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88073-5

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

FONOTAGA TILI

Petitioner.

NO. 43148-3

STATE'S RESPONSE TO
PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Should the petition be dismissed as it raises a claim that was rejected on direct review and there is no material change in the law that would justify reconsideration of the matter?

B. STATUS OF PETITIONER:

Petitioner, Fonotaga Tili, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 97-1-03819-9. Appendix A. Petitioner was found guilty by a jury trial of three counts of first degree rape, one count of burglary in the first degree, and one count of assault in the second degree. *Id.* At the first sentencing hearing the trial court found that the three rapes were separate and distinct acts, imposed standard range sentences on all counts, ran the three serious violent rape sentences consecutively, but ran

1 the sentences for the assault and burglary concurrent with one of the rape convictions for a
2 total period of confinement of 417 months. Appendix B. On appeal petitioner challenged
3 his three rape convictions arguing that they violated double jeopardy (unit of prosecution),
4 or that they at least were the same criminal conduct under the Sentencing Reform Act, and
5 that his conviction for assault violated double jeopardy in that it should merge with his
6 rape convictions. Appendix B. The Supreme Court found that his three rape convictions
7 did not violate double jeopardy as the unit of prosecution was one count per act of sexual
8 intercourse, and the jury had found three distinct acts of sexual intercourse. *Id.* It did,
9 however, find that the trial court should have treated the three acts of intercourse as the
10 same criminal conduct under the facts of this case. *Id.* With regards to petitioner's claim
11 that his assault conviction should merge with his rape convictions, the State conceded that
12 under the facts of the case and the charging language used, that the assault did merge with
13 the rapes, but contended that the assault did not merge with the burglary due to the
14 operation of the burglary anti-merger statute. The Supreme Court agreed with this
15 argument but noted that that the conviction should be used as criminal history when
16 sentencing on the burglary conviction only. Appendix B. The matter was remanded for a
17 new sentencing hearing. *Id.*

18 On remand, the trial court again imposed a sentence of 417 months –this time as an
19 exceptional sentence. Appendix A. The petitioner again appealed arguing that collateral
20 estoppel precluded imposition of an exceptional sentence; the case again ended up in the
21 Supreme Court. Appendix C. The Court noted that while the judgment listed incorrect
22 offender scores and standard ranges, that the sentencing court did have the correct
23 information before it and its calculations of the standard ranges was consistent with the
24 directive in the prior opinion and mandate. *Id.* It rejected petitioner's argument that

1 collateral estoppel precluded imposition of an exceptional sentence and affirmed the
2 sentence. Appendix C. The mandate issued on February 3, 2003. *Id.*

3 In March 2012, petitioner filed an untimely first personal restraint petition arguing
4 that his assault conviction violated double jeopardy as it should merge with his other
5 convictions. Petitioner argues that his petition is not time barred because his judgment is
6 facially invalid and because of the decision in *In re Personal Restraint of Francis*, 170
7 Wn.2d 517, 242 P.3d 866 (2010).

8 Respondent has no information to dispute petitioner's claim of indigency.

9 C. ARGUMENT:

- 10 1. THE PETITION SHOULD BE DISMISSED AS IT IS RAISES A CLAIM
11 THAT IS MERELY A REFORMULATION OF A CLAIM REJECTED IN
12 THE DIRECT APPEAL AND THERE IS NO SHOWING THAT THE
13 INTERESTS OF JUSTICE REQUIRE ITS RELITIGATION.

14 Personal restraint procedure has its origins in the State's habeas corpus remedy,
15 guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of
16 habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A
17 personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for
18 an appeal. *In re Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral relief
19 undermines the principles of finality of litigation, degrades the prominence of the trial, and
20 sometimes costs society the right to punish admitted offenders. These are significant costs,
21 and they require that collateral relief be limited in state as well as federal courts. *Id.*

22 A petitioner asserting a constitutional violation must show actual and substantial
23 prejudice. *In re Haverty*, 101 Wn.2d 498, 681 P.2d 835 (1984). A petitioner relying on
24 non-constitutional arguments, however, must demonstrate a fundamental defect that
25 inherently results in a complete miscarriage of justice. *In re Cook*, 114 Wn.2d at 810-11.

This is a higher standard than the constitutional standard of actual prejudice. *Id.* at 810.

1 Reviewing courts have three options in evaluating personal restraint petitions:

- 2 1. If a petitioner fails to meet the threshold burden of showing actual
3 prejudice arising from constitutional error or a fundamental defect
4 resulting in a miscarriage of justice, the petition must be dismissed;
- 5 2. If a petitioner makes at least a prima facie showing of actual
6 prejudice, but the merits of the contentions cannot be determined
7 solely on the record, the court should remand the petition for a full
8 hearing on the merits or for a reference hearing pursuant to RAP
9 16.11(a) and RAP 16.12;
- 10 3. If the court is convinced a petitioner has proven actual prejudicial
11 error, the court should grant the personal restraint petition without
12 remanding the cause for further hearing.

13 ***In re Hews***, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

14 Collateral attack by personal restraint petition “should not simply be a reiteration of
15 issues finally resolved at trial and direct review, but rather should raise new points of fact
16 and law that were not or could not have been raised in the principal action, to the prejudice
17 of the defendant.” ***In re PRP of Gentry***, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999); ***In***
18 ***re PRP of Lord***, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). A petitioner is prohibited
19 from renewing an issue that was raised and rejected on direct appeal unless the interests of
20 justice require relitigation of that issue. ***In re PRP of Davis***, 152 Wn.2d 647, 670-671, 101
21 P.3d 1 (2004); *see also Gentry*, 137 Wn.2d at 388. An issue is considered raised and
22 rejected on direct appeal if the same ground presented in the petition was determined
23 adversely to the petitioner on appeal, and the prior determination was on the merits. ***In re***
24 ***PRP of Taylor***, 105 Wn.2d 683, 687, 717 P.2d 755 (1986). A petitioner can show the
25 interests of justice are served by reexamining an issue by showing there has been an
 intervening change in the law or some other justification for having failed to raise a crucial
 point or argument in the prior application. ***In re PRP of Stenson***, 142 Wn.2d 710, 720, 16

1 P.3d 1 (2001). The change in the law must be material to petitioner's case. *In re Jeffries*,
2 114 Wn.2d 485, 488, 789 P.2d 731 (1990).

3 "Simply 'revising' a previously rejected legal argument . . . neither creates a 'new'
4 claim nor constitutes good cause to reconsider the original claim." *Jeffries*, 114 Wn.2d at
5 488.

6 [I]dential grounds may often be proved by different factual allegations. So
7 also, identical grounds may be supported by different legal arguments, . . .
8 or be couched in different language, . . . or vary in immaterial respects.
9 Thus, for example, "a claim of involuntary confession predicated on alleged
10 psychological coercion does not raise a different 'ground' than does one
11 predicated on physical coercion."

12 *Id* (citations omitted). A petitioner may not create a different ground for relief merely by
13 alleging different facts, asserting different legal theories, or couching his argument in
14 different language. *Lord*, 123 Wn.2d at 329.

15 In his direct appeal, petitioner challenged his assault conviction arguing that it
16 should merge with his rape convictions. The Supreme Court concluded that while his
17 assault conviction merged with the rape convictions, it was properly included on his
18 judgment because the burglary-antimerger statute precluded it from merging with the
19 burglary conviction, and that it could count as criminal history when sentencing on the
20 burglary. Appendix B. Thus, in order for this Court to revisit a claim that was rejected on
21 direct appeal, petitioner must show that the "interests of justice" require its relitigation.
22 Petitioner makes no argument regarding the "interest of justice" standard. While petitioner
23 does not address the "interests of justice standard", he does discuss a recent decision that
24 he believes is controlling law on his claim – *In re Personal Restraint of Francis*, 170
25 Wn.2d 517, 242 P.3d 866 (2010). In that case, Francis challenged his conviction for

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney or to the attorney for respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/9/20 Johnson
Date Signature

APPENDIX “A”

Judgment and Sentence

CERTIFIED COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

FONOTAGA F. TILI,

Defendant.

CAUSE NO. 97-1-03819-9
WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other - Custody

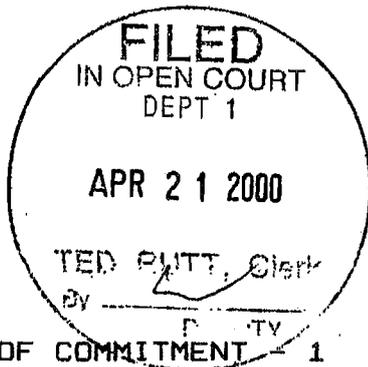
THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).



WARRANT OF COMMITMENT - 1

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence (Sentence of confinement or placement not covered by Sections 1 and 2 above).

FILED
IN OPEN COURT
DEPT 1
APR 21 2000

Dated: 4-21-2000

By direction of the Honorable
[Signature] TED RUTT, Clerk
J U D G E DEPUTY

Ted Rutt
C L E R K

By: [Signature]
D E P U T Y C L E R K

CERTIFIED COPY DELIVERED TO SHERIFF

Date APR 21 2000 By Chau Ladensung Deputy

STATE OF WASHINGTON)
County of Pierce)ss:

I, Ted Rutt, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court.
Dated: _____

TED RUTT, Clerk
By: _____ Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

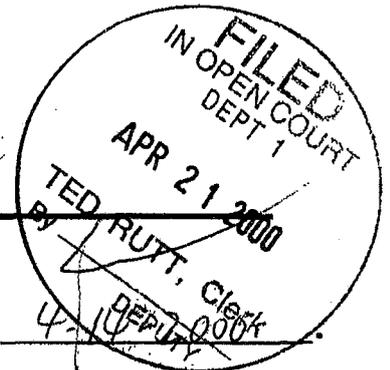
FONOTAGA F. TILI,

Defendant.

DOB: 03/16/1973
SID NO.: WA17608159
LOCAL ID:

CAUSE NO. 97-1-03819-9

JUDGMENT AND SENTENCE
(FELONY/OVER ONE YEAR)



I. HEARING

1.1 A sentencing hearing in this case was held on

1.2 The defendant, the defendant's lawyer, RAYMOND THOENIG, and the deputy prosecuting attorney, GREGORY L. GREER, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on January 27, 1998 by

[] plea [X] jury-verdict [] bench trial of:

Count No.: I
Crime: RAPE IN THE FIRST DEGREE (DIGITAL/VAGINAL), Charge Code: (I20)
RCW: 9A.44.040(1)(d)
Date of Crime: 09/16/1997
Incident No.: Pierce County Sheriff's Department 97-259-1077

Count No.: II
Crime: RAPE IN THE FIRST DEGREE (DIGITAL/ANAL), Charge Code: (I20)
RCW: 9A.44.040(1)(d)
Date of Crime: 09/16/1997
Incident No.: Pierce County Sheriff's Department 972591077

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 1

ENTERED JUDGEMENT # 98-9-03819-9

97-1-03819-9

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3 Count No.: III
Crime: RAPE IN THE FIRST DEGREE (PENILE/VAGINAL), Charge Code:
4 (I20)
RCW: 9A.44.040(1)(d)
5 Date of Crime: 09/16/1997
Incident No.: Pierce County Sheriff's Department 97-2591077

6 Count No.: IV
7 Crime: BURGLARY IN THE FIRST DEGREE, Charge Code: (G2)
RCW: 9A.52.020(1)(b)
8 Date of Crime: 09/16/1997
Incident No.: Pierce County Sheriff's Department 97-2591077

9 Count No.: V
10 Crime: ASSAULT IN THE SECOND DEGREE, Charge Code: (E31)
RCW: 9A.36.021(1)(f)
11 Date of Crime: 09/16/1997
Incident No.: Pierce County Sheriff's Department 97-2591077

- 12 [] Additional current offenses are attached in Appendix 2.1.
13 [] A special verdict/finding for use of deadly weapon other than a
14 firearm was returned on Count(s).
15 [] A special verdict/finding for use of a firearm was returned on
16 Counts_____.
17 [] A special verdict/finding of sexual motivation was returned on
18 Count(s)_____.
19 [] A special verdict/finding of a RCW 69.50.401(a) violation in a
20 school bus, public transit vehicle, public park, public transit
21 shelter or within 1000 feet of a school bus route stop or the
22 perimeter of a school grounds (RCW 69.50.435).
23 [] Other current convictions listed under different cause number's used
24 in calculating the offender score are (list offense and cause
25 number):

- 26 [] Current offenses encompassing the same criminal conduct and
27 counting as one crime in determining the offender score are (RCW
28 9.94A.400(1)):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history
for purposes of calculating the offender score are (RCW
9.94A.360): NONE KNOWN OR CLAIMED.

- [] Additional criminal history is attached in Appendix 2.2.
[] Prior convictions served concurrently and counted as one offense
in determining the offender score are (RCW 9.94A.360(5)(a)):

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 2

2.3 SENTENCING DATA:

	<u>Offender Score</u>	<u>Serious Level</u>	<u>Standard Range(SR)</u>	<u>Enhancement</u>	<u>Maximum Term</u>
Count I:	4	XII	129-171		LIFE
Count II:	0	XII	93-123		LIFE
Count III:	0	XII	93-123		LIFE
Count IV:	8	VII	77-102		LIFE
Count V:	8	IV	53-70		LIFE

Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE:

Substantial and compelling reasons exist which justify an exceptional sentence

above within below the standard range for Count(s) I. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 RECOMMENDED AGREEMENTS:

For violent offenses, serious violent offenses, most serious offenses, or any felony with a deadly weapon special verdict under RCW 9.94A.125; any felony with any deadly weapon enhancements under RCW 9.94A.310(3) or (4) or both; and/or felony crimes of possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first or second degree, and/or use of a machine gun, the recommended sentencing agreements or plea agreements are attached as follows:

2.6 RESTITUTION:

Restitution will not be ordered because the felony did not result in injury to any person or damage to or loss of property.

Restitution should be ordered. A hearing is set for _____.

JUDGMENT AND SENTENCE
 FELONY / OVER ONE YEAR - 3

- Extraordinary circumstances exist that make restitution inappropriate. The extraordinary circumstances are set forth in Appendix 2.5.
- Restitution is ordered as set out in Section 4.1, LEGAL FINANCIAL OBLIGATIONS.

2.7 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability to pay:

- no legal financial obligations.
- the following legal financial obligations:
 - crime victim's compensation fees.
 - court costs (filing fee, jury demand fee, witness costs, sheriff services fees, etc.)
 - county or inter-local drug funds.
 - court appointed attorney's fees and cost of defense.
 - fines.
 - other financial obligations assessed as a result of the felony conviction.

A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

III. JUDGMENT

- 3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.
- 3.2 The court DISMISSES.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

\$ 1,816.28, Restitution to: ① Victim (Confidential address);

② CVC
 406 Legion Way } \$1,578.41
 P.O. Box 44520
 Olympia, WA 98504

JUDGMENT AND SENTENCE
 FELONY / OVER ONE YEAR - 4

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5 \$ 110, Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);
6 \$ 500, Victim assessment;
7 \$ _____, Fine; [] VUCSA additional fine waived due to indigency (RCW 69.50.430);
8 \$ _____, Fees for court appointed attorney;
9 \$ _____, Washington State Patrol Crime Lab costs;
10 \$ _____, Drug enforcement fund of _____;
11 \$ _____, Other costs for: _____;
12 \$ 2,426.28, TOTAL legal financial obligations including restitution [] not including restitution.

- 14 [] Minimum payments shall be not less than \$ _____ per month. Payments shall commence on _____.
15 The Department of Corrections shall set a payment schedule.
16 [] Restitution ordered above shall be paid jointly and severally with:

17

<u>Name</u>	<u>Cause Number</u>
_____	_____
_____	_____

18
19 The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement to assure payment of the above monetary obligations.

20 Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

21 Defendant must contact the Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release or by _____.

22 Bond is hereby exonerated.

23 4.2 CONFINEMENT OVER ONE YEAR: The defendant is sentenced as follows:

24 JUDGMENT AND SENTENCE
25 FELONY / OVER ONE YEAR - 5

(a) CONFINEMENT: (Standard Range) RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

<u>417</u>	months on Count No. I	<input checked="" type="checkbox"/>	concurrent	<input type="checkbox"/>	consecutive
<u>0</u>	months on Count No. II	<input checked="" type="checkbox"/>	concurrent	<input type="checkbox"/>	consecutive
<u>0</u>	months on Count No. III	<input checked="" type="checkbox"/>	concurrent	<input type="checkbox"/>	consecutive
<u>48</u>	months on Count No. IV	<input checked="" type="checkbox"/>	concurrent	<input type="checkbox"/>	consecutive
<u>14</u>	months on Count No. V	<input checked="" type="checkbox"/>	concurrent	<input type="checkbox"/>	consecutive

Standard range sentence shall be concurrent consecutive with the sentence imposed in Cause Nos.: _____

Credit is given for 965 days served;

4.3 COMMUNITY PLACEMENT (RCW 9.94A.120). The defendant is sentenced to community placement for one year two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

COMMUNITY CUSTODY (RCW 9.94A.120(1)). Because this was a sex offense that occurred after June 6, 1996, the defendant is sentenced to community custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

While on community placement or community custody, the defendant shall: 1) report to and be available for contact with the assigned community corrections officer as directed; 2) work at Department of Corrections-approved education, employment and/or community service; 3) not consume controlled substances except pursuant to lawfully issued prescriptions; 4) not unlawfully possess controlled substances while in community custody; 5) pay supervision fees as determined by the Department of Corrections; 6) residence location and living arrangements are subject to the approval of the department of corrections during the period of community placement.

- (a) The offender shall not consume any alcohol;
- (b) The offender shall have no contact with: Victim (L.M.)
or any member of victim's family
- (c) The offender shall remain within or outside of a specified geographical boundary, to-wit: Per CCB.
- (d) The offender shall participate in the following crime related treatment or counseling services: Per CCB.
- (e) The defendant shall comply with the following crime-related prohibitions: See Appendix F

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 6

(f) [] OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS:

(g) [X] HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. (RCW 70.24.340)

(h) [X] DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The Department of Corrections shall be responsible for obtaining the sample prior to the defendant's release from confinement. (RCW 43.43.754)

[] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND DEPORTATION BY THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SUBJECT TO ARREST AND REINCARCERATION IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO THE EXPIRATION OF THE SENTENCE.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9.94A.200(2)).

FIREARMS: PURSUANT TO RCW 9.41.040, YOU MAY NOT OWN, USE OR POSSESS ANY FIREARM UNLESS YOUR RIGHT TO DO SO IS RESTORED BY A COURT OF RECORD.

ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 24 HOURS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130.

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT'S RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE CONVICTION OR THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: 4-21-2000

FILED
OPEN COURT
DEPT 1
APR 21 2000
TED RUTT, Clerk
DEPUTY
JUDGE

Presented by:
[Signature]
GREGORY L. GREER
Deputy Prosecuting Attorney
WSB # _____

Approved as to form:
[Signature]
RAYMOND THOENIG
Lawyer for Defendant
WSB # 6510

jlg

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 7

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year term of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: per CCO

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: Lisa Michael and any member of her family

(III) The offender shall participate in crime-related treatment or counseling services;

(IV) The offender shall not consume alcohol;

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

(VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: _____

FINGERPRINTS

Right Hand

Fingerprint(s) of: FONOTAGA F. TILI, Cause #97-1-03819-9

Attested by: Ted Rutt, CLERK.

By: DEPUTY CLERK [Signature] Date: 4-21-2000

CERTIFICATE

OFFENDER IDENTIFICATION

I, _____
Clerk of this Court, certify that
the above is a true copy of the
Judgment and Sentence in this
action on record in my office.

State I.D. #WA17608159

Date of Birth 03/16/1973

Sex MALE

Dated: _____

Race ASIAN

CLERK

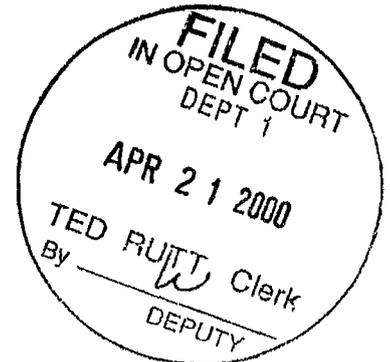
ORI _____

By: _____
DEPUTY CLERK

OCA _____

OIN _____

DOA _____



STATE OF WASHINGTON, County of Pierce
I, Kevin Stock, Clerk of the above
entitled Court, do hereby certify that this
foregoing instrument is a true and correct
copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of said Court this
____ day of April 09 2000
By: [Signature] Deputy

FINGERPRINTS

APPENDIX “B”

Mandate/En Banc

THE SUPREME COURT OF WASHINGTON

16

STATE OF WASHINGTON,

Respondents,

v.

FONOTAGA TILI,

Appellant.

MANDATE

NO. 66695-4

Pierce County No. 97-1-03819-9
FILED
PIERCE COUNTY CLERK'S OFFICE

A.M. NOV 03 1999 P.M.

PIERCE COUNTY, WASHINGTON
TROY HUNT, COUNTY CLERK
BY: [Signature] DEPUTY

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington
in and for Pierce County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on October 7, 1999, became the decision terminating review of this Court in the above entitled cause on October 27, 1999. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs, if any, will be taxed by supplemental judgment.



I have affixed the seal of the Supreme Court of the State of Washington and filed this Mandate this 1st day of November, 1999.

[Signature]

C. J. MERRITT
Clerk of the Supreme Court, State of Washington

cc: Dino Sepe
Kathleen Proctor
Hon. Arthur W. Verharen, Judge
Pierce County Superior Court
Reporter of Decisions

94/103



FILE

CLERK OF COURT

IN CLERKS OFFICE

SUPREME COURT, STATE OF WASHINGTON

DATE OCT - 7 1999

Jerry L. Olefand
for CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondents,)
)
 v.)
)
 FONOTAGA TILI,)
)
 Appellant.)
 _____)

66695-4

En Banc

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IRELAND, J. -- This is a direct review from the trial court. A jury found the defendant, Fonotaga Tili, guilty of three counts of first-degree rape, one count of first-degree burglary, and one count of second-degree assault arising from events occurring at the same time and place and involving the same victim. At sentencing, the trial court imposed consecutive terms for the three rape convictions and concurrent terms for the burglary and assault convictions, resulting in a 417-month sentence. Tili claims the double jeopardy clause and the merger doctrine preclude him

from being convicted and punished for all five offenses. Tili also claims the trial court erred in imposing consecutive terms for his three first-degree rape convictions. And finally, Tili asserts that certain jury instructions were erroneously given because they represented an improper comment on the evidence by the trial court. We uphold Tili's convictions, but find that his three rape convictions meet the criteria of same criminal conduct for sentencing purposes. Tili's sentence, therefore, is statutorily required to be served concurrently unless an exceptional sentence is imposed.

FACTS

On September 16, 1997, L.M. worked a double shift. After returning home from her second shift at approximately 11:15 p.m., L.M. ran the water in her bathtub, intending to take a bath. Out of habit, L.M. brought her cordless phone with her into the bathroom.

During her bath, L.M. heard what sounded like someone entering her apartment. Frightened, L.M. got out of the bathtub and locked the bathroom door. She waited in the locked bathroom for approximately four minutes, but eventually decided to investigate. Before leaving the bathroom, however, L.M. dialed "9" and "1" on her cordless phone without dialing the last "1" necessary to complete a 911 emergency call.

When L.M. entered the kitchen area, she saw Tili, who was wearing only a pair of underpants and holding a heavy metal pan.¹ Moments later, Tili violently struck L.M. in the head with the metal pan. As Tili began his attack, L.M. was somehow able to dial another "1" on her cordless phone, completing a 911 emergency call. The sounds the ensuing physical and sexual assault, lasting approximately two minutes, were captured on the 911 system.²

After numerous blows with the metal pan, L.M. fell to her knees. She begged Tili to stop, telling him to take anything he wanted, but Tili ignored her pleas and continued his attack. He told L.M. to "shut up" and threatened to kill her. Report of Proceedings (RP) at 381. L.M. testified that after Tili beat her into submission, he instructed her to lie on her stomach and to keep her face to the floor. When L.M. attempted to reposition her face to a more comfortable position, Tili "mash[ed] [her] head into the ground." RP at 382. Tili then positioned L.M. with her buttocks raised, removed her robe to expose her nude body, and began to lick her backside.

¹At trial, L.M. identified Tili as her attacker, having seen him at events when she was in high school and at the apartment complex a few days earlier.

²The 911 tape was admitted as evidence and is part of the record on appeal.

Tili proceeded to use his finger to penetrate L.M.'s anus and vagina. Tili inserted his finger into these two orifices separately, not at the same time.³ Tili told L.M. to say she liked it. She complied. Tili then tried to penetrate L.M.'s anus with his penis, but stopped, and instead inserted his penis into her vagina.

At about this time, two deputies knocked on L.M.'s apartment door. Tili told L.M. to "shut up" or he would kill her. RP at 383; *see also* RP at 227, 288-89. When the deputies knocked again and announced "police," L.M. screamed. RP at 227-28, 288-89, 383. Tili then hit L.M. several more times before fleeing as the deputies kicked open the apartment door. Upon entering the apartment, the deputies caught a glimpse of Tili, wearing only his underwear, before he escaped through a bedroom window. The deputies pursued Tili, eventually finding him hiding underneath a parked truck in the parking lot outside L.M.'s apartment.

³There was a factual dispute at trial concerning whether Tili used his finger or some object to penetrate L.M.'s anus and vagina. Under the relevant statute, RCW 9A.44.010(1)(b), the definition of sexual intercourse includes "any penetration of the vagina or anus, however slight, by *an object*" (emphasis added). A finger is clearly "an object" and, thus, this dispute is of no consequence. *See State v. Cain*, 28 Wn. App. 462, 465, 624 P.2d 732 (1981) (under former RCW 9.79.140(1), the predecessor statute to RCW 9A.44.010, the court concluded that "[a] finger is an object within the meaning and intent of the statute."). *See also* issue number four, *infra*.

Tili was charged with one count of first-degree burglary, and one count of second-degree assault. The Information also charged Tili with three counts of first-degree rape for each independent penetration of a different bodily orifice or the same orifice with a different object. At trial, Tili conceded he was guilty of rape, but argued that he was guilty of only one count of rape, not three. However, a jury convicted Tili of all three counts of first-degree rape. The jury also convicted him of one count of first-degree burglary and one count of second-degree assault. Tili was sentenced to 417 months. The three counts of rape were sentenced to be served consecutively. The burglary and assault convictions were imposed concurrently with each other and with the three rape convictions.

ANALYSIS

First Issue: Do the defendant's convictions for three counts of rape in the first degree violate double jeopardy?

The double jeopardy clause of the fifth amendment to the United States Constitution and article I, section 9 of the Washington State Constitution prohibit the imposition of multiple punishments for the same offense. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (citing *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995); *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995)). Tili claims that if his three

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convictions for first-degree rape constitute just one criminal act, or one "unit of prosecution," then his rape convictions violate double jeopardy because he was punished three times for the same offense. *See Adel*, 136 Wn.2d at 632. Tili is incorrect. Under the facts in this case, we hold that Tili's three separate rape convictions do not violate double jeopardy.

If a defendant is convicted of violating a single statute multiple times, the proper inquiry in a single statute case is "what 'unit of prosecution' has the Legislature intended as the punishable act under the specific criminal statute." *Adel*, 136 Wn.2d at 634 (citing *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed 905 (1955); *State v. Mason*, 31 Wn. App. 680, 685-87, 644 P.2d 710 (1982), *superseded on other grounds as stated in State v. Elliott*, 114 Wn.2d 6, 16, 785 P.2d 440 (1990)). "When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime." *Adel*, 136 Wn.2d at 634 (citations omitted). And, if the statute is ambiguous because the Legislature has failed to denote the unit of prosecution, "the ambiguity should be construed in favor of lenity." *Adel*, 136 Wn.2d at 634-35 (citing *Bell*, 349 U.S. at 84). Because Tili claims that his three convictions for rape

in the first degree violate double jeopardy, this is a single statute case and the unit of prosecution analysis applies.

"The first step in the unit of prosecution inquiry is to analyze the criminal statute." *Adel*, 136 Wn.2d at 635. In Washington, there are three degrees of rape, which are defined in RCW 9A.44.040, RCW 9A.44.050, and RCW 9A.44.060. These three statutory provisions have parallel construction. Each statutory provision defining a degree of rape begins with a paragraph setting forth standard elements that must always be proved for that degree, followed by subparagraphs, only one of which needs to be proved in order to convict. *Compare* RCW 9A.44.040, .050, .060. The parallel construction of these statutes dictates that the "unit of prosecution" for rape remains the same from one degree to the next.

The language present in all three statutory provisions provides:

A person is guilty of rape . . . when such person engages in *sexual intercourse* with another person

RCW 9A.44.040 (emphasis added); *see also* RCW 9A.44.050, .060. Each degree of rape consistently requires a standard element: "sexual intercourse." The unit of prosecution for rape, therefore, is the act of "sexual intercourse." Br. of Resp't at 15-16.

The relevant portion of RCW 9A.44.010(1) defines "sexual intercourse" as follows:

- (1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon *any penetration*, however slight, and
- (b) Also means *any penetration* of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex . . . , and
- (c) Also means *any act of sexual contact* between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(Emphasis added.) The State maintains the Legislature was very clear in stating that sexual intercourse was complete upon *any* penetration, however slight, of the vagina or anus, or upon *any* act of sexual contact between the sex organs of one person and the mouth or anus of the other. Br. of Resp't at 16-17 ("predecessor statute to RCW 9A.44.010(1), stated 'any penetration, however slight, is sufficient to complete sexual intercourse'" (citing *State v. Kincaid*, 69 Wash. 273, 276, 124 P. 684 (1912))).

Because the statutory definition of sexual intercourse indicates that any single act of penetration constitutes sexual intercourse, the State argues that two independent digital penetrations of L.M.'s anus and vagina, followed by penile penetration of her vagina, are three separate "units of prosecution."

Br. of Resp't at 17.

In contrast, Tili argues the statute is ambiguous as to the proper unit of prosecution for rape. Tili asserts that this ambiguity must be resolved by "[t]he rule of lenity[,] . . . a well established rule of statutory construction which provides that any ambiguity in a criminal statute must be resolved in favor of the accused and against the state." Br. of Appellant at 27. Tili argues that when the rule of lenity is properly applied to the present case, "it cannot be said that RCW 9A.44.010(1) evinces a legislative intent to punish separately for each penetration occurring during a continuous sexual attack against the same victim at the same time and in the same place." Br. of Appellant at 27. Consequently, under Tili's theory, two of his rape convictions violate both the state and federal double jeopardy clauses. Tili, however, is incorrect.

The meaning of a plain and unambiguous statute must be derived from the wording of the statute itself. *See Paulson v. Pierce County*, 99 Wn.2d 645, 650, 664 P.2d 1202 (1983). While a statute is ambiguous if it is susceptible to two or more reasonable interpretations, it is not ambiguous merely because different interpretations are conceivable. *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996) (citing *State v. Sunich*, 76 Wn. App. 202, 206, 884 P.2d 1 (1994)). Without a threshold showing of ambiguity, the court derives a statute's meaning from the wording of the

statute itself, and does not engage in statutory construction or consider the rule of lenity. *Geschwind v. Flanagan*, 121 Wn.2d 833, 840-41, 854 P.2d 1061 (1993); *see also Paulson*, 99 Wn.2d at 650.

Tili fails to make a threshold showing that the statute is ambiguous. The unit of prosecution for rape is "sexual intercourse," which the Legislature has defined as complete upon "*any* penetration of the vagina or anus, however slight" RCW 9A.44.010 (emphasis added). Although the word "any" is not defined by the statute, "Washington courts have repeatedly construed the word 'any' to mean 'every' and 'all'." *State v. Smith*, 117 Wn.2d 263, 271, 814 P.2d 652 (1991) (citing *State v. Harris*, 39 Wn. App. 460, 463, 693 P.2d 750 (1985); *Lee v. Hamilton*, 56 Wn. App. 880, 884, 785 P.2d 1156 (1990)). "The Legislature is presumed to be aware of judicial interpretations of its enactments." *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992) (citation omitted); *see also In re Foreclosure of Liens*, 117 Wn.2d 77, 86, 811 P.2d 945 (1991) ("The Legislature is presumed to know existing case law in areas in which it is legislating.").

Opposing a conclusion that sexual intercourse is complete upon *any* penetration, Tili refers to this court's recent opinion in *State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998). In *Adel*, this court analyzed the

possession of marijuana statute and concluded that the language "any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor" created one unit of prosecution based solely upon the quantity of drug found where the statute did not reference spatial or temporal aspects of possession. *Adel*, 136 Wn.2d at 635 (quoting RCW 69.50.401(e)). Because this court reasoned that the Legislature failed to indicate whether it intended to punish a person multiple times for simple possession even if the drug was being stashed in multiple places at the same time, the rule of lenity was applied and one of Adel's two convictions was reversed. *Adel*, 136 Wn.2d 635-37.

Adel is easily distinguished from the instant case because the unit of prosecution in *Adel* was the possession of 40 grams or less of marijuana, and not an act of sexual intercourse. Nonetheless, Tili likens *Adel's* reasoning to the present case. Tili argues that if he can be charged and convicted for three counts of first-degree rape based on three separate penetrations, then a defendant could also be charged and convicted for every punch thrown in a fistfight without violating double jeopardy. Tili's argument, however, ignores key differences between the crimes of rape and assault. Unlike the rape statute, the assault statute does not define the specific unit of prosecution in terms of each physical act against a victim.

Rather, the Legislature only defined "assault" as that occurring when an individual "assaults" another. *See* RCW 9A.36.041. A more extensive definition of "assault" is provided by the common law, which sets out many different acts as constituting "assault," some of which do not even require touching. *See, e.g.*, 11 Washington Pattern Jury Instructions: Criminal 35.50 (2d ed. 1994) (WPIC). Consequently, the Legislature clearly has not defined "assault" as occurring upon *any* physical act.

Under the facts in this case, double jeopardy is not violated by Tili's conviction for three counts of first-degree rape. *See Harrell v. Israel*, 478 F. Supp. 752, 754 (E.D. Wis. 1979) (if the statute prohibits individual acts and not simply a course of conduct, then each offense is not continuous and several convictions do not violate double jeopardy). Tili committed three independent acts of rape. He penetrated L.M.'s anus with his finger. He then used his finger to penetrate L.M.'s vagina. Tili inserted his finger into these orifices separately, and not at the same time. After forcing L.M. to say she liked these violations, Tili then inserted his penis into her vagina. Each penetration in this case clearly constitutes an independent unit of prosecution. Each penetration was an independent violation of the victim's personal integrity. As one Wisconsin court aptly stated:

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.

Harrell v. State, 88 Wis.2d 546, 277 N.W.2d 462, 469 (1979). Tili was properly charged and convicted for three counts of first-degree rape. See *People v. Harrison*, 48 Cal.3d 321, 768 P.2d 1078, 1085-88, 256 Cal. Rptr. 401 (1989) (defendant convicted of three digital penetrations of the victim's vagina, even though offenses were committed over a 7 to 10 minute period and the defendant's sole aim was to achieve sexual gratification); *State v. Eisch*, 96 Wis.2d 25, 291 N.W.2d 800, 806 (1980) (genital intercourse, anal intercourse, fellatio, and inserting a beer bottle into the victim's genitals, were not "so similar in nature that they merged one into the other so as to be treated as but one offense."); *Hamill v. State*, 602 P.2d 1212, 1216 (Wyo. 1979) (separate and distinct incidents of sexual assault occurring in different ways can constitute separate definable criminal offenses); *Lee v. State*, 505 S.W.2d 816, 818 (Tex. Crim. App. 1974) (fellatio, anal penetration, and the defendant placing his mouth on the victim's sexual parts constituted separate and distinct offenses); *Mikell v. State*, 242 Ala. 298, 5

So.2d 825, 826 (1942) ("[R]ape is not a continuous offense and each act of intercourse constitutes a separate and distinct offense.") (citation omitted).

Finally, relying on *State v. Johnson*, 92 Wn.2d 671, 676-77, 600 P.2d 1249 (1979), Tili claims the Legislature was mindful of the question of whether multiple punishments should be imposed for crimes incidental to a given offense. In *Johnson*, this court noted that the burglary anti-merger statute, RCW 9A.52.050, showed a legislative intent to require multiple punishments. *Johnson*, 92 Wn.2d at 676-77. Tili argues "[t]he fact that there is no separate statute similar to RCW 9A.52.050 in the sexual offenses section of the criminal code certainly infers legislative intent not to separately punish multiple penetrations occurring in a single sexual attack." Br. of Appellant at 26.

Tili's argument concerning the anti-merger statute fails to recognize the same criminal conduct sentencing statute, which requires multiple convictions to be treated as a single offense under certain circumstances. RCW 9.94A.400(1)(a) requires multiple-current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant's offender score. "'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."

RCW 9.94A.400(1)(a). Because sentences determined under RCW 9.94A.400(1)(a) are served concurrently, "it seems clear that the legislative plan accepts the possibility that a single act may result in multiple convictions, and simply limits the consequences of such convictions." *State v. Calle*, 125 Wn.2d 769, 781-82, 888 P.2d 155 (1995).⁴

Based on the above, we hold that the unit of prosecution for rape is "sexual intercourse" with another individual. Because sexual intercourse is defined in RCW 9A.44.010(1) as "any penetration of the vagina or anus," the two separate digital penetrations of the victim's anus and vagina with Tili's finger, followed by penile penetration of the vagina, constitute three separate units of prosecution. Under the facts in this case, Tili's three first-degree rape convictions do not violate double jeopardy.

Second Issue: Did the trial court err when it concluded that Tili's three counts of rape in the first degree did not constitute "same

⁴Tili also argues the presence of RCW 9.94A.120(2), which allows a court to impose a sentence beyond what is permissible under the standard sentence range, evinces a legislative intent to consider multiple penetrations only as an aggravating factor rather than separate crimes. We do not agree. The legislative foundations, in function and purpose, which apply to unit of prosecution and sentencing, are different. *See* footnote 5, *infra*.

criminal conduct"⁵ for the purpose of sentencing under RCW 9.94A.400?

Tili asserts that even if his three first-degree rape convictions do not violate double jeopardy, the trial court erred in concluding that these rape convictions were not part of the "same criminal conduct" as defined in RCW 9.94A.400(1)(a). Tili argues that his three rape convictions, resulting from three separate penetrations occurring over a two minute period, should be treated as part of the "same criminal conduct" and, therefore, counted as one crime for sentencing purposes pursuant to RCW 9.94A.400(1)(a). On this point, Tili is correct.

RCW 9.94A.400(1)(a) provides in part:

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offenses shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal

⁵It should be noted that the "same criminal conduct" analysis under the Sentencing Reform Act of 1981, and the "unit of prosecution" analysis under double jeopardy are distinct. The "unit of prosecution" analysis is involved during the charging and trial stages, focusing on the Legislature's intent regarding the specific statute giving rise to the charges at issue. *See, e.g., State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998). The "same criminal conduct" analysis, on the other hand, involves the sentencing phase and focuses on (1) the defendant's criminal objective intent, (2) whether the crime was committed at the same time and place, and (3) whether the crime involved the same victim. *See, e.g., State v. Palmer*, 95 Wn. App. 187, 190, 975 P.2d 1038 (1999) (citing RCW 9.94A.400(1)(a)).

conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim

Accordingly, under subsection (a)(1), the offender score for each current conviction is determined by using all other current convictions as if they were prior convictions. The process is repeated in turn for each current conviction. The resulting offender score is used to determine the sentence range applicable for each conviction. Under this subsection, a sentence is then imposed for each current conviction, which are served concurrently unless an exceptional sentence is imposed. See David. Boerner, *Sentencing in Washington* §§ 5.8(a), 5.16 (1985).

RCW 9.94A.400(1)(b), on the other hand, creates a "serious violent offenses" exception to subsection (1)(a). Specifically, RCW 9.94A.400(1)(b) provides for mandatory consecutive sentences and an alternative form of calculating offender scores

[w]henever a person is convicted of two or more serious violent offenses, as defined in RCW 9.94A.030, arising from *separate and distinct criminal conduct*

(Emphasis added.) Thus, under subsection (1)(b), the sentences are served consecutively instead of concurrently as provided in subsection (1)(a). *State v. Salamanca*, 69 Wn. App. 817, 827-28, 851 P.2d 1242 (1993).

The State asserts that Tili's three first-degree rape convictions should be treated as "separate and distinct criminal conduct" pursuant to RCW 9.94A.400(1)(b) because these three rape convictions involve two or more serious violent offenses, as defined in RCW 9.94A.030.⁶ Hence, the State argues that Tili's three first-degree rape convictions should run consecutively under RCW 9.94A.400(1)(b), rather than concurrently under the "same criminal conduct" standard provided by RCW 9.94A.400(1)(a). To support this argument, the State claims the use of different language (i.e., "separate and distinct" versus "same") in RCW 9.94A.400(1)(b) evinces a legislative intent to create a standard different from subsection (1)(a) if

⁶RCW 9.94A.030(34) provides that:

"Serious violent offense" is a subcategory of violent offense and means:

(a) Murder in the first degree, homicide by abuse, murder in the second degree, manslaughter in the first degree, assault in the first degree, kidnapping in the first degree, or *rape in the first degree*, assault of a child in the first degree, or an attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies

(Emphasis added.)

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sentencing for two or more violent offenses, such as multiple first-degree rape convictions.

Tili, on the other hand, argues RCW 9.94A.400(1)(a)'s definition for "same criminal conduct" should be utilized to determine if his three rape convictions are "separate and distinct criminal conduct." Tili argues that if his three rape convictions are part of the "same criminal conduct," they cannot be "separate and distinct criminal conduct" even though his rape convictions are for "serious violent offenses." In essence, Tili claims that if his three rape convictions involve the "same criminal conduct," these convictions are only one offense for sentencing purposes, allowing Tili to be sentenced under RCW 9.94A.400(1)(a) rather than RCW 9.94A.400(1)(b).

It is undisputed that Tili's three rape convictions are "serious violent offenses" under RCW 9.94A.030(34). However, as noted by Tili, the phrase "separate and distinct criminal conduct," unlike the phrase "same criminal conduct," is undefined in RCW 9.94A.400.

Although the meaning of the unambiguous language is derived from the statutes actual language, *State v. Smith*, 117 Wn.2d 263, 270-71, 814 P.2d 652 (1991), the court may resort to various tools of statutory construction where the language is unclear. *Everett Concrete Prods., Inc. v.*

Department of Labor & Indus., 109 Wn.2d 819, 822, 748 P.2d 1112 (1988) (citations omitted); *see also Morris v. Blaker*, 118 Wn.2d 133, 142-43, 821 P.2d 482 (1992).

As originally drafted, both subsections (1)(a) and (1)(b) left their respective terms undefined. In 1987, subsection (1)(a) was amended by Laws of 1987, section five, chapter 456, to include a definition of "same criminal conduct." *See State v. Farmer*, 116 Wn.2d 414, 427, 805 P.2d 200, 13 A.L.R.5th 1070 (1991). However, a similar definition regarding "separate and distinct criminal conduct" was *not* similarly added at that time, or when subsection (1)(b) was revisited by the Legislature in 1990. *See State v. Wilson*, 125 Wn.2d 212, 219-20 n.2, 883 P.2d 320 (1994) (citing Laws of 1990, ch. 3, § 704).

Based on the absence of a clear statutory definition for "separate and distinct criminal conduct," and in light of the legislative history and absence of sufficient guidance to the contrary, we look to the factors defining "same criminal conduct" to determine whether Tili's criminal conduct was not "separate and distinct." *See Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 133, 814 P.2d 629 (1991) ("[E]ach provision of a statute should be read in relation to the other provisions, and the statute should be construed as a whole." (citation omitted)).

"A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law." *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993) (citations omitted). In the present case, the trial court imposed consecutive sentences for Tili's three first-degree rape convictions after concluding that these rape convictions were not part of the "same criminal conduct" as defined in RCW 9.94A.400(1)(a). A review of the relevant factors in this case, however, leads to the conclusion that Tili's three rape convictions were part of the "same criminal conduct."

For multiple crimes to be treated as the "same criminal conduct" at sentencing, the crimes must have (1) been committed at the same time and place; (2) involved the same victim; and (3) involved the same objective criminal intent. *State v. Palmer*, 95 Wn. App. 187, 190, 975 P.2d 1038 (1999) (citing RCW 9.94A.400(1)(a); *Walden*, 69 Wn. App. at 187-88). In the instant case, Tili's offenses involved the same victim, occurred at the same place, and were nearly simultaneous in time. The only issue remaining, therefore, is whether the three acts of rape involved the same objective criminal intent.

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The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next. *Palmer*, 95 Wn. App. at 191 (citing *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998)). The State relies on *State v. Grantham*, 84 Wn. App. 854, 932 P.2d 657 (1997), to support its argument that the three rapes involved three different criminal intents. *Grantham*, however, is factually distinguishable from the present case.

Grantham affirmed the trial court's finding that two rapes were not the "same criminal conduct" for sentencing purposes. *Grantham*, 84 Wn. App. at 860-61. The evidence in *Grantham* supported a conclusion that the criminal episode had ended with the first rape: "Grantham, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." *Grantham*, 84 Wn. App. at 859. After raping his victim, Grantham stood over her and threatened her not to tell. He then began to argue with and physically assault his victim in order to force her to perform oral sex. Thus, Grantham was able to form a new criminal intent before his second criminal act because his "crimes were sequential, not simultaneous or continuous." *Grantham*, 84 Wn. App. at 856-57, 859.

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In contrast to the facts in *Grantham*, Tili's three penetrations of L.M. were continuous, uninterrupted, and committed within a much closer time frame—approximately two minutes. This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration. *Grantham*, therefore, is factually distinct. The present case, on the other hand, is more factually similar to *State v. Walden*, 69 Wn. App. 183.

In *Walden*, the defendant was convicted of rape involving fellatio, as well as attempted rape. Both occurred in short succession. *Walden*, 69 Wn. App. at 184-85, 188. In determining whether the two acts involved the "same criminal conduct" under RCW 9.94A.400(1)(a), the *Walden* court held that, "[w]hen viewed objectively, the criminal intent of the conduct comprising the two charges is the same: sexual intercourse. Accordingly, the two crimes of rape in the second degree furthered a single criminal purpose." *Walden*, 69 Wn. App. at 188.

As in *Walden*, Tili's unchanging pattern of conduct, coupled with an extremely close time frame, strongly supports the conclusion that his criminal intent, objectively viewed, did not change from one penetration to the next. This conclusion is consistent with both *Walden* and *Grantham*.

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We hold that the trial court, having failed to articulate any other viable basis to find Tili's conduct "separate and distinct," abused its discretion in failing to treat Tili's three first-degree rape convictions as one crime under RCW 9.94A.400(1)(a). Therefore, Tili should be sentenced under RCW 9.94A.400(1)(a), and not under RCW 9.94A.400(1)(b), because Tili's three first-degree rape convictions, which are the only serious violent offenses involved in this case, are counted as one offense.

Third Issue: Was the double jeopardy clause or merger doctrine violated based on defendant's conviction of second-degree assault as well as first-degree rape?

Tili also argues that his conviction and sentences for first-degree rape and second-degree assault violate the constitutional prohibition against double jeopardy. Tili argues that under Washington State's "same evidence" test, these two crimes are the same in law and in fact. Traditionally, this court has applied the "same evidence" test to determine whether a defendant was improperly punished multiple times for the same criminal offense in violation of double jeopardy. The "same evidence" test, which "mirrors the federal 'same elements' [test] adopted in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932)," provides that "double jeopardy is violated if a defendant is convicted of offenses which are the same in law and in fact." *State v. Adel*, 136 Wn.2d 629, 632, 965

P.2d 1072 (1998) (citations omitted). According to Tili, "[i]t is unlikely that a person can commit rape in the first degree without committing assault given the fact that rape in the first degree requires forcible compulsion and one of the aggravating factors needed to elevate the rape to first[-]degree is to inflict serious physical injury." Br. of Appellant at 38.

While the State *concedes* that the language used in the charging document causes Tili's second-degree assault conviction to merge with his first-degree rape conviction, the State argues that "when sentencing on the burglary, both the assault and the rape may be separately punished because of the burglary antimerger statute." Br. of Resp't at 45-46.⁷ To support this proposition, the State relies on *State v. Collicott*, 118 Wn.2d 649, 657-58, 827 P.2d 263 (1992).

In *Collicott*, the defendant burglarized a counseling center where the victim was staying. During the course of the burglary, Collicott raped his victim. After completing these two acts, Collicott kidnapped his victim. *Collicott*, 118 Wn.2d at 650-51 n.4. Relying on the burglary anti-merger statute, RCW 9A.52.050,⁸ this court concluded that it was proper to charge

⁷Tili also argues the merger doctrine precludes him from being prosecuted for second-degree assault and first-degree rape. Because the State concedes double jeopardy is violated, it is unnecessary to address Tili's argument concerning the merger of the assault and rape convictions under the merger doctrine.

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and punish the defendant with "burglary in the first degree (count 1), rape in the first degree (count 2) and kidnapping in the first degree (count 3)."

Collicott, 118 Wn.2d at 658. While we agree with the State's position that under *Collicott* and RCW 9A.52.050, there is no merger of the assault and burglary convictions, the assault may be used in calculating the offender score for the burglary conviction only, and not for the rape charges.

Fourth Issue: Did the trial judge instruct the jury without improperly commenting on the evidence?

Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). However, a trial court is forbidden from commenting on the evidence presented at trial. Wash. Const. art. IV, § 16.⁹ "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the

⁸RCW 9A.52.050, provides that "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."

⁹While a defendant on appeal is ordinarily limited to specific objections raised before the trial court, he can, for the first time on appeal, argue that an instruction was an improper comment on the evidence. See, e.g., *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

judge personally believed the testimony in question." *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996) (quoting *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990)).

Tili claims the trial court commented on the evidence when it gave instruction 10. While this instruction defined penetration consistent with WPIC 45.01, the trial court added the following language:

The phrase "any penetration of the vagina or anus, however slight, by an object" does not necessarily mean an inanimate object and includes a finger.

CP at 50. According to Tili, there was a factual issue during the victim's testimony about whether it was defendant's finger or some other object that penetrated her anus or vagina,¹⁰ and by instructing the jury that the penetration of an object can include a finger, the trial court improperly implied to the jury its belief that the victim was penetrated by Defendant's finger. Br. of Appellant at 40. Tili's argument is without merit.

The trial court's addition to WPIC 45.01 in Instruction No. 10 was a correct statement of law. See *State v. Cain*, 28 Wn. App. 462, 464-65, 624 P.2d 732 (1981) (a finger is an "object" under RCW 9A.44.010); see also footnote 3, *supra*. In this case, there was never any dispute that L.M. was penetrated three separate times. The dispute concerned only whether Tili's

finger or some other object penetrated L.M. The wording in the instructions does not indicate how the court felt about the victim's testimony. It merely informed the jury of the appropriate rule of law applicable to the facts in this case. Consequently, there was no error.

Tili also claims error in instructions 7, 8, and 9 because "each instruction exceeded what is required in WPIC 40.02 and RCW 9A.44.040 . . . [by] includ[ing] a description of the specific sexual act that constituted the intercourse." Br. of Appellant at 40-41.¹¹ Tili claims these instructions were an inappropriate comment on the evidence because they inferred that the court believed three counts of rape had occurred. Tili claims these instructions prevented him from arguing his theory of the case, i.e., that only one rape occurred.

As with instruction 10, instructions 7, 8, and 9 do not indicate the trial court's opinion concerning evidence presented at trial. Rather, the description in the instructions of the type of sexual intercourse alleged in each count simply assured that the jury would consider each count distinctly. These instructions did not convey the trial judge's personal beliefs or attitudes to the jury. Defendant was unfettered in arguing the

¹⁰See note 4, *supra*.

merits of the allegations. Consequently, we find the trial court also did not improperly comment on the evidence in instructions 7, 8, and 9.

CONCLUSION

Although Tili was properly convicted of three counts of first-degree rape, the trial court abused its discretion in failing to count Tili's rape convictions as part of the "same criminal conduct" and, therefore, as one crime for sentencing purposes. Because first-degree rape is the only "serious violent offense" for which Tili was convicted, he is properly sentenced under RCW 9.94A.400(1)(a), rather than RCW 9.94A.400(1)(b), which requires two or more serious violent offenses arising from "separate and distinct criminal conduct."

In sentencing for the rape conviction, Tili's offender score should include his first-degree burglary conviction, which is subject to the burglary anti-merger statute. Tili's offender score for the rape conviction, however, should not include his second-degree assault conviction because the State concedes it merges with the rape conviction. Tili's current criminal history for his second-degree assault conviction should include the first-degree burglary conviction, but not the rape conviction. Additionally, Tili's current

¹¹Instructions 7 and 8 referred to putting an object in L.M.'s anus and vagina, while instruction 9 referred to putting the defendant's penis in L.M.'s vagina.

criminal history for the burglary conviction includes both the assault, as well as the three first-degree rape counts which, as noted above, are scored as one conviction because Tili's rape convictions are part of the "same criminal conduct." This case is remanded for resentencing consistent herewith.

Dug, C.J.

Sizil, J.
Johnson

Lulova, J.

Madsen, J.

Alexander, J.

Almudge, J.

Sander, J.

STATE OF WASHINGTON, County of Pierce
I, Kevin Stock, Clerk of the above
entitled Court, do hereby certify that this
foregoing instrument is a true and correct
copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of said Court this **JUL 9**
day of **2012**

By *[Signature]* Deputy
Kevin Stock, Clerk



APPENDIX “C”

Mandate/En Banc



97-1-03819-8 18408408 MND 02-06-03

Case Number: 97-1-03819-9 Date: July 6, 2012
Serial ID: 5EA0D2E2-F20F-6452-DE3D50E234CE9D26
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FILED
SUPREME COURT
STATE OF WASHINGTON

2003 FEB -3 P 2:57

FILED
IN COUNTY CLERK'S OFFICE BY **C.J. MERRITT**

A.M. FEB 04 2003 P.M. CLERK

PIERCE COUNTY WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FONOTAGA TILI,

Petitioner.

MANDATE

NO. 71681-1

Pierce County No.
97-1-03819-9

C/A No. 25878-1-II

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington
in and for Pierce County.

The opinion of the Supreme Court of the State of Washington filed on January 9, 2003,
became final in the above entitled cause on January 29, 2003. This cause is mandated to the
superior court from which the appeal was taken for further proceedings in accordance with the
attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs in the
amount of \$48.84 are awarded in favor of Respondent Pierce County and costs in the amount of
\$3822.48 are awarded to the Appellate Indigent Defense Fund against Appellant Tili.

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MANDATE

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I have affixed the seal of the Supreme Court of the State of Washington and filed this Mandate this 9th day of February, 2003.

A handwritten signature in black ink, appearing to read "C. J. Merritt", is written over a horizontal line.

C. J. MERRITT

Clerk of the Supreme Court, State of Washington

cc: Ms. Linda King
Ms. Kathleen Proctor
Court of Appeals Div II
Reporter of Decisions

Case Number: 97-1-03819-9 Date: July 6, 2012
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FILE

IN CLERKS OFFICE

SUPREME COURT, STATE OF WASHINGTON

JAN 09 2003

DATE JAN 09 2003

Alexander C. J.
CHIEF JUSTICE

FILED
IN COUNTY CLERK'S OFFICE

A.M. FEB 04 2003 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE of WASHINGTON,)
)
Respondent,)
)
v.)
)
FONOTAGA TILI,)
)
Petitioner.)
_____)

No. 71681-1

En Banc

Filed JAN 09 2003

IRELAND, J. – Fonotaga Tili challenges the imposition of an exceptional sentence for three counts of first degree rape, one count of first degree burglary, and one count of second degree assault. Holding that the offender scores were necessarily calculated correctly, that collateral estoppel does not bar the imposition of the exceptional sentence at the resentencing, and that the trial court did not abuse its discretion on resentencing, we affirm the imposition of an exceptional sentence.

FACTS

On September 16, 1997, the victim, L.M., worked a double shift. As was her custom, L.M. left her purse at home because there was no place to safely store it at work. L.M.'s purse was later found in the apartment where the defendant, Fonotaga Tili, was staying, which provided circumstantial evidence that Tili broke into L.M.'s apartment and stole her purse at some point while L.M. was at work.

At around 11:15 p.m., on September 16, L.M. returned from work and ran a bath. Once in the bath, L.M. heard what sounded like someone entering her apartment. Frightened, L.M. got out of the bathtub and locked the bathroom door. After about four minutes, she decided to look outside the bathroom. Before leaving the bathroom, L.M. dialed "9" and "1" on her cordless phone, without dialing the last "1" necessary to complete the 911 call.

When L.M. entered the kitchen, she saw Tili as he leaped from his hiding spot. He wore only underwear and was holding a heavy metal pan. Tili violently and repeatedly struck L.M. in the head with the pan until she collapsed on the floor. As Tili began the attack, L.M. was able to dial the last "1" to complete the 911 call. The sounds of the ensuing physical and sexual assault, lasting about two minutes, were caught on the 911 system.

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When L.M. collapsed to the floor after numerous blows to the head with the metal pan, she begged Tili to stop and told him to take anything he wanted.

Ignoring her, Tili told L.M. to "shut up" and said he was going to kill her.

Tili moved L.M. out from under the kitchen table and told her to lie on her stomach and keep her face on the floor. Tili raised L.M.'s hips and lifted her robe, exposing her nude body. He then licked her anus and proceeded to penetrate L.M.'s anus with his finger. He also used his finger to penetrate her vagina. Both of these penetrations were made separately and not at the same time. Tili demanded that L.M. say she "liked it," and she complied. Tili then attempted to penetrate L.M.'s anus with his penis, but stopped, and instead inserted his penis into her vagina. He told L.M. he had a knife.

At this time in the assault, two police officers knocked on L.M.'s door. Tili told L.M. to stay quiet or he would kill her. Upon the police officers' second knock, they announced themselves and L.M. screamed. Tili then delivered multiple blows with his fist to L.M.'s head before fleeing as the officers kicked the door open. The officers were able to glimpse Tili before he escaped through the bedroom window. Using a police dog, the officers found Tili, still in his underwear, hiding under a truck in the parking lot outside L.M.'s apartment. L.M. was able to identify Tili as her attacker at trial. She had seen him in the apartment

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complex a few days earlier and was acquainted with him from high school, although they were not friends.

PROCEDURAL HISTORY

Tili was charged with one count of first degree rape for each independent penetration of the same or different orifice. He was also charged with one count of first degree burglary and one count of second degree assault.

He was convicted on all counts and was sentenced to 417 months with the three counts of rape to run consecutively. The burglary and assault sentences were to run concurrently with each other and the three rape convictions. At sentencing, the trial court stated that it did not believe that an exceptional sentence would be sustained on appeal if the rapes were considered separate and distinct conduct, as the trial court had considered them. However, the court went on to indicate that, should the multiple rapes be considered same criminal conduct on appeal, the same sentence would be imposed, as an exceptional sentence upward, justified by deliberate cruelty and vulnerability of the victim.

Tili appealed to this court, contending, among other things, that the trial court erred in imposing consecutive terms for his three first degree rape convictions. This court upheld his convictions, but remanded for resentencing. This court held that the assault merged with the rapes but not the burglary, and that

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the three rapes constituted same criminal conduct for sentencing purposes. *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999) (*Tili I*).

At resentencing, the trial court maintained Tili's 417-month sentence as an exceptional sentence based on deliberate cruelty, vulnerability of the victim, and the multiple penetrations. The sentences for all counts were to run concurrently.

ANALYSIS

Issues

Did the trial court miscalculate the offender scores, leading to incorrect presumptive sentencing ranges?

Where the court declined to impose an exceptional sentence at the original sentencing, is the court collaterally estopped from imposing an exceptional sentence on remand?

Was an exceptional sentence justified due to deliberate cruelty, multiple incidents per victim, and the operation of the multiple offense policy?

Standard of Review

We review a sentencing court's calculation of an offender score de novo. *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995).

In order to reverse an exceptional sentence, the reviewing court must find (a) that the reasons relied upon by the sentencing judge when imposing the sentence are not supported by the record or do not justify the exceptional sentence, or (b)

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that the sentence imposed was clearly excessive or clearly too lenient. Former RCW 9.94A.210(4) (1998). Under (a), the court reviews the reasons under a clearly erroneous standard; the court reviews justification as a matter of law. Under (b), the court reviews a clearly excessive or clearly too lenient determination using an abuse of discretion standard. *State v. Pryor*, 115 Wn.2d 445, 450, 799 P.2d 244 (1990) (citing *State v. Nordby*, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986)).

Calculation of Offender Score

A correct offender score must be calculated before a presumptive or exceptional sentence is imposed. Ordinarily, imposition of an exceptional sentence requires a correct determination of the standard range. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). Remand is necessary when the offender score has been miscalculated unless the record makes clear that the trial court would impose the same sentence. *Id.* at 189.

Tili contends that this court must remand for resentencing because the trial court incorrectly calculated his offender score before imposing the exceptional sentence. He asserts a two part error on this matter. First, he points out that the offender scores and presumptive ranges reported in the judgment and sentence are inconsistent with those reported in the findings of fact. Second, he asserts that the

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trial court gave an oral miscalculation of Tili's offender score for his burglary conviction.

Tili had no prior criminal history that would have counted toward his offender score. The correct sentencing data based upon this court's ruling in *Tili I* is calculated as follows:

<u>Count</u>	<u>Offense</u>	<u>Level</u>	<u>Offender Score</u>	<u>Standard range (mos.)</u>
Count I	Rape 1	XII	2 (Burglary 1)	111-147
Count II	Rape 1	XII	2 (Burglary 1)	111-147
Count III	Rape 1	XII	2 (Burglary 1)	111-147
Count IV	Burglary 1	VII	4 (Rape 1/Assault 2)	36-48
Count V	Assault 2	IV	2 (Burglary 1)	12+ - 14

Under *Tili I*, all offenses are to be served concurrently, resulting in confinement under a standard range totaling between 111-147 months. The findings of fact omit the offender scores for each count but report the standard ranges correctly, as they appear in this chart.

Tili correctly points out that the judgment and sentence reflects incorrect offender scores and that the presumptive ranges in the judgment and sentence are inconsistent with those in the findings of fact. However, we hold that the inaccurate figures in the judgment and sentence are without effect, making remand for recalculation of Tili's offender scores unnecessary. Paragraph 2.3 in the judgment and sentence sets forth the sentencing data. The defendant is correct in his contention that the offender scores are incorrectly reported in that paragraph, resulting in an erroneous standard range calculation.

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However, Tili's argument disregards several factors that are clear in the record. First, the correct standard sentence calculation is reflected in the findings of fact and conclusions of law for exceptional sentence, which was incorporated into the judgment and sentence by reference. Had the trial court relied on the erroneous offender scores of the judgment and sentence when it calculated the presumptive ranges for the findings of fact, it would have arrived at incorrect ranges. Yet, the presumptive ranges reported in the findings of fact are, in fact, correct. Second, in *Tili I* we gave a clear instruction as to how the trial court was to calculate Tili's offender scores. Thus, we are certain that the trial court calculated the correct offender scores because it arrived at the correct presumptive sentences reported in the findings of fact.

Tili also contends that at resentencing, the trial court orally stated an incorrect presumptive sentence for Tili's burglary charge (102 months). A trial court has the power to enter a judgment that differs from its oral ruling, but once written judgment has been entered, it cannot enter an amended judgment after rethinking the case, unless the amended judgment is supported by the record. *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). *See also State v. Eppens*, 30 Wn. App. 119, 126, 633 P.2d 92 (1981) (an appellate court may consider a trial court's oral decision in interpreting its written findings of facts and conclusions of law, "so long as there is no

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inconsistency"). Here, the incorrect oral ruling at trial was subsequently corrected by the final written findings, conclusions and judgment signed in open court. Having already determined that the trial court ultimately arrived at the correct presumptive sentences for each count in the findings of fact, its erroneous oral ruling is of no consequence.

In sum, neither "error" Tili challenges necessitates a second resentencing.

Collateral Estoppel

The doctrine of collateral estoppel is embodied in the fifth amendment to the United States Constitution guaranty against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Collateral estoppel (or issue preclusion) "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. This court has long recognized that collateral estoppel applies in criminal cases. *State v. Peele*, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). Washington courts have adopted the perspective of federal decisions that collateral estoppel in criminal cases is not to be applied with a hypertechnical approach but with realism and rationality. *Ashe*, 397 U.S. at 444, cited with approval in *State v. Harris*, 78 Wn.2d 894, 896-97, 480 P.2d 484, rev'd on other grounds, 404 U.S. 55, 92 S. Ct. 183, 30 L. Ed. 2d

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212 (1971). See also *State v. Kassahun*, 78 Wn. App. 938, 948-49, 900 P.2d 1109 (1995).

Before collateral estoppel is applied, affirmative answers must be given to each of the following questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea of collateral estoppel is asserted a party or in privity with the party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied? *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).¹

Tili points out that, at the first sentencing, the trial court decided not to impose an exceptional sentence. He contends that the trial court is collaterally estopped from imposing the exceptional sentence at the resentencing because he believes that issue was already considered and rejected with finality at the first sentencing. Specifically, Tili refers to the trial court's refusal to impose an exceptional sentence when it originally sentenced him as though each of his crimes was separate and distinct criminal conduct. Thus, Tili perceives that the first prong of the collateral estoppel test has been met. However, because his argument overly

¹ Contrary to the dissent's assertion, dissent at 2 n.1, this four-part analysis has been applied in several criminal cases, both by this court and the Court of Appeals. See *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997); *State v. Bryant*, 146 Wn.2d 90, 98-99, 42 P.3d 1278 (2002); *State v. Cleveland*, 58 Wn. App. 634, 639, 794 P.2d 546 (1990); *State v. Vasquez*, 109 Wn. App. 310, 314-15, 34 P.3d 1255 (2001).

simplifies the context of his case, we disagree that there is an identity of the issues between the first and second sentencing hearings.

The procedural history of this case presents us with two sentencing contexts to consider. The first is the presumptive sentence resulting from a determination that the conduct was separate and distinct. The second context is the presumptive sentence arising from a determination that a defendant's conduct constitutes same criminal conduct. In Tili's case, the presumptive sentence vastly differs depending on which context the court was considering at the time of sentencing.² At the original sentencing, the trial court decided Tili's three counts of first degree rape would be counted as separate and distinct for sentencing purposes pursuant to former RCW 9.94A.400(1)(b) (1998). Sentencing seriously violent offenses, of which first degree rape is one, as separate and distinct conduct results in consecutive sentences for those offenses. Sentencing the same offenses as same criminal conduct results in concurrent sentences. Thus, sentencing Tili's rape counts under a separate and distinct format results in a longer overall sentence than if he were sentenced as though the rape counts were the same criminal conduct, simply because the former results in consecutive terms and the latter results in concurrent terms.

² As same criminal conduct, the presumptive range of 111-147 months for the three first degree rape counts is served concurrently. Thus, Tili serves only 111-147 months for all three counts of rape. As separate and distinct conduct, Tili serves three consecutive 111-147 sentences for the rapes. Thus, he would serve from 333-441 months for the three rape counts rather than just 111-147 months, a significant difference.

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The trial court, having decided that it would sentence Tili as though the rape counts were separate and distinct, considered and rejected imposing an exceptional sentence on top of the presumptive sentence, which the judge considered to be fair by reason of the consecutive sentencing that occurs in the separate and distinct context. When we determined that Tili's rape counts were to be sentenced as same criminal conduct in *Tili I*, and we remanded for resentencing in accordance with that determination, the trial court was faced with a different sentencing context. At that point, the sentences for each rape count were to be served concurrently. This results in a sentence for the rape counts that is significantly reduced compared to that which resulted at the first sentencing and one that the trial judge perceived to be too lenient.³ Thus, the issue at the resentencing was fundamentally different. At the first sentencing, the trial court considered and declined to impose an exceptional sentence on top of the presumptive sentence resulting from separate and distinct conduct and consecutive sentences. Upon resentencing, the trial court was deciding whether to impose an exceptional sentence on top of the presumptive sentence resulting from same criminal conduct. For this reason, we answer the first question of the collateral estoppel analysis in the negative. There being no identity of the issues, the trial court was not collaterally estopped from imposing an exceptional sentence at the resentencing.

³ The operation of the multiple offense policy as grounds for an exceptional sentence in this case is discussed later in this opinion.

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Tili relies entirely on *Collicott* to support his collateral estoppel argument and contends that both the facts of *Collicott* and this court's decision in that case compel the same result here. *State v. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992) (*Collicott II*). See also *State v. Collicott*, 112 Wn.2d 399, 771 P.2d 1137 (1989) (*Collicott I*). In broad terms, Tili states that we held in *Collicott II* that "a trial court which considers and rejects the State's request for an exceptional sentence is collaterally estopped from imposing an exceptional sentence on remand for resentencing, based on the same facts considered at the first sentencing." Pet. for Review at 6 (citing *Collicott II*, 118 Wn.2d at 661-62).

Preliminarily, that "holding" of *Collicott II* is questionable because it did not command a majority on the collateral estoppel issue. In fact, in her concurrence, in which four other justices joined, Justice Durham agreed with the outcome of the case but specifically disagreed with the discussion of collateral estoppel as going beyond what was necessary to decide the case. *Collicott II*, 118 Wn.2d at 670. Thus, the discussion of collateral estoppel in *Collicott II* is not mandatory authority regarding the use of collateral estoppel in exceptional sentencing and may be considered dicta. Tili's reliance on *Collicott II* simply warrants an analysis of the facts of that case. By this opinion we do not overrule *Collicott II* as we find it to be distinguishable on the facts.

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In *Collicott II*, this court reviewed the resentencing of a defendant convicted of one count each of burglary, rape, and kidnapping, all in the first degree, where the defendant contended that the imposition of an exceptional sentence at the resentencing was barred by collateral estoppel. *Collicott II*, 118 Wn.2d at 650, 653. Initially, the trial court determined that the three convictions arose out of the same criminal conduct, calculated the offender score, and sentenced Collicott accordingly. *Collicott I*, 112 Wn.2d at 401. At that time, the trial court declined to impose an exceptional sentence. *Collicott II*, 118 Wn.2d at 653. On the first appeal to this court, we affirmed the trial court's determination that Collicott's actions constituted same criminal conduct, but remanded for recalculation of his offender score. *Collicott I*, 112 Wn.2d at 412. At the resentencing, the court was alerted to an additional burglary conviction to which Collicott had delayed pleading guilty until after the original sentencing. The prosecutor advised that this new burglary conviction should be included in the recalculation of Collicott's offender score. *Collicott II*, 118 Wn.2d at 653. It was at this resentencing that the trial court decided to impose an exceptional sentence. *Collicott II*, 118 Wn.2d at 653-54. For purposes of a collateral estoppel analysis, there was an identity of the issues between Collicott's first and second sentencing. Where the trial court decided Collicott's conduct was same criminal conduct but declined to impose an exceptional sentence at the first sentencing, it made the opposite decision at the

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resentencing while the "same criminal conduct" determination remained the same.

Thus, the context, in terms of same criminal conduct or separate and distinct conduct, had not changed as between the first and second sentencing hearings.

As discussed above, unlike *Collicott*, the trial court in Tili's case faced a different issue at the resentencing than was before it at the original sentencing. The issue at resentencing was whether to impose an exceptional sentence on top of a presumptive sentence arising out of same criminal conduct. While at the original sentencing the court evaluated whether to impose an exceptional sentence on top of a presumptive sentence range to be served consecutively arising out of separate and distinct conduct. On this basis, we find *Collicott* distinguishable such that we need not extend its application to the case at bar. In any event, there is language in *Collicott II* indicating this court's permission to impose an exceptional sentence at resentencing if the trial court relied on the "clearly too lenient" standard of the multiple offense policy as the basis for the exceptional sentence. Accordingly, the court stated that it would allow the trial court to "choose again to consider whether the presumptive sentence is 'clearly too lenient'" after recalculating the offender score. *Collicott II*, 118 Wn.2d at 660.

Tili next argues that the trial court exceeded the mandate this court issued in *Tili I* as he perceives the trial court was instructed only to recalculate Tili's offender score consistent with the opinion. Again, Tili seizes upon *Collicott* to

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support his argument. In reality, the deciding issue in *Collicott II* was whether a trial court has "the authority to impose an exceptional sentence upon remand from the Supreme Court when the case was remanded with an order directing the trial court to 'redetermine the petitioner's offender score', and the trial court had originally imposed a standard range sentence." *Id.* at 652. Besides its discussion of collateral estoppel, the opinion concluded that the trial court exceeded the scope of the mandate emanating from *Collicott I* by imposing the exceptional sentence at the resentencing. *Id.* at 661, 663.

In contrast, the mandate from *Tili I* requires "further proceedings in accordance with the attached true copy of the opinion." Clerk's Papers at 147. In the "true copy of the opinion," after determining that Tili's three rape convictions were to be considered "same criminal conduct" for sentencing purposes, we held that "[his] sentence . . . [was] statutorily required to be served concurrently *unless an exceptional sentence [was] imposed.*" *Tili I*, 139 Wn.2d at 110 (emphasis added). Tili asserts that, because this language appears at the beginning of the opinion, it should be considered general commentary about the statutory requirements of former RCW 9.94A.400(1)(a) (1998) and is merely dicta. He claims the true instruction from this court is contained only in the "conclusion" of the opinion, which explains the correct calculus to be used for his offender score, and therefore, the trial court exceeded the scope of the mandate by imposing an

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exceptional sentence. This disputed language does appear at the beginning of the opinion in *Tili I*. However, it is part of a summary of the holdings of this court. As quoted above, this court's holding regarding its determination of "same criminal conduct" appears in the sentence just before the one Tili now challenges. It is not persuasive to argue that by their spatial placement in the opinion alone, certain words, but not others, lose their meaning. Consequently, we disagree that the trial court exceeded the scope of our mandate from *Tili I* by imposing an exceptional sentence.

Finally, Tili argues that collateral estoppel should apply because the trial judge stated at the first sentencing that "[a]s I read the case law and the statutory law in this [s]tate, I do not believe an exceptional sentence would be sustained by the appellate court of this state." Verbatim Report of Proceedings at 515. The trial court went on to rule that "the court feels that the high end of the standard range is appropriate . . . [which] gives the court the ability to sentence [Tili] to 417 [months]." Verbatim Report of Proceedings at 516. "The other sentences will be set at their high range, that they will be served concurrently as required by law." *Id.* However, these statements are meaningless outside the proper context. The following language, read in conjunction with that on which Tili relies, indicates the trial court's awareness, at the first sentencing, of the uncertainty in the law concerning merger and same criminal conduct in scoring these offenses:

The court is given the ability to impose more time than the parameters generally call for by the use of what is called an exceptional sentence. As I read the case law and the statutory law in this [s]tate, I do not believe an exceptional sentence would be sustained by the appellate court of this state.

Verbatim Report of Proceedings at 515. Later in the sentencing, after imposing 417 months for the rape sentences, the court said:

I think the record should reflect that if the court had considered [Tili's] argument about the merger, that I do believe that the various acts constituting this offense could be used as a basis – along with the other reasons mentioned by the prosecuting attorney . . . for an exceptional sentence upwards. And in that event, the court feels that the sentence [it] is going to come up with would be a reasonable sentence.

Verbatim Report of Proceedings at 516. This language shows that the court would have imposed an exceptional sentence, but for its finding of a basis to impose consecutive sentences on the rape counts. Thus, the trial court's judgment at the first sentencing was not that an exceptional sentence was categorically unwarranted, as Tili argues. Rather, the court believed that an exceptional sentence would be unwarranted were the rape convictions to be served consecutively, but would be warranted if Tili's conduct ultimately were to be considered "same criminal conduct."

To recapitulate, we find that the issue of whether to impose an exceptional sentence was not identical as between the first and second sentencing hearings because of the critical change in context from separate and distinct conduct to same

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criminal conduct. We also find the facts and procedural posture of *Collicott II* to be distinguishable from the case at bar. Finally, this court contemplated the imposition of an exceptional sentence upon remand in *Tili I* as did the trial judge as evidenced by the discussion at the first sentencing regarding the judge's intention to impose an exceptional sentence if the rapes were deemed to arise out of the same criminal conduct. For these reasons, the trial court was not collaterally estopped from imposing an exceptional sentence at the second sentencing hearing.

Imposition of an Exceptional Sentence

A. The Sentence Reform Act of 1981

The purpose of the Sentence Reform Act of 1981 (SRA) is to provide structure for the sentencing of felony offenders, while maintaining judicial discretion in sentencing. RCW 9.94A.010. The legislature was careful to preserve this discretion when it provided that "[t]he court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." Former RCW 9.94A.120(2) (1998). The purposes of the SRA are: "(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; (2) Promote respect for the law by providing punishment which is just; (3) Be commensurate with the

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punishment imposed on others committing similar offenses; [and] (4) Protect the public[.]” RCW 9.94A.010.

Having decided that there is no obstacle to the imposition of an exceptional sentence in Tili's case, we now review the appropriateness of the imposition itself.

For illustrative purposes, the SRA sets out a nonexclusive list of both mitigating and aggravating circumstances, any one of which may be used to justify the imposition of an exceptional sentence. Former RCW 9.94A.390(1), (2) (1998). Aggravating circumstances must be shown by a preponderance of the evidence. Former RCW 9.94A.370(2) (1998). The aggravating circumstances of relevance to Tili's case are deliberate cruelty, multiple incidents of offense per victim, and that the operation of the multiple offense policy results in a presumptive sentence that is "clearly too lenient in light of the purpose of [the SRA]." Pet. for Review at 10, 15, 17. *See* former RCW 9.94A.390(2)(a), (d)(i), (i) (1998). Exceptional circumstances must truly distinguish the crime from others of the same category. *State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481 (1992). *See generally* David Boerner, *Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981* § 9.6 (1985). However, those factors that are inherent in the particular class of crimes at issue may not serve to distinguish defendant's conduct from what is "typical" for that crime and may not, therefore, serve as justification for an exceptional circumstance. *See Chadderton*, 119 Wn.2d at 396.

B. Deliberate Cruelty

When the offender's conduct during the commission of the crime manifests deliberate cruelty to the victim, the trial court may impose an exceptional sentence. *See former RCW 9.94A.390(2)(a) (1998)*. Deliberate cruelty consists of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996). To justify an exceptional sentence, the cruelty must go beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense – elements of the crime that were already contemplated by the legislature in establishing the standard range. *See State v. Ferguson*, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001). *See also State v. Armstrong*, 106 Wn.2d 547, 551, 723 P.2d 1111 (1986) (holding that the burns inflicted on the 10-month-old victim by defendant's throwing boiling coffee on the child and plunging the child's foot in the coffee were injuries accounted for in the offense of second degree assault and could not justify an exceptional sentence).

Tili contends that his conduct during the rapes does not amount to deliberate cruelty and that his violent acts are elements of first degree rape, done in order to exact compliance. Tili claims that his demand that L.M. say she "liked it" when he penetrated her anus and vagina does not rise to the level of gratuitous conduct which inflicts pain as an end in itself. In support, Tili cites *Delarosa-Flores*, in

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which Division Three of the Court of Appeals did not uphold a finding of deliberate cruelty where defendant slapped the 67-year-old victim's thighs leaving bruises, called her "stupid lady" during the rapes, and brandished a small pair of scissors. *State v. Delarosa-Flores*, 59 Wn. App. 514, 518-19, 799 P.2d 736 (1990). The court justified this holding by stating that this conduct was not significantly more serious or egregious than is typical of other rapes. *Id.* at 519. The *Delarosa-Flores* court went on to distinguish its facts from those in *State v. Falling*, 50 Wn. App. 47, 49, 747 P.2d 1119 (1987), where an exceptional sentence based on deliberate cruelty was upheld when the defendant repeatedly called his victim "bitch" while raping her, threatened to kill her both during and after the rape, and penetrated her twice. *Delarosa-Flores*, 59 Wn. App. at 519. The commission of the acts in *Falling* lasted 20-30 minutes. *Falling*, 50 Wn. App. at 49.

The facts of this case are more analogous to those recognized by Division One of the Court of Appeals in *Falling*. In his petition for review, Tili attempts to distinguish his conduct from *Falling*'s. In doing so, Tili points out the factors the *Falling* court used in upholding that defendant's exceptional sentence on the basis of deliberate cruelty: that he had "repeatedly threatened to injure or kill the victim, penetrated her orally and vaginally during a 20-30 [minute] period of time, and repeatedly called her 'bitch.'" Pet. for Review at 13. The primary distinction Tili

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attempts to make is the disparate lengths of time between his rapes and *Falling's*. His distinction is without effect. Tili's acts against L.M are more similar to than different from *Falling's*. Tili threatened to kill her and, in fact, did injure her when he repeatedly struck L.M. in the head with a heavy pan until she fell to her knees. He penetrated her vaginally and anally, and further degraded L.M. when he forced her to say she "liked it." These are all similar to those factors deemed sufficient to find deliberate cruelty in *Falling*. The disparate length in time between Tili's rape and that in *Falling* is not critical. Notably, the *Falling* court did not reference the total length of the sexual assault when it listed the factors supporting its finding of deliberate cruelty. *Falling*, 50 Wn. App. at 55.

This court too, in *Cannon*, has upheld a finding of deliberate cruelty where the defendant repeatedly hit the victim's head with his fist, penetrated her multiple times, and verbally humiliated her. *State v. Cannon*, 130 Wn.2d 313, 333, 922 P.2d 1293 (1996).

Like the defendant in *Cannon*, Tili exhibited gratuitously violent behavior. Tili forced L.M.'s head back onto the floor such that she could not breathe when she tried to move her head to the side because of extreme pain. Before fleeing and before police entered L.M.'s apartment, Tili delivered gratuitous blows to L.M.'s head with his fist and had bitten her back. As the State concludes, "the record reveals that [Tili] was more intent on brutalizing [L.M.] than on reasonably using

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only that quantum of force necessary for her submission." Br. of Resp't at 15. We agree that Tili's conduct was more serious than that contemplated by the legislature for first degree rape.

The Court of Appeals also relied on Tili's multiple penetrations as evidence of deliberate cruelty. *State v. Tili*, 108 Wn. App. 289, 301-02, 29 P.3d 1285 (2001). In support it cited rape cases where multiple penetrations had been used as such. However, in each, the defendant was charged with only one count of rape. *Id. See State v. Vaughn*, 83 Wn. App. 669, 924 P.2d 27 (1996) (utilizing multiple penetrations as evidence of deliberate cruelty when defendant charged with one count of first degree rape), *review denied*, 131 Wn.2d 1018 (1997); *State v. Herzog*, 69 Wn. App. 521, 849 P.2d 1235 (same), *review denied*, 122 Wn.2d 1021 (1993). There are key differences between this case and the foregoing. First, Tili was convicted of three counts of rape and sentenced concurrently. Second, the rapes in *Vaughn* and *Herzog* took place over extended periods of time which played a roll in the determinations made in those cases. Third, this court determined in *Tili I* that the rapes were so close in time as to be the same criminal conduct. Thus, on the facts of this case, we decline to reach the issue of whether the multiple penetrations may also be used as evidence of deliberate cruelty since there is sufficient evidence of deliberate cruelty without resort to the multiple penetrations. We also think the issue of Tili's multiple penetrations is better

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addressed under the multiple offense policy discussion below. There being ample evidence to support a finding of deliberate cruelty, we agree with the Court of Appeals that the finding is not clearly erroneous and that the exceptional sentence was thereupon justified as a matter of law.

C. Multiple Penetrations as "Multiple Incidents per Victim"

Multiple incidents of offense per victim can justify an exceptional sentence. Former RCW 9.94A.390(2)(d)(i) (1998). Although the statute discusses "multiple incidents" in the context of major economic offenses, this subfactor may be relied upon as a basis for an exceptional sentence for both noneconomic and economic offenses. *See State v. Dunaway*, 109 Wn.2d 207, 219, 743 P.2d 1237, 749 P.2d 160 (1987). *See also State v. Armstrong*, 106 Wn.2d 547, 550, 723 P.2d 1111 (1986) (using former RCW 9.94A.390(2)(d)(i) (1998) to justify an exceptional sentence for the infliction of multiple injuries in the course of a second degree assault). Multiple acts in themselves establish a greater level of culpability than that contemplated by the legislature in establishing the punishment for a crime committed by a single act. *State v. Vaughn*, 83 Wn. App. 669, 677-78, 924 P.2d 27 (1996), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997). The aggravating circumstance of major economic offense remains a valid reason for imposing an exceptional sentence if even one of the statutory subfactors is satisfied. *State v. Branch*, 129 Wn.2d 635, 651, 919 P.2d 1228 (1996).

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The State raised this aggravating factor at the resentencing for the first time, and the trial court recognized it as an additional justification for the exceptional sentence. Tili challenges the use of the multiple penetrations in this way because he claims his conduct was not "exceedingly more egregious" than what is "'typical' [for] rape in the first degree." Pet. for Review at 16. The State counters that while this court concluded the rapes constituted "same criminal conduct," it did not disallow the use of the multiple penetrations as an aggravating factor.

A straightforward analysis of the parties' contentions is difficult because the record is unclear as to how the trial court ultimately used the multiple penetrations in justifying the exceptional sentence. The stated bases for the exceptional sentence under conclusions of law I are: (a) deliberate cruelty; (b) victim vulnerability; and (c) multiple incidents of offense per victim as provided in former RCW 9.94A.390(2)(d)(i) (1998). Yet, findings of fact II, sections (kk), (oo), (pp), and (qq),⁴ indicate that the court used the multiple rape incidents to support the

⁴ Those sections read as follows:

kk) That the calculation of the defendant's offender score results in a range that does not consider the multiple rapes that the defendant committed against the victim in the present case and therefore a sentence within the standard range would be an insufficient means of accomplishing the purposes of the sentencing reform act;

....

oo) That a sentence within the standard range would not be proportionate to the seriousness of the defendant's offenses because the defendant would

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operation of the multiple offense policy as an aggravating circumstance as provided in former RCW 9.94A.390(2)(i) (1998). *See also* former RCW 9.94A.400 (1998). The findings of fact do not mention the use of multiple incidents per victim as an aggravating circumstance in and of itself.

There is necessarily some overlap between these two aggravating circumstances. However, because the trial court's findings focus on the operation of the multiple offense policy, rather than multiple incidents per victim, we will confine our analysis of the multiple incidents only to the multiple offense policy.

D. Operation of the Multiple Offense Policy

Former RCW 9.94A.390(2)(i) (1998) provides that an exceptional sentence may be imposed if "the operation of the multiple offense policy of [former] RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of [the SRA]." "The 'multiple offense policy' comes from two general rules in [former RCW 9.94A.400(1)(a), (b)]: one, the same criminal conduct rule

be sentenced to a term that would not consider multiple rapes committed by the defendant against the victim;

pp) That a sentence within the standard range would not promote respect for the law because such a sentence would be reflective of only one act of rape and would not take into account the multiple rapes committed by the defendant against the victim. In essence, the defendant would be getting three or more rapes for "free";

qq) That a standard range sentence would result in punishment which would not be commensurate with punishment imposed on others committing similar offenses and would be insufficient to adequately protect the public.

Clerk's Papers at 292-94.

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for determining the offender score; and two, the default use of concurrent sentences for multiple current convictions. *State v. Borg*, 145 Wn.2d 329, 337, 36 P.3d 546 (2001) (footnote omitted). This section gives discretion to the sentencing court to impose an exceptional sentence when, under the above rules, the presumptive sentence is "clearly too lenient." *Id.* at 338. In keeping with this discretionary rule, we will reverse the trial court's finding on this aggravating circumstance only if we consider the leniency determination to be an abuse of discretion. *See Pryor*, 115 Wn.2d at 450.

With no attendant discussion, Tili cites *Borg* in a statement of additional authorities. *See State v. Borg*, 145 Wn.2d 329, 36 P.3d 546 (2001). In *Borg*, the defendant was convicted of six counts of unlawful possession of a firearm. The trial court imposed an exceptional sentence even though the same criminal conduct rule required that all six crimes be treated as one for sentencing. *Borg*, 145 Wn.2d at 331. The trial court's sole reason for doing so was that Borg had committed multiple crimes. *Id.* This court held that the multiple offense policy should be used in exceptional cases involving multiple offenses – not in *any* case involving multiple offenses. *Id.* at 339. Thus, the exceptional sentence was reversed because

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the multiple offenses were the trial court's only basis for relying on the multiple offense policy. *Id.*⁵

The State persuasively discourages the blind application of *Borg* that Tili apparently advocates. The harm *Borg* causes society does not significantly differ with the number of guns he possesses. However, a rape victim "suffers significantly greater harm by the rapist's repeated and varied assaults on her personal autonomy." Suppl. Br. of Resp't at 7. Each penetration, in each orifice, increases the victim's sense of danger, humiliation, and degradation. "A rapist should not be rewarded with the same sentence for multiple rapes that he would have received for a single penetration." Suppl. Br. of Resp't at 7. Based on these distinctions, we perceive Tili's situation as precisely the type of exceptional case, warranting application of the multiple offense policy, envisioned by this court in *Borg*.

An exceptional sentence may not be based on an unproved or uncharged crime, but the underlying facts and nature of the crime may serve as the basis for an exceptional sentence. *State v. Quiros*, 78 Wn. App. 134, 138-39, 896 P.2d 91 (1995) (in vehicular assault sentencing, court could consider excessive speed even

⁵ The dissent misapprehends *State v. Fisher*, 108 Wn.2d 419, 739 P.2d 683 (1987), which was cited in *Borg*. Dissent at 6. The crimes in *Fisher* could not have been characterized as same criminal conduct because although the victim was the same, the incidents apparently occurred on different dates. *Fisher*, 108 Wn.2d at 421. In *Fisher*, each injury was accounted for in a separate count which was incorporated into the calculation of the presumptive range. Here, Tili got the benefit of a same criminal conduct characterization so that the multiple injuries would not be accounted for absent an exceptional sentence.

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though reckless driving not charged). In this case, the trial court's finding at resentencing that "in essence, the defendant would be getting three or more rapes for 'free'" may be debated. Clerk's Papers at 294. However, it is true that the same criminal conduct finding actually resulted in no additional incarceration for *two* of the rapes. In addition, there were acts which could have supported additional units of prosecution, such as licking L.M.'s anus. Thus, the court was within its statutory authority to conclude the sentence was clearly too lenient in light of the purposes of the SRA as a result of the multiple offense policy of former RCW 9.94A.400 and we cannot say there was an abuse of discretion.

E. Victim Vulnerability

Because it was satisfied that the other aggravating factors were sufficiently supported by the record, the Court of Appeals did not address the vulnerability issue, which the State conceded was not supported by the record. The petition for review does not address the issue. We agree with the Court of Appeals and decline discussion on vulnerability as an aggravating factor since there is sufficient evidence of alternate aggravating circumstances to warrant the exceptional sentence.

CONCLUSION

The trial court reported incorrect offender scores in the judgment and sentence. However, the correct presumptive ranges for all counts were reported in

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the findings of fact, which was incorporated by reference into the judgment and sentence. Accordingly, the trial court necessarily relied on the correct offender scores in order to arrive at the correct presumptive ranges. Because the issues were not identical as between the first and second sentencing hearings, the trial court was not collaterally estopped from imposing an exceptional sentence at the resentencing. The trial court's findings of Tili's gratuitous violence against L.M. are not clearly erroneous, and we conclude that the exceptional sentence is justified. Likewise, we do not believe the trial court abused its discretion in concluding that the operation of the multiple offense policy resulted in a presumptive sentence that was too lenient. The Court of Appeals is affirmed.

State v. Tili (Fonotaga)
Majority by Ireland, J.
Concurrence in majority by Madsen, J.

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MADSEN, J. (concurring) -- I agree with the dissent that the multiple offense policy does not support an exceptional sentence under the facts of this case. As the dissent points out, this case is controlled by *State v. Fisher*, 108 Wn.2d 419, 739 P.2d 683 (1987). Nevertheless, I concur in the majority's result because another factor, deliberate cruelty, justifies an exceptional sentence and since the trial judge has twice imposed the same sentence, it is unlikely that a remand would result in a different sentence.

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Madsen, J.

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SANDERS, J. (dissenting)—The majority upholds essentially the same sentence previously reversed on review by this court. *See State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999) (*Tili I*). On remand the trial court reimposed the original sentence term as an exceptional sentence—even though the trial court had previously considered and rejected the State’s same request for an exceptional sentence. Clerk’s Papers (CP) at 230. This was error. The trial court is barred by collateral estoppel and the law of the case doctrine from imposing an exceptional sentence on remand after expressly rejecting it at the original sentencing hearing.

As the majority acknowledges, collateral estoppel in a criminal setting stems from the fifth amendment to the United States Constitution protection against double jeopardy and stands for the principle “that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Majority at 9 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). Collateral estoppel applies when “the issues raised and resolved in the former prosecution are

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identical to those sought to be barred in the subsequent action.” *State v. Peele*, 75 Wn.2d 28, 31, 448 P.2d 923 (1968).¹

The issue raised by the State and resolved at the original sentence hearing was whether to impose an exceptional sentence on grounds of deliberate cruelty and vulnerability of the victim.

So the standard range for the defendant, as he stands before the court, is 315 to 415 months. The State as well has briefed the issue of exceptional sentence and the State is requesting that the court find substantial and compelling reasons to justify an exceptional sentence, based on the facts of this case. The two areas that the State has identified [are deliberate cruelty and vulnerability of the victim].

CP at-223, 224. The State recommended a 587-month sentence. *Id.* at 225. Tili argued every first degree rape is a terrible crime and urged the court not to impose an exceptional sentence. *Id.* at 227. The trial court denied the State’s request for an exceptional sentence.

There can be no argument this was a terrible crime. Truly going to affect the victim and the victim’s family forever. It’s the court’s job to decide what is a reasonable sentence within the parameters of the law. The legislature sets those parameters. The court is given the ability to impose more time than the parameters generally call for by the use of what is called an exceptional sentence. As I read the case law and the statutory law in this State, I do not believe an exceptional sentence would be sustained by the appellate court of this state.

Id. at 230. The trial court sentenced Tili to 417 months. *Id.* at 231.

¹ The majority improperly applies the civil standard. Majority at 10 (citing *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)).

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On review we held the trial court abused its discretion by imposing consecutive sentences for Tili's three rape convictions. *Tili I*, 139 Wn.2d at 124. We remanded for resentencing. *Id.* at 128. The State then renewed its request for an exceptional sentence on remand. II Verbatim Report of Proceedings (RP) (Apr. 2000) at 8. The trial court complied. *Id.* at 18; CP at 294 (Findings of Fact and Conclusions of Law for exceptional sentence).

However, our majority contends collateral estoppel does not apply because the issues before the trial court at the original sentencing and on remand are not the same. Majority at 15. The majority so concludes because it interprets the trial court's prior refusal to impose an exceptional sentence as contingent on appellate affirmation of its finding that Tili's three rape convictions constituted separate criminal conduct. Majority at 4, 15.

By logical extension, the majority allows trial courts to hedge their bets against adverse appellate decisions. This contradicts the express purpose of the Sentencing Reform Act of 1981 (SRA) to provide "a system for the sentencing of felony offenders," which limits "discretionary decisions affecting sentences" and ensures the imposition of sentences "commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010(3); *see also State v. McClarney*, 107 Wn. App. 256, 263, 26 P.3d 1013 (2001) (The purpose of the SRA is "meting out the appropriate punishment for a particular crime, rather than

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tailoring the sentence to a particular individual.”), *review denied*, 146 Wn.2d 1002 (2002).

Consistent with this purpose, the SRA does not provide for contingent sentences. Such order necessarily exceeds the authority of the trial court.²

² Moreover the record does not support the majority’s interpretation. Without any citation to the record the majority describes the first sentencing hearing as follows:

At sentencing, the trial court stated that it did not believe that an exceptional sentence would be sustained on appeal if the rapes were considered separate and distinct conduct, as the trial court had considered them. However, the court went on to indicate that, should the multiple rapes be considered same criminal conduct on appeal, the same sentence would be imposed, as an exceptional sentence upward, justified by deliberate cruelty and vulnerability of the victim.

Majority at 4.

After imposing Tili’s standard range sentence at the original sentence hearing in 1998, the trial court made the following statement:

I don’t know that it’s necessary, but I think the record should reflect that if the court had considered *defendant’s argument about the merger*, that I do believe that the various acts constituting this offense could be used as a basis—along with the other reasons mentioned by the prosecuting attorney—could be used as a basis for an exceptional sentence upwards. And in that event, the court feels that the sentence that the court is going to come up with would be a reasonable sentence.

I RP (Jan. 23, 1998 to Mar. 17, 1998) at 516 (emphasis added). This ambiguous statement, which appears to connect the court’s denial of an exceptional sentence and Tili’s merger argument, became the cornerstone of the State’s argument to the trial court on remand for imposing an exceptional sentence. II RP (Apr. 14 and 21, 2000) at 7-8.

At the second sentencing hearing in 2000, the State read into the record the above quoted passage and argued that in making this statement the trial court had purposely left the door open to impose an exceptional sentence on remand should the State Supreme Court reverse its decision to treat Tili’s three rape convictions as

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At Tili's original sentencing, the trial court declined to impose an exceptional sentence on grounds of deliberate cruelty and vulnerability of the victim. But on remand it imposed an exceptional sentence on exactly the same facts, citing deliberate cruelty, victim vulnerability, and multiple offenses. Thus, there is an identity of issues as to the imposition of an exceptional sentence on grounds of

separate criminal conduct. II RP (Apr. 14 and 21, 2000) at 7-8. The trial court adopted the State's self-serving characterization of its prior decision and imposed an exceptional sentence on remand. *Id.* at 18.

But the record reveals "the defendant's merger argument" had nothing to do with this court's decision to treat the rape crimes as separate criminal conduct. I RP at 491-92; CP at 29-30. Prior to the imposition of Tili's sentence at the original sentence hearing the defendant asked the court to rule on four separate motions raised in his sentencing memorandum. I RP at 489-92. For the purposes of this decision we need concern ourselves with only the merger argument and the same conduct argument. Tili's merger argument moves to dismiss the burglary and assault convictions on the ground that the State necessarily had to prove the lesser included assault and burglary charges to prove the first degree rape charge as charged. I RP at 491-92; CP at 29-30. His same conduct motion asks the court to treat the three rape convictions as the same criminal conduct for the purposes of calculating his sentence. I RP at 491, 500-02; CP at 30-33. After hearing argument and rebuttal, I RP at 492-502, the trial court orally denied all four motions, treating each motion separately. *Id.* at 502-03.

Nowhere in the record does the trial court state, "it did not believe that an exceptional sentence would be sustained on appeal if the rapes were considered separate and distinct conduct, as the trial court had considered them." Majority at 4. Nowhere did it "indicate that, should the multiple rapes be considered same criminal conduct on appeal, the same sentence would be imposed, as an exceptional sentence upward, justified by deliberate cruelty and vulnerability of the victim." *Id.*

"Not the least misfortune in a prominent falsehood is the fact that tradition is apt to repeat it for truth." Hosea Ballou, American theologian (1771-1852), *cited in* George Seldes, *The Great Quotations* 81 (Carol Publ'g Group, 1993).

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deliberate cruelty and victim vulnerability, and the trial court is estopped from imposing an exceptional sentence on those grounds.³

The remaining question is whether the trial court may impose an exceptional sentence for multiple offenses. *State v. Fisher* holds the existence of multiple incidents cannot serve as grounds for an exceptional sentence where these incidents form the basis for multiple counts. 108 Wn.2d 419, 425-26, 739 P.2d 683 (1987).

Pursuant to the SRA's provision on sentencing for multiple current convictions, the trial court took into account Fisher's simultaneous convictions of two counts of indecent liberties in determining Fisher's criminal history, in order to compute his offender score and the presumptive sentencing range. By considering the multiplicity of Fisher's convictions, the trial court already accounted for the multiple incidents underlying those convictions. Therefore, it was not justified in citing Fisher's commission of multiple incidents with the same victim as a reason for imposing an exceptional sentence. This constituted the consideration of a factor which was necessarily accounted for in computing the presumptive range, and thus it was improper. Therefore, the multiplicity of incidents in this case did not justify an exceptional sentence.

Id. (footnote and citation omitted). Like the current case, *Fisher* involved concurrent sentences for multiple counts of sexual offenses against the same victim. *Id.* at 422. *Fisher* recognizes that basing an exceptional sentence on the fact that multiple crimes must be characterized as the same criminal conduct undermines the legislative authority to control sentencing procedures under the SRA.

³ Moreover, the State concedes the record does not support the imposition of an exceptional sentence on grounds of victim vulnerability. Majority at 30.

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The majority fails to recognize this principle. It attempts to limit the holding of *Fisher* to cases involving multiple charges for separate criminal conduct. Majority at 29 n.5. But a close reading of *Fisher* defies the majority's analysis. *Fisher* holds that the multiple incidents factor does not support an exceptional sentence where the multiple incidents form the basis for multiple charges against a defendant, but could be used to support an exceptional sentence where the defendant admitted to inflicting multiple injuries but was only charged with a single count of a criminal activity.

This court has sanctioned the application of this factor to a noneconomic offense, noting the nonexclusive nature of the SRA's list of aggravating circumstances. *State v. Armstrong*, 106 Wn.2d 547, 550, 723 P.2d 1111 (1986) (infliction of multiple injuries in the course of a second degree assault is a factor which justifies an exceptional sentence). However, in *Armstrong*, the multiple incidents took place in the course of a single offense. In contrast, the two incidents of sexual contact here constituted the two counts of indecent liberties of which Fisher was convicted separately.

Fisher, 108 Wn.2d at 425. *Fisher* makes no exception for multiple convictions based on the same criminal conduct. Nor would such an exception make sense because it contravenes the legislative determination that—without more—convictions arising out of the same criminal conduct shall not give rise to an increased offender level.

Furthermore, the doctrine of the law of the case also bars the trial court from entering an exceptional sentence. Under this principle, “questions determined on

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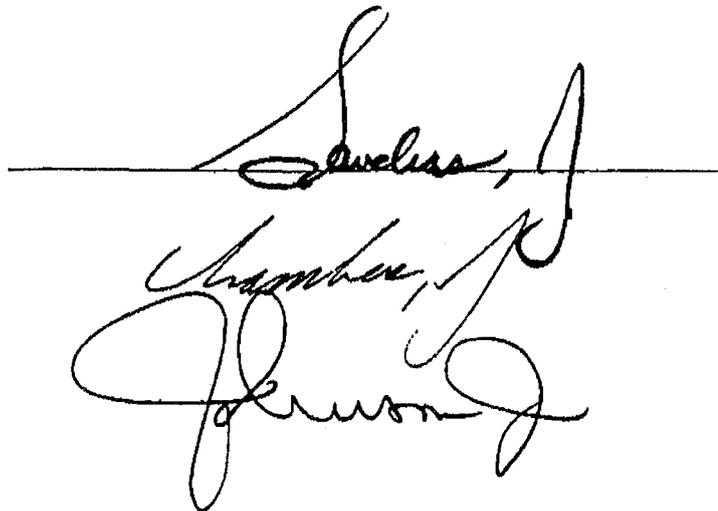
appeal, or *which might have been determined had they been presented*, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.’” *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (emphasis added) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)); *State v. Strauss*, 119 Wn.2d 401, 422, 832 P.2d 78 (1992) (Andersen, J., concurring) (“Had this issue been before us, I would have found that deliberate cruelty on the part of Mr. Strauss was demonstrated and that it justified the imposition of the exceptional sentence in this case. The State did not, however, cross-appeal on this issue and, as the majority opinion correctly notes, the law of the case doctrine prevents our considering it at this point.”).

When Tili first sought review of his sentence by this court in 1998, the State chose not to cross appeal the trial court’s judgment which expressly rejected an exceptional sentence. *Tili I*, 139 Wn.2d 107. There has been no substantial change in the evidence on remand. *See II RP* at 3-19. Thus, the law of the case doctrine bars consideration of this issue.

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I therefore dissent.



A horizontal line is drawn across the page. Below the line, there are two handwritten signatures in cursive. The first signature is "Sandra J." and the second is "Chamberlain, J." followed by a large flourish. Below these, there is another signature that appears to be "Johnson" with a large flourish.

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By /S/Chris Hutton, Deputy.

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