

RECEIVED
STATE OF WASHINGTON

10 DEC 22 PM 3:56

BY RONALD R. CARPENTER

hjh
CLERK

No. 82029-5
(consolidated with 82425-8)

**IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent,

vs.

RICHARD HENRY MUTCH, Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

ORIGINAL

**FILED AS
ATTACHMENT TO EMAIL**

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR..... 1

C. FACTS 2

D. ARGUMENT 4

 1. Pursuant to State v. Barberio Mutch is barred from raising his double jeopardy and same criminal conduct claims in this appeal..... 4

 2. Mutch has failed to demonstrate under RAP 2.5(a) that his double jeopardy claim is a manifest error of constitutional magnitude and may not raise it for the first time on appeal. 11

 3. The jury’s verdict, in the context of the evidence and argument presented and instructions given, reflects that the jury found five separate counts of rape in the second degree. 16

 4. Mutch waived the issue of whether his current offenses were the same criminal conduct by failing to raise the factual issue below, and in fact, the record demonstrates that each rape was a complete act before Mutch committed the next act of rape. 26

 5. The 2007 amendments to RCW 9.94A.537 did not eliminate the trial court’s authority to impose an exceptional sentence based on a defendant’s criminal history, therefore the trial court had the authority to impose an exceptional sentence on remand. 37

 6. The findings entered by the trial court were sufficient to support imposition of an exceptional sentence. 41

E. CONCLUSION 48

TABLE OF AUTHORITIES

Washington Supreme Court

<u>In re Beito</u> , 167 Wn.2d 497, 220 P.3d 4898 (2009).....	39, 40, 41
<u>In re Goodwin</u> , 146 Wn. 2d 861, 877, 50 P.3d 618 (2002)	15, 30
<u>In re LaBelle</u> , 107 Wn.2d 196, 219, 728 P.2d 138 (1986).....	48
<u>In re Lavery</u> , 154 Wn.2d 249, 111 P.3d 857 (2005).....	3
<u>In re Personal Restraint Petition of West</u> , 154 Wn.2d 204, 215, 110 P.3d 1122 (2005).....	15
<u>In re Shale</u> , 160 Wn.2d 489, 158 P.3d 588 (2007).....	30
<u>In re Stoudmire</u> , 141 Wn.2d 342, 356, 5 P.3d 1240 (2000).....	16
<u>State v. Alvarado</u> , 164 Wn.2d 556, 568, 192 P.3d 345 (2008).....	44
<u>State v. Barberio</u> , 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993).....	6
<u>State v. Burns</u> , 114 Wn.2d 314, 319, 788 P.2d 531 (1990)	34
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	8
<u>State v. Hughes</u> , 154 Wn.2d 118, 140, 110 P.3d 192 (2005).....	47
<u>State v. Jackson</u> , 150 Wn.2d 251, 276, 76 P.3d 217 (2003)	46
<u>State v. Kilgore</u> , 167 Wn.2d 28, 216 P.3d 393 (2009).....	8
<u>State v. Kirkman</u> , 159 Wn.2d 918, 927, 935, 155 P.3d 125 (2007).....	13
<u>State v. Law</u> , 154 Wn.2d 85, 93, 110 P.3d 717 (2005).....	6, 10, 46
<u>State v. Noltie</u> , 116 Wn.2d 831, 843, 848, 809 P.2d 190 (1991).....	16, 17
<u>State v. Porter</u> , 133 Wn.2d 177, 181, 942 P.2d 974 (1997).....	32

State v. Powell, 167 Wn.2d 672, 678, 223 P.3d 493 (2008)..... 44

State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). 32, 33, 34, 35, 38,
39

State v. Vance, 168 Wn.2d 754, 230 P.3d 1055 (2010)..... 50

State v. Worl, 129 Wn.2d 416, 424-425, 918 P.2d 905 (1996) 6

Washington Court of Appeals

State v. Berg, 147 Wn. App. 923, 198 P.3d 529(2008) 26

State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007) 25

State v. Carter, 156 Wn. App. 561, 234 P.3d 275 (2010) 26

State v. Corbett, __ Wn. App. __, 242 P.3d 52, 60 (2010) 13, 17

State v. Edvalds, 157 Wn. App. 517, 531, 237 P.3d 368 (2010) 39, 40

State v. Ellis, 71 Wn. App. 400, 404, 859 P.2d 632 (1993)... 15, 23, 24, 25,
26

State v. Elmore, 154 Wn. App. 885, 228 P.3d 760, *rev. den.* 169 Wn.2d
1018 (2010)..... 14

State v. Grantham, 84 Wn. App. 854, 858, 932 P.2d 657 (1997) 31, 32, 33,
35, 36

State v. Hayes, 81 Wn. App. 425, 429, 914 P.2d 788, *rev. den.* 130 Wn.2d
1013 (1996)..... 16, 26

State v. Holland, 77 Wn. App. 420, 425, 891 P.2d 49..... 13, 26

State v. Jennings, 106 Wn. App. 532, 543, 24 P.3d 430..... 43

State v. Mcneal, 156 Wn. App. 340, 231 P.3d 1266, *rev. den.* 241 P.3d 786
(2010)..... 40

State v. Mutch, 87 Wn. App. 433, 942 P.2d 1018 (1997)..... 2

State v. Nitsch, 100 Wn. App. 512, 520, 997 P.2d 1000, *rev. den.*, 141
Wn.2d 1030 (2000) 28, 29, 30

<u>State v. Palmer</u> , 95 Wn. App. 187, 975 P.2d 1038 (1999).....	35
<u>State v. Price</u> , 103 Wn. App. 845, 856-57, 14 P.3d 841 (2000), <i>rev. den.</i> 143 Wn.2d 1014 (2001)	31, 33
<u>State v. Rodriguez</u> , 61 Wn. App. 812, 816, 812 P.2d 868, <i>rev. den.</i> , 118 Wn. 2d 1006 (1991)	31, 32
<u>State v. Stockmyer</u> , 136 Wn. App. 212, 220, 148 P.3d 1077 (2006).....	31
<u>State v. Teuber</u> , 109 Wn. App. 640, 646, 36 P.3d 1089 (2001).....	44
<u>State v. Traicoff</u> , 93 Wn. App. 248, 967 P.2d 1277 (1998).....	7
<u>State v. Warren</u> , 134 Wn. App. 44, 57, 138 P.3d 1081 (2006).....	12

Federal Authorities

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d (2004)	37, 38, 40, 41, 44
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).....	44

Rules and Statutes

Laws of 2005, Ch. 68 §1	37
Laws of 2007 Chapter 205	37
RCW 9.94.400	30
RCW 9.94A.400.....	1, 5, 8, 9, 11, 26, 30
RCW 9.94A.535.....	3, 39, 40, 41, 45, 47
RCW 9.94A.537.....	39, 40
RCW 9.94A.585.....	43

RCW 9.94A.589..... 5, 11, 47

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether a defendant is barred from raising issues related to double jeopardy and same criminal conduct under State v. Barberio where the sentencing judge only corrected the offender score and imposed the same exceptional sentence at the hearing pursuant to RAP 7.2(e).
2. Whether a defendant may raise a double jeopardy issue regarding multiple punishment where the defendant did not raise the issue at the resentencing or at the RAP 7.2(e) sentencing hearing and where the defendant has not demonstrated that the alleged constitutional error was manifest where he was charged with five counts of rape, the victim testified to five separate episodes of rape and the jury convicted him of five counts of rape.
3. Whether the jury's verdict convicting the defendant of five counts of rape reflected that it found the defendant committed rape five times where the jury was instructed that a separate crime was charged in each count, there was a separate to-convict instruction for each count, and the evidence and argument presented five separate counts of rape.
4. Whether the defendant waived the discretionary factual issue of same criminal conduct under former RCW 9.94A.400 by failing to raise it at the resentencing hearing and only asserting a legal argument that the court had to count the offenses as same criminal conduct where there were no jury findings that the offenses were separate at the RAP 7.2(e) hearing.
5. Whether the five rape convictions were the same criminal conduct where count V did not occur at the same time and place, it occurred the next morning in a different room, and where the other four counts did not involve the same time

and intent where there was significant time and communication that occurred between each rape and each episode of rape was a complete act in and of itself.

6. Whether the 2007 amendments to RCW 9.94A.537 applied to defendant's exceptional sentence as to preclude imposition of an exceptional sentence where the trial court's exceptional sentence was not based on an aggravating factor that had to be found by a jury and where the trial court's authority to impose an exceptional sentence based on criminal history facts was never eliminated by the 2005 or 2007 amendments.
7. Whether the trial court's exceptional sentence should be overturned where the court did not err in finding that the defendant's high offender score resulted in some of defendant's current offenses going unpunished, although one of the findings still stated that three of the rapes would go unpunished, which was inaccurate given the reduction in the offender score, and where the court did not make an explicit written finding that the aggravating factor was a "substantial and compelling reason" to impose an exceptional sentence but did state it had considered the purposes of the SRA in deciding whether to impose an exceptional sentence and that an injustice would occur if one wasn't imposed.

C. FACTS¹

In 1994, Mutch was found guilty of five counts of Rape in the Second Degree and one count of Kidnapping in the Second Degree and sentenced as a persistent offender to life without the possibility of release. His conviction and sentence were upheld in the partially published decision of State v. Mutch, 87 Wn. App. 433, 942 P.2d 1018 (1997), *rev.*

¹ Other relevant facts are addressed within the context of the specific issues.

den., 134 Wn.2d 1016 (1998).² In response to one of Mutch's numerous collateral attacks, Sup. Ct. No. 80958-5, the State conceded that Mutch was entitled to be resentenced pursuant to In re Lavery, 154 Wn.2d 249, 111 P.3d 857 (2005). On April 30, 2008 the Supreme Court issued an order granting the personal restraint petition and remanding for resentencing.

Prior to resentencing, the State filed a Notice of Intent to Seek an Exceptional Sentence indicating that it was seeking an exceptional sentence under RCW 9.94A.535 (2)(c), high offender score resulting in current offenses going unpunished. CP 104. Prior to the hearing Mutch filed a Motion to Recuse the Honorable Judge Mura, the judge who had heard the trial, which motion was granted. CP 100-03.

After hearings in July 2008, the Honorable Judge Uhrig resentenced Mutch to an exceptional sentence of 400 months based on his high offender score of 20 resulting in some of his current offenses going unpunished. CP 10, 13, 22-25.

Mutch appealed the exceptional sentence asserting certain errors in the calculation of the offender score as well as unlawful imposition of an exceptional sentence. See Appellant's Brief, Sup. Ct. No. 82029-5. In response the State agreed that errors had occurred regarding calculation of

² COA No. 35810-3-I.

the offender scores and separately moved for remand of the matter to correct the offender score. See State's Response Brief at 21-22; State's Motion for Remand, No. 82029-5.

The State's motion was ultimately denied, and the State moved for a hearing at the trial court in November 2008, pursuant to RAP 7.2(e), to correct the offender score and for the court to reconsider what sentence should be imposed based on the corrected offender score. CP 206-07. As further outlined herein, the court corrected the offender score and reimposed the same exceptional sentence it had in July 2008. CP 165-75. Pursuant to the State's motion under RAP 7.2(e) this Court permitted entry of the November 2008 judgment and Mutch appealed from that sentence. See Feb. 4, 2009 Order, No. 82029-5.

D. ARGUMENT

1. Pursuant to State v. Barberio Mutch is barred from raising his double jeopardy and same criminal conduct claims in this appeal.

In this appeal of the November 2008 sentencing hearing, Mutch asserts for the first time that the judgment and sentence should be amended to vacate the jury's convictions for four of the five counts of second degree rape due to double jeopardy and asserts that his offender score was erroneous because the five rape convictions encompassed the

same criminal conduct under former RCW 9.94A.400(1)(a)³. Mutch is procedurally barred from raising these issues because appellate courts generally are precluded from considering issues that a party could have raised in a prior appeal from the same case, but didn't. Mutch did not raise the issue of double jeopardy at his sentencing in 1994, did not raise it at the resentencing in July 2008 and did not raise it in the sentencing hearing in November 2008. Mutch never presented this issue to the trial court for its review and where, under State v. Barberio, the trial court did not exercise its independent judgment regarding an appellate issue, Mutch is precluded from asserting it on appeal.

This Court should also decline to review his same criminal conduct claim where the trial court at the November 2008 hearing only corrected the offender score due to the errors asserted in the appeal from the July 2008 resentencing and imposed the same exceptional sentence it did before. While Mutch asserted that the offender score was wrong at the November hearing because the court could not find that the offenses were not the same criminal conduct absent jury findings to that effect, the trial court did not exercise any independent judgment regarding the same criminal conduct issue at that hearing. Under State v. Barberio Mutch is precluded from raising the same criminal conduct issue on appeal as well.

³ Currently RCW 9.94A.589(1)(a).

Appellate courts generally are precluded from considering issues that a party could have raised in a prior appeal from the same case, but didn't. State v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993); accord, State v. Worl, 129 Wn.2d 416, 424-425, 918 P.2d 905 (1996) (law of case doctrine precludes appellate courts from considering issues that a party raised or could have raised in prior appeal).

The Rules of Appellate Procedure provide:

Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

- (1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5(c). However, this rule is to be interpreted narrowly:

This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.

Barberio, 121 Wn.2d at 50. RAP 2.5(c) contemplates that the trial court actually addressed an issue that had not been previously litigated in the prior appeal. If the trial court does so, then the appellate court has the discretion to address the issue. Barberio, 121 Wn.2d at 50-51. A decisive factor in determining whether an appellate court may exercise its discretion to review an issue not previously raised is whether the trial

court in fact independently reviewed and considered the issue on remand from the appellate decision. *Id.* at 51.

In Barberio, the trial court imposed an exceptional sentence which the defendant did not challenge in the first appeal. *Id.* at 49. After one of the convictions had been reversed on appeal, at the resentencing, the defendant challenged aggravating factors the court had found at the first sentencing and argued that the reduction in the offender score and subsequent standard range, due to vacation of one conviction, mandated a reduction in the exceptional sentence that had been imposed. *Id.* The trial court, however, imposed the same exceptional sentence. *Id.* On appeal, the court dismissed the appeal of the trial court's exceptional sentence because the trial court had not exercised its independent judgment to review and reconsider its earlier sentence, it had only corrected the judgment and sentence to reflect the new offender score, the revised standard range and eliminated one of the aggravating factors. *Id.* at 51; *see also*, State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009) (dismissal of appeal appropriate where trial court on remand corrected the judgment and sentence to eliminate the reversed convictions, but did not revisit the exceptional sentence and where reduction in offender score did not affect the standard range); State v. Traicoff, 93 Wn. App. 248, 967 P.2d 1277 (1998), *rev. den.*, 138 Wn.2d 1003 (1999) (defendant barred from raising

issue regarding community placement conditions because the defendant had not challenged the conditions in his original appeal and the trial court had only corrected the term of community placement on remand).

At the July 2008 resentencing, Mutch never asserted a double jeopardy argument regarding imposition of multiple punishments based on the five rape convictions⁴, and he does not contend on appeal that he did. He also never asserted an issue regarding the five rape convictions being the same criminal conduct under RCW 9.94A.400. On appeal, from the July 2008 judgment and sentence, he did not assert either a double jeopardy argument or a same criminal conduct argument. See Appellant's Opening Brief No. 82029-5. Mutch's argument regarding the offender score on appeal was that the trial court had erred in calculating his offender score by including his prior non-comparable federal bank robbery in the offender score and by counting his prior 1966 robbery convictions separately. See Appellant's Opening Brief at 21-22.

At the November hearing, held pursuant to RAP 7.2(e), the State informed the trial court that the offender score the trial court found at the July 2008 hearing was erroneous, that the corrected offender score was 16 on the rape counts and 12 on the kidnapping, and urged the court to

⁴ Mutch did assert a "double jeopardy" argument based on *State v. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080 (1996), arguing that the trial court had no authority to resentence him, period. CP 29, 95-96.

impose the same exceptional sentence. CP 184-205; 2RP 15-18.⁵ Mutch, who represented himself, responded that the court did not have jurisdiction to hear the matter because the original sentence was on appeal.⁶ 2RP 18-21. When the court proceeded to hear the matter, Mutch requested to be heard on the offender score, asserting that under the laws of 1994 the trial court had to find the offenses encompassed the same criminal conduct because it would take jury findings for the court to find that they were not the same criminal conduct, and that his offender score therefore was a four. 2RP 33-35. The court then inquired if Mutch had anything further to say, to which he responded no. Id. at 35. The court then asked the prosecutor if he had anything further, and the prosecutor responded no, that the sex offenses counted separately. Id. Mutch then directed the court to the statutory cite of RCW 9.94A.400(1)(a) from the 1994 sentencing guidelines. Id. at 35-36. The prosecutor then indicated as other current offenses, the sex offenses count three points each. Id. at 36. The court then inquired if Mutch had anything further to say to which Mutch reiterated that it would take a jury to make findings that the offenses were not the same criminal conduct. Id. at 37. The judge then reviewed the

⁵ IRP refers to the verbatim report of proceedings for July 28 and 31, 2008; 2RP for the proceedings on November 13, 2008, and 3RP for the trial proceedings held in 1994.

⁶ The prosecutor then explained the procedure the State was following was pursuant to RAP 7.2(e) and the court decided it had the ability to proceed under that rule. 2RP 23-29.

Findings of Fact and Conclusions of Law prepared by the prosecutor and stated:

Okay. Mr. McEachran, I have reviewed your proposed Findings of Fact. I believe they accurately and adequately set forth my findings in this matter. Likewise, the Conclusions of Law specifically with respect to, well, I guess in totality, but, um, specifically my findings with respect to Conclusions of Law 5 and 6. Do you have a proposed judgment and sentence? I will adopt the State's recommendation.

2RP 40.

The judge imposed the same exceptional sentence as before, 400 months on the sex convictions and 120 months on the kidnapping, 2RP 40-41; CP 170, 180-83. He also adopted the comments and the argument from the prior hearing in July, 2RP 41. The Findings and Conclusions are identical to those entered by the court in July 2008 except for the reference to the federal bank robbery is removed under criminal history, finding no. 4, the offender score in conclusion of law no. 1 is changed from 20 to 16 on the sex offenses and 12 on the kidnapping, and conclusion of law no. 2 was changed to reflect that the presumptive sentence would be the same as if Mutch had only committed two acts of second degree rape and one non-violent felony. CP 22-25; CP 180-83.

Here, the court never was requested to exercise its independent judgment regarding the double jeopardy issue at either the July 2008 or November 2008 hearing. All the judge did at the November hearing was

correct the offender score and adopt the same sentence it had imposed before. While Mutch asserted that he had an offender score of four, he did so based on a legal argument that the court could not find that the offenses were not the same criminal conduct unless a jury found they were not, and that otherwise the court had to find that they were. This is not the law, and the court did not entertain this argument and decided only to impose the same sentence based on the corrected offender score. As the court did not address the factual issue, and wasn't asked to address the factual issue, of whether the offenses were the same criminal conduct, i.e., same victim, same time, same place and same intent, the court did not exercise its independent judgment regarding the issue. Under Barberio Mutch is barred from raising his double jeopardy and same criminal conduct issues in this appeal.

2. Mutch has failed to demonstrate under RAP 2.5(a) that his double jeopardy claim is a manifest error of constitutional magnitude and may not raise it for the first time on appeal.

Even if Mutch were not precluded from raising his double jeopardy issue under RAP 2.5(c), he has failed to demonstrate that he may raise this issue under RAP 2.5(a).⁷ Mutch has failed to demonstrate, as is his burden, that his double jeopardy issue is manifest, that the jury actually

⁷ The same criminal conduct issue is not an issue of constitutional magnitude, but only arises by virtue of statute, former RCW 9.94A.400, currently RCW 9.94A.589.

found that Mutch only committed one act of second degree rape despite the jury's verdict that he was guilty of five counts of second degree rape. Mutch was charged with five counts of rape, the evidence presented show five separate episodes of rape, the prosecutor argued that there were five incidents of rape and the jury found Mutch guilty of five counts of rape. Mutch cannot challenge the instructions at this point and cannot demonstrate that he was prejudiced; *i.e.*, that his sentence in fact violated double jeopardy, particularly given the procedural stance of this case.

While double jeopardy implicates constitutional issues, pursuant to RAP 2.5(a) it is Mutch's burden to demonstrate on appeal how his alleged error is a manifest one, *i.e.*, how it actually prejudiced his rights, and that alleged error is truly of constitutional dimension. State v. Kirkman, 159 Wn.2d 918, 927, 935, 155 P.3d 125 (2007). The exception under RAP 2.5(a)(3) is a narrow one, only permitting review of certain constitutional questions. *Id.* at 934. In order to demonstrate that an error is "manifest," the defendant must demonstrate that the error had "practical and identifiable consequences." *Id.* at 935; *see also*, State v. Warren, 134 Wn. App. 44, 57, 138 P.3d 1081 (2006), *aff'd*, 165 Wn. 2d 17, 195 P.3d 940 (2008) (appellant claiming manifest constitutional error must show that the outcome likely would have been different, but for the error.) "If the trial record is insufficient to demonstrate the merits of the constitutional

claim, the error is not manifest and review is not warranted.” Kirkman, 159 Wn.2d at 935. Even if the alleged constitutional error is manifest, it may still be subject to harmless error analysis. *Id.* at 927; *cf.*, State v. Holland, 77 Wn. App. 420, 425, 891 P.2d 49, *rev. den.* 127 Wn.2d 1008 (1995) (lack of unanimity instruction raised for first time on appeal harmless as jury necessarily found defendant committed all three acts where defendant was charged with three counts, victim testified to three separate acts of molestation and jury found defendant guilty of all three counts).

Mutch asserts that he should be entitled to raise this issue for the first time on this second appeal of his resentencing because raising it at the 1994 sentencing would have had no effect on his persistent offender sentence and because all double jeopardy violations are manifest errors of constitutional magnitude and should be corrected when raised. Appellant’s Supplemental Brief at 12. Not all alleged double jeopardy violations are manifest errors of constitutional magnitude and Mutch should be required to show how his, at this late date, is. *See, e.g.*, State v. Corbett, ___ Wn. App. ___, 242 P.3d 52, 60 (2010) (alleged error in failure to include “separate and distinct act” language in instructions did not result in prejudice to defendant where instructions, evidence and closing arguments demonstrated that “any reasonable jury would have known that it must

find separate and distinct acts for each of the four guilty verdicts it entered.”); State v. Elmore, 154 Wn. App. 885, 228 P.3d 760, *rev. den.* 169 Wn.2d 1018 (2010) (alleged constitutional error regarding double jeopardy was not manifest because defendant was unable to show sufficient prejudice regarding failure to merge burglary conviction with felony murder).⁸

To the extent that Mutch’s double jeopardy argument implicates the validity of the jury instructions or the jury’s verdict on the five counts, Mutch is barred from contesting those instructions and the validity of those convictions because they were final when the mandate issued from his direct appeal. *See, In re Personal Restraint Petition of West*, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005) (error in unauthorized sentence was grounds for reversing only the erroneous portion of the sentence imposed, not grounds for vacation of the entire judgment or granting of a new trial); In re Goodwin, 146 Wn. 2d 861, 877, 50 P.3d 618 (2002) (“Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed”); In re Stoudmire, 141 Wn.2d 342, 356, 5 P.3d 1240 (2000) (presence of facial invalidity regarding length of

⁸ Mutch also relies upon federal AEDPA law in order to assert that he should be able to raise this issue at this point. Appellant’s Supplemental Brief at 12-13. However,

sentences did not permit defendant to raise untimely claim of involuntary plea). Within the context of his double jeopardy argument, Mutch faults the lack of a unanimity instruction. However, the right to a unanimous jury verdict is distinct from a double jeopardy argument, and the two rights stem from separate constitutional provisions. State v. Noltie, 116 Wn.2d 831, 843, 848, 809 P.2d 190 (1991); State v. Ellis, 71 Wn. App. 400, 404, 859 P.2d 632 (1993). As Mutch is precluded from alleging error regarding the unanimity of the jury's verdict and the validity of the instructions, this Court should presume that the jury was unanimous and the instructions adequately conveyed the law.

Even if Mutch is not barred from asserting his issues regarding double jeopardy under Barberio, he is barred from asserting it under RAP 2.5(a) because he cannot meet his burden to show that the jury's verdict did not reflect that their findings of guilt on five counts of second degree rape was based on the five separate episodes of rape that JL⁹ described in her testimony. Mutch cannot simply hypothesize that the jury's verdict of five counts was based on a single act, he must demonstrate that it was in order to prove that his allegation of error is manifest.

AEDPA law is based on federal statute and the specific statutory language of that law and is not apposite in this context.

⁹ The victim is listed by initials only to protect her privacy.

3. The jury's verdict, in the context of the evidence and argument presented and instructions given, reflects that the jury found five separate counts of rape in the second degree.

Mutch asserts that the jury's verdict of five counts of rape in the second degree was predicated on one act and therefore his sentence violates double jeopardy. One aspect of the double jeopardy clause prohibits the imposition of multiple punishments for the same offense, but it does not prohibit separate punishments for different offenses. Noltie, 116 Wn.2d at 848. "If one crime is over before another charged crime is committed, and different evidence is used to prove the second crime, then the two crimes are not the 'same offense' and a perpetrator may be punished separately for each crime without violating a defendant's double jeopardy rights." *Id.* "A defendant charged with multiple counts is adequately protected from any risk of double jeopardy when the evidence is sufficiently specific as to each of the acts charged." State v. Hayes, 81 Wn. App. 425, 429, 914 P.2d 788, *rev. den.* 130 Wn.2d 1013 (1996). In reviewing allegations of violations of double jeopardy, the reviewing court may review the entire record, including but not limited to the information, instructions, testimony and argument. Noltie, at 848-49; *see also*, Hayes, 81 Wn. App. at 440 ("No double jeopardy violation results when the information, instructions, testimony, and argument clearly demonstrate

that the State was not seeking to impose multiple punishments for the same offense.”).

In the recent case of State v. Corbett, ___ Wn. App. ___, 242 P.3d 52 (2010) the Court of Appeals Division II rejected a defendant’s claim raised for the first time on appeal that the instructions violated double jeopardy by permitting him to be convicted of four counts based on a single act and based on a non-unanimous verdict. While the defendant had proposed the very instructions he challenged and therefore the court found that the defendant had invited the alleged double jeopardy error he raised, the Court also found the alleged errors to be harmless. Id. ¶33. In that case the instructions included four separate to-convict instructions specifying each count, the instruction that a “separate crime is charged in each count” and an instruction that to convict the defendant on any count, the jury had to be unanimous that the specific act was proved. Id. at ¶13 n.6, ¶30. While the jury instructions did not include the “separate and distinct act” instruction, the court concluded the jury’s verdict was clear and the alleged error harmless where the “context of the presentation of evidence and argument at trial eliminated a strained prejudicial reading of the instruction.” Id. at ¶ 33. The court found that considering the jury instructions, evidence presented and arguments, “any reasonable jury

would have known that it must find separate and distinct acts for each of the four guilty verdicts that it entered.”

The jury’s verdict finding Mutch guilty of five counts of Rape in the Second Degree clearly reflects a finding that Mutch committed five separate acts of rape. The information in the case alleged five counts of rape. CP 137-39. JL testified very specifically about five separate episodes of rape. She testified that the first time happened right after she was trying to put her daughter to bed around 11 p.m. 3RP 170-73. She testified that Mutch hit her when she didn’t agree to talk to him, and then when they were out in the living room, he hit her numerous times about her head, telling her she had been disrespectful to him. She testified, in the midst of being hit, Mutch made her say that he was the king, that her body belonged to him, that her “pussy” and “tits” belonged to him, that she was going to marry him. 3RP 172-75, 186.

He told her she’d never be with another man or another woman, that he’d kill her if she were with another woman¹⁰ and he would kill that woman too, that he had killed other people before and it wouldn’t bother him to kill her, that she had to do what he said or he’d kill her, and that he would kill her sister if the sister interfered with his marrying her. 3RP 175-76. When she refused to take off her clothes after he told her to, Mutch hit

¹⁰ JL was homosexual. 3RP 152.

her even harder causing her to fall over backward. 3RP 177. When she took too long taking her clothes off, he hit her again. Id. After she took off her clothes, he started making her say he was the king again, made her perform oral sex on him and then had her perform vaginal intercourse on top of him. 3RP 177. Mutch had his hands on her ribs instructing her what to do, and if she didn't do it, he would squeeze her ribs hard. 3RP 178. Finally he appeared to have an orgasm, so JL got off him. 3RP 179.

She testified that he then started to do the "repeating thing" again, asking her who the king was, and making her say that he was, making her repeat that her body, etc. belonged to him. She testified that he made her do the same thing, the forced oral sex/vaginal intercourse, four times that night. 3RP 178. Finally she told him she was exhausted, and he permitted her to go to sleep and he appeared to fall asleep. 3RP 178-79.

In the morning, she testified, she got up and tried to think of some way to kill him without jeopardizing her life or her daughter's, but ended up writing a note to her sister whom she knew would be coming over later that morning. 3RP 179. After telling her daughter to give the note to her sister, she went into the studio and soon thereafter Mutch came in and wanted to have sex with her again. 3RP 180-81. JL tried to put him off, but he told her it wouldn't take very long, that it would just be one time,

and they would be business partners¹¹ and would be married. 3RP 181.

He told her he would be moving in and that she would have sex with him.

Id. She testified she then performed oral sex on him and had vaginal intercourse with him and that it was the same thing as before. 3RP 181.

She said this time it went by real fast, then she got dressed and Mutch told her to call about getting a marriage license. 3RP 181. She specifically testified that there had been five episodes of oral sex/vaginal intercourse over the course of the night into the next morning. 3RP 191.

On cross examination defense counsel made a point of asking about the five separate episodes of rape, telling the court in front of the jury that there are five times she had to ask because the State was alleging five times, so she needed to go through each time in order to make sure the jury understood that on each of the five times JL was on top. 3RP 274. JL testified that all five times she was on top during the vaginal intercourse, that the sexual intercourse happened four times during the night, that each episode took around an hour, and that in between the acts of intercourse Mutch would make her repeat things again. 3RP 268-73.

Other evidence presented corroborated that there were multiple, separate, acts of intercourse. The emergency room doctor testified that JL told him that she had been forced to have intercourse four times during the

¹¹ Mutch and JL had met through a meeting regarding Amway and they had talked about

night, after having been hit and after Mutch told her to repeat things like "I am the king," and "you belong to me," and that he forced her to have intercourse again in the morning. 3RP 389, 395-96.¹² According to the medical examiner, an expert in anatomical and clinical pathology, the physical evidence showed that sexual intercourse had occurred more than once over an increased period of time, that there had been multiple ejaculations over an increased period of time. 3RP 456-58, 463. Mutch himself admitted to the detective that he and JL had had intercourse on three or four occasions that night, although he asserted it was consensual and that she had been on top of him on at least one of the occasions. 3RP 435. He also told the detective, when asked about JL's statement that he had said he was a king, Mutch told the officer "I am a king," that he felt he was a king. 3RP 438-39.

In closing, the prosecutor reviewed the evidence and stated that there had been testimony that Mutch forced JL to have oral and vaginal sex four times during that night, and continued:

... and he indicated he would let her go to sleep and this was after the fourth time, the fourth event, and there are five counts. So we have four events that took place from the 2nd through the 3rd.

being business partners. 3RP 127, 131.

¹² JL also told the doctor that she had been forced to perform oral sex. RP 397.

3RP 686-87. The prosecutor then stated that after the fourth event Mutch went to sleep and that later in the morning he forced her to have sex again, and "this is Count V," that she said it was the same thing, forced oral sex followed by vaginal sex, and "this was Count V." He argued that the evidence of sperm demonstrated that there had been more than one occurrence of sexual intercourse and that corroborated JL's testimony.

3RP 697.

Mutch's defense did not contest the number of incidents, or acts, he asserted that the intercourse was consensual, that because JL had been on top there was no forcible compulsion, and that JL was not credible.

3RP 706-722.

In fact, he testified¹³ that she got on top, that she had sexual intercourse on top. She said five times. Every time she claimed that Richard was on the bottom, that she was on top, that he had an erection, and that somehow she was being forced to have sex in that position.

3RP 714.

In this case there were five separate to-convict instructions, each stating a different count number. Mutch neglects to mention that there was also an instruction, instruction No. 25, that stated:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

¹³ Mutch didn't actually testify, presumably counsel was referring to his statement to the detective.

Supp. CP ____, Sub. Nom. 76 (emphasis added)¹⁴. The verdict forms, of course, required the jury to find Mutch guilty, or not guilty, five separate times, once on each numbered count. A reasonable jury would have understood that in order to find Mutch guilty of five counts of rape that it had to find that Mutch raped JL five separate times. It defies logic, and common sense, to assert that the jury found Mutch guilty of five counts of rape based on a single act in the context of this case.

In State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993), the defendant was charged with two counts of rape of a child and two counts of child molestation. The two counts of child molestation had the same elements set forth in separate to-convict instructions, and with the same time period alleged, but the second to-convict instruction stated that the count had to have occurred on a date other than that in count I. *Id.* at 401-02. The two rape counts had the same elements set forth in separate to-convict instructions but with slightly different overlapping time periods, and which time periods also overlapped with the molestation counts. *Id.* The court gave the instruction that a separate crime was charged in each count, that the jury had to decide each count separately and not let their verdict on one count control their verdict on another. The instructions also included one stating the jury had to be unanimous that at least one

particular act had been proved for each count. Id. at 402. The victim testified to on-going abuse, describing at least two incidents of molestation that did not include penetration, and then over 15 incidents of digital and/or vaginal penetration. Id. at 401. In closing the prosecutor argued separate acts supported each of the four counts and that the jury had to be unanimous. Id. at 403.

On appeal in addition to raising a unanimity claim, the defendant in Ellis raised a double jeopardy claim, specifically asserting that the jury may have used a single rape as the factual basis for the two rape counts and that they may have used the same act as a basis for a child molestation count and rape count, since the jury could have found that an act of rape was also an act of molestation. Id. at 404. With respect to the first argument, the court found it unpersuasive, reasoning:

It is our view that the ordinary juror would understand that when two counts charge the very same type of crimes, each count requires proof of a different act.

Id. at 406. It also noted that the court had given the instruction that a separate crime was charged in each count and the instruction that the jury had to be unanimous that one act had been proved for each count.¹⁵ Id.

¹⁴ See WPIC 3.01.

¹⁵ The court also found the second argument unconvincing, finding that the ordinary juror would understand that when similar crimes were charged, it would require proof of a different act. Id. at 406.

This case is similar to Ellis in that separate acts were argued to the jury, there was a separate to-convict instruction for each count, the jury was instructed that separate crimes were charged in each count and that they had to decide each count separately. In addition, defense counsel here acknowledged that five separate acts were alleged, and five rapes, and only five episodes of rape, were testified to by the victim. Mutch also admitted that multiple incidents of intercourse occurred.

State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), relied upon by Mutch, is distinguishable. In that case the State charged four counts of rape of a child over a three year time period. At trial the jurors were instructed, *in one to-convict instruction* regarding all four counts, that the defendant raped the child during an eighteen month time period. *Id.* at 364-65 (emphasis added). The court noted that while there was an instruction that a “separate crime was charged in each count,” no instruction informed the jury that “each crime” required proof of a separate act. *Id.* at 367. The Borsheim court distinguished the Ellis case, noting the instructions were different in that case, and “[m]ost significantly, the trial court in the Ellis case gave four separate ‘to convict’ instructions, one for each charged count.” *Id.* at 368.

Based both on the four separate ‘to convict’ instructions, and the distinguishing language therein contained, it is apparent that the trial court in the Ellis case was attempting to draw the jury’s attention to the principle that each count charged

the commission of a separate event. Here, in contrast, the trial court merely proffered a single 'to convict' instruction, encompassing all four identical counts, but listing the elements of the charged crime only once.

Id. at 369.¹⁶

There is no reason to believe, based on the record before this Court, that the jury's verdict of five counts of second degree rape was based on one act. As in Ellis the jury's verdict represents its finding that Mutch committed five separate acts of rape against JL over the course of a night and into the next morning. Mutch's sentence does not violate double jeopardy.

4. **Mutch waived the issue of whether his current offenses were the same criminal conduct by failing to raise the factual issue below, and in fact, the record demonstrates that each rape was a complete act before Mutch committed the next act of rape.**

Mutch asserts that his offender score is wrong because his rape convictions should have been scored as one offense under former RCW 9.94A.400. Even if Mutch is not barred from raising this issue by Barberio, Mutch waived the discretionary issue of whether the rape

¹⁶ Other cases cited by Mutch in a footnote are distinguishable. State v. Holland, 77 Wn. App. 420, 891 P.2d 49 (1995), was a direct appeal based on jury unanimity, not double jeopardy, and the other cases, State v. Carter, 156 Wn. App. 561, 234 P.3d 275 (2010), State v. Berg, 147 Wn. App. 923, 198 P.3d 529(2008), and State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996) were cases on direct appeal from the conviction challenging the adequacy of the jury instructions. They also all involved multiple allegations of child sex abuse over a prolonged period of time where the testimony revealed more allegations of sexual abuse than just the number of charged counts.

offenses were factually the same criminal conduct by failing to raise this issue below. Mutch failed to raise this issue at the time the trial court first calculated his offender score after remand, at the time it decided his high offender score resulted in some of the current offenses going unpunished and warranted an exceptional sentence. While he raised the issue of "same criminal conduct" under RCW 9.94A.400 at the November 2008 hearing, he did so only in the context of a *legal* argument that the judge could not find that the offenses were not the same criminal conduct without jury findings and therefore the judge had to count the rape convictions as one for purposes of the offender score. He did not raise any factual issue or request the court to exercise its discretion to find that the offenses were the same criminal conduct. 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, Mutch waived this issue by failing to request the court to address the facts of the offenses and to exercise its discretion.

Even if Mutch could raise the issue at this point in time, the record shows that the offenses were not the same criminal conduct. Counts I-IV and Count V occurred in different places and at different times. Counts I-IV occurred in the living room over the course of the night while Count V happened in the morning in the studio after Mutch had been asleep.

Counts I-IV did not occur at the same time because they did not occur in a single, uninterrupted criminal episode over a short period of time. The rapes were not the same criminal conduct because they were sequential acts, not a continuous offense, in between which Mutch had an opportunity to reflect and form a new objective intent to commit another act of rape. Each episode of rape was complete in and of itself. Mutch's five second degree rape convictions were not the same criminal conduct.

a. *Mutch waived his same criminal conduct claim by failing to raise this issue previously.*

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, consideration of the same criminal conduct statutory provision is not mandatory – it is left to the discretion of the trial court. Nitsch, 100 Wn. App. at 523. Therefore, if a defendant fails to object at the time of sentencing to the court not addressing the same criminal conduct issue, he waives the ability to challenge that at a later date.

Mutch did not assert any factual basis for the court to make a discretionary decision regarding whether the offenses encompassed the same criminal conduct. In fact, Mutch's argument was that the court did *not* have the discretion to make a determination of whether the offenses did not encompass the same criminal conduct, that only a jury could make that finding. His legal argument was wrong, under the statute the offenses are presumed to be separate unless the court makes a specific finding that they encompass the same criminal conduct. Nitsch, 100 Wn. App. at 520-21. Mutch failed to identify for the court a factual dispute, and the court did not make any discretionary decision about whether the facts supported a finding that the offenses were the same criminal conduct. He therefore waived any factual issue regarding whether the offenses should have counted as one for offender score purposes. Moreover, he never raised his same criminal conduct claim at the resentencing in July 2008, at the very

time the court was deciding whether to impose an exceptional sentence based on his high offender score. He therefore waived this issue at the July 2008 resentencing and is barred by Barberio from raising it on appeal from the November 2008 hearing.

- b. *The trial court properly counted the five counts of rape in the second degree as separate offenses because they did not occur at the same time, one of them occurred in a different location, and Mutch formed a new intent for each rape.*

Under the Sentencing Reform Act, the presumption is that multiple current offenses will be counted separately, unless the sentencing court makes a finding that the offenses are the same criminal conduct. RCW 9.94A.400(1)(a) (1994); Nitsch, 100 Wn. App. at 520-21. On the other hand, if the court makes a finding that the current offenses constitute the same criminal conduct, those offenses count for offender score purposes as one crime. RCW 9.94.400(1)(a). "Same criminal conduct" is conduct that involves the same victims, the same objective intent, and occurs at the same time and place. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); RCW 9.94A.400(1)(a) (1994). The absence of any one of these factors precludes a finding of "same criminal conduct." State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) The phrase is "construed

narrowly to disallow most claims that multiple offenses constitute the same criminal act...¹⁷ Id.

An offense is separate and distinct from another offense if it was not committed at the same time or same place. While simultaneity is not required to show “same time,” incidents that occur close in time are separate and distinct if they are not part of an uninterrupted, continuous sequence of conduct. State v. Price, 103 Wn. App. 845, 856-57, 14 P.3d 841 (2000), *rev. den.* 143 Wn.2d 1014 (2001). Different rooms within the same residence do not constitute the same place. *See, State v. Stockmyer*, 136 Wn. App. 212, 220, 148 P.3d 1077 (2006), *rev. den.* 161 Wn.2d 1023 (2007) (guns found in different rooms of the same house are found in different places under same criminal conduct test on offense of unlawful possession of a firearm). Frequently the issue of “same time” will be intermingled with the question of “same intent” when there is a course of criminal activity over a period of time. State v. Burns, 114 Wn.2d 314, 319, 788 P.2d 531 (1990); *see also, State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997) (the combined evidence of a gap in time between two crimes, the activities and communications that occurred

¹⁷ An appellate court reviews decisions regarding “same criminal conduct” for abuse of discretion or misapplication of the law. Tili, 139 Wn.2d at 122. If the facts can support a finding of either “separate and distinct criminal conduct” or “same criminal conduct,” the trial court’s decision shall be affirmed. *See, State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868, *rev. den.*, 118 Wn. 2d 1006 (1991)(if the facts support both a finding that

during the gap, and the different methods of committing the crimes supports a finding that the crimes did not occur at the same time and with the same intent).

The formation of a new, independent intent after the commission of one crime constitutes a different objective intent. A defendant's intent is to be viewed objectively, not subjectively. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, *rev. den.*, 118 Wn. 2d 1006 (1991). The court is to decide whether the intent, when viewed objectively, changed from one crime to the next. Tili, 139 Wn.2d at 123. The formation of a new intent is supported if the evidence shows that the criminal acts "were sequential, and not simultaneous or continuous." Tili, 139 Wn.2d at 124 (*quoting Grantham*, 84 Wn. App. at 856-57). If the evidence shows that the defendant had the "time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act," then, objectively, the defendant formed a new, independent criminal intent when he committed his next criminal act. *Id.* at 123-24 (*quoting Grantham* 84 Wn. App. at 859). On the other hand, if the evidence shows that the criminal acts were uninterrupted, continuous and committed within an *extremely* short period of time, it is unlikely that the defendant formed a new criminal intent. Tili, 139 Wn.2d at 124 (*emphasis added*). A

the criminal intent was the same and that it was different for the two counts, the

defendant's choice to commit another criminal act after facing the question as to whether or not to continue his criminal activity substantiates a finding of successive or sequential intents and not one continuous intent. Grantham, 84 Wn. App. at 860-61; *accord*, Price, 103 Wn. App. at 856 (amount of time it took for the defendant to go back to his truck, follow the victims onto the highway, pull beside them and then shoot at them again was sufficient to negate a finding of "continuing, uninterrupted sequence of conduct," defendant formed a new intent after he shot at the victims the first time, and each shooting was a complete criminal act in itself).

The court in Grantham rejected the argument that the defendant's crimes were the same criminal conduct because the defendant's intent in committing the crimes, anal rape and oral rape, was sexual intercourse. Grantham, 84 Wn. App. at 858-59. In Grantham the defendant raped his victim once and after doing so, he threatened the victim not to tell, and the victim begged him to stop and to take her home. The defendant then raped her a second time using new physical force. *Id.* at 859. The court found that, given the gap in time between the two rapes and the communication and activity during the gap, the defendant's intent differed for the two sexual assaults because he completed his intent to commit the first rape at

determination regarding "same criminal conduct" is left to the trial court's discretion).

one point during the sexual attack, and then formed a new, objective, intent to commit the second rape. Id. at 859.

Mutch's crimes were sequential acts and not continuous. Each rape was a complete act in and of itself. The four episodes of rape that occurred in the living room during the night started sometime after 11 p.m. and ended around 4 a.m. 3RP 435. The time in between each rape episode during the night was around an hour or so. 3RP 271-73. In between each episode Mutch talked to JL about being a king and her belonging to him and made her repeat the things that he was saying. 3RP 273. After the fourth episode she told him she had to sleep because she was exhausted, and he permitted her to go to sleep, although she only pretended to sleep. 3RP 178. Then in the morning sometime after 8 a.m., after Mutch had slept for a while, he went into her studio and told her he wanted to have sex, that it would be just the one time and wouldn't take long. 3RP 180-81, 436. When she tried to rebuff him, he told her she would have sex, and she then complied with his demand.

Counts I-IV and V are not the same criminal conduct because they happened at different times and place, and after Mutch had time to form a new intent. Count V happened hours after the fourth episode, after Mutch had slept and had an opportunity to form a new intent to rape JL, and it occurred in a different place, the studio. Counts I through IV are not the

same criminal conduct because they did not occur at the same time, and as in Grantham, they occurred after Mutch formed a new intent to rape.

There was communication in between the acts of rape, each rape was complete before he formed a new, objective, intent to commit the next one.

Mutch asserts that this case is more similar to State v. Palmer, 95 Wn. App. 187, 975 P.2d 1038 (1999), than Grantham. However, in Palmer, there was only a few minutes between the charged rapes, with the vaginal rape occurring immediately after the oral rape. *Id.* at 191. The only activity that occurred in between the acts of rape was the use of threats and force to achieve the vaginal rape. In our case Mutch went through the “repeating” litany before each of the four night episodes of rape and there was about an hour between each of these rapes. While he did that before each of those episodes of rape, there is nothing in the record to show that the litany was part of the act of forcible rape. Tili, also referenced by Mutch, is distinguishable because in that case the acts of rape were nearly simultaneous, occurring within two minutes of one another. Tili, 139 Wn.3d at 123-24.

Mutch mistakenly focuses on what he alleges was his subjective intent in committing the acts of rape. His subjective intent is nowhere in the record, and it is the objective intent from his actions that is the focus of

a same criminal conduct analysis not his subjective intent. The court rejected this kind of argument in Grantham. Grantham, 84 Wn. App. at 858-59. Just like in Grantham, here there was a significant gap in time between the episodes of rape in Counts I through IV and communication during that gap, which under a narrow construction of the term compels a finding that the rapes were not the same criminal conduct.

In finding that the unit of prosecution for rape is sexual intercourse and that it occurs upon any act of penetration, the Tili court expressed concern about lack of consequences for additional sexual assaults on the same person:

Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder,-an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Tili, 139 Wn.2d at 117; *see also*, Grantham, 84 Wn. App. at 861 (express legislative concern in rape statutes is to protect the bodily integrity and personal safety of victims and that protection is best achieved by separately punishing each separate act of rape). Mutch's five separate rapes were not the same criminal conduct and should be counted

separately to hold him accountable for each incident of rape he committed on JL.

5. **The 2007 amendments to RCW 9.94A.537 did not eliminate the trial court's authority to impose an exceptional sentence based on a defendant's criminal history, therefore the trial court had the authority to impose an exceptional sentence on remand.**

Mutch asserts again that the trial court did not have any statutory authority under the 2007 amendment to the exceptional sentencing provisions to impose an exceptional sentence on remand for resentencing relying primarily on the case of In re Beito¹⁸. Specifically Mutch asserts that since he was not sentenced to an exceptional sentence in 1994, the 2007 amendments do not apply to him and he cannot be sentenced to an exceptional sentence. The amendments to the exceptional sentence provisions in 2007 followed on the heels of the 2005 amendments and were designed to address the requirements of Blakely¹⁹ regarding jury findings.²⁰ They did not significantly alter the trial court's existing statutory authority to impose an exceptional sentence where jury findings were *not* required to impose an exceptional sentence. As the 2007 amendments did not remove the trial court's authority to impose an

¹⁸ In re Beito, 167 Wn.2d 497, 220 P.3d 4898 (2009).

¹⁹ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d (2004).

²⁰ Laws of 2005, Ch. 68 §1; Laws of 2007 Chapter 205

exceptional sentence based on a defendant's criminal history, the trial court had the statutory authority to impose the exceptional sentence here.

In In re Beito, this Court addressed whether the 2007 amendments applied to a defendant's case in which the trial court had imposed an exceptional sentence based on an aggravating factor that was not one of the exclusive ones listed in the statute. In 2005 when revising the SRA to conform to Blakely requirements, the legislature made the list of statutory aggravating factors exclusive, whereas they had previously been illustrative. The question before the court was whether a jury could be impaneled to find the non-statutory aggravating factor the court had previously relied upon. *Id.* at 508. The court found that it could not because the list was now exclusive. *Id.* The court thus held that the 2007 amendments did not apply to the defendant and an exceptional sentence could not be imposed upon remand. *Id.*

Here, the State did not request empanelment of a jury to find the statutory aggravating factor of high offender score resulting in some offenses going unpunished. Here the State sought and the trial court imposed an exceptional sentence based on an aggravating factor that does not need to be found by a jury. Therefore, Beito does not provide a basis to overturn Mutch's exceptional sentence.

The 2007 amendments and the procedures set forth in RCW 9.94A.537 do not apply to exceptional sentences based on criminal history. *See, State v. Edvalds*, 157 Wn. App. 517, 531, 237 P.3d 368 (2010) (given context of statutory scheme as a whole, State was not required to provide notice under RCW 9.94A.537 where the State's request for exceptional sentence was based on criminal history). RCW 9.94A.535 provides the basis *for a court* to impose an exceptional sentence and sets forth the specific factors it may rely upon in order to impose that sentence. RCW 9.94A.535(1), (2) (emphasis added). In the 2005 amendments, the legislature amended the statute to delineate those aggravating factors that could be considered by a jury and those that could be considered by a court. The list of aggravating factors to be considered by a jury included language that the "facts should be determined by procedures specified in [RCW 9.94A.537],"²¹ whereas the factors to be considered by a court contained no such language or requirement. RCW 9.94A.535(2), (3). Therefore, the procedures set forth in RCW 9.94A.537 apply only to those exceptional sentences based on aggravating factors that must be found by a jury.

As the procedures in RCW 9.94A.537 do not apply to exceptional sentences based on prior criminal history, they do not limit the trial court's

²¹ The sentence referenced "section 4 of this act" which was a new section added in 2005

authority to impose, or the State's ability to seek, an exceptional sentence based on criminal history. *See, Edvalds*, 157 Wn. App. at 534-35 (trial court did not err in imposing exceptional sentence based on criminal history under RCW 9.94A.535(2)(c) because notice requirement in RCW 9.94A.537 did not apply to State's ability to seek or the court's ability to impose such a sentence and defendant was not otherwise entitled to specific notice before such an exceptional sentence was imposed); *State v. Mcneal*, 156 Wn. App. 340, 231 P.3d 1266, *rev. den.* 241 P.3d 786 (2010) (RCW 9.94A. 537(2) did not preclude sentencing court from consider aggravating factor of high offender score resulting in offense going unpunished because those statutory procedures did not apply to exceptional sentences that fell under RCW 9.94A.535(2), only to those under .537(2)).

The authority for the court's imposition of an exceptional sentence based on criminal history existed prior to the 2005 and 2007 amendments and survived those amendments. The purpose of the 2005 and 2007 amendments was to bring the exceptional sentencing provisions into compliance with the dictates of *Blakely*, but *Blakely* concerns are not implicated with the aggravating factor under RCW 9.94A.535(2)(c). *See, State v. Alvarado*, 164 Wn.2d 556, 568, 192 P.3d 345 (2008). Mutch

and became RCW 9.9A.537. Laws of Washington 2005, Chapter 68 §3, 4.

asserts that Pillatos held that the 2005 amendments did not apply to defendants convicted before the amendments, and therefore the amendments, and the procedures contained therein, cannot apply to him. However, as this Court in Powell noted the Pillatos holding was that the procedures contained *within* .537, those regarding aggravating factors that must be submitted to a jury, did not apply to defendants who had pleaded guilty prior to the effective date of the 2005 amendment. State v. Powell, 167 Wn.2d 672, 678, 223 P.3d 493 (2008) (emphasis added).

Pre- and post-Blakely the trial court has had the authority to impose an exceptional sentence based on criminal history facts. Pre- and post- the 2005 amendment to RCW 9.94A.535, the trial court has had the authority to impose exceptional sentences based on criminal history facts. There is nothing in the 2007 amendments that removed the trial court's ability to impose, or the State's ability to seek, an exceptional sentence based on criminal history facts.

6. The findings entered by the trial court were sufficient to support imposition of an exceptional sentence.

Mutch also asserts that the trial court erred in imposing an exceptional sentence by failing to properly understand Mutch's offender score and by failing to state explicitly in its written findings that the aggravating factor of high offender score resulting in current offenses

going unpunished was a “substantial and compelling reason” to impose an exceptional sentence. While the findings entered by the court were technically incorrect to the extent that they stated that three of Mutch’s rapes would go unpunished instead of two, the trial court did not err in computing the offender score or in finding that some of Mutch’s current offenses would go unpunished due to his high offender score. It is clear from the record that the judge would have imposed the same exceptional sentence anyway. Remand for resentencing is not required if the record is clear that the judge would have imposed the same sentence.

While the court did not state explicitly in its written findings that the aggravating factor of Mutch’s high offender score resulting in current offenses going unpunished was a “substantial and compelling reason” justifying imposition of an exceptional sentence, Mutch has cited no authority that this conclusion must be *explicitly* stated in the court’s findings. Moreover, this conclusion is implicit in the other written findings and the court’s oral statements.

Review of an exceptional sentence is limited by statute. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range

for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4); former RCW 9.94A.120(4) (1994). This limited review can involve three different questions, with different standards of review: 1) whether there is sufficient evidence in the record to support the reasons for an exceptional sentence under a clearly erroneous standard; 2) whether, under a de novo standard, the reasons justify a departure from the standard range; and 3) whether the exceptional sentence is clearly excessive under an abuse of discretion. Law, 154 Wn.2d at 93. Even if the reviewing court invalidates a portion of the basis for an exceptional sentence, the matter need not be remanded for resentencing if the record is clear that the court would have imposed the same sentence based on valid factors. *See, State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003) (court need not remand for sentencing when it invalidates one or more of the reasons supporting an exceptional sentence as long as it is clear from the record that the court would have imposed the same sentence on the basis of the remaining valid reasons); State v. Jennings, 106 Wn. App. 532, 543, 24 P.3d 430, *rev. denied*, 144 Wn.2d 1020 (2001) (exceptional sentence may be upheld despite incorrectly calculated offender score if the record clearly demonstrates the trial court would have imposed the same sentence).

Mutch implies that the conclusion that the aggravating factor found is a "substantial and compelling reason" to impose an exceptional sentence is a "necessary element," but cites no authority for that proposition. The inquiry as to whether there are substantial and compelling reasons to impose an exceptional sentence is a legal conclusion, which is still made by the trial court post-Blakely. State v. Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), *abrogated in part by* Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Moreover where a sentencing court's written findings regarding aggravating factors do not provide a sufficient explanation for its imposition of an exceptional sentence, the written findings may be supplemented by the trial court's oral decision or statements in the record. State v. Teuber, 109 Wn. App. 640, 646, 36 P.3d 1089 (2001), *rev. den.* 146 Wn.2d 1021 (2002), *citing In re LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986).

At the hearing in November 2008, the prosecutor explained that the previous offender score of 20 had been wrongly calculated and that the correct offender score on the rapes was 16 and 12 on the kidnapping. 2RP 16, CP 186. Noting that his sentencing memorandum was virtually the same as the one he had previously submitted for the July 2008 hearing, the prosecutor stated that three of the rapes would go unpunished and one half of the kidnapping would go unpunished if a standard range sentence was

imposed. 2RP 16- 17, CP 189. The prosecutor, while noting the correct offender score and the fact that some current offenses would go unpunished, apparently neglected to adjust the findings regarding the number of offenses from three rapes to two given the adjustment to the offender score.²² The trial court ultimately imposed an exceptional sentence, adopting the State's proposed findings of fact and conclusions of law. 2RP 40. The judge drew attention to the fact that he was specifically making conclusion of law # 5, that the defendant should receive an exceptional sentence over the standard range based on RCW 9.94A.535(2)(c). 2RP 40, CP 182. The court also indicated it was adopting the comments from the prior hearing. 2RP 41. At the prior hearing in July, the judge commented:

But I think the facts of this case clearly require the court to closely examine the sentencing statutes and the sentencing guidelines and the Sentencing Reform Act, if an exceptional sentence were not imposed the defendant would go substantially unpunished for much of the conduct and I do not believe the interest of justice would be served.

1 RP 43-44. He further commented:

I have reviewed the record and files. ... And, as I said, and let me make clear once again that I do believe that the court

²² The State takes exceptions with Mutch's statements as to what his offender score would be on two counts of rape versus three counts of rape, referenced in his brief, because they do not factor in the kidnapping. If Mutch had only been convicted of two counts of rape and the kidnapping, he would have faced an offender score of 7, and with three counts of rape and the kidnapping, he would have faced an offender score of 10. With an offender score of 10, part of one of the rapes or part of the kidnapping would go unpunished.

has the independent power as I say independent of any argument of the State to waive the notice, provide for an exceptional sentence, to reach it's own determination that an exceptional sentence above the presumptive standard range may be imposed by the facts of this case I maintain clearly establish that to do otherwise would result in Mr. Mutch going unpunished for a number of his current offenses. Completely frustrating I believe the purposes of the Sentencing Reform Act and reaching results that are in any opinion contrary to the general notions of justice. (sic)²³

1RP 47-48.

It is clear from the court's comments that the court would have imposed an exceptional sentence whether the number of rapes that would go unpunished were two or three. The court did not err in finding that some of Mutch's current offenses would go unpunished based on his high offender score. The court had the correct offender score before it which demonstrated that some of Mutch's current offenses would go unpunished given that offender score. Even if the number of rapes that would go unpunished was two instead of three, all the court had to find was that some current offenses would go unpunished. It's clear from the record that the court would have imposed the same sentence based on two rapes and one half of a kidnapping going unpunished because the court imposed

²³ The State believes that some of the punctuation in the transcript may be in error.

the same sentence it imposed as it did in July on a reduced offender score.²⁴ Remand for resentencing is not warranted.²⁵

Mutch provides no authority for the proposition that the words “substantial and compelling reason” must explicitly appear in the findings of fact and conclusions of law regarding the exceptional sentence. While better practice would be to include them, here they are implicit in conclusion #5 where the court states that defendant should receive an exceptional sentence over the standard range based on RCW 9.94A.535(2)(c). Certainly, the court’s implicit conclusion that the aggravating factor under RCW 9.94A.535(2)(c) is a substantial and compelling reason to impose an exceptional sentence is clear from the comments of the court that considering the purposes of the SRA an exceptional sentence should be imposed and that an injustice would be done otherwise. If the court requires clarification regarding the findings, it could always remand to the trial court for the limited purpose of clarifying of the findings.

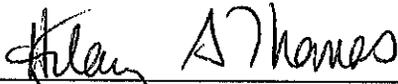
²⁴ Mutch does not assert that only if two and a half of his current offenses go unpunished, the court would be precluded from imposing an exceptional sentence.

²⁵ Mutch asserts that the trial court could only impose a standard range sentence on remand. However, under State v. Vance, 168 Wn.2d 754, 230 P.3d 1055 (2010), the court could also impose an exceptional sentence under RCW 9.94A.589(1)(a).

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that Mutch's exceptional sentence be upheld.

Respectfully submitted this 22nd day of December, 2010.


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

RECEIVED
COURT CLERK
STATE OF WASHINGTON

10 DEC 22 PM 3:56

BY RONALD R. CARPENTER

CERTIFICATE

CLERK I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, NANCY P. COLLINS, addressed as follows:

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101

Tara D. Adrian-Starik
LEGAL ASSISTANT

12/22/10
DATE

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL