IN THE SUPREME COURT OF THE STATE OF WASHINGTON

state of washington, Respondent, v. julio cesar aldana graciano, Petitioner.	NO. 86530-2 EN BANC Filed January 31, 2013

Stephens, J.—We have been asked to resolve conflicting authority on which standard of review applies to a sentencing court's determination of "same criminal conduct" under RCW 9.94A.589(1)(a). The Court of Appeals, Division Two, reviewed this determination de novo, adopting the reasoning of Division Three in *State v. Torngren*, 147 Wn. App. 556, 196 P.3d 742 (2008). The court in *Torngren* acknowledged a long line of precedent stating the proper standard is abuse of discretion but held that a de novo standard "seem[s] more appropriate." *Id.* at 562. We disagree. Today, we reaffirm that determinations of same criminal conduct are reviewed for abuse of discretion or misapplication of law. Because the sentencing court here neither abused its discretion nor misapplied the law, we reverse the Court

of Appeals.

I

Background

Julio Cesar Aldano Graciano was charged by amended information with four counts of first degree rape of a child and two counts of first degree child molestation relating to his cousin's daughter, E.R. Clerk's Papers (CP) at 62-64. He was also charged with one count of first degree child molestation relating to his cousin's son, J.R. CP at 64.

At trial, nine-year-old E.R. testified about the events that unfolded when Graciano came to live with her family for several months at a time. She testified to four incidents of rape, which she described as occurring in the area between the kitchen and living room, Verbatim Transcript of Proceedings (Dec. 2, 2009), at 230, 233, in her bedroom, *id.* at 237-38, in the kitchen, *id.* at 238-39, and on the couch, *id.* at 252.

E.R. also testified that Graciano touched her upstairs in the living room, grabbing her hand and making her touch his exposed penis. *Id.* at 236. E.R.'s testimony was not clear on how many times she was molested. *Compare id.* at 254 (stating she was on the couch with her uncle two times), *with id.* at 258-59 (admitting that these incidents happened more than a couple times).

The jury was instructed that a guilty verdict requires unanimous agreement on which act was proved beyond a reasonable doubt. *See State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); CP at 77. The jury was further instructed that the

acts constituting each count must be separate and distinct from one another. CP at 77, 81-84, 87-88. The jury found Graciano guilty of the four counts of first degree child rape and two counts of first degree child molestation relating to E.R. CP at 93-98. The jury found Graciano not guilty of the molestation charge relating to J.R. CP at 99.

At sentencing, defense counsel argued the crimes should be considered the "same criminal conduct" under RCW 9.94A.589(1)(a) for purposes of calculating Graciano's offender score. Sentencing Verbatim Report of Proceedings (Jan. 22, 2010) at 3. The court disagreed, holding that there "was certainly sufficient evidence for each and every one of the counts to be separate and distinct." *Id.* at 6. The court sentenced Graciano in accordance with its ruling.

Graciano appealed on a number of grounds, including that his convictions constituted the same criminal conduct because they involved the same victim, same criminal intent, and same time and place. On that issue, the Court of Appeals reviewed the sentencing court's determination de novo. *See State v. Aldana Graciano*, noted at 163 Wn. App. 1014 (2011).

In conducting a de novo review, the court found that Graciano had the same criminal intent of present sexual gratification when he molested and raped E.R. *Graciano*, slip op. at 8-9. While the court expressed confidence that each of the four rapes was separate from the others, it noted the record was unclear as to whether Graciano raped E.R. on the living room couch and twice molested her in a single incident or on different occasions. *Id.* at 9. Because the record did not

establish these incidents were separate, the court held that the child molestation convictions and one of the child rape convictions constituted the same criminal conduct. *Id.* The court remanded for resentencing consistent with this holding. In all other respects, the Court of Appeals affirmed the trial court's judgment.

Both Graciano and the State sought review by this court. We granted review only on the issue of what standard of review applies to a trial court's determination of same criminal conduct.

II

Analysis

Today we reaffirm our precedent, holding that determinations of same criminal conduct are reviewed for abuse of discretion or misapplication of law. The Court of Appeals erroneously applied a de novo standard of review and in doing so, inappropriately placed the burden of proof on the State. Applying the correct standard, we hold that the sentencing court neither abused its discretion nor misapplied the law in refusing to treat Graciano's crimes as part of the same criminal conduct.

Appellate Courts Review Determinations of Same Criminal Conduct for Abuse of Discretion or Misapplication of Law

A determination of "same criminal conduct" at sentencing affects the standard range sentence by altering the offender score, which is calculated by adding a specified number of points for each prior offense. RCW 9.94A.525. For purposes of this calculation, current offenses are treated as prior convictions. RCW

9.94A.589(1)(a). However, "if 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.*

Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* Deciding whether crimes involve the same time, place, and victim often involves determinations of fact. In keeping with this fact-based inquiry, we have repeatedly observed that a court's determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law. *E.g.*, *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990) (affirming the petitioner's sentence where the "same criminal conduct" determination involved "neither a clear abuse of discretion nor a misapplication of the law"); *State v. Burns*, 114 Wn.2d 314, 317, 788 P.2d 531 (1990) (noting the same criminal conduct determination will not be disturbed unless an appellate court "finds a clear abuse of discretion or misapplication of the law"); *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994) ("The trial court's determination whether two offenses require the same criminal intent is reviewed by this court for abuse of discretion or misapplication of the law."); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) ("An appellate court will reverse a sentencing court's decision only if it finds a clear abuse of discretion or misapplication of the law."); *State v. Williams*, 135 Wn.2d 365, 367, 957 P.2d 216 (1998) (framing the issue as whether "the sentencing court abuse[d] its discretion by concluding that charges . . . did not constitute the

same criminal conduct"); *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999) ("'A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law.'" (quoting *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993))); *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) ("[A]n appellate court . . . will reverse a sentencing court's determination of 'same criminal conduct' only on a 'clear abuse of discretion or misapplication of the law.'" (quoting *Elliot*, 114 Wn.2d at 17)); *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006) ("A trial court's determination of what constitutes the same criminal conduct will not be disturbed absent an abuse of discretion or misapplication of the law."); *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011) ("We review the 'trial court's determination of what constitutes the same criminal conduct [for] abuse of discretion or misapplication of the law.'" (alteration in original) (internal quotation marks omitted) (quoting *Tili*, 139 Wn.2d at 122)).

While acknowledging such precedent, the Court of Appeals in this case "f[ou]nd this standard unpersuasive" and applied a de novo standard. *Graciano*, slip op. at 8 n.3. In doing so, it relied on *Torngren*, a case in which Division Two of the Court of Appeals decided a de novo standard "seem[s] more appropriate" for reviewing a determination of same criminal conduct. 147 Wn. App. at 562.[1]

[1] The *Torngren* court considered a same criminal intent determination based on a written record with uncontroverted facts. Because the test for determining same criminal intent is "objective," the court noted it stood in as good a position as the trial court to evaluate whether the crimes involved the same criminal intent. 147 Wn. App. at 562-63

Departure from the settled "abuse of discretion or misapplication of law" standard is unwarranted, and we disaffirm any suggestion that determinations of same criminal conduct are appropriately reviewed de novo.

Instead, we review the sentencing court's determination of Graciano's criminal conduct for abuse of discretion or misapplication of law. Under this standard, when the record supports only one conclusion on whether crimes constitute the "same criminal conduct," a sentencing court abuses its discretion in arriving at a contrary result. *See State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991). But where the record adequately supports either conclusion, the matter lies in the court's discretion. Whether the record "supports" a particular conclusion, of course, may depend on who carries the burden of proof. Thus, it is important to clarify who bears the burden for findings of same criminal conduct.

The Defendant Bears the Burden of Proving Same Criminal Conduct

Engaging in de novo review, the Court of Appeals appeared to place the burden on the State to show Graciano's crimes were separate. It first noted E.R.'s testimony "[wa]s not clear" as to whether the molestations occurred on two occasions "separate and distinct" from the rape on the couch. *Graciano*, slip op. at 9. Because the record failed to establish that these incidents were separate, the court concluded the time and place of these crimes was the same. *Id.*

(quoting *State v. Dunaway*, 109 Wn.2d 207, 216-17, 743 P.2d 1237, 749 P.2d 160 (1987)). While the central question in *Torngren* appeared capable of resolution as a matter of law, where facts are disputed or otherwise uncertain, most determinations of same criminal conduct will involve the court's discretion. *See State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991).

Endorsing this reasoning, Graciano contends the State bears the burden to prove the crimes did *not* occur in one incident. Br. of Appellant at 14. For support, he relies on *State v. Dolen*, 83 Wn. App. 361, 921 P.2d 590 (1996). There, the Court of Appeals required the State to prove that multiple crimes were separate, concluding this was in keeping with the requirement the State prove the defendant's criminal history by a preponderance of the evidence. *Id.* at 365 (citing *State v. Jones*, 110 Wn.2d 74, 77, 750 P.2d 620 (1988)). Because the State failed to prove that the defendant's crimes occurred in separate incidents, the *Dolen* court held the trial court's determination that the crimes were not the same criminal conduct was "unsupported." *Id.*

This reasoning cannot withstand scrutiny. The State's burden to prove the existence of prior convictions at sentencing does not include establishing that *current* offenses—treated as prior convictions for purposes of offender score calculation—constitute separate criminal conduct. These determinations differ in a critical respect: one favors the State, the other the defendant. This distinction matters because, in general, "[t]he burden is on a moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor." *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991).

It is because the existence of a prior conviction favors the State (by increasing the offender score over the default) that the State must prove it. *See* RCW 9.94A.500(1) ("If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found

to exist."); *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002).

In contrast, a "same criminal conduct" finding favors the defendant by lowering the offender score below the *presumed* score. *State v. Lopez*, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007) ("In determining a defendant's offender score . . . two or more current offenses . . . are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct."); *In re Pers. Restraint of Markel*, 154 Wn.2d 262, 274, 111 P.3d 249 (2005) ("[A] 'same criminal conduct' finding is an exception to the default rule that all convictions must count separately. Such a finding can operate *only* to decrease the otherwise applicable sentencing range."). Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct.

The dissent's assertion that the statute is silent or "neutral" as to who bears this burden is simply unsupported by the plain language of RCW 9.94A.589. Same criminal conduct does not have a constitutional dimension and the legislature undoubtedly could have placed the burden of proof on the State, but it did not. Instead, the defendant's offender score "shall be determined by using all other current and prior convictions." RCW 9.94A.589(1)(a). This default method of calculating a defendant's offender score is entirely in the State's favor because it treats all current offenses as distinct criminal conduct. Current convictions are omitted from the offender score only "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct." *Id*. The scheme—and

the burden—could not be more straightforward: each of a defendant's convictions counts toward his offender score *unless* he convinces the court that they involved the same criminal intent, time, place, and victim. *Id.* The decision to grant or deny this modification is within the sound discretion of the trial court and, like other circumstances in which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion.

The Trial Court Exercised Appropriate Discretion in Finding Graciano's Crimes Did Not Constitute the Same Criminal Conduct

Two crimes manifest the "same criminal conduct" only if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* As part of this analysis, courts also look to whether one crime furthered another. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); *see also State v. Garza-Villarreal*, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993).

If the defendant fails to prove any element under the statute, the crimes are not the "same criminal conduct." *Maxfield*, 125 Wn.2d at 402. "[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act." *Porter*, 133 Wn.2d at 181.

Here, we do not need to reach the comparatively more difficult question of whether Graciano's objective intent changed from one crime to the other because the evidence heard by the trial court does not suggest Graciano's crimes were committed at the same time and place. At best, the record is unclear. E.R.'s

testimony discussed various incidents in a disjointed manner, with no suggestion the incidents were continuous, simultaneous, or happened sequentially within a short time frame. The Court of Appeals acknowledged as much, but erroneously relied on the *absence* of facts clarifying whether the incidents on the couch formed the basis for a child rape and both molestation convictions. *See Graciano*, slip op. at 9.

Because Graciano bore the burden to establish each element of same criminal conduct under RCW 9.94A.589(1)(a), and failed to do so as to same time and place, the trial court's refusal to enter a finding of same criminal conduct was not an abuse of discretion.

III

Conclusion

The Court of Appeals incorrectly employed a de novo standard of review for determinations of same criminal conduct. As we have consistently held, a sentencing court's determination of same criminal conduct will not be disturbed absent an abuse of discretion or misapplication of the law. Reviewed under this standard, the sentencing judge acted within her discretion in declining to find Graciano's crimes constituted the same criminal conduct. We reverse the Court of Appeals on this issue and reinstate the sentence imposed by the trial court.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Susan Owens

Justice Steven C. González

Justice Mary E. Fairhurst

Justice James M. Johnson