dog was adequately trained in tracking humans, (3) the dog has, in actual cases, been found by experience to be reliable in pursuing human track, (4) the dog was placed on track where circumstances indicated the guilty party to have been, and (5) the trail had not become so stale or contaminated as to be beyond the dog's competency to follow.

Id.

The trial court determined that the State had laid an adequate foundation, finding that the issues raised by the defense went to the weight and credibility and not admissibility. Supp. CP 192, CL 3. The court found that the K-9 handler, Dep. Woodward and the dog were adequately trained in tracking humans, finding that the team had been trained to track humans, had over 500 hours of training, and had been certified. FF 1. The court also found that the dog had in actual cases been found to be reliable in tracking humans, had successfully tracked humans in 2007 and 2008, and had over 50 successful humans which resulted in arrest of individuals. FF 3. The dog was placed on the track and started to track at the location of where the initial rape occurred. FF 4. The court found that the track was not stale or contaminated as the dog was able to conduct the track and indicated that it was tracking a fresh scent. FF 5. The court addressed all the foundation requirements and did not abuse its discretion in determining that evidence of the dog track was admissible.

Salinas asserts that there wasn't sufficient evidence of the dog's being successful in actual application and that the dog's failure to track to the secondary site and the time lapse indicate that the dog was not tracking "the guilty party." "Success" was defined by Dep. Woodward as an

apprehension or find. 3/8/10 PTRP 38. He testified in 2008 57 of the 71 actual tracks were successful, and in 2007 Justice had 19 actual captures or arrests. 3/8/10 PTRP 40-41. He testified that Justice should be able to pick up a scent within 45 minutes to an hour after an event has occurred, and that there weren't any conditions that night that would have adversely affected the scent. 3/8/10 PTRP 44-45. Here, as acknowledged by Salinas, the track occurred around 30 minutes after the rape, well within the time period for a successful track. Loucks does not require that a dog be successful¹⁰ every time he tracks in order for a dog track to be admissible. All that is required is that the dog has been found in actual cases to be reliable in pursuing human track. The testimony demonstrated that Justice had been found to be reliable in tracking humans in actual cases. *See, State v. Welker*, 37 Wn. App. 628, 637, 683 P.2d 110, *rev. den.*, 102 Wn.2d 1006 (1984) (although dog had only had one successful track that resulted in the arrest of a human, the dog's success tracking in two other cases in which the human escaped in an automobile and its success in tracking humans in training was sufficient to meet the foundational factor regarding dog's reliability in tracking). The foundation was sufficient to admit the evidence of the dog track.

¹⁰ As testified to by Dep. Nyhus at trial, some tracks may not be "successful" because, for example, the person being tracked could have been picked up by a vehicle. TRP 593.

4. Even if defense counsel had requested an instruction regarding the dog track evidence, it would not have affected the outcome of the case.

Salinas next asserts that defense counsel was ineffective for failing to request an instruction on the evidence of the dog track. While there is nothing in the record to indicate why defense counsel did not, Salinas cannot demonstrate that there is a reasonable probability that but for the lack of such an instruction, the outcome of the case would have been different. There was significant additional evidence that identified Salinas as the victim's attacker: the victim identified Salinas in court as the one who raped her; Salinas's DNA profile was found to match the DNA on the rape kit swab taken from the victim's vaginal area; the DNA found on Salinas's jacket matched D.P.'s DNA profile; Salinas matched the description that the victim gave immediately after the rape occurred; no one else was observed in the area aside from a transient couple, one of whom was female and the other was not Hispanic; and Salinas fled when he was contacted by the police. Even if an accurate instruction had been given stating simply that dog track evidence alone is insufficient to convict a defendant and that there must be corroborating evidence to support it, any such instruction would not have changed the outcome of the case.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15; Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003).

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." West, 139 Wn.2d at 46, (*citing Strickland*, 466 U.S. at 693). A reviewing court need

not address both prongs of the test if a petitioner fails to make a sufficient showing under one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.” Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

In the context of dog track evidence, two prior cases have held an accurate instruction must be given in an appropriate case when requested. *See*, State v. Ellis, 48 Wn. App. 333, 738 P.2d 1085, *rev. den.*, 109 Wn.2d 1002 (1987); State v. Wagner, 36 Wn. App. 286, 673 P.2d 638 (1983). In Wagner, the court held it was reversible error to fail to give such an instruction when requested because a defendant may not be found guilty based solely on the evidence of a dog track. Wagner, 36 Wn. App. at 287-88. In Ellis the court held that “when requested in an appropriate case the instruction must be given.” Ellis, 48 Wn. App. at 335. An accurate instruction would be limited to advising the jury that the dog track evidence must be viewed with caution, that it must be considered with all the other testimony and that in the absence of other evidence of guilt, it is insufficient to warrant a conviction. Ellis, 48 Wn. App. at 335. “[G]enerally where abundant evidence corroborates dog tracking evidence, failure to provide the instruction is of minor significance.” State

v. Bockman, 37 Wn. App. 474, 484, 682 P.2d 925, *rev. den.*, 102 Wn.2d 1002 (1984).

Where, as here, there was significant other evidence establishing Salinas as the person who raped the victim, the failure to request such an instruction was of limited significance. Here, the victim reported the rape within approximately a half an hour of it occurring. She described her attacker as an Hispanic looking male who spoke Spanish, had a mustache and chin hair or a goatee, and that he had been wearing a dark coat, jeans with a belt, boxers, and boots. She also stated he had a black hat or cap and had a black wallet inside of which there was at least one \$20 bill. She stated that the rapist had cleaned himself off with some tissue and that he had had a knife. A knife sheath and tissue and a black cap were found in the maroon backpack that Salinas was found with and claimed was his. When the K-9 team tracked to Salinas, near where the incident occurred, Salinas fled and tried to hide from law enforcement. No one else matching the description given by the victim was seen in the vicinity of the incident. Although she was unable to identify Salinas in a photo montage the day after she was raped, perhaps due to the fact that one eye was swollen shut and that she did not have her glasses on, she was able to identify him in court. In fact, it appears that she became emotional when she did so. TRP 1282.

DNA matching D.P.'s profile was found on the jacket that Salinas was wearing at the time he was arrested, as well as his boxers and briefs. DNA matching Salinas's profile was found within the DNA from the swab of D.P.'s perineal/vaginal area. While defense attempted to make much of an initial error that occurred with one of the DNA tests at trial, the test was redone and didn't affect the other results. TRP 730-34, 763-69. DNA matching D.P.'s profile was found both inside the jacket as well as on the outside jacket sleeve. While defense also tried to cast doubt on the DNA testing of the vaginal swab, the defense expert admitted that he didn't see any evidence of contamination regarding the testing of the vaginal swab DNA, and agreed Salinas couldn't be excluded as the contributor of the DNA, although he claimed that it could have been from a brother or relative of Salinas. TRP 1138-53. Salinas, however, testified, he didn't have any relatives in the Bellingham area. TRP 1243. The expert also acknowledged that the mixed DNA profile on the inside of the jacket was consistent with D.P.'s and Salinas's profiles. TRP 1169. Ultimately the defense expert admitted that it was unlikely that the DNA was not Salinas's. TRP 1157.

Finally, Salinas' story he testified to at trial was not consistent with what he had told police soon after he was arrested. At trial he testified that he found the jeans, boxers and jacket that had the DNA on them in the

park earlier that day, and that after he had put those on, he went back to his camp around 9 p.m. where he was found by the K-9 team. However, the rape didn't occur until sometime after 1:00 a.m., so Salinas's attempt to insinuate that he was wearing the clothes of the person who had raped the victim didn't make any sense, because the rape hadn't occurred yet. Moreover, Salinas never told the police that the clothing he was wearing when arrested wasn't his or that he had obtained them earlier that night.

There was more than sufficient evidence corroborating the identity of the rapist as Salinas. Defense counsel's failure to request an instruction on the dog track evidence, even if not strategic, had little, if any, effect on the outcome of the case.

5. The court properly ruled that the State could introduce evidence of an in-court identification by D.P. if the foundation could be laid.

Salinas next contends that the trial court erred in admitting D.P.'s in-court identification of Salinas. Unless there is a due process violation, inconsistencies and uncertainty regarding identification go to weight, not admissibility. State v. Vaughn, 101 Wn.2d 604, 610, 682 P.2d 878 (1984); State v. Gosby, 85 Wn.2d 758, 760, 539 P.2d 680 (1975) ("traditional common law rule is that any evidence tending to identify the accused is relevant, competent, and therefore admissible;" inconsistencies only affect weight). "[W]here ... there is no allegation that impermissibly suggestive

identification procedures were utilized, the due process clause does not condition the admissibility of identification testimony upon proof of its reliability.” Vaughn, 101 Wn. 2d at 605. As with other evidentiary rulings, the trial court’s decision regarding admissibility of identification evidence is reviewed for manifest abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001), *rev. den.*, 146 Wn.2d 1022 (2002).

In order to show a due process violation, a defendant must first show that the particular identification procedure was impermissibly suggestive. Vaughn, 101 Wn.2d at 610-11; Kinard, 109 Wn. App. at 433. Only once the defendant has met that burden will a court address whether, under the totality of the circumstances, that suggestiveness created a substantial likelihood of irreparable misidentification. Vaughn 101 Wn.2d at 610-11. Kinard, 109 Wn. App. at 433. Where the defendant does not allege that a police identification procedure was improper, identification evidence is admissible, subject to impeachment with defense evidence regarding reliability. State v. Linares, 98 Wn. App. 397, 400-401, 989 P.2d 591 (1999), *rev. den.*, 140 Wn.2d 1027 (2000); *see also*, State v. Eacret, 94 Wn. App. 282, 285, 971 P.2d 109 (1999) (“When there is no evidence of suggestiveness in the photographic identification procedure, the inquiry ends; in such a case, any uncertainty or inconsistency in

identification testimony goes only to its weight, not to its admissibility.”). A person’s race is merely an identifying characteristic, and the fact that a defendant is the only person of that race does not render an in-court identification impermissibly suggestive. State v. Brown, 76 Wn. 2d 352, 353, 458 P.2d 165 (1969).

In his motion in limine to exclude any in-court identification, Salinas only asserted that any in-court identification would be impermissibly suggestive because “the complainant has no one else to identify as her attacker.” CP 93-95. Salinas did not argue any taint from the prior photo montage because the victim was unable to identify Salinas from the montage. Id. The trial court ruled that as long as the State could lay a foundation for her in-court identification, *i.e.*, that the victim had an independent basis for any such identification, she would be permitted to make an in-court identification. TRP 12. In so ruling, the court noted that in addition to D.P. not having been able to make an identification from the montage, the montage itself had not been impermissibly suggestive. TRP 11-12. The court found that the foundation would be laid if the victim testified that she had previously seen him and could express in what context and that this was the person who attacked her. TRP 12-13. At trial the victim testified that she had seen him before the rape occurred, that she had seen him walking to the park more than once. TRP 81-82. She

testified that she did see him in court and then she identified Salinas. TRP 82. Defense did not object to the sufficiency of the foundation laid at the time D.P. made the in-court identification and therefore waived any issue with respect to the actual foundation laid at the time of trial.

Salinas never asserted that the in-court identification was tainted by a prior impermissibly suggestive identification procedure. His claim thus fails. The trial court properly found that the issue of reliability of the identification, the passage of time and her inability to previously identify him, would go to weight, whether the jury believed the in-court identification, but that it would not affect the admissibility of the in-court identification.

6. Imposing a sentence on count IV, the kidnapping conviction, violated double jeopardy.

Salinas asserts that his kidnapping conviction should be vacated because it merged with the first degree rape. Convictions for offenses that merge into a greater offense under double jeopardy generally should be vacated even where the lesser offenses were not considered for any purpose at sentencing. “[E]ven a conviction alone, without an accompanying sentence, can constitute “punishment” sufficient to trigger double jeopardy protections.” State v. Turner, 169 Wn. 2d 448, 454-55, 238 P.3d 461 (2010). The Supreme Court in State v. Womac, 160 Wn.2d

643, 660, 160 P.3d 40 (2007) determined that if a jury's verdict as to offenses subject to double jeopardy are reduced to judgment, then those convictions must be vacated. The court concluded that a double jeopardy violation against multiple punishment exists even if the conviction is not counted for sentencing purposes and even if no separate sentence is imposed for the merged offense. Womac, 160 Wn.2d at 656-58.

At sentencing defense counsel submitted that if Salinas were sentenced as a persistent offender that the double jeopardy issue would be moot and the State agreed that the issue was moot. SRP 47. While the trial court also believed the issue to be moot, it indicated that it would have found that the kidnap merged with the rape in the first degree if it were not. SRP 49. Although the kidnapping conviction, count IV, did not factor into Salinas' sentence, the judgment and sentence does reflect that he was adjudged guilty and a sentence imposed on that count. CP 6, 7, 9 (sections 2.3, 3.1, 4.5). In this respect, the State concedes that paragraph 2.3 (Sentencing Data) should be amended to remove the reference to count IV. Then, either section 3.1 should be amended to state that Salinas is guilty of the counts listed in Paragraph 2.1 *except count IV* because those counts merged with the other counts, *or* section 3.2 should be amended to state that count IV is vacated because it merged into the other counts.

Section 4.5 and the Warrant of Commitment would also need to be amended to remove the references to count IV.

The State submits that paragraph 2.1 would *not* need to be, and should not be, amended to remove the reference to Counts IV as it correctly reflects that the jury found Salinas guilty of those counts. *See, State v. Johnson*, 113 Wn. App. 482, 488, 54 P.3d 155 (2002), *rev. den.*, 149 Wn.2d 1010 (2003) (judgment and sentence correctly reflected that jury found the defendant guilty of both counts, although the counts constituted only one conviction due to double jeopardy and court imposed sentence on only one count); *State v. Meas*, 118 Wn. App. 297, 304-06, 75 P.3d 998 (2003), *rev. den.*, 151 Wn.2d 1020 (2004) (although judgment and sentence noted that jury had found defendant guilty of both felony murder and intentional murder, no double jeopardy violation where judgment and sentence stated that the conviction on one count merged into the other and defendant was only sentenced on one count).

7. Defense counsel waived the issue of same criminal conduct by failing to request the court to address it below and it is moot.

Salinas next asserts that two of the rape convictions were the same criminal conduct as the third for offender score purposes. However, as current offenses are presumed to count separately under the SRA unless the court makes a specific finding that they are the same criminal conduct,

Salinas waived this issue by failing to request the court at the time of sentencing to exercise its discretion and make such a factual finding. Furthermore, whether certain offenses are the same criminal conduct is an issue related to the offender score which is irrelevant to Salinas's sentence since he was sentenced as a persistent offender. If this Court determines that Salinas did not waive this issue and that the sentencing court should specifically address the offender score issue, the State submits the issue of whether the offenses constituted the same criminal conduct should be remanded to and decided by the trial court.

A defendant can be found to have waived his right to object to the calculation of his offender score where the issue asserted is a factual one or one involving the court's discretion. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). With respect to application of the same criminal conduct statutory provision, which involves both factual determinations and court discretion, a defendant waives the ability to challenge his offender score by his "failure to identify a factual dispute for the court's resolution and ... failure to request an exercise of the court's discretion." Goodwin, 146 Wn.2d at 875 (*quoting State v. Nitsch*, 100 Wn. App. 512, 520, 997 P.2d 1000, *rev. den.*, 141 Wn.2d 1030 (2000)); *see also*, In re Shale, 160 Wn.2d 489, 158 P.3d 588 (2007) (where defendant "failed to ask the court to make a discretionary

call of any factual dispute regarding the issue of ‘same criminal conduct’” and did not contest the issue at trial, defendant could not challenge his offender score on appeal). Under the Sentencing Reform Act (“SRA”), offenses are presumed to be separate unless the court makes a specific finding that they encompass the same criminal conduct. RCW 9.94A.400 (1)(a) (1994); Nitsch, 100 Wn. App. at 520-21.

While Salinas asserted in his sentencing memorandum that the three rape counts would constitute the same course of criminal conduct, at sentencing he never requested the court to address the issue, and did not object to the court not making such a finding. At sentencing, Salinas did not assert any factual basis for the court to make a discretionary decision regarding whether the three rape counts encompassed the same criminal conduct. In fact, in closing defense counsel had conceded that two of the rapes occurred at different places:

And the final point is, if he did this, what did he do? *He raped a woman. He dragged her into a park. He raped her again, threatened her life, and then walked, I don’t know, two or 300 yards away and got in his sleeping bag and went to sleep?*

TRP 1337 (emphasis added). At sentencing, defense counsel informed the court that they had submitted a memorandum “as far as the merger issues,” and that those issues were certainly moot if the court found Salinas to be a persistent offender. SRP 47.

Salinas failed to ask the court to address whether the offenses were the same criminal conduct and didn't make any argument regarding the offender score, presumably because counsel believe that the issue, like the double jeopardy issue, was moot where Salinas was sentenced as a persistent offender. By failing to ask the court to make this discretionary decision he waived any factual issue regarding whether the rape convictions should have counted as one for offender score purposes.

If this Court determines that the offender score issue is not moot given Salinas's persistent offender sentence, it appears the trial court was never asked specifically to address the offender score. In its memorandum, defense counsel asserted it was zero, the PSI asserted it was a 13 on the rape convictions, and the State believed it to be a 9. CP 6, 34-35, Supp CP ___, Sub Nom. 163 at 3-4. If the issue is not moot and Salinas did not waive it, the trial court, who heard all the lengthy testimony, should be the one to address the issue and at the same time address the offender score issue.

8. Salinas did not have a Sixth and Fourteenth Amendment right to have his prior convictions proved to a jury beyond a reasonable doubt.

Salinas contends that his federal constitutional rights under the Sixth and Fourteenth Amendments, to a jury trial and to proof beyond a reasonable doubt, were violated when the trial court, rather than a jury, found the existence of his two prior "strikes." These arguments have been rejected repeatedly by Washington courts.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that "[o]*ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (italics added). Despite this explicit language, defendants argued that Apprendi conferred a right to a jury trial in persistent offender sentencings; *i.e.*, that the State must prove the relevant prior convictions to a jury beyond a reasonable doubt. State v. Wheeler, 145 Wn.2d 116, 119, 34 P.3d 799 (2001), *cert. denied*, 535 U.S. 996 (2002). The Washington Supreme Court rejected this argument: "Unless and until the federal courts extend *Apprendi* to require such a result, we hold these additional protections [charging prior "strike" convictions in an information and proving them to a jury beyond a reasonable doubt] are not required under the United States

Constitution or by the Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW.” *Id.* at 117.

Subsequently, in State v. Smith the Washington Supreme Court addressed these same issues under the Washington Constitution, Article I, Sections 21 and 22, in another POAA case. State v. Smith, 150 Wn.2d 135, 139, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004). The court first reaffirmed its holding in Wheeler under the federal constitution. *Id.* at 143. Then, after a full Gunwall analysis, the court rejected the claim that the Washington Constitution requires a jury trial for determining prior convictions at sentencing. *Id.* at 156. *See also* In re Personal Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) (“In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt.”).

In addition to Apprendi, Salinas relies on the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Blakely, the Court extended the right to a jury trial and proof beyond a reasonable doubt to facts that elevate a sentence above the standard range. Blakely, 542 U.S. at 303-04. But the Washington Supreme Court has rejected the arguments that Salinas now makes, even in light of Blakely. In State v. Thiefault, 160

Wn.2d 409, 418, 158 P.3d 580 (2007), another POAA case, the defendant cited Blakely as well as Apprendi in support of his argument that he had a right to a jury determination of a prior conviction. Citing Lavery¹¹, Smith and Wheeler, the court reiterated: “This court has repeatedly rejected similar arguments and held that *Apprendi* and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.” Thiefault, 160 Wn.2d at 418.

The Washington Supreme Court has rejected Salinas’s argument that he was entitled to have his prior strikes determined by a jury beyond a reasonable doubt. This Court also recently rejected this same due process argument in State v. Langstead, 155 Wn. App. 448, 452-53, 228 P.3d 799, *rev. den.*, 170 Wn.2d 1009 (2010). Here, the trial court even found that the State had met its burden to prove that Salinas had two prior strikes beyond a reasonable doubt. SRP 48. Salinas was not entitled to a determination of his persistent offender status by a jury beyond a reasonable doubt, and the trial court properly made the determination.

9. The Legislature’s failure to classify the “persistent offender” finding as an element does not violate Salinas’s right to equal protection.

Salinas argues that the Legislature’s failure to classify the persistent offender finding as an element, requiring proof beyond a

¹¹ In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005).

reasonable doubt, violated his constitutional rights, although he acknowledges this Court has held to the contrary in Langstead, 155 Wn. App. at 452-53. Divisions II and III also rejected Salinas's argument in State v. McKague, 159 Wn. App. 489, 517-19, 246 P.3d 558, *aff'd on other grounds*, ___ P.3d ___, 2011 WL 4599634 (2011) and State v. Williams, 156 Wn. App. 482, 496-98, 234 P.3d 1174, *rev. den.*, 170 Wn. 2d 1011 (2010). Salinas argues that Langstead was wrongly decided, however the Washington Supreme Court denied review of that case, as well as Williams. The State requests this Court follow its precedent and reject Salinas's argument.

In Langstead the court rejected the equal protection argument Salinas makes, holding "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or similar offense." Langstead, 155 Wn. App. at 456-57. In Williams, the court concluded that:

proof of his prior convictions by a preponderance of the evidence is not entirely irrelevant to the purposes of the persistent offender statutes. [Appellant's] sentence is rationally related to the purposes of the Persistent Offender Accountability Act and is not, then, a violation of equal protection.

Williams, 156 Wn. App. at 498.

After the Court of Appeals denied the appeal in McKague, the Supreme Court granted review on another issue within the case. In declining to review the equal protection argument, the Supreme Court noted: “as we have repeatedly held, the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes.” McKague, __ P.3d __, n.1, 2011 WL 4599634 (2011). Washington law clearly rejects Salinas’ argument regarding equal protection.

10. The State’s evidence was sufficient to prove that Salinas was the person convicted of the 1994 Chelan County Robbery Conviction.

Next, and finally, Salinas contends there was insufficient proof that he was the Hector Salinas who was convicted of Robbery in the First Degree in Chelan County in 1994. He contests only the Chelan County conviction and does not contest his prior Assault in the Second Degree committed in 1998. Salinas misstates the record when he submits the only evidence to prove his identity was a unity of names and the testimony of the eyewitness from 16 years before. The evidence was more than sufficient for the court to find that Salinas had a prior conviction for first degree robbery in 1994.

In order to prove that Salinas was the person who had previously been convicted of the 1994 robbery, the State had to prove his identity by a preponderance of the evidence. State v. Lewis, 141 Wn. App. 367, 393,

166 P.3d 786 (2007), *rev. den.*, 163 Wn.2d 1030 (2008). When sufficiency of the evidence regarding identity is challenged on appeal, the evidence is reviewed in the light most favorable to the State. *Id.* A court can use the certified copies of judgments and sentences containing the defendant's name, social security number, date of birth and fingerprints to make its finding regarding identity. *Id.* at 394. Identity of names is sufficient proof of identity in the absence of rebuttal by the defendant, under oath, that he is not the person named in the prior judgment. State v. Rivers, 130 Wn. App. 689, 128 P.3d 608 (2005), *rev. den.*, 158 Wn. 2d 1008 (2006), *cert. den.* 549 U.S. 1308 (2007). This is true even if there is testimony from a fingerprint expert that he/she is unable to establish from the fingerprints that the person named in the prior judgment is the defendant. *Id.* at 701.

Here, the eyewitness victim testified regarding the incident which had happened 16 years before. SRP 5-7. It was more than a brief encounter. SRP 5-6. While he had not seen Salinas since that day, he affirmatively indicated he recognized him and identified him, with no question in his mind that it was the same person. SRP 7-8. The police reports from the incident, containing a booking photo, were entered as an exhibit. Supp. CP, Ex S4. The victim testified that Salinas looked very close to what he had looked like at the time of the incident, although he

looked meaner at the time, and that it was definitely the same person. SRP

12. The booking photo looks remarkably like the photo of Salinas that was used in the photo montage in this case. Supp. CP ___, Ex. 140.¹²

While the fingerprint comparison of the 1994 judgment and sentence and booking fingerprints was inconclusive, Salinas had previously identified himself to Det. Crosswhite as Hector Serano Salinas, although when asked to write his name, he wrote Isaac Zacharias Salinas. SRP 29-30; Supp CP ___, Ex. S9. The State also introduced defendant's testimony from the pretrial hearing that his "true name," the one he used in Mexico, was Isaac Zacharias Salinas, "not the ones that I used before here." SRP 40-41. He denied that he ever gave the officers the name of Hector Serano Salinas but testified that he admitted he told the officers he did have a probation issue under a different name. SRP 41. Both the prior judgments show a name or alias of Hector Salinas and Antonio Juarez. Ex. S3, S5. In his plea statement on the 1994 robbery, he stated that his true name was "Hector Antonio Salinas Robles," although he signed it as

¹² While the montage photo was not submitted as an exhibit for sentencing, the State has provided it so that the Court may be aware of how similar Salinas in 2008 looked to the booking photo, which would have been obvious to the sentencing court as Salinas was present in court. The court could certainly consider whether Salinas in court looked like the booking photo from the 1994 conviction. The prosecutor noted for the record that the booking photos "amazingly look just like Mr. Salinas today other than being aged." SRP 42.

Hector Salinas and he was charged under the name of Antonio Juarez. Ex. S2.

The judge found the exhibits as well as the in-court identifications very persuasive. SRP 47. The judge believed the exhibits showed a clear trail that Salinas was the same person as the person convicted in both prior judgments, and stated that the booking photos showed that it was clearly the same person. SRP 48, Ex. S8. Taking the evidence in the light most favorable to the State, the evidence was clearly sufficient to prove by a preponderance, even beyond a reasonable doubt, that Salinas was the person convicted of the 1994 Robbery in the First Degree. Moreover, where Salinas never took the stand at sentencing to deny and rebut that he was the one in the prior conviction, the evidence of identity was more than sufficient.

E. CONCLUSION

The State requests this Court deny Salinas's appeal and affirm his convictions and his sentence as a persistent offender.

Respectfully submitted this 8th day of November, 2011.


HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX A

SCANNED 4

FILED
COUNTY CLERK

2011 OCT 27 AM 9:47

WHATCOM COUNTY
WASHINGTON

BY [Signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,)
)
 PLAINTIFF.)
)
 vs.)
)
 HECTOR SERANO SALINAS,)
)
 DEFENDANT.)

No.: 08-1-00877-3

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: 3.6 MOTION HEARING

THIS MATTER having come on for hearing before the above-entitled court on the Defendant's Motion to Suppress, and having heard argument from both parties, the Court makes the following:

I. FINDINGS OF FACT

1. The Bellingham Police K-9 officers came upon Mr. Salinas in his sleeping bag along the creek.
2. At the time the officers came upon Mr. Salinas, they were aware of an existing allegation of rape and assault, and they had a victim who appeared to match the description of someone who had suffered such an attack.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Whatcom County Prosecuting Attorney
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Bellingham, WA 98225
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(360) 738-2532 Fax

- 1 3. The officers were aware, from the information obtained from the victim, that she had
3 been raped, dragged into the park, and raped again at knifepoint.
- 5 4. The officers had a description of a Hispanic male, not English speaking, a knife, a dark
7 jacket, black cap, with a mustache and with possible chin hair.
- 9 5. The officers then conducted a dog track.
- 11
- 13 6. The dog track was consistent with what had been reported by the victim in terms of
15 locale.
- 17 7. The dog track was in close proximity, both in time and in place, to the alleged attack.
- 19
- 21 8. The officers contacted transients during the track. The transients said they heard a
23 woman scream about 30 minutes before the officers got there.
- 25 9. The transients said they saw a male Hispanic, with a black hat and dark jacket, run by
27 about 15 minutes before the officers got there. They said the male Hispanic went toward
29 the restrooms.
- 31
- 33 10. The dog track led the officers through an area that was consistent with what the victim
35 had described and what the other people in the park had described. The direction of the
37 dog track was toward the restrooms.
- 39 11. The dog track led the officers from the initial rape scene to the transient's location and
41 continued to the defendant's location where he was with his sleeping bag.
- 43
- 45 12. The officers identified themselves as "Bellingham Police K-9" and gave the defendant
47 directions to show his hands or the dog would be released. The defendant did not follow
49 their directions to show his hands.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1 13. The defendant's face, which was then visible, matched the face in the description given.

3 14. The defendant pulled his sleeping bag over his head, grabbed a dark jacket and ran.

5 15. Mr. Salinas was found hiding. He was non-compliant with the officers. He matched
7 the description of the assailant. He was wearing a dark colored jacket and a black hat
9 was on the top of the backpack in plain view. He was a male Hispanic with a mustache.

11 16. Mr. Salinas was taken into custody.

13 17. The officers obtained the defendant's name and identification.

15 18. An outstanding warrant is found in the defendant's name. He admits the warrant is his.
17
19

21
23 **II. CONCLUSIONS**

25
27 1. At the point in which Mr. Salinas's face is viewed by the officers and he matches the
29 description given, the officers have grounds for a Terry stop.

31 2. At the point the defendant is taken into custody, whether he is formally arrested for
33 the rape or not, there is probable cause to arrest him for the rape and assault.

35 3. A reasonable person could find, under all of the circumstances that existed at that
37 time, probable cause for the defendant's arrest at the time he was apprehended at the
39 end of the chase.

41 4. The defendant having been arrested, the search was proper incident to his arrest.

43 5. The seizure of the defendant's clothing is proper as incident to his arrest. The fact
45 pattern in this case is distinguishable from the Smith case cited by the defense. The
47

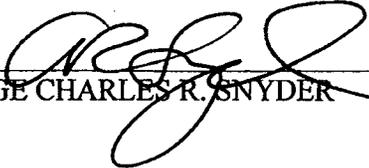
1 evidence and probable cause support a finding that Mr. Salinas had committed a more
3 serious crime and a felony.

5 6. The fact that Mr. Salinas wasn't given an opportunity to post bail and to be released is
7 not relevant to the probable cause determination, arrest, and search incident to arrest.

9 7. The arrest of Mr. Salinas is supported by both the outstanding warrant and probable
11 cause for the rape and assault offenses.

13 8. The clothing seized by law enforcement from the defendant and the forensic testing
15 of that clothing are admissible.

17
19 DATED this 27 day of October 2011.

21
23
25 
27 JUDGE CHARLES R. SNYDER

29 Presented by:

31 

33 DONA BRACKE WSBA#29753
35 Deputy Prosecuting Attorney

37 Approved by:

39  (son) w/o waiving prior
41 STARCK FOLLIS objection
43 Attorney for Defendant

45  w/o waiving prior
47 THOMAS FRYER objection
49 Attorney for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

APPENDIX B

FILED SCANNED 3
COUNTY CLERK

2011 OCT 27 AM 9:47

WHATCOM COUNTY
WASHINGTON

BY 

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

15	THE STATE OF WASHINGTON,)	
17)	No.: 08-1-00877-3
19	PLAINTIFF.)	
21	vs.)	FINDINGS OF FACT AND
23	HECTOR SERANO SALINAS,)	CONCLUSIONS OF LAW
25	DEFENDANT.)	RE: DOG TRACK MOTION HEARING

THIS MATTER having come on for hearing before the above-entitled court on the Defendant's motion to suppress, and having heard argument from both parties, the Court makes the following:

I. FINDINGS OF FACT

1. Officer Woodward and Deputy Nyhus testified that the dog handler, Officer Jeremy Woodward, was qualified by training and experience to use the dog. Officer Woodward testified regarding his training and experience to use the dog.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Whatcom County Prosecuting Attorney
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- 1 2. Officer Woodward and Deputy Nyhus testified that the dog was adequately trained in
3 tracking humans. The dog had over 500 hours of training. The dog was trained to track
5 humans and was certified.
- 7 3. Officer Woodward and Deputy Nyhus testified that the dog had, in actual cases, been
9 found by experience to be reliable in pursuing human tracks. The dog successfully
11 tracked humans in 2007 and 2008. The dog had over 50 successful searches in tracking
13 humans which resulted in the arrest of individuals, thereby showing reliability in
15 pursuing human track.
- 17 4. The victim told the officers the location of her campsite where she had first been
19 assaulted by the defendant. The dog was placed at this location and commenced a track.
- 21 5. Testimony from Officer Woodward and Deputy Nyhus indicated that if the track was
23 stale or contaminated, the dog wouldn't be able to track or continue to track. Officer
25 Woodward testified that the dog continued to pull on the leash and as the dog got closer
27 to the defendant the dog was very active and alert, due to the fresher scent. The dog
29 continued to track without stopping, except when Officer Woodward stopped to speak
31 with a transient.
33
35

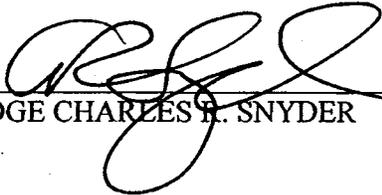
37 **II. CONCLUSIONS**

39

- 41 1. The testimony presented by Officer Woodward and Deputy Nyhus is sufficient for the
43 necessary foundation regarding a dog track.
- 45 2. Testimony related to the dog track is admissible at trial.
47

1 3. Issues raised by the defense are issues that go to weight and credibility rather than
3 admissibility.

5
7 DATED this 27 day of October 2011.

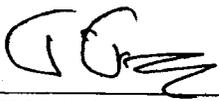
9
11
13 
JUDGE CHARLES R. SNYDER

15 Presented by:

17 
19 _____
DONA BRACKE #29753
21 Deputy Prosecuting Attorney

23 Agreed to by:

25  *w/ waiving prior*
27 ~~STARCK FOLLIS~~ *objection*
29 Attorney for defendant

31  *w/*
33 ~~THOMAS FRYER~~ *w/ waiving prior*
35 Attorney for defendant *objection.*

37
39
41
43
45
47
49 FINDINGS OF FACT AND CONCLUSIONS OF LAW