

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 29, 2012, 1:39 pm
BY RONALD R. CARPENTER
CLERK

NO. 86530-2

RECEIVED BY E-MAIL

**THE SUPREME COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JULIO CESAR ALDANA GRACIANO, PETITIONER

Court of Appeals Cause No. 40289-1-II
Superior Court of Pierce County, No. 09-1-01836-9
The Honorable Kitty-Ann Van Doornick

Supplemental Brief of the Respondent

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

ORIGINAL

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Did the Court of Appeals err in applying a *de novo* standard of review to the trial court's determination of same criminal conduct?..... 1

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

 1. Procedure 1

 2. Facts..... 2

C. ARGUMENT.

 1. THE COURT OF APPEALS ERRED IN REVIEWING THE TRIAL COURT'S DETERMINATION OF WHETHER DEFENDANT'S CRIMES CONSTITUTED THE SAME CRIMINAL CONDUCT *DE NOVO* RATHER THAN UNDER THE APPLICABLE STANDARD FOR ABUSE OF DISCRETION. 7

D. CONCLUSION..... 12

Table of Authorities

State Cases

<i>State v. Aldana Graciano</i> , No. 40289-1-II, Slip Op.	2, 9, 10, 11
<i>State v. Collicott</i> , 112 Wn.2d 399, 771 P.2d 1137 (1989).....	8
<i>State v. Davidson</i> , 56 Wn. App. 554, 558, 784 P.2d 1268, <i>review denied</i> , 114 Wn.2d 1017 (1990).....	8
<i>State v. Dolen</i> , 83 Wn. App. 361, 364, 921 P.2d 590 (1996).....	7
<i>State v. Elliott</i> , 114 Wn.2d 6, 17, 785 P.2d 440, <i>cert. denied</i> 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 2d. 80 (1990).....	8
<i>State v. French</i> , 157 Wn.2d 593, 613, 141 P.3d 54 (2006).....	8, 9
<i>State v. Gerber</i> , 28 Wn. App. 214, 226, 622 P.2d 888 (1981), <i>review denied</i> , 95 Wn.2d 1021 (1981).....	10
<i>State v. Lessley</i> , 118 Wn.2d 773, 778, 827 P.2d 996 (1992).....	7
<i>State v. Porter</i> , 133 Wn.2d 177, 181, 942 P.2d 974 (1997)	8
<i>State v. Rodriguez</i> , 61 Wn. App. 812, 816, 812 P.2d 868 (1991).....	8, 10
<i>State v. Tili</i> , 139 Wn.2d 107, 122, 985 P.2d 365 (1999).....	8
<i>State v. Torngren</i> , 147 Wn. App. 556, 562–63, 196 P.3d 742 (2008).....	11

Statutes

RCW 9.94A.589(1)(a)	7
---------------------------	---

A. ISSUES PRESENTED FOR THE COURT.

1. Did the Court of Appeals err in applying a *de novo* standard of review to the trial court's determination of same criminal conduct?

B. STATEMENT OF THE CASE.

1. Procedure

On April 6, 2009, the State filed an information with the Pierce County Superior court charging defendant, Julio Cesar Aldana Graciano with four counts of rape of a child in the first degree, and two counts of child molestation in the first degree involving E.R.¹ CP 1-4. In the same information defendant was also charged with one count of child molestation involving J.R. *Id.* The State later filed an amended information changing the charging period of each count to be between June 1, 2007, and March 30, 2009. CP 62-65.

Trial began before the Honorable Kitty-Ann van Doorninck on November 24, 2009. The jury found defendant guilty on all four counts of rape of a child in the first degree involving E.R., and both counts of child molestation in the first degree involving E.R. CP 93-98. The jury found

¹ Because B.R., E.R. and J.R. are minors, the State will use their initials rather than their full names.

defendant not-guilty of child molestation in the first degree involving J.R. CP 99.

At the sentencing hearing held on January 22, 2010, the trial court ruled that each of the counts had been shown during trial to be separate and distinct, and calculated defendant's offender score as fifteen accordingly. RP-sentencing 6. Defendant was sentenced to 318 months to life for each count of rape of a child, and 198 months to life for each count of child molestation. CP 115-131. Each of these sentences was within the standard range. RP- sentencing 6-7.

Defendant timely appealed. CP 132. The Court of Appeals held that sufficient evidence had been presented to support defendant's convictions, and the admission of the certified copy of defendant's driver's license did not violate defendant's right to confrontation. *State v. Aldana Graciano*, No. 40289-1-II, Slip Op. at 5, 7. The Court of Appeals also held after a *de novo* review of the trial court's determination that both of defendant's convictions for child molestation should be considered the same criminal conduct as the related child rape convictions. *Id.* at 10.

2. Facts

Sergio Robles and his wife, Martha Robles, lived with their three children, B.R., who was thirteen years old at the time of the trial, E.R.,

who was nine, and J.R., who was seven, in Tacoma, Washington. RP 176, 177. The house was two-stories tall, and had a living room on each floor, a kitchen and three bathrooms. RP 176. The house also had three bedrooms; one that Mr. Robles and Mrs. Robles shared, one that B.R. and J.R. shared, and one that E.R. slept in. RP 178.

In the summer of 2007, defendant, Mr. Robles's cousin, lived with the family for a few months before moving out for approximately eight months. RP 181, 281-82. While living with the family, he stayed in the upstairs living room. RP 282.

In November of 2008, defendant moved back into the house with the Robles family. RP 181. Defendant was only going to stay with the family for a couple of days, but ended up staying until March of 2009. RP 181-2, 282-3. When defendant did not leave the house after a couple of days in November of 2008, E.R. began to persistently ask her mother when he was leaving. RP 212. E.R. wanted her "uncle" out of the house, and told her mother so. *Id.* However, E.R. did not tell her mother why she wanted to know when defendant would leave. *Id.*

One Saturday in March of 2009, E.R. told her mother that she wanted defendant to move out. *Id.* When Mrs. Robles asked E.R. why, she kept insisting that defendant move out E.R. said, "Because I don't want him here. He's scary. He's evil, and I just want him to move out

and I hope he goes and he dies.” RP 188. Mrs. Robles asked why E.R. would say something like that, and E.R. told Mrs. Robles that she didn’t want to tell. *Id.* Finally, E.R. told her mother, “He did things, bad things, to me.” RP 190. E.R. elaborated that defendant had touched her “privates.” *Id.* Mrs. Robles testified that E.R. appeared to be afraid to say anything else. RP 191-2.

Mrs. Robles talked to Mr. Robles about what E.R. had told her. RP 289. That night Mr. Robles confronted defendant and asked him to leave, and defendant left right away. RP 291. On the following Monday, after defendant had left and E.R. had calmed down, she told her mother that defendant had put his fingers inside of her and “put things inside of her” while the two of them were in the downstairs living room. RP 193-4. When Mrs. Robles asked E.R. where defendant had put things, she said, “In my butt.” RP 194. E.R. indicated that defendant had anal intercourse with her. *Id.* E.R. also told her mother that this was not the first time he had touched her. RP 195-6.

Mrs. Robles called the police, who referred her to the Child Advocacy Center. RP 198. Cornelia Thomas, a social worker at the Child Advocacy Center in Pierce County and a child forensic interviewer, conducted an interview with E.R. RP 349. A DVD was made of this

interview, and was shown to the jury, with some omissions, during trial. RP 350-1; Exhibit 6.

At trial E.R. testified that she was nine years old and in the fourth grade. She also testified that her "Uncle Julio" had come to live in the house during her summer vacation after second grade and stayed for a couple of months. RP 226, 228. She identified defendant as Uncle Julio. RP 227. While defendant lived with the family he stayed in the living room "on top with the TV." *Id.* Defendant moved out after a couple months, and then moved back in again. RP 228.

E.R. remembered that during the first time defendant lived in the house, the two of them had gone downstairs while her father and brothers were upstairs and her mother was at work. RP 229. While they were between the living room and the kitchen downstairs, defendant pulled down her pants, and then pulled down his own pants. Defendant was behind E.R. and he took "his penis out." RP 231. E.R. heard the zipper on defendant's jeans, and felt defendant's penis inside her anus, and then felt something wet. RP 231- 33. Then she heard her father's footsteps coming down the stairs, and ran into the bathroom. RP 233-4. E.R. cleaned herself off with toilet paper and saw that she was bleeding from her anus. RP 234. She put her pants back on and left the bathroom. RP 235. Her father told her to go upstairs, so she did. RP 235.

E.R. testified that defendant had also touched her in the upstairs living room on the couch while there was a blanket on top of them. On that occasion, defendant “grabbed [her] hand” and “put [her] hand on his penis, with his pants on.” RP 236. Defendant squeezed her hand hard, and then removed his penis from his pants and underwear. RP 236. “[T]hen he grabbed [E.R.’s] hand and he started squeezing it again.” RP 236-7. E.R. said she knew she was feeling the skin on defendant’s penis because “it was all wet and it was kind of hairy.” RP 237. E.R. testified that defendant had touched her on the couch “more than just a couple times.” RP 258-9. On at least one occasion while sitting on the couch, defendant touched E.R.’s anus, causing it to hurt when she went to the bathroom for a couple of days. RP 321-2.

E.R. recalled that defendant also touched her in her bedroom. E.R. testified that he pulled her pants and underwear down, and he touched her “with his hands and his penis” and a “couple of [her] toys and [her] mirror.” *Id.* With the toys defendant touched her “on the front part.” E.R. testified that defendant “put it in my butt” and went on to describe anal penetration with the objects; telling the jury that defendant put these things inside her body “in the back.” RP 237-8. E.R. also described defendant penetrating her anus with his penis in her bedroom. *Id.*

On another occasion, defendant and E.R. were in the kitchen, and E.R.'s pants were down. RP 239. Everyone else was upstairs in the house at the time. *Id.* Defendant took a fork and touched E.R. with it. E.R. explained that defendant "put it on [her] butt and [her] front part." *Id.* E.R. indicated that defendant penetrated her anus with the fork causing her to bleed. RP 250-1.

C. ARGUMENT.

1. THE COURT OF APPEALS ERRED IN REVIEWING THE TRIAL COURT'S DETERMINATION OF WHETHER DEFENDANT'S CRIMES CONSTITUTED THE SAME CRIMINAL CONDUCT *DE NOVO* RATHER THAN UNDER THE APPLICABLE STANDARD FOR ABUSE OF DISCRETION.

RCW 9.94A.589(1)(a) provides that a defendant's sentencing range will be calculated using all prior offenses and all current offenses except those which the court finds to be the same criminal conduct to determine his offender score. Two crimes consist of the same criminal conduct when they (1) require the same criminal intent, (2) are committed at the same time and place, (3) and involve the same victim. *Id.* If any one of these elements is missing, the offenses are not the same criminal conduct and must be counted separately in determining the defendant's offender score. *State v. Dolen*, 83 Wn. App. 361, 364, 921 P.2d 590 (1996), citing *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Whether the crimes involved the same criminal intent is a question of the objective intent, not the subjective intent of the defendant.

Where the record supports only a finding that the crimes involved the same criminal conduct, the trial court abuses its discretion in finding they did not. *State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991), *internal citations omitted*. The same is true if the record only supports a finding that the crimes did not involve the same criminal conduct and the trial court finds that they did. *Id.* If the record supports either conclusion, the court cannot be said to have abused its discretion in entering either finding. *Id.*

The standard of review for questions of same criminal conduct for the purposes of calculating defendant's offender score has long been for abuse of discretion or misapplication of the law. See *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006); *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); *State v. Davidson*, 56 Wn. App. 554, 558, 784 P.2d 1268, *review denied*, 114 Wn.2d 1017 (1990); *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied* 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 2d. 80 (1990); *State v. Collicott*, 112 Wn.2d 399, 771 P.2d 1137 (1989).

Defendant in this case never alleged that the court had misapplied the law. Appellant's opening brief to court of appeals, p. 14. The question then is whether the court abused its discretion in determining that

the defendant's crimes did not meet the three requirements for constituting same criminal conduct.

This case is analogous to *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). There, the sentencing court calculated French's offender score after finding that the multiple counts of rape did not constitute the same criminal conduct as the multiple counts of molestation. In *French*, the sentencing court determined that the crimes were against the same victim, but were committed over an extended period of time, making a temporal connection between the crimes "tenuous at best," and the crimes were sequential, not continuous. *Id.* This Court also determined in *French* that the crimes of first degree child rape and first degree child molestation have distinct criminal intents. *Id.*

The same is true of the crimes in the present case. Defendant's crimes here took place over a period of nearly two years. CP 1-4. The victim testified to multiple instances of rape and molestation that took place at different times during the time defendant lived with her family. RP 229, 231, 236-39, 258-59, 321-22. The record here supports the finding that defendant's crimes were not continuous, and did not meet the requirements to be the same criminal conduct.

Here, the Court of Appeals overturned the trial court's determination that the crimes did not involve the same criminal conduct, where it should have deferred to the lower court's discretion. *Aldana Graciano*, No. 40289-1-II, Slip Op. at 4. In making its determination that

the trial court had erred, the Court of Appeals stated: “The record is not clear... with regard to whether Graciano molested E.R. on two occasions separate and distinct from the four times he raped her.” *Aldana Graciano*, No. 40289-1-II, Slip Op. at 4. Where the record is unclear, it supports either a finding that the four acts of rape were separate and distinct from the two acts of molestation of E.R., or that they were not. Because the record supports either conclusion, the trial court cannot be said to have abused its discretion in finding that crimes were in fact separate acts. *Rodriguez*, 61 Wn. App. at 816. Where trial court’s finding is not an abuse of discretion, the Court of Appeals must defer to the trial court.

For the purposes of determining defendant’s offender score at sentencing, the trial court is in a better position than the court of appeals to answer the factual questions necessary to determine whether defendant’s crimes constitute the same criminal conduct. When a question requires the weighing of evidence, and resolving conflicts in testimony, the Court of Appeals defers to the trier of fact whether it be the trial court or the jury. *State v. Gerber*, 28 Wn. App. 214, 226, 622 P.2d 888 (1981), *review denied*, 95 Wn.2d 1021 (1981). This is because the trier of fact has heard the testimony, seen the evidence, and is responsible for making determinations of credibility. The question of whether crimes took place at the same time and place is a question of fact, and while the test is an objective one, determining whether the defendant had the same criminal intent or had formed a new criminal intent during the commission of the

crimes also involves weighing of facts, and resolving conflicts in testimony and evidence. The court of appeals should defer to the trial court's judgment on questions of fact, absent a clear abuse of discretion.

The Court of Appeals relied on the reasoning in *State v. Torngren*, 147 Wn. App. 556, 562–63, 196 P.3d 742 (2008), to find that the applicable standard of review for determinations of same criminal conduct is *de novo*. *Aldana Graciano*, No. 40289-1-II, Slip Op. at 4. That reasoning is inapplicable to this case. The court in *Torgren* reasoned that because the question of whether the criminal intent is the same is an objective one, the court of appeals is in as good a position as the trial court to make the determination. 147 Wn. App. at 562–63.

However, in *Torgren*, the sentencing court was determining whether the defendant's *prior* crimes constituted the same criminal intent. *Id.* at 560. When determining whether prior convictions are the same criminal conduct, as in *Torgren*, the decision is made from a sterile record of documents such as the information, declaration of probable cause, judgment and sentence, and perhaps the statement of defendant on plea of guilty. In such a case, the Court of Appeals presumably has access to all of the documents the sentencing court used in determining whether the defendant's prior convictions were the same criminal conduct for the purposes of the sentence. Hence, the remark in *Torgren*: that the appellate court was in as good a position to judge the basis of the determination as the trial court. 147 Wn. App. at 562.

In the present case, the sentencing court was determining whether the defendant's *current* offenses, tried before the judge who made the determination, constituted the same criminal intent. The trial court saw all of the witnesses, heard their testimony, and considered all of the evidence admitted at trial. The trial court made a determination of fact, based upon the testimony and other evidence in the current case. RP-sentencing 6. The trial court also found, based upon the evidence in conjunction with the jury instructions, that the jury had also concluded that, factually, the counts were not the same criminal conduct. RP-sentencing 5.

Here, the court of appeals did not have the opportunity to be present during testimony. Therefore it was not in an equal position with the trial court to determine whether the defendant's conduct constituted the same criminal conduct. Because the trial court was in a better position to determine whether the acts were the same criminal conduct, the appellate courts must defer to the trial court's decision. The proper standard of review of such a determination is whether the trial court abused its discretion. The *de novo* review used by the Court of Appeals is erroneous.

D. CONCLUSION.

Because the determination of same criminal conduct for the purpose of calculating a defendant's offender score entails questions of fact and the weighing of evidence, the State respectfully requests that this

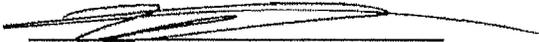
court reverse the court of appeals' decision and remand for the case to be reviewed under abuse of discretion standard.

DATED: February 29, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney



THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442



Margo Martin
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by *email* or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/29/12
Date
[Signature]
Signature