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Division II  
State of Washington  
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No. 54424-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

HENRY A. SADOWSKI III,

Appellant.

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

The Honorable Chris Lanese, Judge  
Cause No. 18-1-01079-34

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE .....1

C. ARGUMENT.....3

    1. The trial court acted within its discretion by finding that the Pierce County Robbery and Assault convictions did not count as the same criminal conduct for purposes of the offender score.....3

D. CONCLUSION .....10

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

State v. Graciano,  
176 Wn.2d 531, 537 P.3d 219 (2013).....4, 5

State v. Haddock,  
141 Wn.2d 103, 3 P.3d 733 (2000).....3-5

State v. Handburgh,  
119 Wn.2d 284,830 P.2d 641 (1992).....9

State v. Porter,  
133 Wn.2d 177, 942 P.2d 974 (1997).....3, 4

State v. Tili,  
139 Wn.2d 107, 985 P.2d 365 (1999).....4

State v. Vike,  
125 Wn.2d 407, 885 P.2d 824 (1994).....3

**Decisions Of The Court Of Appeals**

State v. Knight  
176 Wn. App. 936, 309 P.3d 776 (2013).....7, 8

State v. Saunders,  
120 Wn. App. 800, 86 P.3d 232 (2004).....4

**Statutes and Rules**

RCW 9.94A.589(1)(a).....3

RCW 9A.36.031(1)(d).....8

RCW 9A.56.190.....9

RCW 9A.56.200.....9

RCW 9A.56.210.....9

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion by finding that Sadowski's prior robbery in the second degree and assault in the third degree convictions did not count as same criminal conduct for purposes of his offender score where the assault in the third degree occurred after the victim had been removed from the stolen vehicle and was neither required to complete the robbery nor to escape from the robbery

B. STATEMENT OF THE CASE.

Following a burglary investigation by the Thurston County Sheriff's Office and the Yelm Police Department, the appellant, Henry Sadowski, III, was charged with burglary in the second degree. CP 2, RP 7-9, 10, 11, 13, 14. After being released on bail, Sadowski failed to appear at a scheduled omnibus hearing on August 16, 2018. RP 37, 27, 29-31, 45. As a result, an additional charge of bail jumping was added. CP 3. Sadowski waived his right to a jury trial and proceeded to a bench trial. CP 45, RP 4-53. The State elected to proceed on only the bail jumping charge and dismissed the burglary charge. RP 5, 56.

Following the bench trial, the trial court found Sadowski guilty of the crime of bail jumping and entered findings of fact and

conclusions of law. RP 53-56, CP 22-24. In fact, during closing arguments, defense counsel for Sadowski acknowledged the lack of a defense. RP 52-53. Prior to sentencing, the defense filed a sentencing memorandum arguing that Sadowski's prior criminal history contained in Pierce County cause number 09-1-03289-2, constituted same criminal conduct. CP 16-18, 50-66. The State responded in writing with its own sentencing memorandum. CP 67-91. The State recommended a sentence within the standard range of 43 to 57 months, based on a finding that the Pierce County crimes were not same criminal conduct. RP 62. Sadowski argued that his offender score should be a six because the three Pierce County convictions should be treated as the same criminal conduct and scored as a single point. RP 63, CP 52-53. The defense admitted that Sadowski committed the offense of bail jumping and indicated the reason they went to trial was to try to receive an exceptional sentence if the court were to consider giving Sadowski one. RP 63.

The trial court ruled, "I am finding that there is no same course of criminal conduct previously based on the standards and reasons articulated by the State in their memorandum." RP 65. With a standard range of 43-57 months and an offender score of 8,

the trial court imposed a sentence of 44 months. RP 65-66, CP 25-35. This appeal follows.

C. ARGUMENT.

1. The trial court acted within its discretion by finding that the Pierce County Robbery and Assault convictions did not count as the same criminal conduct for purposes of the offender score.

When calculating an offender score, RCW 9.94A.589(1)(a) provides that all “current and prior convictions [should be treated] as if they were prior convictions for the purpose of the offender score,” but recognizes the exception that “*if the court enters a finding that some or all of the current offenses encompass the same criminal conduct* then those current offenses shall be counted as one crime.” RCW 9.94A.589(1)(a) (emphasis added).

The “same criminal conduct” “means two or more crimes that require the same criminal intent, involve the same victim and are committed at the same time and place.” All of these elements must exist in order for a court to make a finding of same criminal conduct. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Courts narrowly construe this analysis and a trial court’s finding on the issue is reviewed under an abuse of discretion standard. Porter,

133 Wn.2d at 181 (1997); State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); Haddock, 141 Wn.2d at 110; State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999). Abuse occurs if the trial court “arbitrarily counted the convictions separately.” Haddock, 141 Wn.2d at 110.

The defendant bears the burden of proving same criminal conduct. Graciano, 176 Wn.2d at 538-540. The court in Graciano was addressing the standard of review applicable to a trial court’s determination of same criminal conduct and held that the appropriate standard is abuse of discretion. *Id.* at 535. A court abuses its discretion when the facts permit only one conclusion and the court decides to the contrary. *Id.* at 538. If the record supports either conclusion, the court’s decision will not be disturbed. *Id.* Germane to that determination is the question of which party bears the burden of proving same criminal conduct. The court in Graciano concluded that it is the defendant. The State understands that Graciano was specifically addressing other current offenses, not prior convictions. Graciano, 176 Wn.2d at 539. However, other current offenses are counted as prior convictions for purposes of calculating the offender score, RCW 9.94A.589(1)(a), and the same

reasoning should apply to both prior convictions and other current offenses. The Graciano court said:

It is because the existence of a prior conviction favors the State (by increasing the offender score over the default) that the State must prove it. . .

In contrast, a “same criminal conduct” finding favors the defendant by lowering the offender score below the *presumed* score. . . Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct. . .

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. . . The decision to grant or deny this modification is within the sound discretion of the trial court and, like other circumstances in which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion.

Graciano, 176 Wn.2d at 539-40, emphasis in original, internal cites omitted. This Court will defer to the discretion of the sentencing court and will reverse the decision of the trial court’s determination of same criminal conduct only on a clear abuse of discretion.” Haddock, 141 Wn.2d at 110.

In Pierce County Cause number 09-1-03289-2, Sadowski was convicted of robbery in the second degree, assault in the third degree and malicious mischief in the third degree. CP 81. The

Pierce County Court did not find that the offenses constituted same criminal conduct and scored them against each other. CP 82. In support of his argument that his prior offenses should count as same criminal conduct, Sadowski provided a declaration of probable cause from the Pierce County case and an information charging him with robbery in the first degree in that case. CP 62, 64. Despite the fact that he pled guilty in his Pierce County case, the Statement of Defendant on plea of guilty and the amended information were not provided to the sentencing court in this case. CP 81.

The declaration of probable cause that was provided states:

When deputies arrived, they met with victim J. Ewing who was bleeding from (sic) a significant head laceration. Ewing told them that he had been at a party in the area with several men. At some point Ewing drove some of the men (known to Ewing as "Frankie" and "Tony") to a grocery store to buy beer. After the purchase en route back to the party, "Frankie," who was seated in the backseat grabbed Ewing by the neck and choked him. Ewing stopped the car and was thrown out of his own car. "Tony" threw a beer bottle at Ewing and hit him in the head causing the injury. "Frankie" and "Tony" then fled in Ewing's car. A few days later deputies located Ewing's car on a power line access road. The car had been burned and was now a hulk.

CP 64.

In State v. Knight 176 Wn. App. 936, 940, 309 P.3d 776 (2013), this Court found that an assault and murder that occurred during a robbery did not encompass the “same criminal conduct.” In that case, three men and a woman went to Sanders' house to inspect a diamond ring offered for sale on Craigslist. Id. at 941-942. The suspects said by telephone that the ring was sought for a Mother's Day gift for a mother-in-law. Id. The family was detained. When the suspects started to beat one of the children, the elder Sanders intervened and was fatally shot. Id. at 942-944. The defendant, Knight, argued the issue of same criminal conduct for the robbery, assault and murder. Id. at 958-959. This Court summarized Knight's arguments as follows:

Knight argues that the trial court erred in failing to treat the following pairs of crimes as the “same criminal conduct” for offender score purposes because they occurred at the same time and place and her “objective intent throughout the incident never changed from completing the robbery”: (1) first degree robbery and felony murder of James (Counts II and I), and (2) first degree robbery and second degree assault of Charlene (Counts IV and V). She also argues that first degree burglary should have counted as the same criminal conduct as her other crimes because it, too, occurred at the same time and place and her “objective intent throughout the incident never changed.” Br. of Appellant at 31. At sentencing, the trial court rejected Knight's same criminal conduct argument, stating:

[T]he robbery, that is, of the ring, was completed before the assaults and the murder occurred. Therefore, although they occurred in the same place, Counts I and II and IV and V do *not occur at the same time*. The robbery of James Sanders was completed, as well as the robbery of Charlene Sanders, at the time their rings were stolen. And therefore, the murder and the assaults would not be the same criminal conduct because of that.

Knight at 959-960. (emphasis added).

This Court adopted the trial court's rationale as it pertains to the assault occurring after the robbery was completed even though they occurred during the same incident. *Id.* at 960.

Just as in the Knight case, the assault in this case did not occur at the same time as the robbery. Sadowski had already completed taking the car by use of force and ejected the victim from the vehicle. He threw the beer bottle at the victim and injured him after the victim had been ejected from the vehicle and the vehicle was possessed by the defendants. It is also important to note that the assault in the third-degree charge that Sadowski was convicted of was pursuant to RCW 9A.36.031(1)(d), which requires that the defendant, "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." CP 81.

His conviction for robbery was for robbery in the second degree, RCW 9A.56.190 and RCW 9A.56.210. CP 81. Unlike robbery in the first degree, the crime of robbery in the second degree does not require an aggravating factor such as bodily injury. RCW 9A.56.200; RCW 9A.56.210. The robbery in the second degree was completed when Ewing was removed from his vehicle. The following assault was not necessary to further the robbery.

Sadowski argues the transactional nature of the crime of robbery requires that a different result was reached by the trial court in this case because the use of force can occur during the taking and/or thereafter to retain possession of the property. State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992). In that case, our Supreme Court discussed the appellate court's decision stating:

A person takes money from the cash register of a seemingly unattended convenience store, thereby committing theft. Before the thief flees, the owner comes out of the back room and confronts him. Seeing the owner, the thief points a gun at him. Under the *Handburgh* court's construction of the statute, this would amount to a theft and an assault. In our opinion, however, the theft should be considered a robbery, even if no additional property is taken; the retention of the case, by the use of or threatened use of force in the presence of the store owner, is more than theft.

*Id.* at 290-291. Unlike the situation the Supreme Court was discussing, the assault committed on Ewing was not related to the theft of his vehicle. A fair reading of the facts available demonstrate that Sadowski and his co-defendant had already used force to take Ewing's vehicle and remove him from it. There was no need for Sadowski to use additional force to retain the vehicle. The intent from the throwing of the beer bottle can be characterized as more of an intent for gratuitous violence than an intent to affect a taking or retain property.

On the limited facts regarding the Pierce County case which were presented to the trial court in this case, the trial court did not abuse its discretion by finding that the offenses were not the same criminal conduct for the purposes of the Sadowski's offender score. The robbery had been completed prior to the assault, the robbery arguably occurred in the vehicle, whereas the victim was outside the vehicle during the assault, and Sadowski's intent changed from the intent to take the vehicle to the intent to harm Ewing.<sup>1</sup>

#### D. CONCLUSION.

The trial court properly exercised its discretion in finding that the prior offenses from Pierce County were not the same criminal

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<sup>1</sup> At trial, the defense argued that the crime of malicious mischief was also same criminal conduct, but Sadowski does not make the same claim on appeal.

conduct. The defense provided nothing in the record which demonstrates a clear abuse of that discretion. The State respectfully requests that this Court affirm the trial court's ruling and sentence in its entirety.

Respectfully submitted this 28th day of July, 2020.

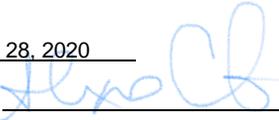
  
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**DECLARATION OF SERVICE**

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: July 28, 2020

Signature:  \_\_\_\_\_

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**July 28, 2020 - 8:23 AM**

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