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NO. 96194-8
Court of Appeals NO. 35079-7-III, 35080-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOMINIC CUDMORE,

Petitioner.

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

PETITION FOR REVIEW

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A. <u>IDENTITY OF PETITIONER</u>

Pursuant to RAP 13.4 Petitioner Dominic Cudmore asks this Court to accept review of the opinion of the Court of Appeals in *State v. Cudmore*, 35079-7-III.

B. <u>OPINION BELOW</u>

Mr. Cudmore challenged the trial court's conclusion that his convictions of identity theft and possession of a stolen access device did not arise from the same criminal conduct. Even though both crimes rested upon his possession and use of a single bank card, the Court of Appeals concluded they did not involve the same victim and did share the same objective criminal intent.

C. <u>ISSUE PRESENTED</u>

Where multiple crimes arise from the "same criminal conduct," they count as a single offense for purposes of calculating the individual's offender score. Offenses constitute the same criminal conduct at sentencing if the crimes were committed at the same time and place, involved the same victim, and involved the same criminal intent. Where the possession of a stolen access device, another's bank card, coincided with Mr. Cudmore's possession or use of the bank card

as an act of identity theft, did the offenses arise from the same criminal conduct and did the trial court abuse its discretion in finding otherwise?

D. SUMMARY OF THE CASE

Brittani Urann reported her bank card stolen after items were taken from an unlocked school locker room. CP 3-4. The card was cancelled, but someone tried to use it at a convenience store that same day. CP 4. Through surveillance video, that person was determined to be Dominic Cudmore. CP 4-5. The State charged Mr. Cudmore with one count of second degree possession of stolen property for the bank card and one count of second degree identity theft. CP 1-2.

Mr. Cudmore is a veteran who struggles with mental health issues and substance abuse. RP 7-9. Due to post-traumatic stress disorder, he "finds it very difficult to engage in social situations, to maintain employment, [and] to engage in any type of leisure activities." RP 7; *accord* RP 16-18. He entered drug court to resolve the issues underlying these charges, as well as those in two other cases: the first related to property stolen from his brother and subsequently sold to a pawn shop, and the second related to possession of a controlled

substance.[1] RP 2-6; CP 6-9. The facts underlying the charges for identity theft and possession of a stolen access device are the only ones relevant to this appeal.

Mr. Cudmore was transferred from drug court to mental health court. RP 3-6; CP 14-19. His mental health issues led to difficulty engaging in treatment, and he was eventually terminated from mental health court. RP 8-9, 28-31, 48-49, 70.

Based on the probable cause statements, the trial court found Mr. Cudmore guilty of the charged counts. RP 74-78. At sentencing, Mr. Cudmore argued the identity theft and possession of a stolen access device offenses constitute the same criminal conduct because they were premised on the possession of a single bank card and they occurred at the same time and place. CP 28-31; RP 81, 82-83. Mr. Cudmore was charged with both crimes after he presented Ms. Urann's bank card for a purchase at a convenience store. CP 3-4. No other facts relating to his obtaining, possessing or using the bank card or Ms. Urann's identity were presented. Agreeing with the State, the court found the two crimes

[1] The identity theft and possession of a stolen access device counted as two separate points in Mr. Cudmore's offender score for the charges relating to theft from his brother. Mr. Cudmore appeals the sentence for those stolen property charges at Cause No. 35080-1. The information is contained in the clerk's papers for that appeal at pages 1-2 and the affidavit of probable cause at pages 3-4.

were not the same criminal conduct because the intent for each crime was different. RP 84, 89. The offenses carried different intents according to the State because possession of a stolen access device depends upon mere possession but identity theft requires the defendant to have used the access device. RP 84; CP 32-34.

The trial court's finding resulted in an offender score of "9" for all the property charges in the two cases. RP 82-83, 92; CP 29. A finding of same criminal conduct would have reduced his offender score to an "8." *Id*. Mr. Cudmore was sentenced to an in-custody drug offender sentencing alternative (DOSA) sentence. CP 35-48.

E. ARGUMENT

Mr. Cudmore's two offense occurred at the same time and place and shared the same intent. The two offenses arose from the same criminal conduct and should have been counted as a single offense in his offender score.

The record shows that Mr. Cudmore's possession and use of the access device coincided at the convenience store; the acts were indistinguishable. Based on the probable cause statements, which was the only evidence before the trial court, Mr. Cudmore committed a single act relevant to these two charges: he used Brittani Urann's bank

card to make a purchase at a convenience store. CP 4 (probable cause statement); RP 74 (court reviewed probable cause statements).

Where two or more offense share the same criminal intent and victim and occur at the same time and place they should treated as single offense in a person's offender score. RCW 9.94A.589(1)(a).

Here, Mr. Cudmore's offenses of possession of a stolen access device and identity theft occurred at the same time an place. The evidence underlying both counts was that Mr. Cudmore used Ms. Urann's stolen bank card to make a purchase at a convenience store. CP 4. The victim was the same for both counts. Ms. Urann's bank card was the object underlying both the possession of stolen property and the identity theft counts. *See id.*; CP 1-2 (information). Ms. Urann was the victim of both counts. *See State v. Haddock*, 141 Wn.2d 103, 111, 3 P.3d 733 (2000) (owner of the property is victim of possession of stolen property); *State v. Berry*, 129 Wn. App. 59, 67-68, 117 P.3d 1162 (2005) (person whose financial or other sensitive, personal information is appropriated is victim of identity theft); *see also State v. Leyda*, 157 Wn.2d 335, 349, 138 P.3d 610 (2006) (recognizing same), *superseded by statute on other grounds* RCW 9.35.020(4). The court's conclusion that Ms. Urann was not the sole victim of both offenses,

Opinion at 5, is contrary to decisions of this Court and the Court of Appels. Review is proper under RAP 13.4.

The objective intent for both charges was the same as well. In determining whether the criminal intent element of the same criminal conduct analysis is satisfied, the question is whether the defendant's criminal intent, objectively viewed, changed from one crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). To constitute separate conduct, there must be a substantial change in the nature of the criminal objective. *State v. Calloway*, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985).

Importantly, intent "is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). The proper examination focuses on to "what extent did the criminal intent, when viewed objectively, change from one crime to the next." *Tili*, 139 Wn.2d at 123.

Objective intent may be found when one crime furthered the other or if both crimes were part of a recognizable scheme or plan.

State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013) (citing *Dunaway*, 109 Wn.2d at 215); *State v. Israel*, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002). One crime furthers another where the first crime facilitates commission of the other crime. *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004); *State v. Collins*, 110 Wn.2d 253, 263, 751 P.2d 837 (1988).

Despite recognizing that statutory *mens rea* does not resolve or inform this this inquiry, the Court of Appeals nonetheless concluded the offenses did not share the same intent solely because the possession charge required only knowing possession while the identity theft charge required knowing possession with intent to use the card. Opinion at 5. That is not the proper analysis. Instead, the question is whether his objective intent changed.

Mr. Cudmore's objective intent in possessing the stolen access device and in appropriating Ms. Urann's identity coincided here. Both acts furthered the goal of purchasing items at the convenience store. *See State v. Garza-Villareal*, 123 Wn.2d 42, 49, 864 P.2d 1378 (1993) (possession of different controlled substances with intent to deliver constituted same criminal conduct because both furthered the same overall objective of delivering controlled substances in the future). The

overall objective underlying the acts was to obtain items without having to provide one's own money. Possessing the stolen access device was necessary to and furthered the identity theft. *See State v. Anderson*, 72 Wn. App. 453, 464, 864 P.2d 1001 (1994) (same criminal conduct where defendant would have been unable to commit one crime without the other); *Haddock*, 141 Wn.2d at 113 (same intent for purposes of same criminal conduct where a single intent to possess stolen property motivated the conduct underlying convictions for possession of stolen property and firearms).

The single intent was to use the stolen access device to purchase items at the convenience store. The evidence did not show that the possession and use of the access device were distinct. The Court of Appeals reliance solely on the differing *mens rea* of the two offense is contrary to decisions of both this Court and the Court of Appeals review is proper under RAP 13.4.

F. <u>CONCLUSION</u>

Because the analysis of the Court of Appeals is contrary to decisions of this Court and the Court of Appeals, this Court should accept review.

DATED this 3rd day of August, 2018.

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

STATE OF WASHINGTON, Respondent, v. DOMINIC LUIS CUDMORE, Appellant.	)	No. 35079-7-III (consolidated with 35080-1-III) UNPUBLISHED OPINION

FEARING, J. — The trial court, after a bench trial, convicted Dominic Cudmore with second degree possession of stolen property, second degree identity theft, and first degree trafficking in stolen property. The trial court also convicted Cudmore of two counts of trafficking of stolen property in the first degree under case No. 35080-1-III. On appeal, Cudmore only challenges his sentence. He contends the trial court erroneously calculated his offender score when refusing to deem the convictions for possession of stolen property and identity theft as the same criminal misconduct. He also posits that the trial court mistakenly imposed a community custody condition that he refrain from association with known drug offenders. We affirm the trial court.

FACTS

On a spring day in 2013, Brittani Urann returned from softball practice, at Saint

Michael's Academy, to discover her Wells Fargo debit card missing from her locker. During the practice, at least twenty bags from the girls' locker room at the academy went missing. Two hours after Urann noticed the missing card, an individual attempted to purchase Coors Light from a Zip Trip using Urann's debit card, and the store clerk declined the transaction. Law enforcement reviewed surveillance footage, which revealed the card user to be Dominic Cudmore.

PROCEDURE

The State of Washington charged Dominic Cudmore with first degree theft other than a firearm, second degree possession of stolen property, identity theft in the second degree, and trafficking in stolen property in the first degree. Months later Cudmore signed a drug court waiver and agreement. The State dropped Cudmore's first degree theft charge, and Cudmore entered an agreement with the State on the remaining three counts. Pursuant to the agreement, the State conditionally released Cudmore so long as he abstained from drug and alcohol use, among other conditions.

Four months later, Dominic Cudmore agreed to remove his case from drug court to mental health court. Cudmore nonetheless struggled to comply with the terms of his agreement while his case remained in mental health court. Cudmore did not attend court hearings, missed mental health counseling appointments, and incurred positive urinalysis and breath analysis tests. The trial court terminated Cudmore's mental health court agreement.

After trial, the trial court convicted Dominic Cudmore of second degree possession of stolen property, identity theft in the second degree, and trafficking in stolen property in the first degree. Before sentencing, Cudmore stipulated to his prior criminal history apart from the current convictions.

At sentencing, Dominic Cudmore argued he deserved an offender score of eight instead of nine because the identity theft and possession of stolen property charges constituted the same criminal conduct. Cudmore emphasized that each crime involved possession of the debit card at the same time and place. In response, the State distinguished between the two crimes. According to the State, Cudmore completed the crime of possession of stolen property when he first held Brittani Urann's debit card. Cudmore would be guilty of this first crime regardless of whether he attempted to purchase any goods with the card. Cudmore committed the crime of identity theft only when he later entered the convenience store and attempted to purchase the beer. By attempting to charge the purchase to the card, Cudmore falsely represented himself as Urann.

The trial court determined each charge did not constitute the same criminal conduct and sentenced Dominic Cudmore based on an offender score of nine. Dominic Cudmore's sentencing court determined that Dominic Cudmore has a chemical dependency that contributed to his offenses. Cudmore received community custody

conditions as part of his sentence, which conditions included the prohibition: "No contact with DOC ID'd drug offenders except in treatment setting." Clerk's Papers at 41.

LAW AND ANALYSIS

Same Criminal Conduct

On appeal, Dominic Cudmore challenges two features of his sentence: the offender score and a community custody condition. We review a trial court's determination of what constitutes the same criminal conduct, for purposes of calculating the offender score, for abuse of discretion or a misapplication of the law. *State v. Aldana Graciano*, 176 Wn.2d 531, 536-37, 295 P.3d 219 (2013); *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). A trial court abuses its discretion if it renders a manifestly unreasonable decision based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

"Same criminal conduct" means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). The absence of any one of these prongs prevents a finding of same criminal conduct. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

In the context of "same criminal conduct," "intent" is not the mens rea required for the crime, but rather, it means the defendant's "'objective criminal purpose in committing the crime.'" *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465 (2013) (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)). "[I]n construing

the 'same criminal intent' prong, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." *State v. Vike*, 125 Wn.2d at 411.

Dominic Cudmore's criminal intent differed when he attempted to use the debit card as opposed to when he merely possessed the card. RCW 9A.56.140(1), the possession of stolen property statute, defines the crime as:

> "Possessing stolen property" means knowingly to receive, retain, possess, conceal, 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.

The identify theft statute, RCW 9.35.020(1) reads:

> No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

We agree with the trial court that the possession of stolen property charge and the identity theft charge are distinct crimes. Dominic Cudmore possessed stolen property when he first acquired the debit card with the intent to withhold it from Britanni Urann. The identity theft occurred at a later time when he approached the convenience store counter with the alcohol. Cudmore's intent differed when he committed identity theft because he intended to commit theft at the Zip Trip. The crime of identity theft also gained the added victim of the convenience store.

Community Custody Condition

A court reviews community custody conditions for an abuse of discretion and will reverse them only if they are "manifestly unreasonable." *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Dominic Cudmore challenges his community custody condition prohibiting contact with Department of Corrections identified drug offenders except in a treatment setting. He contends the condition infringes his freedom to associate and is vague.

The due process vagueness doctrine under the Fourteenth Amendment to the Unites States Constitution and article I, section 3 of the Washington State Constitution "requires that citizens have fair warning of proscribed conduct." *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine assures that ordinary people can discern the prohibited conduct and gain protection against arbitrary enforcement of the laws. *State v. Valencia*, 169 Wn.2d at 791; *State v. Bahl*, 164 Wn.2d at 752. If persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite. *State v. Bahl*, 164 Wn.2d at 754; *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990).

Limitations on fundamental rights are permissible, provided they are imposed sensitively. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). An offender's freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state and public order. *State v. Riley*, 121 Wn.2d at 37-38.

In *State v. Hearn*, 131 Wn. App. 601, 128 P.3d 139 (2006), Tami Hearn argued that a community custody condition demanding that she refrain from associating with known drug offenders violated her freedom to associate. The jury had convicted Hearn of drug possession at the trial court level. This court affirmed Hearn's community custody condition, noting "[r]ecurring illegal drug use is a problem that logically can be discouraged by limiting contact with other known drug offenders." *State v. Hearn*, 131 Wn. App. at 609.

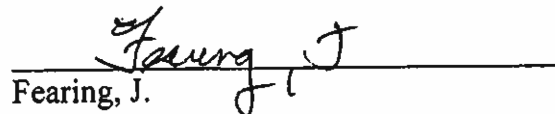
Dominic Cudmore's sentencing court found that Dominic Cudmore suffered from a chemical dependency that contributed to his offenses. Cudmore exhibited a dependency disorder when he breached the terms of his drug court agreement. Therefore, as in *Hearn*, the court reasonably imposed a prohibition from associating with Department of Corrections identified offenders, outside of treatment settings. This condition aids Cudmore in remaining sober. Discouraging further criminal conduct is a goal of community placement. *State v. Riley*, 121 Wn.2d at 38.

An individual of ordinary intelligence can plainly understand the association with drug offender's condition prohibits Cudmore from associating with individuals the Department of Corrections labels as offenders. The offender can readily gain a list of those offenders. The trial court did not abuse its discretion in imposing this condition.

CONCLUSION

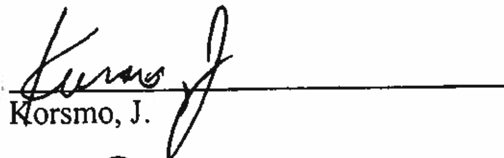
We affirm Dominic Cudmore's sentence.

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.

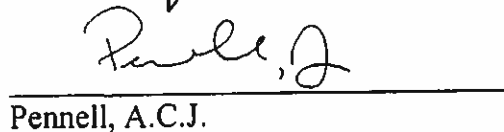


Fearing, J.

WE CONCUR:



Korsmo, J.



Pennell, A.C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
RESPONDENT,	)	
v.	)	COA NO. 35079-7-III
DOMINIC CUDMORE,	)	
PETITIONER.	)	

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SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF AUGUST, 2018.

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WASHINGTON APPELLATE PROJECT

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