

NO. 35054-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY [Signature] DEPUTY

STATE OF WASHINGTON, Respondent,

v.

LAURA SUSAN ARCHER, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Archer in Counts IX, X, XI, and XII, where the State had not provided sufficient evidence of Archer's knowledge, intent, and accomplice liability.
2. The trial court erred by failing to score Counts I, VIII, IX, and X as the same criminal conduct where these counts involved the same victim, the same intent, and occurred at the same time.
3. The trial court erred by finding that "the correct calculation under the *State v. Ose* case is seven points."

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the State provide sufficient evidence that Archer had any knowledge of the cards hidden in the police car or that she in any way assisted in crimes involving those cards?
- B. Did the trial court err finding that all counts related to victim Harju should not be counted as the same criminal conduct for purposes of determining Archer's offender score?

III. STATEMENT OF THE CASE

December 16, 2005, police were called to the Chips Casino in Lakewood, Washington, by a cashier who believed that a credit card was being used by two people who were not the owner of the card. RP 61-63. The name on the card was "Erlene Harju." RP 63. Laura Archer and Pat Halvorson were arrested at the scene. RP 70.

Archer and Halvorson were handcuffed and placed together in the back of a police car for transport. RP 70. Archer was searched before being placed in the car. RP 70. Halvorson was placed in the car first and may not have been searched prior to transport. RP 78. After transport, the officer found more Harju credit cards under the back seat of the car, along with a card in the name of Kathleen Resenberger. RP 71. Harju's purse was found inside Archer's truck next to the seat Halvorson had occupied.

Archer was charged with six counts of identity theft in the second degree. CP 7-9. Although the indictment and jury instructions do not set out the specific property involved in each count, the prosecution's closing argument tells the jury that Count I relates to Harju's driver's license; Count VIII is the US Bank card used at the casino; Counts IX, X, XI and

XII are the cards found in the police car (IX, X & XI were Harju's cards; XII bore Resenberger's name).¹ RP 231-32.

Laura Archer admitted at trial that she had attempted to use Harju's card at the casino. RP 181. Archer said that she was suffering from bi-polar disorder. RP 165. In her disorganized mental state, she believed her friend, Pat Halvorson, who said his roommate, Harju, had given him permission to withdraw cash from her card. RP 177-78. Halvorson gave Archer Harju's wallet, including ID, and asked her to withdraw the cash. RP 189. Archer denied knowing about or possessing any cards not in that wallet, including the cards found in the police car. RP 188. Halvorson also told Archer which cards to try. CP 5, RP 142, 144.

Following a jury trial, Archer was convicted on all counts. CP 39-44. At sentencing, Archer asked that the five counts relating to Harju's cards be scored as the same criminal conduct, giving her an offender score of three. RP 265. The court denied the motion, giving Archer a score of seven and sentencing her to the low end of the statutory range. RP 266. This appeal timely followed.

¹ There are no counts II through VII. RP 231, CP 7-9.

IV. ARGUMENT

ISSUE 1: THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT ARCHER HAD ANY KNOWLEDGE OF THE CARDS HIDDEN IN THE POLICE CAR OR THAT SHE IN ANY WAY ASSISTED IN A CRIME INVOLVING THOSE CARDS.

The convictions for Counts IX, X, XI, and XII, the cards found in the police car, must be dismissed because the State failed to prove that Archer had ever possessed these cards, that she knew about them, or that she had in any way assisted in taking or possessing them. Thus, the evidence on these counts was insufficient to prove beyond a reasonable doubt that Archer committed second degree identity theft in violation of RCW 9.35.020.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

RCW 9.35.020 provides in relevant part:

(1) 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.

...

(3) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value that is less than one thousand five hundred dollars in value, or when no credit, money, goods, services, or anything of value is obtained shall constitute identity theft in the second degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

...

Thus, the State was required to prove that Archer, either as a principal or accomplice, “knowingly obtain[ed], possess[ed], use[d], or transfer[ed]” those cards found in the police car “with the intent to commit, or to aid or abet, any crime.” The State argued that in this case the intent was to commit the crime of possession of stolen property. RP 235.

There is no evidence that Archer ever had possession of the cards found in the police car. To the contrary, Archer was searched before being placed next to Halvorson in the car and the cards were not found then. There is no evidence Halvorson was ever searched. There was no evidence that Archer or anyone else ever used the cards. In fact, there is nothing to connect Archer in any way to the cards other than her mere presence in proximity to the cards.

Furthermore, there is no evidence that Archer knew Halvorson had the cards or assisted him in criminally possessing the cards. “A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another in planning or committing the crime.” CP 19. “However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.” CP 19.

In this case, the State has no proof of who had those cards—only that they were not there before Halvorson and Archer were in the car. Given the circumstances, it is certainly most likely that Halvorson put the cards under the seat. It was Halvorson who was in the car alone before Archer and who was likely person who took the cards. But regardless of whether the State can prove that Halvorson placed the cards under the seat, it has certainly failed to connect Archer to those cards either as a principal or an accomplice. The only evidence offered by the State was the officer’s testimony that she saw them moving around in the back seat and talking together during transport. RP 70. Without more, that is insufficient evidence of Archer’s involvement in a crime. There is no proof she knew about those cards or that she aided in the crime of

possessing them. Therefore, Counts IX, X, XI, and XII must be dismissed.

ISSUE 2: THE TRIAL COURT ERRED BY FAILING TO FIND THAT ALL COUNTS RELATED TO VICTIM HARJU SHOULD BE COUNTED AS THE SAME CRIMINAL CONDUCT FOR PURPOSES OF DETERMINING ARCHER'S OFFENDER SCORE.

If concurrent offenses encompass the same criminal conduct, they are treated as one crime for the purposes of calculating the offender's sentence. RCW 9.94A.400(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). 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.400(1)(a). All three prongs must be met, and the absence of any one prong prevents a finding of “same criminal conduct.” *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The relevant inquiry for finding the objective criminal intent is “the extent to which the criminal intent, objectively viewed, changed from one crime to the next. . . . This, in turn, can be measured in part by whether one crime furthered the other.” *State v. Vike*, 125 Wn.2d at 411 (citations omitted).

In this case, Archer was convicted of five counts of second degree identity theft of information from Harju. These five counts occurred at the same time and involved the same victim, with the same intent—possession

of stolen property, according to the State. They should therefore be deemed the same criminal conduct for purposes of scoring the convictions.

At sentencing, the State argued that because each card is deemed a separate “unit of prosecution,” they cannot be counted as the same criminal conduct. RP 266; *See State v. Ose*, 156 Wn.2d 140, 124 P.3d 635 (2005); *State v. Fisher*, 131 Wn. App. 125, 126 P.3d 62 (2006). The trial court found this argument persuasive and ruled that: “I am going to find that the correct calculation under the *State v. Ose* case is seven points.” RP 266. This finding was in error.

Ose held that, for double jeopardy purposes, the unit of prosecution for the crime of possessing a stolen access device is each access device in the defendant’s possession. 156 Wn.2d at 148. Likewise, *Fisher* held that, for double jeopardy purposes, the unit of prosecution for second degree identity theft is “possession of a means of identification of financial information of another.” 131 Wn. App. at 132. Neither of these cases have anything to say about whether multiple crimes of identity theft should be considered the same criminal conduct.

The double jeopardy analysis, of which the “unit of prosecution” is a part, is concerned with whether a person can be charged with and convicted of multiple crimes. The same criminal conduct analysis is a statutory test to determine how legal convictions should be counted for

sentencing purposes. Therefore, it is irrelevant to same criminal conduct analysis that each card possessed could be charged separately.

The test for same criminal conduct is whether each count involved the “same criminal intent, are committed at the same time and place, and involve the same victim.” *See* RCW 9.94A.400(1)(a). All five counts involving Harju’s cards involved the same criminal intent (possession of stolen property), were committed at the same time and place (December 16, 2005), and involved the same victim (Harju). Therefore, it was error for the court to rule these five counts were not the same criminal conduct.

V. CONCLUSION

For the reasons stated above, Counts IX, X, XI, and XII must be dismissed for lack of sufficient evidence. Further, the court should remand for re-sentencing, finding that all counts relating to Harju’s cards constitute the same criminal conduct.

DATED: January 9, 2007

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CERTIFICATE OF SERVICE

I certify that on the 9th day of January 2007, I caused a true and correct copy of this

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