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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

KYLE SMITH, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni. A. Sheldon, Judge

No. 16-1-00110-6

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) Because the trial court properly exercised its discretion, it did not err when it found that two of Smith's forgery convictions and his trafficking in stolen property conviction did not constitute same criminal conduct for sentencing purposes.
- 2) The State agrees with Smith's contention that recent statutory amendments apply to this case while on direct review and require that, because he was indigent at the time of sentencing, the imposition of discretionary costs should be stricken from his judgment and sentence.
- 3) Although the State agrees with Smith's basic contention that recent statutory amendments apply to this case and prohibit the collection of a DNA fee in this case if he has submitted a DNA sample in a prior case, there is nothing in the record of this case to show that Smith has, in fact, previously submitted a sample.
- 4) Smith is correct that although his sentence was correctly calculated based on an offender score of seven, due to a typographical error the judgment and sentence shows an offender score of eight and should be corrected to show the correct offender score of seven.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Smith's statement of facts, except where the State provides additional or contrary facts to develop its arguments, below. RAP 10.3(b).

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C. ARGUMENT

- 1) Because the trial court properly exercised its discretion, it did not err when it found that two of Smith's forgery convictions and his trafficking in stolen property conviction did not constitute same criminal conduct for sentencing purposes.

In addition to convictions for three counts of third degree theft (which are not at issue here), the jury convicted Smith for three counts of forgery and one count of trafficking in stolen property. CP 90-98. At sentencing, the trial court found that two of the forgery convictions constituted same criminal conduct for sentencing purposes because they occurred at the same time and place and involved the same victim, Donald Guy. RP 460. However, the court found that the third forgery conviction involved a different victim, Max Guy, and that it and the trafficking conviction were not the same criminal conduct to each other or to the forgeries involving Donald Guy. RP 460. Smith contends that all three forgery convictions and the trafficking conviction were the same criminal conduct.

a) Standard of Review.

A trial court's same criminal conduct determination is reviewed for abuse of discretion or misapplication of law. *State v. Graciano*, 176

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Wn.2d 531, 535, 295 P.3d 219 (2013). “Under this standard, when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* at 537-38 (citation omitted). “But where the record adequately supports either conclusion, the matter lies in the court's discretion.” *Id.* at 538. The defendant bears the burden of proving whether the crimes at issue constitute the same criminal conduct. *Id.* at 538-39.

b) Legal test applicable to same criminal conduct determinations.

RCW 9.94A.589(1)(a) defines “same criminal conduct” and controls the sentencing treatment of such crimes. “Two crimes manifest the same criminal conduct only if they require the same criminal intent, are committed at the same time and place, and involve the same victim.” *Graciano* at 540 (internal quotations and citation omitted). “If the defendant fails to prove any element under the statute, the crimes are not the same criminal conduct.” *Id.* (internal quotations and citations omitted). “[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.” *Id.* (internal quotations and citations omitted).

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c) *Forgery and Trafficking in Stolen Property do not have the same criminal intent.*

To determine whether two crimes share the same criminal intent, a sentencing court should determine whether the defendant's objective intent changed one from crime to the other and whether one crime furthered the other. *State v. Freeman*, 118 Wn. App. 365, 377, 76 P.3d 732 (2003) (citing *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994)). Or, put another way:

Intent is assessed objectively, rather than subjectively. *State v. Rodriguez*, [61 Wn. App. 812, 816, 812 P.2d 868 (1991)]. First, we must "objectively view" each underlying statute and determine whether the required intents are the same or different for each count. *Rodriguez*, [61 Wn. App. at 816]. If the intents are different, the offenses will count as separate crimes. If they are the same, we next "objectively view" the facts usable at sentencing to determine whether a defendant's intent was the same or different with respect to each count. *Rodriguez* [at 816].

State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999).

Proof of forgery requires proof of "intent to injure or defraud." RCW 9A.60.020(1). Proof of trafficking in stolen property, however, requires proof that the defendant "knowingly" engages in conduct constituting the offense. RCW 9A.82.050(1). Thus, these crimes have

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differing criminal intents, because trafficking does not require an intent to injure or defraud, whereas forgery does require such intent.

d) The three forgeries and the trafficking offense have multiple, overlapping victims.

“‘Victim’ means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” RCW 9.94A.030(54). Two crimes cannot be the same criminal conduct if one crime involves only one victim and the other involves multiple victims. *State v. Davis*, 90 Wn. App. 776, 782, 954 P.2d 325 (1998).

Where, as here, the purchaser is unaware that the property is stolen, trafficking in stolen property has two specifically identifiable victims: the owner of the stolen property and the purchaser of the stolen property. Here, Smith trafficked all three of the stolen cars to one person, Mr. Askay. RP 76-77. But two of the stolen cars were owned by Max Guy, and one was owned by Donald Guy. RP 144-45.

The forgery counts, also, involve multiple victims. On the facts of this case, Smith’s three forgeries have four victims. Askay paid \$400 for three hulk cars and three lost title affidavits, but the affidavits were

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worthless. RP 41, 128, 138. Thus, Askay is a victim of all three forgeries. But the State, also, is a victim of all three forgeries because it was foreseeable that the State would suffer some loss related to correcting its records because of the forgeries. Additionally, Donald Guy is a victim of all three of the forgeries because his name was forged in each case and because he owned one of the cars that pertained to one of the forgeries. RP 144-45. Finally, Max Guy is the victim of two of the forgeries because those forgeries pertained to cars that he owned. RP 144-45.

e) The trial court did not abuse its discretion when it found that two of the forgeries and the trafficking charge were not the same criminal conduct for sentencing purposes.

In this case the jury was instructed that “[a] person commits the crime of forgery when, with intent to injure or defraud, he falsely makes, completes or alters a written instrument or possesses, offers, disposes of or puts off as true, a written instrument which he knows to be forged.” CP 77. The jury was instructed that “[a] person commits the crime of trafficking in stolen property in the first degree when he knowingly traffics in stolen property knowing the property was stolen.” CP 83. Thus, as defined by the jury instructions, the forgeries and the trafficking might, but might not, have occurred at the same time and place.

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Additionally, Smith could have committed any one of the forgeries without also committing the others, and he could have trafficked any one of the cars without also trafficking the others. Arguably, the forgeries facilitated the trafficking offense, but whether one crime facilitated the other is relevant only if the criminal intent for each crime is the same. *Hernandez*, 95 Wn. App. at 484. As argued above, however, the forgery offenses and the trafficking offense have different criminal intents. Still more, as argued above, the forgeries and the trafficking charge both have multiple, sometimes overlapping, victims.

The State contends that Smith has failed to satisfy his burden of showing that the facts support a finding of same criminal conduct and that because the record supports more than one conclusion, the trial court did not abuse its discretion when it ruled that these offenses are not the same criminal conduct for sentencing purposes. *State v. Graciano*, 176 Wn.2d 531, 535-39, 295 P.3d 219 (2013).

- 2) The State agrees with Smith's contention that recent statutory amendments apply to this case while on direct review and require that, because he was indigent at the time of sentencing, the imposition of discretionary costs should be stricken from his judgment and sentence.

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At sentencing, the trial court ordered Smith to pay Legal Financial Obligations (LFOs) totaling \$2,543.97. CP 121. The LFOs included a \$500 victim assessment (RCW 7.68.035), a \$100 DNA fee (RCW 43.43.7541), a \$200 filing fee pursuant to RCW 36.18.020(2)(h) (2017), and under the authority of RCW 10.01.160(3) the court ordered discretionary costs of \$373.97 for witness fees, a \$250 jury demand fee, and \$1,120 for sheriff's service fees. CP 121. In conjunction with a notice of appeal, Smith filed a motion for order of indigency stating that he had no real property, no personal property, and no income from any source. CP 134-37. The trial court granted Smith's motion and entered an "Order of Indigency on Review." CP 138-39. Accordingly, because Smith had no income and no assets, he was "indigent" as defined by RCW 10.101.010(3)(c) because his income was less than 125% of the federal poverty guideline.

After the judgment and sentence was entered in this case, but while the case was pending on direct appeal, the Supreme Court released its decision in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (Sep. 20, 2018). The Supreme Court noted that RCW 36.18.020(2)(h) had been amended by House Bill 1783 and that it now "prohibit[s] courts from

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imposing the \$200 filing fee on indigent defendants.” *Ramirez* at 739.

The *Ramirez* Court also noted that recent amendments to RCW 10.01.160(3) prohibit the imposition of discretionary costs against defendants who are indigent at the time of sentencing. *Ramirez* at 748.

The Court held that these amendments apply prospectively to cases pending on direct review. *Id.* at 749. Accordingly, the State concedes that these amendments apply to the instant case and that because he was indigent at the time of sentencing, the discretionary costs and the \$200 filing fee should be stricken from Smith’s judgment and sentence.

- 3) Although the State agrees with Smith’s basic contention that recent statutory amendments apply to this case and prohibit the collection of a DNA fee in this case if he has submitted a DNA sample in a prior case, there is nothing in the record of this case to show that Smith has, in fact, previously submitted a sample.

Smith appeals the imposition of a \$100 DNA-collection fee in the judgment and sentence, asserting that a DNA sample was previously submitted to the state as a result of a prior conviction. A legislative amendment to RCW 43.43.7541, which took effect June 7, 2018, requires imposition of the DNA-collection fee “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” The amendment applies to defendants whose appeals were pending when the

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amendment was enacted. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (Sep. 20, 2018).

However, claims of error on direct appeal must be supported by the existing record on review. *See* RAP 9.1. A claim of error based on a factual assertion that the defendant previously submitted a DNA sample necessarily fails on direct appeal if there is nothing in the record to show the defendant actually submitted a DNA sample previously. *See State v. Thibodeaux*, ___ Wn. App. 2d ___, 430 P.3d 700 (No. 76818-2-I, Nov. 26, 2018); *State v. Lewis*, 194 Wn. App. 709, 720–21, 379 P.3d 129 (2016), *review denied*, 186 Wn.2d 1025, 385 P.3d 118 (2016); *State v. Thornton*, 188 Wn. App. 371, 374, 353 P.3d 642 (2015). The fact of a prior conviction alone is not enough to show actual submission of a DNA sample. *Thibodeaux* at para. 16.

In this case, the judgment and sentence shows that Smith has several previous felony convictions. CP 116. Based on these prior convictions, it would appear that Smith has *most likely* submitted a DNA sample in at least one of the prior convictions. However, because there is nothing in the record of the instant case to show that Smith has in fact

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submitted a DNA sample in a prior case, this Court should deny Smith's appeal of this issue.

- 4) Smith is correct that although his sentence was correctly calculated based on an offender score of seven, due to a typographical error the judgment and sentence shows an offender score of eight and should be corrected to show the correct offender score of seven.

On Smith's judgment and sentence, and offender score of "8" was typed in the sentencing score table. CP 117. However, at the time of sentencing the trial court judge found that two of Smith's three forgery convictions constituted same criminal conduct for sentencing purposes. RP 461-62. Therefore, the offender score was reduced to seven. RP 462. The standard range sentences based on the offender score of eight were marked out, and the correct standard range sentences for the correct offender score of seven were hand-written onto the form. CP 117. Smith's ultimate sentence was correctly calculated based on an offender score of seven, rather than eight. CP 119. But the judgment and sentence still shows an offender score of eight. CP 117. Therefore, the State agrees with Smith that this case should be remanded for correction of this clerical error. *In re Pers. Restraint Petition of Mayer*, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

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D. CONCLUSION

The State contends that the trial court did not abuse its discretion or misapply the law when it found that Smith's forgery convictions and his trafficking in stolen property convictions were not same criminal conduct for sentencing score calculation purposes.

Otherwise, the State agrees with Smith that because he was legally indigent at the time of sentencing, the trial court's imposition of discretionary costs should be stricken from his judgment and sentence. However, because there is nothing in the record to support Smith's contention that he has previously submitted a DNA sample, his appeal of this issue should be denied.

Finally, the State agrees with Smith's contention that the offender score of eight is a typographical error and on remand this error should be corrected to show the correct score of seven.

DATED: December 19, 2018.

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