

NO. 67616-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PERNELL FINLEY,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS HILL

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. PROCEDURAL FACTS	3
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	10
1. THE TRIAL COURT REASONABLY EXERCISED ITS DISCRETION IN DENYING FINLEY'S UNTIMELY MOTION TO PROCEED PRO SE	10
2. THE NO-CONTACT ORDER THAT FORMED THE BASIS OF THE FELONY VIOLATION CHARGE WAS APPLICABLE AND ADMISSIBLE EVIDENCE	16
3. FINLEY'S PUNISHMENT FOR BOTH FIRST- DEGREE RAPE AND FELONY HARASSMENT DOES NOT VIOLATE DOUBLE JEOPARDY	20
4. REMAND FOR RESENTENCING ON FINLEY'S RAPE CONVICTIONS IS UNNECESSARY BECAUSE FINLEY'S STANDARD RANGE WAS CORRECTLY CALCULATED	24
a. Application Of Scoring Rules To Finley's Convictions	24
b. Florida's First-Degree Robbery Statute Is Comparable To Washington's Corollary	27
c. Finley's Florida Conviction For Burglary Is Comparable To First-Degree Burglary In Washington	29

d.	Florida's Crime Of Escape, As Charged In Finley's Indictments, Is Not Comparable To First-Degree Escape In Washington	35
e.	This Matter Should Be Remanded For Resentencing Only On Two Of The Instant Non-Violent Felonies.....	38
5.	FINLEY WAS NOT DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS SENTENCING	40
D.	<u>CONCLUSION</u>	46

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Blockburger v. United States, 284 U.S. 299,
52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).....21, 22

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 40, 41, 44

United States v. Dixon, 509 U.S. 688,
113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).....20

Washington State:

City of Seattle v. May, 171 Wn.2d 847,
256 P.3d 1161 (2011)..... 17

In re Detention of Turay, 139 Wn.2d 379,
986 P.2d 790 (1999)..... 14

In re Personal Restraint of Riley,
122 Wn.2d 772, 863 P.2d 554 (1993)..... 41

State v. Adams, 91 Wn.2d 86,
586 P.2d 1168 (1978)..... 41

State v. Bickle, 153 Wn. App. 222,
222 P.3d 113 (2009)..... 42

State v. Eaton, 82 Wn. App. 723,
919 P.2d 116 (1996)..... 23

State v. Farnsworth, 133 Wn. App. 1,
130 P.3d 389 (2006)..... 31

State v. Ford, 137 Wn.2d 472,
973 P.2d 452 (1999)..... 27

<u>State v. Fritz</u> , 21 Wn. App. 354, 585 P.2d 173 (1978).....	13, 15
<u>State v. Frohs</u> , 83 Wn. App. 803, 924 P.2d 384 (1996).....	23
<u>State v. Hernandez</u> , 95 Wn. App. 480, 976 P.2d 165 (1999).....	46
<u>State v. Jamison</u> , 105 Wn. App. 572, 20 P.3d 1010 (2001).....	13
<u>State v. Larkins</u> , 147 Wn. App. 858, 199 P.3d 441 (2008).....	33, 34
<u>State v. Lessley</u> , 118 Wn.2d 773, 827 P.2d 996 (1992).....	43
<u>State v. Manchester</u> , 57 Wn. App. 765, 790 P.2d 217 (1990).....	28
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	27, 32, 33
<u>State v. Nitsch</u> , 100 Wn. App. 512, 997 P.2d 1000 (2000).....	42, 44
<u>State v. Nysta</u> , 168 Wn. App. 30, 275 P.3d 1162 (2012).....	20, 21, 22, 23
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <u>cert. denied</u> , 523 U.S. 1008 (1998).....	13
<u>State v. Vermillion</u> , 112 Wn. App. 844, 51 P.3d 188 (2002).....	12, 13, 14
<u>State v. Walden</u> , 67 Wn. App. 891, 841 P.2d 81 (1992).....	46
<u>State v. Wilson</u> , 136 Wn. App. 596, 150 P.3d 144 (2007).....	42

Other Jurisdictions:

Brown v. State, 896 So.2d 808
(Fla. Dist. Ct. App. 2005).....33

People v. Windham, 19 Cal. 3d 121,
560 P.2d 1187, 137 Cal. Rptr. 8 (1977)..... 13

Simmons v. State, 780 So.2d 263
(Fla. Dist. Ct. App. 2001).....33

Statutes

Washington State:

RCW 10.99.050..... 17

RCW 26.50.110..... 39, 46

RCW 9.94A26

RCW 9.94A.03024

RCW 9.94A.510 26, 39, 40

RCW 9.94A.515 24, 26, 39

RCW 9.94A.52526, 27

RCW 9.94A.589 24, 25, 38, 42, 45

RCW 9A.04.11033

RCW 9A.20.02139

RCW 9A.28.02037

RCW 9A.44.01021

RCW 9A.44.04021

RCW 9A.46.02021

RCW 9A.52	31
RCW 9A.52.020	30, 33
RCW 9A.52.030	30
RCW 9A.52.050	42
RCW 9A.56.190	28, 29
RCW 9A.56.200	33
RCW 9A.76.110	36, 37
<u>Other Jurisdictions:</u>	
Fla. Stat. ch. 810.02	30, 33
Fla. Stat. ch. 812.02	30
Fla. Stat. ch. 812.13	28, 29, 33
Fla. Stat. ch. 944.02	36
Fla. Stat. ch. 944.40	36, 37

Other Authorities

Sentencing Reform Act	27, 39
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A. ISSUES PRESENTED

1. A defendant's request to represent himself must be unequivocal and, if the request is made mid-trial, the existence of the defendant's right to proceed pro se rests in the informed discretion of the trial court. Here, Finley demonstrated that his mid-trial request to represent himself was simply an alternative desire for substitute counsel, and the trial court had ample reason, based on Finley's behavior and his attorneys' representations, to believe that allowing him to proceed pro se would have greatly disrupted and delayed the orderly completion of the trial. Did the trial court properly deny Finley's equivocal, untimely motion to represent himself?

2. A trial court properly exercises its "gate-keeping" function when it allows into evidence court orders that are applicable to the conduct that the defendant is alleged to have unlawfully committed. Here, the trial court admitted into evidence an earlier court's order prohibiting Finley from coming within 500 feet of the protected party's person and residence. Finley was charged in the instant matter with living with and raping the protected party in violation of that order. Did the trial court properly admit the order as relevant and probative evidence?

3. A defendant is not deprived of his constitutional protection against double jeopardy unless each charged crime required proof of the same fact. Here, Finley was convicted of raping the victim by using threats to forcibly compel her to submit to anal intercourse, and was also found guilty of felony harassment for threatening to kill the victim. However, the jury was presented with ample evidence that Finley's threats to kill the victim were made before and well after he had completed his rapes. Did the trial court properly sentence Finley for completing separate and distinct acts that did not require the same proof?

4. Foreign convictions may be included in the calculation of a defendant's offender score if the out-of-state offenses are legally and/or factually comparable to corresponding Washington crimes. Here, Finley's Florida convictions for robbery were for violations of a statute that is legally equivalent to Washington's first-degree robbery law, and his Florida burglary conviction was for conduct that was factually equivalent to that prohibited by this state's first-degree burglary statute. Finley's Florida convictions for felony escape, however, were not proven to be consistent with Washington's equivalent laws. Should this matter be remanded for correction of Finley's offender score on his judgment and sentence,

and for resentencing only where the corrected score results in a new standard range?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Pernell Finley, was charged by amended information with two counts of rape in the first degree – domestic violence (Counts I and II), felony harassment – domestic violence (Count III), domestic violence felony violation of a court order (Count IV), and witness tampering – domestic violence (Count V). CP 23-26. By jury verdicts rendered on January 21, 2011, Finley was found guilty as charged on all counts. CP 167-75.

2. SUBSTANTIVE FACTS

On the morning of March 5, 2010, Shawn Emerson was watching television in the apartment he shared with his wife, Susan, in Kent. 7RP 722, 725.¹ Hearing horrific screaming, Shawn ran out into his building's hallway and saw a hysterical, naked woman, Monique Lock, shouting over and over that she had been raped. 7RP 725, 230. Emerson quickly returned to his apartment for a

¹ The verbatim report of proceedings consists of 13 volumes, referred to in this brief as follows: 1RP (10/5/10, 11/15/10, 11/22/10, 12/6/10, and 12/16/10); 2RP (1/5/11); 3RP (1/6/11); 4RP (1/10/11); 5RP (1/11/11); 6RP (1/12/11); 7RP (1/18/11); 8RP (1/19/11); 9RP (1/20/11); 10RP (1/21/11); 11RP (4/13/11); 12RP (7/22/11); and 13RP (8/19/11). The volumes are consecutively paginated.

blanket and asked his wife to call 911; he then wrapped the blanket around Lock and escorted her to his home. 7RP 730; 8RP 853.

Susan Emerson was already on the phone with a 911 dispatcher when her husband returned with Lock, who was bleeding from a leg injury. 8RP 855-56. Susan gave the phone to Lock, who told the dispatcher that her ex-fiancée had tried to kill her. 5RP 412-13. She added that he had been armed with a knife and had made her "have all kind of sex with him." 5RP 413.

Through a window in the Emersons' apartment, Lock could see her assailant fleeing the scene, and described his appearance and location to the dispatcher. 5RP 413-15. Based on Lock's information, Kent Police Department patrol officer Paul Peter located Lock's ex-fiancée, Pernell Finley, and apprehended him after a brief pursuit. 6RP 634-35.

Kent Police Department officer Amanda Quinonez spoke with Lock at the scene. 9RP 961. Lock told Quinonez that she had been forced at knifepoint and under threat to have anal sex. 9RP 967. Lock said that she had never had anal sex before and had not wanted to on this occasion, and added that it was very painful. 9RP 867.

Kent Fire Department medic Justin Schauer treated Lock at the Emersons' apartment. 5RP 491. Lock told Schauer that she had been assaulted and hit in the face earlier that morning, and had also been pushed down a flight of stairs. 5RP 493. Schauer bandaged Lock's injured knees and elbows and left the scene after Lock declined a ride to a local hospital. 5RP 494. However, shortly after leaving, Schauer was directed by a dispatcher back to Lock's location. 5RP 494. Lock then told him that she had also been raped multiple times; Schauer transported her to Valley Medical Center in Renton. 5RP 494.

At Valley Medical Center, Lock was treated by emergency room nurse Anna Hulse. 6RP 555. Lock told Hulse that she had awakened in her apartment at approximately 5:30 a.m. and found Finley sitting at her computer. 6RP 563. Lock asked Finley when he was going to leave her home, but he did not answer. 6RP 563. Instead, he went into the kitchen, got a knife, and found Lock back in her bed. 6RP 563. Finley told Lock that she had ruined his life and that he was going to kill her. 6RP 563. He told her to be quiet and to lay face-down on the bed. 6RP 563. Finley then spit on his penis and engaged in anal sex with Lock. 6RP 563. Lock told Hulse that she washed herself with a wet towel when Finley got off

of her, and that Finley then lubricated his penis with Vaseline and anally penetrated her again; this time, he ejaculated. 6RP 563. Lock washed up again and returned to bed. 6RP 563. Finley continued to tell Lock that she was going to die because she had ruined his life; he also said that he was going to kill himself and that they "were both going to be in the papers." 6RP 563. When Finley stepped away momentarily, Lock ran to escape. 6RP 563. Finley chased after Lock and pushed her, causing her to fall down a flight of stairs. 6RP 563.

Forensic testing of anal swabs taken from Lock showed the presence of Finley's DNA. 6RP 695.

Lock testified in the State's case-in-chief, and stated that she had met Finley over the phone, after he had called her from Florida in his capacity as a telemarketer for a satellite television company. 5RP 354-58. Their telephonic relationship progressed over time, and Lock eventually paid for a plane ticket for Finley to join her at her home in Kent. 5RP 361-62.

Lock testified regarding an incident that had occurred in April 2009, during which, Lock had told responding officers at the time, Finley threatened her with a knife and said he was going to cut her throat. 5RP 365-71. On the witness stand, Lock minimized the

seriousness of the events, and claimed that she was never truly in fear. 5RP 365-67, 372. However, she did identify a court order that had been issued following Finley's conviction for the 2009 incident, which prohibited him from having contact with her. 5RP 376-78. Lock testified that, notwithstanding the no-contact order, Finley moved back into Lock's apartment shortly thereafter. 5RP 380.

With regard to the events at her home on the morning of March 5, 2010, Lock recanted some of what she had consistently told Shawn Emerson, the 911 dispatcher, Amanda Quinonez, Justin Schauer, and Anna Hulse about her victimization at Finley's hands. She testified that Finley "may have said" that he was going to kill her and himself, but that he never put his hands on Lock or hurt her. 5RP 390-92. Lock stated that *she* initiated anal intercourse with Finley – twice -- to calm him down, and that it was consensual. 5RP 393. She testified that her efforts to soothe Finley did not work, and that, after their second round of anal sex, he still continued to talk about murder-suicide, so she ran out of the apartment. 5RP 403-05. According to Lock, she pulled away when Finley tried to grab her, causing her to fall down a flight of stairs. 5RP 410.

The State played a series of recorded phone conversations between Lock and Finley that had taken place while Finley was in jail following his arrest on March 5, 2010. 9RP 982-1036. In the calls, Finley emotionally manipulates Lock, telling her that she should not feel responsible for casting him into an unbearable situation, though, he explains, her testimony at his upcoming trial will cause him to spend the rest of his life in prison. 9RP 984, 1000-03. When Lock tells Finley that she fears he intends to hurt himself, Finley suggests that if she avoids appearing for trial, the case against him will be dropped. 9RP 1011. He further explains that, as an alternative, she could alter her testimony and describe the rapes as consensual intercourse. 9RP 1015-19. In the penultimate call, Lock assures Finley that she will perjure herself at his trial. 9RP 1024-25. In the final recorded conversation played for the jury, Finley instructs Lock that if she is asked, she should deny that she had spoken to him since his arrest; he then instructs her again regarding what she should say on the witness stand. 9RP 1032, 1036.

Finley testified in his defense. 9RP 1046. He admitted knowing of the existence of the 2009 no-contact order and of violating it, but explained that he did so with Lock's consent, and

contended that she often used the order as leverage over him, threatening to report him for violating it whenever he would discuss ending their relationship. 9RP 1057, 1061-62.

Finley stated that he had fallen asleep at the computer on the early morning of March 5, 2010, and was awakened by Lock, who berated him for wasting electricity. 9RP 1072. Frustrated by Lock's hectoring and her constant controlling behavior, Finley "snapped" and grabbed a knife from Lock's kitchen. 9RP 1074-75. He confronted Lock and demanded that she stop dominating him. 9RP 1075. Finley testified that Lock then "pulled one of her moves" and started to kiss him and tell him that she wanted to have sex. 9RP 1075.

According to Finley, they then had "regular" and anal sex. 9RP 1077. Afterward, Lock told Finley that she had been frightened of him. 9RP 1080. Finley testified that he had wanted Lock to remain scared, so he picked up the knife again and told her that she had to stop treating him like a child. 9RP 1080-81. Lock then ran off while he went to the balcony to smoke a cigarette. 9RP 1081. Finley tried to catch Lock because she was "butt naked," but she slipped away and fell down a flight of stairs through no fault of his own. 9RP 1082.

C. ARGUMENT

1. THE TRIAL COURT REASONABLY EXERCISED ITS DISCRETION IN DENYING FINLEY'S UNTIMELY MOTION TO PROCEED PRO SE.

Finley opens his appeal by asserting that he was illegally deprived of his constitutional right to self-representation. He contends that the trial court abused its discretion when it denied his mid-trial motion to proceed pro se, because its denial was predicated on the erroneous conclusion that his motion was insufficiently unequivocal. Brief of Appellant, at 24. His claim is without merit. Not only was the trial court correct in determining that Finley was equivocal in his desire to act as his own attorney, it exercised reasonable discretion in denying his untimely motion for a variety of other legitimate reasons, as well.

The State opened its case-in-chief on January 11, 2011, following three days of hearings on pre-trial matters and jury selection. 5RP 341. Over the course of January 11, 12, and 18, 2011, the State called eight individuals to the witness stand, who were subjected to direct examination and cross-examination by Finley's trial counsel. At the commencement of the trial day on January 19, 2011, Finley raised, for the first time, a request to proceed pro se. 8RP 823.

The trial court inquired as to the reasons for this unusually late request, and Finley explained that his attorneys were acting as agents of the State and intentionally sabotaging his defense. 8RP 823, 834. He further alleged that his counsel had repeatedly lied to him and withheld evidence. 8RP 823-24. The court asked if Finley had any evidence of his counsel's alleged misdeeds, and Finley conceded that he had none. 8RP 825.

Finley's attorneys explained to the court that they had found communicating with their client to be a frustrating experience, to the extent that they had requested a competency evaluation while the matter was pending. 8RP 829. Defense counsel said that although Finley was found by the evaluator to be able to stand trial, it still remained a challenge to review the State's evidence with him. 8RP 829. Finley's counsel asked, on the basis of their client's unhappiness with their performance and their difficulty in conveying information to him, to be discharged from representation. 8RP 830.

The trial court asked Finley whether he indeed wanted to represent himself, or if he would be satisfied by appointment of new counsel. 8RP 835. Finley responded by asking if it would indeed be possible for him to have new lawyers. 8RP 835. When the judge repeated her question, Finley explained that he asked to

represent himself only because he did not believe he would be provided with substitute counsel; he said that he would choose to proceed as his own attorney, though he admittedly lacked any legal training, if he were not eligible for new lawyers. 8RP 836.

The trial court denied Finley's motion to represent himself, finding that his request was neither truly unequivocal nor timely. 8RP 836-37. The court ruled that allowing Finley to begin representing himself in the middle of trial would hinder the administration of justice and that his motion appeared to be timed to gain a tactical advantage. 8RP 837. The court also noted that in its observations, trial counsel appeared to be actively communicating with Finley and that there was no assertion of a conflict of interest that would warrant their sought-after discharge at this stage of the proceedings; in addition, the trial court commended the performance of defense counsel thus far. 8RP 836. The State then called two more witnesses, resting its case-in-chief the following day. 9RP 1046.

A defendant's right to proceed pro se is not absolute, and in order to exercise that right, he must request to represent himself knowingly, unequivocally, and in a timely manner. State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). A trial

court's disposition of a request to proceed pro se is reviewed for abuse of discretion, and will be reversed only if the court's decision is based on clearly untenable or manifestly unreasonable grounds. Vermillion, 112 Wn. App. at 855; State v. Jamison, 105 Wn. App. 572, 590, 20 P.3d 1010 (2001).

The trial court's discretion lies along a continuum that corresponds to the timeliness of the request. See State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). If the demand for self-representation is made during the trial, the right itself rests largely in the informed discretion of the trial court. Id. As this Court explained in Fritz, when a midtrial request for self-representation is presented, the trial court should consider factors such as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." Id. at 363, quoting People v. Windham, 19 Cal. 3d 121, 128-29, 560 P.2d 1187, 137 Cal. Rptr. 8 (1977).

A request to proceed pro se must be unequivocal in the context of the record as a whole. State v. Stenson, 132 Wn.2d 668, 740-42, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

Here, the trial court properly concluded that Finley's motion was not wholehearted when viewed with an appropriately broad perspective. As the record makes clear, Finley was far less motivated by a desire to act as his own attorney than simply by frustration and unjustified mistrust of his assigned counsel. 8RP 823-25, 829, 834. When asked by the court if he would prefer substitute counsel, Finley responded positively to the suggestion, and indicated that he was moving to proceed pro se only because he believed himself ineligible for a new set of attorneys. 8RP 836.

The court's exchange with Finley illustrates his understandable ambivalence about assuming total responsibility for his trial four-fifths of the way through the State's case-in-chief. As the state supreme court noted in In re Detention of Turay, 139 Wn.2d 379, 398, 986 P.2d 790 (1999), if a defendant requests to act as his own attorney as an alternative to substitution of a new counsel, this may constitute an indication to the trial court that, in light of the whole record, the request is not unequivocal. Given that courts should indulge every presumption against finding that a defendant has waived the right to counsel,² the trial court's

² Vermillion, 112 Wn. App. at 851.

conclusion can only be seen as a reasonable exercise of its discretion.

Additionally, evaluation of each of the criteria identified by this Court in Fritz supports the trial court's finding that Finley should not be granted his eleventh-hour motion to represent himself. Even a cursory review of the record reinforces the trial court's conclusion that Finley's assigned attorneys had been conducting a skillful defense of their client, including their leading of Ms. Lock through her comprehensive recantation of her original complaint. Finley's untimely motion, made shortly before the conclusion of the State's case, was the first instance in which Finley requested to proceed pro se. His request was based on unsupported fantasies that his attorneys were acting as agents for the prosecution, his counsel informed the court that they had long been concerned with Finley's competency to stand trial, and Finley was unable to present his motion without engaging in unjustified verbal sparring with a judge who was merely trying to extract the necessary facts and arguments to inform her decision. 8RP 823-37.³ The trial court can hardly be faulted for concluding that granting Finley's motion would

³ Indeed, immediately after this hearing, Finley voluntarily absented himself from the trial, refusing to return from the jail. 8RP 843.

cause unjustifiable disruption and delay of a trial that was well underway. In light of all of these circumstances, the trial court's denial of Finley's request was eminently reasonable.

2. THE NO-CONTACT ORDER THAT FORMED THE BASIS OF THE FELONY VIOLATION CHARGE WAS APPLICABLE AND ADMISSIBLE EVIDENCE.

Finley next asserts that the domestic violence no-contact order that he was charged with violating was inapplicable to him due to an obvious scrivener's error, and thus should not have been admitted into evidence, much less form the basis of a conviction. Brief of Appellant, at 28. He contends that the trial court failed to perform its "gatekeeping" function by allowing the jury to consider the no-contact order, though he fails to specify what the appropriate remedy should be in the larger context of his trial and sentence. His failure, however, is immaterial. Even with the erroneous provision excised, the order remained otherwise applicable to Finley and prohibited him from engaging in conduct that he himself admitted to. The jury was entitled to consider the order in its deliberations.

As a condition of the sentence imposed on Finley on May 29, 2009, under King County Superior Court cause no. 09-1-02983-7 KNT, following his conviction for fourth-degree

assault (domestic violence), King County Superior Court Judge Michael Heavey issued an order prohibiting contact pursuant to RCW 10.99.050. Ex. 2. The order contained two key provisions. The first barred Finley from having any contact, other than by phone, with Monique Lock. Ex. 2. Unfortunately, the order contained a scrivener's error with regard to this provision: the expiration date of that ban was nonsensically listed as the same date as the date of issuance, i.e., May 29, 2009. Ex. 2.

However, the other key aspect of the order was memorialized accurately. It prohibited Finley from coming within 500 feet of Lock's residence, school, workplace, and person until May 29, 2011, which was the length of Finley's suspended sentence for the misdemeanor assault. State's Ex. 2; CP 410-12.

Relying on City of Seattle v. May, 171 Wn.2d 847, 256 P.3d 1161 (2011), Finley now contends that the trial court should never have allowed the jury to consider the order in its entirety because of the error in the first provision. He argues that the trial court failed to abide by its obligation, as identified by the May court, to exclude orders that are "inapplicable to the crime charged (i.e., the order either does not apply to the defendant or does not apply to the charged conduct)...." May, 171 Wn.2d at 854. Finley asserts that

the erroneously-entered expiration date in the first provision meant that the order in its entirety expired on the day of its issuance, and thus was “inapplicable” to conduct he was charged with having committed on March 5, 2010.

His claim fails because it accounts neither for the second provision, which unambiguously prohibited him from coming within 500 feet of Lock’s residence and person until May 29, 2011, nor the court’s “to-convict” instruction regarding the crime of felony violation of a court order, which asked the jury to determine whether the State had sufficiently proved that Finley violated “a provision” of an order of which he was aware. CP 202. By his own account, Finley was in violation of this order on March 5, 2010, when he engaged in sexual activity with Lock at her apartment and had, by his own admission, been living there for many months. 9RP 1057, 1071-78.

To be sure, Finley denied that, in the course of violating the order, his conduct was assaultive, which was an element of the charge of felony violation. CP 202; 9RP 1076 (Finley testifying that Lock initiated their sexual activity). The jury, of course, had ample evidence to reject his claim and conclude that his conduct of penetrating Lock anally and pushing her down a flight of stairs both violated the ban on his coming within 500 feet of her person and

residence *and* included unwanted harmful or offensive touching.

CP 201 (defining "assault"), 202.

During the course of its deliberations, the jury inquired whether the error as to the lifespan of the first provision of the order voided the entire document. CP 165. The trial court properly responded by directing the jury to refer to their instructions. CP 166. The relevant instruction – the "to-convict" instruction – properly allowed the jury to convict Finley if the State had proven he had violated "a provision of" the no-contact order. CP 202 (emphasis added). The order contained more than one provision, and the one that was properly drafted and still in effect on March 5, 2010, proscribed conduct that Finley clearly committed, as was established by ample evidence that included Finley's in-court admissions. Accordingly, Finley's contention that the trial court should have excluded the order from evidence due to its inapplicability thus fails.

3. FINLEY'S PUNISHMENT FOR BOTH FIRST-DEGREE RAPE AND FELONY HARASSMENT DOES NOT VIOLATE DOUBLE JEOPARDY.

Finley argues that he was deprived of his constitutional protection against double jeopardy when he was convicted and punished for the crimes of felony harassment and first-degree rape. He contends that the acts amounting to felony harassment cannot be seen as anything other than a means to effectuate his raping of Lock. Brief of Appellant, at 36. Because his threats to kill Lock served no separate purpose, Finley contends, his conviction for harassment should have merged with his rape counts. Brief of Appellant, at 36. Finley's claim is without merit, and runs contrary to case law.

Where a defendant's actions support charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. State v. Nysta, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012). The "mere fact that the same conduct is used to prove each crime is not dispositive." Id. at 44-45, citing United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

Double jeopardy analysis begins with comparison of the language of the two criminal statutes at issue. Nysta, 168 Wn. App. at 45. This consideration – meant to determine whether each crime requires proof of a fact that the other does not, i.e., whether they are the “same in law” – is often referred to as the Blockburger test, after the test developed by the U.S. Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).

In the instant matter, each of the charged crimes demands proof of an element that the other does not. Felony harassment, as charged in this case, requires a threat to kill, not merely to cause bodily harm. RCW 9A.46.020(2); CP 199. That crime does not include an element of sexual intercourse, as the crime of first-degree rape does. See RCW 9A.44.040(1). Likewise, first-degree rape does not require a threat to kill; “forcible compulsion,” an element of rape in the first degree, can be established by proof that the defendant applied physical force or issued a threat *to cause physical injury*. See RCW 9A.44.010(6), .040(1) (emphasis added). Given the disparities between the plain language of the two statutes, this Court held in Nysta that the crimes of felony

harassment and rape by forcible compulsion are not the “same in law.” Nysta, 168 Wn. App. at 46.

Double jeopardy analysis continues beyond a comparison of statutory elements, however, and must answer the remaining question of whether each crime required proof of a *fact* that the other charged offense did not. Id. at 47, citing Blockburger, 284 U.S. at 304. In this matter, the evidence of a threat to kill – the basis of the harassment count – was not limited to those statements that Finley made in order to complete his multiple rapes of Lock. He continued to threaten her after he was finished with those sexual offenses, which then led, as Lock explained to emergency room nurse Anna Hulse, to her flight from the apartment, naked and utterly terrified, as soon as she had an opportunity. 6RP 563. As Hulse stated, Lock told her that she “got back in bed and he kept telling me I ruined his life and that I was going to die. He got up and walked toward the patio door, and I took off running.” 6RP 563. Though Lock recanted her original statements about the non-consensual nature of their sexual congress, she remained consistent about fleeing the apartment because Finley kept threatening her after their sexual acts were completed. 5RP 405.

In this regard, this case is indeed akin, as Finley suggests in his opening brief, to State v. Eaton, 82 Wn. App. 723, 919 P.2d 116 (1996), overruled on other gds., State v. Frohs, 83 Wn. App. 803, 924 P.2d 384 (1996), in which this Court rejected the appellant's claim that his felony harassment and first-degree rape convictions merged for sentencing purposes. This Court concluded that merger was inappropriate because the defendant continued to threaten to kill his victim even after the rape was completed. Eaton, 82 Wn. App. at 731-32.

Under the double jeopardy challenge that Finley presents here, a similar outcome is appropriate. It cannot be said that the evidence *required* to support the conviction for felony harassment was the *same* evidence required to support his conviction for first-degree rape. As this Court observed in Nysta, it is not enough to prevail on a double jeopardy challenge to show that the same piece of evidence was available to support both convictions; the contention will succeed only if the same piece of evidence was the *sole* proof of an element of both crimes. Nysta, 168 Wn. App. at 149. No such threshold has been met here, and Finley's claim should thus be rejected.

4. REMAND FOR RESENTENCING ON FINLEY'S RAPE CONVICTIONS IS UNNECESSARY BECAUSE HIS STANDARD RANGE WAS CORRECTLY DETERMINED.

Finley asserts that the trial court erroneously placed him in an incorrect standard sentencing range following his convictions for first-degree rape and his three non-violent felonies. He contends that this error was the product of counting his prior out-of-state convictions for robbery, burglary, and escape in the calculation of his offender score, which resulted in his placement in the range for offenders with a score of nine or more felony convictions.

a. Application Of Scoring Rules To Finley's Convictions.

At the time of his sentencing, Finley faced punishment on two charges of rape in the first degree. First-degree rape is a serious violent felony. RCW 9.94A.030(41). As RCW 9.94A.589(1)(b) provides (emphasis and footnote added):

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions *that are not serious violent offenses* in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious

violent offenses shall be determined according to (a) of this subsection.⁴ All sentences imposed under (b) of this subsection shall be served *consecutively* to each other and currently with sentences imposed under (a) of this subsection.

In this matter, wherein Finley was convicted of two serious violent felonies with the same seriousness level, it was necessary to calculate Finley's score for only one of the rape convictions (Count I); for the other (Count II), his score was zero, and that sentence would run consecutively as required by RCW 9.94A.589(1)(b). And for purposes of calculating his score on Count I, Count II would not be included, though his other concurrent felonies – for felony violation of a no-contact order (Count III), felony harassment (Count IV), and witness tampering (Count V) would count for one point each.

Thus, for Count I, Finley's score began as a three. However, Finley had a lengthy criminal history, which he acquired in Florida, prior to his multiple crimes against Monique Lock inside her apartment in Kent. Finley in fact had been convicted of six different felonies in Florida in the 1990s, including two convictions for armed

⁴ Under RCW 9.94A.589(1)(a), whenever a defendant is to be sentenced for multiple crimes that are not serious violent offenses, the standard range for each current offense is determined by using all other current convictions as if they were prior convictions for the purpose of calculating his offender score.

robbery, one for armed burglary, one for possession of cocaine, and two for felony escape. CP 311-17, 341-43, 350-52, 359-62. The sentencing court found that all of these crimes were comparable to Washington felonies, and that the robbery and burglary convictions corresponded to their first-degree equivalents in this state. 12RP 1223-24. Because first-degree robbery and first-degree burglary are classified as violent felonies under Title 9.94A, they counted as two points each – or six points altogether -- in the calculation of Finley’s offender score for Count I. See RCW 9.94A.525(9). Accordingly, if Finley’s entire felony history was included, along with his concurrent, non-violent felonies, in the calculation of his score for one count of first-degree rape, his score would properly be computed as 12.⁵ Pursuant to RCW 9.94A.510, a score of 12 results in a standard range of 240 to 318 months for a level XII offense, including first-degree rape. See RCW 9.94A.515 (categorizing “Rape 1” as a level XII crime).

Finley was scored at 10 for each of his non-violent felonies (Counts III-V), due to the inclusion, on each charge, of his four concurrent offenses as well as his six prior convictions. CP 368.

⁵ It is unclear from the record why a superimposed score of 14 was handwritten over the printed “12” on the judgment and sentence.

b. Florida's First-Degree Robbery Statute Is Comparable To Washington's Corollary.

The Sentencing Reform Act requires that prior out-of-state convictions be classified "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). In determining whether a foreign conviction is comparable to a Washington felony, a sentencing court must compare the out-of-state offense with the elements of the most equivalent Washington crime. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the results of the comparison show that the elements are comparable as a matter of law, the foreign conviction counts toward the defendant's offender score for the present crime. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

Here, Finley posits that his 1991 and 1996 convictions in Florida for that state's crime of first-degree robbery should not have been included in his offender score for his various offenses because Florida's robbery statute does not include the term "immediate force," as Washington's does. Compare Fla. Stat.

ch. 812.13⁶ and RCW 9A.56.190. Finley contends that this distinction renders Florida's statute broader than Washington's and incomparable, because Florida's statute allows for prosecution of a culprit who uses force after he has already stolen the sought-after property, whereas Washington's statute, he argues, is in play only when "the force or fear takes place before or during the taking, rather than after the taking has been completed." Brief of Appellant, at 47.

Finley's argument runs contrary to the plain language of Washington's statute defining robbery:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person.... Such force or fear must be used to obtain *or retain* possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190 (emphasis added); see also State v. Manchester, 57 Wn. App. 765, 769, 790 P.2d 217 (1990) (holding that a robbery occurs in Washington if the culprit uses force even after the taking

⁶ Fla. Stat. ch. 812.13(1) defines robbery as "the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear."

is complete). Indeed, both Washington's robbery statute and Florida's expressly define the offense under the "transactional view" of that crime, in which a robbery is ongoing even after the stolen property has been obtained. Compare RCW 9A.56.190 and Fla. Stat. ch. 812.13(3)(b) (providing that an act shall be deemed "in the course of the taking" if it occurs "either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.").

Finley's sole challenge to the comparability of the elements of Washington's and Florida's robbery statutes thus failing, he provides no basis upon which this Court should overturn the trial court's inclusion of his 1991 and 1996 robbery convictions in the calculation of his offender score.

c. Finley's Florida Conviction For Burglary Is Comparable To First-Degree Burglary In Washington.

Finley also challenges the inclusion of his 1991 burglary conviction in Florida in the computation of his offender scores, asserting that the elements of Florida's burglary statute are broader than Washington's, thus allowing punishment for acts that would not be deemed burglaries in this state. Brief of Appellant, at 49-50. Finley's challenge requires suspension of simple common sense in

favor of a hyper-technical exercise in statutory interpretation that produces absurd results.

Florida defines burglary as entering or remaining without license or invitation in a “dwelling, structure, or conveyance with the intent to commit an offense therein.” Fla. Stat. ch. 810.02(1)(b). In Washington, a person commits the crime of burglary if he unlawfully enters or remains in a building with the intent “to commit a crime against a person or property therein.” RCW 9A.52.030. If the burglar is armed with a dangerous or deadly weapon, he has committed the crime of first-degree burglary in Florida and Washington. See Fla. Stat. ch. 812.02(2)(b); RCW 9A.52.020.

On appeal, Finley limits his challenge to the comparability of the elements to the issue of requisite intent. He contends, without much argument, that there is a meaningful distinction to be drawn from Florida’s reference to the culprit’s “intent to commit an offense” and Washington’s “intent to commit a crime against a person or property,” and that this differing language renders the statutes inconsistent. Brief of Appellant, at 50.

Finley's argument requires this Court to accept as a commonplace proposition the notion that a person would unlawfully enter or remain in another's building with the intent to commit a victimless crime, one that is neither against another or another's property. Although Washington's legislature has not specifically defined what a "crime against a person or property" is in the context of RCW chap. 9A.52, offenses such as driving under the influence, possession of a controlled substance, and failure to register as a sex offender are generally seen as crimes without a specific victim. The possibility of such a scenario – in which a person unlawfully entered a structure in order to unlawfully possess his own heroin, for instance, or in order to drunkenly drive – is so remote as to not warrant reading great significance into the alternative words in Florida's and Washington's statutes.

Nevertheless, assuming, arguendo, that this Court concludes that Washington's burglary statute defines the element of intent more narrowly than Florida's, the determination of comparability does not immediately end. A sentencing court should then proceed to conduct a factual comparability analysis. See State v. Farnsworth, 133 Wn. App. 1, 17-18, 130 P.3d 389 (2006).

Where, as here, the defendant pleaded guilty or no contest to the charge alleged in the out-of-state information,⁷ a sentencing court is limited to reviewing the defendant's conduct as described in that information when determining whether such conduct would be punishable as a particular felony in this state. See Morley, 134 Wn.2d at 606.

Finley entered his no-contest plea in 1991 to the following charges of robbery and burglary:

PERNELL FINLEY...on the 8th day of February [1991]...by force, violence, assault, or putting Judy Lee in fear, willfully and unlawfully against the will of Judy Lee, did take from the person or lawful custody of Judy Lee money or other property, to wit: purse and contents, with intent to deprive Judy Lee of said money or property, and in the course of committing said robbery PERNELL FINLEY did carry a deadly weapon, to wit: a piece of lumber...

[And] PERNELL FINLEY...on the 8th day of February [1991]...unlawfully and without invitation or license did enter or remain in that certain structure, the dwelling of Judy Lee, located at 314 W. Church Avenue, Dade City,... the property of Judy Lee, with the intent to commit an offense therein, and during the course

⁷ CP 311 (1991 judgment and sentence, indicating that Finley entered pleas of guilty and/or *nolo contendere* to the crimes of first-degree robbery and burglary in Pasco County, Florida).

thereof and within said structure was armed with a dangerous weapon, to wit: a piece of lumber....

CP 288-89.⁸

Finley asserts that the sentencing court overstepped the boundaries described in Morley by concluding that the robbery and burglary were connected, i.e., that Finley unlawfully entered the home of the victim, Judy Lee, in order to rob her. He argues that this conclusion requires judicial fact-finding that impermissibly goes beyond the facts contained in the information. Brief of Appellant, at 51. He relies on this Court's decision in State v. Larkins, 147 Wn. App. 858, 199 P.3d 441 (2008), for support. In Larkins, the defendant had previously been convicted of burglary in Ohio, and the sentencing court in Washington was called upon to determine comparability. Larkins, 147 Wn. App. at 865. The Ohio indictment had charged Larkins with burglary for trespassing "by force, stealth,

⁸ The distinction in the 1991 information between "deadly weapon" and "dangerous weapon" as used in the robbery and burglary charges, respectively, would seem to be a function of the Florida legislature's choice of language in the statutes defining the substantive offenses. See Fla. Stat. ch. 812.13(2)(a) (defining armed robbery), ch. 810.02(2)(b) (penalizing armed burglary as first-degree offense). This distinction appears to be purely semantic, as both "deadly weapon" and "dangerous weapon" have been defined by Florida courts as a "weapon likely to produce death or great bodily injury." See Brown v. State, 896 So.2d 808 (Fla. Dist. Ct. App. 2005); Simmons v. State, 780 So.2d 263, 265 (Fla. Dist. Ct. App. 2001). This definition is consistent with the term "deadly weapon" as used in this state. See RCW 9A.04.110(6); RCW 9A.52.020; RCW 9A.56.200.

or deception” into the home of an individual named Lipscomb, with the intent to commit a “misdemeanor that was not a theft offense.” Id. at 864. In the same indictment, Larkins was also charged with committing a misdemeanor assault of Lipscomb on the same date. Id.

This Court held that the sentencing court necessarily exceeded its authority by drawing a factual inference – that Larkins entered Lipscomb’s home in order to assault him – that could not be established with certainty by reference to the indictment. Id. at 865-66. This Court returned the matter to the lower court for resentencing without the inclusion of the Ohio burglary conviction in the calculation of Larkins’s offender score. Id. at 867.

The State recognizes the significance of Larkins to the analysis this Court must undertake with regard to Finley’s conviction for burglary in Florida. However, an important distinction can be made in the specificity of the allegation in the Florida indictment charging Finley with both burglary and robbery on the same date against the same victim, Judy Lee. In both, Finley was armed with a very unusual weapon: a piece of lumber. CP 288. It would appear to be an eminently reasonable conclusion -- and one the trial court should be allowed to make -- that Finley did not carry

a piece of lumber all day, choosing to victimize Lee at two distant points in time using the same weapon, but that he equipped himself with a piece of wood and then unlawfully entered Lee's home with the intent to deprive her of her purse and her money, a crime he then completed.

d. Florida's Crime Of Escape, As Charged In
Finley's Indictments, Is Not Comparable To
First-Degree Escape In Washington.

The sentencing court also concluded that Finley's 1993 and 1996 convictions in Florida for that state's crime of felony escape were comparable to Washington's offense of escape in the first degree. 12RP 1229. The State concedes that the court erred, due to the differences in terminology between Florida's and Washington's criminal codes. These differences leave one unable to determine, from the facts contained in Finley's 1993 and 1996 indictments, whether his actions would run afoul of a like statute in this state.

The 1993 information charging Finley with escape alleged that he, "while a prisoner in the custody of Ptl. Lynn Tab, a law enforcement official, and during the process of being transported to or from a place of confinement, did escape or attempt to escape from custody." CP 353. The 1996 information was framed

similarly, charging that Finley, “while a prisoner in the custody of Harry Lindenfeld, a law enforcement official, and during the process of being transported to or from a place of confinement did escape or attempt to escape from custody.” CP 344.

These acts violated Fla. Stat. ch. 944.40, which provides:

Escapes; penalty. Any prisoner confined in any prison, jail, private correctional facility, road camp, or other penal institution, whether operated by the state, a county, or a municipality...working upon the public roads, or being transported to or from a place of confinement, who escapes from such confinement commits a felony of the second degree....

Florida defines the term “prisoner” to include “any person under civil or criminal arrest and in the lawful custody of any law enforcement official, or any person committed to or detained in any municipal or county jail or state prison....” Fla. Stat. ch. 944.02(6).

For comparison, Washington’s crime of first-degree escape provides that:

- (1) A person is guilty of escape in the first degree if, being detained pursuant to a conviction of a felony or an equivalent juvenile offense, he escapes from custody or a detention facility.
- (2) Escape in the first degree is a Class B felony.

RCW 9A.76.110.

It is quite apparent from examination of these statutes that, for example, in Florida, a misdemeanor arrestee who flees from

custody while awaiting trial would be guilty of that state's felony escape offense, while he would not be subject to punishment for first-degree escape in Washington, due to both the classification of his crime and his pre-trial status. Additionally, a person who *attempts* to escape in Florida is guilty of felony escape, whereas, in Washington, such an individual could potentially be guilty of a lesser felony. See RCW 9A.28.020(c) (defining punishment scheme when crime of conviction is an attempted offense).

Because the elements of Fla. Stat. ch. 944.40 and RCW 9A.76.110 are not aligned, the sentencing court was required to engage in consideration of the facts as alleged in the Florida informations, reprinted supra. Those documents, alas, do not describe with any specificity (a) the crime(s) for which Finley was in custody, (b) his status as either a convict or a pre-trial arrestee, (c) or whether he succeeded in escaping or only made an unsuccessful attempt. CP 344, 353. Lacking that information, the trial court erred by concluding that the crimes were equivalent, and that Finley's Florida convictions for escape should be included in the calculation of his offender score.

- e. This Matter Should Be Remanded For Resentencing Only On Two Of The Instant Non-Violent Felonies.

Should this Court accept the State's concession regarding Finley's convictions in Florida for escape and otherwise agree with the State that the trial court properly included Finley's foreign convictions for robbery and burglary, then resentencing would not be necessary with regard to his sentences for the two counts of first-degree rape (Counts I and II). As discussed supra, Finley's offender score on Count I, with the inclusion of the escape convictions, would be scored as a 12. Because those two out-of-state convictions should not have been considered, Finley's score is properly a 10, which leaves him in the same standard range. Furthermore, Finley's conviction on Count II remains the same, scored as a zero under RCW 9.94A.589(1)(b). Accordingly, with regard to Finley's sentences on Counts I and II, this matter should be remanded solely for correction of his offender score as noted on his judgment and sentence.

With regard to Finley's sentences on Counts III and V, remand for resentencing is necessary. Finley was scored at 10 for each of these non-violent felonies, due to the inclusion, on each charge, of his four concurrent offenses as well as his six prior

convictions, which erroneously included the two Florida convictions for escape. CP 368. With the subtraction of those two offenses, two points are eliminated from Finley's offender score for Counts III and V, leaving him at eight points, rather than 10. Because felony harassment (Count III) and witness tampering (Count V) are considered Level III offenses under RCW 9.94A.515, Finley's correct standard range for these two crimes is 43 to 57 months, rather than the 51 to 60 month range he was placed in at the time of his sentencing hearing. See RCW 9.94A.510.

In contrast, Finley's standard range for Count IV, felony violation of a domestic violence court order, is unaffected by the adjustment of his offender score. That offense is assigned a seriousness level of III in the SRA. RCW 9.94A.515. When Finley was incorrectly scored as a 10 for this offense, his standard range was 72 to 96 months, under RCW 9.94A.510. However, because this crime is a Class C felony, the maximum allowable sentence was 60 months. See RCW 26.50.110(4), 9A.20.021(1)(c). Thus, Finley's standard range was, in reality, 60 months to 60 months, as was reflected on his judgment and sentence. CP 368. Even with the subtraction of his two out-of-state escape charges, and a resulting score of eight, Finley's standard range sentence remains

60 months to 60 months, because application of the sentencing grid provided in RCW 9.94A.510 would result in unlawful imposition of a sentence with the standard range of 62 to 82 months. Accordingly, Finley need not be resentenced on Count IV, though his judgment and sentence should be corrected to reflect a proper offender score of 8.

5. FINLEY WAS NOT DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS SENTENCING.

Finally, Finley attacks the performance of his counsel at his sentencing hearing, charging that she provided ineffective assistance because she failed to argue that Finley's 1991 convictions for burglary and robbery arose from the same criminal conduct and should have merged at sentencing. He also contends that his counsel should have convinced the sentencing court that his instant convictions for harassment and felony violation of a court order merged with his rape convictions under the doctrine of "same criminal conduct." Brief of Appellant, at 57-60.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) ineffective representation and (2) resulting prejudice. Strickland v. Washington, 466 U.S. 668, 688-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Either prong of

the Strickland test may be examined first, and if one of the two prongs is not satisfied, an examination of the other is unnecessary. See In re Personal Restraint of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993). Here, because Finley fails to demonstrate that his attorney's reluctance to explore the details of his robbery and burglary convictions was anything other than a sensible tactical decision, and because he fails to establish a reasonable likelihood that his sentence would have been different had he pursued a claim that his harassment and felony violation of a court order (FVNCO) were part of the same conduct as his rape, his challenge to his sentencing counsel's competence fails.

There is a strong presumption that a trial attorney's performance was adequate, and great deference must be given when evaluating counsel's strategic decisions. Strickland, 466 U.S. at 689. If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Here, Finley claims that his attorney deprived him of effective assistance

because she failed to argue that RCW 9.94A.589(1)(a)⁹ applied to his burglary and robbery convictions in Florida in 1991. In order to rule on such an argument, had it been made, the trial court would have needed to engage in consideration of specific facts that would have assuredly required Finley to disclose details of the events in Florida in 1991 beyond what was contained in the indictment. See State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000) (holding that application of the “same criminal conduct statute involves both factual determinations and the exercise of discretion.”). The need for Finley to provide additional information would have been particularly acute in light of the fact that trial courts must construe RCW 9.94A.589(1)(a) narrowly to disallow most assertions of same criminal conduct,¹⁰ and that Finley’s burden was made even larger by RCW 9A.52.050, the burglary anti-merger provision, which expressly provides that an individual who commits a burglary may be punished separately for other crimes committed in the course of that burglary. See State v.

⁹ RCW 9.94A.589(1)(a) provides that if concurrent offense involved the same criminal conduct they will be treated as a single crime for purposes of calculating a defendant’s offender score. Offenses amount to the “same criminal conduct” if they require the same overall intent, occur at the same time and place, and involve the same victim. See State v. Bickle, 153 Wn. App. 222, 229, 222 P.3d 113 (2009).

¹⁰ State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007).

Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992) (holding that the antimerger statute gives the sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct).

At his sentencing hearing, Finley and his attorney chose instead to contest the comparability of the Florida robbery and burglary statutes to their Washington counterparts; this challenge, as described in detail supra, led the sentencing court to engage in both a legal comparison of the statutory elements and a *factual* analysis of whether Finley's conduct, had it occurred in this state, would have violated Washington's laws against burglary and robbery. Finley's silence with regard to the events in Florida restricted the sentencing court to consideration of the limited facts in the indictment, which, one can reasonably conclude, strengthened his comparability claim. Finley also refused to admit that he was even *the same individual* as the person who was named in the 1991 indictment and subsequently convicted. CP 220-23; 12RP 1226. Finley's unwillingness to self-identify as the person who committed the numerous out-of-state crimes 20 years earlier forced the State to take the inherently risky added step of proving his identity through expert testimony.

To relate the details of his Florida crimes necessary to support a claim of same criminal conduct would have gravely jeopardized both of these arguments. As this Court noted in Nitsch, it may be a reasonable trial strategy to decline to raise the issue of “same criminal conduct” where doing so would have weakened other claims a defendant wished to present. Nitsch, 100 Wn. App. at 523. The election by Finley’s sentencing counsel to pursue certain claims and eschew other inconsistent ones is a legitimate trial tactic, and, as such, cannot support a claim of ineffective assistance.¹¹

Turning to Finley’s contention that his attorney was ineffective because she failed to assert that his harassment and FVNCO convictions amounted to the same criminal conduct as the rape counts, it must be noted that a defendant can prevail only if he shows a reasonable probability that the outcome of his sentencing would have been different absent counsel’s deficient performance. See Strickland, 466 U.S. at 693. As was discussed supra in

¹¹ Moreover, it is altogether inappropriate for a defendant to pursue legitimate tactics, albeit unsuccessfully, at his sentencing hearing and then raise inconsistent ones for the first time on appeal, in the guise of a claim of ineffective assistance.

responding to Finley's claim that his separate punishments for rape and harassment violated double jeopardy, it is by no means certain that Finley's conviction for harassment rested entirely upon the threats he uttered during his forcible rape of Ms. Lock; as Lock explained to emergency room nurse Anna Hulse, Finley told Lock he was going to kill her before he began directing her to submit to nonconsensual anal sex, and he continued to tell her she was going to die after the rapes were complete. 6RP 563. Given that the same criminal conduct provision of RCW 9.94A.589 must be construed with an eye toward separate punishments, and that there was substantial evidence showing that Finley intentionally committed harassment for its own sake, and not simply to facilitate a rape, he can hardly show prejudice by his counsel's failure to raise a claim that would not have succeeded.

Finley's argument as to his FVNCO conviction is even more tenuous, particularly regarding the requisite unity of intent between that crime and the rapes. The intent necessary for the crime of violating a court order that, as in the instant matter, specifically restricts where the subject party may be present is the intent to be

where the court order prohibits the defendant from going.¹² See RCW 26.50.110(1). In contrast, rape does not contain an element of intent. See State v. Walden, 67 Wn. App. 891, 894, 841 P.2d 81 (1992). Where one crime has a statutory intent element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct. State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). Additionally, the victim of the rape – Ms. Lock – is different than the victim of the FVNCO, i.e., the court whose order was knowingly violated by Finley. This divergence of victims would also have defeated the argument that Finley now faults his attorney for not making.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Finley's convictions for first-degree rape, felony harassment, felony violation of a court order, and witness tampering. The State also asks this Court to remand this matter for

¹² It should also be noted that nothing in the statute requires that the offender intended to commit an assault *in order to* violate the court's prohibition; all that is required for felony punishment is that the conduct that violated the order also amounted to an assault. See RCW 26.50.110(1), (4).

resentencing on the harassment and tampering counts, and for
correction of Finley's offender score on his judgment and sentence.

DATED this 11 day of September, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. PERNELL FINLEY, Cause No. 67616-4-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

9/11/12
Date