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No. 68874-0-I

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

STATE OF WASHINGTON, Respondent,

v.

MARK ANTHONY STILLER, Appellant.

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DIVISION ONE
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BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUE PERTAINING TO APPELLANT’S ASSIGNMENTS
OF ERROR..... 1

C. FACTS 1

 1. Procedural. 1

 2. Substantive..... 3

D. ARGUMENT..... 7

 1. **The court did not abuse its discretion in determining
that the offenses were not the same criminal conduct
where each offense was based on specific acts and where
the child testified that the abuse occurred multiple times
over a two year period, particularly where defendant
had the burden of demonstrating that the crimes were
not separate..... 7**

E. CONCLUSION 15

TABLE OF AUTHORITIES

Washington Court of Appeals

State v. Dolen, 83 Wn. App. 361, 921 P.2d 590 (1996) 13

State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997)..... 11

State v. Price, 103 Wn. App. 845, 14 P.3d 841 (2000)..... 10, 11

State v. Rodriguez, 61 Wn. App. 812, 812 P.2d 868, *rev. den.*, 118 Wn. 2d
1006 (1991)..... 9, 10

State v. Saiz, 63 Wn. App. 1, 816 P.2d 92 (1991)..... 11

State v. Walden, 69 Wn. App. 183, 847 P.2d 956 (1993)..... 13

Washington Supreme Court

State v. Burns, 114 Wn.2d 314, 788 P.2d 531 (1990). 10

State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013) 8, 9, 10, 12, 13

State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997) 9

State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999)..... 9, 10, 11

Rules and Statutes

RCW 9.94A.589..... 8

A. ASSIGNMENTS OF ERROR

None.

B. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in determining that the rape of a child counts were not the same criminal conduct under RCW 9.94A.589(1)(a) as the child molestation count and the other rape of a child counts where the child testified to multiple instances of sexual abuse and to specific acts and where it was the defendant's burden to establish that the counts were the same criminal conduct.

C. FACTS

1. Procedural.

Appellant Mark Stiller was charged with and ultimately went to trial on one count of Child Molestation in the First Degree, and five counts of Rape of a Child in the First Degree. CP 92-94, 156-58, 167-69, 172-73. All counts alleged the same time period, Oct. 16, 2008 to October 15, 2010 and involved the same victim, AJB. CP 92-94. The information charged, and the to-convict instructions regarding the five child rape counts required the State prove, that count II involved fellatio, count III cunnilingus, count IV digital anal penetration, count V penile anal penetration and count VI digital vaginal penetration. CP 85-89, 92-94. The instructions informed the jury that a separate crime was charged in

each count and each of the to-convict instructions referenced the specific count. CP 76, 85-89. The jury found Stiller guilty of all six counts. CP 66.

At sentencing, Stiller asserted that all the counts should be counted as the same criminal conduct, alleging there was no evidence of “specific dates or times”, although he acknowledged that there was some vague evidence as to a time frame for the penile anal child rape and therefore the standard range could be 120-160 months, instead of 93-123 months. CP 36-40; SRP¹ 24-25, 28-29. At the hearing, the State asserted that the standard range for each of the child rape counts would be 240-318 months and sought an exceptional sentence. SRP 17-18. In addressing the defense same criminal conduct argument, the court stated:

Now, the same course of criminal conduct cases involves (sic), generally, when there’s a number of multiple acts, things that happen in fairly short succession in a matter of an hour or two hours on a particular incident. Some of the cases that have been cited involve situations where a defendant and the victim are together for an hour or an hour and a half. Numerous things occur during that same period of time. It’s not like something that happens over and over again over the course of a year or two years.

The testimony in this case as I’ve gone back and reviewed my notes and my recollection of the testimony was that, clearly, the one incident, I believe it was in September, the penile anal contact was described as a separate event, but it is also my recollection that the child described numerous instances in the same room and described different things that happened at those instances without being able to say what date they were and what sequence they happened, but they were separate events, and I agree that some of

¹ “RP” refers to the verbatim report of proceedings for the trial and “SRP” refers to those related to sentencing.

these things may have happened on more than one of those events, but the testimony was there were numerous events.

The testimony I think clearly supports the jury finding that there were separate events that involved separate behavior, and that the intent for those behaviors is different. There are multiple dates. There are multiple, separate acts, and I think under those circumstances, the holding in *Dolen* is not necessarily controlling to this Court.

...

So my feeling and my belief and my finding and my decision as to how they should be treated is that each of these offenses has been found. Each one relates to a specific act. Each specific act has its own 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.

SRP 37-38. The court then imposed a standard range minimum sentence term of 198 months on count I and 318 months on count II-VI, with a maximum of life.

2. Substantive.

On Oct. 12, 2010 after AJB came out of the bathroom and told her mother that it "hurt to pee," AJB disclosed to her mother that she had been touched by a man RP 329, 332. AJB was in fourth grade at the time and living at the Shamrock Motel. RP 328-29. AJB told people that night that "Uncle Mark" had sexually abused her. Ex. 1, RP 406. AJB, her mother and sister had just stayed for about six nights at the Stiller apartment after they couldn't afford to stay where they had been living, though both girls

had not stayed every night at the Stillers during that time period. RP 330, 344, 346, 351, 580-81.

AJB's mother had known Stiller for 10 years and AJB had known him all her life. RP 330-31, 337. AJB had been to the Stiller residence throughout her third and fourth grades, she frequently played there, almost daily at times, with her "cousins," Stiller's two sons, and had previously spent the night there. RP 331, 339, 342, 348, 363. Her family had stayed with the Stillers one other time. RP 347. Stiller was with AJB alone on many occasions over the years, and it wasn't unusual for AJB to be alone with him. RP 363. Stiller told the detective that he had babysat AJB alone before and that he had known her all her life. RP 456-57.

AJB told a child sexual assault nurse practitioner the night of her disclosure that the sexual abuse had been going on for two years, that rectal, mouth, genital and breast touching had happened lots of time, and that the last incident had involved penile/anal intercourse². RP 407, 411-12, 414. She said that on some of the occasions yellow or white stuff came out of Stiller's penis³ and told the nurse about one time that the white stuff had been in her mouth. RP 411-12, 414. AJB described numerous times

² AJB described it as he put his "privates" in her "butt." RP 412. The nurse clarified with questions and a drawing that AJB meant his penis. Id.

³ AJB's usual term for penis at the time was "pee pee."

that the nurse did not ask about because the nurse focused her exam on sexually transmitted diseases. RP 414-15.

AJB spoke with Det. Jana Bouzek, a state certified child interviewer, on Oct. 15, 2010 about what happened. RP 435. AJB told the detective that the abuse started when she was seven and a half and that it had ended the month before, in 2010. RP 580. She described to Det. Bouzek the penile/anal intercourse that had occurred the last time. RP 581. AJB told the detective that Stiller sometimes had used a red handkerchief when he had her masturbate him and how he had her use white fuzzy gloves to masturbate him. RP 568, 581-82. AJB also told the detective about times that Stiller used vibrating sex toys and lubricant. RP 569. She also described in detail how she fellated Stiller, and described how he performed cunnilingus on her. RP 583-84. She told Det. Bouzek that Stiller used his hands to touch her private and her butt and that he had put his finger inside her vagina. RP 584-85 She said that he had rubbed her butt with his hand, that he had put cold stuff on her bottom hole and that one time he said he was “going to cream.” RP 584-86, 588. She also told Det. Bouzek about yellowish-whitish stuff coming out of his penis and that she spat it out. RP 587. She also told Det. Bouzek that the sexual abuse happened sometimes while playing with fur coats and she also

described how Stiller rubbed his penis on her vagina and in her butt crack. RP 637.

At trial AJB testified that the sexual abuse had happened in the Stillers' bedroom in both 4th and 3rd grades, that Stiller had touched her on her hands, mouth, and "front," i.e., her vagina, and that his "front," i.e., his penis, had touched her hands, mouth and bottom. RP 487-92. She testified at the very start of the abuse, he taught her how to use her hands when touching his "front," and demonstrated in court with the use of a pen. RP 496-97. She also described times when he had her use white fuzzy gloves to masturbate him. RP 514-15.

AJB testified that her touching his "front" happened the most and that second most was her mouth touching his "front." RP 504-05. She testified that Stiller had her put her mouth on his "front" and move up and down while she was on her knees and he was standing. RP 497-98. At the end sometimes he said "good job" and sometimes "excellent." RP 498, 506. She testified that sometimes white, wet stuff came out in her mouth and she rinsed her mouth out. RP 499-500. The white stuff came out of his "front" three to four times, sometimes on her and sometimes in her mouth. RP 506-07.

AJB described how Stiller rubbed her "front" and that one time he tried to put his finger in her "front," that it went in part way and it hurt. RP

500-02. She testified that he also used his tongue on her and that he put his tongue on her “front” while she was on the bed and on the floor. RP 503-04. There were times when the sexual abuse involved fur coats. RP 515. There were times when Stiller held her hands while “all sorts of touching” happened, but that the holding of her hands didn’t happen every time. RP 518-20. Afterwards he gave her candy, ice cream, and/or soda, and he told her not to tell anyone. RP 508-09.

D. ARGUMENT

- 1. The court did not abuse its discretion in determining that the offenses were not the same criminal conduct where each offense was based on specific acts and where the child testified that the abuse occurred multiple times over a two year period, particularly where defendant had the burden of demonstrating that the crimes were not separate.**

Stiller asserts that the trial court abused its discretion in finding that five of his six offenses were not the same criminal conduct because there was insufficient evidence to show that the abuse AJB described happened at different times and not in one episode. It appears that Stiller is conceding that count V, the count involving anal/penile intercourse occurred at a separate time from the other counts. See Appellant’s Brief at 5 n.1. The trial court did not abuse its discretion in finding that count I, II, III, IV and VI were separate offenses. Child molestation and rape of a

child do not have the same statutory intent and AJB testified that the abuse started with Stiller teaching her how to masturbate him. While AJB did not testify as to specific dates when the fallatio, count II, the cunnilingus, Count III, and the digital/anal and digital/vaginal intercourse, counts IV and VI, happened, the testimony clearly showed that the oral sexual intercourse and the manual masturbation occurred multiple times. There was no testimony that showed that all the acts occurred in one episode. Under State v. Graciano⁴ Stiller bore the burden of demonstrating that the offenses were the same criminal conduct, and if the evidence can be interpreted either as same criminal conduct or separate, the decision is left to the discretion of the trial court. The trial court did not abuse its discretion because the evidence showed that most of the acts occurred multiple times and at separate times.

In determining the offender score, all other current offenses are to be counted as prior offenses, unless the court enters a finding that the other current offenses encompass the same criminal conduct. RCW 9.94A.589 (1)(a). Under RCW 9.94A.589, “same criminal conduct,” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a); *see also* State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365

⁴ State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013).

(1999) (“Same criminal conduct” is conduct that involves the same victim, the same objective intent, and occurs at the same time and place). The absence of any one of these factors precludes a finding of “same criminal conduct.” State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). In order to make this determination, courts are to consider whether one offense furthered the other. State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). The “same criminal conduct” phrase is “construed narrowly to disallow most claims that multiple offenses constitute the same criminal act...” Porter, 133 Wn.2d at 181. The defendant bears the burden of proving that the offenses encompassed the same criminal conduct. Graciano, 176 Wn.2d at 539-40.

An appellate court reviews decisions regarding “same criminal conduct” for abuse of discretion or misapplication of the law. Graciano, 176 Wn.2d at 537. If the record adequately supports either a finding of same criminal conduct or separate conduct, “the matter lies in the court’s discretion.” *Id.* at 538.; *see also*, State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, *rev. den.*, 118 Wn. 2d 1006 (1991) (if the facts support both a finding that the criminal intent was the same and that it was different, the determination regarding “same criminal conduct” is left to the trial court’s discretion). If the record is unclear as to whether the all the factors of same criminal conduct have been met, the trial court does

not abuse its discretion in concluding that the defendant failed to meet his/her burden. *See*, Graciano, 176 Wn.2d at 541.

While simultaneity is not required to show “same time,” incidents that occur close in time are separate and distinct if they are not part of an uninterrupted, continuous sequence of conduct. State v. Price, 103 Wn. App. 845, 856-57, 14 P.3d 841 (2000), *rev. den.* 143 Wn.2d 1014 (2001). Frequently the issue of “same time” will be intermingled with the question of “same intent” when there is a course of criminal activity over a period of time. State v. Burns, 114 Wn.2d 314, 319, 788 P.2d 531 (1990).

A defendant’s intent is to be viewed objectively, not subjectively. Rodriguez, 61 Wn. App. at 816. The court is to decide whether the intent, when viewed objectively, changed from one crime to the next. Tili, 139 Wn.2d at 123. The court first determines whether the underlying statutes involve the same intent. Rodriguez, 61 Wn. App. at 816. If the statutory intents are the same, then the court determines whether the specific defendant’s intent changed from one crime to the next under the facts of the case. *Id.*

The formation of a new, independent intent after the commission of one crime constitutes a different objective intent. The formation of a new intent is supported if the evidence shows that the criminal acts “were sequential, and not simultaneous or continuous.” Tili, 139 Wn.2d at 124,

(quoting State v. Grantham, 84 Wn. App. 854, 856-57, 932 P.2d 657 (1997)). If the evidence shows that the defendant had the “time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,” then, objectively, the defendant formed a new, independent criminal intent when he committed his next criminal act. *Id.* at 123-24 (quoting Grantham, 84 Wn. App. at 859). However, if the evidence shows that the criminal acts were uninterrupted, continuous and committed within an extremely short period of time, it is unlikely that the defendant formed a new criminal intent. Tili, 139 Wn.2d at 124. A defendant’s choice to commit another criminal act after facing the question as to whether or not to continue her criminal activity substantiates a finding of successive or sequential intents and not one continuous intent. State v. Grantham, 84 Wn. App. 854, 860-61, 932 P.2d 657 (1997); *accord*, Price, 103 Wn. App. at 858.

Count I, child molestation, has a separate intent from the rape of a child counts. The intent requirement with respect to child molestation is that the defendant committed the act for sexual gratification. State v. Saiz, 63 Wn. App. 1, 4, 816 P.2d 92 (1991). There is no intent element with respect to rape of a child because it is a strict liability offense – all that is required is proof of the act of sexual intercourse with an under-age child.

Id. Therefore, child rape and child molestation do not involve the same intent elements. Id.

There is nothing in the record here to show that defendant's objective intent remained that same from the molestation to the statutory rapes or that the child molestation occurred on the same day as or furthered the specific acts of child rape. AJB testified that the abuse started with Stiller teaching her how to masturbate him, clearly demonstrating one separate incident. The record also shows that AJB testified about multiple occurrences of child molestation and rape that occurred at separate times, particularly given different statements the defendant made and different items used during the abuse. Therefore, the trial court did not abuse its discretion in declining to find that the child molestation count was the same criminal conduct as the child rapes and that the rapes were not the same criminal conduct.

The Graciano case is instructive. In Graciano the defendant was charged with four counts of child rape and two counts of child molestation regarding his cousin's daughter. Graciano, 176 Wn.2d at 533. The child testified as to four instances of rape and that occurred in the kitchen/living room area, a bedroom, the kitchen and on a couch. She also testified to molestation that occurred in the living room, but was not clear on how many times she was molested. Id. at 533-34. The jury found the defendant

not guilty on one of the molestation counts. *Id.* at 534. The trial court at sentencing found that the offenses were not the same criminal conduct. *Id.* The Supreme Court determined that it did not need to determine whether the defendant's objective intent changed from one crime to the next because the evidence did not suggest that the defendant's offenses were committed at the same time and place. *Id.* at 540-41. It noted that "[a]t best, the record [was] unclear," noting that the child testified about the incidents "in a disjointed manner, with no suggestion the incidents were continuous, simultaneous, or happened sequentially within a short time frame." *Id.* at 541. The Court concluded that because the defendant bore the burden of proof as to each of the factors of same criminal conduct and he had failed to do so with respect to time and place, the trial court had not abused its discretion in refusing to find that the offenses were not the same criminal conduct.

Stiller relies on State v. Walden, 69 Wn. App. 183, 847 P.2d 956 (1993)⁵ in asserting the trial court abused its discretion. In that case the testimony showed that all the events occurred in one episode: the defendant took the boy's bike causing the boy to follow him, whereupon

⁵ Below Stiller relied upon State v. Dolen, 83 Wn. App. 361, 921 P.2d 590 (1996), in asserting that the counts should be considered the same criminal conduct. However, that case was abrogated by Graciano because it placed the burden upon the state to prove that the crimes were not the same criminal conduct. *See, Dolen*, 83 Wn. App. at 365; Graciano, 176 Wn.2d at 538.

the defendant dragged him up a hill, forced him to masturbate and then performed fellatio on the boy. *Id.* at 184. The defendant then attempted anal intercourse with the boy. There was no testimony of multiple incidents. The issue there was whether the defendant's objective intent had changed from the first rape to the attempted rape. The testimony clearly showed that the two rape incidents happened in a very short period of time and were sequential, which is not the case here. The testimony here clearly shows multiple instances of molestation and child rape at separate instances, although the record is not clear as to whether and which acts of sexual abuse happened with other acts.

Stiller makes reference to the fact that the jury instructions did not require the jury verdict to indicate whether the counts were based on the same incident or separate incident. Stiller, however, has not raised a double jeopardy or unanimity issue, and cannot because the to-convict instructions required the verdicts to be based on distinct acts of sexual abuse. The issue on appeal is whether the trial court abused its discretion in refusing to find that the child molestation and four of the child rape counts were not the same criminal conduct based on the evidence presented at trial. Given the testimony of multiple incidents of different sex acts and the lack of testimony that the acts occurred within one single episode, the trial court did not abuse its discretion.

E. CONCLUSION

The State requests that the Court of Appeals affirm Stiller's sentence for his multiple convictions of child molestation and child rape.

Respectfully submitted this 23rd day of September, 2013.



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CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Christopher Gibson, addressed as follows:

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