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Case #: 1037775

Supreme Court No. _____
Court of Appeals No. 39311-9-III

THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON
Petitioner,

v.

ANDREW V. DRAKE
Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Appellant State of Washington, by and through the Stevens County Prosecuting Attorney, requests review of the Unpublished Opinion of the Washington Court of Appeals, Division III, designated in Part III of this Petition.

II. STATEMENT OF THE CASE

Mr. Andrew V. Drake (hereinafter “Mr. Drake”) was convicted by a Stevens County jury of nine counts of theft of a firearm, one count of theft in the third degree, nine counts of possession of a stolen firearm, one count of possessing property in the third degree, nine counts of trafficking in stolen property in the first degree, and one count of trafficking in stolen property in the second degree. Clerk’s Papers at pages 26-37, 38-67. Before trial, Mr. Drake pled guilty to one count of Bail Jumping, leaving thirty counts to be tried to a jury. Report of Proceedings at page 20: lines 9-17, 313:12-16; CP 38-67.

Mr. Drake stole his father's firearms sometime after his father's house burned down on December 13, 2018. RP 222-23. After the fire, Mr. Drake continued to live on his father's property. RP 44:10-19.

The theft of firearms was discovered in August of 2019. RP 44-46. But it wasn't until October of 2019, that Mr. Drake disposed of the stolen firearms to two separate individuals on two separate occasions; one transfer to a Mr. Joe Benefield (hereinafter "Mr. Benefield") and one transfer to a Ms. Kyndal Swift (hereinafter "Ms. Swift"). RP 137:4-19, 106-07.

Mr. Drake was eventually caught, charged, and proceeded to trial by jury. RP 136:16-18; CP 26-37.

At trial, Mr. Benefield testified that he obtained several firearms and a pellet gun, wrapped in a sleeping bag and a duffle bag, from Mr. Drake, in October of 2019. RP 106, 127. Mr. Drake asked Mr. Benefield to store the firearms and the pellet gun for him. RP 108:17-19. Mr. Benefield contacted Stevens County Sheriff's Detective Mark Coon. RP 105:5-16. Detective

Coon identified and testified about the firearms and pellet gun he received from Mr. Benefield. RP 4, 119, 120, 121, 123, 124, 125, 126, 135, 162; CP 26-28, 29-35 (Counts 1-7, 10, 11-18, 19-26).

Detective Coon testified that he later heard that Ms. Swift had possession of and was trying to sell one of the stolen firearms, a .45 caliber pistol. RP 127:11-22. Detective Coon developed a sting operation to obtain the stolen .45 caliber pistol from Ms. Swift. RP 127-28. Ms. Swift decided not to sell the .45 caliber pistol to Detective Coon and stated the pistol was “too hot” and that she intended to bury it or hold on to it. RP 128:8-10. Later, in October of 2019, Detective Coon met with Ms. Swift at the Stevens County Sheriff’s Office. RP 128:11-16. Ms. Swift talked to Detective Coon about the .45 caliber pistol, which she identified as a Taurus .45 caliber pistol. RP 129:10-18; CP 29, 36. Ms. Swift sold the Taurus .45 caliber pistol and helped Detective Coon get it back from the purchasers. RP 129-31. Ms. Swift also surrendered a .22 caliber Springfield bolt action rifle. RP 131:4-23, 133; CP 29, 36-37 (Counts 8, 27, 29).

Mr. Drake admitted to Detective Coon that he had either gifted or sold the Taurus .45 and the Springfield .22 to Ms. Swift. RP 136:4-15.

The jury found Mr. Drake guilty on all thirty counts that were submitted for verdict, in Verdict Forms A through DD. RP 300-306; CP 38-66.

The first attempt at sentencing took place on October 10, 2022. RP 313-22. The sentencing court addressed the State's calculation and decided to give Mr. Drake's attorney additional time to submit briefing and develop arguments:

So that's the state's point is it's not the same time and place anymore, based on the testimony at trial, even though the charging document has the same range. So that's my question to you, Mr. Myers. Do you need a minute to think about this? I can take a recess and you can do your own research if you want, briefly.

RP 321:5-10; see also RP 322:5-10.

The sentencing court reconvened the next day, after giving defense counsel time to consider the issue of offender score calculation. RP 323. At the second hearing, the sentencing court

found Mr. Drake's offender score to be three because it found that Mr. Drake engaged in the same course of conduct for all firearm theft and possession counts. RP 341:12-13; CP 91.

The State argued for a calculation of Mr. Drake's offender score at five points. CP 81. The Superior Court assigned one point for Mr. Drake's trafficking of firearms to Mr. Benefield and one point for Mr. Drake's trafficking of another group of firearms to Ms. Swift. RP 331:6-11; CP 90-91.

The State requested that the sentencing court resolve factual questions by consulting the affidavits of probable cause. RP 315:6-16. The sentencing court refused to consider the affidavits. RP 333:18-24.

The result was that the Superior Court refused to sign an additional point to the theft counts and an additional point to the possession counts, resulting in an offender score of three. RP 340:6-13.

The State timely appealed. Division III of the Court of Appeals filed its Unpublished Opinion on December 10, 2024.

III. DECISION OF THE COURT OF APPEALS

In its Unpublished Opinion filed on December 10, 2024 under case number 39311-9-III, the Court of Appeals denied the State's appeal and affirmed the Superior Court's calculation of Mr. Drake's offender score. See Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review under WA RAP 13.4(b)(1) because Division III's Opinion is in direct conflict with a decision of this Court?
2. Should this Court accept review under WA RAP 13.4(b)(3) when Division III's Opinion broadly applies to sentencing of felony convictions in Washington, thereby impacting a significant portion of felons?

V. ARGUMENT

This Court should accept review, based on two of the four tests in RAP 13.4(b):

- (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 a published 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.

WA RAP 13.4(b). This Court should accept review because Division III's Opinion is in direct conflict with a decision of this Court and because the Opinion impacts a significant question of criminal law.

In reaching its decision, Division III held that a Superior Court may relieve a convicted person of his burden of proof, so long as there is ambiguity in the trial record:

At sentencing, Mr. Drake presented a meritorious argument that his nine theft convictions constituted the same criminal conduct as his nine possession convictions and thus were correctly counted as one crime toward his offender score. Although Mr. Drake's intent in possessing the stolen firearms **may have evolved, where, as here, the record adequately supports more than one conclusion,** the matter lies in the court's discretion.

Opinion at page 9 (emphasis added). Division III held that "[t]he trial court did not abuse its discretion in failing to hold Mr. Drake

to his burden of proving same criminal conduct.” Opinion at page 10.

Division III seems to have misapprehended numerous aspects of the Superior Court’s ruling: “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.” Opinion at page 5, footnote 5.

But the Superior Court correctly viewed the trafficking to Ms. Swift and the trafficking to Mr. Benefield as separate conduct. RP 331:6-11; CP 90-91. Where the Superior Court erred, in part, was refusing to make that same differentiation when it considered whether theft and possession of the firearms at two different times and in two different batches constituted separate conduct. It is unclear what Division III’s understanding was, given the court’s commentary in footnote 5, which appears

to be an incorrect conclusion that the Superior Court did not assign separate points to each of the two trafficking events.

Division III's rationale for finding that the Superior Court did not abuse its discretion was that the Superior Court could raise the issue of same criminal conduct, *sua sponte*. "Notwithstanding defense counsel's brief argument, there is no statutory prohibition against the court sua sponte conducting a same criminal conduct analysis based on the evidence presented during trial." Opinion at page 10.

Division III appears to have misapprehended the issue by saying that the Superior Court could *sua sponte* raise the issue of point calculation for an offender. The State was not concerned with the Superior Court's *sua sponte* raising of the issue; the State was concerned with the failure of the Superior Court to apply the burden on the appropriate Party. Division III's rationale conflates raising an issue with which party has the burden of proof.

1. Division III's Opinion conflicts with this Court's decision in State v. Graciano.

Division III's Opinion is in direct conflict with this Court's decision in State v. Graciano. In Graciano, this Court supplied a test for calculating an offender score when a superior court encounters a question of whether or not the convicted person engaged in the same course of conduct. This Court imposed a factual burden of proof on the convicted person. Division III's Opinion reverses Graciano.

“In contrast, a ‘same criminal conduct’ finding favors the defendant by lowering the offender score below the **presumed** score.” State v. Graciano, 176 Wash.2d 531, 539, 295 P.3d 219 (2013) (emphasis in original). “Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct.” Id.; see also Opening Brief of Appellant at page 9.

“Two crimes manifest the ‘same criminal conduct’ **only** if they ‘require the same criminal intent, are committed at the same

time and place, **and** involve the same victim.’ As part of this analysis, courts also look to whether one crime furthered another.” Id. at 540 (emphasis added) (internal citations omitted).

“If the **defendant fails to prove** any element under the statute, the crimes are not the ‘same criminal conduct.” Id. (emphasis added). “[T]he **statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.**” Id. (emphasis added).

Division III’s rule is in direct conflict with Graciano:

At sentencing, Mr. Drake presented a meritorious argument that his nine theft convictions constituted the same criminal conduct as his nine possession convictions and thus were correctly counted as one crime toward his offender score. Although Mr. Drake’s intent in possessing the stolen firearms **may have evolved, where, as here, the record adequately supports more than one conclusion,** the matter lies in the court’s discretion.

Opinion at page 9 (emphasis added). Division III’s holding illustrates its destruction of this Court’s rule in Graciano: “The trial court did not abuse its discretion in failing to hold Mr. Drake

to his burden of proving same criminal conduct.” Opinion at page 10.

In other words, a sentencing court no longer needs to follow Graciano. Instead, the sentencing court may find a continuing course of conduct from ambiguity in the record or where the record supports more than one conclusion.

Saying that Mr. Drake’s intent “may” have changed is not the same as saying that Mr. Drake proved that his intent did not change. Division III therefore took the matter from an affirmative obligation to a mere formality that is met so long as any ambiguity remains in the record. In other words, Division III’s Opinion changes the matter from a burden to a rebuttable presumption in the opposite direction, thereby placing its Opinion in direct conflict with Graciano.

2. Division III’s Opinion has a significant impact on sentencing of felony convictions throughout Washington.

This Court should grant review under WA RAP 13.4(b)(3) because Division III’s Opinion impacts the application of the

Sentencing Reform Act and felony sentencing, in two ways.

First, Division III's Opinion removes the convicted person's burden by forcing the State to prove at trial that the defendant did not act in a continuing, single course of conduct and, so long as there is any ambiguity in the record, the defendant need prove nothing after conviction.

In calculating the offender score, Section 589 commands a sentencing court to treat other current convictions as if they were prior convictions unless the sentencing court enters a finding that the current offenses were part of the same criminal conduct. See RCW 9.94A.589(1)(a). In State v. Graciano, this Court held that because a finding of same course of conduct under Section 589 benefits the convicted person, he has the factual burden of proving that his crimes were part of the same course of conduct. Graciano, 176 Wash.2d at 539.

Second, Division III's Opinion removes the burden of proof from the convicted and places it on the State to demand an evidentiary hearing if there is any ambiguity in the record. And,

when the State does not demand the evidentiary hearing, the convicted person's refusal to stipulate to certain facts becomes a substitute for proof.

In Mr. Drake's case, the Superior Court refused to consider any extraneous facts or hold an evidentiary hearing. As Division III correctly concluded, Mr. Drake disputed the specific dates or date ranges for his theft of the nine firearms and the State did not ask for an evidentiary hearing; but neither did Mr. Drake. See Opinion at pages 10-11.

It was Mr. Drake's burden—not the State's—to show that his theft of all nine firearms and his later possession of stolen firearms were part of the same course of conduct.

Instead of holding Mr. Drake to that burden, the Superior Court merely declared it a draw and awarded the point calculation to Mr. Drake. Division III's Opinion reinforces that incorrect burden realignment.

VI. CONCLUSION

This Court should accept review. This Case presents two bases for review under WA RAP 13.4(b).

I certify that the number of words in this Document, excluding this Certificate and other portions of this Document exempt from the word count, according to Microsoft Word, is 2,374 and is therefore within the word count permitted by WA RAP 18.17.

RESPECTFULLY SUBMITTED 8th day of January,
2025.



Will Ferguson, WSBA 40978
Special Deputy Prosecuting Attorney
Office of the Stevens County Prosecuting Attorney
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on the 8th day of January, 2025, I caused a copy of the foregoing document to be served via e-mail upon uploading the same to the Washington Courts web portal, to the following Parties or their attorney(s):

Laura M. Chuang, WSBA 36707
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Northwest Appellate Law
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A handwritten signature in blue ink, appearing to read "Will Ferguson", is positioned above a horizontal line.

Will Ferguson, 40978

APPENDIX A

FILED
DECEMBER 10, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

| | | |
|----------------------|---|---------------------|
| STATE OF WASHINGTON, |) | |
| |) | No. 39311-9-III |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | |
| ANDREW V. DRAKE, |) | UNPUBLISHED OPINION |
| |) | |
| Respondent. |) | |

C●●NEY, J. — A jury found Andrew Drake guilty of 28 felonies and 2 misdemeanors. Prior to trial, Mr. Drake pleaded guilty to bail jumping. At sentencing, the State advocated for an offender score of 5 on each felony conviction. The court, sua sponte, found many of the counts constituted the same criminal conduct, calculated Mr. Drake's offender score at 3, and ordered a standard range sentence on each felony count. The State appeals.

BACKGROUND

After a fire ravaged Mr. Drake's father's home, Mr. Drake stole nine firearms and a pellet gun from his father's safe. Mr. Drake later delivered two of the firearms to Kyndal Swift. Mr. Drake gave the remaining firearms and a pellet gun to Joe Benefield. Mr. Benefield voluntarily turned the stolen firearms and pellet gun over to law enforcement.

By amended information, the State charged Mr. Drake with nine counts of theft of a firearm (theft),¹ alleged to have occurred between December 1, 2018, and October 22, 2019 (the range for counts 8 and 9 concludes on October 25, 2019). The State also charged nine counts of possession of a stolen firearm (possession),² alleged to have occurred between December 1, 2018, and October 22, 2019 (the range for counts 27 and 28 concludes on October 25, 2019). The State charged Mr. Drake with two counts of trafficking in stolen property in the first degree (trafficking)³ for the firearms delivered to Ms. Swift, and eight counts of trafficking⁴ for the firearms and pellet gun delivered to Mr. Benefield.

¹ Counts 1-9.

² Counts 11-17, 27-28.

³ Counts 29-30.

⁴ Counts 19-26 (Count 26 related to a pellet gun).

In count 31, the State alleged Mr. Drake committed the crime of bail jumping by knowingly failing to appear in court on January 7, 2020 after a court order released him. Mr. Drake pleaded guilty to count 31 prior to trial.

At sentencing, the State calculated an offender score of 5 on each felony conviction. The State counted the nine theft convictions as the same criminal conduct (1 point), counted the two possession convictions related to the firearms given to Ms. Swift as the same criminal conduct (1 point), counted the seven possession convictions related to the firearms given to Mr. Benefield as the same criminal conduct (1 point), counted the two trafficking convictions related to Ms. Swift as the same criminal conduct (1 point), counted the eight trafficking convictions related to Mr. Benefield as the same criminal conduct (1 point), and added 1 point for the bail jumping conviction. Defense counsel initially agreed with the State's proffered offender score.

The trial court challenged the State's calculation, noting that the theft convictions and possession convictions alleged the same criminal intent, the same time and place, and the same victim. In response, the State directed the court to the affidavit of probable cause to establish a substantial break in time. The court declined to rely on the probable cause affidavit to resolve any factual disputes. Although the court noted it was the defendant's burden to establish same criminal conduct, it recognized the State's analysis was "counter to what the case law says." Rep. of Proc. (RP) at 331.

Ultimately, the court found the nine theft convictions and nine possession convictions constituted the same criminal conduct (1 point), the two trafficking convictions related to Ms. Swift were the same criminal conduct (1 point), the eight trafficking convictions related to Mr. Benefield were the same criminal conduct (1 point), and added one point for the bail jumping conviction. Mr. Drake was then sentenced within the standard range under an offender score of 3 on each count.

The State timely appeals.

ANALYSIS

On appeal, the State argues the trial court abused its discretion in calculating Mr. Drake's offender score, in failing to place the burden of proving same criminal conduct on Mr. Drake, and in declining to consider the affidavit of probable cause. We disagree with each of the State's arguments and affirm.

A court "abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable." *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540 (2016) (citing *State v. Barnes*, 85 Wn. App. 638, 669, 932 P.3d 669 (1997)). A "decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). A "decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view

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‘that no reasonable person would take,’ and arrives at a decision ‘outside the range of acceptable choices.’” *Rohrich*, 149 Wn.2d at 654 (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)). Indeed, a trial court’s discretion is broad:

[W]e give great deference to the trial court’s determination: even if we disagree with the trial court’s ultimate decision, we do not reverse that decision unless it falls outside the range of acceptable choices because it is manifestly unreasonable, rests on facts unsupported by the record, or was reached by applying the wrong legal standard.

State v. Curry, 191 Wn.2d 475, 484, 423 P.3d 179 (2018) (citing *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013)).

COURT’S CALCULATION OF MR. DRAKE’S OFFENDER SCORE

The State asserts the trial court misapplied the law when it failed to recognize that Mr. Drake’s intent in possessing the firearms changed when he “divided the spoils of his theft into two batches,” thereby possessing the firearms at different times and places. Br. of Appellant at 22.⁵

A court’s determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law. *State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). “[W]hen the record supports only one conclusion

⁵ 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.

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on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* at 537-38 (quoting *State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991)). “[W]here the record adequately supports either conclusion, the matter lies in the court’s discretion.” *Id.* at 538.

Trial court discretion has been described as “sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 303 P.2d 290 (1956)). “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion.” *Id.*

Before imposing a sentence, the court shall conduct a hearing to determine the offender score used to calculate a sentencing range for each conviction. RCW 9.94A.500, .525. Generally, when a defendant is sentenced for multiple current offenses, the sentence range for each offense is determined by counting other current convictions “as if they were prior convictions.” RCW 9.94A.589(1)(a). However, “if the court enters a finding that some or all of the current offenses encompass the same criminal conduct” then the current offenses constituting the “same criminal conduct” are “counted as one crime.” *Id.* Same criminal conduct determinations rest within the sound discretion of the trial court. *See Graciano*, 176 Wn.2d at 536.

“Same criminal conduct” means “two or more crimes that [(1)] require the same criminal intent, are committed at [(2)] the same time and place, and [(3)] involve the same victim.” RCW 9.94A.589(1)(a). We construe “same criminal conduct” narrowly and will not apply it if any one of the three elements are absent. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Here, regardless of who Mr. Drake delivered the firearms to, the theft and possession convictions were directed at the same victim: Mr. Drake’s father. As charged and proved by the State, the crimes were committed during the same broad time period and originated at the same place—on or between December 1, 2018, and October 25, 2019, at Mr. Drake’s father’s devastated home. Thus, the determinative question is whether each of the theft and possession convictions required the same “statutory intent” as set forth by the Supreme Court’s recent decision in *State v. Westwood*, 2 Wn.3d 157, 166, 534 P.3d 1162 (2023).

Under *Westwood*, each of Mr. Drake’s theft and possession convictions plausibly constitute the same criminal conduct as the other theft and possession convictions. Mr. Drake’s nine theft convictions necessarily have the same “statutory intent” because they are all violations of the same statute. *Id.* at 167-68; RCW 9A.56.300. Similarly, all nine of Mr. Drake’s possession convictions carry the same “statutory intent.” RCW 9A.56.140, .310. However, our inquiry does not end. As argued by the State,

Mr. Drake's intent in possessing the stolen firearms may have shifted between the time he obtained the firearms and when he furnished them to Ms. Swift and Mr. Benefield.

In analyzing *Westwood's* "statutory intent" test, RCW 9A.56.020(1)(a) defines "theft" as to "wrongfully obtain or exert unauthorized control over the property . . . of another . . . with intent to deprive him or her of such property." *See Clerk's Papers* (CP) at 130, 144. The mens rea for possession differs from theft. "Possession" means to "knowingly . . . possess . . . or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1); CP at 145. Because the statutory mens rea of each crime is similar (the intentional or knowing deprivation or appropriation of another's property), this court may "look at whether the crimes furthered each other" and whether "the nature of the crime did not change significantly throughout."

Westwood, 2 Wn.3d at 168.

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. Albeit, Mr. Drake later delivered the firearms to Ms. Swift and Mr. Benefield, the nature of the crimes did not

change significantly throughout the charging period. Whether Mr. Drake intended to possess or deliver the stolen firearms, his overarching intent was the deprivation or appropriation of his father's firearms.

At sentencing, Mr. Drake presented a meritorious argument that his nine theft convictions constituted the same criminal conduct as his nine possession convictions and thus were correctly counted as one crime toward his offender score. Although Mr. Drake's intent in possessing the stolen firearms may have evolved, where, as here, the record adequately supports more than one conclusion, the matter lies in the court's discretion.

The trial court did not apply the incorrect legal standard in its same criminal conduct analysis or offender score calculation, and therefore did not abuse its discretion.

BURDEN OF PROVING SAME CRIMINAL CONDUCT

The State argues the trial court abused its discretion in failing to hold Mr. Drake to his burden of proving same criminal conduct at sentencing.

The State cites *Graciano*'s holding, "Because this finding [of same criminal conduct] favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct." 176 Wn.2d at 539.

Although brief and contrary to his earlier position, Mr. Drake's trial counsel did offer argument supporting same criminal conduct:

After looking into some of the case law even further, it seems that the intent remained the same from the time of taking possession, which merged the—

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the course of conduct between the theft and the possession. Because he took possession at that time, which was what was alleged at trial, and he maintained that possession up until transfer. What was alleged at trial. So the intent remained the same.

RP at 324-25. Notwithstanding defense counsel’s brief argument, there is no statutory prohibition against the court sua sponte conducting a same criminal conduct analysis based on the evidence presented during trial. *See* RCW 9.94A.589(1)(a). Moreover, the “continuing and substantial public interest in ensuring that offenders are sentenced with the correct offender score” would outweigh the question of whether the court or defendant broached the issue. *State v. Rodriguez*, 183 Wn. App. 947, 952, 335 P.3d 448 (2014).

The trial court did not abuse its discretion in failing to hold Mr. Drake to his burden of proving same criminal conduct.

AFFIDAVIT OF PROBABLE CAUSE

The State contends the trial court abused its discretion when it refused its invitation to consider the affidavit of probable cause.

RCW 9.94A.530(2) provides:

In determining any sentence other than a sentence above the standard range, *the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing*, or proven pursuant to RCW 9.94A.537. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.

(Emphasis added.)

At trial, the State alleged the thefts and possessions occurred between December 1, 2018, and October 25, 2019. Because Mr. Drake disputed specific dates or date ranges between December 1, 2018, and October 25, 2019, Mr. Drake would have had to approve of the court's consideration of the affidavit of probable cause. Alternatively, the State could have requested the trial court hold an evidentiary hearing.

In declining to review the affidavit of probable cause, the court reasoned:

And then we have the trafficking. So where the state's—where the guns were actually transferred to Mr. Benefield or Ms. Swift, we have dates for that, sometime between October 20th and 22nd is when those—of 2019.

But the possession at the same time and place, I think it matters how it's charged with the time range, I really do, with the date range. Because a defendant has a right to a jury trial. And what is a jury? The jury is the finder of fact. I'm not the finder of fact. The jury is the finder of fact. And that date range is a fact. That's how it was charged. So I don't know what date the jury decided they were stolen, and if they decided and found that that date was different from the date that they were transferred to Mr. Benefield or Ms. Swift.

And it's—I know this is a fact-driven analysis, but I think there has to be something more than support from a probable cause statement that's not part of evidence in evidence at trial. And I'm not going to invade the purview of the jury. I think it would trample all over your constitutional right to a jury trial and how the jury of your peers determine what the facts are in your case.

And so what I have is I have the same date ranges. And I think that's why it matters. And that's all I know about the facts. Ms. Swift's testimony, the state even in their own memorandum says it wasn't clear at trial. But the probable cause statement is. And I'm not going to rely on a probable cause to find facts that weren't found by the jury based on evidence that wasn't presented at trial. So I think that's risky business. It's my discretion, and I won't do it.

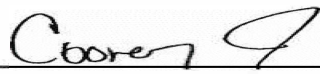
RP at 333-34. The court declined to invade the purview of the jury by considering the affidavit of probable cause. This reasoning was sound. Thus, the court's decision was

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not based on untenable grounds nor was it manifestly unreasonable. The court did not abuse its discretion.

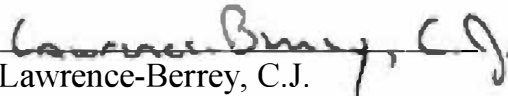
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Cooney, J.

WE CONCUR:



Lawrence-Berrey, C.J.



Staab, J.

January 08, 2025 - 11:26 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 39311-9
Appellate Court Case Title: State of Washington v. Andrew V. Drake
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