NO. 101216-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,
v.

JAMES BERNHARD,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Alexander Ekstrom, Judge

ANSWER TO STATE'S CROSS-PETITION FOR REVIEW

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A. CROSS-PETITIONER AND COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals' decision in State v. Bernhard, 37665-6-III (Op.), filed July 28, 2022, as to the claim of error at sentencing. Review is not warranted.

B. ISSUE PRESENTED

In the Court of Appeals, Mr. Bernhard argued that defense counsel was ineffective at sentencing for failing to argue that his offenses were same criminal conduct. The Court of Appeals agreed. Does this decision warrant this Court's review under RAP 13.4(2)(b)? (No. The Court of Appeals decision on the sentencing issue is consistent with decades of settled precedent. It is the State's novel theory that would create a conflict.)

C. STATEMENT OF THE CASE

As noted in the petition for review, the State argued Mr. Bernhard committed the second-degree assault in any of three ways: by poisoning Mrs. Bernhard with a dangerous dose of

insulin, by penetrating her vagina with an object that caused lacerations and severe bleeding, or by assaulting her with the intent to commit second-degree rape. See RP 1760-1766.

Consistent with that argument, the jury was instructed that it could convict Mr. Bernhard of second-degree assault only if it found he either:

> (a) intentionally assaulted [Mrs. Bernhard] and thereby recklessly inflicted substantial bodily harm on [her]; or
>
> (b) administered or caused to be taken by [Mrs. Bernhard] a poison or a destructive or noxious substance with intent to inflict bodily harm on [her]; or
>
> (c) assaulted [Mrs. Bernhard] with intent to commit Rape in the Second Degree.

CP 160. By special verdict form, the jury found alternatives (a) and (c) had been proved, but it unanimously rejected the second alternative. CP 189.

The special verdicts indicate the jury believed Mr. Bernhard committed the rape and the assault simultaneously.

But defense counsel did not argue at sentencing that Mr. Bernhard's offenses constituted the same criminal conduct. See RP 1845-89.

Treating the convictions as separate criminal conduct massively inflated Mr. Bernhard's offender score.[1] The Court of Appeals correctly held that a same criminal conduct argument

[1] The trial court found Mr. Bernhard had an offender score of 5 for count II (second-degree rape) and 3 for count III (second-degree assault). CP 207. Consistent with that calculation, the court imposed a standard range sentence of 126 months for the rape, to run concurrently with a 15-month term for the assault but consecutively to a 24-month sexual motivation enhancement, for a total of 150 months. CP 207; RP 1885.

Three of the points on each count reflect the requirement in RCW 9.94A.525(17) to add three points for each prior sex offense, when imposing a sentence for another sex offense. See RCW 9.94A.030(47)(c) ("sex offense" includes felony with a finding of sexual motivation). The additional two points on count II reflect the requirement in RCW 9.94A.525(21)(a) to add two points for a prior conviction of second-degree assault with a domestic violence finding, when imposing a sentence for another domestic violence offense. See RCW 10.99.020(4) ("domestic violence" includes second-degree assault committed against a family or household member).

would likely have succeeded, and that Mr. Bernhard therefore received ineffective assistance of counsel and was entitled to resentencing.

The Court of Appeals' analysis is consistent with decades of precedent. The State's arguments to the contrary misstate the law.

D. REASONS THIS COURT SHOULD DENY THE STATE'S CROSS-PETITION FOR REVIEW

The State contends Division Three's determination of the sentencing issue conflicts with a published decision of the Court of Appeals, and therefore warrants review under RAP 13.4(b)(2). State's Ans. and Cross-Pet. at 17. The State is incorrect. Division Three's decision is consistent with longstanding precedent from this Court and all three divisions of the Court of Appeals. There is no conflict to resolve.

1. The State argues two offenses can never be "same criminal conduct" if they do not entail identical statutory *mens rea* elements; this theory conflicts with decades of settled precedent.

The State argues that offenses can never be "same criminal conduct" if they involve different statutory mental states. State's Ans. and Cross-Pet. at 15, 17-18, 21-23. The State contends the rape and assault convictions at issue here cannot be same criminal conduct because assault requires intent while rape does not. State's Ans. and Cross-Pet. 21-23. The Court of Appeals correctly rejected this argument, explaining that "intent" in the context of the same criminal conduct analysis, "is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." Op. at 29.

This holding by Division Three is consistent with long-settled precedent from this Court and all three divisions of the Court of Appeals. State v. Garza-Villarreal, 123 Wn.2d 42, 48-

49, 864 P.2d 1378 (1993) (same criminal conduct has "three elements: the same objective criminal intent (*which can be measured by determining whether one crime furthered another*), same time and place, and same victim") (emphasis added); State v. Latham, 3 Wn. App. 2d 468, 479, 416 P.3d 725 (2018) (Division Three) (for purposes of same criminal conduct analysis, "[c]rimes may involve the same criminal intent if they were party of a continuing, uninterrupted sequence of conduct"); State v. Kloepper, 179 Wn. App. 343, 356-57, 317 P.3d 1088 (2014) (Division Three) ("[i]ntent, [under State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987),] is not the particular *mens rea* element of a particular crime, but rather is the offender's objective criminal purpose") (internal quotations omitted); State v. Phuong, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013) (Division One) ("Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the

crime") (internal quotations omitted); State v. Taylor, 90 Wn. App. 312, 321, 950 P.2d 526 (1998) (Division Two) ("[w]hen determining if two crimes share a criminal intent, we focus on (1) whether the defendant's intent, viewed objectively, changed from one crime to the next and (2) whether commission of one crime furthered the other").

Indeed, if the State's theory were correct, trial courts would almost always be precluded—as a matter of law—from finding that two different statutory offenses constituted same criminal conduct. See State's Ans. and Cross-Pet. at 23 ("Since assault requires a mental state while rape does not, they do not constitute 'same criminal conduct' for purposes of RCW 9.94A.589(1)(a).") This is plainly contrary to decades of precedent. E.g., Dunaway, 109 Wn.2d at 217 (kidnapping and robbery of single victim were same criminal conduct); Phuong, 174 Wn. App. at 546-48 (trial counsel ineffective for failing to argue that rape and unlawful imprisonment constituted same

criminal conduct); Taylor, 90 Wn. App. at 320-22 (trial court abused its discretion by finding assault and kidnapping were not same criminal conduct); State v. Anderson, 72 Wn. App. 453, 463-64, 864 P.2d 1001 (1994) (Division One) (assault and escape were same criminal conduct); see Garza-Villarreal, 123 Wn.2d at 48-49 (two counts of possession with intent to deliver were same criminal conduct even though each arose from possession of different substance); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992) (conducting factual analysis of defendant's crimes to determine whether burglary and subsequent kidnapping reflected single unifying intent). To agree with the State's interpretation of "same criminal conduct," this Court would need to overturn roughly 30 years of case law.

In support of its novel theory, the State cites three cases: State v. Brown, 100 Wn. App. 104, 995 P.2d 1278 (2000); Kloepper, 179 Wn. App. 343, and State v. Hernandez, 95 Wn.

App. 480, 976 P.2d 165 (1999). None of these cases indicates a conflict among the divisions.

In Brown, the defendants did not argue that their offenses constituted "same criminal conduct." 100 Wn. App. at 111. Instead, they advanced the novel theory that "their offenses *nearly* satisfy the 'same criminal conduct' exception" to standard offender scoring, under former RCW 9.94A.400(1)(a), and that they should therefore escape the consecutive sentencing rule applicable to "separate and distinct" serious violent offenses under former RCW 9.94A.400(1)(b). Brown, 100 Wn. App. at 111-13 (emphasis added). The Court of Appeals rejected this argument in a statutory analysis concluding that "crimes which do not meet the 'same criminal conduct' exception are necessarily 'separate and distinct.'" Id. at 113-15.

Consistent with the defendant's argument in that case, the question of what constitutes "same criminal conduct" was simply not at issue in Brown. Id. at 111-15. Thus, contrary to the State's

argument here, Brown does not "control" the outcome in Mr. Bernhard's case or any other case raising a same criminal conduct claim.

Kloepper addresses a "same criminal conduct" analysis, but it is readily distinguishable from Mr. Bernhard's case. In Kloepper, the defendant broke into the victim's apartment and repeatedly struck her in the head with a metal bar. 179 Wn. App. at 347. The two struggled for a while; when the victim asked the defendant why he was attacking her, he responded, "'[B]ecause Obama was elected president.'" Id. (alteration in original). After he made that comment, the victim told the defendant that "if he was there to rape her, 'just get it over with.'" Id. The defendant then attempted to rape the victim with his penis, was unable to, and instead raped her with his fingers. Id.

The trial court conducted a "same criminal conduct" analysis and concluded the defendant originally intended only to assault the victim, and that "the rape [w]as a crime of opportunity

that presented itself after the assault rather than as the object of the attack." Id. at 358. The Court of Appeals affirmed that conclusion, reasoning that it was nether compelled by the evidence nor an abuse of discretion. Id. at 357-58.

Unlike the rape and assault at issue in Kloepper, the rape and assault at issue in Mr. Bernhard's case presumptively stem from the same act. See BOA at 53-56. And unlike the defendant in Kloepper, Mr. Bernhard was never given an opportunity to argue this to the trial court. Thus, Kloepper's holding is entirely distinguishable. To the extent its reasoning is relevant to Mr. Bernhard's case, it supports his argument for a new sentencing hearing. See supra at 6 and BOA at 60 (both citing Kloepper for the principle that "intent," for purposes of same-criminal-conduct analysis, is not determined by statutory *mens rea*).

The State is correct that this longstanding test cannot be reconciled with Division Two's 25-year-old opinion in Hernandez, 95 Wn. App. 480. But Hernandez was a poorly

reasoned decision that has long been abandoned. It does not indicate the current state of the law.

In Hernandez, the Court of Appeals held that one count of possession with intent to deliver and one count of simple possession were not same criminal conduct because the first offense has an intent element while the second does not. Id. at 484-86. The Hernandez decision recognized—at length—that its interpretation of the same criminal conduct statute *achieved an absurd result*, punishing more harshly a first-time offender who commits a single count of possession with intent to sell and a single count of simple possession, than a first-time offender who commits multiple counts of possession with intent to sell (a more serious offense than simple possession). Id. at 485-86. But it found this result compelled by the statute's ostensible "plain language." Id.

Perhaps because it affirmed an exercise of the trial court's discretion, Hernandez appears never to have been explicitly

overruled. But it was almost immediately abrogated by this Court's analysis in State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994) (disapproving interpretation of same criminal conduct statute that would permit harsher punishment for buyer of two separate drugs, in single transaction, than for seller). Hernandez has not won out over time: it is long-dead letter.

As evidenced by the authority cited above, there is no conflict among the Divisions on the "intent" prong of the same criminal conduct analysis. The issue does not merit this Court's review.

2. The State asserts that an assault and a rape cannot be same criminal conduct unless they inhere in the same act of penetration; this theory conflicts with longstanding precedent from this Court and the Court of Appeals.

Mr. Bernhard appreciates the State's concession that he was convicted of the assault based on injuries to Mrs. Bernhard's vagina. State's Ans. and Cross-Pet. at 20 (citing RP 807) ("Moreover, the substantial bodily harm supporting the charge of

assault in the second degree consisted of lacerations to the outside of the vagina . . . ") As Mr. Bernhard noted in his briefing to the Court of Appeals, the jury unanimously rejected the State's theory that he assaulted Mrs. Bernhard by administering insulin, returning special verdicts consistent with a finding that the rape and assault stemmed from the same act of rape. BOA at 55-56.

But the State incorrectly asserts that the injuries in question "were external lacerations not penetrating the vagina," and are therefore "separate from the rape," as a matter of law, for purposes of the same criminal conduct analysis. State's Ans. and Cross-Pet. at 20 (citing RP 807).

In fact, the State's expert witness testified that Mrs. Bernhard had two minor external lacerations, very close to the opening of the vagina, and two internal lacerations. RP 777-83, 789-90. He opined that the internal injuries did not result from a fall, that disconnected tears indicate "separate issues," and that

the longer of the two internal tears likely resulted from "an object non-accidentally placed in the vagina." RP 806-07.

Assuming the vaginal tears resulted from separate points of contact, the evidence indicated they occurred in a continuous, unchanging course of conduct constituting a second-degree rape—*and this is exactly what the State argued in closing*. See RP 1753-55, 1768. That is dispositive for purposes of the same criminal conduct analysis.

Even if the State had obtained *multiple* rape convictions based on this evidence, the trial court would be legally bound to sentence them as same criminal conduct. State v. Tili, 139 Wn.2d 107, 122-25, 985 P.2d 365 (1999) (trial court abused its discretion by concluding that three first-degree rapes were "separate and distinct" offenses; where testimony indicated they occurred over the course of a couple of minutes and as part of "continuous, uninterrupted . . . pattern of conduct," three offenses were "same criminal conduct" for sentencing purposes); State v.

Palmer, 95 Wn. App. 187, 191-92, 975 P.2d 1038 (1999) (oral rape and attempted anal rape were same criminal conduct because they occurred in short succession with no evidence of change in "objective criminal intent"); accord State v. Mutch, 171 Wn.2d 646, 653-55, 254 P.3d 803 (2011) (concluding five rape counts were not same criminal conduct where they occurred over the course of entire night and next morning, separated by many opportunities for renewed criminal intent, but *affirming analysis applied in* Tili *and* Palmer).

Again, the State's reading of the same criminal conduct statute conflicts with decades of settled precedent. While there is no current conflict to resolve, adopting the State's theory would create one.

E. CONCLUSION

The Court of Appeals properly resolved the sentencing issue. Accepting review of that issue would not resolve a conflict among the divisions. Instead, to agree with the State's novel same criminal conduct theory, this Court would have to overrule 30 years of precedent.

I certify that this document was prepared using word processing software and contains 2,548 words excluding the parts exempted by RAP 18.17.

DATED this 11th day of October, 2022.

Respectfully submitted,

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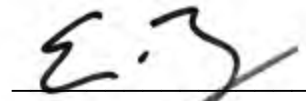

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