NO. 45473-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHANARA SOEUN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 13-1-01061-7

BRIEF OF RESPONDENT

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

1. Should defendant's claim that the sentencing court abused its discretion in refusing to score the three felonies he committed in 2007 as same criminal conduct be rejected since defendant failed to meet his threshold burden of production by neglecting to produce a transcript of the trial where the conduct underlying his claim was proved?

2. Has defendant also failed to show the sentencing court abused its discretion in separately scoring each of defendant's three 2007 felonies as they were separately scored by the court that calculated defendant's sentence for them when the limited record available does not prove they encompassed the same criminal conduct?

B. STATEMENT OF THE CASE.

1. Procedure

On March 14, 2013, the Piece County Prosecuting Attorney (State) charged Chanara Soeun (defendant) with one count of first degree robbery. CP 1. Trial began on September 4, 2013, before the Honorable

James Orlando. 1RP 38.[1] The jury could not reach verdict on count I, first degree robbery, but found defendant guilty of the lesser included charge of second degree robbery. CP 15-16.

A hearing to determine defendant's sentence was held on October 4, 2013. 2RP 259-73. Defendant argued the double jeopardy claim raised in his sentencing memorandum before the sentence was imposed. 2RP 261-62, 265-66; CP 40-43. The memorandum maintained defendant's first degree theft, first degree robbery, and third degree assault convictions from 2007 should have merged into the first degree robbery conviction and therefore only count as one prior offense in defendant's offender score. CP 40-43. The memorandum did not raise same criminal conduct under RCW 9.94A.525(5) as an alternative basis for scoring those felonies as one point. CP 40-43. Nor did defendant provide the court any record of the underlying offenses other than an uncited recitation of facts presumably derived from this Court's unpublished decision in ***State v. Soeun***, 2008 WL 3319819 (Div.II). Defendant also failed to provide a transcript of the 2007 sentencing proceeding necessary to determine whether a same criminal conduct analysis was conducted as to the 2007 offenses.

[1] The State will refer to the verbatim report of proceedings by the volume number followed by the page number.

Defendant untimely[2] raised same criminal conduct as an alternative theory for reducing his offender score for the first time in oral argument after the sentencing court rejected his position on merger. 2RP 264-66. The court found defendant's same criminal conduct argument equally unpersuasive from the incomplete record before it.[3] 2RP 264-66. The court found defendant's offender score to be a six, and imposed a standard range sentence of 40 months confinement. CP 47, 50.

On October 9, 2013, defendant filed a timely notice of appeal. CP 57.

2. Facts

On March 13, 2013, Young Park was working at the convenience store she owned with her husband. 1RP 40-42. Defendant entered the store and demanded money as he walked toward her with a hand in his pocket and a hood pulled over his head in a way that concealed his face. 1RP 40-42. Park opened the cash register and gave him some cash, to which defendant replied "got any more money?" 1RP 42. Park replied that she did not and defendant went to his car and drove away. 1RP 42.

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[2] CR 6(d)

[3] Defendant failed to provide a copy of the transcripts from the 2007 case already prepared for appeal in that case. The citations to the 2007 opinion and Judgment and Sentence were provided from the State's memorandum regarding sentencing. The sentencing court *sua sponte* reviewed the information, court's instruction to the jury, questions from the jury, and verdict forms, yet recognized "I[t] d[id]n't have the complete trial record." RP 264-65; CP 96-97, 100-129.

Park immediately called the police whose investigation led them to defendant's residence. As Pierce County Sheriff's Deputy Walter Robinson approached defendant's residence defendant exited the house with a roll of money in his hand, walked up to Deputy Robinson, and said "I did it." 1RP 125. Deputy Robinson placed defendant under arrest and, after being advised of his constitutional rights, defendant gave a statement to Deputy Robinson admitting that he robbed the convenience store. 1RP 130.

C. ARGUMENT.

1. DEFENDANT'S CLAIM THAT THE SENTENCING COURT ABUSED ITS DISCRETION IN REFUSING TO SCORE THE THREE FELONIES DEFENDANT COMMITTED IN 2007 AS SAME CRIMINAL CONDUCT SHOULD BE REJECTED BECAUSE DEFENDANT FAILED TO MEET HIS THRESHOLD BURDEN OF PRODUCTION BY NEGLECTING TO PRODUCE A TRANSCRIPT OF THE TRIAL WHERE THE CONDUCT UNDERLYING HIS CLAIM WAS PROVED.

A sentencing court's finding that some of a defendant's prior offenses encompass same criminal conduct alters the standard range of a pending sentence, for those offenses are counted as one crime instead of multiple crimes in the calculation of the defendant's offender score. RCW 9.94A.525(5); RCW 9.94A.589(1)(a).

The defendant bears the burden of production and persuasion as to each element of the same criminal conduct under RCW 9.94A.589(1)(a). ***State v. Graciano***, 176 Wn.2d 531, 538-41, 295 P.3d 219 (2013). "[E]ach

of defendant's convictions [therefore] counts toward his offender score unless he convinces the court that they involved the same criminal intent, time, place, and victim." *Id.* at 540. "[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act." *Id.* (*citing* ***State v. Porter***, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)). A sentencing court therefore cannot abuse its discretion in refusing to enter a finding of same criminal conduct where the record is unclear. *Id.* at 541.

Defendant raised the applicability of the same criminal conduct exception to the general scoring rule for the first time at the sentencing hearing, and only after the double jeopardy challenge to the offender score briefed in his memorandum failed to persuade the court. 2RP 264-66; CP 40-43. Defendant did not provide the sentencing court a transcript of the trial where the facts underlying the 2007 convictions were adduced. Defendant also failed to provide a transcript of the sentencing hearing where the court allegedly failed to conduct a same criminal conduct analysis. The State supplemented the record with this Court's unpublished opinion affirming those convictions; however, the statement of facts contained therein was not drafted to support a same criminal conduct analysis as that level of detail was not necessary to resolve the procedural

issues decided by that case.[4] The State also produced the 2007 Judgment and Sentence, which refuted defendant's same criminal conduct claim by establishing the sentencing court that considered the challenged convictions in 2007 also counted them separately as other current offenses.[5] CP 132-36.

The sentencing court did the best it could to provide defendant a hearing on the untimely raised same criminal conduct challenge to his offender score. It reviewed the information, court's instruction to the jury, questions from the jury, and verdict forms, yet nevertheless appreciated its ability to accurately analyze the issue was compromised by defendant's failure to provide "[t]he complete trial record." 2RP 265. That record was essential to defendant proving the 2007 convictions encompassed same criminal conduct. It would have presumably provided comprehensive evidence of how each act occurred in the context of all others. It would have also informed the court as to whether a same criminal conduct analysis had already been performed at sentencing for the 2007 offenses. That information was peculiarly necessary in this case as defendant urged the court to apply the narrowly construed same criminal conduct exception

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[4] ***Soeun***, 2008 WL 3319819 held counsel was not ineffective for stipulating CrR 3.5 hearing was unnecessary and for failing to move for a mistrial based on a detective's testimony.

[5] The 2007 Judgment and Sentence states that defendant has four juvenile convictions, which are calculated at half a point each for a total of two points. RCW 9.94A.525(9). The 2007 robbery conviction is calculated as two points and the assault and theft convictions are calculated as one point each, for a total of six points. CP 132-33.

to prior offenses decided by a different tribunal, which, unlike the sentencing court, had been exposed to the underlying conduct proved at trial.

It would have been an abuse of discretion for the sentencing court to enter a finding of same criminal conduct based on the inadequate record before it. First, because its ruling may have contradicted a 2007 ruling that same criminal conduct did not apply. Second, the evidence of the underlying conduct remained at least unclear, which means defendant did not carry his burden of production. RCW 9.94A.589(1)(a)'s "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." ***State v. Graciano***, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). "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.* Defendant cannot fairly blame the sentencing court for reaching the conclusion it did given defendant's burden of production and decision not to provide the court any evidence or authority in support of his claim. *See e.g.,* ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***State v. Elliott***, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (Arguments that are not supported by references to the record, meaningful analysis, or citation to pertinent authority need not be considered); ***Colorado Structures v. Blue Mountain Plaza***, 159 Wn.

App. 654, 660, 246 P.3d 835 (2011) ("It is impossible for a trial court to abuse discretion it was never called upon to exercise."). This assignment of error should be rejected as inadequately presented for review.

2. DEFENDANT ALSO FAILED TO SHOW THE SENTENCING COURT ABUSED ITS DISCRETION IN SEPARATELY SCORING EACH OF HIS THREE 2007 FELONIES AS THEY WERE SEPARATELY SCORED BY THE COURT THAT CALCULATED DEFENDANT'S SENTENCE FOR THEM BECAUSE THE LIMITED RECORD AVAILABLE DOES NOT PROVE THEY ENCOMPASSED THE SAME CRIMINAL CONDUCT.

Multiple current offenses are presumptively counted separately unless the trial court finds that the current offenses encompass the "same criminal conduct." RCW 9.94A.589(1)(a). 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. ***State v. Graciano***, 176 Wn.2d at 536; ***State v. Vike***, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). A defendant bears the burden to establish each element of same criminal conduct. ***State v. Graciano***, 176 Wn.2d at 536. RCW 9.94A.589(1)(a) is construed narrowly to disallow most claims that multiple offenses constitute the same criminal act. *Id.* at 540. Deciding whether crimes encompass the same criminal conduct involves determinations of fact by the sentencing court that will not be reversed absent an abuse of discretion. *Id.* at 536. A court abuses its discretion if its

decision is based on clearly untenable or manifestly unreasonable grounds. ***State v. Martinez-Lazo***, 100 Wn. App. 869, 872, 999 P.2d 1275 (2000) (*citing* ***State v. Olmsted***, 70 Wn.2d 116, 119, 422 P.2d 312 (1966)). A court does not abuse its discretion in refusing to enter a finding of same criminal conduct when the record the defendant bears the burden to produce remains unclear. ***State v. Graciano***, 176 Wn.2d at 541.

Defendant bore the burden to come forward with sufficient facts to warrant an exercise of the court's discretion on his behalf. ***State v. Hoffman***, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). Because defendant failed to adduce pertinent portions of the trial record in support of his claim, it must be analyzed from a statement of facts included in an unpublished decision that was not drafted for that purpose. The decision summarized the facts underlying the 2007 convictions as follows:

> On June 11, 2006, Eli and Carrie Adamson left their residence in a relative's truck to go to a hardware store. After they left, defendant stole their Honda Accord that was parked in their driveway. A neighbor watched defendant steal the car, and called the Adamsons on their cellular phone. Carrie Adamson turned the truck around, while Eli Adamson spoke with police on their cellular phone.
>
> On their way home, the Adamsons passed defendant driving their Honda towards them in the opposite lane. Carrie Adamson turned the truck around again, followed defendant into a cul-de-sac, and pulled the truck up next to the Honda when defendant parked it in front of his residence. Eli Adamson got out of the truck, yelled at defendant to get out of the car, pulled open the driver's side door, and grabbed defendant by his hair. Defendant then shifted the Honda into reverse and stepped on the gas pedal.

> The moving Honda pulled Eli Adamson under it and ran over his ankle while he managed to pull defendant from the driver's seat of the car. The Honda made two revolutions in reverse, running over Eli Adamson's torso and coming to a stop when it hit a telephone pole. Defendant fled the scene and was subsequently apprehended.

State v. Soeun, 2008 WL 3319819 (Div.II) at 1; *See also* CP 66.

a. The vehicle theft completed at the Adamson residence when its owners were away did not encompass the same criminal conduct as the robbery and assault defendant subsequently committed against Eli Adamson near defendant's residence because the offenses occurred at different times and places and apparently involved different victims.

A person commits the crime of theft when he or she "wrongfully obtains or exerts unauthorized control over the property or services of another...with intent to deprive him or her of such property...." RCW 9A.56.020(1)(a). Whereas a person commits the crime of robbery when he or she "unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone." RCW 9A.56.190. If a person inflicts bodily injury in committing the crime, he or she is guilty of first degree robbery. RCW 9A.56.200(1)(a)(iii). A person is guilty of third degree assault if he or she, "with criminal negligence, causes bodily harm

to another person by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(d).

Defendant failed to show the theft occurred at the same place and time as the robbery and assault. The available record shows the theft was completed when defendant took the vehicle from the Adamsons' residence. ***State v. Soeun***, 2008 WL 3319819 (Div.II) at 1. The Adamsons were not home to confront defendant at the time, so he encountered no resistance as he illegally took exclusive control of their vehicle and drove it away. *Id.* He continued in that exclusive possession as he drove it for an unknown distance along a public road to his residence located on a cul-de-sac some distance away. *Id.* The record is silent as to whether he stopped somewhere he could have hidden the vehicle along the way. He was neither immediately nor continuously pursued from the location where the theft was committed to the distant location where he was eventually confronted. The pursuit did not begin until the Adamsons fortuitously saw defendant as he drove past them in the opposite lane on his way home. The record is silent as to how long after the theft that chance encounter occurred.

The incomplete record provided does not specify how much time separated each event, as the trial record might have; it is nonetheless clear that adequate time passed for several significant acts to transpire: (1)

defendant's theft of the car; (2) the neighbor's call to the Adamsons; (3) the Adamsons' call to the police; (4) the Adamsons' change of direction; (5) the Adamsons' travel back to the vicinity of their home; (6) the Adamsons' observation of defendant in the opposite lane of travel; (7) the Adamsons' second change of direction; (8) the Adamsons' pursuit; (9) the Adamsons parking; (10) Eli Adamson[6] exiting the vehicle he was in; (11) Eli Adamson demanding defendant exit the stolen vehicle and; the subsequent struggle between defendant and Eli Adamson.

Defendant relies on ***State v. Truong*** and ***State v. Handburgh*** to argue that a single continuous robbery occurred when defendant stole the Honda from the Adamsons' driveway. 168 Wn. App. 529, 277 P.3d 74 (2012); 119 Wn.2d 284, 830 P.2d 641 (1992); Brief of appellant at 10, 12. However, ***Truong*** and ***Handburgh*** are clearly distinguishable from the case at hand. In both cases, the thefts were not actually completed before escalating to robberies because the defendants in both cases were immediately confronted before they had the opportunity to flee the original scene of the crime without encountering the escalating resistance.

In ***Truong***, the defendant and a group of her friends were riding a bus when the defendant grabbed an MP3 player from the victim's lap and

[6] The Adamsons will often be referred to by their first names for the purpose of clarity. No disrespect is intended.

passed it to one of her friends. ***State v. Truong***, 168 Wn. App. at 532. The victim confronted the defendant and her friends, and when they refused to return the MP3 player, a fight ensued. *Id.* The Court of Appeals affirmed the defendant's conviction for robbery, finding that her use of force "almost immediately after [the victim]...tried to get [her MP3 player] back" supported the conclusion that the defendant used force to overcome the victim's efforts to resist the taking. *Id.* at 539.

Likewise, in ***Handburgh***, the victim left her bicycle unattended for several minutes while inside a recreation center, and when she returned she found the defendant riding it. ***State v. Handburgh***, 119 Wn.2d at 286. The defendant refused to return the bicycle, and verbally threatened the victim before he physically assaulted her. *Id.* The Court held that the use of force against the property owner for the purpose of retaining the bicycle constituted robbery. *Id.* at 293.

Here, unlike in ***Truong***, defendant stole the vehicle outside the presence of its owners and removed it from the scene while its owners were too far away to immediately defend against the theft. The pursuit that followed occurred after defendant exerted exclusive control over the vehicle over some substantial time and distance. Unlike in ***Handburgh***, defendant waited until the Adamsons had left their residence, presumably assuming that they would not return for a significant period of time. ***State***

v. Soeun, 2008 WL 3319819 (Div.II) at 1. Defendant was only confronted by the Adamsons when they coincidentally drove past him on their way home. *Id.* The use of force did not occur immediately after the theft of the vehicle, unlike in ***Truong*** and ***Handburgh***, but rather after defendant had already driven the vehicle to his residence. *Id.*

Finally, the limited record available makes it reasonable to conclude that both Eli and Carrie Adamson owned the Honda and were thus both victims of the theft; whereas only Eli was a victim of the robbery and assault.

In ***State v. Dunaway***, our State Supreme Court held that crimes involving multiple victims must be treated as separate for purposes of calculating a defendant's offender score. 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Thus, "two crimes could not be the same criminal conduct if one involves two victims and the other only involves one." ***State v. Davis***, 90 Wn. App. 776, 782, 954 P.2d 325 (1998); *see also* ***State v. Davison,*** 56 Wn. App. 554, 558, 784 P.2d 1268 (1990).

Because defendant failed to meet his burden of production and failed to adequately provide a record which would resolve the question of vehicle ownership, an inference can be made that both Eli and Carrie were victims of the theft because the stolen Honda belonged to both of them while only Eli was a victim of the robbery and assault because he was the

only one injured during the struggle with defendant. Thus, the theft and robbery do not encompass the same criminal conduct, as the robbery and assault only had one victim while the theft had two.

Defendant's argument—that the robbery and theft constitute the same criminal conduct because the robbery was an ongoing act that began in the Adamsons' driveway and ended at defendant's residence—fails, as the theft was completed before the robbery occurred, and the crimes did not occur in the same time and place and did not apparently involve the same victims.

b. Defendant failed to prove the robbery and assault encompassed the same criminal conduct from the incomplete record provided as it remains unclear how much time and distance separated each injury or how the criminal negligence involved in leaving a running vehicle in a condition to inadvertently run over someone would further the robbery.

A person is guilty of third degree assault if he or she, "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(d). A person commits the crime of robbery when he or she "unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of

immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone." RCW 9A.56.190.

Based on defendant's failure to provide a complete record of the relevant facts the exact time and distance isolating the conduct underlying the robbery and assault remain unclear. The available record does establish that defendant was parked in front of his residence when Eli Adamson approached him. ***State v. Soeun***, 2008 WL 3319819 (Div.II) at 1. Defendant shifted the vehicle into reverse when Eli grabbed him and completed the robbery when he drove the car of Eli's ankle. *Id.* It is not clear how long after that robbery was completed that Eli managed to pull defendant from the vehicle, or how far the vehicle had traveled from the location where the robbery occurred by that time. *Id.* The record also does not provide adequate information about whether the two men remained stationary or moved to a different location as they struggled. There is also no way of discerning the circumference or duration of each of the two revolutions the vehicle completed before running over Eli's torso.

Beyond the uncertainty associated with the physical and temporal distance between the conduct underlying the robbery and the conduct underlying the assault, the available record is silent regarding the evidence adduced at trial in support of the criminal negligence *mens rea* element of third degree assault. CP 117. Criminal intent is the same for two or more

crimes when the defendant's intent, viewed objectively, does not change from one crime to the next, such as when one crime furthers another. ***State v. Lessley***, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). "Intent, in this context, is not the *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." ***State v. Adame***, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Courts narrowly construe the statutory language to disallow most assertions of the same criminal conduct. ***State v. Price***, 103 Wn. App. 845, 855, 14 P.3d 841 (2000).

Criminal negligence requires proof defendant failed to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation. CP 117; WPIC 10.04. Lawful conviction for third degree assault therefore requires some proof defendant failed to seize a reasonable opportunity to make the vehicle safe before Eli Adamson was injured by it. And there is no obvious way in which defendant advanced his goal of robbery by leaving an unattended vehicle in a condition that caused it to inadvertently run over someone. For robbery involves the criminal intent to take physical property by force, not abandon property in any way that transforms it into a public hazard. CP 113. Without clarity as to the

relevant chain of events separating the robbery from the assault a trial court could not reasonably find defendant proved the two offenses amounted to same criminal conduct. For where the record is unclear, as it is in this case, the sentencing court does not abuse its discretion in refusing to enter a finding of same criminal conduct. *See* ***State v. Graciano***, 176 Wn.2d at 541.

D. CONCLUSION.

Defendant's claim that the sentencing court abused its discretion in refusing to score the three felonies he committed in 2007 as same criminal conduct should be rejected because defendant failed to meet his threshold burden of production. Furthermore, defendant has failed to show the sentencing court abused its discretion in separately scoring the 2007 felonies when the limited record available did not show that they encompassed the same criminal conduct. For the foregoing reasons, the

State respectfully requests this Court to affirm defendant's conviction and sentence.

DATED: JUNE 3, 2014

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Rule 9

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