

NO. 36092-6

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN KIE CHANG, APPELLANT

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DIVISION II
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Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 05-1-05648-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court reject defendant's claim that his convictions for identity theft and forgery violate double jeopardy when the Washington Supreme Court has decided that they do not?
2. Did the State adduce sufficient evidence to show that defendant had knowing constructive possession of a firearm when it was found under the driver's floor mat, in his own car, while he was driving it?
3. Did the trial court properly find that that defendant's convictions for identity theft and forgery were not the same criminal conduct when they had different victims?

B. STATEMENT OF THE CASE.

1. Procedure

On November 15, 2005, the Pierce County Prosecutor's Office filed an information charging appellant, STEVEN CHANG ("defendant"), with: 1) identity theft in the second degree, 2) forgery, 3) theft in the second degree, 4) unlawful possession with intent to deliver, 5) unlawful possession of a firearm, and 6) possessing stolen property in the second degree. CP 1-5. The State also alleged a firearm enhancement on the possession of stolen property charge. Id.

The matter came on for trial before the Honorable Thomas P. Larkin. When the case was called for trial, the prosecution indicated that it was no longer proceeding on the unlawful possession with intent to deliver charge and moved to dismiss Count IV; the court granted the motion. RP 4-5. At the close of the State's evidence the court dismissed Count VI, possessing stolen property in the second degree. RP 77. After hearing the evidence the jury convicted defendant as charged of the remaining four counts. RP 8, 39, 40, 41; RP 151-155.

The court sentenced defendant based upon an offender score of "5" and imposed standard range sentences of 20 months on the unlawful possession of a firearm, 18 months on the identity theft, and 12 months each on the forgery and theft in the second degree, all to run concurrently. CP 42-53. The court also imposed \$800 in legal financial obligations. Id.

Defendant filed a timely notice of appeal from entry of this judgment. CP 55-59.

2. Facts

On November 7, 2005, the defendant walked in to a Rite Aid in Milton, Washington, and wrote a check for approximately four hundred dollars in order to purchase a gift card and a leather day planner. RP 20-21, 23, 44-45. The clerk that took the check, who was relatively new, ran the check through a Check Rite security machine, which cleared the check for acceptance, but after finalizing the sale, she called her manager,

Elizabeth Smith, to the register because she was concerned that the name on the check did not look Asian and the defendant did. RP 20-22, 29. Ms. Smith became concerned about the transaction because store policy required gift cards to be purchased by cash, credit or debit card. Id. Ms. Smith ran out to the parking lot and stopped the defendant as he was trying to start his car; she asked him to come back inside, explaining that the store did not accept checks for gift cards, and indicated that she needed to undo the transaction and return his check. RP 22, 30. Defendant told her in broken English that he would go to an ATM. RP 22. Ms. Smith repeated that she needed the gift card back and told him that if he left, she would call the police. Id. Defendant left without returning the gift card or day planner; Ms Smith got his license number as he drove off. RP 22-23. She called the police who arrived within a few minutes; she gave the police a description of the defendant, his car and his license number as well as the check he had written. RP 22-23. A few days later, a police officer returned to show Ms. Smith a photo montage; she identified a picture of the defendant as the person that had written the \$400 check. RP 24-26, 47. Ms. Smith was able to get the gift card cancelled but the store took a loss on the leather day planner. RP 33.

The name on the check that defendant presented to Rite Aid was Frank Poulson. RP 23, 35, 46. Mr. Poulson testified that he ordered a batch of checks that would have begun with check number 11,871, but that he never received those checks. RP 34-35. The check that was presented

to Rite Aid was numbered 11,874. RP 35. He did not sign the check that was presented to Rite Aid and had not authorized anyone to sign his name. RP 35-36. Mr. Paulson did not know the defendant. RP 35. Mr. Poulson closed his checking account after getting a call from the Milton Police about the check written on his account. RP 38.

Officer Luckman of the Milton Police Department testified that he responded to the Rite Aid on November 7, 2005, regarding a forgery. RP 44-45. He took a report as to what had occurred and took the check into evidence. RP 45-46. He obtained a description of the car and a license plate number; a record check came back that the registered owner was a "Steven Chang." RP 46-47. Within a few days, the officer created a photo montage which included Stephen Chang's picture and showed it to Ms Smith. She identified the picture of Stephen Chang as being the person that had presented the forged check. RP 47.

About a week later, Officer Luckman stopped defendant while he was driving his blue and white Mini-Cooper because he recognized the car and the first three numbers on the license plate number from taking the report on this case. RP 48. Once some back up officers arrived, Officer Luckman approached the driver; he immediately recognized the driver as being Steven Chang whose picture was in the photo montage. RP 49. There was a male passenger in the front seat, who was identified and released at the scene. RP 48, 50-51, 62. Officer Luckman took the defendant into custody. RP 49. Defendant had an identification in his

back pocket that had his name and picture on it and also an identification that had his picture but with a different name; in his wallet he had several credit cards and identifications with different names. RP 50, 59-62. A search of the vehicle incident to arrest revealed that in the area where defendant's feet would have been was a .45 caliber Detonics firearm hidden under the floor mat. RP 52, 63. The magazine with ammunition was in the gun, but there was no round in the chamber. RP 52. The bulge caused by the gun under the floor mat was such that it should have been noticeable to anyone driving the car. RP 64. The gun was admitted as evidence. RP 64. Defendant has 1999 convictions for forgery and theft in the first degree. RP 87.

Defendant testified in his own defense. He testified that his arrest occurred differently from how Officer Luckman testified; defendant testified that Officer Luckman did not wait for back up officers so that the passenger was left alone in the car, unobserved by anyone for a few minutes after he was removed from the driver's seat. RP 101-105. Defendant testified that the gun was not under the front driver's floor mat at the time he was pulled out of the car. RP 107. He was shown the gun that was found there; he testified that he had never seen that gun before it was shown in court. RP 107-108. He acknowledged his prior convictions. RP 110-111. He did not testify regarding the check transaction at the Rite Aid.

C. ARGUMENT.

1. DEFENDANT'S ARGUMENT THAT HE HAS BEEN SUBJECTED TO IMPROPER MULTIPLE PUNISHMENTS MUST BE REJECTED AS THE SUPREME COURT HAS HELD THAT CONVICTIONS FOR FORGERY AND IDENTITY THEFT DO NOT VIOLATE DOUBLE JEOPARDY.

The Washington State Constitution, article I, section 9, and the Fifth Amendment to the federal constitution prohibit multiple prosecutions or punishments for the same offense. State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). The state constitution provides the same protection against double jeopardy as the federal constitution. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Beyond these constitutional constraints, the Legislature has the power to define criminal conduct and to assign punishment. State v. Louis, 155 Wn.2d 563, 568, 120 P.3d 936 (2005); State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). When a claim of improper multiple punishments is raised, the appellate court must determine that the lower court did not exceed the punishment authorized by the legislature. See Calle, 125 Wn.2d at 776.

Where a defendant contends that he has been punished twice for a single act under separate criminal statutes, the question is "whether, in light of legislative intent, the charged crimes constitute the same offense." State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (quoting In the Matter of the Personal Restraint of Orange, 152 Wn.2d 795, 815, 100

P.3d 291 (2004)). If the relevant statutes do not expressly authorize multiple convictions, courts apply the Blockburger and “same evidence” tests. Graham, 153 Wn.2d at 404, citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under these tests, double jeopardy arises if the offenses are identical both in law and in fact. Baldwin, 150 Wn.2d at 454.

The issue in this case is whether the Legislature intended to allow multiple punishments for identity theft, RCW 9.35.020, and forgery, RCW 9A.60.020. This was the precise issue addressed by the Supreme Court in Baldwin. After analyzing the two statutes under the Blockburger test and the same evidence test, the court concluded that the crimes are not the same in law or fact as each requires proof of a fact that the other crime does not.¹ Baldwin, 150 Wn.2d at 453-457. The court also held that when offenses harm different victims, the offenses are not factually the same for purposes of double jeopardy. Baldwin, 150 Wn.2d at 457.

Under the controlling authority of Baldwin, this court must reject defendant’s double jeopardy argument. The offenses are not the same in law or fact and, therefore, convictions on both do not violate double jeopardy. Additionally, in this case, the two crimes had different victims. While Frank Poulson was the sole victim of the identity theft, while he and

¹ Identity theft does not require proof that a written instrument was falsely made completed or altered. RCW 9.35.020. Forgery does not require that you use another person’s identification or financial information. RCW 9A.60.020.

the Rite Aid store were the victims of the forgery. The store would have suffered the financial loss on the unlawfully obtained gift card and the leather day planner; it managed to mitigate its losses by having the gift card cancelled but did not recover the day planner. RP 33.

Defendant's convictions for forgery and identity theft do not result in improper multiple punishments and do not violate double jeopardy.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF UNLAWFUL POSSESSION OF A FIREARM.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also, Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988)(citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn.

App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

The jury was instructed that to convict defendant of unlawful possession of a firearm in the second degree it had to find the following elements beyond a reasonable doubt:

- (1) That on or about the 14th day of November, 2005, the defendant knowingly had a firearm in his possession and control;
- (2) That the defendant had previously been convicted of a felony; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

CP 10-38, Instruction 19. Defendant's sole challenge to the State's proof is a claim that the prosecution produced insufficient evidence to show that he *knowingly possessed* the firearm found in his vehicle.

The jury was given the following instruction on possession:

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is not actual physical possession but there is dominion and control over the item and such dominion and control may be immediately exercised.

CP 10-38, Instruction No. 23. The jury was also instructed on unwitting possession. CP 10-38, Instruction No. 24.

As the jury was instructed in this case, possession may be actual or constructive. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant actually possesses an item if he has physical custody of it; he

constructively possesses the item if he has dominion and control over it or the premises where the item is found. Jones, 146 Wn.2d at 333; State v. Coahran, 27 Wn. App. 664, 668, 620 P.2d 116 (1980)(citing State v. Callahan, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)). An automobile is considered to be “premises.” State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000); State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). Whether a passenger’s occupancy of a particular part of an automobile would constitute dominion and control of contraband found in that area depends upon the particular facts of the case. Mathews, 4 Wn. App. at 656. A person has dominion and control of an item if he has immediate access to it. Jones, 146 Wn.2d at 333. Mere proximity, however, is not enough to establish possession. Jones, 146 Wn.2d at 333. No single factor is dispositive in determining dominion and control. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995). The totality of the circumstances must be considered. Collins, 76 Wn. App. at 501.

When there is sufficient evidence of the defendant’s dominion and control over the premises, the defendant may be found guilty of constructive possession of contraband found in those premises even if he denies knowledge of the item. Callahan, 77 Wn.2d at 29-30 (citing State v. Weiss, 73 Wn.2d 372, 438 P.2d 610 (1968); State v. Chakos, 74 Wn.2d 154, 443 P.2d 815 (1968), cert. denied, 393 U.S. 1090, 89 S. Ct. 855, 21

L. Ed. 2d 783 (1969); State v. Mantell, 71 Wn.2d 768, 430 P.2d 980 (1967); State v. Morris, 70 Wn.2d 27, 422 P.2d 27 (1966)).

Here there is evidence that defendant had dominion and control over the premises where the gun was found. The car was registered to him and he was driving it. It is reasonable to infer that an owner of a car is aware of its contents. Moreover, he had dominion and control over the area where the gun was found. The gun was found under the floor mat where the driver's feet would be. It is reasonable to infer that a person would have knowledge of something that was under their feet. This is sufficient evidence to support the jury's verdict.

It must also be noted that the defendant took the stand and denied any knowledge of the gun. This means that the jury was asked to assess his credibility in making a determination as to the knowledge element. By its verdict, the jury clearly found that the defendant was lying when he denied knowledge. This credibility assessment must be considered when weighing the sufficiency of the evidence. Looking at all of the evidence in the light most favorable to the prosecution it is clear that the State met its burden in proving this element.

3. THE TRIAL COURT PROPERLY FOUND THE CONVICTION FOR IDENTITY THEFT AND FORGERY TO BE SEPARATE OFFENSES AS THEY HAD DIFFERENT VICTIMS.

For the purposes of sentencing “same criminal conduct” involves crimes that (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.589(1)(a) (formerly RCW 9.94A.400(1)(a)); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The absence of any one of these criteria prevents a finding of same criminal conduct. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The Legislature intended the phrase “same criminal conduct” to be construed narrowly. State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994).

An appellate court will generally defer to a trial court’s decision on whether two different crimes involve the same criminal conduct and will not reverse absent a clear abuse of discretion or a misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). The presumption is that a defendant’s current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they “encompass the same criminal conduct.” RCW 9.94A.589(1)(a).

Defendant asserts that the trial court erred when it treated his conviction for identity theft as a separate crime from his forgery

conviction. Defendant raised this issue in the trial court thereby preserving it for appellate review. 2SRP 14, 17; see In re Personal Restraint Petition of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002).

The two crimes did not have the same victims. The victim of defendant's identity theft was Frank Poulsen and, while he was also a victim of the forgery, that crime also victimized the Rite Aid store. The fact that there is some overlap in victims does meet the criteria for same victim. For example, in Lessley, the Supreme Court refused to treat a burglary and a kidnapping as the same criminal conduct. The court reasoned that while the kidnapping victim was also a victim of the burglary, the burglary involved additional victims- her parents with whom she lived; therefore the victims of the two crimes were not the same. 118 Wn.2d at 778-779.

The crimes did not occur at the same time. Defendant had to acquire Mr. Poulson's financial information and formulate the intent to commit a crime prior in time to when he proffered the forged check to the clerk at Rite Aid.

Nor did the two crimes share the same intent. Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. State v. Lessley, *supra*, at 777. To find the objective intent, the courts should begin with the intent element of the crimes charged. See State v. Flake, *supra*, at 180; State v. Dunaway, 109

Wn.2d 207, 216, 743 P.2d 1237 (1987). A defendant's subjective intent is irrelevant. State v. Lessley, supra, at 778.

In State v. Dunaway, supra, the Washington Supreme Court distinguished between the objective intent and a defendant's subjective intent for the purposes of the "same criminal conduct" analysis. Defendant Green had been convicted of robbery and attempted murder. He had robbed a donut shop and shot one of the employees during his escape. On appeal, Green argued these two crimes constituted the "same criminal conduct" under former RCW 9.94A.400(a)(1). He reasoned that his intent when he shot his victim was to avoid being arrested for the robbery, so his intent did not change between the robbery and the attempted murder. The Supreme Court disagreed, noting that this approach focused on Green's subjective intent. State v. Dunaway, supra, 216. Instead, the court looked at the intent element in the statutes for robbery, RCW 9A.56.190, and attempted murder, RCW 9A.32.030, to find Green's objective intent. Id. As these intent elements were different, the court determined that the two crimes did not have the same objective intent, and thus did not constitute the same criminal conduct. Id.

Here the objective intent of an identity theft is the intent to commit a crime using another person's identification or financial information. The objective intent in forgery is the intent to injure or defraud using a forged written instrument. These are not the same objective intents.

The trial court below did not find that the two crimes to have the same intent finding that "it is one thing to take the identity, it is another thing to do something with it." 2SRP 17. In light of the fact that the crimes did not have the same intent, occur at the same time, or have the same victims, the court properly found that the crimes did not constitute the same criminal conduct. The sentence should be affirmed.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgment and sentence entered below.

DATED: FEBRUARY 19, 2008.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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