

Original

NO. 34215-4

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOHN PAUL REDMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 04-1-05259-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When defendant raped M.S., did he commit three separate and distinct crimes or a single criminal act?

B. STATEMENT OF THE CASE.

1. Procedure

On November 8, 2005, the Pierce County Prosecutor's Office filed an information charging John Paul Redman, hereinafter "defendant," with one count of burglary in the first degree, one count of kidnapping in the first degree, and three counts of rape in the first degree, all while armed with a deadly weapon. CP 1-5. On March 25, 2005, the State amended this information, adding one count of attempted murder in the first degree while armed with a dangerous weapon. CP 52-55. On September 26, 2005, the State again amended the information, changing the charge of burglary in the first degree to burglary in the first degree with sexual motivation, and changing the charge of kidnapping in the first degree to kidnapping in the first degree with sexual motivation. CP 6-9.

Ultimately, defendant was charged with one count of burglary in the first degree with sexual motivation while armed with a deadly weapon, one charge of kidnapping in the first degree with sexual motivation while armed with a deadly weapon, three charges of rape in the first degree

while armed with a deadly weapon, and one charge of attempted murder in the first degree while armed with a deadly weapon. CP 6-9.

Defendant agreed to a stipulated facts trial before the Honorable John A. McCarthy. CP 55-85. Defendant waived his right to a jury trial, his right to call and examine witnesses, his right to a bench trial, and his right to a CrR 3.5 hearing after a colloquy with the court on September 22, 2006. CP 17-29, 55-85. Defendant understood the facts to which he stipulated would establish beyond a reasonable doubt that he committed the three counts of rape, the count of burglary, and the count of kidnapping on November 8, 2005, and that all counts were committed with a deadly weapon. CP 55-85.

On September 22, 2005, the court found defendant guilty of the burglary, kidnapping, and rape counts as charged, and found a deadly weapon enhancement for each of these counts. CP 17-29. The court found defendant not guilty of attempted murder in either the first or second degrees. CP 17-29. On December 2, 2005, the court entered written findings and conclusions of law in this case pursuant to CrR 6.1(d). CP 17-29.

During the sentencing hearing of December 2, 2005, the court found that the rapes were separate and distinct acts and that the sentences for those crimes should be served consecutively. CP 30-43; RP 10-17. The court also found that the kidnapping charge merged with one of the rape charges and with the burglary charge. CP 30-43; RP 17-28. As a

result, the court did not sentence defendant to serve any time for the kidnapping charge. CP 30-43; RP 27-28. The court sentenced defendant to 116 months to life for the burglary charge, and 123 months to life for each rape charge. CP 30-43; RP 44. The court sentenced defendant to serve the rape charges consecutively, and the burglary charge concurrently with the rape charges (for a total of 369 months). CP 30-43; RP 44. The court sentenced defendant to 24 months for each deadly weapon enhancement, to be served consecutively (for a total of 96 months). CP 30-43; RP 44. In all, defendant was sentenced to 465 months to life with credit for 388 days served. CP 30-43. The court also ordered that defendant be given appropriate sexual offender treatment if available, and ordered defendant to pay monetary penalties. CP 30-43; RP 44-47. This timely appeal follows. CP 47.

2. Facts

On November 8, 2004, at 6:05 p.m., M.S., her mother Liz S., and M.S.'s 13 month old daughter went shopping at Stadium Thriftway in Tacoma, WA. CP 17-29, 55-85. They left the grocery store at 6:05 p.m. and drove the short distance to the Baywatch Apartments, where M.S. and her daughter lived in apartment 30. CP 17-29, 55-85. When they arrived at the building, Liz S. waited with M.S.'s daughter in the car while M.S. brought in the groceries. CP 17-29, 55-85. M.S. was walking up the stairs to the third floor of the apartment building when she met defendant, who

was coming down the stairs from the fourth floor. CP 17-29, 55-85. Defendant lived in apartment 45 of the Baywatch Apartments, and M.S. had seen him in the apartment building before. CP 17-29, 55-85. He was carrying a green gym bag when M.S. met him, and he was rummaging in it looking for something. CP 17-29, 55-85. M.S. exchanged a few words with defendant and then went to her apartment door a short distance away. CP 17-29, 55-85. When M.S. unlocked her apartment door, defendant appeared behind her with a knife. CP 17-29, 55-85. He put the knife to her neck and said, "You do as I say. You don't ask any questions." CP 17-29, 55-85. He then forced her into the apartment and brought the green bag with him. CP 17-29, 55-85.

Once in the apartment, defendant asked if M.S. had a VCR. CP 17-29, 55-85. She told him, "no," and defendant brought M.S. into her bedroom and told her to "take off all [her] clothes." CP 17-29, 55-85. She complied, and he gave her a pair of white panties and a black shirt and ordered her to put them on, which she did. CP 17-29, 55-85. Defendant then ordered her to take them off, and she did so. CP 17-29, 55-85. When she was undressed again, defendant "french kissed" her by putting his tongue in her mouth. CP 17-29, 55-85. He then moved down and sucked on her breasts. CP 17-29, 55-85. Defendant said, "shut up, be quiet, and do what I say." CP 17-29, 55-85. He took a condom out of his gym bag,

unwrapped it, and asked if M.S. had any sexually transmitted diseases. CP 17-29, 55-85. She said, “no.” CP 17-29, 55-85. Defendant did not use the condom, but left it on M.S.’s bed. CP 17-29, 55-85.

a. First Rape (Count IV)

Defendant then pushed M.S. to the bedroom floor, pulled down his pants, and sat down on the bedroom floor. CP 17-29, 55-85. He ordered her to perform oral sex on him by putting her mouth on his penis. CP 17-29, 55-85. She complied. CP 17-29, 55-85. While holding onto the knife, defendant pushed M.S.’s head down onto his penis so far that she gagged. CP 17-29, 55-85. M.S. did not know if defendant ejaculated, but she said that she felt something “slimy” in her mouth. CP 17-29, 55-85.

b. Second Rape (Count V)

After M.S. had performed oral sex on defendant, defendant stood up, moved to M.S.’s bed, and sat down on it. CP 17-29, 55-85. He ordered M.S. to perform oral sex on him again, and because defendant was still holding the knife, she complied.¹ CP 17-29, 55-85. While M.S. performed oral sex, defendant held the knife to her throat and pushed her head down with his hands. CP 17-29, 55-85. He also penetrated M.S.’s

¹ This act of oral sex was not charged in the State’s information. CP 6-9.

vagina² with his finger and then he penetrated her anus with his finger while she performed oral sex. CP 17-29, 55-85. This anal penetration was the basis for Count V of the State's information. CP 6-9.

While M.S. was performing oral sex on defendant on her bed, the telephone in the living room rang. CP 17-29, 55-85. Defendant asked if M.S. was expecting anyone and she told him, "no." CP 17-29, 55-85. Defendant forced M.S. out into the living room to answer the phone call, which was from the telephone company. CP 17-29, 55-85. While M.S. was on the phone, defendant noticed that she had a VCR in the living room. CP 17-29, 55-85. When M.S. hung up the phone, defendant accused M.S. of lying to him about the VCR, opened his green bag, and took out a pornographic videotape that he had brought with him. CP 17-29, 55-85. He told M.S. to place the tape in the VCR, rewind it a little, and press play. CP 17-29, 55-85. M.S. complied and the tape began to play, depicting an actress performing oral sex on a man. CP 17-29, 55-85. Defendant told M.S. to "do what they are doing," and sat down on the floor in front of the couch. CP 17-29, 55-85. He leaned against the couch and told M.S. to "suck" him, and M.S. complied, again performing oral sex on defendant. CP 17-29, 55-85.

The telephone rang again at 6:23 p.m., and continued to ring until the answering machine began to record a message. CP 17-29, 55-85. The

² This act of vaginal penetration was not charged in the State's information. CP 6-9.

call was from Liz S., who was wondering what was taking M.S. so long in the apartment. CP 17-29, 55-85. Defendant forced M.S. to answer the phone and told her not to tell her mother anything. CP 17-29, 55-85. M.S. complied, telling her mother that she would be down soon, and then she hung up the phone. CP 17-29, 55-85.

c. Third Rape (Count III)

Defendant then ordered M.S. to “straddle” him. CP 17-29, 55-85. She did so, and he had penile-vaginal intercourse with her for a time. CP 17-29, 55-85. Defendant told M.S. to “rub hard” because he was having difficulty maintaining an erection. CP 17-29, 55-85.

After having penile-vaginal intercourse with M.S., defendant dragged M.S. back into the bedroom by her ponytail. CP 17-29, 55-85. He took a leather belt out of his green bag, placed it around her neck, and began to choke her. CP 17-29, 55-85. M.S. started to scream and defendant told her to stop. CP 17-29, 55-85. Defendant threatened that M.S. would never see her daughter again, pushed M.S. to one side, shoved M.S. against a dresser, and began to hit her on the head. CP 17-29, 55-85. M.S. covered her head and continued to scream. CP 17-29, 55-85. Defendant threw M.S.’s backpack to the floor looking for money and left the apartment. CP 17-29, 55-85. M.S. called her mother at 6:27 p.m. and Liz S. called 9-1-1. CP 17-29, 55-85.

Defendant's mother Terri Baker lived in apartment 20 of the Baywatch Apartments and suggested that defendant may have gone to the Mecca Adult Theater in Tacoma, WA. CP 17-29, 55-85. Police found defendant at the Mecca Adult Theater and arrested him. CP 17-29, 55-85. They also found defendant's green bag in a trashcan between the Baywatch Apartments and the Mecca Adult Theater. CP 17-29, 55-85.

C. ARGUMENT.

1. DEFENDANT RAPED M.S. THREE SEPARATE AND DISTINCT TIMES, SO DEFENDANT WAS PROPERLY SENTENCED TO SERVE CONSECUTIVE TERMS.

A trial court's determination whether multiple offenses constitute the "same criminal conduct" will not be disturbed absent an abuse of discretion or a misapplication of the law. State v. Tili, 139 Wn.2d 107, 122, 123, 985 P.2d 365 (1999); State v. Calvert, 79 Wn. App. 569, 577, 903 P.2d 1003 (1995); State v. Haddock, 141 Wn.2d 103, 3 P.2d 733 (2000); State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003). In other words, "same criminal conduct" is a mixed question of fact and law. The legal question is whether the trial court applied the correct legal standard to determine whether defendant should serve his sentences consecutively or concurrently. Legal questions are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). The factual

question is whether, under the appropriate legal standard, the trial court properly concluded that the three rapes were separate and distinct. The trial court's factual determination is reviewed for an abuse of discretion. Tili, 139 Wn.2d at 122-23. An abuse of discretion exists only when no reasonable person would have taken the position adopted by the trial court. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

The appropriate legal standard for determining when a defendant should serve his sentences consecutively is found in RCW 9.94A.589(1)(b), which states that a person serves the sentences of two or more serious violent offenses concurrently if the offenses arise out of a single act. If the crimes arise out of separate and distinct acts, then the person serves the sentences for those offenses consecutively. RCW 9.94A.589(1)(b). Rape in the first degree is a serious violent offense. RCW 9.94A.030(37)(a)(vii). The appellate court must narrowly construe the language of RCW 9.94A.589(1)(a) to disallow most assertions of same criminal conduct. State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000); State v. Palmer, 95 Wn. App. 187, 191 n.3, 975 P.2d 1038 (1999).

The Tili court held that the "separate and distinct criminal conduct" language of RCW 9.94A.589(1)(b) is construed identically to the "same criminal conduct" language of RCW 9.94A.589(1)(a).³ Tili, 139 Wn.2d at 122. Under RCW 9.94A.589(1)(a), two crimes are considered

³ Tili cites RCW 9.94A.400, which has since been recodified as RCW 9.94A.589.

the “same criminal conduct” only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). If one of these elements is missing, then the crimes cannot constitute the same criminal conduct. Lessley, 118 Wn.2d at 778; Vike, 125 Wn.2d at 410.

The trial court applied the Tili analysis and the elements of RCW 9.94A.589 when it determined that defendant committed three separate and distinct rapes and sentenced him to serve consecutive sentences for those rapes. CP 55-85. Defendant espouses the RCW 9.94A.589 analysis and the Tili analysis in his brief as appropriate standards for determining whether sentences should be served consecutively or concurrently. Appellant’s Br. at 13. Because the trial court sentenced defendant using the legal standard that is supported by case law and on which defendant relies, there is no dispute that the trial court applied the correct legal standard in this case. Thus, the appellate court only needs to determine whether the trial court abused its discretion in concluding that the rapes were separate criminal conduct. *See* Tili, 139 Wn.2d at 122, 123.

No party disputes that M.S. was the sole victim of the rapes on which this case is based. CP 17-29, 55-85. Thus, in order to find that the rapes were separate criminal conduct, the court had to have evidence that

defendant either 1) raped M.S. in three separated and distinct locations, 2) raped M.S. at three separate and distinct times, or 3) formulated the intent to rape M.S. three separate and distinct times.

The court was able to find all three of elements of the “separate criminal conduct” test, each of which is sufficient by itself to justify the court’s conclusion that defendant’s three rapes were separate and distinct criminal conduct. Moreover, defendant’s interpretation of this test is overly broad and the court should not apply it. Defendant should serve his sentences consecutively

a. Defendant raped M.S. in three separate and distinct locations.

Defendant committed three separate and distinct rapes when he raped M.S. in three separate and distinct locations in her house. First, he raped her on the bedroom floor when he forced her to perform oral sex on him. Second, he raped her on her bed when he penetrated her anus with his finger. Finally, he raped her on the floor of her living room when he forced her to have penile-vaginal intercourse. Each of these locations is a distinct place in M.S.’s apartment that is separate from the others; each rape occurred entirely in only one location; and no two rapes occurred in the same location. Because defendant committed each rape in a separate

and distinct location of M.S.'s apartment, each rape was a separate and distinct crime, and defendant should serve his sentences for those rapes consecutively.

b. Defendant raped M.S. at three separate and distinct times.

Even if the court finds that defendant did not commit the rapes in separate and distinct locations, defendant did commit them at separate and distinct times, which is sufficient in and of itself to establish that all three rapes were separate and distinct crimes.

Defendant first raped M.S. when he forced her to perform oral sex on him while he was sitting on her bedroom floor. The actual act of intercourse ended when defendant put his penis into M.S.'s mouth, and this sexual episode ended when M.S. removed her mouth from defendant's penis. The second rape did not begin until defendant used his finger to penetrate M.S.'s anus. Between the two rapes, defendant moved from the floor to the bed, ordered M.S. to come to him, renewed his threat by raising the knife to M.S.'s throat, and ordered M.S. to perform additional oral sex, and M.S. complied. By the time defendant anally penetrated M.S., ample time had passed to separate and distinguish the anal penetration on the bed from the first act of oral sex on the floor.

Even more time passed between the second and third times that defendant raped M.S. The second rape ended when defendant removed his finger from M.S.'s anus. The third rape began when defendant penetrated M.S.'s vagina with his penis. Between these criminal acts, the telephone rang, defendant ordered M.S. to answer the phone, defendant and M.S. moved into the living room, M.S. answered the phone, defendant noticed the VCR and accused M.S. of lying about it, defendant retrieved the pornographic tape he had brought, defendant ordered M.S. to rewind the tape, defendant ordered M.S. to play the tape, defendant ordered M.S. to do what the actors on the tape were doing and to "suck" him, M.S. performed oral sex on defendant, the telephone rang long enough that the answering machine began to record a message, M.S. answered the phone and spoke to her mother, and defendant ordered M.S. to straddle him. So much time passed between the second and third rapes, that there can be no doubt that the two rapes occurred at separate times.

Because there was a gap in time between each of the rapes that defendant committed, the rapes were committed at separate and distinct times, which sufficiently establishes that the rapes were separate and distinct crimes whose sentences should be served consecutively.

- c. Defendant raped M.S. with three separate and distinct intents.

Even if defendant did not rape M.S. in separate and distinct locations or at separate and distinct times, he did rape her with separate and distinct intents, which is sufficient on its own to establish that all three rapes were separate and distinct crimes.

Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. Lessley, 118 Wn.2d at 777. The court in State v. Grantham, 84 Wn. App. 854, 860, 861, 932 P.3d 657 (1997) accurately described when a defendant has reformed the intent to commit a crime:

If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment and he must be treated as accepting that risk whether he in fact knew of it or not.

State v. Grantham, 84 Wn. App. at 860, 861 (*citing Harrell v. State*, 88 Wis. 2d 546, 277 N.W.2d 462, 466 (1979)). A defendant's subjective intent is irrelevant. Lessley, 118 Wn.2d at 778.

Throughout his attack on M.S., defendant had multiple opportunities to break off his attack and leave M.S.'s apartment after he had completed each rape. He reformed the intent to rape her twice after

the initial rape, however, objectively manifesting the intent to perform intervening acts, and then a renewed intent to have intercourse with M.S.

Defendant committed the first rape with the objective intent of forcing M.S. to perform oral sex on him, which he succeeded in doing. When that rape was finished, he then had the presence of mind to move from the floor to the bed, decide to force M.S. to perform oral sex, raise the knife to M.S.'s throat in order to force her to perform oral sex, and penetrate M.S.'s vagina with his finger before he ever manifested the intent to anally penetrate M.S. with his finger.

Each of these actions represents a time when defendant had the presence of mind to make a conscious decision to change the course of his attack; at each intervening decision, defendant formed a new objective intent to commit a new act that was unrelated to either the oral sex of the first rape or the digital-anal penetration of the second rape. Furthermore, defendant also manifested his changed objective intent by changing the type of penetration from oral to anal. By the time he chose to anally penetrate M.S., defendant had certainly come to a "fork in the road" at which he objectively reformed his intent to invade M.S.'s interest by continuing to denigrate her. *See Grantham*, 84 Wn. App. at 860.

After the second rape, defendant had more chances to stop invading M.S.'s interests. After he anally penetrated her, the phone rang,

and he had the presence of mind to order M.S. to answer it. While M.S. was on the phone, defendant noticed the VCR and chose to berate M.S., retrieve the pornographic tape, and force M.S. to rewind the tape to the spot that depicted the act he wanted M.S. to imitate. He positioned himself on the floor with his pants pulled down so that M.S. could perform oral sex on him a third time. When the telephone rang again, he had the presence of mind to make sure that M.S. answered it without telling Liz S. anything. He finally ordered M.S. to straddle him and then chose to again penetrate her, this time changing from anal penetration to vaginal penetration. Once again, defendant demonstrated that his intent changed many times between the second and third rapes. His intent to rape M.S. the second time ended when the phone rang and he became concerned with answering it. From that point until the time he ordered M.S. to straddle him, defendant manifested the intent to do several things that were unrelated to the third rape, such as hide himself from M.S.'s mother, force M.S. to play the videotape, and force M.S. to perform oral sex. Thus, he objectively changed his intent after the second rape and reformed it before the third rape. Because defendant formed three separate and distinct intents to rape M.S., he committed three separate criminal acts by raping her those three times.

- d. Defendant relies on distinguishable cases and proposes an overbroad application of the “same criminal conduct” analysis.

Defendant cites three cases extensively throughout his brief: State v. Grantham, 84 Wn. App. 854; State v. Tili, 139 Wn.2d 107; and State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). Appellant’s Brief at 11-13, 17, 23-27. These cases support the conclusion that defendant committed separate criminal acts when he raped M.S. Moreover, the analysis defendant draws from these cases is dangerously overbroad.

i. Distinguishing State v. Tili.

The two leading rape cases for determining same criminal conduct are State v. Tili, 139 Wn.2d 107, and State v. Grantham, 84 Wn. App. at 860, 861. In Tili, the Washington Supreme Court determined that three charges of rape, based on three separate penetrations of the same victim in a two minute period, constituted the same criminal conduct for purposes of sentencing. Tili, 139 Wn.2d at 124, 125. The only other event that occurred during Tili’s attack occurred when he ordered his victim to tell him that she enjoyed the attack and she complied; this order did not interrupt the rape. Tili, 139 Wn.2d at 111.

The Tili court contrasted the facts before it with those in Grantham, which also involved multiple rapes of the same victim, although the Grantham court determined that the rapes were not the same criminal conduct. Grantham raped his victim twice. Grantham, 84 Wn.

App. at 856. Between rapes, Grantham's victim begged for him to take her home, and Grantham kicked her, called her names, grabbed her face, threatened her, and slammed her head against a wall. Grantham, 84 Wn. App. at 856, 857. The Tili court indicated that Grantham was still good authority:

The evidence in Grantham supported a conclusion that the criminal episode had ended with the first rape: 'Grantham, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.' Grantham, 84 Wn. App. at 859. After raping his victim, Grantham stood over her and threatened her not to tell. He then began to argue with and physically assault his victim in order to force her to perform oral sex. Thus, Grantham was able to form a new criminal intent before his second criminal act because his 'crimes were sequential, not simultaneous or continuous.' Grantham, 84 Wn. App. at 856-57, 859. In contrast to the facts in Grantham, Tili's three penetrations of L.M. were continuous, uninterrupted, and committed within a much closer time frame—approximately two minutes. This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration.

Tili, 139 Wn.2d at 123-124. The court held that as the trial court failed to articulate any viable basis to find Tili's conduct "separate and distinct;" it had abused its discretion in failing to treat Tili's three first-degree rape convictions as the same criminal conduct. Tili, 139 Wn.2d at 124. The time and intent elements of the present case make most like Grantham and distinguish it from Tili.

The time that lapsed between each rape that defendant committed is most similar to the time that lapsed between the rapes in Grantham. Like Grantham, defendant had time before each of his successive rapes to renew his threats, reposition his victim, and order his victim to perform a new sex act. Grantham, 84 Wn. App. at 857. Tili, on the other hand, only had time to command his victim to say one thing before the entire attack ended, and this command did not interrupt the action of the rapes at all. Tili, 139 Wn.2d at 111.

The amount of time that passed between defendant's entrance into and flight from the apartment also makes the present case similar to Grantham and distinguishes it from Tili. Defendant raped M.S. over a period of nearly 22 minutes (M.S. arrived at home just after 6:05 p.m. and made her final call to Liz S. at 6:27 p.m.). While Grantham does not state how long Grantham's attack lasted, there was enough time during the attack for Grantham to argue with his victim, strip her, call her names, threaten her, and beat her repeatedly. Tili, on the other hand, raped his victim over a period of only two minutes. Defendant's 22 minute attack, which provided ample time for defendant to commit three separate and distinct rapes, makes the present case much more similar to Grantham's long attack than to Tili's two minute attack.

Finally, defendant and Grantham both changed their course of conduct over the time of their attacks, demonstrating that they changed

their intent throughout the attack and reformed the intent to commit the successive rapes; Tili did not change his conduct at all and so his intent remained objectively the same. Grantham formed the intent to rape his victim once and then separately formed intents to assault, threaten, talk to, and again assault his victim before raping his victim the second time. Tili, on the other hand, raped his victim three times while talking to her once, and he did not perform any acts between the three rapes. Defendant's case is more similar to Grantham because he also had time to form separate and distinct intents to act before raping M.S. the second and third times as discussed above.

ii. Distinguishing State v. Walden.

Defendant also relies heavily on State v. Walden, 69 Wn. App. 183 to argue that defendant's rapes constituted the same criminal conduct. Appellant's Br. at 17, 23, 25-27. Walden lured a thirteen-year-old boy behind a store and dragged him up a hill, where he forced the boy to masturbate and then perform oral sex on Walden. Id. at 184. The court found that Walden acted at the same time and with the same intent: sexual intercourse. Id. at 188.

Walden is distinguishable from the present criminal conduct, however, because no acts or events interrupted the two rapes that Walden committed. State v. Walden, 69 Wn. App. at 184. Walden is wholly different from the present case because defendant here had the

opportunity to talk to M.S., move to a new location, order M.S. to move to a new location, threaten M.S., and engage in sexual activity unrelated to the charged rapes before committing the second and third rapes for which he was found guilty. These intervening acts and events clearly separated the second and third rapes both in time and in intent as discussed *supra*. While defendant may have intended to have intercourse with M.S. each time that he raped her, he had to *reform* that intent before each rape because he had already finished the previous rape and performed several intervening intentional acts. By renewing his intent before each rape, defendant formed a separate and distinct intent to rape M.S. each time that he raped her. Walden, which deals with a rapist who did not objectively manifest a renewed intent to rape, thus has no bearing on the case currently before the court.

iii. Defendant's overbroad "same criminal conduct" analysis.

Defendant's version of the "same criminal conduct" analysis overly broadens the rules laid out in Tili and Grantham, destroying any incentive a rapist may have to stop after the first rape, and actually encouraging the rapist to continue to denigrate his victim after he has begun.

Between rapes, defendant in the present case chose to move M.S. to different parts of the apartment, prepare for different sexual acts and

positions, worried about his own health by asking if she had any sexually transmitted diseases, and took time to cover his tracks when Liz S. called. Defendant would espouse a rule declaring claims that all these acts are the same criminal conduct because each intervening step ultimately furthered a general intent to eventually rape M.S.

Under defendant's analysis, a rapist would have free reign to poke, prod, and penetrate his victim at will for a long period of time and would not serve consecutive sentences. Defendant's version of the "same criminal conduct test" encourage a smart rapist to rape his victim continuously and repeatedly for up to 22 minutes, pausing only to intimidate his victim, plan new ways to mortify her, and frustrate attempts to rescue the victim or capture the rapist. Under defendant's rule, such a rapist could gratify himself as much as he wanted, frustrate others who might stop or capture him, and benefit from the fact that he raped his victim relentlessly. The rapist would have no incentive to stop raping her even when he came to a "fork in the road" at which time he has the opportunity to end the attack and save the victim from further denigration. *See Grantham*, 84 Wn. App. at 860; in fact, he would be encouraged to rape her incessantly.

The law should not shield a rapist who ignores the opportunity to end his attack, let alone encourage that rapist to perform multiple rapes, frustrate potential rescuers, and cover his tracks. Defendant's proposed reading of *Grantham* and *Tili* would have all of these negative effects,

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leaving a rape victim vulnerable to multiple attacks without the chance of rescue and protecting the rapist from capture or from consecutive sentences.

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D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentence.

DATED: July 6, 2006.

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Certificate of Service:

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

7/6/06 Meresa K
Date Signature