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NO. 66623-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SCOTT ALLISON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZÁLEZ

BRIEF OF RESPONDENT

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A. CROSS-ASSIGNMENT OF ERROR

1. The trial court erred when it considered Allison's motion to modify his judgment and sentence after Allison affirmatively agreed that his prior offenses were not the same criminal conduct.¹

B. ISSUES PRESENTED

1. Whether Allison waived any challenge to his offender score when he affirmatively agreed that his prior convictions for forgery and identity theft were not the same criminal conduct?

2. Whether the trial court properly found that Allison's three convictions for forgery were not the same criminal conduct because they involved different criminal intent, different victims, and occurred at different times and places?

3. Whether the trial court properly found that Allison's conviction for identity theft was not the same criminal conduct as his forgery convictions because the crimes involved different victims?

¹ The State may assign error without filing a notice of cross-appeal because the State is not seeking affirmative relief. See State v. Kindsvogel, 149 Wn.2d 477, 481, 69 P.3d 870 (2003) (holding the prevailing party need not cross-appeal a trial court ruling if the party seeks no further affirmative relief). As the prevailing party, the State "may argue any ground to support a court's order which is supported by the record." McGowan v. State, 148 Wn.2d 278, 288, 60 P.3d 67 (2002).

C. STATEMENT OF THE CASE

On August 11, 2010, after several hours of drinking at Golden Gardens Park in Seattle, Scott Allison became upset at Caitlin Hamilton when she tried to rouse a friend who had fallen asleep. 3RP 74-81.² Allison began choking Hamilton, yelling, "Do you realize how close you are to death right now?" 3RP 83. Allison then smashed Hamilton's head against the concrete. Id. Although Hamilton had no memory of Allison punching her, several independent witnesses saw Allison standing over Hamilton, hitting her multiple times. 2RP 25-29; 3RP 109-13, 120-23. Hamilton suffered significant injuries from the assault, including a right orbital fracture, which required surgical repair. 3RP 17-18.

The State charged Allison with assault in the second degree. CP 1-5. Trial occurred in January of 2011. The jury found Allison guilty as charged. CP 33. At sentencing on January 28, 2011, trial counsel said,

I spoke to Mr. Allison. He in fact did his own math and agrees that his offender score is 10, believes under the current case law that even though there is [sic] four forgeries on one cause number, they have different victims and therefore the Court has to find them as separate offenses....

² The verbatim report of proceedings consists of six volumes: 1RP (10/25/10), 2RP (1/10/11), 3RP (1/11/11), 4RP (1/12/11), 5RP (1/28/11), and 6RP (8/2/11).

5RP 3. The trial court adopted the parties' calculation and imposed a standard-range sentence based on an offender score of 10.

CP 53-61.

On August 2, 2011, Allison filed a pro se motion to modify or correct his judgment and sentence, claiming that his offender score should be 6, rather than 10. CP 134-36. Allison argued that his prior convictions for three counts of forgery and one count of identity theft under Spokane County Case Number 06-1-01895-9 constituted the same criminal conduct and should be counted as one point, rather than four. CP 139-44. Allison also argued that his convictions for unlawful possession of payment instruments and unlawful possession of fictitious identification device under Spokane County Case Number 06-1-03830-5 constituted the same criminal conduct and should be counted as one point, rather than two. CP 145-46. The court invited appellate counsel to represent Allison on his motion. CP 138. This Court granted Allison's motion to stay his appeal pending the outcome of the trial court motion. Id.

The trial court granted Allison's motion in part, reducing Allison's offender score to nine. CP 156. The trial court ruled that the convictions for forgery and identity theft were not the same criminal conduct. Id. However, the court found that the convictions

for unlawful possession of payment instruments and unlawful possession of fictitious identification device were the same criminal conduct. Id. The new offender score did not change Allison's standard range, and the trial court did not alter the amount of confinement originally imposed. Id.

D. ARGUMENT

1. ALLISON WAIVED HIS CHALLENGE TO HIS OFFENDER SCORE WHEN HE AGREED THAT HIS PRIOR CONVICTIONS WERE NOT THE SAME CRIMINAL CONDUCT.

Allison appeals the trial court's partial denial of his post-sentencing motion to modify his offender score, arguing that the trial court erred when it ruled that his prior convictions for forgery and identity theft were not the same criminal conduct. Without even addressing the same criminal conduct analysis, this Court should hold that Allison waived his objection to his offender score.

Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion. State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). Unlike the out-of-state conviction provision of the Sentencing Reform Act, the same criminal conduct statute is not mandatory. Id. When a

defendant agrees to the calculation of his standard range, he waives any challenge to the offender score based on same criminal conduct. Id. at 519. Courts have applied the waiver rule to both direct appeals and collateral attacks of the judgment and sentence. Id.; In re Personal Restraint of Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007).

There can be no question that Allison agreed to his offender score at sentencing. In fact, he specifically affirmed that his prior convictions were not the same criminal conduct because they involved different victims. 5RP 3. It was only after serving the first six months of his sentence that Allison filed his pro se motion to modify his judgment and sentence. Although the State argued that Allison had waived any challenge based on same criminal conduct, the trial court ruled on the merits of Allison's motion. 6RP 4-5.

Just as an appellate court would hold that Allison waived any challenge to his offender score, the trial court should have declined to address his motion under Nitsch and Shale. This Court should affirm Allison's judgment and sentence based on his affirmative agreement that his prior convictions for forgery and identity theft were not the same criminal conduct.

2. THE TRIAL COURT PROPERLY FOUND ALLISON'S MULTIPLE CONVICTIONS FOR FORGERY WERE NOT THE SAME CRIMINAL CONDUCT.

Allison argues that the trial court erred when it determined that his three forgery convictions were not the same criminal conduct. Because each forgery involved a different criminal intent, a different victim, and occurred at a different time and place, the trial court properly concluded that each conviction should be included in Allison's offender score.

For the purposes of calculating an offender score, the sentencing court shall count all prior convictions separately unless the court finds that the offenses encompass the same criminal conduct. RCW 9.94A.525(5)(a). Two or more crimes are considered the same criminal conduct if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a). All three factors must be present and the absence of any one of these factors prevents a finding of same criminal conduct. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The court must narrowly construe the same criminal conduct rule to "disallow most assertions of same criminal conduct." State v. Price, 103 Wn. App. 845, 846, 14 P.3d 841 (2000). An appellate court will reverse a

sentencing court's determination of same criminal conduct only upon a showing of a "clear abuse of discretion or misapplication of the law." State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

a. Relevant Facts.

On December 22, 2005, Allison used Vince Cruse's checkbook to make many unauthorized transactions. CP 145-51. Allison was charged with identity theft and three counts of forgery; the forgery charges were based on a \$631.81 purchase at Lowe's, a \$265.00 purchase at K-Mart, and a \$476.66 purchase at Barnes and Noble. CP 75-76, 149-51. As part of plea negotiations on multiple cases, Allison pleaded guilty to three counts of forgery and one count of identity theft on April 17, 2007.³ CP 78-87.

b. Each Forgery Involved A Different Criminal Intent.

In determining whether two or more crimes involve the same intent, the court focuses "on the extent to which the defendant's

³ Although not dispositive to this Court's "same criminal conduct" analysis, when Allison was sentenced on the four counts, the court did not find that the offenses were the same criminal conduct. CP 91.

criminal intent, as objectively viewed, changed from one crime to the next." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). Objective intent may also be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan. State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007).

Crimes that share the same broad objective do not necessarily share the same criminal intent, especially if each crime is separately realized. State v. Young, 97 Wn. App. 235, 241-42, 984 P.2d 1050 (1999). In Young, the defendant was convicted of five counts of forgery. Id. at 238-39. On appeal, Young argued that his forgeries, which involved photocopies of the same check, presented to the same check-cashing business over several days, shared the same criminal intent. Id. at 241. This Court disagreed, holding, "Although the crimes shared the same objective, passing a forged check, each crime was separately realized." Id. Consequently, the forgeries did not share the same criminal intent, and were properly included in Young's offender score. Id. at 241-42.

There is no question that Allison's prior forgeries shared the same broad objective of passing forged checks. Just as in Young,

when Allison passed each check at a different store, he committed a separate act of forgery, with the intent of defrauding a different victim. Id. at 241. Because each forgery was separately realized, they did not share the same criminal intent. Id. Therefore, the trial court properly concluded that they did not encompass the same criminal conduct.

c. Each Forgery Occurred At A Different Time And Place.

In addition to having different criminal intents, Allison's prior forgeries did not take place at the same time or place. For multiple offenses to satisfy the "same time" element of RCW 9.94A.589(1)(a), simultaneity is not a requirement if consecutive crimes involve a "continuing, uninterrupted sequence of conduct." State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997) ("same time" element satisfied where sequential drug sales occurred as closely in time as they could without being simultaneous). On the other hand, two successive crimes may be separate criminal conduct if there is an interruption between them. State v. Price, 103 Wn. App. 845, 856, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014 (2001) (two attempted murders did not satisfy the

"same time" element where the defendant shot at the victim, got in his car, pursued the victim, and shot at him a second time a few miles away).

Although Allison passed all three checks on the same day, they were passed at three different stores. Even if the forgeries occurred within a short period of time of each other, each forgery was interrupted by the time required to travel between the stores.⁴ Therefore, the forgeries were not a continuing, uninterrupted sequence of conduct.⁵ See Porter, 133 Wn.2d at 186.

Relying on State v. Calvert, 79 Wn. App. 569, 903 P.2d 1003 (1995), Allison claims that the forgeries satisfy the "same time" element because they occurred on the same day. Contrary to Allison's contention, the Calvert court did not hold that "forged checks deposited on the same day" satisfy the "same time" element. App. Br. at 7. In Calvert, the only aspect of the trial court's same criminal conduct analysis that the State challenged was regarding whether the forgeries shared the same criminal

⁴ Allison's friend reported driving him to each location. CP 149.

⁵ Because the checks used at Lowe's, K-Mart, and Barnes and Noble were not sequentially numbered (#3424, #3426, and #3431), it is reasonable to infer that Allison conducted transactions in between each charged forgery. See CP 149-51.

intent. Id. at 577-78. Consequently, any discussion of the "same time" element was dicta.

In addition to occurring at different times, the forgeries did not occur at the same place. Multiple crimes are not part of the same criminal conduct if the physical locations of those crimes are different. Price, 103 Wn. App. at 856. Courts interpret the "same place" element narrowly. State v. Stockmyer, 136 Wn. App. 212, 220, 148 P.3d 1077 (2006), review denied, 161 Wn.2d 1023 (2007) (firearms found in different rooms in the same house did not satisfy "same place" element).

Here, Allison passed the forged checks at three different locations: Lowe's, K-Mart, and Barnes and Noble. Because each crime occurred in a different location, Allison cannot satisfy the "same place" element.

Allison argues that "it is artificial to assign a physical location to an economic crime" and that, because the "'place' of an economic crime is an indeterminate computer server transferring funds...[t]he closest approximation of a physical location of the crime would be the bank." App. Br. at 7. Allison offers no authority to support this claim.

This Court's opinion in Young is instructive on the issue of where a forgery occurs. In Young, the defendant argued that, although he passed forged checks on several different days, the "same time" element was satisfied because the checks were all returned unpaid on the same day. Young, 97 Wn. App. at 241. This Court rejected Young's argument, holding that the payee incurred its loss when it gave property in return for a forged check, rather than when the check was returned. Id. Because the stores incurred their losses when they gave Allison merchandise in exchange for the forged checks, the crimes occurred at the place where the forged check was presented. See also State v. Brown, 29 Wn. App. 11, 13, 627 P.2d 132 (1981) (regardless of where defendant actually forged the checks, Washington had jurisdiction over the crimes because all the checks were passed in Washington).

Because Allison committed the forgeries at different times *and* in different places, he has not satisfied the "same time and place" elements required for same criminal conduct.

d. Each Forgery Involved A Different Victim.

Finally, because each forgery involved a different victim, they cannot be considered the same criminal conduct under RCW 9.94A.589(1)(a).

"Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged. RCW 9.94A.030(53). In this case, the stores became victims when they gave Allison merchandise in exchange for forged checks.

Relying on Calvert, Allison claims that the victims were actually Cruse and Cruse's bank. Allison's reliance on Calvert is misplaced. In Calvert, the defendant deposited several fraudulent checks belonging to his former mother-in-law, into his bank account. Id. at 572. On appeal, the State challenged both the trial court's ruling on same criminal conduct and the trial court's decision to impose an exceptional sentence below the standard range. Id. at 577-84. Regarding the exceptional sentence, the State challenged the mitigating factor that the offenses were primarily committed against a family member. Id. at 580. Rejecting the trial court's reliance on that mitigating factor, the appellate court held, "The record shows that both the bank and Mr. Calvert's former

mother-in-law were victims of these forgeries." Calvert, 79 Wn. App. at 580. Allison mistakenly assumes that "the bank" refers to the mother-in-law's bank, rather than Calvert's bank. Nothing in the opinion supports Allison's interpretation. Regardless, Calvert certainly does not hold that the recipient of a forged check is not a victim.

Indeed, this Court has referred to the recipient of a forged check as a victim. Young, 97 Wn. App. at 242 (where defendant presented multiple forged checks to the same check-cashing outlet, he harmed the same victim). Likewise, for the purposes of a double jeopardy challenge, the Supreme Court has held that the victim of a forgery is the recipient of the forged instrument. State v. Baldwin, 150 Wn.2d 448, 457, 78 P.3d 1005 (2003).

Allison claims that the stores could not be victims because they were paid from Cruse's bank account. App. Br. at 6. There is nothing in the record to support this assertion. Allison also argues that if the stores were not paid, they could be victims only of theft and not forgery. App. Br. at 6 n.1. However, the prosecution had discretion to decide whether to charge defendant with theft by deception or forgery, if both apply to a defendant's conduct. State v. Scoby, 117 Wn.2d 55, 61, 810 P.2d 1358 (1991).

Allison successfully purchased merchandise from Lowe's, K-Mart, and Barnes and Noble on December 22, 2005, using forged checks. CP 149-51. Each store that was defrauded by Allison was a victim of his forgeries. Since each forgery involved a different victim, the forgeries were not the same criminal conduct.

3. THE TRIAL COURT PROPERLY FOUND THAT ALLISON'S CONVICTION FOR IDENTITY THEFT WAS NOT THE SAME CRIMINAL CONDUCT AS HIS FORGERY CONVICTIONS.

In a footnote, Allison claims that the identity theft was "clearly the same criminal conduct as the forgeries." App. Br. at 9 n.2. Allison offers no authority to support this claim. This Court should decline to address any assignment of error not supported by authority or argument. RAP 10.3; State v. Bello, 142 Wn. App. 930, 932 n.3, 176 P.3d 554 (2008).

Even if this Court addresses Allison's argument, the identity theft charge is not the same criminal conduct as the forgeries because the crimes do not involve the same victim. The victim of identity theft is the person whose identity is used unlawfully, whereas the victim of forgery is the party receiving the forged instrument. State v. Baldwin, 111 Wn. App. 631, 641, 45 P.3d

1093, 1098 (2002) affirmed, 150 Wn.2d 448, 78 P.3d 1005 (2003). Here, the victim of the identity theft was Vince Cruse; the victims of the forgeries were the stores where the forged checks were passed. Even assuming Cruse was also a victim of the forgeries, two crimes cannot be the same criminal conduct if one involves two victims and the other only involves one. State v. Davis, 90 Wn. App. 776, 782, 954 P.2d 325 (1998). Therefore, the trial court properly concluded that Allison's identity theft conviction did not constitute the same criminal conduct as his forgery convictions.

E. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Allison's judgment and sentence.

DATED this 9 day of January, 2012.

Respectfully submitted,

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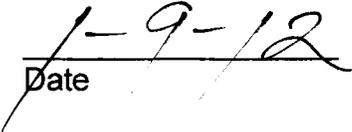
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SCOTT ALLISON, Cause No. 66623-1-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date