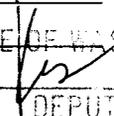


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DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

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

STATE OF WASHINGTON, RESPONDENT

v.

BRENDA MARIE JOHNSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan Serko

No. 07-1-02186-0

BRIEF OF RESPONDENT

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

1. Was there sufficient evidence for the jury to find defendant guilty of theft in the first degree when defendant accessed an account she did not own and withdrew money from it on five separate occasions?
2. Is defendant precluded from arguing for the first time on appeal that her convictions constituted the same criminal conduct?
3. Did defendant receive constitutionally effective assistance of counsel where defendant cannot prove deficient performance or prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Brenda Marie Johnson, on April 23, 2007 with one count of theft in the first degree. CP 1-2. The State amended the charges on February 6, 2008 to five counts of theft in the first degree. 1RP 3-4, CP 3-5¹.

Trial commenced on February 6, 2008 in front of the Honorable Susan Serko. 1RP 3. A CrR 3.5 hearing was held and the court ruled that

¹ The State will refer to the verbatim report of proceedings as follows: 1RP- 2/6/08; 2RP- 2/7/08; 3RP- 2/11/08; 4RP- 2/12/08; and 5RP- 3/26/08.

defendant's statements were admissible. 1RP 38, CP 45-48. On February 12, 2008 the jury found defendant guilty on all five counts. 4RP 77-8, CP 37-41.

Sentencing was held on March 26, 2008. 5RP 3. Defendant had an offender score of four which encompassed the current crimes. CP 42-44, 49-60. Defendant's sentencing range was 12+ - 14 months. 5RP 4, CP 49-60. The court sentenced defendant to 12+ months with credit for time served. 5RP 7-8, CP 49-60. Defendant filed this timely appeal. 5RP 10, CP 64.

2. Facts

Defendant worked for Washington Mutual from December 13, 2004 to April 19, 2005. 2RP 69.

On June 21, 2005, defendant went into the Washington Mutual at 72nd and Pacific, inside the Fred Meyer, and requested \$2,500 from a line of credit. 2RP 44, 46. The line of credit belonged to Leslie and Brenda Lynette Johnson. 2RP 38, 3RP 61. The teller was Ben Bergstrom. 2RP 49, 84. Defendant had to write a check to activate the account. 2RP 42. The check that defendant wrote bounced. 2RP 38. Defendant requested the \$2,500 be paid to her in cash. 2RP 46.

On June 23, 2005, defendant again went to the branch at 72nd and Pacific and requested money from the line of credit. 2RP 50-1.

Defendant requested \$6,000 and was given the money in the form of a bank check. 2RP 51. The teller was Marlana Ammon. 2RP 85.

On June 24, 2005, defendant went into the Twin Lakes branch of Washington Mutual in Federal Way and requested \$7,000 from the line of credit. 2RP 55- 6. The funds were distributed by bank check. 2RP 56. The teller was Joanna Nquyen. 2RP 85.

On July 27, 2005, defendant went into the Benson Plaza branch of Washington Mutual in Renton and requested \$7,000 from the line of credit. 2RP 60-1, 64. Defendant received the funds in a bank check. 2RP 61. The teller was Patricia Aberion. 2RP 85

On July 29, 2005, defendant returned to the branch at 72nd and Pacific. 2RP 65. Defendant received \$10,000 in the form of a bank check from the line of credit. 2RP 65-6. The teller was Francisco Obrigon. 2RP 85.

The owners of the line of credit, Leslie and Brenda L. Johnson, noticed the cash withdrawals that they did not make and immediately called the bank. 3RP 62-3, 67. The Johnson's had not authorized anyone to use their account and they did not know defendant. 3RP 63-4, 67. The forgery affidavit they filled out was completed on July 26, 2005. 2RP 78.

Defendant admitted that she was the one in the photos that showed the five transactions taking place. 3RP 73. Defendant claimed she had gotten e-mails from Nigeria claiming she has inherited an unknown amount of money from an unknown person. 3RP 74. Defendant claimed

that the Nigerian contacts gave her the account number. 3RP 155, 4RP 10-11. Although she was supposed to send the money she obtained from the line of credit back to Nigeria, defendant did not send any of the money back to Nigeria because she was having financial problems and also had a gambling problem. 3RP 75.

C. ARGUMENT.

1. THE EVIDENCE AGAINST DEFENDANT WAS SUFFICIENT FOR A JURY TO FIND HER GUILTY OF THEFT IN THE FIRST DEGREE WHEN DEFENDANT ACCESSED AN ACCOUNT SHE DID NOT OWN AND WITHDREW MONEY FROM IT ON FIVE DIFFERENT OCCASIONS.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are

equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App., at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Under RCW 9A.56.030(1)(a) and RCW 9A.56.020(1)(b) a person is guilty of theft in the first degree when “he or she commits theft of [p]roperty or services which exceed(s) one thousand five hundred dollars in value ...[b]y color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” The State charged defendant with all five counts of theft under these statutes.

There was sufficient evidence for the jury to find that defendant has committed five counts of theft in the first degree. Defendant claims there was no evidence of deception. Defendant deceived the bank by pretending that she was the rightful owner of the line of credit account that actually belonged to Leslie and Brenda L. Johnson.

Defendant had extensive experience with banks and bank accounts. Defendant had worked in banks for several years. 3RP 138-9, 4RP 22. During the time period that she worked at Washington Mutual, she specifically worked with mortgage accounts, including lines of credit and

loans. 2RP 70, 3RP 141. Defendant had access to names and account numbers as well as the account balances while she worked at Washington Mutual. 2RP 69.

Defendant used the opportunity of working at the bank to her advantage. Defendant accessed the line of credit belonging to Leslie and Brenda L. Johnson before she left Washington Mutual. 4RP 7-10. At that time, she had access to account numbers, the names of account holders and account balances. 2RP 69. She took out \$10,000 and then immediately returned it. 4RP 7-10. Defendant then waited and made the first withdrawal that she did not return, the first theft, towards the end of June. 2RP 44, 46. In fact, the five thefts were towards the end of the month, right before the statement would have gone out. The statement for the account was for a one month period from June 2-July 1. 2RP 83.

Defendant was deceptive in how she signed for the withdrawals. Defendant used the name "Brenda Johnson" without a middle initial for the five withdrawals. 2RP 47, 51, 57, 61, 66, Ex. 2b, 3b, 4b, 5b, 6b. She did not use her middle initial despite the fact that she testified that she usually uses her middle initial for legal issues and did use her middle initial on the statement to police. 3RP 89, 4RP 22, Ex. 10. The victim, Brenda L. Johnson, testified that she always signs her name without her middle initial. 3RP 68. There is no signature card for a line of credit for a teller to be able to compare the signature to. 2RP 81.

Further, a line of credit account is attached to a home loan. Based on her employment with Washington Mutual and her record of working in banks for years, defendant knew what a line of credit account was for and knew that she was accessing a line of credit account. 4RP 12, Ex. 2b, 3b, 4b, 5b, 6b. There was evidence that defendant was living in an apartment, and no evidence that she owned a home, so she would not have been able to legitimately access such an account. Ex. 9f. Her knowledge of the banks and specifically Washington Mutual policies helped her gain access to the account and to take the money out of it.

Defendant accessed the same account for the five thefts but went to three different branches and five different tellers. She then used the money to gamble and also made large ATM withdrawals. 3RP 75, 131, 134, 4RP 21, Ex. 7f, 7g. In addition, her checking account at Seattle Metropolitan was overdrawn before she started the thefts. 3RP 75, Ex. 7f, 7g. Defendant's account at one time was in danger of being closed. Ex. 9f. In fact, defendant used a check that bounced in order to obtain the money in the first theft. 2RP 38, 4RP 15, Ex. 1b.

In addition, all five thefts were well over \$1,500. The amounts of the thefts were \$2,500, \$6,000, \$7,000, \$7,000, and \$10,000. Ex. 2b, 3b, 4b, 5b, 6b.

There is no evidence that the Nigerian e-mails sent to defendant had anything to do with her accessing the account at Washington Mutual. The Nigerian contacts supposedly tried to mail her two checks that

bounced. 3RP 20-1, Ex. 9f. In addition, the Nigerian contacts claimed they were going to deposit money into defendant's account, but defendant asked how, when she hadn't given them her account number. Ex. 9d. In one of the e-mails, defendant refers to the Nigerian money as a "deal" and not an inheritance. Ex. 9f. She also states that if the deal does not go through, they will have to find themselves another "flunky." Ex. 9f. There is no evidence that they ever gave her an account number at Washington Mutual. 3RP 79.

While defendant claims she researched the claim of the inheritance, defendant says she didn't know the name of the supposed deceased relative, that she was the only person with the last name of Johnson that they could contact and that she found out the Econo bank was real. 3RP 117, 144, 145, 150. Brenda Johnson is a common name and the rest shows no real research. 3RP 31, 68, 156. Further, there is no evidence that the Nigerian contacts ever told her how much to take out and in fact, defendant testified that she took out whatever amount she wanted. 3RP 157, *See* Ex. 9a-9j. The story is far from believable and does not explain how she got access to a line of credit account at Washington Mutual.

Defendant used her knowledge of banks and their procedures, specifically those procedures at Washington Mutual, to access the line of credit account belonging to Brenda and Leslie Johnson and steal money from it five separate times. Defendant deceived the bank by acting like

she owned the account when she did not own the account, never had and had no expectation of owing a line of credit account. There was sufficient evidence for a jury to find defendant guilty of all five counts.

2. DEFENDANT IS PRECLUDED FROM ARGUING FOR THE FIRST TIME ON APPEAL THAT HER CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT.

A defendant cannot agree to a punishment in excess of what the Legislature has established. *In re Goodwin*, 146 Wn.2d 861, 50 P.3d 618, (2002). Generally, a defendant cannot waive a challenge to a miscalculated offender score. *Id.* While waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion. The application of the same criminal conduct statute by a trial court involves both factual determinations and the exercise of discretion. *Id.*, citing *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000, review denied, 114 Wn.2d 1030 (2000).

In this case, defendant stipulated to the offender score of 4, which encompassed the current charges on which she was being sentenced. CP 42-44. Defense counsel did not dispute the offender score at sentencing.

Thus, the waiver was effective because the error alleged on appeal was a matter within the discretion of the trial court.

This case is like *Nitsch*. In that case, the defendant affirmatively agreed to the standard range of his sentence. On appeal, the defendant argued that the court erred when it did not find that the crimes he was convicted of constituted the same criminal conduct. *Nitsch*, 100 Wn. App. 512, 997 P.2d 1000 (2000). The court held that the defendant waived any argument that his crime constituted the same criminal conduct because he explicitly agreed that his offender score was properly calculated. *Id.* Also, the court noted that the application of the same criminal conduct statute involved the use of discretion by the court. *Id.* at 523.

Because defendant affirmatively stipulated to her offender score and did not ask the court to engage in the same criminal conduct analysis, defendant waived her right to appeal same criminal conduct.

3. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to

survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also **State v. Walton**, 76 Wn. App. 364, 884 P.2d 1348 (1994), review denied, 126 Wn.2d 1024 (1995); **State v. Denison**, 78 Wn. App. 566, 897 P.2d 437, review denied, 128 Wn.2d 1006 (1995); **State v. McFarland**, 127 Wn.2d 322, 899 P.2d 1251 (1995); **State v. Foster**, 81 Wn. App. 508, 915 P.2d 567 (1996), review denied, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 56 (1992), further clarified the intended application of the **Strickland** test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing **Strickland**, 466 U.S. at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S., at 689.

Defendant argues that trial counsel was ineffective for failing to ask for a same criminal conduct analysis.

Under RCW 9.94A.589(1)(a), two crimes shall be considered the “same criminal conduct” only when all three of the following elements are

established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). 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). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *Lessley*, 118 Wn.2d at 778. 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, 3 P.2d 733 (2000).

Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. *Lessley*, 118 Wn.2d at 777. To find the objective intent, the courts should begin with the intent element of the crimes charged. *See Flake*, 76 Wn. App. at 180; *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). A defendant’s subjective intent is irrelevant. *Lessley*, 118 Wn.2d at 778. “In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.” *Dunaway*, 109 Wn.2d at 215.

The Supreme Court of Washington has held that objective intent is “measured by determining whether one crime furthered another.” *Lessley*, 118 Wn.2d at 778. Defendant does not argue that she committed one theft in order to commit the other thefts, only that the motivation behind all the thefts was the same. Defendant’s motivation, however, is irrelevant, and the trial court should not attempt to speculate as to what was going on inside defendant’s head at the time of the crimes. Defendant’s actions constitute separate and distinct criminal conduct.

In *State v. Grantham*, 84 Wn. App. 854, 932 P.3d 657 (1997). Grantham was convicted of two counts of second degree rape. Grantham anally raped his victim. *Id.* at 856. He then withdrew, assaulted her, and demanded his victim perform oral sex on him and when she kept her mouth closed, he slammed her head against the wall and forced her to comply. *Id.*

The trial court found Grantham’s two convictions were separate and distinct criminal conduct. *Id.* at 857. In addressing the issue of whether the two counts were same criminal conduct, the reviewing court noted that while the crime occurred at the same place and against the same victim, the two crimes were committed “not simultaneously, although relatively close in time.” *Id.* at 858. A period of time between crimes, not

only defeats the “same time” prong of the same criminal conduct test, it also defeats the “same objective intent” prong, because:

If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment and he must be treated as accepting the risk whether he in fact knew of it or not.

Grantham, 84 Wn. App. at 861.

The evidence was sufficient to establish that Grantham “had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” *Id.* Grantham “chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous.” *Id.* Thus, the trial court properly concluded the crimes were not same criminal conduct because they did not occur at the same time and did not involve the same objective intent. *Id.* at 661.

Contrary to defendant’s assertions, the crimes in the instant case did not occur at the same time and place. The five thefts took place on five different days. While all the crimes took place at a Washington Mutual branch, they took place at three different branch locations. Further, defendant approached a different teller during each theft. The thefts took place at different times and places.

In addition, each theft had a separate objective intent. Defendant accessed the account on June 21, 2005, withdrew \$2,500 in cash and then left the bank. 2RP 44, 46. The theft was complete when defendant received the money. Defendant had time to stop and reflect after the first theft. Defendant chose to commit another theft, a separate criminal act two days later. Each theft was a separate criminal act in that each theft was completed when defendant left the bank with money that did not belong to her. Each individual theft was its own crime and did not have to be completed in order for defendant to commit another theft. Defendant formed a separate and distinct criminal intent for each act of theft. They cannot be said to constitute the same criminal conduct.

In the instant case, a review of the record shows that defendant received constitutionally effective assistance of counsel. The five thefts each constituted a separate criminal act at a separate time and place with a separate criminal intent. There was no reason for defense counsel to argue that they encompassed one criminal act when case law holds the opposite. Further, trial counsel made motions and arguments on behalf of defendant and presented a case to the jury on her behalf. There is no evidence that trial counsel was deficient in his representation of defendant. As the five crimes constitute separate criminal acts, there is no evidence that defendant was prejudiced by trial counsel's decisions. Defendant cannot

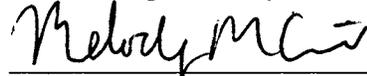
meet the burden for showing that she received ineffective assistance of counsel.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court to affirm the convictions and sentence below.

DATED: NOVEMBER 6, 2008

GERALD A. HORNE
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

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.

11/6/08 Brenda Johnson
Date Signature

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