

No. 70125-8 -I

ORIGINAL

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

STATE OF WASHINGTON, Respondent,

v.

HECTOR SERANO SALINAS, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the defendant waived appellate argument that there was insufficient evidence that a separate rape occurred at a second location where he did not argue that at the remand hearing, where he did not contest that a separate act of rape occurred at the second location at trial, and where it is the defendant's burden to establish that the offenses are the same criminal conduct.
2. Whether the trial court abused its discretion in determining that one of the three rape counts was not the same criminal conduct as the other two where the jury found three separate acts of rape, the victim told the officers that night that the defendant had raped her at a different location, inside the park, after raping her at the first location and that the defendant had wiped himself off with tissues at the park site after he had ejaculated and where she testified that defendant orally and anally raped her and attempted to vaginally rape her at the first location, even though she didn't testify to a specific act of rape occurring at the park site.

C. FACTS

1. Procedural.

Appellant Hector Salinas was charged with three counts of Rape in the First Degree, in violation of RCW 9A.44.040(1), and one count of Kidnapping in the First Degree, in violation of RCW 9A.40.020(1), and was provided notice in the information that if he been convicted twice previously of most serious offenses, the mandatory penalty was life in

prison without parole, in accord with RCW 9.94A.120(4) and RCW 9.94A.570. CP 3-5. Salinas was tried by a jury and found guilty of all four counts. CP 8, 42.

At sentencing the court found that Salinas was a persistent offender and imposed life without possibility of release. CP 9, 12. Prior to sentencing defense counsel filed a memorandum in which he asserted, among other things, that the three counts of rape should be considered the same course of criminal conduct. CP 65-71. However, at sentencing he did not mention this, informing the court only that he had submitted a memorandum regarding merger issues but that if the court imposed a persistent offender sentence the issues would be moot. SRP¹ 47. The court did not address the issue. SRP 47. However, on appeal Salinas asserted that the court should have addressed the issue, and the Court of Appeals found that the issue was not moot and directed the sentencing court to address the issue on remand. State v. Salinas, 169 Wn. App. 210, 224, 279 P.3d 917 (2012), *rev. den.*, 176 Wn.2d 1002 (2013). The Court's decision also required that the first degree kidnapping conviction be vacated on remand. Id.

¹ TRP refers to the verbatim report of proceedings for the trial and SRP for the sentencing transcript. Other transcripts are referenced by their date.

2. Substantive.

On June 28, 2008 while on patrol around 2 a.m., Officers Wubben and Bennett saw a woman flagging them down by the side of the road on Dupont St., above Maritime Heritage Park in Bellingham TRP 181-82, TRP 330-331. After they stopped, the woman limped up to the officers. She was so traumatized she could barely speak. TRP 183, TRP 332-33. She had cuts on her nose that were bleeding, her cheek was red and swollen, her right eye was nearly swollen shut and she had dirt and pine needles on her shirt and in her hair. TRP 219, 184-85, TRP 332. While trying to catch her breath, she whispered to the officers, "Help me," and then a couple seconds later she said "I was raped." TRP 183, TRP 333. The officers obtained a description of the woman's attacker and eventually he was found via a K-9 track and arrested. TRP 28-30, 183, 187, 336-433.

The victim, D.P., was homeless and took the officers to her campsite in the park where it happened. TRP 183, 332. She told the officers the man had threatened to kill her with a knife, had hit her with his fist, and then had dragged her into Maritime Park. TRP 189-91, 333. When the officers asked her what happened in the park, she said, "He wanted more," and told them that he raped her again after dragging her into the park. TRP 186, 333. She told them that he had ejaculated inside her and had used a tissue to wipe himself off after he raped her the second

time in the park. TRP 33-34, 189. Officers found the site of the second rape the next day. TRP 633-35, 819-21, 1024. The ground was disturbed and there were a number of tissues scattered about the area. TRP 636-37, 1025.

At the hospital, oral, rectal and vaginal swabs were taken from D.P. TRP 134. When D.P. was shown a photo montage she told the detective that she had been raped orally, anally and vaginally, and that it had happened first at her campsite and then he dragged her to another location in the park, raped her again there and then wiped himself off. TRP 1012.

At trial D.P. testified on June 30, 2008 she was homeless and had been camping at Maritime Heritage Park at Dupont Street. TRP 36-38. She had gone to sleep while it was still light out and had been asleep for a while when the smell of a person's body odor woke her up. TRP 39, 45. She woke up to find a man sitting close to her. TRP 48. When she sat up, he reached over and kissed her and she immediately stood up. TRP 49, 51. He stood up too, grabbed her shirt, and hit her three to four times in the face with a closed fist. TRP 51-52. His fist had a knife in it. TRP 51. After he hit her hard, he shoved her over, took off her shoes and pants, knelt between her legs, unbuckled his belt, pulled down his boxers and jeans and made her perform oral sex. TRP 53-57. He held her back down

with his hand and then penetrated her anally once. TRP 58-59. She yelled as loud as she could for someone to help her. TRP 59. Then he attempted to penetrate her vaginally two to three times, but D.P.'s vagina had been surgically closed from cervical cancer. TRP 60-62. When she tried to tell him she was too narrow, he didn't appear to understand and licked her vagina. TRP 62-65.

He then pulled his pants back on, grabbed her arm and dragged her down the concrete stairs. TRP 65-67. D.P. told him she had grandchildren because she was afraid he was going to kill her. TRP 67. At the bottom of the stairs he made her stand up and walked her across the bridge to an area where the trails were closed. TRP 68. They went under the signs around some machinery along the dirt until they came to some trees that he made her crawl underneath. TRP 68-69. He took off his dark jacket and made her sit on the inside of it, then lifted her shirt and licked her breast. TRP 69. He undid his belt, pulled his jeans down to his knees and had a knife on the ground. TRP 69-71. When he was done with her, he put the knife away and wiped himself off with toilet paper and then attempted to bury the toilet paper. TRP 69-70. He asked her if she needed money, and she nodded yes, but she didn't mean she wanted his money. TRP 70. He then gave her a \$10 bill from the wallet. TRP 70-71. D.P. then tried to find her way back up to Dupont Street but had difficulty

because her eye was so blurry and dysfunctional. TRP 73-74. D.P. was able to identify Salinas in court. TRP 81-82.

The Washington State Patrol Crime Lab tested the DNA samples and determined that the DNA profile on the outside of Salinas's jacket, a single source, matched D.P.'s. TRP 712. The DNA found on the inside of the jacket was a mixed source and D.P.'s DNA profile was consistent with being the main source of the DNA, and Salinas's could not be excluded as the source for the minor DNA. TRP 713-14. The boxers and briefs both showed mixed DNA profiles. TRP 725-28. The briefs' profiles were consistent with a mixture of D.P.'s and Salinas's DNA and the DNA on the boxers matched D.P.'s. TRP 726-28. The perineal/vaginal swab was also examined, and it was determined to have a DNA profile that matched Salinas's. TRP 783-88.

D. ARGUMENT

- 1. The court did not abuse its discretion in determining that the rape count that occurred at a different location was not the same criminal conduct as the other two rapes because the defendant failed to meet his burden to show that the crimes were not separate.**

Salinas asserts that the trial court abused its discretion in finding that one count of rape was not the same criminal conduct as the other two counts because there was insufficient evidence to show that a rape

occurred at the second location. He does not contest on appeal, as he did at the hearing on remand, that there was not a sufficient break in time or location for the third count of rape to be considered separate from the other two counts. Instead he challenges the court's determination that the one count of rape was not the same criminal conduct as the other two based on the sufficiency of the evidence to show that the third rape occurred at the park site, an argument he failed to assert below. Under State v. Graciano² Salinas bore the burden of demonstrating that the offenses were the same criminal conduct, and if the evidence could be interpreted either as same criminal conduct or separate, the decision is left to the discretion of the trial court. The trial court did not abuse its discretion in finding that one of the three counts of rape was a separate offense from the other two because defense failed to demonstrate the acts were the same criminal conduct and the record supports the court's determination that one of the rapes occurred at a separate location.

In determining the offender score, all other current offenses are to be counted as prior offenses, unless the court enters a finding that the other current offenses encompass the same criminal conduct. RCW 9.94A.589 (1)(a). Under RCW 9.94A.589, "same criminal conduct," means "two or more crimes that require the same criminal intent, are committed at the

² State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013).

same time and place, and involve the same victim.” RCW 9.94A.589(1)(a); *see also* State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (“Same criminal conduct” is conduct that involves the same victim, the same objective intent, and occurs at the same time and place). The absence of any one of these factors precludes a finding of “same criminal conduct.” State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The “same criminal conduct” phrase is “construed narrowly to disallow most claims that multiple offenses constitute the same criminal act...” Id. at 181. The defendant bears the burden of proving that the offenses encompassed the same criminal conduct. State v. Graciano, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013).

An appellate court reviews decisions regarding “same criminal conduct” for abuse of discretion or misapplication of the law. Graciano, 176 Wn.2d at 537. If the record adequately supports either a finding of same criminal conduct or separate conduct, “the matter lies in the court’s discretion.” Id. at 538. If the record is unclear as to whether all the factors of same criminal conduct have been met, the trial court does not abuse its discretion in concluding that the defendant failed to meet his/her burden. *See, Graciano*, 176 Wn.2d at 541.

a. *Salinas waived factual issue as to whether a separate act of rape actually occurred at the second site.*

On appeal, the court “may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5; State v. Lindsey, 177 Wn. App. 233, ¶35, 311 P.3d 61, 69 (2013). A defendant can be found to have waived his right to object to the calculation of his offender score where the issue asserted is a factual one or one involving the court’s discretion. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). A defendant waives the ability to challenge his offender score by failing “to identify a factual dispute for the court’s resolution and ... fail[ing] to request an exercise of the court’s discretion.” Goodwin, 146 Wn.2d at 875 (*quoting* State v. Nitsch, 100 Wn. App. 512, 520, 997 P.2d 1000, *rev. den.*, 141 Wn.2d 1030 (2000)); *see also*, In re Shale, 160 Wn.2d 489, 158 P.3d 588 (2007) (where defendant “failed to ask the court to make a discretionary call of any factual dispute regarding the issue of ‘same criminal conduct’” and did not contest the issue at trial, defendant could not challenge his offender score on appeal); *cf.*, State v. Garbaccio, 151 Wn. App. 716, 731, 214 P.3d 168 (2009), *rev. den.*, 168 Wn.2d 1027 (2010) (defendant could not raise new argument on appeal where it was not raised in his suppression motion and he did not otherwise seek a ruling on the issue below).

Salinas never asked the court to resolve the factual issue Salinas asserts on appeal and therefore waived this argument. While the initial memo filed by one of the defense counsel for sentencing asserted that the victim testified that the rapes only occurred at the first site, this was belied by the other defense counsel's argument in closing:

And the final point is, if he did this, what did he do? *He raped a woman. He dragged her into a park. He raped her again*, threatened her life, and then walked, I don't know, two or 300 yards away and got in his sleeping bag and went to sleep?

TRP 1337 (emphasis added). The issue at trial was not whether the rapes had occurred, but whether Salinas was the one who committed them.

At the hearing on remand to address the same criminal conduct issue, Salinas's counsel³ only argued that the rape that occurred at the second site, in the park, was not sufficiently different in location and time to constitute a separate act of rape. Counsel never asked the court to find that all the rapes occurred at the victim's camping site. In fact, Salinas's counsel acknowledged a rape occurred at the second site inside the park:

The debatable issue is whether same place and same time is in the strict and literal sense literally the same, the same exact spot in terms of place versus a more grand site which is the, the park area down there below, below the street.
I would, I would take the position that given the fact that we're dealing with a very small area here, I can't recall the exact dimensions. I know that Bellingham police did take a, a measuring

³ Salinas's counsel was one of the two defense counsel who had represented him at trial.

device down there from the initial site and measured it down to where they believed a second site was located, and I don't recall it being a very long distance. I'm going to guess that it was something under 200 feet away, but based, literally basically down the hill, and at the bottom of the falls *there where the creek comes out I think is the second site of the second incident.*

As far as time is concerned, I think we're talking about moments, not, not hours not certainly not days or weeks, but literally moments, and I think that under the Sentence Reform Act, the Court certainly could well find that was is a, a series of transactions that are all related to one another, and in that sense are same place, same time, same victim and would certainly possibly be found to be same course of conduct.

3/21/13 RP 4-5. The prosecutor conceded that the rapes that occurred up by the street were the same course of conduct, but argued that the rape that occurred at the second location was not:

I mean, to argue that the entire park is the place, you could argue that the whole City of Bellingham is the place. It just get (sic) broader and broader, but in this case, the fact that she was right up on a public street when he first raped her and then decided – and also had hit her with his fist, and then decided to drag her down into the park, this is down a couple flights of stairs, it's across a bridge, it's down a trail that was under, being constructed, and off that trail, actually several feet off the trail into an area with vegetation and trees significantly increases her risk, her ability to get help, all of those things.

And I think that's the difference here is that there's evidence, plenty of evidence in the record that she was raped at two different locations. There's a break in time, and going through the transcript it, on several occasions she has said he wanted more and dragged her into the park and raped her again.

At that point, that's where she had told the officer that he ejaculated inside of her, wiped himself with a tissue, and that's where the whole search for the tissue came from, and wiped her off after he raped her the second time in the park, gave her \$10 which she had on her later. ...

3/21/13 RP 5-6. Salinas's counsel did not object to this recitation of the facts, nor did he argue the facts showed otherwise. Salinas cannot now raise a different factual argument he did not ask the court to resolve below as a basis for overturning the trial court's discretionary decision, particularly where it was his burden to demonstrate the counts were the same criminal conduct.

b. The trial court did not abuse its discretion in finding that the offenses were not the same criminal conduct.

Even if Salinas didn't waive his factual argument by failing to present it below, the court did not abuse its discretion in finding that he had not met his burden to show that all the rape offenses occurred at the same time and place.

In order to make the same criminal conduct determination, courts are to consider whether one offense furthered the other. Graciano, 176 Wn.2d at 540. While simultaneity is not required to show "same time," incidents that occur close in time are separate and distinct if they are not part of an uninterrupted, continuous sequence of conduct. State v. Price, 103 Wn. App. 845, 856-57, 14 P.3d 841 (2000), *rev. den.* 143 Wn.2d 1014 (2001). Frequently the issue of "same time" will be intermingled with the question of "same intent" when there is a course of criminal activity over a period of time. State v. Burns, 114 Wn.2d 314, 319, 788 P.2d 531 (1990).

A defendant's intent is to be viewed objectively, not subjectively. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, *rev. den.*, 118 Wn. 2d 1006 (1991). The court is to decide whether the intent, when viewed objectively, changed from one crime to the next. Tili, 139 Wn.2d at 123.

The formation of a new, independent intent after the commission of one crime constitutes a different objective intent. If the evidence shows that the defendant had the "time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act," then, objectively, the defendant formed a new, independent criminal intent when he committed his next criminal act. Tili, 139 Wn.2d. at 123-24 (quoting State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997)). However, if the evidence shows that the criminal acts were uninterrupted, continuous and committed within an extremely short period of time, it is unlikely that the defendant formed a new criminal intent. Tili, 139 Wn.2d at 124. A defendant's choice to commit another criminal act after facing the question as to whether or not to continue his criminal activity substantiates a finding of successive or sequential intents and not one continuous intent. State v. Grantham, 84 Wn. App. 854, 860-61, 932 P.2d 657 (1997); *accord*, Price, 103 Wn. App. at 858.

The jury found that Salinas committed three separate acts of rape. Supp. CP ___, Sub Nom. 152 (Inst. No. 6, 12-15). The jury also found that

Salinas abducted the victim with the intent to facilitate the commission of first degree rape and/or to inflict bodily injury on her. Id. (Inst. No. 19). The victim testified that the defendant had forced her to perform oral sex once on him and committed anal rape once on her at her camping site up above the park. TRP 56-59. She also testified that he tried vaginal sexual intercourse but couldn't because her vaginal canal had been surgically closed. TRP 60-63, 136. While she didn't testify to any acts of sexual intercourse when describing what happened at the second site inside the park, she testified that after Salinas licked her breast, he pulled his jeans down to his knees and then "the next thing she knew" he was wiping himself off with toilet paper and then trying to bury it. RP 69-70. She also stated that after he pulled his jeans back up, he put the knife away, and that "the whole time the knife blade was out, but I seen him put it, put it away after he got done with me." RP 70.

While D.P. denied that Salinas had touched her aside from touching her breast at the park site, this was a victim who had difficulty testifying about what happened that night, who broke down when she identified Salinas in court, and had difficulty remembering everything that had happened. TRP 54-55, 64-65, 97, 1282. She told the officers that night that after she was dragged into the park, "he wanted more," and that when she was asked what that meant, she told the officers that he had

raped her again. She had “made it clear that the first rape happened at the campsite, and then that he also raped her down in the park as well after dragging her down there.” RP 186, 333. When one of the officers asked her if the perpetrator had ejaculated *inside her*, she told them yes, that he had some kind of tissue that he wiped himself off with the second time down in the park. RP 189-90, 206, 333 (emphasis added). The victim did not testify to any ejaculation happening at the first location, her campsite. Later that morning of the incident, when she was being shown a photo montage, the victim told another officer that she was raped up at her campsite and then again down in the park. TRP 1012. The record supports the trial court’s determination that D.P. was raped at the park site as well.

The Graciano case is instructive. In Graciano the defendant was charged with four counts of child rape and two counts of child molestation regarding his cousin’s daughter. Graciano, 176 Wn.2d at 533. The child testified as to four instances of rape and that occurred in the kitchen/living room area, a bedroom, the kitchen and on a couch. She also testified to molestation that occurred in the living room, but was not clear on how many times she was molested. Id. at 533-34. The trial court at sentencing found that the offenses were not the same criminal conduct. Id. at 534. The Supreme Court determined that it did not need to determine whether the defendant’s objective intent changed from one crime to the next

because the evidence did not suggest that the defendant's offenses were committed at the same time and place. Id. at 540-41. It noted that "[a]t best, the record [was] unclear." Id. at 541. The Court concluded that because the defendant bore the burden of proof as to each of the factors of same criminal conduct and he had failed to do so with respect to time and place, the trial court had not abused its discretion in refusing to find that the offenses were not the same criminal conduct.

As in Graciano, Salinas failed to prove that the offenses occurred at the same time and place, and despite the victim's lack of testimony as to a specific act of rape at the second location, the trial court did not abuse its discretion in declining to find the offenses were the same criminal conduct.

E. CONCLUSION

The State requests that the Court of Appeals affirm the trial court's decision on remand regarding whether Salinas's offenses constituted the same criminal conduct and the resultant offender score in the judgment and sentence.

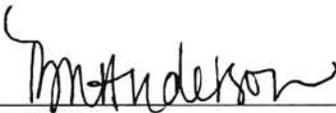
Respectfully submitted this 5th day of February, 2014.


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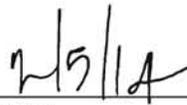
CERTIFICATE

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

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NAME



DATE