

NO. 50397-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALBERT SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Kevin D. Hull, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	4
1. <u>Charges, verdicts, and exceptional sentence</u>	4
2. <u>Pretrial ruling regarding checks</u>	6
3. <u>Trial testimony</u>	6
C. <u>ARGUMENT</u>	10
1. THE COURT ERRED WHEN IT DENIED THE MISTRIAL MOTION FOLLOWING THE INTRODUCTION OF HIGHLY PREJUDICIAL, EXCLUDED EVIDENCE.	10
2. THE COURT’S FINDING THAT “SOME OF” THE CURRENT CRIMES WOULD GO UNPUNISHED IF CONCURRENT SENTENCES WERE IMPOSED WAS IMPROPER. UNDER ITS PLAIN LANGUAGE, THIS AGGRAVATOR DOES NOT APPLY TO THIS CASE.....	17
a. <u>An exceptional sentence, including consecutive sentences, may be imposed under the Sentencing Reform Act only when “some” of the current offenses would otherwise go unpunished.</u>	17
b. <u>The remedy is reversal and remand for resentencing.</u>	24
3. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE CURRENT FIRST DEGREE THEFT AND FIRST DEGREE IDENTITY THEFT CONVICTIONS WERE THE SAME CRIMINAL CONDUCT.	25
a. <u>Applicable statute and standard of review.</u>	25

TABLE OF CONTENTS (CONT'D)

	Page
b. <u>The court abused its discretion in adopting the State's dubious assertion of separate criminal conduct.</u>	26
4. REMAND FOR RESENTENCING IS REQUIRED BECAUSE AT LEAST ONE OF THREE BASES THE COURT RELIED ON IN IMPOSING THE EXCEPTIONAL SENTENCE WAS INVALID.....	31
5. BASED ON THE ARGUMENTS THAT FOLLOW, REMAND FOR RESENTENCING IS ALSO REQUIRED DUE TO THE MISCALCULATED OFFENDER SCORE...	32
6. THE TRIAL COURT ERRED IN FAILING TO APPLY A “SAME CRIMINAL CONDUCT” ANALYSIS TO SMITH’S PRIOR CONVICTIONS.....	34
7. THE STATE FAILED TO PROVE PRE-1997 CONVICTIONS BY A PREPONDERANCE OF THE EVIDENCE.	38
8. THIS COURT SHOULD REMAND FOR RESENTENCING BEFORE A DIFFERENT JUDGE.....	40
D. <u>CONCLUSION</u>	43

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</u> 146 Wn.2d 1, 43 P.3d 4 (2002).....	20
<u>Hollingsworth v. Washington Mutual Sav. Bank</u> 37 Wn. App. 386, 681 P.2d 845 (1984).....	11
<u>In re Custody of R.</u> 88 Wn. App. 746, 947 P.2d 745 (1997).....	42
<u>Sherman v. State</u> 128 Wn.2d 164, 905 P.2d 355 (1995).....	41
<u>State v. Adame</u> 56 Wn. App. 803, 785 P.2d 1144 (1990) <u>review denied</u> , 182 Wn.2d 1022 (2015)	26, 36
<u>State v. Allen</u> 159 Wn.2d 1, 147 P.3d 581 (2006)	11, 16
<u>State v. Altum</u> 47 Wn. App. 495, 735 P.2d 1356 <u>review denied</u> , 108 Wn.2d 1024 (1987)	33
<u>State v. Alvarado</u> 164 Wn.2d 556, 192 P.3d 345 (2008).....	19, 20, 23
<u>State v. Babcock</u> 145 Wn. App. 157, 185 P.3d 1213 (2008).....	13, 14, 15
<u>State v. Brown</u> 60 Wn. App. 60, 802 P.2d 803 (1990).....	34
<u>State v. Burns</u> 114 Wn.2d 314, 788 P.2d 531 (1990).....	27, 28, 36
<u>State v. Calvert</u> 79 Wn. App. 569, 903 P.2d 1003 (1995).....	27, 36

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Chenoweth</u> 185 Wn.2d 218, 370 P.3d 6 (2016).....	26, 27
<u>State v. Conover</u> 183 Wn.2d 706, 355 P.3d 1093 (2015).....	18, 22, 23
<u>State v. Davis</u> 182 Wn.2d 222, 340 P.3d 820 (2014).....	24
<u>State v. Deharo</u> 136 Wn.2d 856, 966 P.2d 1269 (1998).....	36
<u>State v. Dunaway</u> 109 Wn.2d 207, 743 P.2d 1237 (1987).....	30
<u>State v. Ervin</u> 169 Wn.2d 815, 239 P.3d 354 (2010).....	20
<u>State v. Escalona</u> 49 Wn. App. 251, 742 P.2d 190 (1987).....	11, 12, 13, 14, 16
<u>State v. Feely</u> 192 Wn. App. 751, 368 P.3d 514 (2016).....	18
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	38
<u>State v. Fricks</u> 91 Wn.2d 391, 588 P.2d 1328 (1979).....	38
<u>State v. Gaines</u> 122 Wn.2d 502, 859 P.2d 36 (1993).....	31
<u>State v. Gamble</u> 168 Wn.2d 161, 225 P.3d 973 (2010).....	11, 41
<u>State v. Garza</u> 150 Wn.2d 360, 77 P.3d 347 (2003).....	26

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Graciano</u> 176 Wn.2d 531, 295 P.3d 219 (2013).....	35
<u>State v. Hernandez</u> 48 Wn. App. 751, 740 P.2d 374 <u>review denied</u> , 109 Wn.2d 1020 (1987)	33
<u>State v. Hopson</u> 113 Wn.2d 273, 778 P.2d 1014 (1989).....	10
<u>State v. Hunley</u> 175 Wn.2d 901, 287 P.3d 584 (2012).....	39
<u>State v. K.L.B.</u> 180 Wn.2d 735, 328 P.3d 886 (2014).....	22
<u>State v. Kloepper</u> 179 Wn. App. 343, 317 P.3d 1088 <u>review denied</u> , 180 Wn.2d 1017 (2014)	26
<u>State v. Lara</u> 66 Wn. App. 927, 834 P.2d 70 (1992).....	35
<u>State v. Larson</u> 184 Wn.2d 843, 365 P.3d 740 (2015).....	20
<u>State v. Law</u> 154 Wn.2d 85, 110 P.3d 717 (2005).....	18
<u>State v. Lessley</u> 118 Wn.2d 773, 827 P.2d 996 (1992).....	30, 36
<u>State v. Lopez</u> 147 Wn.2d 515, 55 P.3d 609 (2002).....	38, 39
<u>State v. Madry</u> 8 Wn. App. 61, 504 P.2d 1156 (1972).....	42

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Mandanas</u> 168 Wn.2d 84, 228 P.3d 13 (2010)	29
<u>State v. Mendoza</u> 139 Wn. App. 693, 162 P.3d 439 (2007) aff'd, 165 Wn.2d 913, 205 P.3d 113 (2009).....	38
<u>State v. Miles</u> 73 Wn.2d 67, 436 P.2d 198 (1968).....	13, 14
<u>State v. Nitsch</u> 100 Wn. App. 512, 997 P.2d 1000 (2000).....	25, 35
<u>State v. Parker</u> 132 Wn.2d 182, 937 P.2d 575 (1997).....	33, 34
<u>State v. Phuong</u> 174 Wn. App. 494, 299 P.3d 37 (2013).....	26, 28
<u>State v. Porter</u> 133 Wn.2d 177, 942 P.2d 974 (1997).....	28, 29
<u>State v. Ramirez</u> 190 Wn. App. 731, 359 P.3d 929 (2015).....	38
<u>State v. Reinhart</u> 77 Wn. App. 454, 891 P.2d 735 (1995).....	35
<u>State v. Reis</u> 183 Wn.2d 197, 351 P.3d 127 (2015).....	22
<u>State v. Roggenkamp</u> 153 Wn.2d 614, 106 P.3d 196 (2005).....	22
<u>State v. Rundquist</u> 79 Wn. App. 786, 905 P.2d 922 (1995) review denied, 129 Wn.2d 1003 (1996).....	26

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Sells</u> 166 Wn. App. 918, 271 P.3d 952 (2012) <u>review denied</u> , 176 Wn.2d 1001 (2013).....	29
<u>State v. Slattum</u> 173 Wn. App. 640, 295 P.3d 788 (2013).....	22, 23
<u>State v. Smith</u> 123 Wn.2d 51, 864 P.2d 1371 (1993).....	31, 32
<u>State v. Smith</u> 87 Wn. App. 345, 941 P.2d 725 (1997).....	11, 12
<u>State v. Solis-Diaz</u> 187 Wn.2d 535, 387 P.3d 703 (2017).....	41
<u>State v. Suleski</u> 67 Wn.2d 45, 406 P.2d 613 (1965).....	13, 14, 16
<u>State v. Thomas</u> 57 Wn. App. 403, 788 P.2d 24 (1990).....	33
<u>State v. Torngren</u> 147 Wn. App. 556, 196 P.3d 742 (2008).....	35, 37
<u>State v. Vike</u> 125 Wn.2d 407, 885 P.2d 824 (1994).....	28, 35
<u>State v. Weatherwax</u> 188 Wn.2d 139, 392 P.3d 1054 (2017).....	23
<u>State v. Weber</u> 99 Wn.2d 158, 659 P.2d 1102 (1983).....	11
<u>State v. Williams</u> 176 Wn. App. 138, 307 P.3d 819 (2013) <u>aff'd</u> , 181 Wn.2d 795, 336 P.3d 1152 (2014).....	30, 37

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES, AND OTHER AUTHORITIES</u>	
1 MCCORMICK ON EVIDENCE § 10 (John W. Strong) (4th ed. 1992).....	12
2 John Henry Wigmore, EVIDENCE § 657 (revised by Chadbourn (1979)).....	12
COLLINS ENGLISH DICTIONARY, available at https://www.collinsdictionary.com/dictionary/english	20, 21
ER 602	11
RCW 9.35.020	4, 29, 30
RCW 9.94A.500	39
RCW 9.94A.510	19
RCW 9.94A.525	34, 35, 37
RCW 9.94A.535	4, 5, 17, 18, 19, 20, 21, 22, 23, 24, 40
RCW 9.94A.585	18
RCW 9.94A.589	18, 25, 34, 35, 37
RCW 9.94A.730	22
RCW 9A.44.079	27
RCW 9A.56.020	29
RCW 9A.56.030	4
RCW 9A.64.020	27

TABLE OF AUTHORITIES (CONT'D)

	Page
Sentencing Reform Act.....	17, 18, 19, 33, 37
U.S. CONST. amend. VI.....	41
U.S. CONST. amend. XIV.....	41
CONST. art. I, § 22.....	41

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the appellant's motion for a mistrial following a serious trial irregularity.
2. Where the appellant was only convicted of two offenses, the trial court erred in finding that "some" of the current offenses would otherwise go unpunished.
3. The court erred in determining first degree identity theft and first degree theft did not constitute the same criminal conduct.
4. The trial court erred in imposing an exceptional sentence.
5. The trial court erred in entering findings 1 and 3 in support of the exceptional sentence. CP 193.
6. The trial court erred in entering conclusion 1 in support of the exceptional sentence. CP 193.
7. The trial court erred in failing to apply a "same criminal conduct" analysis to the appellant's prior convictions.
8. The State failed to establish the appellant's pre-1997 convictions by a preponderance of the evidence.
9. Resentencing before the same judge on remand would violate the appearance of fairness doctrine and the appellant's constitutional right to an impartial sentencing judge.

Issues Pertaining to Assignments of Error

1. The appellant was alleged to have stolen from his wife's employer by cashing checks against the company's account. The trial court ruled that, based on lack of personal knowledge, the sole testifying company employee—and the State's primary witness—was not permitted to testify that the appellant's wife wrote the checks. But, while testifying, the witness testified the wife had written the checks, violating the court's order in limine. Although the trial court struck the testimony, the irregularity was so serious and central to the issues in the case that any instruction to disregard was incapable of curing the resulting prejudice. Did the trial court therefore err in denying the appellant's motion for a mistrial?

2. Reversal of an exceptional sentence is required where the trial court's reasoning does not justify the departure from the standard range. The trial court imposed exceptional, consecutive sentences based on a determination that "some of the current offenses" would otherwise go unpunished. However, only *one* current offense failed to increase the appellant's potential period of confinement. Where the plain language of the statute allows for an exceptional sentence on this ground only where *multiple* current offenses will otherwise go unpunished, should this Court vacate the unlawful finding, as well as the resulting exceptional sentence?

3. The appellant was charged with first degree identity theft and first degree theft based on the use of a company's "Comdata" account information to cash checks against the company's "Comdata" account. The crimes, as charged, were committed against the same victim, committed at the same time and place, and involved the same criminal intent. Did the court therefore err when it found the two convictions did not constitute the same criminal conduct? Correspondingly, did the court also err in imposing an exceptional sentence based in part on the finding that the two offenses were not the same criminal conduct?

4. Where one or more of the three bases provided by the trial court supporting the exceptional sentence were invalid, is remand for resentencing required?

5. Did the trial court err in failing to apply a "same criminal conduct" analysis to the appellant's prior convictions?

6. The State presented judgment and sentence documents for the appellant's post-1997 felony convictions, but did not present the judgment and sentence documents for crimes before that date, and offered no explanation for its failure to do so. Did the State present insufficient evidence to support the appellant's prior convictions? Correspondingly, must the case be remanded for resentencing required based on a correctly-determined offender score?

7. Where several comments by the sentencing judge indicate that the appellant will not receive a fair hearing on remand, should the case be remanded for resentencing before a different judge?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and exceptional sentence

The State charged Albert Smith with first degree identity theft² and first degree theft³ occurring between November 26, 2014 and November 1, 2015. The State also alleged the crimes constituted a “major economic offense,” a sentencing aggravator listed under RCW 9.94A.535(3)(d). CP 44-46. The complainant entity was Spaeth Transfer, a moving company

¹ This brief refers to the verbatim reports as follows: 1RP – 8/11/16, 12/19/16, and 2/13/17; 2RP – 9/1/16, 10/24/16, and 3/31/17; 3RP – 9/12/16; 4RP – 1/9/17 and 2/27/17; 5RP – 2/28/17; 6RP – 3/1/17; and 7RP – 3/2/17. The reports are numbered chronologically based on the first date appearing in each volume.

² RCW 9.35.020(1) (defining identity theft as “[to] 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”); RCW 9.35.020(2) (first degree identity theft requires that the accused commit the crime of identity theft and obtain credit, money, goods, services, or anything else of value in excess of \$1,500 in value).

³ RCW 9A.56.020(1) (defining “theft” in part as “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 service”); RCW 9A.56.030(1)(a) (first degree theft based on taking of property or services exceeding \$5,000).

where Smith's wife was employed during most of the charging period. CP 4-5, 45.

A jury convicted Smith as charged and found the "major crimes" aggravating factor applied to Smith as a principle and as an accomplice. CP 84-86 (verdict and special verdict forms); see also CP 76, 81 (jury instructions dealing with aggravator).

The court rejected the defense argument that the crimes constituted same criminal conduct, adopting the State's rationale to find them separate offenses. CP 193 (first written finding in support of exceptional sentence); 2RP 11, 20. The court also found that Smith's "high offender score results in crimes going unpunished if sentenced concurrently."⁴ CP 193 (third finding in support of exceptional sentence). Also relying on the jury's "major economic offense" finding, CP 193, the court sentenced Smith to 240 months of incarceration,⁵ reflecting 120 months on each count, to be served consecutively. CP 183; 2RP 20-21.⁶

⁴ RCW 9.94A.535(2)(c).

⁵ This sentence was *longer* than requested by the State. See 2RP 9 (requesting consecutive sentences of 100 months each at sentencing hearing based in part on theory that Smith would only serve only 10 years if sentenced to 200 months); CP 94-117 (State's sentencing memorandum).

⁶ In contrast, the standard range for first degree identity theft was 63-84 months and, for first degree theft, 43-57 months. CP 182; RCW 9.94A.510; RCW 9.94A.515.

The court found Smith had an offender score of 21. Over defense objection, the court found the existence of 20 prior felony convictions, even though the State only presented certified documents reflecting 15 felony convictions. CP 118, 129, 140, 151, 158, 167, 174, 179. Although Smith argued that many of the prior convictions constituted same criminal conduct, the court engaged in no analysis and did not explicitly rule on the matter. 2RP 8-9 (defense argument).

Smith timely appeals his convictions and sentence. CP 195.

2. Pretrial ruling regarding checks

Before trial, the court ruled that the sole testifying Spaeth employee, Jenay Ingalls, would not be permitted to testify that Smith's wife wrote checks later cashed by Smith, which formed the basis for the charges. Smith argued Ingalls lacked personal knowledge as to who wrote the checks. 4RP 45-50. The prosecutor appeared to agree and assured the court that she would instruct the witness regarding the limitation. 4RP 49-50.

3. Trial testimony

Spaeth Transfer contacted the police in November of 2015. 6RP 277, 279. Officer Johnny Rivera responded to Spaeth's Bremerton office and spoke with Ingalls and Robert Loidhammer. 6RP 277. Rivera was provided a stack of cancelled "Comdata" checks dated November 26, 2014 through October 31, 2015. 6RP 279-80, 312. The checks had been made

out to Albert Smith (Smith) or his wife Sharyl, with most made out to Smith. 6RP 288.

Between December 2, 2014 and November 1, 2015, records showed that Albert Smith cashed several "Comdata" checks at two different Money Tree locations in Kitsap County. 6RP 252, 261, 264, 289-90. The checks totaled \$264,500. 6RP 265.

Spaeth was a moving and storage company and was run as a corporation. 6RP 315. Between November of 2014 and late October of 2015, Ingalls was a salesperson for the company and spent most of her time out of the office. 6RP 315-16, 353, 358. Ingalls became president of Spaeth in December of 2016, a few months before the trial. 6RP 314.

Ingalls testified that Spaeth staff consisted of two salespeople, a bookkeeper, a receptionist/clerk, a dispatcher, a crew of 10-20 depending on the season, and the company president. The previous president was Robert Loidhammer, but he passed away in December of 2016 shortly after transferring power to Ingalls. 6RP 317, 357.

According to Ingalls, Spaeth's bookkeeper was responsible for accounts receivable as well as accounts payable. 6RP 318. Sharyl Smith was the bookkeeper between 2012 and October 30, 2015. 6RP 318-19, 351-52. After Sharyl left the company, Ingalls took over the role. 6RP 317-18.

Shortly after assuming that role, Ingalls received, via email, a notice of bill from “Comdata.” 6RP 321.

Ingalls was not familiar with Comdata. She looked up Spaeth’s account on the Comdata website and discovered Spaeth had been making large payments to Comdata. 6RP 322. Comdata acts like a credit card company; Spaeth used the service to transfer money to out-of-town truck drivers for trucking expenses (such as gas and tires) as well as to provide advance payments on drivers’ contracts.⁷ 6RP 323-25. Ingalls characterized the payments that she discovered online as larger than what Spaeth would normally forward to a driver. 6RP 622.

To obtain money via Comdata check, a truck driver would normally be required to call Spaeth during business hours to obtain an authorization code. 6RP 326, 329. The bookkeeper—Sharyl—kept preprinted codes corresponding to dollar amounts. Typically, the bookkeeper would give the code to the truck stop or other entity, and the Comdata checks could be exchanged for cash. 6RP 326.

According to Ingalls, Sharyl had also been responsible for reimbursing Comdata. Ingalls discovered Sharyl had been paying Comdata bills online. This was contrary to company policy. 6RP 327; see also 6RP

⁷ Ingalls explained that the drivers were considered independent contractors. 4RP 323.

338-346 (summarizing various payments to Comdata during charging period, including payments by Loidhammer). Ingalls asked then-president Loidhammer about the Comdata payments she had discovered; he appeared “stunned.” 6RP 327.

Ingalls testified that, in 2016, Spaeth paid between \$80,000 and \$90,000 to Comdata. 6RP 327-28. Although Spaeth did roughly the same amount of business in 2015, that year’s payment was much a larger. 6RP 328.

Ingalls was unaware of any reason that a Comdata check would be made out to Smith or his wife. 6RP 330. There was no record of Smith working for Spaeth. 6RP 331. Ingalls acknowledged, however, that she had seen Albert Smith in Loidhammer’s office on occasion. She did not know what the men were discussing. 6RP 354.

At trial, Ingalls reviewed the cancelled Comdata checks. The last check written to Smith was dated October 31, 2015. 6RP 334-36; Ex. 1. Ingalls testified that, at that point, she was acting as the company’s bookkeeper. 6RP 335. Ingalls had not authorized that check; rather, it was “written by Sharyl.” 6RP 335.

Consistent with the court’s pretrial ruling, defense counsel objected to this testimony. The court struck the testimony and told the jury to disregard it. 6RP 335.

Immediately following Ingalls's testimony, defense counsel moved for a mistrial. 7RP 368. Commenting only that jurors were presumed to follow the court's instructions, the court denied the motion. 7RP 368-69.

C. ARGUMENT

1. THE COURT ERRED WHEN IT DENIED THE MISTRIAL MOTION FOLLOWING THE INTRODUCTION OF HIGHLY PREJUDICIAL, EXCLUDED EVIDENCE.

The court erred in denying Smith's motion for a mistrial following a serious trial irregularity. The court ruled that, lacking personal knowledge, Spaeth employee Ingalls would not be permitted to testify that Smith's wife wrote the checks Smith later cashed. During Ingalls's testimony, however, she asserted that Smith's wife had written the checks. Although the court struck the testimony, the trial irregularity was so serious and prejudicial that the instruction to disregard the testimony was incapable of curing the error. Reversal is, therefore, required.

This Court reviews a trial court's denial of a motion for mistrial for abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). In considering whether a motion for mistrial should have been granted, this Court considers (1) the seriousness of the claimed irregularity; (2) whether the information imparted was cumulative of other properly admitted evidence, and (3) whether admission of the illegitimate evidence

could be cured by an instruction to disregard. State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (where witness revealed forbidden evidence that accused had committed a similar crime in the past, reversal was required despite curative instruction).

When testimony is improper because it violates a pretrial order excluding certain evidence, the question is whether the improper testimony, when viewed in the context of all the evidence, deprived the defendant of a fair trial. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010) (citing State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006)). When a defendant's constitutional right to a fair trial has been violated and he moves for mistrial, the motion should be granted. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

Under ER 602, “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” State v. Smith, 87 Wn. App. 345, 351, 941 P.2d 725 (1997). The rule bars testimony that purports to relate facts when such “facts” are based only on the reports of others. Id. (citing Hollingsworth v. Washington Mutual Sav. Bank, 37 Wn. App. 386, 393, 681 P.2d 845 (1984)). Put another way, personal knowledge of a fact cannot be based on the statement of another. Smith, 87 Wn. App. at 351 (citing 2

John Henry Wigmore, EVIDENCE § 657 (revised by Chadbourn (1979)); 1 MCCORMICK ON EVIDENCE § 10 (John W. Strong) (4th ed. 1992)).

Here, the trial court correctly excluded testimony that Sharyl had written the checks in question, as Ingalls lacked personal knowledge as to who had written the checks. See Smith, 87 Wn. App. at 351-52 (“[S]ome testimony may be based partially on admissible personal knowledge, and partially on reports from others. Under those circumstances, the court must exclude testimony unsupported by personal knowledge.”).

But the trial court later erred in denying the mistrial motion after Ingalls—the State’s primary witness—violated the ruling. A mistrial was warranted because Smith can satisfy each of the three Escalona factors, as set forth above.

First, the irregularity was serious. The defense theory was that the State had not proven its case, i.e., proved that the payments to Smith were unauthorized. Ingalls had insufficient personal knowledge of the inner-workings of accounts payable during the charging period to state that the payments were unauthorized. 7RP 424-25 (defense closing argument). Although Ingalls had a theory about what had occurred (matching the State’s own theory), she simply did not know why the payments were made. Indeed, the evidence showed Loidhammer paid some Comdata bills during the charging period. A claim that Sharyl wrote the checks seriously

undermined the defense theory. Thus, Ingalls's unsupported (and therefore inadmissible) assertion that Sharyl had written the checks was devastating to the defense. This factor weights strongly in favor of granting mistrial.

The next question is whether the invalid testimony was cumulative of properly admitted evidence. Escalona, 49 Wn. App. at 255. It was not. The court excluded the evidence. This factor therefore also weighs strongly in favor of a mistrial.

The final question, whether a curative instruction was sufficient to cure the prejudice, also weighs in favor of a mistrial. Id. The instruction to disregard the evidence was incapable of curing the enduring prejudice created by Ingalls's testimony. While it is presumed that juries follow a court's instructions to disregard testimony, see Weber 99 Wn.2d at 166, no instruction can "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Escalona, 49 Wn. App. at 255 (alteration in original) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)); see also State v. Babcock, 145 Wn. App. 157, 164, 185 P.3d 1213 (2008) (curative instruction held to be inadequate based on the nature of stricken evidence); State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965) (so holding).

Escalona and Miles recognize that the admission of evidence concerning commission of a crime similar to the charged offense is inherently difficult to disregard. See Escalona, 49 Wn. App. at 255-56; Miles, 73 Wn.2d at 71 (analyzing effect of stricken testimony that defendant had committed robbery similar to charged crime).

This case, however, does not involve the introduction of evidence regarding the prior commission of an act similar to the charged crime. It is, therefore, more like Suleski and Babcock.

In Suleski, the defendant was charged with unlawful possession of burglary tools and with attempt to obtain a narcotic drug by fraud, deceit, misrepresentation, or subterfuge, and/or alteration of a prescription. 67 Wn.2d at 47. The charges were consolidated for trial, and any motions to suppress were to be decided based on the evidence presented at trial. At the conclusion of the State's case, the trial court suppressed the evidence relating to the burglary tools charge because it was obtained through an unlawful search and seizure. The trial court then dismissed the related charge. But it denied the defendant's motion for mistrial and instead simply instructed the jury to disregard the evidence relating to the burglary tools charge. Id. at 49.

On appeal, the Supreme Court reversed and remanded, holding that Suleski's right to a fair trial was irretrievably prejudiced by the admission

of the burglary tools evidence, curative instruction notwithstanding. Id. at 51-52. The inherently prejudicial impact of such evidence was not easily overcome, and, as a result, Suleski did not receive a fair trial. See id. at 51 (“We are not assured that the evidentiary harpoon here inserted could effectively be withdrawn. It was equipped with too many barbs.”).

In Babcock, the defendant was originally charged with sexually abusing two young girls, M.B. and A.T. 145 Wn. App. at 157-58. At trial, the State introduced hearsay statements of A.T. through five witnesses. Id. at 161-62. Then, when the State called A.T., she refused to testify. Id. at 162. As a result, the trial court ruled that A.T.’s previous statements were inadmissible, and it dismissed the charges as to A.T. Id. The trial court, however, refused to grant a mistrial as to the remaining charges, and instead gave an instruction instructing jurors to disregard the evidence relating to A.T. Id. The Court of Appeals reversed because the acts relating to A.T. were so similar to those relating to M.B. that it would be inherently difficult for the jury to disregard the testimony. Id. at 165-66.

Here, as in those cases, the prohibited testimony was such that an instruction could not have erased it from the jurors’ minds. Without the unauthorized testimony, there were simply too many answered questions for a reasonable juror to find guilt beyond a reasonable doubt. See 7RP 427-28 (defense closing argument, highlighting several unanswered

questions for jury's consideration). With it, the jury was alerted to Ingalls' belief that Smith's wife had written the checks.⁸ As discussed above, this was devastating to Smith's defense.

In summary, despite the court's instruction to disregard the evidence, the evidence—akin to an “evidentiary harpoon”⁹—would have been exceedingly difficult for jurors to extricate from their consideration of the remaining evidence. Introduction of the evidence therefore deprived Smith of his right to a fair trial, Allen, 159 Wn.2d at 10, and no instruction was capable of erasing its effect. Because the third factor also weighs strongly in Smith's favor, the court erred in denying his motion for a mistrial.

Under the State's theory, the two counts were based on the same evidence and the same acts. Thus, based on careful consideration of the three factors, reversal of both convictions is required. Escalona, 49 Wn. App. at 255.

⁸ Although defense counsel mentioned Ingalls's prohibited testimony again in closing argument—to remind the jury it could not consider it—the court had by then denied the motion for mistrial. 7RP 427. Counsel was, at that point, simply making the best of a bad situation.

⁹ Suleski, 67 Wn.2d at 51.

2. THE COURT'S FINDING THAT "SOME OF" THE CURRENT CRIMES WOULD GO UNPUNISHED IF CONCURRENT SENTENCES WERE IMPOSED WAS IMPROPER. UNDER ITS PLAIN LANGUAGE, THIS AGGRAVATOR DOES NOT APPLY TO THIS CASE.

The court's finding that if concurrent sentences were imposed, "some of" the current crimes would go unpunished was entered in error. CP 193. Under its plain language, and as a matter of law, this statutory aggravator does not apply to the facts of this case. Smith was only convicted of two offenses. Assuming for the sake of argument that he has an offender score greater than nine, only one of his current offenses would not add to his sentence if he received standard range concurrent sentences. Thus, the court erred in imposing consecutive sentences and lengthening each term under RCW 9.94A.535(2)(c) ("defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."). Reversal is required.

- a. An exceptional sentence, including consecutive sentences, may be imposed under the Sentencing Reform Act only when "some" of the current offenses would otherwise go unpunished.

By statute, an exceptional sentence, including consecutive sentences, may be imposed only when "some"—not *one*—of the current offenses would otherwise go unpunished.

Appellate review of a defendant's sentence is dictated by statute. RCW 9.94A.585(4); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

In reviewing an exceptional sentence, this Court must determine whether:

(1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient.

State v. Feely, 192 Wn. App. 751, 770, 368 P.3d 514 (2016); Law, 154 Wn.2d at 93. De novo review applies in this case because the trial court's reasoning does not justify the departure from the standard range. De novo review is also appropriate because the issue is one of statutory construction. State v. Conover, 183 Wn.2d 706, 711, 355, P.3d 1093 (2015).

The court may impose a sentence outside the standard range for an offense if it finds, considering the purposes of the Sentencing Reform Act (SRA), that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Smith faced sentencing on two felony convictions. Under the SRA, when an individual is sentenced on two or more offenses at the same time, the sentences imposed on each count must be served concurrently. RCW 9.94A.589. Consecutive sentences may be imposed only under the exceptional sentence provisions of RCW 9.94A.535. See RCW 9.94A.589(1)(a).

The State asked the trial court to impose consecutive sentences in Smith's case based on RCW 9.94A.535(2)(c).¹⁰ This provision provides that

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

....

The defendant has committed multiple current offenses and the defendant's high offender score results in *some of* the current offenses going unpunished.

RCW 9.94A.535(2)(c) (emphasis added).

Assuming that Smith has an offender score greater than nine,¹¹ under the SRA, standard range sentences do not increase when an offender score is nine or more. RCW 9.94A.510. But, contrary to the court's finding that "some" offenses would go unpunished (mirroring the statutory language), the record demonstrates that only one offense would not increase the period of incarceration. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d345 (2008) ("punishment" is expressed in terms of the total confinement time); RCW 9.94A.510 (each point up to nine increases potential punishment).

¹⁰ 2RP 9; CP 98-99.

¹¹ As discussed in Argument sections 3, 6, and 7 below, Smith disputes the trial court's calculation of his offender score.

To properly interpret RCW 9.94A.535(2)(c), this Court must determine the legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Where a statute is plain on its face, "the court must give effect to that plain meaning as an expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). This Court may determine a statute's plain language by examining the statute in which the provision is found, related provisions, and the larger statutory scheme in its entirety. State v. Larson, 184 Wn.2d 843, 365 P.3d 740 (2015) (citing Ervin, 169 Wn.2d at 820). "When a term has a well-accepted, ordinary meaning, [this Court] may consult a dictionary to ascertain the term's meaning." Alvarado, 164 Wn.2d at 562.

The plain language of RCW 9.94A.535(2)(c) demonstrates that the legislature did not intend for a trial court to impose an exceptional sentence where only one count failed to increase the standard range. The word "some," when used in this manner, indicates more than one.

"Some" means different things in different contexts. As the Collins English Dictionary explains, the word "some" is used to refer to a quantity of something that is not precise.¹² When used as a determiner, meaning at

¹² COLLINS ENGLISH DICTIONARY, available at https://www.collinsdictionary.com/dictionary/english/some_1 (last accessed Sept. 19, 2017) (at definition 1).

the beginning of a noun group to indicate a reference to one thing or several things,¹³ it can indicate the quantity of things is either fairly large or fairly small.¹⁴ For example, an activity may take “some time” or something may only happen to “some extent.” However, when the word “some” is placed in front of the word “of”—as it is in RCW 9.94A.535(2)(c)—it acts as a quantifier. Thus, “some of” one particular thing means a part of the thing but not all of it, whereas “some of” several things means a few of the things, but not all of them.¹⁵

When describing “some of” a discrete thing, the term “some” is synonymous with the word “few.”¹⁶ Thus, when the legislature expressed its concern as “some of the current offenses” going unpunished, it indicated that the trial court could impose an aggravated exceptional sentence where a few of the crimes would otherwise go unpunished. RCW 9.94A.535(2)(c).

An examination of the larger statutory scheme demonstrates that, in contrast to the use of the word “some” in RCW 9.94A.535(2)(c), the

¹³ See COLLINS ENGLISH DICTIONARY, available at <https://www.collinsdictionary.com/us/dictionary/english/determiner> (last accessed Sept. 19, 2017) (definition of “determiner”).

¹⁴ COLLINS ENGLISH DICTIONARY, available at https://www.collinsdictionary.com/dictionary/english/some_1 (at definition 2).

¹⁵ *Id.* at definition 4.

¹⁶ *Id.*

legislature employs the use of the phrase “one or more” in other provisions. See State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (a “fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms”); accord Conover, 183 Wn.2d at 713 (“Clearly, the legislature’s choice of different language indicates a different legislative intent.”). For example, the legislature describes “one or more crimes” in RCW 9.94A.730, “one or more of the facts” in RCW 9.94A.537, and “one or more violent acts” in RCW 9.94A.562.

The use of “some of” rather than “one or more” in RCW 9.94A.535(2)(c) demonstrates the legislature did not intend for a sentencing court to impose an exceptional sentence where only one charge went unpunished. See State v. Slattum, 173 Wn. App. 640, 656, 295 P.3d 788 (2013) (use of particular language in one statute demonstrated legislature “knew how to say it” when it intended to do so, and did not intend same meaning when using different language). Because the plain language of the statutory provision is unambiguous, the Court’s inquiry should end here. See State v. K.L.B., 180 Wn.2d 735, 739, 328 P.3d 886 (2014).¹⁷

¹⁷ A plain language analysis, aided by principles of statutory construction, controls over any external statement of intent. See State v. Reis, 183 Wn.2d 197, 212, 351 P.3d 127 (2015) (“legislative intent . . . does not trump the plain language of the statute”). Courts have addressed different arguments

In summary, the plain language permits an exceptional sentence only where “some of” the current offenses would otherwise go unpunished. RCW 9.94A.535(2)(c). The legislature could have, but did not, say an exceptional sentence is available where “one or more” current offenses go unpunished. The legislature used such language in several other provisions, indicating it “knew how to say it” when that is what it meant. Slattum, 173 Wn. App. at 656. The meaning of this provision is dictated by the plain language. Alvarado, 164 Wn.2d at 561-63. It does not permit an exceptional sentence where only one offense fails to increase the potential punishment.

Finally, even if the Court were to find that the language of RCW 9.94A.535(2)(c) is susceptible to more than one reasonable interpretation, the rule of lenity requires the Court to construe the statute strictly against the State and in favor of Smith. State v. Weatherwax, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017); Conover, 183 Wn.2d at 712. The underlying rationale for the rule of lenity is to place the burden on the legislature to be clear and definite in criminalizing conduct and establishing criminal

regarding the provision at issue here by resorting to the usual plain-language principles of statutory construction on which Smith relies. In Alvarado, for example, the Court addressed an argument regarding the meaning of the word “unpunished” under RCW 9.94A.535(2)(c) by invoking the plain-meaning rule, including consideration of related provisions and dictionary definitions. Alvarado, 164 Wn.2d at 561-63.

penalties. Weatherwax, 188 Wn.2d at 155. Under the rule of lenity, RCW 9.94A.535(2)(c) must be construed to require that more than one offense will go unpunished before permitting the trial court to impose an exceptional sentence.

b. The remedy is reversal and remand for resentencing.

The remedy for erroneous reliance on this factor is remand for resentencing. Although this brief discusses, in Argument section 4, the effect of invalidating one or more of the three bases for the exceptional sentence, the court explicitly relied on RCW 9.94A. 535(2)(c) to impose the sentences *consecutively*. CP 193 (“The defendant’s high offender score results in some crimes going unpunished if sentenced concurrently.”).

Where an exceptional sentence is not legally justified by the aggravating factor, reversal is required. State v. Davis, 182 Wn.2d 222, 232, 340 P.3d 820 (2014). Here, the record is clear that only one charge, rather than “some of” the charges, failed to increase Smith’s sentence. When the trial court found the requirements of RCW 9.94A.535(2)(c) had been satisfied, it mistakenly interchanged the word “some” with “one.” Because the trial court erred in imposing consecutive sentences where the plain language of this provision was not satisfied, this Court should reverse and remand for resentencing.

3. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE CURRENT FIRST DEGREE THEFT AND FIRST DEGREE IDENTITY THEFT CONVICTIONS WERE THE SAME CRIMINAL CONDUCT.

The court erred in failing to treat first degree identity theft and first degree theft as the same criminal conduct. The State alleged the crimes occurred during the same charging period, in the same geographical area, and involved the same complainant-corporation. When “intent” is viewed objectively, even under the State’s theory, the crimes involved the same criminal purpose. Because the current crimes constituted same criminal conduct, remand for resentencing is required for this reason as well.

a. Applicable statute and standard of review

When a person is sentenced for two or more current offenses, “the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score” unless the crimes involve the “same criminal conduct.” RCW 9.94A.589(1)(a). “Same criminal conduct” means crimes that involved the same victim, were committed at the same time and place, and involved the same criminal intent. Id.

Whether two crimes constitute the same criminal conduct involves a determination of fact as well as the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000 (2000). A trial court

abuses its discretion when its decision is based on untenable grounds or rests on untenable reasoning. State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003). Use of an incorrect legal standard in making a discretionary decision also constitutes an abuse of discretion. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003 (1996).

- b. The court abused its discretion in adopting the State’s dubious assertion of separate criminal conduct.

Here, the trial court’s determination that the two crimes did not encompass same criminal conduct was an abuse of discretion. In adopting the State’s reasoning to find the crimes separate offenses, the trial court applied the incorrect legal standard.

Again, “same criminal conduct” means crimes that require the same intent, were committed at the same time and place, and involved the same victim. “Intent, in this context, is not the particular mens rea . . . of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (quoting State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)), review denied, 182 Wn.2d 1022 (2015); accord State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088, review denied, 180 Wn.2d 1017 (2014); cf. State v. Chenoweth, 185 Wn.2d 218, 223, 370 P.3d 6 (2016)

(comparing statutory intents to preclude same criminal conduct finding).¹⁸ This includes whether the crimes were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995). “The test takes into consideration how intimately related the crimes committed are” and whether one crime furthered the other. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

At sentencing, Smith’s counsel asked the court to find that the current offenses were the same criminal conduct. 2RP 12. Counsel pointed out that the date range was the same, the victim entity was the same, and the purpose of commission was the same—to take money from that entity. 2RP 12.

In contrast, the State had argued in its sentencing memorandum that the acts were not the same because Smith had to get an authorization code to cash the checks, then actually go and cash the checks using the authorization code. CP 100 (State’s sentencing memorandum). Thus, the

¹⁸ The Supreme Court’s decision in Chenoweth, 185 Wn.2d 218, does not change the objective criminal intent standard. There, the Court held that first degree incest and third degree child rape were not the same criminal conduct because “[t]he intent to have sex with someone related to you differs from the intent to have sex with a child.” Id. at 223. But those crimes are strict liability offenses with no mens rea elements. RCW 9A.64.020 (1)(a); RCW 9A.44.079 (1). The Chenoweth Court therefore did not create a new rule requiring that courts look to the statutory mens rea in determining criminal intent for the purposes of same criminal conduct.

State's theory was *not* that the theft occurred when Spaeth's funds were later used to pay Comdata. Rather, the State argued that Smith exerted unauthorized control over Spaeth's property by using the authorization codes. Yet, the codes also formed the basis for the State's theory of identity theft. E.g. 7RP 419 (State's closing argument). Thus, even under the State's theory, one crime furthered the other. Phuong, 174 Wn. App. at 548. It is hard to imagine two crimes more intimately connected. Burns, 114 Wn.2d at 318.

First degree identity theft and first degree theft constituted same criminal conduct. There can be no dispute that the two crimes targeted the same entity and covered the same time period. The two offenses also involved the same criminal intent. "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In applying this test, courts consider whether the crimes are linked, whether one crime furthered the other, and whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318. Crimes may involve the same criminal intent if they were part of a "continuing, uninterrupted sequence of conduct." State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997).

The facts demonstrate the crimes were committed with the same objective criminal purpose—to take money from Spaeth Transfer.

Washington's identity theft statute prohibits a person from knowingly obtaining, possessing, or using a means of identification or financial information of another person with the intent to commit "any crime." RCW 9A.56.020(1); State v. Sells, 166 Wn. App. 918, 923, 271 P.3d 952 (2012), review denied, 176 Wn.2d 1001 (2013). "Theft" means to wrongfully obtain or exert unauthorized control over the property of another with intent to deprive that person of the property. RCW 9A.56.020(1)(a).

Defense counsel's argument that the offenses were the same criminal conduct correctly focused on the Smiths' objective purpose, to take money from Spaeth. Indeed, the identity theft was committed with intent to commit the ensuing theft. Under the State's theory, the intent did not change from the obtaining of the codes to the cashing of the checks. The offenses therefore involved a "continuing, uninterrupted sequence of conduct." Porter, 133 Wn.2d at 186; see also State v. Mandanas, 168 Wn.2d 84, 86-87, 228 P.3d 13 (2010) (second degree assault and felony harassment were same criminal conduct were defendant punched victim in the face, hit him in the head with a gun, and then pointed the gun at him and threatened to kill him). The State's tortured attempt to subdivide the scheme—a continuing sequence of conduct—into separate components ignores this precedent. The court's

adoption of the State's dubious theory (which misapplied the applicable legal standard) constituted an abuse of discretion.¹⁹ 7RP 20.

Because under the applicable legal standard, correctly applied, the two offenses encompassed the same criminal conduct, the trial court erred in concluding otherwise. This Court should remand for resentencing to score the two convictions as a single offense. State v. Dunaway, 109 Wn.2d 207, 217-18, 743 P.2d 1237 (1987). Moreover, as stated in the Argument section that follows, the trial court relied on the fact that the offenses did not constitute same criminal conduct as a factor supporting an exceptional sentence. Because the court's finding was invalid, the exceptional sentence was also invalid.

¹⁹ Notably, the court did not exercise its discretion under RCW 9.35.020(4), which provides that "[e]very person who, in the commission of identity theft, shall commit any other crime may be punished therefor as well as for the identity theft, and may be prosecuted for each crime separately." Cf. State v. Lessley, 118 Wn.2d 773, 779-82, 827 P.2d 996 (1992) (burglary antimerger statute grants a sentencing court discretion, in calculating an offender score, to count current burglary and non-burglary convictions separately even if they encompass the same criminal conduct).

However, it is not mandatory that, based on such a statute, a court find that the current crimes do not constitute same criminal conduct. See State v. Williams, 176 Wn. App. 138, 143, 307 P.3d 819 (2013) ("to the extent the court viewed applying the [burglary antimerger] statute as mandatory, it erred), aff'd, 181 Wn.2d 795, 336 P.3d 1152 (2014).

4. REMAND FOR RESENTENCING IS REQUIRED BECAUSE AT LEAST ONE OF THREE BASES THE COURT RELIED ON IN IMPOSING THE EXCEPTIONAL SENTENCE WAS INVALID.

Here, the court entered written findings stating that it was imposing an exceptional sentence as follows:

- (1) The offenses do not constitute same criminal conduct.
- (2) The jury found that the crimes were major economic offenses.
- (3) The defendant's high offender score results in some crimes going unpunished if sentenced concurrently.

CP 193. From these three findings, the court concluded, "an exceptional sentence is appropriate." CP 193.

But, as demonstrated above, one or more of the three bases the court relied on imposing the exceptional sentence were invalid. The record does not indicate that the court would have considered the remaining basis or bases sufficient to impose an exceptional sentence. Thus, remand for resentencing is required.

Appellate courts typically will not remand for resentencing where it is clear the trial court would impose the same sentence based on other valid aggravating factors. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). However, in State v. Smith, 123 Wn.2d 51, 58, 864 P.2d 1371 (1993), the Court invalidated two of the four reasons given for the exceptional sentence.

Even though the sentencing court indicated it would have imposed the sentence based on any one of the four findings, *id.* at 58 n. 8, the Supreme Court remanded nonetheless, ruling that it could not conclude with certainty that the trial court would impose the same sentence on remand without the invalid aggravators. *Id.* at 58.

In Smith, two out of the four reasons for the exceptional sentence were invalid. Here, two out of three reasons are invalid, and, unlike in Smith, the trial court made no finding that any one (or even two) would suffice to support the exceptional sentence. As in Smith, this Court cannot conclude with certainty that the trial court would have imposed the same sentence had it considered the only valid aggravating circumstance. Therefore, Smith asks that the exceptional sentence be vacated and that the case be remanded for resentencing without consideration of the improper aggravating factors. But even if this Court finds only one of the three factual bases is invalid, the same reasoning applies. In the event that that occurs, remand is also required.

5. BASED ON THE ARGUMENTS THAT FOLLOW,
 REMAND FOR RESENTENCING IS ALSO REQUIRED
 DUE TO THE MISCALCULATED OFFENDER SCORE.

The arguments that follow address specific challenges to Smith's offender score. Based on these arguments, remand for resentencing is required based on the trial court's miscalculation of Smith's offender score.

An appellate court may uphold an exceptional sentence, despite an incorrectly calculated offender score, when the record clearly demonstrates that the trial court would have applied the same exceptional sentence even had the offender score been calculated correctly. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997),

But in Parker the Supreme Court overruled a line of cases, including State v. Thomas, 57 Wn. App. 403, 410, 788 P.2d 24 (1990), in which the Court affirmed an exceptional sentence even though the trial court had incorrectly calculated the offender score. Parker, 132 Wn.2d at 189-90. Although the Thomas Court concluded that “the erroneous offender score did not affect the exceptional sentence,” 57 Wn. App. at 411, the Supreme Court deemed this conclusion improper:

We are hesitant to affirm an exceptional sentence where the standard range has been incorrectly calculated because of the great likelihood that the judge relied, at least in part, on the incorrect standard ranges in his calculus. Affirming such would uphold a sentence which the sentencing judge might not have imposed given correct information and would defeat the purpose of the [SRA].

We note the Court of Appeals took the opposite approach in [Thomas, 57 Wn. App. at 411] (“erroneous offender score did not affect the exceptional sentence”) . . . ; State v. Altum, 47 Wn. App. 495, 735 P.2d 1356, review denied, 108 Wn.2d 1024 (1987); and State v. Hernandez, 48 Wn. App. 751, 754, 740 P.2d 374, review denied, 109 Wn.2d 1020 (1987). *To the extent [that] Thomas, Altum, and Hernandez conflict with [our] ruling today, they are overruled.*

Parker, 132 Wn.2d at 190 (emphasis added).

Parker goes on to hold that when the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record *clearly* indicates the sentencing court would have imposed the same sentence anyway. Parker, 132 Wn.2d at 189 (emphasis added) (citing State v. Brown, 60 Wn. App. 60, 70, 802 P.2d 803 (1990)). Smith has a right to be sentenced based on a properly calculated offender score.

Thus, in the event that this Court finds the trial court erred in calculating Smith's offender score, Parker also requires remand for resentencing.

6. THE TRIAL COURT ERRED IN FAILING TO APPLY A "SAME CRIMINAL CONDUCT" ANALYSIS TO SMITH'S PRIOR CONVICTIONS.

The trial court failed to apply a "same criminal conduct" analysis to Smith's prior convictions, despite its duty to do so. Unless waived, such analysis is mandatory. Remand for resentencing is required for this reason, as well.

A current sentencing court must calculate an offender score based on an offender's "other current and prior convictions." RCW 9.94A.589(1)(a). A sentencing court is bound by an earlier court's finding under RCW 9.94A.589(1)(a) that multiple offenses encompass the same

criminal conduct. RCW 9.94A.525(5)(a)(i). If the previous court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current court must independently evaluate whether those prior convictions involve the same criminal conduct and, if they do, must count them as one offense. Id.; RCW 9.94A.589(1)(a); State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008) (“A sentencing court . . . must apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct. The court has no discretion on this.”) (citing RCW 9.94A.525(5)(a)(i); State v. Reinhart, 77 Wn. App. 454, 459, 891 P.2d 735 (1995); State v. Lara, 66 Wn. App. 927, 931-32, 834 P.2d 70 (1992)), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013); cf. Nitsch, 100 Wn. App. at 522 (court has no duty to conduct a same criminal conduct analysis sua sponte as to *current* crimes). The offender bears the burden of proving the prior offenses encompass the same criminal conduct. Graciano, 176 Wn.2d at 539.

As noted above, offenses constitute the same criminal conduct if they are (1) committed with the same criminal intent, (2) committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a); Vike, 125 Wn.2d at 410. “Intent, in this context, is not the particular mens rea element of the particular crime, but rather is the

offender's objective criminal purpose in committing the crime." Adame, 56 Wn. App. at 811.

Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318; Calvert, 79 Wn. App. at 577-78. Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). "[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Here, the judgment and sentence documents²⁰ for at least some of the prior convictions involved identical crimes occurring on overlapping dates or dates occurring only days apart. See, e.g. CP 151 (2005 theft convictions). In another case, the judgment and sentence indicates that the

²⁰ As discussed in Argument section 7, below, the State failed to establish, by a preponderance of the evidence, each of the prior convictions the court included in the offender score.

sentencing court found prior convictions to be same criminal conduct, despite the fact that the original sentencing court did not do so. See CP 158-59 (based on calculated offender score of eight, appearing to score 1997 theft convictions as same criminal conduct); cf. RCW 9.94A.525(5)(a)(i) (“Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score.”).

Under these circumstances, and in light of Smith’s objection to the State’s calculation of his offender score, the current sentencing court was required to apply the same criminal conduct test to the prior convictions. Torngren, 147 Wn. App. at 563; see also State v. Williams, 176 Wn. App. 138, 144, 307 P.3d 819 (2013) (sentencing court erred by relying on the burglary anti-merger statute to count Williams’s prior burglary and robbery convictions separately rather than relying on the same criminal conduct test), aff’d, 181 Wn.2d 795, 336 P.3d 1152 (2014).

Smith did not agree to his offender score. The court erred by failing to exercise its statutory duty under RCW 9.94A.525(5)(a)(1) to apply the same criminal conduct test to the prior convictions. Williams, 176 Wn. App. at 144; Torngren, 147 Wn. App. at 563. Remand is required for the Court to apply the test mandated by the SRA.

7. THE STATE FAILED TO PROVE PRE-1997 CONVICTIONS BY A PREPONDERANCE OF THE EVIDENCE.

The State failed to prove the existence of pre-1997 convictions by a preponderance of the evidence. The State did not offer certified copies of the judgment and sentence documents, and it offered no reason for this omission. Remand for resentencing is required on this basis, as well.

The State has the burden of proving a defendant's criminal history by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). "The State does not meet its burden through bare assertions, unsupported by evidence." State v. Ramirez, 190 Wn. App. 731, 733, 359 P.3d 929, 930 (2015) (citing State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999)). "[T]he best evidence of a prior conviction is a certified copy of the judgment." State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). "The State may introduce other comparable evidence only if it is shown that the [certified copy] is unavailable for some reason other than the serious fault of the proponent." Id. (citing State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (discussing the best evidence rule)). Finally, this Court reviews de novo the sentencing court's calculation of the offender score. State v. Mendoza, 139 Wn. App. 693, 703-04, 162 P.3d 439 (2007), aff'd, 165 Wn.2d 913, 205 P.3d 113 (2009).

Here, although the State indicated it was filing “certified” copies through 1997, 2RP 17, it offered no explanation for the failure to present documents supporting crimes prior to that.

The State appended to its sentencing memorandum a purported list of Smith’s prior convictions. CP 95, 108-10; see RCW 9.94A.500(1) (“A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein.”).

Thus, the State appeared to rely on RCW 9.94A.500(1). But, while that statute has been held not to be *facially* unconstitutional, the statute was found unconstitutional as applied where a criminal history summary submitted by the prosecutor was not accompanied by sufficient evidence to establish the claimed prior convictions. State v. Hunley, 175 Wn.2d 901, 917, 287 P.3d 584 (2012). As to the pre-1997 convictions, this case is indistinguishable from Hunley. Thus, as applied in this case, the statute is unconstitutional, and the trial court erred in relying on it to score the pre-1997 convictions in Smith’s offender score.

Because the State failed to prove the pre-1997 convictions, the trial court erred in its calculation of Smith’s offender score. Remand for resentencing is, once again, required. Lopez, 147 Wn.2d at 523.

8. THIS COURT SHOULD REMAND FOR RESENTENCING BEFORE A DIFFERENT JUDGE.

Several remarks at sentencing indicate that the sentencing judge will not provide Smith a fair hearing on remand. Thus, resentencing before a different judge is required.

The court made several comments indicating that the court could not be impartial, should the case be remanded for resentencing. For example, the judge said, “I feel like I owe the Spaeth Transfer an apology,” apparently referring to the that Smith had not been imprisoned for life for prior theft offenses. 2RP 19. The court also said

I don't think when you combine the criminal history that Mr. Smith has with the amount of money that was stolen, with the condition of the owner of the business who was having to deal with this,^[21] I don't think it's—I don't think you can have a clearly excessive sentence.

And I don't think that—I mean, if someone were to say, “Why didn't Mr. Smith get the maximum penalty?” I don't know what I would tell them. . . . I don't know what I would tell them. I'd say, “You're right. You're absolutely right.”

2RP 20-21.

²¹ As discussed in the Statement of the Case, above, Spaeth's former president was ill during a portion of charging period and later passed away. After defense counsel expressed concern that the court was relying on an unproven vulnerable victim aggravator, RCW 9.94A.535(3)(b) (included in aggravating circumstance to be found by jury), the court disavowed such a basis for the exceptional sentence. 2RP 21.

Based on the foregoing remarks, this Court should remand for resentencing before a different judge.

A criminal defendant has the right to be tried and sentenced by an impartial court. U.S. CONST. amends. VI, XIV; CONST. art. I, § 22; State v. Solis-Diaz, 187 Wn.2d 535, 539-40, 387 P.3d 703 (2017)

Under the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing. Gamble, 168 Wn.2d at 187. The law requires more than an impartial judge; it requires that the judge also appear to be impartial. Id. The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias. Id. at 187-88. The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts. Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995).

Because the law requires both an impartial judge and a judge that *appears* impartial, to promote the appearance of fairness, a different superior court judge should conduct proceedings on remand where it appears that the judge who earlier made decisions in the case will have difficulty setting aside either prior knowledge of a case or previously expressed opinions about a case. See Solis-Diaz, 187 Wn.2d at 541

(remanding for resentencing before different judge where judge's remarks at the first resentencing strongly suggested that, regardless of the information presented in mitigation, he was committed to the original standard range sentence); In re Custody of R., 88 Wn. App. 746, 763, 947 P.2d 745 (1997) (remanding for proceedings before different judge where trial judge expressed personal disapproval of party); cf. State v. Madry, 8 Wn. App. 61, 69-71, 504 P.2d 1156 (1972) (remanding for proceedings before different judge where trial judge had information about defendant from judicial investigation of hotel that defendant managed).

Given the vehemence with which the court declared statutory maximum consecutive sentences to be the only appropriate punishment, it is clear that it will be difficult for the court to set aside its prior conclusion, even if the circumstances change dramatically and the court's prior bases for imposing the sentence are held to be invalid. On these facts, remand for resentencing before a different judge is required.

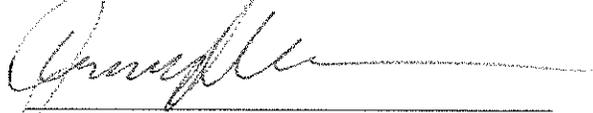
D. CONCLUSION

The trial court erred in denying the motion for a mistrial following a serious trial irregularity. This Court should reverse Smith's conviction and remand for a new trial on both counts. But, in any event, based on several sentencing errors, remand for resentencing is required. Finally, because resentencing before the same judge on remand would violate the appearance of fairness doctrine and the constitutional right to an impartial sentencing judge, resentencing before a different judge is required.

DATED this 10th day of October, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER

WSBA No. 35220

Office ID No. 91051

Attorney for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

October 10, 2017 - 11:56 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50397-2
Appellate Court Case Title: State of Washington, Respondent v Albert K. Smith, Appellant
Superior Court Case Number: 16-1-00732-3

The following documents have been uploaded:

- 4-503972_Briefs_20171010115230D2921027_4228.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BOA 50397-2-II.pdf

A copy of the uploaded files will be sent to:

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Copy sent to: Albert Smith, 987262 Stafford Creek Corrections 191 Constantine Way Aberdeen, WA 98520

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jennifer M Winkler - Email: winklerj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20171010115230D2921027