

NO. 70310-2-I

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

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2014 JUN 27 PM 1:09

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STATE OF WASHINGTON,

Respondent,

v.

ELIZABETH A. EWING,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Where the objective intent for theft and identity theft are different, and the two crimes were not committed at the same time and place; did the sentencing court err by determining that defendant's prior convictions for second degree theft and second degree identity theft were separate crimes?

2. Did the sentencing court engage in unconstitutional fact-finding by reviewing the affidavit of probable cause for determining whether defendant's prior convictions manifested the same criminal conduct?

## **II. STATEMENT OF THE CASE**

On April 10, 2013, Elizabeth Anne Ewing, defendant, entered guilty pleas to First Degree Burglary, under Snohomish County Superior Court case number 12-1-02207-5, and Second Degree Identity Theft, under Snohomish County Superior Court case number 13-1-00304-4. CP 63-78, 146-161; RP (4/10/13) 2-10. The prosecuting attorney's statement of defendant's criminal history and offender's score were attached to Defendant's Statement on Plea of Guilty. CP 76-78, 159-161. Defendant disputed her criminal history, specifically claiming that her prior 2008 convictions for second degree theft and second degree

identity theft were the same criminal conduct. CP 71, 154. Sentencing was set for April 17, 2013. RP (4/10/13) 9.

On April 17, 2013, the sentencing court reviewed the following documents from Snohomish County Superior Court case number 08-1-01352-3 regarding defendant's 2008 convictions: Judgment and Sentence; Statement of Defendant on Plea of Guilty; Information; and Affidavit of Probable Cause. CP 24-62, 108-145. Defendant agreed that these were the documents the court should consider to determine the facts of her 2008 convictions and directed the court her statement in paragraph 11 of her guilty plea.<sup>1</sup> RP (4/17/13) 5-6.

The sentencing court noted that at the time of her 2008 guilty plea, defendant agreed that the State's rendition of her criminal history and offender score, counting the current theft and identity theft convictions separately, were correct; and that the court in 2008 specifically did not make "a finding that the facts

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<sup>1</sup> Directly below defendant's statement, paragraph 12 states: "I am aware that an Affidavit of Probable Cause has been filed in this case. The court may consider this Affidavit in deciding whether there is a factual basis for my plea." CP 39, 122.

encompassed the same criminal conduct.”<sup>2</sup> The court found: the crimes did not manifest the same criminal conduct; the objective intents for second degree theft and for identity theft are different; and the theft was committed before the identity theft began. Additionally, the court found that under the facts set forth in the Affidavit of Probable Cause, the crimes took place at different times and at different places.

The theft was done before this defendant walked out the door of the Quiznos with the purse. She took the purse which had been left behind and appropriated it to her own use. At a later time during that day she committed the identity theft.

RP (4/17/13) 8-14. The court found defendant’s offender score was five, and imposed standard range sentences. CP 13-23, 97-107; RP (4/17/13) 22, 26-27.

### **III. ARGUMENT**

#### **A. THE COURT DID NOT ABUSE ITS DISCRETION OR MISAPPLY THE LAW IN FINDING DEFENDANT’S PRIOR CONVICTIONS FOR SECOND DEGREE THEFT AND SECOND DEGREE IDENTITY THEFT WERE NOT THE SAME CRIMINAL CONDUCT.**

Defendant argues the sentencing court’s determination that her 2008 convictions did not encompass the same criminal conduct

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<sup>2</sup> The box indicating the current offenses encompassed the same criminal conduct was not checked. Based on the scoring and sentence range, the 2008 sentencing court did not consider the two convictions as the same criminal conduct. CP 52, 53, 135, 136.

was incorrect. Brief of Appellant 4-9. 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.” RCW 9.94A.589(1)(a); State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013); State v. Garza-Villarreal, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993).

The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently ... whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a) ...

RCW 9.94A.525(5)(a)(i). The statute requires the sentencing court to determine whether prior offenses which were served concurrently were the same criminal conduct. State v. Reinhart, 77 Wn. App. 454, 459, 891 P.2d 735, review denied, 127 Wn.2d 1014 (1995); State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214, 1224 (1995). Here, that is what the sentencing court did; it found that the two crimes had different objective criminal intents, the crimes took place at a different time and place, and the theft was completed before the identity theft started. The sentencing court concluded that the crimes were not the same criminal conduct. RP (4/17/13) 11-14.

Deciding whether crimes involve the same time, place, and victim often involves determinations of fact. In keeping with this fact-based inquiry, we have repeatedly observed that a court's determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law.

Graciano, 176 Wn.2d at 536; State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838, 111 S.Ct. 110, 112 L.Ed.2d 80 (1990). “If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist.” RCW 9.94A.500(1).

While the State must prove the existence of a prior conviction by a preponderance of the evidence, it is the defendant who bears the burden of production and persuasion to establish the crimes constitute the same criminal conduct. Graciano, 176 Wn.2d at 539-540; State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002); State v. Williams, 176 Wn. App. 138, \_\_\_, 307 P.3d 819, 820 (2013). If the defendant fails to prove any element under the statute, the crimes are not the “same criminal conduct.” Graciano, 176 Wn.2d at 540. “[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.” Graciano, 176 Wn.2d at 540, quoting State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

The analysis of whether two crimes shared the same criminal intent starts with looking at the intent element of the crimes set out in the statutes. If the statutory intent is different, the crimes are counted separately. If the statutory intent is the same, the court then looks to the facts to determine if the defendant's intent is the same for both crimes. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, review denied, 118 Wn.2d 1006 (1991), citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

The criminal intent required for theft is to “deprive another of his or her property or services.” RCW 9A.56.020(1)(a); State v. Crittenden, 146 Wn. App. 361, 370, 189 P.3d 849, 853 (2008). The criminal intent required for identity theft is to “knowingly obtain, possess, use, or transfer a means of identification or financial information of another person ... with the intent to commit ... any crime. RCW 9.35.020(1). The intent elements of identity theft and second degree theft are not the same in law. State v. Milam, 155 Wn. App. 365, 372, 228 P.3d 788, 791 (2010). In the present case, the sentencing found that second degree theft and identity theft had different objective criminal intents:

The criminal intent for second degree theft is to deprive the rightful owner of the property. ... The

criminal intent for identity theft is different than that. It is that the defendant did knowingly obtain, possess, use, and transfer a means of identification and financial information of a person ... with the intent to aid and abet a crime....

RP (4/17/13) 11.

Further, the sentencing court found under the facts set forth in the Affidavit Probable Cause that the theft and identity theft occurred at a different time and place; the intent to deprive the owner of her property occurred when defendant took the purse and appropriated it to her own use before the other criminal intent began. RP (4/17/13) 11-12. Where the second crime is “accompanied by a new objective intent,” one crime can be said to have been completed before commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the same criminal conduct. State v. Wilson, 136 Wn. App. 596, 613-614, 150 P.3d 144 (2007), citing State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). Here, the record shows that the sentencing court properly made an independent determination that defendant’s 2008 crimes were not the same criminal conduct.

Defendant asserts that the two crimes were part of “one overall purpose” and that “one crime furthered the other.” Brief of

Appellant 7-9. That assertion finds scant support in the Affidavit of Probable Cause. Even if the Affidavit of Probable Cause could be read to support defendant's version, it also clearly supports the court's finding that the theft was completed before the identity theft started. Where the record adequately supports either conclusion, the matter lies in the court's discretion and depends on whether defendant carried her burden of proof. Graciano, 176 Wn.2d at 538. When the court selects between two findings that are both supported by the record, there is no abuse of discretion. State v. Freeman, 118 Wn. App. 365, 378, 76 P.3d 732 (2003). Since the crimes were not part of a recognizable scheme or plan, and there was a substantial change in the objective intent, the sentencing court correctly counted them separately.

Defendant bore the burden to establish each element of same criminal conduct under RCW 9.94A.589(1)(a), and failed to do so as to the objective intent, and same time and place. Thus, the sentencing court's refusal to enter a finding of same criminal conduct was not an abuse of discretion. Graciano, 176 Wn.2d at 541.

**B. THE SENTENCING COURT DID NOT ENGAGE IN UNCONSTITUTIONAL FACT-FINDING BY REVIEWING THE AFFIDAVIT OF PROBABLE CAUSE.**

Defendant argues that the sentencing court engaged in unconstitutional fact-finding when it reviewed the affidavit of probable cause for her 2008 convictions in order to determine whether her convictions for second degree theft and second degree identity theft were the same criminal conduct. Brief of Appellant 10-11. Defendant's argument ignores her burden of proof; defendant bears the burden of production and persuasion to establish the crimes constitute the same criminal conduct. Graciano, 176 Wn.2d at 539-540; Lopez, 147 Wn.2d at, 519; Williams, 307 P.3d at 820. If reviewing of the affidavit of probable cause is unconstitutional fact-finding, then defendant did not meet her burden to establish that the crimes were the same criminal conduct.

Judges may decide whether a defendant has a prior conviction. State v. Hughes, 154 Wn.2d 118, 137, 110 P.3d 192 (2005), abrogated on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006); In re Lavery, 154 Wn.2d 249, 256, 254, 111 P.3d 837 (2005) (whether a defendant has a prior conviction need not be presented to a jury and proven beyond a reasonable doubt); State v. Wheeler, 145

Wn.2d 116, 121, 34 P.3d 799 (2001) (court need only find, by the preponderance of the evidence, that a prior conviction existed). The Supreme Court has specifically excluded findings of prior convictions from its holdings that juries must decide aggravating facts supporting a sentence above the standard range. Hughes, 154 Wn.2d at 137.

In support of her argument defendant cites the following cases: Alleyne v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013); Descamps v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2276, 186 L. Ed. 2d 438 (2013) reh'g denied, 134 S.Ct. 41, 186 L. Ed. 2d 955 (U.S. 2013); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000). Her reliance on these cases is misplaced. Alleyne, Descamps and Apprendi addressed elements of the charged crime and enhancements, not the defendant's criminal history.

In Alleyne the jury indicated on the verdict form that Alleyne had "[u]sed or carried a firearm during and in relation to a crime of violence," but did not indicate a finding that the firearm was "[b]randished." Nonetheless, the sentencing court found that Alleyne brandished a firearm. "Brandishing" a firearm increased the term of imprisonment from 5 years to 7 years. Alleyne, 133

S.Ct. at 2156. The Court held that since the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury. Alleyne, 133 S.Ct. at 2162. The Court explained that its holding was not directed at sentencing discretion:

In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial fact[-]finding, does not violate the Sixth Amendment.

Alleyne, 133 S.Ct. at 2163, citing Apprendi, 530 U.S. at 481.

In Descamps the defendant was convicted of being a felon in possession of a firearm. Unadorned the offense had carried maximum sentence of 10 years. However, under the Armed Career Criminal Act (ACCA) there was a 5 year sentence enhancement for defendants with prior violent felony convictions. The Government sought an ACCA enhancement based on Descamps' prior state conviction for burglary. The Court granted certiorari regarding whether the "modified categorical approach" applied in determining when a defendant's prior state conviction counts as one of ACCA's enumerated predicate offenses.

Descamps, 133 S.Ct. at 2282-2283. Under the modified approach the court may examine a limited class of documents, including the charging paper and the terms of a plea agreement—i.e., charging documents, jury instructions, plea colloquy, and plea agreement—to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction. Descamps, 133 S.Ct. at 2284, citing Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) and Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). The court held that a “court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction.” Descamps, 133 S.Ct. at 2293.

In Apprendi, the defendant was sentenced to 12 years' imprisonment under a New Jersey statute that increased the maximum term of imprisonment from 10 years to 20 years if the trial judge found that the defendant committed his crime with racial bias. Apprendi, 530 U.S. at 470. The Court ruled that the New Jersey procedure was unacceptable. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490.

The Court held that Apprendi's sentence had been unconstitutionally enhanced by the judge's finding of racial bias by a preponderance of evidence. Apprendi, 530 U.S. at 491–492.

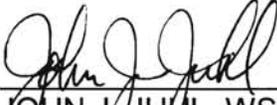
In the present case, defendant agreed that the court should consider the affidavit of probable cause to determine the facts of her 2008 convictions. The sentencing court properly made an independent determination, as required by RCW 9.94A.525, that defendant's prior 2008 convictions were not the same criminal conduct. The sentencing court's review of the affidavit of probable cause did constitute an unconstitutional fact-finding.

#### **IV. CONCLUSION**

For the reasons stated above, the judgment and sentence should be affirmed.

Respectfully submitted on January 24, 2014.

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DIVISION I  
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**Re: STATE v. ELIZABETH A. EWING  
COURT OF APPEALS NO. 70310-2-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

JOHN J. JUHL, #18951  
Deputy Prosecuting Attorney

cc: Washington Appellate Project  
Appellant's attorney

2/17/14 Jan 14  
D. K. K. K.

COURT OF APPEALS  
STATE OF WASHINGTON  
2014 JAN 27 PM 1:00

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

THE STATE OF WASHINGTON,  
  
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ELIZABETH A. EWING,  
  
Appellant.

No. 70310-2-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27<sup>th</sup> day of January, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

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SEATTLE, WA 98101-4170

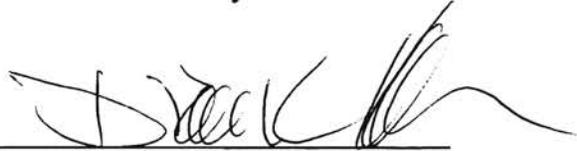
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1511 THIRD AVENUE, SUITE 701  
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 24<sup>th</sup> day of January, 2014.

A handwritten signature in black ink, appearing to read 'DK Kremenich', written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit