IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CRAIG ROCKY GARRISON, Appellant.	No. 42405-3-II UNPUBLISHED OPINION

Penoyar, J. — Craig Rocky Garrison appeals his sentences for third degree rape and first degree incest, arguing that the trial court erred when calculating his offender score because his crimes should have been treated as parts of the "same criminal conduct" under RCW 9.94A.589(1)(a) ("'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."). He additionally argues ineffective assistance of counsel for failing to correctly argue that his two convictions were the same crime for sentencing purposes. We affirm.[1]

FACTS

At sentencing, the State argued that the two crimes were not part of the same conduct under RCW 9.94A.589(1) because although they involved the "same time, place, [and] victim. The criminal intent is . . . different and distinct." Report of Proceedings (RP) (July 13, 2011) at 3. Garrison agreed with the State that the criminal conduct occurred against the same victim at the same time and place but objected to the State's position that the crimes should be treated as

---

[1] On March 14, 2012, a commissioner of this court granted Garrison's unopposed motion for accelerated review and set the matter as a motion on the merits. The motion on the merits was referred to this three-judge panel.

different for sentencing. He, however, qualified the objection by adding that he was unsure whether he had legal basis for arguing that the crimes were the same because the elements of the two crimes are not identical. The trial court ruled that it did not believe that the acts "necessarily" occurred at the same time and that "the rape constitutes one specific act, the incest another." RP (July 13, 2011) at 3.

ANALYSIS

On appeal, Garrison reiterates his argument that his crimes should have been treated as parts of the same criminal conduct for sentencing purposes.[2] The State now concedes that "Rape in the Third Degree and Incest in the First Degree, as charged and proven in this case, are the same criminal conduct" and asks us to remand the matter for resentencing.[3] Resp't's Br. at 2.

We, however, cannot accept the State's concession in light of the clear language in *State v. Bobenhouse*, 166 Wn.2d 881, 896, 214 P.3d 907 (2009), which states that child rape and child incest do not involve the same criminal conduct for sentencing purposes:

> Bobenhouse further argues the trial court abused its discretion when it did not find that the underlying rape and incest charges (stemming from forcing the children to have sexual intercourse with each other) *constituted the "same criminal conduct" for purposes of sentencing. Bobenhouse would have this court hold that first degree child rape and first degree incest involve the same criminal intent, sexual intercourse. But this argument has no merit.* We have previously held that "the Legislature intended to punish incest and rape as separate offenses,

[2] At trial, the State presented testimony by the victim of two incidents of sexual contact in the same evening. The verdict does not specify which incident, or both, the State proved actually occurred and the State did not rely on one incident to prove one crime and the other incident to prove the second crime. In this circumstance, the guilty verdicts are insufficient to establish the two crimes occurred at separate times. *See State v. Dolen*, 83 Wn. App. 361, 365, 921 P.2d 590 (1996).

[3] Generally, a trial court's finding that multiple offenses were not part of the same criminal conduct is reviewed for abuse of discretion or misapplication of law. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

> even though committed by a single act." *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995). Bobenhouse's argument must fail in light of the precedent set by our decision in *Calle*.

(Emphasis added.) Despite Garrison's argument that we should disregard *Bobenhouse* because the case it relies upon, *Calle*, 125 Wn.2d at 781-82, concerned double jeopardy and not sentencing and also indicated that rape and incest may be treated differently for sentencing, we are bound to follow a decision of our Supreme Court. *In re Pers. Restraint of Heidari*, ___ Wn.2d ___,274 P.3d 366, 369 (2012). Under *Bobenhouse*, child rape and incest do not have the same criminal intent for "purposes of sentencing."[4] 166 Wn.2d at 896; *but see Dolen*, 83 Wn. App. at 365 (child molestation and child rape a part of the same criminal conduct).

We affirm.

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

Penoyar, J.

We concur:

Van Deren, J.

[4] Because the trial court correctly sentenced Garrison, we need not reach his claim of ineffective assistance of counsel at sentencing.

Johanson, A.C.J.