ADVANCE SHEET HEADNOTE
June 12, 2023

2023 CO 33

No. 21SC325, *Chirinos-Raudales v. People*—Criminal Law—Child Hearsay Statute—Sexual Assault on a Child—Concurrent Sentences—Identical Evidence.

The supreme court considers, first, whether the trial court properly admitted statements the victim made when she was fifteen years old under the child hearsay statute, which provides that out-of-court statements describing an offense of unlawful sexual behavior are admissible if made by a child "as child is defined under the statutes that are the subject of the action." § 13-25-129(2), C.R.S. (2022). The supreme court holds that, pursuant to the plain language of the child hearsay statute, the "subject of the action" for sexual assault on a child by one in a position of trust is the substantive offense, which applies when the child is under eighteen, rather than the sentence enhancer, which applies when the child is under fifteen.

Second, the supreme court considers whether the trial court abused its discretion by entering consecutive sentences for two of the defendant's convictions

notwithstanding section 18-1-408(3), C.R.S. (2022), which requires a trial court to impose concurrent sentences when multiple convictions involving a single victim are supported by identical evidence. The court holds that because the two counts at issue here were not supported by identical evidence, section 18-1-408(3) did not mandate that the trial court enter concurrent sentences for the two counts.

Accordingly, the court affirms the portion of the court of appeals' opinion concluding that the trial court properly admitted statements made by the victim under the child hearsay statute. However, the court reverses the portion of the court of appeals' opinion that ordered the trial court to impose concurrent sentences for two of the counts and remands for further proceedings consistent with this opinion.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 33

Supreme Court Case No. 21SC325
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA1132

Petitioner/Cross-Respondent:

Dennis Chirinos-Raudales,

v.

Respondent/Cross-Petitioner:

The People of the State of Colorado.

Judgment Affirmed in Part and Reversed in Part
en banc
June 12, 2023

Attorneys for Petitioner/Cross-Respondent:
Megan A. Ring, Public Defender
Stephen C. Arvin, Deputy Public Defender
Denver, Colorado

Attorneys for Respondent/Cross-Petitioner:
Philip J. Weiser, Attorney General
Brock J. Swanson, Senior Assistant Attorney General
Denver, Colorado

Attorneys for Amicus Curiae Colorado Criminal Defense Bar:
Haddon, Morgan & Foreman, P.C.
Adam Mueller
Denver, Colorado

CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court, in which **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 Colorado's child hearsay statute provides that out-of-court statements describing an offense of unlawful sexual behavior are admissible if made by a child "as child is defined under the statutes that are the subject of the action." § 13-25-129(2), C.R.S. (2022). The issue before us is what happens when a defendant is charged under a statute that references two different ages. Here, the answer lies in how the "subject of the action" defines "child."

¶2 Specifically, the People charged Dennis Chirinos-Raudales with, among other crimes, sexual assault on a child ("SAOC") by one in a position of trust, which prohibits sexual contact with persons under eighteen, but whose penalty escalates from a class 4 felony to a class 3 felony if the victim is under fifteen. *See* § 18-3-405.3(1), (2)(a), C.R.S. (2022). So, the question here is whether the "subject of the action" is the subsection that applies when the child is under eighteen or the subsection that applies when the child is under fifteen. We hold that the "subject of the action" for SAOC by one in a position of trust is the substantive offense rather than the sentence enhancer. Therefore, because the substantive offense applies when the child is under eighteen and the victim was under eighteen at the time she made the statements in question, we conclude that the trial court properly admitted them under the child hearsay statute.

¶3 Separately, we consider whether the trial court properly entered consecutive sentences for two of Chirinos-Raudales's convictions. A division of the court of appeals held that concurrent sentences were mandated under section 18-1-408(3), C.R.S. (2022), which requires a trial court to impose concurrent sentences when multiple convictions involving a single victim are supported by identical evidence. We conclude, however, that the two counts were *not* supported by identical evidence, meaning concurrent sentences were not required.

¶4 We therefore affirm the portion of the division's opinion concluding that the trial court properly admitted statements made by the victim under the child hearsay statute. However, we reverse the portion of the division's opinion that ordered the trial court to impose concurrent sentences for two of the counts and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶5 Chirinos-Raudales sexually abused his stepdaughter, P.S., from the time she was four or five years old until she was fourteen. When P.S. was fifteen years old, she told her school nurse about the abuse; as a result, a forensic interview was conducted.

¶6 During the forensic interview, P.S. said that it was difficult for her to remember specific instances of sexual abuse because the assaults were so similar. However, P.S. was able to describe in greater detail two specific instances of sexual

abuse. The first incident was when Chirinos-Raudales took P.S.'s virginity ("the virginity incident"). The second incident was the final time Chirinos-Raudales sexually abused P.S. ("the last incident"). The virginity incident occurred when P.S. was in the sixth grade, and the last incident occurred when P.S. was in the seventh grade.

¶7 The People focused on those two incidents when charging Chirinos-Raudales. Specifically, the People charged Chirinos-Raudales with the following crimes:

- SAOC with force for the virginity incident ("the force count");
- SAOC by one in a position of trust for the virginity incident ("the trust (virginity) count");
- SAOC as part of a pattern of sexual abuse for the virginity incident ("the pattern count");
- SAOC by one in a position of trust for the last incident ("the trust (last) count"); and
- SAOC for the last incident ("the SAOC count").

The two trust counts included a sentence enhancer reflecting that the victim was under the age of fifteen.

¶8 At trial, the judge admitted a video of the forensic interview under the child hearsay statute. Ultimately, the jury found Chirinos-Raudales guilty of all counts except the force count. The trial court sentenced Chirinos-Raudales to the Department of Corrections for twenty-four years to life on the pattern count, eight

years to life on each of the trust counts, and four years to life on the SAOC count. The trial court imposed concurrent sentences for the trust (last) count and the SAOC count but imposed a consecutive sentence for the trust (virginity) count and the pattern count, thereby lengthening Chirinos-Raudales's minimum sentence by eight years. Chirinos-Raudales appealed.

¶9 The division affirmed the judgment of conviction for the four guilty counts but ruled that concurrent sentences were required for the trust (virginity) count and the pattern count. *People v. Chirinos-Raudales*, 2021 COA 37, ¶¶ 3, 47, 491 P.3d 538, 541, 546–47. In affirming the judgment of conviction, the division held that the trial court did not err by admitting P.S.'s forensic interview under the child hearsay statute. *Id.* at ¶ 9, 491 P.3d at 541. In so holding, the division rejected Chirinos-Raudales's argument that the "subject of the action" was section 18-3-405.3*(2)(a)*, which escalates the sentence for SAOC by one in a position of trust when the child is under the age of fifteen. *Id.* at ¶ 16, 491 P.3d at 542. Instead, the division concluded that the "subject of the action" was section 18-3-405.3*(1)*—which outlines the elements of SAOC by one in a position of trust, including that the child be under eighteen—because it creates the substantive charge. *Id.* at ¶¶ 17, 22, 491 P.3d at 542–43. The division reasoned that although the People charged Chirinos-Raudales under both subsection (1) and (2)(a), the

latter was merely a sentence enhancer and thus was "of no import to this issue." *Id.* at ¶ 18, 491 P.3d at 542–43.

¶10 Next, the division held that the trial court was required to impose concurrent, rather than consecutive, sentences for the trust (virginity) count and the pattern count. *Id.* at ¶ 47, 491 P.3d at 546–47. Specifically, the division concluded that because the two counts were based on the same act—namely, the virginity incident—concurrent sentences were required under section 18-1-408(3), which mandates that a trial court impose concurrent sentences when convictions are supported by identical evidence. *Id.* at ¶¶ 39, 40, 491 P.3d at 545.

¶11 Chirinos-Raudales petitioned for certiorari review on the issue of the child hearsay statute, and the People cross-petitioned for certiorari review on the issue of concurrent sentences. We granted certiorari on both issues.[1]

---

[1] We granted certiorari to review the following issues:

1. Whether P.[S.]'s forensic interview was inadmissible in evidence because she was 15 at the time of the interview and child hearsay statements are admissible under section 13-25-129(2), C.R.S. (2021) only if, as relevant here, the declarant was *less than* 15 at the time of the statements.
2. Whether a division of the court of appeals erred in concluding that the sentences for two sex offenses arising out of the same incident were required to run concurrently because they were based on identical evidence.

II. Child Hearsay Exception

¶12 Chirinos-Raudales argues that because P.S. was fifteen at the time of the forensic interview, she wasn't a "child" under the child hearsay statute for purposes of SAOC by one in a position of trust. Considering this argument, we explain our standard of review and principles of statutory interpretation. We then outline the text of the child hearsay statute, which provides that the age of the child should be defined "under the statutes that are the subject of the action." Last, we rely on the plain language of the statute and hold that the "subject of the action" for SAOC by one in a position of trust is section 18-3-405.3(1), which applies when a child is under eighteen, meaning the court properly admitted the forensic interview.

A. Standard of Review and Principles of Statutory Interpretation

¶13 "We review questions of statutory interpretation de novo." *People v. Perez*, 2016 CO 12, ¶ 8, 367 P.3d 695, 697. Our primary task when interpreting a statute is to "give effect to the intent of the General Assembly." *People v. Dist. Ct.*, 713 P.2d 918, 921 (Colo. 1986). "[W]here the plain language is unambiguous, we apply the statute as written." *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 12, 488 P.3d 1140, 1143. To ascertain the intent of the legislature, "we look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and we apply words and phrases in accordance with their plain and ordinary

meanings." *Bill Barrett Corp. v. Lembke*, 2020 CO 73, ¶ 14, 474 P.3d 46, 49 (quoting *Blooming Terrace No. 1, LLC v. KH Blake St., LLC*, 2019 CO 58, ¶ 11, 444 P.3d 749, 752).

B. Child Hearsay Statute

¶14 Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted," CRE 801(c), and is not admissible unless a rule or statute provides for an exception. CRE 802. One such exception is the child hearsay statute. *See* § 13-25-129.

¶15 The child hearsay statute provides that out-of-court statements made by a child that describe unlawful sexual conduct are admissible if certain safeguards of reliability are met. *See id.* Rather than set a single age for when the child hearsay exception applies, section 13-25-129(2)[2] provides that the age of the child should be defined by the offenses at issue:

> An out-of-court statement made by a child, *as child is defined under the statutes that are the subject of the action* . . . describing all or part of an offense of unlawful sexual behavior . . . performed or attempted to be performed with, by, on, or in the presence of the child declarant . . . is

[2] The General Assembly has amended this statute since Chirinos-Raudales's trial in 2016. *See* Ch. 42, sec. 1, § 13-25-129, 2019 Colo. Sess. Laws 144, 144 (moving the relevant language from subsection (1) to subsection (2) and slightly modifying the text). These revisions do not affect our analysis because the operative language is nearly identical; thus, we cite to the current statute throughout this opinion.

> admissible in evidence in any criminal, delinquency, or civil proceeding if [certain] conditions . . . are satisfied.

(Emphasis added.)

¶16 The question here is whether P.S. was a "child" under the child hearsay statute for purposes of SAOC by one in a position of trust when she gave the forensic interview at the age of fifteen.

C. Application

¶17 Chirinos-Raudales was charged with SAOC by one in a position of trust under both subsection 18-3-405.3(1) and (2)(a). Subsection (1) states that "[a]ny actor who knowingly subjects another . . . to any sexual contact commits sexual assault on a child by one in a position of trust if the victim is a child *less than eighteen years of age* and the actor . . . is one in a position of trust." § 18-3-405.3(1) (emphasis added). Subsection (2)(a) escalates SAOC by one in a position of trust from a class 4 felony to a class 3 felony, stating that "[s]exual assault on a child by one in a position of trust is a class 3 felony if . . . [t]he victim is *less than fifteen years of age*." § 18-3-405.3(2)(a) (emphasis added). To establish whether "child" should be defined as under eighteen or under fifteen for purposes of the child hearsay statute, we must first determine which subsection is the "subject of the action."

¶18 Chirinos-Raudales argues that the "subject of the action" for purposes of SAOC by one in a position of trust is subsection (2)(a) because he was sentenced under that subsection. Specifically, he interprets the phrase "statutes that are the

subject of the action" to encompass any matter placed before a fact finder to decide. Thus, because the jury was tasked with determining whether Chirinos-Raudales was under fifteen for purposes of subsection (2)(a), Chirinos-Raudales argues that subsection (2)(a) is the "subject of the action."

¶19 Because the child hearsay statute does not define "subject of the action," we look to the plain meaning of the phrase. Black's Law Dictionary defines "subject" as "[t]he matter of concern over which something is created." *Subject*, Black's Law Dictionary (11th ed. 2019). Further, Black's Law Dictionary defines "action" as "[a] civil or criminal judicial proceeding." *Action*, Black's Law Dictionary (11th ed. 2019). Thus, the phrase "subject of the action" means the matter of concern over which the judicial proceeding is created. *See Aetna Cas. & Sur. Co. v. Lanz*, 18 Ohio Law Abs. 121, 122 (Ohio Ct. App. 1934) ("We deem it unnecessary to define the term []'subject of the action' other than to state that it is the subject of judicial inquiry involved in a particular case.").

¶20 Turning to section 18-3-405.3, whereas subsection (1) lists the elements of SAOC by one in a position of trust, subsection (2)(a) escalates the penalty for that crime from a class 4 felony to a class 3 felony if the victim is under fifteen. Therefore, the "subject of the action" for SAOC by one in a position of trust is subsection (1) because without that subsection, there would be no judicial proceeding. It would have been impossible for the People to bring a judicial

proceeding against Chirinos-Raudales under subsection (2)(a) without also charging him under subsection (1) because subsection (2)(a) does not list the elements of the crime.[3] *See People v. Simon*, 266 P.3d 1099, 1108 (Colo. 2011) ("Whether the offense is committed as a class 3 or class 4 felony, the relevant unit of prosecution—and the substantive crime of which the defendant stands convicted—remains the act statutorily designated as 'Sexual assault on a child' or 'Sexual assault on a child by one in a position of trust.'"); *Brown v. Dist. Ct.*, 569 P.2d 1390, 1391 (Colo. 1977) (concluding that a sentence enhancer is not a substantive offense because it is "triggered only after a defendant has been found guilty of the substantive crime"). In fact, the jury was instructed and asked to return a verdict on the elements of subsection (1), which notably includes an element that the victim was under eighteen during the time of the sexual contact. *Cf.* COLJI-Crim. 3-4:40 (2022) (providing model jury instructions for SAOC by one in a position of trust, which the trial court mirrored). And without a jury finding that Chirinos-Raudales violated the substantive crime in subsection (1), the sentence enhancer in subsection (2)(a) would be meaningless.

---

[3] We recognize that the People's bill of particulars lists only subsection (2)(a) for the two SAOC by one in a position of trust counts. However, the complaint lists both subsection (1) and (2)(a) for the SAOC by one in a position of trust charges, and the jury returned a verdict on the statutory elements listed in subsection (1).

¶21 Therefore, we hold that the "subject of the action" for SAOC by one in a position of trust is subsection (1) rather than subsection (2)(a). Accordingly, we conclude that the age of "child" for purposes of the child hearsay statute in Chirinos-Raudales's case was under eighteen, and the trial court properly admitted the forensic interview.

III. Concurrent Versus Consecutive Sentences

¶22 Next, the People argue that the division erred in concluding that the trust (virginity) count and the pattern count were supported by identical evidence and thus the trial court was required to impose concurrent sentences under section 18-1-408(3). We start by explaining our standard of review. We then outline when section 18-1-408(3)'s identical-evidence mandate requires a trial court to impose concurrent sentences. Finally, we apply section 18-1-408(3) and hold that the trust (virginity) count and the pattern count were not based on identical evidence, meaning the trial court did not abuse its discretion by imposing consecutive sentences for those two counts.

A. Standard of Review

¶23 We review the trial court's decision to impose consecutive sentences for an abuse of discretion. *People v. Muckle*, 107 P.3d 380, 382 (Colo. 2005). A court abuses its discretion if the ruling is manifestly arbitrary, unreasonable, or unfair. *Id.* A

trial court also abuses its discretion when it misapplies the law. *Antero Res. Corp. v. Strudley*, 2015 CO 26, ¶ 14, 347 P.3d 149, 154.

B. Section 18-1-408(3)

¶24 Generally, a trial court "has the discretion to impose either concurrent or consecutive sentences." *Juhl v. People*, 172 P.3d 896, 899 (Colo. 2007). However, the legislature can limit that discretion by statute. *Id.*

¶25 One such statutory limitation is section 18-1-408(3), which requires a trial court to impose concurrent sentences when multiple convictions against a single victim are supported by identical evidence.[4] This concurrent-sentencing requirement applies only if the evidence supports "no other reasonable inference than that the convictions were based on identical evidence." *Juhl*, 172 P.3d at 900. "[W]e have analyzed identical evidence by considering whether the acts underlying the convictions were sufficiently separate." *Thompson v. People*, 2020 CO 72, ¶ 60, 471 P.3d 1045, 1058. To do so, we must analyze the evidence to "determine if the separate convictions were based on more than one distinct act

---

[4] The People argue that even if Chirinos-Raudales's convictions were based on identical evidence, the Sex Offender Lifetime Supervision Act—which requires a trial court to impose consecutive sentences when a sex offender is convicted of multiple crimes arising out of the same incident as the sex offense, *see* § 18-1.3-1004(5)(a), C.R.S. (2022)—trumps section 18-1-408(3). Because we conclude that the two convictions in question are not supported by identical evidence, we decline to address this argument.

and if so, whether those acts were separated by time and place." *Id.* (quoting *Juhl*, 172 P.3d at 901). "The mere possibility that the jury may have relied on identical evidence in returning more than one conviction is not alone sufficient to trigger the mandatory concurrent sentencing provision." *Id.* at ¶ 61, 471 P.3d at 1058.

C. Application

¶26 Here, the trial court imposed consecutive sentences for the trust (virginity) count and the pattern count without explicitly determining whether the two counts were supported by identical evidence. On appeal, the division held that concurrent sentences were required, concluding that the trust (virginity) count and the pattern count were based on identical evidence because both counts were based on the virginity incident. *Chirinos-Raudales*, ¶¶ 40, 47, 491 P.3d at 545–47.

¶27 We disagree with the division's determination. While the trust (virginity) count and the pattern count both relied on evidence of the virginity incident and were labeled as the "Virginity Incident" on the jury instructions and verdict forms, the jury could not have found Chirinos-Raudales guilty of the pattern count based on the virginity incident alone. Rather, to find that Chirinos-Raudales committed the offense as part of a pattern of sexual abuse, the jury had to find that he had committed at least one other incident of sexual contact with P.S. *See* § 18-3-401(2.5), C.R.S. (2022) (defining "[p]attern of sexual abuse" as "the

commission of *two or more incidents* of sexual contact involving a child when such offenses are committed by an actor upon the same victim" (emphasis added)).

¶28 The People presented evidence of both the virginity incident and the last incident. The two incidents occurred months apart; therefore, they were distinct criminal episodes. *See Quintano v. People*, 105 P.3d 585, 591 (Colo. 2005) ("[I]ncidents of sexual assault may be factually distinct if separate criminal acts have occurred at different times . . . ."). As a result, because the pattern count comprised two distinct acts and the trust (virginity) count only comprised one act, we hold that the two convictions were not supported by identical evidence.

¶29 Accordingly, because the charges were not based on identical evidence, we conclude that the trial court was not required to impose concurrent sentences under section 18-1-408(3) and did not abuse its discretion by imposing consecutive sentences for the trust (virginity) count and the pattern count.

IV. Conclusion

¶30 For the foregoing reasons, we affirm in part and reverse in part. We affirm the portion of the division's opinion concluding that the trial court properly admitted P.S.'s forensic interview under the child hearsay statute. However, we reverse the portion of the division's opinion ordering the trial court to impose concurrent sentences for the trust (virginity) count and the pattern count and remand for further proceedings consistent with this opinion.