No. 95905-6

NO. 48454-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEONEL R. OCHOA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 14-1-02595-7

Brief of Respondent

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

1. Did the trial court abuse its discretion in excluding the defendant's proffered immigration cross examination evidence where the evidence had little or no probative value and was tainted by the danger of substantial unfair prejudice?

2. Did the trial court abuse its discretion in its same criminal conduct ruling where there was ample support for its finding that the strangulation assault and rapes were separate and distinct acts?

3. Should this Court exercise its discretion and award appellate costs to the state in the event the state is the substantially prevailing party, and furthermore, should consideration of the defendant's ability to pay be deferred pending a motion for revision or an attempt to collect?

B. STATEMENT OF THE CASE.

1. *Procedural Facts.*

On July 7, 2014, Appellant Leonel Romero Ochoa (the "defendant") was charged with four class A felonies, two counts of first degree rape, and one count each of first degree burglary and first kidnapping. CP 1-2. The incident date was three days before, on July 4, 2014, and the victim was the same for all four counts. *Id.* The defendant

was accused of having burglarized the victim's home, raped and abducted her. CP 3-4.

The charges were amended before trial and corrected during the trial. The final charges consisted of seven counts: four counts of first degree rape, and one count each of first degree burglary, first degree kidnapping and second degree assault by strangulation. CP 11-14.

The case proceeded to trial on October 12, 2016. 1 RP 4[1]. Just before the trial the state filed a trial brief which included a motion *in limine* seeking exclusion of evidence of the victim's immigration status. CP 206-213. The defendant did not file a response, nor did he file any declarations, identify any witnesses or other evidence. Instead he orally argued that the motion should be denied and indicated that he would obtain from federal immigration authorities documentation that would support his claim of admissibility. 1 RP 20-21. The trial court took the matter under advisement. *Id.*

The trial court issued its ruling about the victim's immigration status on October 19, 2015. 5 RP 28. It considered information provided by the defense consisting of correspondence between the prosecution and the victim's immigration attorney concerning a so-called U-visa. Exhibit

[1] The verbatim reports are contained in thirteen numbered volumes. Citations will include the volume and page number.

24. When the issue was initially brought up before the trial court, the court identified a central concern regarding admissibility, namely whether the victim was subject to any imminent immigration enforcement action. 1 RP 21-22. Exhibit 24 included no documentation from federal immigration authorities as to the victim's immigration status and furthermore showed that the prosecution had declined to assist the victim with her U-visa application. Exhibit 24. The trial court ruled that immigration status could not be inquired into during cross-examination because the evidence had low probative value and an "inflammatory effect". 5 RP 28. Nevertheless, during cross examination of the victim the defendant elicited that the victim had only lived in the United States for twelve years. 6 RP 58.

Thereafter the parties presented their cases. The prosecution introduced evidence through eighteen witnesses. They included the victim, VIC, three of her eyewitness neighbors, eight law enforcement officers and four medical providers. CP 239-40, Witness Record. The defendant offered a consent defense and testified. CP 236-38, Omnibus Order. 9 RP 6 *et. seq.* In rebuttal, the state introduced testimony from the victim's sister to contradict the defendant as to an alleged pre-existing relationship between the defendant and the victim. 9 RP 70 *et. seq.* At the conclusion of the five day trial the defendant was found guilty as charged of all four rape charges, the first degree burglary and the second degree

assault. CP 134-153, 239-40. He was also found guilty of unlawful imprisonment as a lesser included offense in place of the kidnapping. *Id.*

2. *Statement of Facts.*

The events leading to the defendant's convictions took place at the victim's residence in a Lakewood mobile home park. 5 RP 137. VIC had lived in unit A, a mobile home, for approximately three or four years. *Id.* At the time of the rape, she lived alone with her six year old daughter with whom she shared a bedroom. 5 RP 137-40. She worked as a swing shift waitress six days a week until approximately 10:00 pm, and her sister, who lived in the same complex, took care of in her daughter while she was at work. *Id.* She denied knowing or having a relationship with the defendant. She had seen him previously at the complex and identified him in court as her attacker. 5 RP 141. 6 RP 36-37.

The attack happened at approximately 3:00 in the morning. 6 RP 8. The victim had worked the night before and got off at approximately 10:30 pm. 5 RP 142. She left work, collected her daughter from her sister's residence, went home, showered and got ready for bed. 5 RP 142-43. She testified that she went to bed after her shower and her daughter's bath at approximately 11:40 pm. *Id.* She and her daughter shared the same bed. *Id.*

The window latch to the victim's bedroom was non-functional. 6 RP 8. At approximately 3:00 in the morning she woke to find the defendant in her bedroom standing next to her bed and looking at her. 6 RP 9. She ran for the door in hopes of escaping outside for help but he caught her and began slapping her and choking her. 6 RP 9-10, 34. Medical evidence corroborated that the victim suffered visible injuries to her head and neck and she was treated for traumatic injury to her neck at the hospital. 7 RP 20-25, 81. The defendant forcibly deposited VIC on the couch, pinned her, removed his clothing and hers and began raping her vaginally. 6 RP 12. The victim was screaming for help and seeking a way to escape. *Id.* Eventually, having noticed that the defendant smelled of alcohol, VIC successfully managed to escape by offering the defendant a beer and running for the door when he took it. 6 RP 12-16.

VIC's escape did not last long. She fled her home unclothed from the waist down and tried to get help from her neighbors. 6 RP 14-15, 54. The defendant caught her, caused her to urinate on herself, dragged her by the hair back into her home and proceeded to rape her a second time. 6 RP 15-20, 54-55. The attack ended only because the police arrived in response to 911 calls from the victim's neighbors. 6 RP 20-22.

The victim's neighbors witnessed parts of the attack. Elizabeth Guillen saw the victim, heard her screaming for help and noted her state of

undress. 5 RP 99-104. Rafael Guillen-Gonzalez saw the defendant dragging the victim by her hair back into her home. 5 RP 117-120. The complex manager also heard VIC's screams and a man's voice and called the police. 6 RP 99-103. The neighbors also confirmed that VIC was not in a relationship with the defendant.

The victim was obviously injured and terrified and was taken to the emergency room for treatment. 5 RP 104-06. 7 RP 16-21, 81, 94. VIC was treated for the sexual assault and for strangulation. 7 RP 22. The emergency room physician testified as to the seriousness of the neck injuries: "The concern that I have is with particular vascular injuries. Those injuries can bleed and hemorrhage into the neck. The neck has a finite amount of space, and when there is hemorrhage, it can compromise the airway. That's my immediate concern. Another concern is with arterial injuries, clots can form, and those clots can break off and go into the brain and cause a stroke." *Id.* He also testified about the victim's pelvic examination, and in particular that during the internal examination of her vagina, he noted bleeding. 7 RP 34.

The defense case consisted of the defendant. He testified that he had a previous romantic and sexual relationship with VIC that he broke off dating to 2008-09. 9 RP 8, 12-15. He claimed that they would meet at a motel but that he stopped his relationship with her in 2013. *Id.* The

defendant testified that it was chance that brought him to the mobile home park that night; he caught a ride from his boss and went there to visit his brother. 9 RP 16-17. He claimed his boss was coming back to pick him up to drive him back home to Kent but on cross examination said, "I don't know what happened to him." 9 RP 49. He testified that as he was walking in the complex, VIC appeared at her window, beckoned him, had him climb through her window, and then seduced him. 9 RP 18-20. He claimed that he stopped having sex with VIC and that this made her angry and led her to go outside "to get some air" and that when she was outside she began calling for help. 9 RP 18-22. The defendant claimed that he "grabbed her" to take her back in and that she then seduced him again. 9 RP 22-24. They were in the act of disrobing when the police arrived and "she started again acting up." *Id.* Among many details that he was asked about during cross examination, the defendant claimed that the victim self-inflicted any of her injuries. 9 RP 54-56.

The victim' sister testified in rebuttal. She contradicted the defendant in his claims about the pre-existing relationship and in his testimony about VIC's family constellation. 9 RP 71-76. Testimony was thereupon completed on October 26, 2015.

The defendant was convicted as described above on October 29, 2015. 12 RP 3. Sentencing was scheduled for December 18, 2015. CP

134-53. As a result of agreement of the parties the trial court found that two of the four rape counts were the same criminal conduct. 13 RP 4. After argument the court further found that the unlawful imprisonment offense was the same criminal conduct but the burglary and assault were not. CP 134-53. 13 RP 4-21. The defendant's offender score was calculated at six points for count one, the first rape charge. *Id.* He was sentenced to four indeterminate terms ranging from 73.5 to 197 months to life and one determinate term of fourteen months. CP 134-53. With the addition of sentence enhancement time and with one of the two rape charges running consecutive, the defendant's total sentence was 360 months to life. CP 142. This appeal was timely filed on January 12, 2016. CP 180-200.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY RULING THAT THE DEFENDANT COULD NOT INTRODUCE EVIDENCE OF THE RAPE VICTIM'S IMMIGRATION STATUS WHERE THE EVIDENCE HAD LITTLE OR NO PROBATIVE VALUE AND WAS TAINTED BY UNFAIR PREJUDICE.

Criminal defendants have a constitutional right under both the United States Constitution and the Washington Constitution to present a defense. United States Constitution, Amendment VI. Washington Constitution, Article I, §22. That right does not, however, include the right to introduce inadmissible evidence. ***State v. Aguirre***, 168 Wn.2d

350, 362-63, 229 P.3d 669 (2010). ***State v. Mee Hui Kim***, 134 Wn. App. 27, 41, 139 P.3d 354 (2006), quoting ***State v. Thomas***, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), quoting ***State v. Hudlow***, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The right to defend means simply that " '[a] defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.' " ***State v. Rafay***, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012), quoting ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

Criminal defendants also have a constitutional right to confront witnesses. Sixth Amendment. Washington Constitution, Art. I, § 22. "The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions." ***State v. Darden***, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002), citing ***Washington v. Texas***, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), ***Davis v. Alaska***, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) and ***State v. Hudlow***, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The right of confrontation, like the right to present a defense, does not obviate the rules of evidence. ***State v. Thomas***, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). "In keeping with the right to establish a defense and its attendant limits, 'a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.' " *Id.*, quoting ***State v. Hudlow***, 99 Wn.2d at 15.

Examples of valid limitations on the right of confrontation include other suspect evidence and polygraph results. ***State v. Thomas***, 150 Wn.2d at 856-57. In ***Thomas***, a capital defendant argued that during his cross examinations he should have been permitted to delve into such issues. *Id.* This was rejected: "We hold that the trial court did not abuse its discretion in limiting the evidence to that which was relevant to the consideration at issue by excluding 'other suspect' evidence and polygraph evidence pertaining to Lynch when each was at once irrelevant and unreliable." *Id.* at 861.

In its ruling concerning the victim's U-visa, the trial court in this case no more violated the defendant's rights than did the trial court in ***Thomas***. It was the state that brought the issue before the trial court in its trial brief. CP 206-13. Having been apprised of the issue, the trial court did not immediately exclude the evidence. 1 RP 20-21. Rather it deferred ruling thus giving the defense an opportunity to submit authorities, argument and supporting evidence. *Id.* The trial court could be described as skeptical but open to argument when it was first confronted with the issue. The court said, "There's something on the order of 11 million undocumented aliens in the United States. And to the degree that perhaps there is some sort of imminent threat of her deportation which would justify at least raising the specter that these allegations were made up in order to obtain a hardship Visa or a protection Visa than maybe someone

that just sort of out of the blue without any sort of ongoing action through immigration services, that's a different matter." 1 RP 20-21.

Although the defendant indicated that he would pursue additional information via the immigration authorities, during colloquy and argument about the pre-trial motions nothing was produced from that effort before the trial court made its ruling. 3 RP 76 *et. seq.*, 5 RP 27-32. The only documentation submitted by the defense consisted of excerpts from the prosecution's numbered discovery. Those pages were marked for identification as Exhibit 42 after the trial court made its ruling.

Exhibit 42 showed that the victim's U-visa application had little or no relevancy and offered no support for an alleged plot to falsely accuse the defendant. Exhibit 42. For one thing the material is dated more than three months after the rape. For another the trial court's concern about whether there was a pending immigration proceeding was not addressed. There was no information in Exhibit 42 showing that the victim was in imminent danger of deportation. Nor was any other supporting evidence produced to show that there was a connection with the rape incident. 5 RP 27 *et. seq.* No evidence was offered to show that the victim consulted the immigration attorney at any time connected to the night of the rape. Furthermore, the record actually includes evidence that a plot involving a U-visa would have been fruitless. Exhibit 42 shows that the prosecution's

office policy was not to take action on such applications while a case is pending. In short, the trial court had ample support for its judgment: "Its probative value is overwhelmed by the prejudicial effect. That's the finding. It's a straightforward ER 401, 402, 403 analysis in conjunction with the case law . . . ." 5 RP 32.

Between the time that the defendant first raised the issue and the trial court's ruling the defendant had a week to support his position. 1 RP 20. 5 RP 27 *et. seq.* Thus, the defendant was given every opportunity to show that the obvious unfair prejudice in forcing a rape victim to answer questions about her immigration status was outweighed by some probative value. ER 403. In taking its time, in reviewing authority from the Washington Supreme court [5 RP 28], the trial judge conducted himself as one would hope a cautious and experienced trial judge would. The manner in which the trial court made its decision in this case is anything but an abuse of discretion.

Although the U-visa issue is presented as a central issue in this appeal, it appears not to have been an actual issue at the trial. This Court is not left to speculate about the defendant's defense. He testified. His defense was consent. CP 236-38. 9 RP 19. The testimony he gave before the jury was calculated to convince the jurors that (1) he and the victim had been lovers [9 RP 8-14, 41-46], (2) that he had broken off their

relationship [9 RP 14], (3) that the night of the rape she lured him into her home (implausibly, by having him climb through the bedroom window into the bedroom where her daughter was sleeping) [9 RP 14-18, 50-52], (4) that having aggressively seduced him she became angry when he rebuffed her supposed advances [9 RP 18-22], (5) that thereupon she self-inflicted injury to various parts of her body and went outside naked from the waist down [9 RP 56-58], and (6) that sexual assault was the furthest thing from the defendant's mind because "when she went out the door, [the defendant] thought she just needed to get some air. . . ." [9 RP 21-22].

In weighing the merits of the U-visa issue the Court should be mindful of what effect that issue would have had if the trial court's ruling had gone the other way. In that event the defendant would not only have needed to convince the jury of the truthfulness of the above story, but would also have had to complicate his defense by arguing that the victim planned the entire thing so as apply for a U-visa. No experienced defense attorney would cast doubt on his client's credibility by suggesting such a bizarre theory. After all that theory would require that the jury believe that the victim planned the events of that night in advance even though she had no way of knowing the defendant would be at her complex after 2:00 in the morning. More implausibly still, the jury would have needed to be convinced that the victim injured herself, ran outside half naked, called the

police and submitted to the indignity of a rape exam all in an effort to become eligible to apply for a U-visa. Lastly, this theory would have been suggested in the absence of any evidence that the victim had immigration trouble. It is hard to imagine any defense attorney, much less a competent one, seeking to advance such a weak theory of the case.

A trial court has considerable discretion regarding the admissibility of evidence. ***State v. Stumpf***, 64 Wn. App. 522, 527, 827 P.2d 294 (1992). A trial court's ruling concerning admissibility of evidence is reviewed for an abuse of discretion. ***State v. Aguirre***, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). Abuse of discretion occurs when a trial court's decision to admit or not admit evidence is "manifestly unreasonable or based upon untenable grounds or reasons." ***State v. Magers***, 164 Wn.2d 174, 181, 189 P.3d 126 (2008), citing ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The trial court had some awareness of immigration matters as is exemplified by its statement that there may be as many as "11 million undocumented aliens in the United States." 5 RP 20. The U-visa issue in this case traces its roots to 8 U.S.C. § 1101(15)(U). That section of the federal immigration law provides an avenue for a limited number of immigrants to remain temporarily in the United states if they have been the victim of crimes such as "rape; torture; trafficking; incest; domestic

violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation . . . ." 8 U.S.C. § 1101(15)(U)(iii). The burdens placed on the applicant and federal authorities are substantial. *See* 8 U.S.C. § 1184(p). The limitations include a numerical limit of 10,000 applicants per year and a maximum duration of four years. 8 U.S.C. § 1184(p)(2) and (6). It goes without saying that, since the defendant did not cite or discuss these statutory provisions, the trial court had no information showing that the victim had satisfied all of the burdens placed on her by these provisions. There is even less of a showing that she had reason to expect before the rape incident that she could satisfy those burdens. In short, there was little if any probative value and substantial unfair prejudice in the defendant's U-visa submission.

Balanced against the minimal probative value was well-documented prejudice. "It is well-established that appeals to nationality or other prejudices are highly improper in a court of justice, and evidence as to the race, color, or nationality of a person whose act is in question is generally irrelevant and inadmissible if introduced for such a purpose." ***State v. Avendano-Lopez***, 79 Wn. App. 706, 718-19, 904 P.2d 324 (1995). The trial court was sensitive to this prejudice and observed its effect during jury selection: "But even in this venire on questioning -- and I let you question the venire quite extensively, Mr. McNeish, related to this -- there were emotional reactions of sufficient severity and intensity that I

believe that bringing up immigration and going into the status of any of the people that are going to be testifying in this case is going to inflame one way or another the jury so that their view of the case is going to be driven not by the evidence, but by their personal views about immigration and immigration policy and what should or shouldn't happen to those who are in this country without proper documentation. So that's it." The trial court can hardly be faulted for considering the probative value of immigration evidence to have been outweighed by the substantial danger of unfair prejudice.

The foregoing discussion of the probative value of the U-visa evidence also supports a harmless error analysis. Confrontation claims are subject to harmless error. ***Harrington v. California,*** 395 U.S. 250, 251–52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), ***Chapman v. California,*** 386 U.S. 18, 21, 87 S. Ct. 824, 17 L. Ed. 2d (1967). "[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to ***Chapman*** harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." ***Delaware v. Van Arsdall***, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438, 89 L. Ed. 2d 674 (1986). *See* ***State v. Bourgeois,*** 133 Wn.2d 389,

403, 945 P.2d 1120 (1997); ***State v. Thomas,*** 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The state satisfies its harmless error burden if it shows beyond a reasonable doubt that any reasonable jury would have reached the same result with or without the evidence. ***State v. Guloy,*** 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), ***State v. Damon,*** 144 Wn.2d 686, 693, 25 P.3d 418 (2001).

Here, the defendant's credibility undoubtedly benefited because the irrelevant, red herring, U-visa issue did not muddy his straightforward consent defense. The defendant faced contradiction in his claims about a consensual encounter because the victim's neighbors saw and heard parts of what he did to her. If his defense attorney had pursued the U-visa theory he would have necessarily had to explain how the neighbors were persuaded to conspire with the victim in a supposed plot to obtain limited temporary immigration help. For obvious reasons the defendant is fortunate that his attorney did not pursue that line of defense.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS SAME CRIMINAL CONDUCT RULING AS THERE WAS AMPLE SUPPORT FOR ITS FINDING THAT THE ASSAULT AND RAPES WERE SEPARATE AND DISTINCT ACTS.

In Washington, with a few exceptions, felony sentencing depends on a defendant's offender score and the resulting standard sentencing range. RCW 9.94A.510, .525 and RCW 9.94A.530(1). The State has the burden of proving the defendant's criminal history by a preponderance of

the evidence. RCW 9.94A.500(1). ***State v. Hunley***, 175 Wn.2d 901, 909–10, 287 P.3d 584 (2012), citing ***State v. Ford***, 137 Wn.2d 472, 479–80, 973 P.2d 452 (1999). The standard of review for a sentencing court's calculation of an offender score is *de novo*. ***State v. Bergstrom***, 162 Wn.2d 87, 92, 169 P.3d 816 (2007), citing ***State v. Tili***, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). However its "determination of whether crimes constitute the same criminal conduct is reviewed for abuse of discretion." ***State v. Israel***, 113 Wn. App. 243, 294, 54 P.3d 1218 (2002), citing ***State v. Haddock,*** 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

A defendant's criminal history together with other current offenses comprises the bulk of the defendant's offender score. RCW 9.94A.589(1)(a). "[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score . . . ." *Id.* Other current offenses are not inevitably counted as criminal history but instead when "the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." *Id.*

In the case before the court the defendant argued to the trial court that none of the other current offenses should count toward his offender score. 13 RP 4 *et. seq.* The trial court went through each of the counts one by one, applied the proper standard and analyzed each count in light

of the evidence at trial. *Id.* While not directly applicable to the issue raised in this appeal, the trial court's analysis as to the rape, burglary and unlawful imprisonment underscores the correctness of its rulings and that it did not abuse its discretion.

Concerning the rape counts, the state conceded and the trial court accepted that two of the counts were not counted as other current offenses. CP 134-153. 13 RP 3-4. The trial court's analysis of what happened to the victim concerning the other two rape counts is instructive: "And I did hear the evidence. It was clear to me that the victim in this case freed herself from her attacker, ran outside and tried to beat on the neighbors' windows and scream for help. He then emerged from the victim's residence, pulled her by the hair back into the residence and committed a sex rape offense." 13 RP 6. The court applied the applicable three-prong test and found, "I think the fact that the offender could have just broken off his assault at that point because the victim had freed herself constitutes a separation of time that would result in there being a finding of the two rapes not being the same criminal conduct." *Id.*

The trial court also analyzed same criminal conduct as to the burglary and unlawful imprisonment. It ruled that the burglary was not same criminal conduct [13 RP 12-14.] but that the unlawful imprisonment was [13 RP 16.]. As to the burglary it applied the burglary anti merger statute saying, "but simply applying the antimerger (sic.) statute as written

results in a finding of no merger of the offense." 13 RP 13. *See* RCW 9A.52.050.

Lastly as to the assault the trial court's analysis of the facts was similar to the two rape counts. It distinguished the assault from the rapes based on what was sought to be accomplished by the specific act of strangulation saying, "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." 13 RP 20-21. As to that finding, the trial court's determination is well supported.

The statutory elements of same criminal conduct are "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). As to the intent element, it has been said that "[o]bjective intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan." ***State v. Israel***, 113 Wn. App. 243, 295, 54 P.3d 1218, 1247 (2002) ("The objective intent for [the defendant's] indecent liberties (sexual gratification) is much different than the objective criminal intent of robbery (economic enrichment)."), citing ***State v. Lewis***, 115 Wn.2d 294,

302, 797 P.2d 1141 (1990). Here the trial court correctly determined that the defendant's intent in strangling the victim was different from his intent in committing sexual intercourse by forcible compulsion.

In the first place it should be noted that the strangulation incident took place before the two rape incidents. 6 RP 10-12, 33-34, 56. That is before the first rape, and before the victim was able escape by running outside half naked and screaming for help from her neighbors, the defendant wrapped one hand around her neck and covered her mouth with his other hand. 6 RP 10-15. He then released her mouth and neck and took off her clothing incident to the rape. *Id.* He told her "to keep quiet" during the rape but did not use strangulation to make sure she did. 6 RP 11. In fact he raped her for a period of approximately fifteen to twenty minutes and she was "crying" and "screaming" as he did so. 6 RP 11-12. It was after the first rape incident that the victim escaped. 6 RP 15.

The strangulation did not further the rapes. This is most clear as to the second rape. The second rape was perpetrated after a significant intervening event, namely the victim's escape attempt. 6 RP 15-19. The two rapes were not same criminal conduct because the first was completed before the second. ***State v. Grantham***, 84 Wn. App. 854, 859, 932 P.2d 657, 660 (1997). "[T]he trial court could find that [the defendant], 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. He chose the latter . . . .". *Id.*

Likewise in this case the assault was completed before the second rape. During the second rape the victim kept quiet literally for fear of her life. 6 RP 19. The second rape incident took place after the defendant hunted the victim down and dragged her back in to the trailer by her hair. 6 RP 15-19. There can be no doubt that the earlier strangulation incident was separated in time and purpose from the second rape.

The assault also did not further the first rape. The defendant strangled the victim gratuitously before raping her. He did not use the strangulation to keep her quiet, he simply escalated his attack from choking and slapping to the most heinous of personal violations. 6 RP 10-15. This Court construes the statutory phrase "narrowly and will not find same criminal conduct if any of the three elements are missing." ***State v. Saunders***, 120 Wn. App. 800, 824, 86 P.3d 232, 245 (2004), citing ***State v. Porter***, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Here the assault did not further the rape and *vice versa*. They were two different and sequential types of infliction of pain to two different parts of the victim's body. As the trial court put it: "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." 13 RP 20-21.

The trial court's analysis in this case is eminently supported by ***Israel, Grantham*** and similar cases involving physical and sexual violence. As a matter of common human experience it is understandable that physical violence is different in kind from sexual violence. Thus where a victim was lured to a motel room, robbed, beaten with a gun, and raped with sexual devices, it should come as no surprise that an appellate court would reason that "the rape and assault of [the victim] were serious violent offenses that constituted separate and distinct criminal conduct. . . ." ***State v. Brown***, 100 Wn. App. 104, 115, 995 P.2d 1278, (2000), *reversed on other grounds*, 147 Wn.2d 330, 58 P.3d 889 (2002). The same reasoning applies here where the victim was sequentially victimized, first by having her airway forcibly occluded and subsequently by sexual assault.

While drug dealers who happen to sell or possess two or more different kinds or quantities of drugs may be said to have been engaged "in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme to sell drugs", such reasoning does not translate well into cases of physical and sexual violence. ***State v. Porter***, 133 Wn.2d

177, 185–86, 942 P.2d 974, 978 (1997). The ***Deharo***, ***Lewis*** and ***Porter*** cases are readily distinguishable since they involve drug dealing. "[I]t makes no sense to say one crime involved intent to deliver [the narcotic drug] now and the other involved intent to deliver it in the future"; and then hold that "the two crimes should be treated as encompassing the same criminal conduct." ***State v. Deharo***, 136 Wn.2d 856, 859, 966 P.2d 1269 (1998). But a drug dealer's objective intent is hardly comparable to that of a rapist. Intent in a burglary, rape and assault is quite another matter.

A closer question is presented in the case of kidnapping. Even there, where one crime is completed before the commencement of the next, there is reason not to view the crimes as same criminal conduct. ***State v. Lessley***, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). "Objectively viewed, then, [the defendant's] criminal intent changed when he moved from the burglary to the kidnapping; the former did not further the latter. . . the burglary and kidnapping are not the same criminal conduct because the intent was not the same for both crimes." *Id.* It is only when a kidnapping and assault is "committed simultaneously" and where the assault had no purpose "beyond facilitating and furthering the abduction" that the two crimes should be deemed the same criminal conduct and "counted as one crime." ***State v. Taylor***, 90 Wn. App. 312, 322, 950 P.2d 526 (1998).

A further reason for upholding the trial court's judgment and discretion on this issue is its ruling concerning the unlawful imprisonment. The defendant's unlawful imprisonment conviction was a lesser included offense stemming from kidnapping. Perhaps in light of a cautious reading of ***Lessley*** and ***Taylor***, and similar cases, the trial court counted the unlawful imprisonment as the same criminal conduct. This cautious view of the issue supports the conclusion that the trial court did not abuse its discretion. It perceptively came to a different conclusion about the unlawful imprisonment versus the assault and rapes. Its judgment is supported by both the law and the facts. This court should not hold that the trial court abused its discretion under these circumstances.

3. IF THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY THIS COURT SHOULD EXERCISE ITS DISCRETION, AWARD APPELLATE COSTS AND DEFER CONSIDERATION OF THE DEFENDANT'S ABILITY TO PAY PENDING A FUTURE MOTION FOR REVISION OR AN ATTEMPT TO COLLECT.

RCW 10.73.160(2) states that "the court of appeals...may require an adult offender convicted of an offense to pay appellate costs." This provision provides appellate courts with legislative authorization to order the recoupment of some or all of the costs of an appeal from a defendant who does not prevail. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). In ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016), Division I stated that the award of appellate costs to a prevailing

party is within the discretion of the appellate court. *See also* RAP 14.2 and ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000). The issue is not whether this Court can order appellate costs, but whether it should, when and how much.

The idea that those convicted of a crime should be required to pay some of the expense is not new. In 1976, the legislature enacted RCW 10.01.160 concerning trial court costs. A short time afterward in ***State v. Barklind***, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that costs which included contribution for appointed counsel under this statute did not "impermissibly burden defendant's constitutional right to counsel." *Id.* at 818.

Imposition of appellate costs is also not new. The statute was enacted in 1995 in response to ***State v. Rogers***, 127 Wn.2d 270, 281, 898 P.2d 294 (1995), which held that appellate costs could not be awarded in the absence of statutory authority. *See* Laws of 1995, Ch. 275 § 3, and ***State v. Nolan***, 141 Wn.2d at 623. ***Nolan*** examined RCW 10.73.160 and noted that it was enacted in order to allow the courts to require one whose conviction and sentence is affirmed on appeal to pay appellate costs including statutory attorney fees. *Id.* at 627. In ***Blank***, *supra*, at 239, the Supreme Court held the statute constitutional and affirmed this Court's

award of appellate costs as "reasonable". *See* ***State v. Blank***, 80 Wn. App. 638, 643, 910 P.2d 545 (1996).

In both ***Nolan*** and ***Blank***, the defendant initiated review of the appellate costs issue by filing an objection to the state's cost bill. ***State v. Blank***, 131 Wn.2d at 234, ***State v. Nolan***, 141 Wn.2d at 622. As to a defendant's ability to pay, the court in ***Blank*** stated: "[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." ***State v. Blank***, 131 Wn.2d at 242 (footnote omitted).

In light of the Supreme Court's "common sense" observation in ***Blank***, it can be argued that conditioning "appellate review" of an appellate costs issue on whether "the issue is raised in an appellant's brief" prematurely raises an issue not then properly before the court. The court in ***Sinclair*** concluded (somewhat in contradiction of ***Blank***) that, "Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor." ***State v. Sinclair***, 192 Wn. App. at

389. In addition, under RCW 10.73.160(4), the proper time for considering a defendant's ability to pay appellate costs is when the state seeks to collect. ***State v. Blank***, 131 Wn.2d at 242; ***State v. Smits***, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009), citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991). At that time there would generally be no need to speculate as to the defendant's financial status and thus an accurate and timely determination can be made of whether the costs "will impose a manifest hardship on the defendant or the defendant's immediate family". RCW 10.73.160(4).

Prior to the time of collection, the determination of whether the defendant either has or will have the ability to pay is necessarily speculative. ***State v. Baldwin***, 63 Wn. App. at 311, ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). It has been suggested that the proper time for determining if a defendant is indigent "is the point of collection and when sanctions are sought for nonpayment" as to appellate costs. ***Blank***, 131 Wn.2d at 241–242, ***State v. Wright***, 97 Wn. App. 382, 383-84, 965 P.2d 411 (1999). In summary, as noted in ***Blank*** "there is no reason [at the time of the decision] to deny the State's cost request based upon speculation about future circumstances." *Id.* at 253.

It is important to acknowledge that in ***Blazina***, the Supreme Court rejected the argument that "the proper time to challenge the imposition of

an LFO arises when the State seeks to collect." ***State v. Blazina***, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (footnote one), ***State v. Shirts***, 195 Wn. App. 849, 854-55, 381 P.3d 1223 (2016). However, the statute at issue in ***Blazina*** and ***Shirts*** specifically prohibited trial courts from ordering a "defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). That prohibition is not included in the appellate costs provision. *See* RCW 10.73.160.

Most criminal defendants are represented on appeal at public expense. RCW 10.73.160(3) specifically allows for "recoupment of fees for court-appointed counsel." Since defendants with "court-appointed counsel" are necessarily indigent, the statutory provision for attorney fees would be meaningless if such fees were invariably denied on the basis of ability to pay. By enacting RCW 10.01.160 and RCW 10.73.160, the legislature expressed its intent that criminal defendants, including the indigent, should contribute to the cost of their cases.

RCW 10.01.160 was enacted in 1976 and RCW 10.73.160 was enacted in 1995. These legislative determinations should be given full effect. An award of costs should reflect to some extent the cost to the public of an appeal. Insofar as attorney fees are concerned, courts are called upon to judge the reasonableness of an award with some frequency. It is submitted that a rational basis on which this court may exercise its

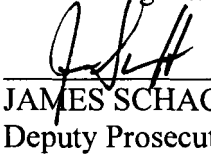
discretion could be this Court's view of the quality of the appellate lawyering exhibited in the appeal compared to the amount submitted in a cost bill as having actually been expended. Presumably this would approximate the market value to the defendant of the effort expended on his behalf. As to ability to pay, this Court can award appellate costs, including attorney fees, on the basis of the actual cost of this appeal or even with a discount, secure in the knowledge that ability to pay must be taken into account "before enforced collection or any sanction is imposed for nonpayment. . . ." ***State v. Blank***, 131 Wn.2d at 242.

D. CONCLUSION.

For the foregoing reasons, the state respectfully requests that the court affirm the defendant's conviction and sentence.

DATED: Thursday, December 22, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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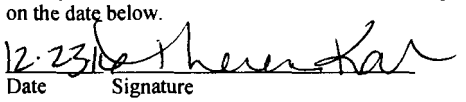

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