

70125-8

70125-8

NO. 70125-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

HECTOR S. SALINAS,

Appellant.

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

The Honorable Charles Snyder, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR -4 PM 4: 15

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
SALINAS' CONVICTIONS ARE THE "SAME CRIMINAL CONDUCT" FOR PURPOSES OF HIS OFFENDER SCORE.....	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

	Page
<u>CASES</u>	
<u>In re Personal Restraint of Goodwin</u> 146 Wn.2d 861, 50 P.3d 618 (2002)	1
<u>In re Shale</u> 160 Wn.2d 489, 158 P.3d 588 (2007)	1
<u>State v. Nitsch</u> 100 Wn. App. 512, 997 P.2d 1000 <u>review denied</u> , 141 Wn.2d 1030, 11 P.3d 827 (2000)	1

A. ARGUMENT IN REPLY

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

At the hearing on remand from this Court, defense counsel argued the three rapes occurred at the same place. In doing so, however, counsel assumed an act of rape had occurred in a slightly different location in the park below. RP (3/21/13) 4-5. Citing Goodwin¹ and Shale,² the State argues that counsel's failure to assert that all acts of rape actually occurred at the campsite (even if true) waives that position on appeal. See Brief of Respondent, at 9-12. The State is mistaken.

In Goodwin, the Supreme Court approved of the decision in State v. Nitsch,³ in which the Court of Appeals held that the total failure to raise a "same criminal conduct" argument at sentencing, both factually and legally, precluded the issue on appeal. Goodwin, 146 Wn.2d at 875 (citing Nitsch, 100 Wn. App. at 520). Shale stands for the same proposition – the total failure to make a "same

¹ In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).

² In re Shale, 160 Wn.2d 489, 158 P.3d 588 (2007).

³ State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000).

criminal conduct” argument below precludes appellate review. Shale, 160 Wn.2d at 494-496.

Unlike these cases, Salinas raised the “same criminal conduct” argument (indeed, resolution of that issue was the primary reason for remand), and the defense sentencing memorandum expressly argues that all acts of rape occurred at precisely the same location – D.P.’s campsite. CP 68. Defense counsel’s failure to further highlight this position at the hearing on remand was – like the court’s erroneous decision – probably due to faded memories that come with the passage of three years since trial. But the defense did assert a correct version of the facts in its memorandum. There was no waiver.

Alternatively, on the merits, the State maintains its position that D.P. also was raped at the second location because she repeatedly described what happened at that location using the word “rape.” Brief of Respondent, at 3-4, 14-15. But this ignores what was made clear during D.P.’s testimony: the acts at the second location she called “rape” do not qualify as rape under Washington law. The only sexual contact at that location was when Salinas licked D.P.’s breast. RP (3/10/10) 69-70; see also Brief of Appellant, at 8-9.

One pretrial statement attributed to D.P., in particular, warrants some additional discussion because the State emphasizes it in its brief. One of the police officers responding to the incident – Officer Dale Wubben – testified:

Officer Bennett asked her if he had ejaculated inside of her. She responded, “Yes,” and then she volunteered that he had a tissue of some kind that he had wiped himself off with the second time down in the park.

RP (3/11/10) 189-190.⁴ The State interprets this to mean that Salinas ejaculated inside D.P. at the second location immediately before wiping himself off, thereby establishing an actual rape at that location. Brief of Respondent, at 15. The timing of these two events is not at all clear, however, from Wubben’s recollection of what D.P. told Bennett.

In any event, D.P.’s own trial testimony clarifies that the ejaculation *inside of her* did not occur at the second location because Salinas merely licked her breast at that location before using the tissues to clean up. RP (3/10/10) 69. As already discussed, the State’s interpretation is only a possibility if we ignore

⁴ Officer Bennett’s testimony was slightly different. He merely testified that D.P. indicated Salinas had ejaculated and had proceeded to wipe both of them off with the tissues. RP (3/15/10) 333.

D.P.'s detailed and clear explanation at trial of what actually occurred.

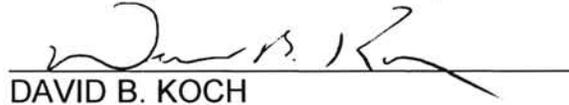
B. CONCLUSION

For all of the reasons discussed in Salinas' opening brief and above, this Court should find that all three rape convictions involve the same criminal conduct.

DATED this 4th day of April, 2014.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON

Respondent,

v.

HECTOR SALINAS,

Appellant.

)
)
)
)
)
)
)
)
)
)
)

COA NO. 70125-8-1

DECLARATION OF SERVICE

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

THAT ON THE 4TH DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE REPLY BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE, SUITE 201
BELLINGHAM, WA 98227
Appellate_Division@co.whatcom.wa.us

[X] HECTOR SALINAS
DOC NO. 726671
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF APRIL 2014.

x Patrick Mayovsky

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR -4 PM 4:15