

November 13, 2019

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

LEONEL ROMERO-OCHOA,

Appellant.

No. 48454-4-II

UNPUBLISHED OPINION

MELNICK, P.J. — A jury convicted Leonel Romero-Ochoa of two counts of rape in the first degree and one count each of burglary in the first degree, unlawful imprisonment, and assault in the second degree. Romero-Ochoa appealed, and we reversed all but Romero-Ochoa’s unlawful imprisonment conviction. We did not address his claim of sentencing error.

The Supreme Court reversed, reinstated Romero-Ochoa’s convictions, and remanded for us to address Romero-Ochoa’s contention that the trial court erred at sentencing by failing to treat one of his rape convictions and his assault conviction as the same criminal conduct when calculating his offender score. *State v. Romero-Ochoa*, 193 Wn.2d 341, 364, 440 P.3d 994 (2019).

Because the trial court acted within its discretion when determining that Romero-Ochoa’s convictions were not the same criminal conduct, we affirm his sentence.

FACTS<sup>1</sup>

On July 3, 2014, the victim fell asleep in her home and around 3 a.m. awoke to a noise. The victim saw Romero-Ochoa standing next to her bed. He told the victim, “Just be quiet. Don’t say anything.” *State v. Romero-Ochoa*, No. 48454-4-II (Wash. Ct. App. Dec. 28, 2017) (unpublished), <http://www.courts.wa.gov/opinions/> (quoting Report of Proceedings (RP) (Oct. 20, 2015) at 9). When the victim attempted to flee her home, Romero-Ochoa grabbed and choked her before she could escape. He then forced her onto a couch, removed her clothing, and vaginally raped her. During the rape, the victim screamed for help while Romero-Ochoa repeatedly slapped her in the face and covered her mouth.

The victim eventually ran out of her home and screamed for help, but Romero-Ochoa grabbed her hair, hit her face, and dragged her back into her home where he raped her a second time.

The State charged Romero-Ochoa with four counts of rape in the first degree, burglary in the first degree, kidnapping in the first degree, and assault in the second degree. The State based its assault in the second degree charge on the allegation that Romero-Ochoa assaulted the victim by strangulation or suffocation. The matter proceeded to a jury trial at which the jury returned verdicts finding Romero-Ochoa guilty of two counts of rape in the first degree, two counts of rape in the second degree as lesser-included crimes, burglary in the first degree unlawful imprisonment as a lesser-included crime, and assault in the second degree.

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<sup>1</sup> The facts underlying Romero-Ochoa’s convictions are set forth in our prior opinion and are repeated here only as relevant to his claim of sentencing error. *State v. Romero-Ochoa*, No. 48454-4-II (Wash. Ct. App. Dec. 28, 2017) (unpublished), <http://www.courts.wa.gov/opinions/>.

At sentencing, the trial court accepted the State's concession that Romero-Ochoa's rape in the second degree convictions merged with his rape in the first degree convictions. The trial court also found that Romero-Ochoa's unlawful imprisonment conviction constituted the same criminal conduct as his rape in the first degree convictions. But the trial court rejected Romero-Ochoa's argument that his assault in the second degree conviction constituted the same criminal conduct as his rape convictions, reasoning:

[T]he Assault in the Second Degree conviction wasn't necessary to prove the element of Rape in the First Degree. That was proven by the unlawful entry, not based on causing serious bodily harm to the victim. In fact, there was evidence that after the forensic examination following the assault that there were marks on the victim's neck and it seemed that a strangulation did take place as a separate crime, and it was not necessary to prove strangulation in support of the Rape First Degree conviction.

....

I distinguish this from the unlawful imprisonment, which basically is the restraint of liberty or a holding of the victim down for the purpose of accomplishing a rape, which is sort of part and parcel of the whole thing.

Strangulation is not necessary to accomplish unlawful imprisonment or forcible rape and is a separate and distinct act that was found by the jury to have occurred, and that's what supported the Assault in the Second Degree conviction. So I don't think it is the same criminal conduct, and the offenses don't merge. So that one will be sentenced separately.

*State v. Romero-Ochoa*, No. 48454-4-II (Wash. Ct. App. Dec. 28, 2017) (unpublished), <http://www.courts.wa.gov/opinions/> (quoting RP (Dec. 18, 2015) at 18, 20-21).

Romero-Ochoa appealed from his convictions. Based on the procedural history of this case, we address Romero-Ochoa's remaining claim that the trial court erred at sentencing by failing to treat one of his rape in the first degree convictions and his assault in the second degree conviction as the same criminal conduct when calculating his offender score. We conclude that the court did not err.

## ANALYSIS

## SAME CRIMINAL CONDUCT

We “will reverse a sentencing court’s determination of ‘same criminal conduct’ only on a ‘clear abuse of discretion or misapplication of the law.’” *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) (quoting *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990)). Crimes that encompass the “same criminal conduct” are counted as one crime for purposes of sentencing. Former RCW 9.94A.589(1)(a) (2002). “Same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” Former RCW 9.94A.589(1)(a). At issue here is only whether Romero-Ochoa’s first degree rape and assault convictions involved the same criminal intent.

In *State v. Chenoweth*, 185 Wn.2d 218, 223-24, 370 P.3d 6 (2016), the court examined the statutory mens rea elements of child rape and incest and concluded that the crimes could not share the same criminal intent for purposes of a same criminal conduct analysis. *Chenoweth*, however, did not explicitly overrule the objective criminal intent test set forth in *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987). Under the objective criminal intent test, we determine whether multiple crimes encompass the same criminal intent by “focus[ing] on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.” *Dunaway*, 109 Wn.2d at 215. “[T]his analysis will often include the related issue of whether one crime furthered the other.” *Dunaway*, 109 Wn.2d at 215.

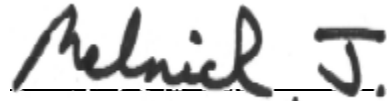
Romero-Ochoa argues that the trial court abused its discretion by failing to find that his conduct in assaulting the victim by strangulation furthered his first count of rape. He does not address the statutory mens rea test articulated in *Chenoweth*, 185 Wn.2d at 223-24. Regardless of which test applies, Romero-Ochoa’s claim cannot succeed.

Under the *Chenoweth* statutory mens rea test, Romeo-Ochoa's crimes of assault in the second degree and rape in the first degree cannot share the same criminal intent because assault in the second degree required an intent to assault the victim by strangulation or suffocation whereas rape in the first degree required an intent to engage in sexual intercourse with the victim by forcible compulsion. 185 Wn.2d at 223-24; RCW 9A.36.021(1)(g); RCW 9A.44.040(1)(d).

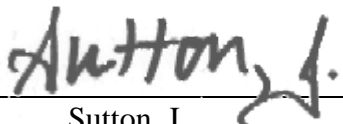
Romeo-Ochoa's argument also fails under the objective criminal intent test. Here, the trial court found that Romero-Ochoa's act of strangulation was gratuitous and not made for the purposes of furthering the first count of rape. While reasonable minds could disagree as to whether Romero-Ochoa's intent in strangling the victim occurred to further the rape, we cannot conclude that the trial court abused its discretion in finding to the contrary. *See State v. Graciano*, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013) (when record supports multiple same criminal conduct determinations, court does not abuse its discretion by reaching one of those determinations).

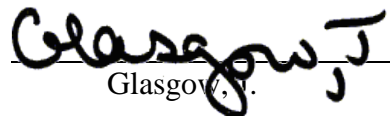
Here, the victim testified that Romero-Ochoa grabbed her as she initially attempted to flee her home. She stated that Romero-Ochoa then grabbed her hair, took her over to a seat, and choked her by placing one hand over her neck, all of which occurred prior to the first rape. Nobody presented evidence that this act of strangulation occurred in response to the victim screaming for help. The trial court's determination that Romero-Ochoa's conduct in strangling the victim was gratuitous and not necessary for the purpose of furthering the first rape was within the trial court's discretion. Accordingly, we affirm Romero-Ochoa's sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
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Melnick, P.J.

We concur:

  
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Sutton, J.

  
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Glasgow, J.