

70125-8

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NO. 70125-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

HECTOR S. SALINAS,

Appellant.

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

The Honorable Charles Snyder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. All three of appellant's rape convictions constitute the "same criminal conduct" for sentencing.
2. The trial court erred when it found one of the rapes involved a different time, place, and intent.

Issues Pertaining to Assignments of Error

1. Appellant was convicted on three counts of rape for continuous and uninterrupted penetrations of the victim during a relatively short period of time. Did the sentencing court err when it failed to find that all three constituted the "same criminal conduct" for purposes of appellant's offender score?
2. The sentencing court believed that one of the rapes occurred at a different location and, therefore, involved a different time, place, and intent. Is this incorrect where the trial evidence clearly establishes all of the rapes occurred at the same time and place?

B. STATEMENT OF THE CASE

Salinas was charged with three counts of Rape in the First Degree and one count of Kidnapping in the First Degree. CP 3-5. This Court summarized the circumstances of the crimes in a July 2, 2012 opinion:

The rape occurred in Bellingham near Maritime Heritage Park on the night of June 20, 2008. The victim, DP, was homeless and living on the streets. She awoke to find a man sitting close to her. The man reached over and kissed her. He spoke Spanish. When DP stood up, the man grabbed her and hit her in the face. He had a knife in his hand. He raped her. Then he dragged her to a different area of the park where the assault continued.

Afterward, DP flagged down a police car and told the officer she had been raped by a man with a knife. . . .

CP 23-24.

A jury convicted Salinas on all four charges. CP 8. Prior to sentencing, defense counsel argued the three rapes involved the same criminal conduct and should be scored as a single offense. Supp. CP ____ (sub no. 165, Defendant's Sentencing Memorandum, at 3). Because Salinas was a persistent offender, the sentencing court imposed the mandatory sentence of life in prison without the possibility of parole. CP 12. Apparently believing this rendered Salinas' offender score moot, it did not decide the "same criminal conduct" issue. RP (6/8/10) 47-55. The court calculated his offender score as 9. CP 9.

On appeal, this Court ordered the kidnapping conviction dismissed based on the sentencing court's proper finding that it merged with the rape convictions. CP 37-38. It also ordered the

sentencing court to decide whether Salinas' three rape convictions involved the same criminal conduct, noting that his offender score would become relevant if his life sentence were ever reversed. CP 38-39.

On remand, defense counsel again argued all three rapes satisfied the test for same criminal conduct. RP (3/21/13) 4-5. The prosecutor, however, argued the three rapes did not qualify as same criminal conduct because D.P. was raped in two locations: first at her campsite and, later, in another location of the park where Salinas had taken her after the initial attack. The prosecutor also argued that the break in time as D.P. was moved from one location to the other also meant all three rapes did not involve the same time. RP (3/21/13) 5-6.

Describing it as a "difficult call," the court relied on its recollection of the evidence from the 2010 trial. The court believed D.P. was raped at her campsite near the street, dragged down through the park below her campsite, and raped again. Based on this series of events, the court ruled as follows:

So I think there was sufficient intervening time and the new location that would require him to create the intent to commit a third count in a different time and location, and they're sufficiently distinct from the originals that the Court would find the first two counts,

the two that occurred up near where [D.P.] was camping would merge as a single course of conduct; that the third incident that occurred over down in the park at another location some minutes later could be read as a separate event, and not the same course of conduct under the statute.

RP (3/21/13) 8.

The court filed an amended Judgment and Sentence finding two of the three rapes involved the same criminal conduct, but scoring the third rape conviction as a separate crime. Consequently, Salinas' offender score went from 9 to 8. RP (3/22/13) 3-6; CP 43. Salinas timely filed a Notice of Appeal. CP 53-64.

C. ARGUMENT

SALINAS' CONVICTIONS ARE "THE SAME CRIMINAL CONDUCT" FOR PURPOSES OF HIS OFFENDER SCORE.

"[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a).

"Same criminal conduct" means crimes that involve the same intent, were committed at the same time and place, and

involved the same victim. Id. The test is an objective one that:

takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective. Also relevant is whether one crime furthered the other.

State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

The issue is reviewed for an abuse of discretion or misapplication of the law, and the defendant bears the burden to show crimes involve the same criminal conduct. State v. Graciano, 176 Wn.2d 531, 535-539, 295 P.3d 219 (2013). Where, however, “the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” Id. 537-538 (citing State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991))

The sentencing court found that one of the three rapes occurred after the other two and at a different location; i.e., elsewhere in the park after Salinas dragged D.P. away from her campsite. Likely due to the significant passage of time between trial and resentencing, the trial court’s recollection of the evidence was mistaken. The court’s memory that D.P. was raped in two separate locations probably stems from the testimony of police officers involved in the case.

Bellingham Police Officer Dale Wubben, one of the officers D.P. flagged down, testified that D.P. claimed she had been raped at her campsite and then dragged down into the park. RP (3/11/10) 182-186. Wubben asked her what happened down in the park, and D.P. said, "He wanted more." RP (3/11/10) 186. According to Officer Wubben:

I asked her what she meant by that, and she said that he had raped her again. She made it clear that the first rape happened at the campsite, and then he also raped her down in the park as well after dragging her down there.

RP (3/11/10) 186.

Bellingham Police Officer Daniel Bennett, Officer Wubben's partner, testified similarly. RP (3/15/10) 331-333. When asked if D.P. provided any details of the rape, he replied:

She said that she was raped in that overlook area, and then he dragged her down a trail toward the park, into the park, and then he continued raping her there, and then he wiped – after he was through he wiped himself off and her off.

RP (3/15/10) 333.

Finally, Bellingham Police Detective Gina Crosswhite testified to her interview of D.P. while D.P. was in the hospital. RP (3/22/10) 1001-1012. According to Crosswhite, D.P. said she had been raped at her campsite, dragged to a second location in the park, and raped

again. RP (3/22/10) 1012.

While it is apparent D.P. told police she had been raped in two separate locations, D.P.'s trial testimony – far more detailed than what she told officers – made it clear that what she labeled “rape” at the second location was not actually a rape. Rather, all three rapes occurred at the campsite in quick succession.

Specifically, D.P. testified that, while at her campsite, Salinas forced her to have oral, anal, and then vaginal intercourse. RP (3/10/10) 56-63, 66. Afterward, Salinas pulled up his pants and then dragged D.P. down into the park, stopping near some heavy machinery, where he had D.P. sit down on his jacket. RP (3/10/10) 66-69. D.P. then explained everything that happened at that location:

A: And he was saying some words again, but I didn't understand what he was talking about, and lifted my right side, he lifted up my shirt and licked my right side breast.

Q: And then what happened after that?

A: He – first of all, he undid his belt and pulled down his blue jeans down to his knees, and the next think I knew is that he had toilet paper.

Q: Okay. After he pulled his jeans down to his knees, did he do anything to you?

A: No, no.

Q: So while you were sitting on his jacket, did he touch you other than licking your breast?

A: No.

Q: And then what, what is the next thing you remember him doing? He had some kind of toilet paper. What did he do?

A: He tried to bury the white toilet paper. He put it on the opposite side of my left leg, and he put dirt over the toilet paper, and that's where he left it, and that's the only way that I can describe exactly where I was.

Q: Before he tried to bury it, did he do anything with the toilet paper?

A: Wiping himself off.

Q: Did he do anything to you with the toilet paper?

A: No.

Q: What's the next thing you remember happening at that location?

A: He stood up and pulled his pants back up and buckled his belt and put his knife away. The whole time the knife blade was out, but I seen him put it, put it away after he got done with me.

RP (3/10/10) 69-70.

While D.P. told two Bellingham Police Officers and a Detective that she had been "raped again" after being dragged into the park, it is apparent from her detailed trial testimony that the

sexual contact away from her campsite does not satisfy the legal definition of rape.

Rape requires sexual intercourse. RCW 9A.44.040(1). And “sexual intercourse” requires penetration of the vagina or anus or sexual contact between “sex organs” and the mouth or anus of another. RCW 9A.44.010(1)(a)-(c). A breast is not a “sex organ.” See State v. Land, 172 Wn. App. 593, 602, 295 P.3d 782 (contact with “sex organs” means genitals), review denied, 177 Wn.2d 1016, 304 P.3d 114 (2013). At most, licking D.P.’s breast qualified as indecent liberties, merely requiring “sexual contact,” which is any touching of the sexual or intimate body parts of another for sexual gratification. See RCW 9A.44.010(2); 9A.44.100(1)(a).

Because all three rapes (oral, anal, vaginal) occurred at D.P.’s campsite, were continuous, and uninterrupted, they were the “same criminal conduct” for purposes of Salinas’ offender score. See State v. Tili, 139 Wn.2d 107, 111-112 122-125, 985 P.2d 365 (1999) (three first-degree rapes committed during a brief period of time involving continuous and uninterrupted penetrations of different bodily orifices, or the same orifice with different objects, were “same criminal conduct”).

The trial court's contrary findings based on time and place were the product of an inaccurate memory of the evidence – not entirely surprising given the almost three-year gap between trial and the court's ruling.¹ Because, however, the record only supports a conclusion that the crimes involved the same time, place, and intent, the court abused its discretion in treating one of the rape convictions as a separate offense. Graciano, 176 Wn.2d at 537-538.

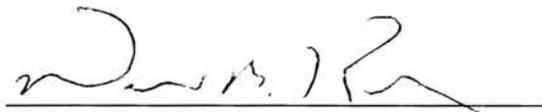
D. CONCLUSION

All three of Salinas' rape convictions involve the same criminal conduct and should count as a single point for sentencing. His judgment should be amended accordingly.

DATED this 30th day of October, 2013.

Respectfully submitted,

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¹ Indeed, this Court's opinion remanding the matter back to the sentencing court notes that same criminal conduct determinations are best made when the evidence is still fresh in the court's mind. CP 38-39.

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HECTOR SALINAS,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **DESIGNATION OF CLERK'S PAPERS -- SUPPLEMENTAL** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF OCTOBER 2013.

X *Patrick Mayovsky*