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

STATE OF WASHINGTON,

Respondent,

v.

ALBERT KEVIN SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00732-3

BRIEF OF RESPONDENT

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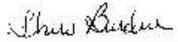
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in denying Smith's motion for mistrial when the trial irregularity was minor, the allegedly offending statement was cumulative, and the trial court gave the jury a curative instruction?

2. Whether the trial court erred in sentencing when armed with a jury finding of major economic offense and with an enormous criminal history, the trial court imposed the statutory maximum while not having proof of all of Smith's offender points?

II. STATEMENT OF THE CASE

A. Procedural History

Albert Kevin Smith was first charged by information filed in Kitsap County Superior Court with first degree theft. CP 1. Later, the information was amended to include one count of first degree identity theft as an accomplice with a special allegation of major economic offense and first degree theft as an accomplice and with a special allegation of major economic offense. CP 44-46.

After both parties rested, the defense moved for mistrial. 3RP 368.

The basis for that motion was a statement by state's witness Jenay Ingalls, saying that Sharyl Smith, Albert Smith's wife, had written one of the unauthorized checks that were the basis for the case. 2RP 335.¹ The issue was raised by a defense motion in limine seeking to exclude testimony by Ms. Ingalls as to whether or not the checks cashed by Smith were authorized by the victim business, Spaeth Transfer. CP 36.

Smith was found guilty as charged. CP 84. The jury gave affirmative answers to the special verdict interrogatory on major economic offense for both counts. CP 85-86. The trial court sentenced Smith with a 21 offender score on each count. CP 182. The defense disputed this score, arguing that the state had not proven the history, that some of the many prior felonies were same criminal conduct (RP, 3/31/17, 9), and that the current offenses constitute same criminal conduct. RP, 3/31/17, 11-12. At the same time, the defense conceded the major economic offense aggravator. RP, 3/31/17, 13-16. The state provided the trial court with certified copies of the documents from Smith's last seven sentencing dates, which accounted for 15 points. RP, 3/31/17, 17; CP 118-180.

The trial court ruled that the present offenses are not same criminal conduct. RP, 3/31/17, 20. The trial court, although aghast that a quarter of a million dollars was stolen from a business run by an older man who

¹ The actual statement and the context in which it was made are below in the facts and

was dying of cancer, expressly denied that it was relying on a vulnerable victim aggravator. RP, 3/31/17, 22. The state asked for 100 months on each count to be served consecutively. RP, 3/31/17, 9. Smith was sentenced to the statutory maximum on each count, 120 months, those to run consecutively for a total of 240 months. Id. at 21. Findings of Fact and Conclusions of Law were entered: the trial court found that the exceptional sentence was justified because the jury found the major economic offense aggravator (on each count) and because Smith's high offender score resulted in "some crimes going unpunished if sentenced concurrently." CP 193.

B. Facts

Richard Baze is the assistant vice president of operations for the business Moneytree. 2RP 252. He is familiar with the Moneytree record keeping system. Id. Moneytree provides "retail financial services," including payday loans and check cashing. 2RP 253.

In check cashing, it is important to confirm the identity of the person presenting the check. 2RP 254. This so funds are not given to a person who is not authorized to cash the check. Id. To this end, in the normal course of business, the Moneytree keeps records of the identification of the persons cashing checks. Id.

highlighted by the heading *statement leading to mistrial motion*.

Mr. Baze was contacted by law enforcement in regard to the account of Albert Smith. 2RP 255. Mr. Baze provided foundation for the admission of Albert Smith's "customer screen" which shows his personal information and a summary of his transaction history with the business. Id., (admitted as exhibit 3). Albert Smith's customer information indicated that he had made 202 visits to branches of the Moneytree. 2RP 258. Mr. Baze provided law enforcement with a log of all the checks Smith had cashed from Comcheck. 2RP 260.

The records revealed that the date of the first such check cashed was in December, 2014 and the last check was in November 2015. 2RP 261. In total, there were 176 checks cashed by Smith for a total of \$264,500. 2RP 265. Each of the single transactions appeared to be legitimate in part because the type of checks, from Comdata, required an authorization code from the company in order to cash them. 2RP 266.

Law enforcement responded to a report from the victim business, Spaeth Transfer. 2RP 278-79. There, Mr. Loidhammer provided the officer with a stack of cancelled checks. 2RP 279. The cancelled checks provided the officer with information on where the check was cashed; many were cashed at Moneytree. 2RP 285-86. By gathering information from Moneytree and by the endorsement of the checks by the payee, the officer focused on Albert Smith as a suspect. 2RP 287-88. Most of the checks were made out to Albert Smith but a few were made to Sharyl

Smith. 2RP 288. The cancelled checks did not provide information as to who wrote them or why they were written. 2RP 312-13.

Ms. Jenay Ingalls works for Spaeth Transfer, a moving and storage company. 2RP 314-15. At the time of trial, Ms. Ingalls was the president of the company. *Id.* During the time between November of 2014 and November of 2015, she was employed by Spaeth in sales. *Id.* This job entailed looking at a moving job and quoting a price to the customer. 2RP 316. But while not doing estimates, Ms. Ingalls worked in the office helping with accounting and scheduling. *Id.* In October, 2015, the bookkeeper left and Ms. Ingalls became the bookkeeper. 2RP 317.

The previous bookkeeper was Sharyl Smith. 2RP 317. Ms. Smith had started there as bookkeeper in 2012. 2RP 318. Her duties included being in charge of all receivables and payables for the company. *Id.* She was the only person in charge of these transactions except for one other person who handled payroll. 2RP 319. She was in charge of paying the company bills. *Id.* Albert Smith is Sharyl Smith's husband. *Id.*

Ms. Ingalls, in her new role as bookkeeper, had received a bill from Comdata. 2RP 321. In looking into that bill, Ms. Ingalls discovered that Spaeth was paying them more money than was normal. 2RP 321-22. She then looked over the company bank accounts and found that there were "excessive" payments to Comdata. 2RP 322. Comdata is a company that operates as a credit card company and is used by Spaeth to advance

cash to out-of-town contract drivers for expenses like fuel, new tires, or paying labor. 2RP 323. The company keeps track of all this because the contract driver must pay the company back for the advances by deductions from his or her pay. 2RP 325.

The drivers would contact Sharyl Smith and tell her they need an advance. 2RP 325-26. Sharyl Smith would provide the driver with code numbers that correspond to dollar amounts. 2RP 326. The driver would then fill out a Comdata check with the code numbers and use it as cash. Id. It was part of Sharyl Smith's duties to provide these code numbers. Id. And, it was part of Sharyl Smith's duties to pay Comdata. Id. Ms. Ingalls discovered that Sharyl Smith had been making these Comdata payments online, which was against company policy. 2RP 327. When she reported her findings to Mr. Loidhammer, he was stunned and speechless. Id.

Ms. Ingalls also found a box of Comdata checks in Sharyl Smith's desk. 2RP 328. This was unusual because it is the drivers who fill out the checks in the field; the office has no need for them. 2RP 328-29.

Ms. Ingalls requested copies of the Comdata checks that had been negotiated and found that they were mostly made out to Albert Smith with a couple to Sharyl Smith. 2RP 329-30. Ms. Ingalls knew of no legitimate reason for there to be Comdata checks to Albert Smith. 2RP 330. Ms. Ingalls found appropriate paperwork for the codes provided to actual

drivers but no such required paperwork for the checks to Albert Smith. 2RP 331. There was no record of Albert Smith being employed by Spaeth Transfer during the relevant time period. Id.

Statement Leading to Mistrial Motion

The state was asking Ms. Ingalls about the timing of the last check in the list of Comdata checks payable to Sharyl and Albert Smith (listed in exhibit 1). 2RP 333. The state asked how many checks were written to Sharyl Smith and the witness answered that the first four were written to Sharyl Smith and the rest to Albert Smith. 2RP 334. Ms. Ingalls indicated that Sharyl Smith's last date of employment was October 30, 2015. Id. The list indicated that the last check written was on October 31, 2015. Id. On October 31, 2015, then, Ms. Ingalls would have been in charge of Spaeth's finances. 2RP 335. The prosecutor asked "Did you authorize this check?" Id. Ms. Ingalls responded "No. That's written by Sharyl." Id.

The defense objected to this answer, the trial court sustained. 2RP 335. The defense moved to strike the answer and the trial court instructed the jury: "Members of the jury, you're asked to disregard the statement about that check being written by Sharyl Smith." Id. Ms. Ingalls was then asked "You did not write that check?" 2RP 335. She responded "No." 2RP 336.

Ms. Ingalls' testimony continued as she identified Spaeth

Transfer's bank statements. 2RP 337. Her testimony established that payments to Comdata that were made when Sharyl Smith was not the bookkeeper were by paper check signed by Mr. Loidhammer. 2RP 340-41. Ms. Ingalls' review of bank statements included that in November and December of 2014 there were no unusual payments by Spaeth to Comdata. 2RP 342. But in January, 2015, she found some online payments to Comdata. Id. These online payments to Comdata increased in frequency in the subsequent months. 2RP 343. Ms. Ingalls did not authorize any of the online payments. Id. After Ms. Ingalls took charge of Spaeth's finances, Comdata payments were again made by paper check signed by Mr. Loidhammer. 2RP 346.

It was established that payments to Comdata took one to three days to be posted. 2RP 350. Sharyl Smith's employment ended on Friday October 30, 2015. 2RP 351. And the last unauthorized check written was on October 30, 2015. 2RP 351-52. It was established that business hours at Spaeth Transfer were Monday through Friday 8:00 to 4:00. 2RP 351. The records indicated that some of the unauthorized checks were written on Saturdays and Sundays. 2RP 352.

III. ARGUMENT

A. SMITH'S MOTION FOR MISTRIAL WAS PROPERLY DENIED WHERE THE TRIAL IRREGULARITY WAS MINOR, THE ALLEGEDLY OFFENSIVE EVIDENCE WAS CUMULATIVE, AND THE TRIAL COURT'S CURATIVE INSTRUCTION WAS EFFECTIVE.

Smith argues that the trial court erred in denying his motion for mistrial based on his sustained objection to testimony that Smith's wife, Sharyl, had written one of the checks that Smith cashed. This claim is without merit because the trial court's ruling on the point of evidence was arguably in error and thus the irregularity in the proceedings was at most minor, because the context of the remark and the strong circumstantial evidence show that the remark was cumulative, and finally, because the jury was properly and effectively instructed to disregard the remark.

“Because the trial judge is in the best position to determine the prejudice of circumstances at trial, an appellate court reviews the decision to grant or deny a mistrial for abuse of discretion.” *State v. Babcock*, 145 Wn.App. 157, 163, 185 P.3d 1213 (2008), *citing State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). And, similarly, the decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 706–707, 903 P.2d 960 (1995). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State*

ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The test on review of mistrial issues was formulated in the *Weber* decision. That case is particularly apt here because it also included a witness giving testimony that had been excluded by the trial court. There, a police officer testified to inculpatory statements made by the defendant at the time of arrest. 99 Wn.2d at 160. The defense objected and successfully moved to exclude the statement because it had not been provided in discovery. *Id.* Then, the officer, who had been present in court when the trial court ruled that the statement was excluded, said the same remark again. *Id.* at 161. The defense moved for mistrial, which the trial court denied. *Id.* The trial court instructed the jury to disregard the statement. *Id.*

The Washington Supreme Court first considered whether in reviewing such issues it matters whether the reviewing court can say that the offending statement was intentional or inadvertent. 99 Wn.2d at 164. The Court concluded that the better rule is that it does not matter. *Id.* at 164-65; *see also State v. Young*, 129 Wn. App. 468, 119 P.3d 870 (2005) *review denied* 157 Wn.2d 1011 (2006) (reversal of conviction based on trial court's "inadvertent" remark). This because the ultimate question is "Did the remark prejudice the jury, thereby denying the defendant his right to a fair trial?" *Id.* at 165. To determine the fairness of the trial "the court

should look to the trial irregularity and determine whether it may have influenced the jury.” *Id.* And, it should be considered whether the alleged irregularity could be cured by an instruction to disregard. *Id.*

The Supreme Court approved of a quote from a 1979 case:

A mistrial should be granted only when “nothing the trial court could have said or done would have remedied the harm done to the defendant.” In other words, a mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that defendant will be tried fairly. Only those errors which may have affected the outcome of the trial are prejudicial.

99 Wn.2d at 165 *quoting State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). The Court then proceeded to apply a three factor test that considers (1) the seriousness of the irregularity, (2) whether the evidence was cumulative, and (3) the effectiveness of the trial court’s instruction to the jury to disregard the remark. *Id.*; *see also State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265 P.3d 853 (2011) (En banc) (using same test).

1. The ruling excluding the allegedly offensive statement was in error and therefore there was not a serious irregularity in the case.

In *Weber, supra*, the Supreme Court found that the statement made was but a minor irregularity because the trial court’s ruling excluding the evidence was in error. 99 Wn.2d at 165. Similarly, in the present case, the alleged irregularity is minor both because the trial court erred in excluding the testimony and because the testimony, in the context of the

case, could not have caused prejudice.

The witness involved, Ms. Ingalls, was testifying in her capacity as the present president and bookkeeper of the victim business. The state's case, including Ms. Ingalls' testimony, had built a very strong circumstantial case around Albert Smith. Direct testimony established that Smith had cashed the checks at the Moneytree. It was clearly established that Smith's wife as bookkeeper of the victim business had authority over the accounts and codes involved in the thefts. It was similarly clearly established, by records and testimony, that the irregular checks and the irregular payments to the check company coincided with the dates of Sharyl Smith's employment. There simply was no evidence to the contrary. In sum, Smith asserted no alternative theory or in any way rebutted these facts.

The situation smacks of the epistemic question often used in jury selection to explain circumstantial evidence. It is posited that when a man went to bed, he could see his green lawn out the window. When he awakes, there are six inches of snow on his lawn. Even though the man never saw a single flake fly, he does in fact have personal knowledge that it snowed while he slept. Ms. Ingalls is like this man—she may not have directly seen Sharyl Smith ever write a single word, yet her review of the documentary evidence, her knowledge of the workings of the company, and her knowledge of all the circumstances of the thefts supply her with

knowledge of Sharyl Smith's actions. Moreover, it does not appear that Ms. Ingalls received her impression of the circumstances from another person.

ER 602 provides that "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." This rule "has a low threshold for what constitutes personal knowledge and only requires that evidence sufficient to support a finding of personal knowledge be introduced." *State v. Jefferson*, 199 Wn. App. 772, 803, 401 P.3d 805 (2017) *citing State v. Vaughn*, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). Further, "Testimony should be excluded only if, as a matter of law, no trier of fact could reasonably find that the witness had firsthand knowledge." 199 Wn. App. at 803 *citing Vaughn*, 101 Wn.2d at 611-12.

As argued, the evidence in this case left little or no doubt that Ms. Ingalls knew what she was talking about. In fact, in the special verdict answers, the jury found that Albert Smith's accomplice committed a major economic offense and that he knew that his accomplice was doing so. CP 85-86. If the jury had been allowed to consider Ms. Ingalls' remark, they could have reasonably found that she had knowledge of the matter.

2. *Because the strong circumstantial evidence established that Sharyl Smith was the author of the checks Albert Smith cashed, evidence that she had written one of the checks was cumulative.*

The circumstantial evidence in the case raised a nearly incontrovertible inference that Sharyl Smith, at the time the bookkeeper at the victim business, provided her husband, Albert Smith, with both the Comdata checks and the access codes. There was no evidence presented that would bottom an inference that anyone else in the world except Sharyl Smith could have provided her husband with the means to steal nearly a quarter of a million dollars from Spaeth Transfer. It is certain that Smith did not controvert this fact at trial.

The jury was instructed that “circumstantial evidence refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.” CP 59. Viewed through this lens, it is again quite clear that the jury could easily, and certainly reasonably, infer that Sharyl was the provider of the material necessary for Albert to steal the money. This will remain true even if Ms. Ingalls remark is excised from the record. Ms. Ingalls inadvertent remark that Sharyl wrote one check out of over a hundred checks was cumulative to well-established proposition that the Smiths worked together in this scheme. The remark was cumulative.

3. ***The trial court's instruction cured any prejudice that may have occurred from this minor irregularity.***

When Ms. Ingalls testified that about a check that “that’s written by Sharyl,” the trial court sustained the defense objection. 2RP 335. The defense moved to strike the answer and the trial court instructed the jury: “Members of the jury, you’re asked to disregard the statement about that check being written by Sharyl Smith.” *Id.* Later, in discussion of the defense mistrial motion, the defense did not request any further instruction on the point. 3RP 368-69. Moreover, the trial court was satisfied that the jury would follow the trial court’s curative instruction. *Id.*

Jurors are presumed to follow the judge’s instructions. *See State v. Weber, supra*, 99 Wn.2d at 166. Relying on this rule, the trial court did not believe that such prejudice had been caused that a mistrial was warranted. And, “the trial judge is best suited to judge the prejudice of the statement.” 99 Wn.2d at 166. This a sentiment that underlies the abuse of discretion standard of review. The trial court here was obviously aware of the strength of the state’s case and in particular the strength of the reasonable inference from all the evidence that Sharyl Smith had done just that act. It was not manifestly unreasonable for the trial court to believe that any possible prejudice from the remark was cured by the instruction. Moreover, the record shows that any reasonable jury would have found guilt beyond a reasonable doubt either with or without Ms. Ingalls’

inadvertent remark. There was no abuse of discretion and this claim fails.

B. THE TRIAL COURT DID NOT ERR IN SENTENCING SMITH.

Smith next claims that the trial court made seven errors in sentencing Smith.

A sentencing court may depart from the standard range “if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. Facts supporting an aggravated sentence must be found by a jury. RCW 9.94A.537(3). Upon such a jury finding, the sentencing court may sentence the offender up to the statutory maximum for the offense so long as the sentencing court has considered the purposes of the SRA and found substantial and compelling reasons. RCW 9.94A.537(6).

Herein, the jury found that both the current offenses were major economic offenses or series of offenses and involved multiple incidents per victim, involved monetary loss substantially greater than typical for the offense, involved a high degree of sophistication and planning and occurred over a lengthy period of time. CP 85-86; RCW 9.94A.535(3)(d)(i),(ii), and (iii). The trial court relied on this jury finding in imposing the exceptional sentence.

The imposition of a sentence that departs from the standard range

may be reversed only if the reviewing court finds

(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4). This provision propounds three questions and varying standards of review:

(1) Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous. (2) Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law. (3) Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Fisher, 188 Wn. App. 924, ¶55, 355 P.3d 1188 (2015).

The trial court also articulated that it found that Smith had committed multiple current offenses and that his high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c). This provision is excepted from those aggravators that must be found by a jury. Here, the trial court was taken aback by the large size of Smith's criminal history and discussed it at length.

1. Smith's misreads RCW 9.94A.535(2)(c) in an attempt to create statutory ambiguity and in a manner that is contrary to the legislature's intent.

RCW 9.94A.535(2)(c) provides that an aggravated exceptional sentence may be imposed if "The defendant has committed multiple

current offenses and the defendant's high offender score results in some of the current offenses going unpunished.” Smith argues that because he had but two current offenses, the statute does not reach his sentence because his single unpunished conviction is not the same as “some offenses.” According to Smith, the supposed linguistic anomaly would insulate from punishment he and any other defendant who comes to sentencing with a high offender score but just two current convictions.

First, Smith misreads the provision. He focuses on and places much emphasis on the word “some,” and concludes that “some” does not mean “one” in this context. However, in so doing, Smith ignores another important word in the sentence—“multiple.” That word is defined as “consisting of, including, or involving *more than one*.” Merriam-Webster online dictionary (emphasis added). Thus the statute applies where a defendant has committed more than one current offense and two is of course more than one. Next, “some” is defined in this context and in this usage as “*being one*, a part, or an unspecified number of something (such as a class or group) named or implied.” Merriam-Webster online dictionary (emphasis added). Thus “some” refers to any of those “multiple” current offenses, including any *one* that fits into the named class or group of multiple current offenses, that go unpunished. The word “some” belongs to the meaning of this sentence and does not require that a defendant have more than one unpunished current offense for it to apply.

This plain language gloss on the statute is the correct one. Smith’s strained analysis of the language does not set up an equally viable definition to which lenity would apply. Read properly, with no single word taken out of context, the provision is simply not ambiguous.

Second, in a pre-*Bakely v. Washington*² the Washington Supreme Court rejected a very similar argument. *State v. Smith*, 123 Wn.2d 51, 56, 864 P.2d 1371 (1993), *overruled on other grounds*, *State v. Hughes*, 154 Wn.2d 118 (2005).³ Smith there argued as Smith does here under the following circumstances:

Here, the defendant had multiple current offenses which resulted in an offender score of 10 – 1 point over the sentencing grid’s “9 or more” category. Given that each second degree burglary conviction counts for two points, in effect, Smith is receiving one-half of a “free” crime; petitioner admits as much in his brief.

123 Wn.2d at 56. The Court specifically rejected the notion that there had to be even a whole free crime, much less multiples:

Smith argues that one-half of a free crime is insufficient to support an exceptional sentence. This argument is patently meritless. Both public policy and the stated purposes of the SRA demand full punishment for each current offense.

Id., at n.4 (*citing State v. Stephens*, 116 Wn.2d 238, 245, 803 P.2d 319

² 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

³ *Hughes* held that the “clearly too lenient” part of the free-crimes circumstance was a fact that had to be found by the jury under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (2004). *State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), abrogated on other grounds, *Washington v. Recuenco*, 548 U.S. 212 (2006). As will be discussed, the legislature eliminated that part of the aggravator when it amended

(1991)).

Although Smith was decided under the pre-*Blakely* version of the statute, its holding remains relevant. After *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), held that aggravating circumstances other than the fact of a prior conviction must be found by the jury, the Legislature amended RCW 9.94A.535 to bring the statute into compliance with the ruling. Of significance to the present case, the Legislature explicitly declared its intent to make no substantive changes to existing aggravating circumstances:

The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ____ (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. ... *The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances.* The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances. ...

Laws 2005, ch. 68, § 1 (emphasis supplied).

The legislative intent was thus not to change substance of any

the statute to comply with *Blakely*..

aggravating circumstance, but only to bring into compliance with *Blakely*. The Legislature accomplished that task with regard to the free-crimes aggravator by simply eliminating the “clearly too lenient” aspect of the aggravator identified in *Hughes* as violating *Blakely*, leaving only the remainder to be properly found by the court. Nothing in the Legislature’s explicitly-stated intent indicates that it intended to elevate the application of the free-crimes aggravator from defendants with a 10 or more offender score to those with at least eleven prior crimes. Because Smith’s interpretation of the statute is contrary the statute’s plain language, contrary to existing judicial gloss, and the explicitly-enunciated legislative intent, his claim should be rejected.

2. The two convictions are not same criminal conduct.

Smith claims that the two convictions should have been held to be same criminal conduct. They are not the same criminal conduct.

Two or more crimes are considered to be same criminal conduct if they require the same intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). The rule is construed narrowly. *State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). All prongs of the statutory test must be met. *State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). The burden of establishing same criminal conduct falls to the defendant. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). A trial court’s

determination of this question is reviewed for abuse of discretion. *Graciano*, 176 Wn.2d at 536.

The Washington Supreme Court's most recent decision on RCW 9.94A.589(1)(a) is *State v. Chenoweth, supra*. Herein, Smith relegates that case to a footnote claiming that, since the two crimes there considered, child rape and incest, do not have *mens rea* elements, the case has no application to crimes that do. The state respectfully disagrees. So does the Supreme Court.

In the decision, the Court seems to have no problem with the idea that child rape and incest are crimes that show intent. And, “[t]he intent to have sex with someone related to you differs from the intent to have sex with a child.” 185 Wn.2d at 223. Thus, “Chenoweth's single act is comprised of separate and distinct *statutory* criminal intents and therefore under RCW 9.94A.589(1)(a) do not meet the definition of same criminal conduct.” *Id.* (emphasis added)(internal quotation omitted). Further, the Court found that the legislature intended to punish incest and rape as separate offenses. *Id.* at 224. Finally, the Court concluded that it was advancing a “straightforward analysis of the statutory criminal intent of rape of a child and incest.” *Id.*

Herein, Smith seeks to avoid this straightforward analysis. Instead, Smith asserts the argument of the *Chenoweth* dissent. The dissent, and Smith here, wish to maintain the previous “objective criminal purpose”

test. 185 Wn.2d at 230-31. After *Chenoweth*, the inquiry focuses on statutory intent, not on some judicially created overarching criminal purpose. The straightforward statutory approach arguable makes the law more certain by avoiding subjective questions designed to divine a particular defendant's particular overarching criminal purpose.

Here, identity theft is defined as “No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1). The intent required is to “commit, or aid and abet, any crime.” Theft is “any crime.” Moreover, “The legislature intends to penalize for each unlawful act of improperly obtaining, possessing, using, or transferring means of identification or financial information of an individual person.” RCW 9.35.001(1). The unit of prosecution for identity theft is “each individual use of any one person’s means of identification or financial information.”⁴ Under RCW 9A.56.020, theft requires “intent to deprive [a person] of such property or services.” Thus a straightforward review of the statutory intent elements clearly shows that conviction of the two crimes involves different intents—one to get the information necessary to commit the other.

The *Chenoweth* majority gave appropriate deference to the

⁴ Thus it appears that the state could have charged Smith for over a hundred counts of using discreet instances of Spaeth Transfer’s Comdata codes.

legislature by noting that the crimes involved are defined in separate sections of the criminal code and have been defined as separate crimes during the entire history of the state. 185 Wn.2d at 224. Herein, the legislature has clearly made its intention known by the passage of RCW 9.35.020(4), which provides that “[e]ach crime prosecuted under this section shall be punished separately under chapter 9.94A RCW, unless it is the same criminal conduct as any other crime, under RCW 9.94A.589.” And, even more to the point, RCW 9.35.020(6) providing 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.” Subsection six, then, seems to foreclose Smith’s argument. But as with the *Chenoweth* case, Smith relegates these statutory provisions to a footnote.

The state cannot understand why any trial court would be required to “exercise it’s discretion” in doing just what the statute authorizes. The trial court’s discretion aside, RCW 9.35.020(4) and (6) are simply the law. Smith’s argument says that anytime a trial court’s action is in accordance with law, that court must have been said to exercise it’s discretion in applying that law. It is unsurprising that Smith cites to no authority to support this proposition.

The two offenses have different intent elements and are codified to address different concerns. Moreover, the legislature has clearly

expressed its intent that identity theft be punished separately from other related crimes. The trial court did not err in finding that these two offenses are not same criminal conduct.

3. The jury found the major economic offense aggravating circumstance beyond a reasonable doubt and that circumstance alone supports the exceptional sentence imposed.

Smith claims that the trial court asserted three reasons to support the exceptional sentence imposed and, he argues, since two of the three are not valid reasons, the exceptional sentence must be reversed. This claim is without merit because the trial court may rely on the aggravating circumstance found by the jury.

First, it is unclear why Smith thinks the trial court's ruling on his motion regarding same criminal conduct was intended by the trial court as a reason for an exceptional sentence. Although that ruling is included in the trial court's written findings, the record is clear that this inclusion was not intended as a reason for an exceptional sentence. It is not. It was inartful to include that ruling in the Findings and Conclusions but not erroneous.

A reviewing court may uphold an exceptional sentence if it finds any of the sentencing court's reasons for imposing the sentence valid. *See State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993) accord *State v. Smith*, 180 Wn. App. 1019, __P.3d__ (2014) (UNPUBLISHED AND

UNBINDING: cited here to establish that this court still follows the *Gaines* rule). Even if the reviewing court finds one of the reasons invalid, a case will be remanded only if the reviewing court also finds that it is not clear whether the trial court would impose the same sentence based on valid factors alone. 122 Wn.2d at 512.

Smith cites to *State v. Smith*, 123 Wn.2d 51, 864 P.2d 1371 (1993). That case proceeded in a very different milieu. The case was decided long before the *Blakely v. Washington* line of cases change sentencing law. For instances, there the trial court made its own findings of aggravating factors. 123 Wn.2d at 54. The case has dubious vitality under present law. However, at the end of that case, we find that *Smith* is simply a singular application to the well-worn rule: the Supreme Court was not convinced under the circumstances of that case, which included the striking of two of the four aggravating factors, that the trial court would impose the same sentence without the two stricken factors. 123 Wn.2d at 58.

Moreover, the remand in *Smith* was based primarily on the durational aspect of the exceptional sentence there imposed. The Court noted that “Given the great disparity between the presumptive sentence and the exceptional sentence, it is unclear whether the trial judge would have imposed the same sentence had he considered only the two valid

aggravating factors.” But under current law “[t]he trial court has all but unbridled discretion in fashioning the structure and length of an exceptional sentence.” *State v. France*, 176 Wn. App. 463, 470, 308 P.3d 812 (2013) (internal quotation and cite omitted) *review denied* 179 Wn.2d 1015 (2014). The statute provides that once correct grounds for a departure are extant, the trial court may sentence up to the statutory maximum for an offense. RCW 9.94A.537(6). The Supreme Court has noted that the SRA does not require a trial court to articulate its reasons for the length of an exceptional sentence where the statute requires that the sentencing court provide its reasons for imposing an upward departure in the first instance. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). Once the reasons for the departure are established, “[t]here is no such statutory requirement as to the *length* of an exceptional sentence.” 126 Wn.2d at 392 (emphasis by the court).

In the present case, the trial court would have imposed the same sentence even if “some” does not mean “one.” That is, the major economic offense aggravator would have been sufficient by itself. Smith stole nearly a quarter of a million dollars from the victim business. And, whether the multiple offense statute applies or not, Smith has a horrendous criminal history and there is no abuse of discretion in considering that history. The trial court would impose the same sentence. This issue fails.

4. *Proof of Smith's criminal history fell short of the total points used at sentencing but because Smith's score is over nine in any event, the offender score calculation omission is harmless.*

Smith claims that his offender score was miscalculated, that some of his priors were same criminal conduct, and that some of his prior convictions were not properly proven.

The state concedes that the Smith's pre-1997 criminal history was not proven. The present sentencing should have proceeded with the 15 prior offense points that were proven. However, the state does not agree as to the remedy for this omission insofar as Smith believes he should get sentencing de novo. Here, everything the trial court did, it would have done had Smith been sentenced with a 16 offender score rather than a 21. Since in either case Smith's offender score is well over 9, the proof or calculation error is harmless. Further, Smith completely failed in his burden to establish that at any of his prior sentencings, his crimes were considered same criminal conduct. The matter need not be resentenced.

First, it should be noted that Smith said for the record at the sentencing hearing that he was disputing his offender score. RP, 3/31/17, 9. He argued that he should be sentenced with zero offender points. RP, 3/31/17, 11-12. Then, regarding historical same criminal conduct "Mr. Smith has indicated to me just today that he believes that some of his prior history should be considered as same criminal conduct." Id. Defense

counsel conceded that he had not investigated that possibility. *Id.* The defense never raised that issue again. The defense instead argued that the current offenses should be regarded as same criminal conduct. RP, 3/31/17, 12-13.

The state did come to the hearing with some proof. The prosecutor indicated that she was providing certified copies of previously entered Judgement and Sentences that account for 15 points. RP, 3/31/17, 17. These are the best evidence of prior convictions. *See State v. Lopez*, 147 Wn.2d 515, 519, 55P.3d 609 (2002). These documents were provided to the trial court and appear in the present record. CP 118-180. A Kitsap County Superior Court Judgment and Sentence that was originally filed on October 18, 2012, listed 20 prior felonies and contained no indication that any of those priors had been sentenced as same criminal conduct. CP 118-19. The present J and S recited exactly those same 20 felony priors. CP 182. Moreover, the state provided the trial court with a comprehensive criminal history sheet that included 122 entries for various law violations, including felonies, misdemeanors, and traffic violations. CP 108.

The state has the burden of proving Smith's offender score by a preponderance of the evidence. *See State v. Arndt*, 179 Wn. App. 373, 320 P.3d 104 (2014). But "[a] trial court may determine that nine convictions exist and then stop counting, so long as the court is not

considering the imposition of an exceptional sentence based on reasons related to the offender score.” *State v. Fleming*, 140 Wn. App. 132, 138, 170 P.3d 50 (2007) *review denied* 163 Wn.2d 1047 (2008). Further, “[w]here the standard sentence range is the same regardless of a recalculation of the offender score, any calculation error is harmless.” *Id.* In *Fleming*, the defendant came to be sentenced on three crimes already possessed of an 8 offender score. The trial court “*could*” have subjected the three crimes to same criminal conduct inquiry but it was harmless that it did not because in any event Fleming’s score would still have been 9. 140 Wn. App. at 138 (italics by the court).

Here, the trial court was faced with a situation where Smith’s offender score would be above 9 in any event. The state proved 15 points by certified copies of previous Judgment and Sentence documents. Moreover, the major economic offense aggravator that was found by the jury beyond a reasonable doubt provided the trial court with a reason to impose an exceptional sentence that has nothing at all to do with Smith’s offender points. Moreover, even if this court considered remand to correct the J and S, “[n]othing in the SRA or our case law indicates that a person’s exceptional sentence must necessarily be reduced on a recalculation of an offender score.” *State v. Barberio*, 66 Wn. App. 902, 907, 833 P.2d 459 (1992).

In this case, the trial court had more than adequate facts to justify the imposition of an exceptional sentence. No matter how one parses Smith's history, his offender points exceed nine. Remand for recalculation (or for the state to prove up six more points) would change none of the circumstances of the case. The missing six points would not change any part of the jury's completely appropriate major economic offense finding. Albert Smith's career as a criminal has caught up to him. He was appropriately sentenced and any omission in proving the offender score is harmless.

IV. CONCLUSION

For the foregoing reasons, Smith's conviction and sentence should be affirmed.

DATED December 11, 2017.

Respectfully submitted,

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