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NO. 68874-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARK STILLER,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by refusing to find five of Appellant's six current convictions constituted same criminal conduct for purpose of calculating appellant's offender score.

Issue Pertaining to Assignment of Error

Multiple current offenses must be counted as a single offense for purposes of calculating a defendant's offender score where the offenses constitute the same criminal conduct. Offenses are the same criminal conduct where they are committed against the same victim, occurred at the same time and place, and shared the same objective intent. A jury convicted appellant of six current offenses. The evidence supports finding that five of them were committed at the same time, same place, against the same person and with the same objective intent. Where the jury verdict does not conflict with a same criminal conduct finding for these five offenses, did the trial court err by counting each of them separately in calculating appellant's offender score?

B. STATEMENT OF THE CASE

Appellant Mark A. Stiller was charged with five counts of child rape and one count of first degree child molestation, all allegedly committed against A.J.B. between the dates of October 16, 2008 and

October 15, 2010. CP 92-94. Stiller pled not guilty and the case was set for trial. 3RP 14.

At trial, A.J.B. was asked about the nature of certain touches by Stiller, and if they were done over her clothes or on her skin. 2RP 519-20. When asked if other touching was going on at the time, she said "Yes." 2RP 520. With regard to where the touching occurred, A.J.B. said it was in the Stiller's home, specifically in one room. 2RP 487, 491, 527. With regard to when the offenses occurred, A.J.B. said some of them occurred at the same time, but was no more specific. 2RP 504-05, 518, 520.

The jury was given one instruction on intent for all offenses. CP 78 (Instruction 10). In the to-convict instructions, the jury was asked only to find the offenses occurred sometime during the two-year charging period. CP 80, 85, 86, 87, 88, 89 (Instructions 12, 17, 18, 19, 20, 21).

The jury convicted Stiller of all six counts. CP 66. At sentencing, Stiller urged the court to find all counts constituted the same criminal conduct in light of the State's inability to identify specific acts or times for the counts. CP 36-46 (Defendant's Sentencing Memorandum); 4RP 24. The State conceded some of the offenses occurred at the same time. 4RP 19. Indeed, at sentencing the trial court acknowledged the jury was not asked to and did not determine which specific date each individual act

occurred. 4RP 36. Nonetheless, the trial court refused to grant the defense motion, stating:

Counsel...have provided authority for the Court as best they can, because I think one of the issues we're struggling with here today hasn't been well defined by our appellate courts, or our State Supreme Court, and I think the issue that this Court has to face is somewhat different than in Dolen, and somewhat different from that in Camarillo. So to the extent they're guidance, I'm not sure that's particularly true....The question before the Court is does Dolen, therefore, say that under these circumstances, the fact that the jury was not asked to and did not determine which specific dates each of these individual acts occurred means they must all be treated as the same criminal conduct....Each specific act has its own specific intent to perform that act, and therefore, they aren't to be counted as same criminal conduct. They should be counted as separate criminal conduct.

4RP 19-20, 24-25, 35-38. The trial court did not address the evidence that at least some of the acts were committed at the same time.

C. ARGUMENT

THE SENTENCING COURT ABUSED ITS DISCRETION BY
REFUSING TO FIND THAT FIVE OF SIX COUNTS
INVOLVED SAME CRIMINAL CONDUCT

A determination of "same criminal conduct" at sentencing affects the standard range sentence by altering the offender score, which is calculated by adding a specified number of points for each prior offense. RCW 9.94A.525. For purposes of this calculation, current offenses are treated as prior convictions. RCW 9.94A.589(1)(a). However, "if the

court enters a finding that some or all the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." Id.

Our Supreme Court has recognized that "the same time and place analysis applies...when there is a continuing sequence of criminal conduct." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990).

RCW 9.94A.589(1)(a) 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. The appellate court reviews a trial court's determination of whether two acts constituted the same criminal conduct for abuse of discretion. State v. Graciano, 176 Wn.2d 531, 533, 295 P.3d 219 (2013). At the sentencing, it is the defendant who must establish the crimes constitute the same criminal conduct. Id. at 539. The appellant bears the burden to prove an abuse of discretion. State v. Asaeli, 150 Wn. App. 543, 573, 208 P.3d 1136 (2009).

There is an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable ground, or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

Here, there is no dispute that the crimes involve the same victim, the same intent and the same place. CP 78 (Instruction 10); CP 92-94 (Third Amended Information); 2RP 487, 491, 527. However, the fact of *when* the offenses occurred is in dispute. 2RP 504-05, 518, 520.¹

Contrast this case with State v. Walden, where the defendant was convicted of one count of second degree rape and one count of attempted second degree rape of a 13-year old boy. 69 Wn. App. 183, 184, 847 P.2d 956 (1993). The boy was riding a bicycle when Walden approached him, eventually dragged him up a hill and forced him to masturbate and then perform fellatio upon him; Walden then unsuccessfully attempted to perform anal intercourse. Id. The trial court counted the offenses as separate criminal conduct. Id. at 188. However, this Court reversed finding the trial court abused its discretion because the acts occurred at the same place, with the same intent and nearly at the same time. Id.

Further, our Supreme Court has found that individual crimes may be considered same criminal conduct if they occur during an uninterrupted incident. State v. Porter, 133 Wn.2d 177, 185-186, 942 P.2d 974 (1997). The "same time" element does not require that the crimes occur simultaneously. Id.

¹ Specifically Counts I, II, III, IV, and VI.

Here, the record is devoid of any evidence of separate and distinct incidents for five of the six charges. Nor do the jury verdicts for these five counts indicate whether some or all are based on the same incident or separate incidents. As such, there is not basis to conclude one way or the other. Indeed, similar to Walden, A.J.B. testified that at least some of the offenses took place during a single encounter. 2RP 519-20. She did not testify specifically when any other offenses took place, and the jury was never asked to determine whether any of the incidents occurred at the same time or on separate occasions. CP 80, 85, 86, 87, 88, 89. (Instructions 12, 17, 18, 19, 20, 21); 4RP 36. Accordingly, the evidence does not support a finding of separate and distinct acts. Indeed, the State conceded as much at sentencing. 4RP 19-20, 24-25. As a result, the decision by the trial court to refuse to find five of the six counts involved same criminal conduct was made on untenable grounds based on facts unsupported in the record.

The Supreme Court's recent decision in State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013) overruling State v. Dolen, 83 Wn. App 361, 365, 921 P.2d 590 (1996), and holding that the defendant at *sentencing* bore the burden of establishing that crimes were the same criminal conduct does not alter this conclusion.

The change in burden is not material to the resolution of this case because the record establishes that some of the incidents in five of the six counts happened in the same encounter. 2RP 504-05, 518, 520. And there is no specific evidence or jury finding as to the timing of any of the offenses. The testimony of A.J.B., plus the State's concession combined with the trial court's assertion that the jury was not asked to and did not determine which specific dates each of the individual offenses occurred leaves this Court but one conclusion: The trial court abused its discretion for purposes of finding same criminal conduct when it refused to consider the facts in the record.

The remedy for an incorrect offender score is reversal of the sentence and remand to the trial court for resentencing with a corrected offender score. State v. Williams, 135 Wn.2d 365, 366-67, 957 P.2d 216 (1998). As a result, this Court must reverse Stiller's sentence and remand for resentencing.

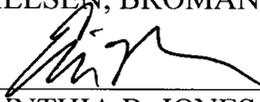
D. CONCLUSION

For the foregoing reasons, this Court should reverse Stiller's sentence and remand for resentencing based on a correctly calculated offender score.

DATED this 10th day of June, 2013.

Respectfully Submitted,

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STATE OF WASHINGTON)	
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v.)	COA NO. 68874-0-1
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MARK STILLER,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF JUNE 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JUNE 2013.

x *Patrick Mayovsky*

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