Supreme Court No. 91448-6
COA No. 45473-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHANARA SOEUN,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

A. IDENTITY OF PETITIONER/DECISION BELOW

Chanara Soeun requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Soeun, No. 45473-4-II, filed February 18, 2015. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals affirmed the trial court's finding that Mr. Soeun's two prior convictions for theft and robbery did not encompass the same criminal conduct based on the Court of Appeals' conclusion that the theft may have occurred when Mr. Soeun took the car, and the robbery may have occurred when he used force to maintain possession of the car after the theft was completed. This reasoning is plainly contrary to how the crimes of theft and robbery are defined. The crime of robbery requires an unlawful taking and therefore *cannot* occur separately from the underlying theft. Should this Court grant review in order to correct the Court of Appeals' plainly wrong and harmful view of the crimes of theft and robbery? RAP 13.4(b)(4).

2. Mr. Soeun received two separate prior convictions for assault and first degree robbery after a car he stole ran over the victim while Mr. Soeun was attempting to retain possession of the car. The Court of

Appeals affirmed the trial court's finding that the assault and the robbery were separate criminal conduct because it was impossible to tell from the record whether the car ran over the victim while Mr. Soeun was still in the car, or whether it ran over the victim right after Mr. Soeun had been pulled from the car by the victim. The Court of Appeals' reasoning is incorrect because it does not matter whether the car ran over the victim while Mr. Soeun was still in the car or after he had been pulled from the car. In either case, the assault indisputably occurred during a struggle over possession of the stolen car. In addition, the assault was an essential element of the robbery because the first degree robbery charge required proof that Mr. Soeun inflicted bodily injury during the course of the robbery. Thus, there is only one correct way to view the facts: the assault was part of the same criminal conduct as the robbery. Should this Court grant review to correct the Court of Appeals' erroneous view of the crimes of assault and robbery, and to clarify that a court may not make a finding of separate criminal conduct based on a singular view of the facts that is not supported by the way in which a crime has been defined by the Legislature? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Mr. Soeun was convicted of second degree robbery. CP 15. At sentencing, defense counsel argued Mr. Soeun's three prior convictions from 2007 for first degree robbery, first degree theft, and third degree assault, which the prior sentencing court ordered to be served concurrently, encompassed the "same criminal conduct" and should count as only one point in his current offender score. CP 41, 47, 62. The State objected. CP 66-67.

The trial court reviewed several documents from the 2007 convictions, including the judgment and sentence, information, probable cause declaration, jury instructions, verdict forms, and a note the jury submitted to the court during deliberations. RP 264-65; CP 83-93. The court also reviewed the statement of facts set forth in the Court of Appeals opinion affirming the prior convictions. RP 263; see State v. Soeun, 2008 WL 3319819 (No. 36317-8-II, Aug. 12, 2008); CP 66.

According to the Court of Appeals opinion, the prior convictions arose from the following facts:

> On June 11, 2006, Eli and Carrie Adamson left their residence in a relative's truck to buy flooring at a hardware store. After they left, Chanara Soeun stole the Adamsons' white Honda Accord parked in their driveway. A neighbor watched Soeun 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 Soeun driving their Honda towards them in the opposite lane. Carrie Adamson turned the truck around again, followed Soeun into a cul-de-sac, and pulled the truck up next to the white Honda when Soeun parked it in front of his residence. Eli Adamson got out of the truck, yelled at Soeun to get out of the car, pulled open the driver's side door, and grabbed Soeun by his hair. Soeun 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 Soeun from the driver's seat and out 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. Soeun fled the scene.

Soeun, 2008 WL 3319819, at *1; CP 66.

The current sentencing court concluded from these facts that the prior offenses all arose from "separate and distinct acts" and thus did not encompass the "same criminal conduct." RP 264-65. The court counted the three offenses separately in Mr. Soeun's offender score. CP 47.

Mr. Soeun appealed. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court of Appeals' opinion affirming the trial court's finding of separate criminal conduct is based on an erroneous and disturbing view of how the crimes of robbery, theft and assault are defined, and reflects a fundamental misunderstanding about how facts should be analyzed in order to make a finding regarding same criminal conduct

When sentencing a felony offender, the court must calculate the offender score based on the offender's "other current and prior convictions." RCW 9.94A.589(1)(a). If an offender has multiple prior offenses and the previous sentencing court found the offenses "encompass the same criminal conduct," the current sentencing court must count those prior convictions as one offense. RCW 9.94A.525(5)(a)(i). If the prior sentencing court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must independently evaluate whether those prior convictions "encompass the same criminal conduct" and, if they do, must count them as one offense. Id. ("The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently . . . , whether those offenses shall be counted as one offense or as separate

offenses using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a)").

Thus, the current sentencing court must apply the same criminal conduct test to multiple prior convictions, served concurrently, that a court has not already concluded amount to the same criminal conduct. State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013); see also State v. Reinhart, 77 Wn. App. 454, 459, 891 P.2d 735 (1995) ("the language of the statute appears clear and unambiguous in mandating that the current sentencing court determine whether to count prior offenses, served concurrently, as separate offenses").

Multiple offenses encompass the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). In determining whether two offenses require the same criminal intent, the court focuses on "the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Courts consider "how intimately related the crimes are," "whether, between the crimes

charged, there was any substantial change in the criminal objective," and "whether one crime furthered the other." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

Crimes need not occur simultaneously to meet the "same time" element of the statute. State v. Porter, 133 Wn.2d 177, 182-83, 942 P.2d 974 (1997). Sequential crimes involving the same victim may qualify as same criminal conduct if one crime furthers the other. Id. If the crimes are part of a continuous, uninterrupted sequence of conduct, they occur at the "same time" for purposes of the same criminal conduct analysis. Id.

A trial court's decision regarding "same criminal conduct" is reviewed for abuse of discretion or misapplication of the law. State v. Graciano, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013). Under this standard, if 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. Id. But if the record adequately supports either conclusion, the matter lies within the court's discretion. Id.

1. The Court of Appeals' decision rests on a fundamental misunderstanding of the crimes of theft and robbery

In committing the prior offenses, Mr. Soeun took a Honda Accord from the Adamsons' driveway, drove it to his own neighborhood, and parked it in front of his residence. CP 66. The Adamsons followed him there and arrived at the same time. Id. Before Mr. Soeun could get out of the car, Mr. Adamson approached him, yelled at him to get out of the car, opened the door, and grabbed him by his hair. Id. Mr. Soeun shifted the car into reverse and stepped on the gas pedal. Id. The moving car ran over Mr. Adamson's ankle while he managed to pull Mr. Soeun from the car. Id. The car continued moving, running over Mr. Adamson again, then coming to a stop when it hit a telephone pole. Id.

The Court of Appeals affirmed the trial court's finding that the theft and the robbery did not encompass the same criminal conduct, reasoning that

> The facts of the prior convictions before the trial court can support a determination that the theft was completed when Soeun parked the car in front of his residence. Soeun stole the car, obtained exclusive possession, drove it away, and parked the car in front of his house. The facts of the prior convictions also can support a determination that after Soeun completed the theft by parking the car in front of his own residence, Adamson

> approached the car, pulled Soeun by the hair, and Souen used force to retain possession of the car. Therefore, because the facts of the prior convictions before the trial court can support either conclusion—that the convictions were based on separate acts or were the same criminal conduct—the trial court did not abuse its discretion by not making a same criminal conduct finding.

Slip Op. at 5.

The Court of Appeals' reasoning is based on a surprising and disturbing misunderstanding regarding the nature of the crimes of theft and robbery. 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 force, violence, or fear of injury. RCW 9A.56.190. "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking." Id.

Washington courts apply the "transactional" analysis of robbery, which provides that the force or threat of force used to accomplish a robbery need not precisely coincide with the taking. State v. Truong, 168 Wn. App. 529, 535-36, 277 P.3d 74, review denied, 175 Wn.2d 1020, 277 P.3d 74 (2012). The robbery statute provides that the force may be used either to obtain *or retain* possession of the property. RCW 9A.56.190. Consistent with the statute, Washington courts hold

that "the force necessary to support a robbery conviction need not be used in the initial acquisition of the property. Rather, the retention, via force against the property owner, of property initially taken peaceably *or* outside the presence of the property owner, is robbery." State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992).

A necessary corollary to the rule that the taking need not coincide with the force used, is that the taking and force are not distinct criminal acts and may not be separately punished. Id. at 291. In Handburgh, the defendant stole a bicycle that was left unattended outside a recreation center. Id. at 285-86. When the owner of the bicycle came outside and saw the defendant riding off on her bike, she approached him and demanded that he return it. Id. When she tried to retrieve the bike, he threw rocks at her and a struggle ensued. Id. The owner was injured in the struggle and left the bicycle behind. Id.

The defendant in Handburgh committed a single crime of robbery and not separate crimes of theft and assault. Id. at 290-91. "[A] peaceable taking or a taking in the owner's absence, followed by the use of force, is a robbery" and not two separate crimes. Id. at 292. The force may be used *either* at the time of the taking, *or* "in flight after an attempt or commission of theft." Id. In either case, a single

crime of robbery occurs. A thief's willingness to use force against those who would restrain him in flight after a peaceable taking raises the crime from theft to robbery. Id. at 292-93.

Thus, robbery is an ongoing offense that begins with the initial taking and ends when the assailant effects an escape. Truong, 168 Wn. App. at 535-36; State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). The taking is considered to be ongoing or continuing so that the later use of force to retain the property taken renders the actions a robbery. Handburgh, 119 Wn.2d at 290; see also State v. Robinson, 73 Wn. App. 851, 856, 872 P.2d 43 (1994) ("Pursuant to [the transactional view of robbery], a robbery can be considered an ongoing offense so that, regardless of whether force was used to obtain property, force used to retain the stolen property or to effect an escape can satisfy the force element of robbery.").

Because robbery is an ongoing offense, a person may not be punished separately for theft and robbery merely because the taking and force occurred at different times. See Handburgh, 119 Wn.2d at 291-92. Both robbery and theft include the essential element of a specific intent to deprive the owner of his or her property. State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012); RCW

9A.56.020(1)(a) ("theft" means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services."). Theft is a lesser-included offense of robbery. State v. Ralph, 175 Wn. App. 814, 825, 308 P.3d 729 (2013), review denied, 179 Wn.2d 1017, 318 P.3d 280 (2014). It is the use of force that raises the theft to a robbery. Handburgh, 119 Wn.2d at 292-93. Thus, a person may not be punished for both theft and robbery arising from a single taking. Ralph, 175 Wn. App. at 825-27 (holding defendant's separate convictions for taking a motor vehicle without permission and second degree robbery, where defendant punched victim in face and drove away in his truck, violated the constitutional prohibition against double jeopardy).

Here, there is only *one* correct way to view the facts: only a single taking occurred. The Court of Appeals reasoned that the robbery could have occurred after the theft was completed. Slip Op. at 5. But that is plainly contrary to the way in which the crimes of robbery and theft are defined. As stated, a robbery *cannot* occur after the underlying theft has already been completed. A robbery *requires* a theft and cannot occur without a taking of property. See RCW

9A.56.190. As in Handburgh, the robbery began when Mr. Soeun peaceably took the Honda from the Adamsons' driveway. Handburgh, 119 Wn.2d at 292-93. The robbery was ongoing and ended when he used force in an attempt to retain possession of the Honda in front of his residence. Truong, 168 Wn. App. at 535-36. The taking was an *essential part* of the robbery and not separate from it. Both the theft and the robbery entailed the same objective criminal intent—to deprive the owner of the property.

There is only one correct way to look at the facts. It is plainly erroneous to conclude, as the Court of Appeals did, that the robbery could have occurred *after* the theft was completed. Because the Court of Appeals' conclusion is based on such a fundamental misunderstanding of the law, this Court should grant review and reverse.

2. *The Court of Appeals' opinion also rests on a misunderstanding of the crimes of assault and robbery*

Mr. Soeun's conviction for third degree assault arose from his conduct of shifting the Honda into reverse and stepping on the gas

pedal, causing the car to run over Mr. Adamson.[1] CP 66. The assault occurred during the struggle between Mr. Soeun and Mr. Adamson over possession of the Honda. Id. It therefore occurred at the same time and place as the robbery and entailed the same objective criminal intent—to deprive the owner of the property.

In addition, the first degree robbery conviction *depended on* the underlying assault. The conviction for first degree robbery required proof that Mr. Soeun inflicted bodily injury in the course of the robbery. See CP 83 RCW 9A.56.200(1)(a)(iii). Thus, the assault was an *essential element* of the robbery and not separate from it.

Ignoring these principles, the Court of Appeals reasoned

> The underlying facts before the trial court show that Soeun attempted to retain possession of the car by shifting the car in reverse and stepping on the gas pedal. The underlying facts in the record also show that a struggle ensued between Adamson and Soeun and that Soeun was pulled out of the car by Adamson. However, the record is unclear whether the car ran over Adamson while Soeun was still in the car trying to escape from Adamson or whether the car ran over Adamson after Soeun had been pulled out of the car. Because the record is unclear, the trial court did not abuse its discretion by

---

[1] The third degree assault conviction required proof that Mr. Soeun, "[w]ith criminal negligence, cause[d] bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d).

finding Soeun's adult robbery and assault convictions did not constitute the same criminal conduct.

Slip Op. at 5-6.

The Court of Appeals' opinion is based on a singular view of the facts that is not consistent with the way that the crimes of assault and robbery are defined. It does not matter whether the car ran over Mr. Adamson while Mr. Soeun was still in the car, or after he had been pulled from the car. Under either scenario, the assault occurred while Mr. Soeun was attempting to retain possession of the stolen car and was therefore part of the robbery. Also, the Court of Appeals' opinion would be correct only if there were *two separate* assaults, one that resulted in bodily injury and served as the basis of the bodily injury element of the first degree robbery charge, and another, separate assault. But assault is an ongoing offense. The facts here support the conclusion that only a single assault occurred. Thus, the Court of Appeals was wrong to conclude that the assault could possibly be separate from the robbery.

When a person commits an assault in an effort to deprive a person of property, the assault encompasses the "same criminal conduct" as the robbery or attempted theft. State v. Miller, 92 Wn. App. 693, 964 P.2d 1196 (1998); State v. Rienks, 46 Wn. App. 537,

731 P.2d 1116 (1987). In Miller, the defendant was convicted of third degree assault and attempted theft of a firearm after he struggled with a police officer in an attempt to deprive the officer of his firearm. Miller, 92 Wn. App. at 697. The assault was "intimately related" to the attempted theft because Miller could not deprive the officer of his holstered weapon without assaulting him. Id. at 708. Both crimes shared the same objective intent—to deprive the officer of the weapon. Id. Therefore, the assault and attempted theft encompassed the "same criminal conduct" for sentencing purposes. Id.; see also State v. Anderson, 72 Wn. App. 453, 456-57, 464, 864 P.2d 1001 (1994) (convictions for first degree assault and first degree escape encompassed "same criminal conduct" where defendant assaulted corrections officer while attempting to escape; both offenses shared the same objective criminal intent—to escape the officer's custody).

Similarly, in Rienks, the defendant was convicted of first degree assault and first degree robbery after he pointed a gun at several individuals inside an apartment while he took personal property from a briefcase and then left the scene. Rienks, 46 Wn. App. at 538-39. The two offenses were part of a single recognizable scheme or plan and were committed with no substantial change in the nature of the criminal

objective, which was to rob the victim. Id. at 543-44. Therefore, they encompassed the "same criminal conduct."

This case is indistinguishable from Miller, Anderson, and Rienks. Mr. Soeun assaulted Mr. Adamson in an effort to retain possession of the Honda. CP 66. The assault and the robbery were "intimately related" because Soeun could not commit the first degree robbery without using force and inflicting bodily injury on Mr. Adamson. See Miller, 92 Wn. App. at 708. The two crimes were part of a single recognizable scheme or plan and were committed with no substantial change in the nature of the criminal objective, which was to steal the property. See Rienks, 46 Wn. App. at 543-44. It does not matter whether the assault occurred while Mr. Soeun was still in the car or had just been removed from the car. In either case, the assault occurred while Mr. Soeun was trying to retain possession of the car. Therefore, the assault and robbery encompassed the "same criminal conduct" and should have counted as one offense in the offender score.

In addition, the only way the Court of Appeals' opinion could be correct is if there were *two separate* assaults, one that resulted in bodily injury and served as the basis of the bodily injury element of the first degree robbery charge, and another, separate assault. But the

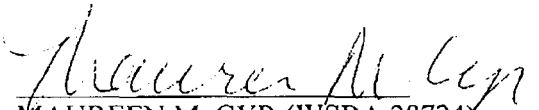
record cannot be read in that manner. Assault is a "course of conduct crime." State v. Villanueva-Gonzalez, 180 Wn.2d 975, 984-95, 329 P.3d 78 (2014). That means a person cannot be separately punished for each assaultive act committed during a single, continuous assaultive episode. Id. Here, there was only one, single assaultive episode. The assault occurred when the car ran over Mr. Adamson. CP 66. There is no suggestion anywhere in the record of a separate, distinct assault. Thus, the assault was plainly part of the first degree robbery. The record cannot be viewed in any other manner. The trial court abused its discretion in finding that the assault and the robbery were separate conduct, and the Court of Appeals erred in affirming the trial court's finding.

E. CONCLUSION

The Court of Appeals' opinion is based on a fundamental misunderstanding of the crimes of robbery, theft and assault. The court's opinion evidences an unreasonable application of the same criminal conduct test when applied to prior convictions. Although current sentencing courts have discretion as to whether to count prior offenses as the same criminal conduct, the court must exercise its discretion in a reasonable manner. The court may not view the facts as creating separate conduct where that conclusion is not supported by the way in which those

crimes have been defined by the Legislature. Because the Court of Appeals' opinion affirming the trial court is based on an alarming and disturbing application of the same criminal conduct test to Mr. Soeun's prior convictions, this Court should grant review and reverse.

Respectfully submitted this 20th day of March, 2015.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHANARA SOEUN, Appellant.	No. 45473-4-II UNPUBLISHED OPINION

LEE, J. — Chanara Soeun appeals his sentence following his conviction for second degree robbery. Soeun argues that the trial court incorrectly calculated his offender score because three of his prior convictions should have been considered the same criminal conduct. We hold that the trial court did not abuse its discretion by scoring Soeun's three prior convictions separately for the purpose of calculating Soeun's offender score and Soeun's sentence. Therefore, we affirm.

FACTS

A jury found Soeun guilty of second degree robbery.[1] Soeun's criminal history included four juvenile convictions and adult convictions for first degree robbery, third degree assault, and first degree theft. The adult robbery, assault, and theft convictions resulted from a single incident. Soeun does not dispute the existence of his prior convictions.

[1] Soeun does not challenge his conviction for second degree robbery and his same criminal conduct argument is based on three prior convictions. Therefore, the facts underlying his conviction are unnecessary for resolving Soeun's appeal.

At sentencing, the State argued that Soeun's offender score should be calculated at 6. The State reached its calculation by counting a half point for each juvenile conviction (2 points), 2 points for the first degree robbery conviction, 1 point for the third degree assault, and 1 point for the first degree theft. Soeun argued that his offender score should be calculated at 4 because the robbery, assault, and theft convictions were the same criminal conduct and should be counted as 2 points (scored for the robbery).

Soeun presented the trial court with the information, probable cause statement, jury instructions, verdict forms, and judgment and sentence for the robbery, assault, and theft charges. The State presented the trial court with our opinion affirming Soeun's prior adult robbery, assault, and theft convictions. In that opinion, we recited the underlying facts of Soeun's prior robbery, assault, and theft convictions as follows:

> On June 11, 2006, Eli and Carrie Adamson left their residence in a relative's truck to buy hardwood flooring at a hardware store. After they left, Chanara Soeun stole the Adamsons' white Honda Accord parked in their driveway. A neighbor watched Soeun 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 Soeun driving their Honda towards them in the opposite lane. Carrie Adamson turned the truck around again, followed Soeun into a cul-de-sac, and pulled the truck up next to the white Honda when Soeun parked it in front of his residence. Eli Adamson got out of the truck, yelled at Soeun to get out of the car, pulled open the driver's side door, and grabbed Soeun by his hair. Soeun 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 Soeun from the driver's seat and out 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. Soeun fled the scene.

State v. Soeun, noted at 146 Wn. App. 1033, 2008 WL 3319819.

After reviewing all the information, the trial court found that the prior convictions had been charged as three separate and distinct acts, and that the jury found Soeun guilty of three separate distinct acts. And, the trial court noted that, without additional information, it could not come to a different result. The trial court calculated Soeun's offender score at 6 and imposed a standard range sentence. Soeun appeals.

ANALYSIS

Soeun argues that the trial court erred by determining that his prior adult robbery, assault, and theft convictions did not constitute the same criminal conduct, and that the trial court should have calculated his offender score as 4 rather than 6. We hold that Soeun failed to meet his burden to prove that his prior convictions were the same criminal conduct. Thus, the trial court did not abuse its discretion by determining that Soeun's prior convictions were not the same criminal conduct.

All of a defendant's prior convictions are counted separately unless some or all of the prior convictions are the same criminal conduct. RCW 9.94A.589(1)(a). Prior convictions are the same criminal conduct if the convictions required the same criminal intent, were committed at the same time and place, and involved the same victim. RCW 9.94A.589(1)(a). If a prior sentencing court found that the convictions were the same criminal conduct, then the current sentencing court must count them as one offense. *State v. Williams*, 176 Wn. App. 138, 141, 307 P.3d 819 (2013), *aff'd*, 181 Wn.2d 795 (2014). However, if a prior sentencing court did not make a same criminal conduct finding, then the current sentencing court must determine whether the prior convictions are the same criminal conduct. *Williams*, 176 Wn. App. at 141. We review the trial court's same criminal conduct finding for a "'clear abuse of discretion or misapplication of the law.'" *State v. Haddock*,

141 Wn.2d 103, 110, 3 P.3d 733 (2000) (quoting *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990)).

Because a same criminal conduct finding lowers the defendant's presumed offender score, the defendant bears the burden to prove that his prior convictions are the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). If the defendant fails to prove any of the three statutory elements, the defendant has failed to meet his burden to prove his prior convictions are the same criminal conduct. *Graciano*, 176 Wn.2d at 540. If the record before the sentencing court "supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result." *Graciano*, 176 Wn.2d at 537-38. However, when the record supports either result or the record is unclear, the trial court does not abuse its discretion by refusing to enter a same criminal conduct finding. *Graciano*, 176 Wn.2d at 538, 541.

Here, the court that sentenced Soeun on the prior adult robbery, assault, and theft convictions did not make a same criminal conduct finding; therefore, the current trial court properly conducted a determination of whether Soeun's prior convictions were the same criminal conduct. The only evidence the trial court had regarding the facts of the prior case was the statement of facts from our opinion and the probable cause statement from the original charging document, both of which were consistent. The trial court noted that it did not have the trial record to make a more accurate determination. Based on the information before it, the trial court determined that the prior convictions were based on acts that were separate and distinct. Soeun argues to the contrary. However, the record before the trial court can support either conclusion

under the same criminal conduct analysis. Therefore, the trial court did not abuse its discretion by not making a same criminal conduct finding.

A theft becomes a robbery if force is used while effectuating escape because the taking of property is considered ongoing until the defendant has completed his escape. *State v. Truong*, 168 Wn. App. 529, 535-36, 277 P.3d 74, *review denied*, 175 Wn.2d 1020 (2012); *see also State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992) (using force against the property owner to retain property initially taken outside the property owner's presence is robbery). The facts of the prior convictions before the trial court can support a determination that the theft was completed when Soeun parked the car in front of his residence. Soeun stole the car, obtained exclusive possession, drove it away, and parked the car in front of his house. The facts of the prior convictions also can support a determination that after Soeun completed the theft by parking the car in front of his own residence, Adamson approached the car, pulled Soeun by the hair, and Soeun used force to retain possession of the car. Therefore, because the facts of the prior convictions before the trial court can support either conclusion—that the convictions were based on separate acts or were the same criminal conduct—the trial court did not abuse its discretion by not making a same criminal conduct finding.

In addition, the record is unclear whether the prior convictions support the conclusion that the robbery and assault involved the same criminal intent. The underlying facts before the trial court show that Soeun attempted to retain possession of the car by shifting the car in reverse and stepping on the gas pedal. The underlying facts in the record also show that a struggle ensued between Adamson and Soeun and that Soeun was pulled out of the car by Adamson. However, the record is unclear whether the car ran over Adamson while Soeun was still in the car trying to

escape from Adamson or whether the car ran over Adamson after Soeun had been pulled out of the car. Because the record is unclear, the trial court did not abuse its discretion by finding Soeun's adult robbery and assault convictions did not constitute the same criminal conduct.

Here, the record before the trial court is unclear. At best, the facts before the trial court could support either result under a same criminal conduct analysis. Therefore, we hold that Soeun did not meet his burden to prove same criminal conduct, and the trial court did not abuse its discretion by not making a same criminal conduct finding. Because the trial court did not abuse its discretion by not entering a same criminal conduct finding, the trial court correctly calculated Soeun's offender score at 6. Soeun's challenge to the calculation of his offender score fails.

We affirm.

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

Lee, J.

We concur:

Johanson, C.J.

Maxa, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 45473-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Jason Ruyf, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 20, 2015

WASHINGTON APPELLATE PROJECT

March 20, 2015 - 3:49 PM

Transmittal Letter

Document Uploaded: 4-454734-Petition for Review.pdf

Case Name: STATE V. CHANARA SOEUN
Court of Appeals Case Number: 45473-4

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us