

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2/7/2025 2:00 PM  
BY ERIN L. LENNON  
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Supreme Court No. 1037775

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

ANDREW V. DRAKE,

Respondent.

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ON STATE'S PETITION FOR REVIEW FROM  
COURT OF APPEALS, DIVISION III, 39311-9-III

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

The Honorable Jeffrey B. Swan

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ANSWER TO PETITION FOR REVIEW

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## **A. INTRODUCTION**

Respondent Andrew Drake takes this opportunity to file an answer to the State's petition for review.

Mr. Drake was found guilty of thirty counts, which included several convictions for theft of a firearm, possession of stolen property, and trafficking in stolen property. The State petitions for review because the Court of Appeals affirmed the superior court's determination that same criminal conduct applied to several of these convictions at sentencing. The trial court's decision to apply same criminal conduct reduced Mr. Drake's offender score to three points, rather than the five points the State anticipated would apply.

In its petition, the State claims the Court of Appeals' opinion eliminates the defendant's burden of proving same criminal conduct, and puts the State in the position of needing to demand an evidentiary hearing to disprove ambiguity in the record. But where the record adequately supports more than one conclusion, a trial court has wide discretion in determining

whether same criminal conduct applies. Here it was well-  
within the facts of the record, and for the crimes charged and  
proven, for the trial court to conclude same criminal conduct  
applied. There is nothing to support the State's position that the  
Court of Appeals' decision below somehow shifts the burden to  
the State to disprove same criminal conduct.

The trial court did not abuse its discretion. The record  
supports the trial court's finding of same criminal conduct. The  
Court of Appeals' decision affirming this finding was not error,  
and this Court should not accept review.

#### **B. RESTATEMENT OF ISSUE PRESENTED**

Whether the Court of Appeals correctly affirmed the trial  
court's finding of same criminal conduct where the trial court  
did not abuse its discretion because the record supported its  
finding, and the trial court did not shift the burden to the State  
to disprove same criminal conduct.

#### **C. RESTATEMENT OF THE CASE**

On December 13, 2018, Donald Drake's home in Kettle  
Falls burned down. (RP 40, 43, 222-223). In his home was a  
safe which contained over 40 firearms. (RP 41). A few days

before the fire, Donald<sup>1</sup> opened the safe and saw that nothing was missing. (RP 43). After the fire, Donald was concerned about the contents of the safe, and he requested his friends to help him find out if it was salvageable. (RP 45). When the safe was found, it was completely empty. (RP 45). Donald contacted law enforcement and reported the contents of the safe as stolen. (RP 45-46).

Donald's son, Andrew Vern Drake, continued to live in a small cabin on the property after the fire. (RP 44, 67).

After further investigation, the State charged Andrew Drake by amended information with 31 counts. (CP 26-37). The charges were as follows: theft of a firearm (Counts 1 to 9); possession of a stolen firearm (Counts 11 to 17, 27, and 28); and trafficking in stolen property (Counts 19 to 26, 29 and 30)<sup>2</sup>. (CP 26-37).

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<sup>1</sup> First names are used to avoid confusion. No disrespect is intended.

<sup>2</sup> Mr. Drake was also charged with two misdemeanors and bail jumping, which are not the subject of this appeal.

Witnesses testified at trial consistent with the facts above.  
(RP 39-231).

Donald said when he first discovered the safe was empty, his son Andrew showed up to the scene a few minutes later. (RP 49). Andrew knew Donald was concerned about the guns' whereabouts, and Donald had previously asked Andrew several times to go look for the safe. (RP 49, 66-68).

Donald's former neighbor, Michael Winn, testified. (RP 83-90). At Donald's request, Mr. Winn searched the property and found the safe, but realized it was completely empty. (RP 84-86). Mr. Winn could not remember when he found it, but believed it was midsummer. (RP 85, 88).

Kyndal Swift testified. (RP 91-101). She was good friends with Andrew in 2018 and 2019. (RP 91). She testified Andrew gave her two guns. (RP 91-96). One was a Taurus .45 pistol and the other was a .22 rifle. (RP 91-96). Ms. Swift never testified as to when she received these guns. (RP 91-

101). She turned over the .22 rifle to law enforcement. (RP 95-96).

Joe Benefield testified he also received firearms from Andrew. (RP 104-110). He stated Andrew asked him to take the firearms for him because his home burned down. (RP 105). Mr. Benefield did not know where Andrew had gotten them. (RP 105-106). Mr. Benefield received the guns from Andrew at Andrew's residence, on the same property where Donald's house burned down. (RP 106). Andrew gave him the guns in a sleeping bag and duffle bag, but Mr. Benefield never looked at them or counted them. (RP 106-107). He did not testify about the dates this occurred, but Mr. Benefield said he turned them over to Detective Mark Coon approximately two days after he received them. (RP 106-107).

Detective Coon testified. (RP 111-144, 161-163). He was notified several firearms had gone missing from Donald's Kettle Falls property. (RP 113). He reached out to Mr. Benefield initially, requesting whether he had information



about any firearms becoming available. (RP 114). Around October 22, 2019, Mr. Benefield notified Detective Coon he received several firearms from Andrew and turned them over. (RP 114-127).

Detective Coon testified he also had contact with Ms. Swift, and attempted to purchase the .45 Taurus from her under the ruse of being a potential buyer. (RP 127-128). On October 25, 2019, in an interview room at the county sheriff's office, he spoke to Ms. Swift about the gun. (RP 128-129). She had sold the .45 Taurus and could not get it back. (RP 129-130). As for the other gun Andrew provided to Ms. Swift, Detective Coon saw Ms. Swift give the .22 rifle to another law enforcement officer. (RP 130-131).

Andrew told Detective Coon he had given the guns to Ms. Swift. (RP 136). He also told Detective Coon the guns given to Mr. Benefield were ones he had permission to sell or give away. (RP 136-137). Andrew acknowledged he gave the

.45 to Ms. Swift. (RP 137). Andrew said he salvaged them from the fire. (RP 137).

Detective Coon identified nine firearms that he recovered between Mr. Benefield and Ms. Swift. (RP 118-131, 161-163). These same firearms were the ones Donald identified as some of the firearms he kept in his safe before the fire. (RP 47-61, 222-223; 2nd Supp. CP Exhibit List).

The jury found Andrew Drake guilty of 30 counts, to include the following: theft of a firearm (Counts 1 to 9); possession of a stolen firearm (Counts 11 to 17, 27, and 28); and trafficking in stolen property (Counts 19 to 26, 29 and 30)<sup>3</sup>. (CP 38-67; RP 300-306).

The trial court held two sentencing hearings, during which the parties and trial court addressed whether same

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<sup>3</sup> Count 10 (theft in the third degree), Count 18 (possession of stolen property in the third degree), and Count 31 (bail jumping) are not a subject of this appeal. (CP 47, 55, 91).

criminal conduct applied to several of the convictions. (CP 68-84, 86-89; RP 313-341).

The State argued that the nine counts of theft of a firearm (Counts 1 to 9) and nine counts of possession of a stolen firearm (Counts 11 to 17) were not the same criminal conduct because the transference of the firearms to two separate parties—Mr. Benefield and Ms. Swift—were what constituted possession of stolen firearms. (CP 68-84, 86-89; RP 313-341). Thus, the State argued the offender score should be five points. (CP 81).

The trial court did not agree with this analysis. (RP 313-341). The trial court stated:

[I]f you have theft of a firearm, you've got necessarily possession of the firearm. And the date ranges were the same for those charges. The [S]tate says that is a factor, not the determining factor. And if you look at the statute, which the [S]tate explains in their memorandum same course of conduct requires the same criminal intent, commission at the same time and place.

So if you—if you steal the guns, at the same time and place that you steal those you're in

possession of those. So that's the same—same time and place and the same victim. We had the same victim. We have the same time and place as far as possession goes. We don't have a date—well, let me see, did we have—we had a date when they knew the safe was empty was in August.

(RP 320). The trial court reiterated its reasoning on why theft of a firearm in this case constituted the same criminal conduct as possession of stolen firearms, stating:

[W]hat the State seems to be hanging their hat on here is this possession was not at the same place.

I take defense counsel's point, when it occurs to a reasonable, rational person, when you read that argument that *if you take them from the same place where you were stealing them to another location, to avoid that you would always just have to stay in the same location where you were trying to steal them from...* there are cases of theft where—in the case law where this is exactly what happens, somebody steals firearms from one location and it's still one—the same course of conduct.

...

All the guns were stolen from the same place at the same time from the same victim with the intent to deprive the owner of the property.

And then you have all of those guns then being charged as possession of stolen firearm. You have the same victim. You have the same place. We're at the same piece of property. And it defies reason, and it's not consistent with the case law that I've read, that you would stay where you were stealing the weapons from in order for those not to be the same course of conduct.

[T]he theft and possession are the same course of conduct... it's the same victim. *It's the same time and place that he was in possession of those.*

...

He was in possession of those at the same time and place. Mr. Benefield testified he came out to where Mr. Drake lived, which was on the burnt-out property.

...

[The State is] wanting me to find that based on the testimony it's clear that these guns were stolen on a date certain and possessed on a different date certain. And I'm not finding that.

...

So I think this is the same victim, same time and place, same objective criminal intent, which is to deprive the owner of the property.

(RP 329-340) (emphasis added).

The State also requested the trial court review the probable cause statements for facts supporting its argument that same criminal conduct did not apply. (RP 315). The trial court declined, stating it would only base its decision on the evidence presented at trial, and to do otherwise would invade the purview of the jury. (RP 333-334).

The trial court held the nine convictions for theft of a firearm (Counts 1 to 9) and nine convictions for possession of a stolen firearm (Counts 11 to 17, 27 and 28) were the same criminal conduct. (CP 90-91; RP 313-341). The trial court concluded Andrew had an offender score of three points, not five points as the State was anticipating. (RP 313-314, 340-342).

On appeal, the State challenged the trial court's finding of same criminal conduct. (State's Pet. For Review at Appendix A, COA Opinion filed Dec. 10, 2024). The Court of Appeals affirmed the trial court.

(*Id.*). The Court of Appeals found the trial court did not abuse its discretion when calculating Mr. Drake's offender score and in declining to consider the affidavit of probable cause. (*Id.*).

The State now petitions this Court for review.

#### **D. ARGUMENT**

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

The State contends RAP 13.4(b)(1) and (3) apply.

(State's Pet. for Review, pg. 6).

**1. Whether the Court of Appeals correctly affirmed the trial court's finding of same criminal conduct where the trial court did not abuse its discretion because the record supported its finding, and the trial court did not shift the burden to the State to disprove same criminal conduct.**

The State claims the Court of Appeals opinion improperly held that a superior court may relieve the defendant from his burden of proving same criminal conduct. (State's Pet. for Review, pg. 7-8, 10-14). This argument is not supported. The State's claim excludes key details that were essential to the appellate court's holding.

First, it should be noted the trial court recognized the defendant has the burden of proving same criminal conduct. (RP 331; COA Opinion, pg. 3). But here, the type of convictions and the evidence presented at trial supported a finding of same criminal conduct, as recognized by the Court of Appeals:



As proved by the State, the nine firearms at issue were taken by Mr. Drake from his father's safe following the destruction of his father's home. As further proved by the State, Mr. Drake's intent in taking the firearms was to deprive his father of the guns. Simultaneous to the theft, Mr. Drake, knowing the firearms had been stolen, knowingly possessed the firearms and appropriated them for his own use. Mr. Drake's theft of the firearms furthered his crimes of possessing the firearms.

(COA Opinion, pg. 8). This analysis flows naturally from the Supreme Court's opinion in *State v. Westwood*, 2 Wn.3d 157, 166, 534 P.3d 1162 (2023). The *Westwood* Court clarified that when it comes to same criminal conduct, the determinative question is whether each of the theft and possession convictions required the same statutory intent. *Id.* at 166; (COA Opinion, pg. 7).

As recognized in the Court of Appeals opinion, the theft and possession convictions had the same statutory intent. The trial court did not relieve the defendant of his burden of proof—the convictions and evidence presented follows *Westwood* precedent. Moreover, the trial court is within its discretion to

find same criminal conduct where the record supports either conclusion. *State v. Graciano*, 176 Wn.2d 531, 537-538, 295 P.3d 219 (2013)). The State seemingly argues there could only be one conclusion—that these crimes were separate. (State’s Pet. for Review, pg. 8). But the record does not present only one possible conclusion—there were two viable possibilities for the trial court to choose from—and thus no discretion was abused.

Second, the State completely ignores that defense counsel did offer arguments supporting same criminal conduct for the theft and possession convictions. (RP 324-325; COA Opinion, pg. 9). Though defense counsel’s argument was brief, he argued for a same criminal conduct finding. (*Id.*). For the State to say the defendant did not meet his burden also ignores the argument defense counsel made.

Finally, there is nothing in case law or statute that prevents a trial court from sua sponte raising same criminal conduct. RCW 9.94A.589(1)(a); (COA Opinion, pg. 10). The trial court is solely responsible for determining whether same

criminal conduct applies. “Same criminal conduct determinations rest within the sound discretion of the trial court.” (COA Opinion, pg. 6) (citing *Graciano*, 176 Wn.2d at 536). The trial court did not abuse its discretion when it addressed the issue.

As a side note, the State claims the Court of Appeals misapprehended the trial court’s ruling when it included the following footnote:

The State does not challenge the trial court’s finding that the nine theft convictions constitute the same criminal conduct nor its findings that the two trafficking convictions related to Ms. Swift are the same criminal conduct as are the eight counts related to Mr. Benefield.

The State misreads this comment to mean the Court of Appeals did not think the trial court assigned separate points to each of the two trafficking events. (State’s Pet. for Review, pg. 9) (citing COA Opinion, pg. 5, fn. 5). Yet the Court of Appeals was merely noting that the State did not assign error to the trial court’s finding of same criminal conduct as to *all* individual

counts amongst those convictions. In sum, while it would not have had merit, the State did not argue that each of those convictions were separate. This footnote is not essential to the Court of Appeals' opinion, it was merely an observation to orient the reader.

The State further alleges that the Court of Appeals' opinion places a requirement on the State to demand an evidentiary hearing, so it can present more evidence to prove crimes are separate criminal conduct. (State's Pet. for Review, pgs. 13-14). However, as pointed out herein, the burden was never shifted to the State to disprove same criminal conduct.

The trial court did not abuse its discretion. The trial court saw the evidence and convictions supported a finding of same criminal conduct, defense counsel's argument supported it, and the trial court made its discretionary ruling.

The State cannot show the Court of Appeals' decision conflicts with a decision from the Supreme Court. RAP 13.4(b)(1); (State's Pet. for Review, pg. 7). In no way did the

trial court abuse its discretion nor apply the burden of proving same criminal conduct to the wrong party. This Court should not grant review under RAP 13.4(b)(1).

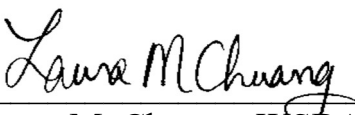
The State also claims the Court of Appeals' decision "impacts a significant question of criminal law." (State's Pet. for Review, pgs. 6-7, 12-14) (citing RAP 13.4(b)(3)). To meet the standard in RAP 13.4(b)(3), however, the State must present authority demonstrating this is a significant question of law under the state and/or federal constitutions. RAP 13.4(b)(3). The State cites no constitutional authority nor makes any constitutional arguments. This Court should not grant review under RAP 13.4(b)(3).

#### **E. CONCLUSION**

This Court should not accept review under RAP 13.4(b)(1) or (3). The State has not proven review is merited as the trial court did not abuse its discretion in finding same criminal conduct applied.

I certify this document contains 3,062 words, excluding  
the parts of the document exempted from the word count by  
RAP 18.17.

Respectfully submitted this 7th day of February, 2025.

  
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Laura M. Chuang, WSBA #36707

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

STATE OF WASHINGTON	) Supreme Court No.
Petitioner	) 1037775
vs.	)
	) COA No. 39311-9-III
ANDREW V. DRAKE,	)
Respondent.	) PROOF OF SERVICE
_____	)

I, Laura M. Chuang, assigned counsel for the Respondent herein, do hereby certify under penalty of perjury that on February 7, 2025, having obtained prior permission, I served a copy of the answer to petition for review on the Petitioner at [wferguson@stevenscountywa.gov](mailto:wferguson@stevenscountywa.gov) using the Washington State Appellate Courts' Portal.

Dated this 7th day of February, 2025.

/s/ Laura M. Chuang  
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# **NORTHWEST APPELLATE LAW**

**February 07, 2025 - 2:00 PM**

## **Transmittal Information**

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