

NO. 41667-1-II

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

11-20-10 10:10:00
BY 

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES L. ROBINSON, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 10-1-00683-6

Brief of Respondent

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

1. Did the trial court properly allow the State to charge and the jury to convict defendant of theft in the second degree and forgery without violating double jeopardy.
2. During sentencing, did the court properly find the crimes of theft and forgery not to consist of the “same criminal conduct,” pursuant to RCW 9.94A.589(1)(a).

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Charles Robinson (hereafter referred to as “defendant”) with one count of forgery and one count of theft in the second degree on February 11, 2010. CP 1-2.

Trial commenced on September 28, 2010. RP 5. Defense counsel motioned to dismiss the case on September 29, 2010, at the conclusion of the State’s case-in-chief. RP 79-82. He argued that the State had failed to present sufficient evidence for the crimes charged. *Id.* The court denied the motion. *Id.*

On October 1, 2010, the jury found defendant guilty of forgery and theft in the second degree. CP 65-66; RP 152-54.

The court sentenced defendant on January 7, 2011, to a standard range sentence of 18 months of confinement. CP 168-80; RP 178-192. Defendant filed a timely notice of appeal on January 7, 2011.

2. Facts

In May of 2009, Matthew Staerk posted an advertisement on Craigslist, attempting to sell a laptop computer. RP 25. Within a day or two, a man named Mark or Marcus contacted Mr. Staerk by telephone, expressing interest in purchasing the laptop. RP 26. Mr. Staerk testified that he arranged to sell the laptop to Mark for \$1,450. RP 27. They agreed to meet at Poodle Dog, a restaurant in Fife, and finalize the deal. *Id.*

Mr. Staerk testified that he met a man and a woman in the Poodle Dog parking lot at approximately 8:30 pm on May 21, 2009. RP 28-30. He identified the man as defendant. *Id.* The man introduced himself as Mark or Marcus. *Id.* Mr. Staerk showed the laptop to defendant and the woman, who defendant introduced as his wife Kristina. RP 30-31.

Defendant withdrew 15 \$100 bills from a bank envelope and handed them to Mr. Staerk. RP 31-32. Mr. Staerk testified that he thought it strange at the time that defendant gave him \$50 more than the amount to which they agreed. *Id.* He gave the laptop to defendant. RP 32.

Mr. Staerk testified that after concluding the deal he got into his car and examined the bills more closely. RP 32. He noticed that the bills lacked security features that he expected to see. RP 32. By the time he noticed this, he realized that defendant's vehicle had already left the parking lot. RP 33-34.

On August 28, 2009, Fife Police Officer Michael Malave matched the phone number provided by Mr. Staerk to defendant's girlfriend, Helen White Eagle. RP 57-58. Using this information, he created a photomontage containing defendant's photo and presented it to Mr. Staerk. RP 58-59. Mr. Staerk, properly advised of the instructions for the photomontage, identified defendant from the photos. RP 59-60; 38.

Secret Service Special Agent Timothy Hunt testified as part of the State's case-in-chief. RP 62-78. He examined the fifteen \$100 bills and, using multiple techniques, determined them all to be counterfeit. RP 78-79.

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY DETERMINED THAT DEFENDANT'S CONVICTION FOR THEFT AND FORGERY DID NOT VIOLATE PROHIBITIONS AGAINST DOUBLE JEOPARDY.

Claims of double jeopardy are questions of law that are reviewed *de novo*. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010) (citing

State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009)). The double jeopardy clause of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution, prohibits the imposition of multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002); *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). The federal and state double jeopardy clauses provide identical protections. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Although the protection itself is constitutional, it is for the Legislature to decide what conduct is criminal and to determine the appropriate punishment. *Calle*, 125 Wn.2d at 776. The court's role is limited to determining whether the Legislature intended to authorize multiple punishments. *Id.*

The double jeopardy clause bars multiple punishments for the same offense. *Kelley*, 168 Wn.2d at 76 (citing *In re Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)); *Calle*, 125 Wn.2d at 776.

“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”

Kelley, 168 Wn.2d at 77 (quoting *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)). The legislature has authority to

enact statutes that in a single proceeding impose cumulative punishments for the same conduct. *Kelley*, 168 Wn.2d. at 77.

“[I]f the defendant's act supports charges under two statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question.” *Borrero*, 161 Wn.2d at 536; *State v. Gaworski*, 138 Wn. App. 141, 156 P.3d 288, 291 (2007) (citing *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981))). If the legislature did intend to impose cumulative punishments for the crime, double jeopardy is not offended. *Borrero*, 161 at 536 (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following conviction or acquittal, and (2) multiple punishments for the same offense. *State v. Hescock*, 98 Wn. App. 600, 603-04, 989 P.2d 1251 (1999). To determine whether a defendant has received multiple punishments for the same offense, the court must determine the unit of prosecution that the legislature intended to constitute the prohibited act. *State v. Green*, 156 Wn. App. 96, 98, 230 P.3d 654 (2010) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). “The ‘unit of prosecution’ refers to the scope of the criminal act.” *Green*, 156 Wn. App. at p. 98 (quoting *Adel*, 136 Wn.2d at 634. When the

legislature's intent is unclear any ambiguities must be construed in the defendant's favor pursuant to the rule of lenity. *Green*, 156 Wn. App. at 98 (citing *State v. Bobic*, 140 Wn.2d 250, 261-62, 996 P.2d 610 (2000)).

The Washington Supreme Court identified the "same evidence" test for determining whether two crimes charged violate double jeopardy:

In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003) (quoting *Vladovic*, 99 Wn.2d at 423). This test bears striking resemblance to the test used by the Supreme Court to determine legislative intent in these cases. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). Under the *Blockburger* test, "two offenses are not the same if each contains an element not contained in the other." *State v. Corrado*, 81 Wn. App. 640, 649, 915 P.2d 1121 (1996)(citing *Blockburger*, 284 U.S. at 304). If the crimes meet this test, the court presumes that the legislature intended separate punishment. *Gaworski*, 138 Wn. App. at 146 (citing *Freeman*, 153 Wn.2d at 772). The *Blockburger* presumption may also be rebutted by evidence of contrary legislative intent. *Freeman*, 153 Wn.2d at 772.

Here, a jury convicted defendant of one count of theft in the second degree and one count of forgery. CP 65-66. To properly determine whether or not the offenses contain elements not contained in the other, the court must consider the language of the applicable statutes. “A person is guilty of forgery if, with intent to injure or defraud: ... He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged.” RCW 9A.60.020. In the context of the case at bar, theft means “[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[.]” RCW 9A.56.020. When the property or service in question “exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value,” it constitutes theft in the second degree. RCW 9A.54.040.

Examining the statutes themselves, both crimes contain elements not present in the other statute. Forgery requires that a defendant has attempted to present as legitimate a forged written instrument, an element unnecessary for theft in the second degree. RCW 9A.60.020. Theft, on the other hand, requires that a defendant obtain control over property or services of another, an element wholly unnecessary for proving forgery. RCW 9A.56.020. With respect to the statutory construction, both crimes have distinct elements that the other does not contain.

Furthermore, the two offenses in this case have distinct factual elements. The victim, Matthew Staerk, testified that he gave defendant his laptop as part of the exchange. RP 33. He did not realize until shortly thereafter that defendant had deceived him and unlawfully took possession of the laptop. RP 34. Defendant took possession of Mr. Staerk's laptop through deception; taking possession of the property of another, although a necessary element of theft, has no bearing on the charge of forgery. Similarly, Mr. Staerk testified that defendant gave him fifteen \$100 bills, passing them as legitimate currency. RP 31-32. Special Agent Timothy Hunt testified as to the varied security features not present in the bills used by defendant. RP 62-79. He testified that all fifteen \$100 bills had been counterfeit. RP 78-79. Although the State must demonstrate that defendant attempted to use a forged instrument as an essential element in proving the crime of forgery, those facts bore no relevance to proving the crime of theft.

Using the "same evidence" analysis of *Blockburger*, the Washington Supreme Court has previously held that identity theft and forgery do not implicate double jeopardy under the same evidence test. *Baldwin*, 150 Wn.2d at 454-57. Similarly, the Court of Appeals held that theft and identity theft in the second degree do not implicate double jeopardy. *State v. Milam*, 155 Wn. App. 365, 228 P.3d 788 (2010). Furthermore, in a case of theft in the second degree and forgery involving

forged bank checks, the court did not find that the defendant's freedom from double jeopardy had been impinged. *State v. Goodlow*, 27 Wn. App. 769, 773, 620 P.2d 1015 (1980); *State v. Barton*, 28 Wn. App. 690, 695, 626 P.2d 509 (1981).

The Washington Supreme Court further clarified the "same evidence" test: "The applicable rule is that where *the same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires proof of a fact* which the other does not." *In re Orange*, 152 Wn.2d 795, 817, 100 P.3d 291 (2004) (emphasis in original) (citing *Gavieres v. United States*, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911)). More specifically, the Court in *Orange* emphasizes that a single action can only be prosecuted under two statutes if each statute requires proof of an additional fact which the other does not. *Orange*, 152 Wn.2d at 817 (quoting *Gavieres*, 220 U.S. at 342). In *Orange*, the Supreme Court held that first degree attempted murder and first degree assault of the same victim "based on the same shot in the same incident" violated double jeopardy. 152 Wn.2d at 815.

Defendant argues that in light of *Orange*, the Supreme Court has disregarded the holding of *Baldwin* and other pre-*Orange* cases utilizing the “same evidence” test¹. App. Br. at 17-18. However, the Washington Supreme Court reviewed double jeopardy jurisprudence in a more recent case, clarifying the holding of *Orange* and concluding that when a court distinguishes two charges based on “spurious distinctions between the charges[,]” double jeopardy is intimated. *State v. Jackman*, 156 Wn.2d 736, 748-50, 132 P.3d 136 (2006) (citing *Adel*, 136 Wn.2d at 635). Furthermore, the Court later reaffirms the test as described in *Baldwin*:

Under the same evidence test, two statutory offenses are the same for double jeopardy purposes if the offenses are identical in law and in fact. If each offense includes an element not included in the other, and each requires proof of a fact the other does not, then the offenses are not constitutionally the same under this test.

Hughes, 166 Wn.2d at 682. The charges here each have substantive elements required for one but not for the other; under the *Blockburger* test, the crime of forgery and theft in the second degree in the context of the case do not implicate double jeopardy.

A jury found defendant guilty of two separate crimes that arose from the same series of events. The statutes in question describe crimes

¹ The Supreme Court decided *Orange* on November 10, 2004, a year after *Baldwin*. However, the Court heard argument for *Orange* in November of 2002, six months before hearing argument for *Baldwin*. Thus, the suggestion that the Court would decide *Baldwin* having already heard argument for *Orange*, only to overrule it a year later, seems unlikely.

with different elements. Because the two crimes differ in fact and law, they are not presumed the same for purposes of double jeopardy. Therefore, defendant's constitutional protection against double jeopardy was not infringed.

2. THE SENTENCING COURT PROPERLY DETERMINED THAT DEFENDANT'S MULTIPLE CONVICTIONS DID NOT CONSTITUTE "SAME CRIMINAL CONDUCT" FOR PURPOSES OF SENTENCING.

RCW 9.94A.589(1)(a) addresses the counting of crimes for purposes of determining the sentence: "That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." Furthermore, the statute specifies that "'Same criminal conduct,' as used in this subsection, 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.589(1)(a).

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). To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the

objective criminal intent test, which requires a court to focus on “the extent to which a defendant’s criminal intent, as objectively viewed, changed from one crime to the next.” *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); *State v. Lessley*, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992)).

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).

Here, the sentencing court addressed the different intent of the two crimes. The State argues that, with respect to forgery, “it is the intent to injure or defraud[.]” RP 163; *see* RCW 9A.60.020. However, when considering the crime of theft, the intent involves the taking of property. RP 163; *see* RCW 9A.65.020. The court comes to accept the State’s argument and further reasons how the intent for each of the two crimes differs. RP 166-68. In utilizing the counterfeit currency, defendant intended to “annoy, vex or injure.” RP 172. Thus, as held by the court, defendant had different intent with respect to the forgery than with the

theft. Therefore, under the intent portion of “same criminal conduct” rule, the forgery and theft did not constitute the “same criminal conduct.”

The court also addresses the potential victim of the different crimes. With forgery, defendant introduced the “instrumentality into the stream of commerce,” potentially injuring, vexing, and disturbing others. RP 172. Thus, the crime of forgery targets more people than just the victim of the theft, Mr. Staerk; it has as its potential victims all of the people in the stream of commerce. Thus, the convictions for forgery and theft do not have the same victim and are not the “same criminal conduct.”

Although not specifically articulated by the sentencing court, utilizing counterfeit “obligations or other security of the United States” is a harm against the United States of America. *See* 18 U.S.C. § 472; *see also* 18 U.S.C. § 8 (defining “obligations or other security of the United States” to include Federal Reserve notes). Thus, by attempting to utilize counterfeit currency and introduce it into the stream of commerce, the federal government is made a victim.

Defendant cites the analysis of the appellate court in *State v. Calvert*, 79 Wn. App. 569, 903 P.2d 1003 (1995). In *Calvert*, the sentencing court held that two counts of forgery committed on the same day at the same bank constituted same criminal conduct. The State, on cross-appeal, argued that the two counts had different intent “because they did not further each other.” *Id.* at 577. The court holds that analysis of

intent “may include, but is not limited to, the extent to which one crime furthered the other, whether they were part of the same scheme or plan and whether the criminal objectives changed.” *Id.* at 578 (citing *Maxfield*, 125 Wn.2d at 402-03). In affirming the sentencing court’s determination, the court of appeals found that it did not abuse its discretion. Here, the sentencing court conducting considerable analysis of intent of both crimes, finding that the intent of each crime differed sufficiently enough to warrant separate acts of criminal conduct. RP 162-168; 172. In this analysis, the court did not abuse its discretion.

When evaluating whether a trial court properly determined “same criminal conduct,” the reviewing court will not reverse absent a clear abuse of discretion. *Haddock*, 141 Wn.2d at 110. Given the court’s reasoned and documented thought process, the court did not unreasonably conclude that defendant’s two convictions constituted separate acts of criminal conduct for purposes of sentencing. Therefore, the sentencing court’s decision should be affirmed.

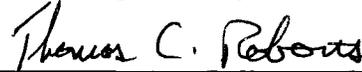
D. CONCLUSION.

Defendant’s convictions for theft in the second degree and forgery do not implicate double jeopardy as they did not contain the same elements in fact and law. Furthermore, the trial court did not abuse its

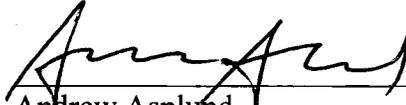
discretion in determining that the two crimes did not constitute the same criminal conduct for purposes of sentencing. For the reasons argued, the State respectfully requests that the defendant's sentence be affirmed.

DATED: July 11, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



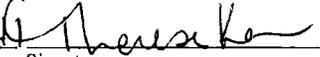
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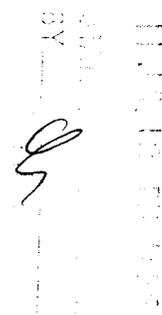


Andrew Asplund
Rule 9 Legal Intern

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.

7.12.11 
Date Signature



APPENDIX “A”

9A.56.040. Theft in the second degree--Other than firearm or motor vehicle

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle; or

(b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant; or

(c) An access device.

(2) Theft in the second degree is a class C felony.

9A.56.020. Theft--Definition, defense

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By 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; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

Selected statutes from RCW Title 9A: Washington Criminal Code

9A.60.020. Forgery

(1) A person is guilty of forgery if, with intent to injure or defraud:

(a) He falsely makes, completes, or alters a written instrument or;

(b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged.

(2) In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

(3) Forgery is a class C felony.