No. 86530-2

WIGGINS, J. (dissenting) – I dissent from the majority opinion because it incorrectly places the burden of proving same criminal conduct onto the defendant. Majority at 7-10. The majority announces a new rule that departs from prior expectations, that neither party has called for, and that is inconsistent with the policy of the Sentencing Reform Act of 1981. *See* RCW 9.94A.010. Applying the proper rule, the defendant is entitled to a remand for resentencing.

The Majority's Rule Is Unsolicited

Both Julio Cesar Aldana Graciano and the State cited approvingly to *State v. Dolen*, 83 Wn. App. 361, 921 P.2d 590 (1996) (State has the burden of proving separate criminal conduct) in their supplemental briefs. Furthermore, both parties reaffirmed at oral argument that the burden of proof for a determination of same criminal conduct fell on the State.

At oral argument, counsel for Graciano argued that "initially it's the defendant who has to come forward and say the convictions are same criminal conduct, and…the burden shifts to the state to show they're not the same criminal

conduct. . . .” Wash. Supreme Court oral argument, *State v. Aldana Graciano*, No. 86530-2 (May 24, 2012), at 20 min., 52 sec., *audio recording by* TVW, Washington State’s Public Affairs Network, *available at* http://www.tvw.org.

The State agreed that “it’s the State’s burden to prove they were not the same criminal conduct, just because that determination is going to rise from the presentation of evidence, and just as it is the State’s burden to prove the defendant’s criminal history.” *Id.* at 15 min., 27 sec. In other words, there was no dispute between the parties that extant law placed the onus on the State to prove separate criminal conduct, just as the State was required to prove all other matters regarding criminal history and offender scores. *See id.* at 21 min., 11 sec.

Graciano and the State were both correct. As a prerequisite to taking away a defendant’s liberty, we impose procedural protections at both trial and sentencing. In the case of sentencing, RCW 9.94A.500(1) provides that “[i]f 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.” Although this language is neutral on its face, we have interpreted it to place the burden on the State to prove the defendant’s criminal history by a preponderance of the evidence. *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986); *accord State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007); *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002); *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999)[1].

[1] We have further held that the State must prove by a preponderance of the evidence

The legislature acknowledged this reading in its 2008 revisions to the SRA.[2] There, the legislature amended the SRA to make a defendant's silence an acquiescence to alleged criminal history (contravening our holding in *Ford*), and to allow the State to introduce evidence at resentencing of prior convictions not adequately alleged at the initial sentencing (contravening our holdings in *Lopez* and *Cadwallader*). 2008 Final Legislative Report, 60th Wash. Leg., at 84. The legislature could have, but did not, interfere with the basic common thread of all these cases, that is, that "the prosecutor has the burden of proving an offender's criminal history to the court." *Id.* Rather, we noted in *State v. Mendoza*, 165 Wn.2d 913, 924, 205 P.3d 113 (2009), that the legislature's concern was "'to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history'" (quoting Laws of 2008, ch. 231, § 1). We then reaffirmed that this goal was consistent with placing the burden on the State to prove criminal history and to ensure that the record supported the defendant's alleged history. *Id.* at 920. In other words, as the State properly

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the comparability of the defendant's out-of-state convictions, *State v. McCorkle*, 137 Wn.2d 490, 973 P.2d 461 (1999). Our SRA jurisprudence draws the State's burden broadly, with the only exception being that the State need not prove the constitutional validity of prior convictions used in determining criminal history. *Ammons*, 105 Wn.2d at 187-88.

[2] I recognize that these revisions added to the statute the language, "A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein." However, this new language does not change my reading of RCW 9.94A.500. Laws of 2008, ch. 231, § 2(1). By its plain language, it concerns only the initial, prima facie burden of production and does not purport to shift the ultimate burden of persuasion. Indeed, it is perfectly consistent with the burden-shifting regime envisioned by counsel (*see* Wash. Supreme Court oral argument, *supra*, at 20 min., 52 sec.).

conceded at oral argument, it is the State's duty to present an accurate and complete criminal history. And a criminal history that contains too many charges is just as inaccurate as a criminal history that contains too few.

Just as our prior cases require the State to prove the defendant's criminal history, so the State must prove that the defendant's other current offenses should be included in the criminal history by proving that the other current offenses involve separate conduct. The question of same or separate criminal conduct is governed by RCW 9.94A.589, which, like RCW 9.94A.500, addresses calculation of the offender score. RCW 9.94A.589(1)(a) provides that "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," and defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place and involve the same victim." Like RCW 9.94A.500, this language is facially neutral, but it should be read consistently with the burden that we have placed squarely upon the State, an allocation that the legislature has never changed[3]. The issue of same or separate criminal conduct has the singular purpose of factoring into the defendant's offender score. The majority's conclusion that same/separate criminal

[3] The majority argues that our "assertion that the statute is silent or 'neutral' as to who bears the burden is simply unsupported by the plain language of RCW 9.94A.589." Majority at 9. As the majority points out, the legislature could have placed the burden of proof on the State, but it did not. Importantly, however, the legislature did not place the burden of proof on the defendant either. Nowhere in its plain text does the SRA purport to allocate a burden of proof, and in fact the majority does not rely on the plain text, but on its own reasoning that the "default" position of separate criminal conduct implies a burden when a defendant seeks a departure from the default.

conduct is different—that it can be splintered off from the rest of the criminal history calculus—is an invention of the majority. Neither party took the majority's position, neither the superior court nor the Court of Appeals conceived of it, the SRA does not provide for it, and it is antithetical to the SRA's policy goals.

The legislature enacted the SRA to structure discretion in sentencing and to provide sentences "commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010(3). The difficulty is that given the expansive reach of the criminal code, a given course of criminal conduct may potentially be charged as more or fewer offenses. *See State v. Daniels*, 165 Wn.2d 627, 642, 200 P.3d 711 (2009) (Chambers, J., dissenting) ("Over the years, more and more conduct has been criminalized; definitions of crimes often overlap and crimes can be committed by alternative means, in different degrees, and may be aggravated or enhanced. Under current Washington law, the same criminal course of conduct often can result in multiple counts of multiple charges, in multiple potential degrees." (citation omitted)). Thus, in the absence of a judicial check on the multiplicity of offenses, a given defendant's sentence might be determined as much by the number of criminal offenses the prosecutor could identify as by the defendant's actual criminal conduct. This result would contravene the SRA's express purpose of similarly treating similarly situated defendants and would not reduce discretion in sentencing, but merely shift it to the prosecutor.

The majority intuits that a defendant should bear the burden of proving same

criminal conduct because the determination works to the defendant's benefit. This rationale appears nowhere in the statute and fails as a general principle. A verdict of not guilty favors the defendant, yet we do not require that the defendant disprove guilt. Similarly, a finding of an affirmative defense favors the defendant, but we allocate the burden of proof to the State on some affirmative defenses. *See*, *e.g. State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984) (State bears burden of disproving self-defense in an assault case); *State v. McCullum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983) (State bears burden of disproving self-defense in a murder case). *But see State v. Box*, 109 Wn.2d 320, 327, 745 P.2d 23 (1987) (defendant bears burden of proof on insanity defense). Our test for allocating the burden of proof on an affirmative defense is not who benefits, but whether the affirmative defense negates an element of the offense or whether there is a legislative intent to shift the burden. *State v. Camara*, 113 Wn.2d 631, 638, 781 P.2d 483 (1989). Neither the SRA nor its legislative history suggests that the party benefiting from a given finding must bear the burden of proof. The more reasonable reading, given the legislature's acquiescence in our holdings in *Ford*, *Lopez*, and *Cadwallader*, is that the State bears the ultimate burden with respect to all aspects that go to offender score.

Furthermore, bearing the burden of proving separate criminal conduct would not significantly prejudice the State, for two reasons. First, we observed in *Ford* that the State already gathers evidence of a defendant's criminal history "[i]n the normal

course." 137 Wn.2d at 482. Similarly, the State already gathers evidence of a defendant's criminal conduct in the normal course of prosecution. If the evidence is sufficient to prove that two or more charges constituted separate criminal conduct, that evidence should be presented to the sentencing court. If the evidence points to same criminal conduct or is insufficient to discern where one offense ended and the other began, the State should not be entitled to rely on that ambiguity to enhance the defendant's sentence.

Second, Minnesota's experience demonstrates that a sentencing scheme highly analogous to ours, *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 307, 979 P.2d 417 (1999), can work with imposing the burden on the State. In Minnesota courts, the burden of proving multiple crimes that were *not* part of the same behavioral incident falls squarely on the State.[4] *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2004); *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983); *State v. Gilbertson*, 323 N.W.2d 810, 812 (Minn. 1982); *State v. Zuehlke*, 320 N.W.2d 79, 82 (Minn. 1982). The statute is couched in a policy that "protects defendants from both multiple sentences and multiple prosecutions and ensures that 'punishment [is] commensurate with the criminality of defendant[s'] misconduct.'" *Williams,* 608 N.W.2d at 841 (footnote omitted) (quoting *State v. Johnson*, 273 Minn. 394, 399 n.9, 141 N.W.2d 517 (1966)). These policy concerns are no less salient here. We should follow Minnesota in keeping the burden of proof on the State.

[4] Minn. Stat. § 609.035 (outlining the Minnesota "single behavioral incident" rule, which is analogous to our same-criminal-conduct doctrine).

The Court Abused Its Discretion By Not Making a Determination of Same or Separate Criminal Conduct[5]

A trial court abuses its discretion when its decision is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). This means that the decision rests on facts unsupported in the record or is reached by applying the wrong legal standard. *Id.* (citing *State v. Rundquist,* 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). Here, the trial court applied the wrong legal standard. Presented with the issue of same criminal conduct at the sentencing hearing, the court made a summary finding that

> [t]he Instructions were clear that there needed to be separate and distinct acts. And that's – and based on the record of the testimony, that there was certainly sufficient evidence for each and every one of the counts to be separate and distinct.

Verbatim Report of Proceedings (VRP) (Jan. 22, 2010) at 6.

The majority holds that a trial court's determination of same criminal conduct should not be disturbed unless the court abuses its discretion. Majority at 7. But here the trial court never made its own determination of same or separate criminal conduct. Rather, the trial court gave the jury an instruction to "unanimously agree as to which act has been proved beyond a reasonable doubt. The particular act for each count must be separate and distinct from any other count." Clerk's Papers (CP) at 77; *see State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). But this instruction does

[5] Because neither party has raised a jury trial issue under *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) or *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), we do not address the issue.

not encompass the statutory definition of same criminal conduct, namely, the three requirements of same criminal intent, same time and place, and same victim. RCW 9.94A.589(1)(a). Relying on the jury's judgment pursuant to this instruction, the trial court suggested that the jury had already decided separate criminal conduct and held without explanation that the jury's decision was supported by sufficient evidence. In other words, neither the jury (because it was not instructed on the statutory test) nor the sentencing judge (because she deferred to the jury) ever decided that Graciano's offenses were separate criminal conduct as defined by RCW 9.94A.589(1)(a). The trial court had no discretion to adopt a jury determination that was based on an inapplicable instruction.

The trial court further abused its discretion by failing to use the preponderance of the evidence standard to determine same criminal conduct. The SRA mandates that criminal history be proved by a preponderance of the evidence, RCW 9.94A.500(1), and as part of the determination of criminal history, same or separate criminal conduct should be decided by the same test. This is because the purpose of criminal history in the SRA scheme is to determine offender score and thus the standard sentencing range. As a factor that reduces offender score, same criminal conduct is part of the same inquiry. In fact, same criminal conduct is a highly consequential part of the offender score inquiry, with the potential to profoundly affect a defendant's sentence (particularly if the defendant has prior sex offenses, which are trebled under the statute). It would be absurd to hold that the court must determine the existence of criminal history by a preponderance of the evidence and then may apply

a lesser standard in deciding how many offender score points that criminal history actually constitutes. The preponderance of the evidence standard should control the whole of the offender-score inquiry.

Finally, the trial court abused its discretion by evaluating for sufficiency of the evidence rather than making its own determination of same or separate criminal conduct. The majority holds that the trial court has discretion to grant or deny a determination of same criminal conduct. Majority at 10. But the trial court must still make its own decision to grant or deny.[6] The statute vests responsibility for determining same or separate criminal conduct in "the court." RCW 9.94A.589(1)(a). For the trial court to delegate this responsibility to a jury, especially an improperly instructed one, is plainly against the statutory procedure for determining same criminal conduct. And, by taking the jury's determination at face value, the court also contravened the SRA's policy goals of constraining judges' discretion and according equal treatment to similarly situated defendants. RCW 9.94A.010 (the SRA "structures, but does not eliminate, discretionary decisions affecting sentences" and sentences are to "[b]e commensurate with the punishment imposed on others committing similar offenses" (RCW 9.94A.010(3)). In the SRA's statutory scheme,

[6] While the language of RCW 9.94A.589(1)(a) is permissive rather than mandatory ("... *if* the court ...." (emphasis added)), the language is better read to mean that the trial court need not decide same or separate criminal conduct sua sponte, but must still make an affirmative decision, one way or the other, when the defendant places same criminal conduct at issue. Therefore, I would hold that when Graciano raised the issue of same criminal conduct at his sentencing hearing, VRP (Jan. 22, 2010) at 3, the sentencing court was obligated to make its own determination of same or separate criminal conduct by a preponderance of the evidence.

same criminal conduct will often be a major factor in determining the sentencing range. *See* RCW 9.94A.510 (standard ranges escalate with increasing offender score). Therefore, in order to prevent similarly situated defendants from receiving divergent sentences, the determination of same criminal conduct cannot be wholly up to the judge's discretion. It is not enough for the judge to make a summary decision without independent analysis; rather, the statute interposes the preponderance-of-the-evidence test. The trial court contravened both the letter and the spirit of the SRA when it used a sufficient-evidence analysis. While the court may certainly consider the jury's findings in determining same criminal conduct, it may not substitute the jury's determination for its own altogether.

It is entirely possible that the trial judge believed Graciano's acts constituted separate criminal conduct. We cannot be certain because the trial judge did not state her own reasoning on the record. Because the trial court analyzed only the sufficiency of the evidence, we cannot determine whether it would have found same criminal conduct by a preponderance of the evidence. Therefore, I would remand this case to the trial court to make a specific finding of same or separate criminal conduct. If the judge finds by a preponderance of the evidence that Graciano's charges of child molestation and rape of a child were the same criminal conduct, or determines there was insufficient proof either way, then Graciano is entitled to resentencing with a corrected offender score.[7] If the judge finds by a preponderance of the evidence that

[7] Graciano's offender score was calculated as 15. CP at 118. Even if Graciano's two child molestation convictions merge into his four rape-of-a-child convictions, the minimum offender score he could have is 9—three for each of his concurrent

Graciano's crimes constituted separate criminal conduct, then his sentence is valid.

Graciano's crimes were undoubtedly very serious—not only in the profound harm he inflicted upon E.R., but also his abuse of his family's trust. But punishing him accordingly does not demand of us a holding that neither party asked for and that actually contravenes both parties' understanding of the SRA. Nor does it require us to put the onus of an unclear record on the defendant. The clearer rule, and the one more consistent with the policy of the SRA, is to make the State responsible for the entirety of the criminal history issue.

convictions, under RCW 9.94A.525(17). Because 9 is the highest offender score contemplated by the SRA, RCW 9.94A.510, it could be argued that any sentencing error was harmless; a defendant with an offender score of 15 is situated equally to a defendant with an offender score of 9. *See State v. Bobenhouse*, 166 Wn.2d 881, 896, 214 P.3d 907 (2009). But in the present case, the court sentenced Graciano to the maximum term within the standard range—318 months to life on each count of rape of a child, and 198 months to life on each count of child molestation. CP at 121. The court may have decided differently if Graciano's offender score had been calculated correctly at 9.

I dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:

Justice Charles W. Johnson