

FILED  
DECEMBER 13, 2016  
Court of Appeals  
Division III  
State of Washington

34371-5-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

DWAYNE OTTO RUNGE, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. Appellant Dwayne Runge received ineffective assistance of counsel at his sentencing hearing due to counsel's failure to request an available sentencing alternative and failure to argue that the offenses in Counts 1 and 2 and Counts 1 and 3 constituted the same criminal conduct, entitling him to a new sentencing hearing.
2. The trial court miscalculated Mr. Runge's offender score.

## **II. ISSUES PRESENTED**

1. Whether defense counsel provided ineffective assistance of counsel when he elected to recommend a low-end, standard range sentence, rather than requesting a DOSA sentence, given his client's lengthy history with drug use, and where the trial court considered a DOSA sentence in any event?
2. Has the defendant waived argument that the trial court miscalculated his offender score where he did not request the sentencing court to consider whether any of his current convictions were the same criminal conduct?
3. Whether defense counsel provided ineffective assistance of counsel in not arguing that defendant's current convictions were the same criminal conduct and should be scored as one point for purposes of sentencing, where the current convictions do not involve the same criminal intent, and where defendant is unable to demonstrate he was prejudiced by the alleged error.

## **III. STATEMENT OF THE CASE**

Dwayne Runge was charged in Spokane County Superior Court with one count of second degree possession of stolen property and two

counts of second degree identity theft, based on his possession and use of a stolen access device. CP 1-2; RP 39-40. The defendant's matter proceeded to trial on April 4-5, 2016. RP 38-292.

### Substantive Facts

Alexandra Rich discovered that her car was broken into sometime between 11 p.m. on March 15, 2015 and 8 a.m. on March 16, 2015. RP 116-117. She found that her wallet, containing her Spokane Teacher's Credit Union debit card, driver's license, and student ID card had been taken. RP 117. Ms. Rich filed a police report, called her bank to cancel the card, and completed a fraud report through her bank. RP 120, 122. She learned that her debit card had been used in two locations, a Maverik gas station and a Walmart in Spokane County. RP 121, 125. Ms. Rich did not give anyone permission to possess or use her debit card. RP 127.

Detective Hobbs, of the Cheney Police Department, investigated the theft and use of Ms. Rich's debit card. RP 133-134. He went to the Airway Heights Walmart, where he was able to retrieve video recordings of the individuals who attempted to use Ms. Rich's card to purchase electronics and gift cards from the store.<sup>1</sup> RP 136-137, 139. This transaction, for the purchase of \$688 worth of merchandise, occurred at approximately

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<sup>1</sup> The suspects entered Walmart at approximately 6:03 a.m. on March 16, 2015. RP 144.

6:18 a.m., but was unsuccessful because the individual who used the card failed to use the correct PIN number twice. RP 140, 146, 148, 233. Detective Hobbs identified the defendant as one of the two individuals depicted in the video, and as the individual who attempted to make the purchase.<sup>2</sup> RP 142, 149.

Detective Hobbs then went to the Maverik gas station, located in Cheney, Washington, and contacted the manager. RP 153-154. The manager was able to assist the detective in locating a video recording of the transaction in which Ms. Rich's card had been used to make a purchase in the amount of \$23.18. RP 154-155. On the video, Detective Hobbs observed the defendant walk into the Maverik station at 5:42 a.m., wearing a different coat than he was wearing at Walmart. RP 155-156. Mr. Runge then purchased three packs of cigarettes with Ms. Rich's stolen debit card.<sup>3</sup> RP 157, 159. Mr. Runge left the Maverik station at 5:44 a.m.<sup>4</sup> RP 164.

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<sup>2</sup> Detective Mark Brownell also testified on behalf of the State, and stated that he had reviewed the video surveillance from both the Maverik and Walmart, and recognized Dwayne Runge on both videos, as he had talked to Mr. Runge on several prior occasions. RP 169-170, 173-174, 177.

<sup>3</sup> Because the purchase was for less than \$25, no signature or identification was required for the transaction. RP 212.

<sup>4</sup> Approximately 19 minutes elapsed between the time Mr. Runge left the Maverik station and entered Walmart. RP 165. Detective Hobbs testified that a person could drive from the Maverik to the Walmart in about 15 minutes. RP 165-166.

The jury convicted the defendant of all three charges on April 5, 2016. CP 101-103.

#### Procedural Facts

The defendant, through counsel, filed a motion for a new trial or to arrest the judgment based on a lack of identification of the defendant as the individual who used Ms. Rich's debit card. CP 110-111. The court heard that motion before sentencing. RP 295-300. The court denied the motions, finding that there was sufficient evidence for the jury to identify the defendant as the individual depicted in the security footage from both stores. RP 299-300.

At sentencing, the State requested the maximum sentence on each of the crimes based on defendant's high offender score,<sup>5</sup> noting that the presumptive sentence is the midpoint of the standard range. RP 302. Additionally, the State requested that the defendant be sentenced to 12 months of community custody.<sup>6</sup> RP 303. The State believed that the case "may have been driven by some sort of a chemical dependency" and requested that the defendant undergo a chemical dependency evaluation

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<sup>5</sup> The State calculated Mr. Runge's offender score to be above a "9." RP 301. Defendant agreed to the State's understanding of his criminal history. CP 118-120.

<sup>6</sup> The State requested that the court impose 48 months in custody for the two crimes of identity theft, with 12 months of community custody, and 29 months of custody for the possession of stolen property charge, so as to avoid the imposition of a sentence exceeding the statutory maximum of 60 months. RP 303.

while in custody so that “maybe the defendant will not find himself in this situation again.” RP 304.

Acknowledging the defendant’s lengthy criminal history, defense counsel recommended that the court impose a low-end sentence with community custody. RP 304. The Court asked if Mr. Runge had previously taken advantage of a prison-based drug offender alternative sentence in the past; Mr. Runge indicated that he had previously completed a DOSA in 2001 while he was in prison. RP 304-305.

On his own behalf, Mr. Runge apologized for “being up here in front of” the court again, and acknowledged that he has been a drug addict for 21 years. RP 305. He expressed his concern over the resolution of his “other court matter,”<sup>7</sup> and indicated that he was concerned that the court would order the sentences to run consecutively to each other. RP 305.

The Honorable Maryann Moreno asked Mr. Runge what sentence he believed he deserved given his criminal record. RP 307. He acknowledged that two years before, he was given a “credit for time served” plea, and that it was his fault for being again before the court on additional criminal charges. RP 307. He told the court that the most prison time he had

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<sup>7</sup> According to Mr. Runge, his offer to resolve all of his pending matters was 227 months in prison (18 years) given his high offender score. RP 306.

ever served was 14 months, but that he has spent nine total years of his life in prison. RP 309.

The defendant then told the court:

I feel 43 months is -- is -- is -- if you're -- I mean, it's your choice. It's standard range. I mean, it's low end. I would recommend -- *obviously I'd recommend the low end for myself.* But, I mean, if you -- if I -- if I get DOSA, I mean, I could try to do -- I mean, I would do DOSA or --

RP 311 (emphasis added).

The court then asked defense counsel if the defendant had had an opportunity to enter a plea of guilty and ask for a prison-based DOSA sentence rather than proceeding to trial. RP 311. Defense counsel indicated that the defendant had previously had an offer to plead guilty with an agreed DOSA recommendation, but that it had been “taken off the table” for reasons that he did not recall. RP 311. The court mentioned that she had recently sentenced one of Mr. Runge's co-defendants to a prison-based DOSA sentence, and that defendant may have had a worse record than Mr. Runge. RP 312.

Because the defendant had more than one criminal case pending and because none of his cases had evidentiary issues, the prosecutor stated he could not offer the defendant a prison-based DOSA based on internal office policy. RP 312-13. Mr. Runge also indicated that his attorney “didn't want

[him] to take [a prison-based DOSA]” and to take his case to trial instead.

RP 311.

Before pronouncing Mr. Runge’s sentence, the court observed:

there comes a point in time when the citizens of Spokane are just sick of this... Washington State has the highest property crime of any state in the United States. And I don’t know why that is, but you’re part of the problem...

You get to a certain point in time – and I’m not a big fan of prison and I’m not a big fan of jail. Doesn’t do anybody any good except that at least I know when I go to sleep tonight you’re not going to break into my car, right?

RP 314-315.

The court then sentenced Mr. Runge to 45 months of custody on the two identity thefts with 12 months of community custody on each count, and 29 months of custody on the possession of stolen property, with all sentences running concurrently. RP 317; CP 125-126. The court found that Mr. Runge was chemically dependent and ordered him to undergo an evaluation and chemical dependency treatment. RP 317; CP 123, 127.

The defendant timely appealed.

#### IV. ARGUMENT

##### A. DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY ELECTING TO RECOMMEND A LOW-END, STANDARD RANGE SENTENCE, RATHER THAN REQUESTING A DOSA SENTENCE.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 80 L.Ed.2d 674, 104 S.Ct 2052 (1984). To prevail on such a claim, the defendant must show his attorney was “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment’ and [counsel’s] errors were ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998), citing *Strickland*, 466 U.S. at 687. Judicial scrutiny of counsel's performance is highly deferential and requires that every effort be made to eliminate the “distorting effects of hindsight” to evaluate the conduct from “counsel's perspective at the time”; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound strategy. *Strickland*, 466 U.S. at 689.

The first element of an ineffective assistance of counsel claim is met by showing counsel's conduct fell below an objective standard of

reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). In this case, the defendant has not demonstrated that his counsel was either deficient by not requesting a DOSA sentence or that he was prejudiced by any deficiency.

A trial court has discretion to grant a DOSA sentence if certain qualifications are met. RCW 9.94A.660(1). A trial court even has the ability to make a sua sponte "motion" for a special drug offender sentencing alternative. RCW 9.94A.660(2). Where the statutory requirements for DOSA are met, however, the decision to authorize a DOSA sentence rests solely in the trial court's discretion. *See State v. Conners*, 90 Wn. App. 48, 53, 950 P.2d 519, *review denied*, 136 Wn.2d 1004 (1998). A trial court's decision to impose a standard range sentence instead of a DOSA sentence is not reviewable. *State v. Williams*, 112 Wn. App. 171, 177, 48 P.2d 354 (2002). Although a trial court's decision to impose a standard range sentence instead of DOSA is not reviewable, a trial court's *refusal* to exercise its discretion *at all* in determining whether the DOSA alternative is a viable option *is* subject to review. *See State v. Schloredt*, 97 Wn. App. 789, 801, 987 P.2d 647 (1999) (appellate review is

permissible where trial court refuses to exercise its discretion in imposing standard range sentence).

Here, Mr. Runge does not show that there was a reasonable probability that the trial court would have given him a DOSA sentence even if counsel had argued for it; thus, he fails to establish prejudice. The court inquired whether a DOSA had been considered by him and his attorney before proceeding to trial. Such an alternative had been considered, but counsel recommended against requesting a DOSA, and advised Mr. Runge to proceed to trial. RP 311.

After Mr. Runge was convicted of the instant offenses, the sentencing court clearly considered whether a DOSA sentence was appropriate for him, notwithstanding his attorney's recommendation of a low-end standard range sentence. The record reflects a lengthy conversation with the defendant about his lifestyle and choices, and his desire to live a crime free life. RP 305-311, 315-317. However, Defendant's lackluster indication that he "could try" or would do a DOSA if ordered by the court, likely did not inspire the court to do so. Additionally, the defendant's lack of acceptance of responsibility for his actions probably also weighed against the court sentencing him to a DOSA. RP 306-307 ("...they have no proof. They have – really have no proof of – of me stealing this card. They have no – no real proof of me going in there.") *See,*

*e.g., State v. Hender*, 180 Wn. App. 895, 900, 324 P.3d 780 (2014) (“The trial court emphasized Ronald Hender’s lack of accountability and refusal to be responsible for his conduct. Although many behavioral scientists disagree, many recognize that one who blames others for his wrongs is detached from reality and this detachment interferes in one’s ability to benefit from treatment... Thus, the trial court did not abuse its discretion when concluding that a DOSA sentence does not fit the predisposition of Ronald Hender”).

Ultimately, the court simply concluded that a standard range sentence was appropriate, a decision that rested solely in the court’s discretion, after having considered whether a DOSA would be appropriate. The defendant cannot show that the outcome of the proceeding would have been different even if his counsel had requested a DOSA sentence on his behalf. Mr. Runge’s failure to show prejudice defeats his ineffective assistance of counsel argument. *Petition of Riley*, 122 Wn.2d 772, 780, 863 P.2d 554 (1993) (“If the prejudice prong is not proved by defendant, then the court need not proceed to an examination of the performance prong”).

Likewise, defendant is not able to demonstrate deficient performance. There are a number of sound tactical reasons an attorney may not recommend a DOSA sentence for his client. Here, it was clear that the

defendant was facing other criminal charges, with a potential for significant exposure to additional incarceration. RP 305-307. Because a defendant is only entitled to two DOSA sentences every ten years,<sup>8</sup> it is probable that the attorney recommended against the defendant using both his DOSA sentences at the current time. Additionally, a DOSA sentence could potentially, if not probably, expose a defendant to *additional* incarceration time should he unsatisfactorily complete the alternative sentence;<sup>9</sup> counsel certainly would have wanted to avoid this danger for his client, who was an admitted heroin addict, RP 305, with family and friends who were negative influences, RP 308-310. After all, old habits die hard, especially 21-year heroin habits. Counsel explored the DOSA option with his client during the negotiations, RP 311, but purposefully did not request a DOSA sentence, a

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<sup>8</sup> RCW 9.94A.660.

<sup>9</sup> Here, defense counsel recommended a low-end standard range sentence of 43 months with 12 months of community custody. Defendant would likely be entitled to one-third off that sentence in good-time credits. RCW 9.94A.729. That yields a total sentence of 28 months of prison time plus 12 months of community custody.

If defense counsel had recommended a DOSA sentence, the defendant would have been required to serve 25 months in custody, and 25 months out of custody, given that half of his standard range was 50 months. RCW 9.94A.662. Although he would be entitled to good-time credits on this sentence as well, *see, e.g., In Re Personal Restraint of Taylor*, 122 Wn. App. 880, 95 P.3d 790 (2004), he would be subject to community custody for *twice the amount of time* with similar conditions of treatment, no criminal law violations, etc. If the defendant violated the terms of the community custody portion of his DOSA sentence he could face serving the balance of the original 50 month sentence in prison. RCW 9.94A.662(3). Even with good time, a sentence of 50 months would, at best, result in an actual sentence of 33 months, with a period of community custody to follow after its completion. *See* RCW 9.94A.660(8); 9.94A.662(1)(e).

clear tactical decision. Mr. Runge's claim fails because he cannot show either prong necessary to establish a claim of ineffective assistance of counsel.

**B. THE TRIAL COURT DID NOT MISCALCULATE THE DEFENDANT'S OFFENDER SCORE; DEFENDANT STIPULATED TO HIS PRIOR CONVICTIONS, AND HIS ATTORNEY WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT HIS CURRENT CONVICTIONS CONSTITUTED THE SAME COURSE OF CONDUCT.**

On appeal, the defendant alleges that his offender score was miscalculated by the trial court. However, he does not indicate what he believes his "correct" offender score to be. He simply alleges that the criminal conduct in counts 1 and 2 and counts 1 and 3 are the same criminal conduct<sup>10</sup> and should count as one offense.

A defendant's offender score calculation "shall be determined by using all other current and prior convictions." RCW 9.94A.589(1)(a). A defendant may appeal a standard range sentence if the court failed to follow proper procedures, including determination of the offender score calculation. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999). However, where an alleged sentencing error "involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial

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<sup>10</sup> Defendant's first assignment of error indicates that he believes count 1 and 2 and count 1 and 3 are the same criminal conduct. Appellant's Br. at 1. However, he later argues that counts 1 and 3 and counts 2 and 3 are the same criminal conduct. Appellant's Br. at 16. The State assumes that the latter argument is merely a typographical error.

court discretion,” the error may not be raised for the first time on appeal. *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002); *State v. Wilson*, 170 Wn.2d 682, 689, 244 P.3d 950 (2010). As discussed below, the defendant has waived his claim that the sentencing court improperly determined his offender score because he affirmatively acknowledged his prior convictions at sentencing, and did not request the court to exercise any discretion to determine whether his current offenses constitute the same criminal conduct.

1. Defendant’s Prior Convictions.

When calculating an offender score, the State has the burden of proving that prior convictions have not washed out. *Ford*, 137 Wn.2d at 479–80. The State also has the burden to prove the existence of prior convictions at sentencing by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). When a defendant affirmatively acknowledges at the sentencing hearing that the State’s criminal history and offender score calculations are correct, nothing more is necessary, and the proof requirement is met. *State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P.3d 816 (2007). However, the Supreme Court has emphasized “the need for an affirmative acknowledgement by the defendant of facts and information introduced for the purposes of sentencing” before

the State will be excused from its burden of providing criminal history. *State v. Mendoza*, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009).

The defendant's prior criminal history was stipulated to by both the defendant and his attorney. CP 118-120. The defendant had previously been convicted of nine felony charges, in addition to multiple misdemeanor offenses. *Id.* Each of those charges, except for the defendant's 1985 juvenile conviction for attempted second burglary, count toward the calculation of his offender score. Starting from the defendant's 1997 conviction for possession of stolen property, he has been unable to live "crime free" in the community for five years without an intervening criminal conviction; therefore, none of defendant's felony convictions since 1997 is subject to the "wash out" provisions of RCW 9.94A.525.<sup>11</sup> Excluding the defendant's current convictions, his offender score, therefore, was "8." On appeal, the defendant does not challenge that this prior criminal history is correct or that it does not count toward his offender score.

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<sup>11</sup> Under RCW 9.94A.525(2)(b), class B felony offenses "wash out" of a defendant's offender score "if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction."

Similarly, under RCW 9.94A.525(2)(c), class C felony offenses "wash out" of the defendant's offender score "if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction."

2. Defendant's Current Convictions.

The defendant *does* challenge the manner in which the court counted his “current offenses.” In the instant case, the defendant was convicted of three offenses: one count of second degree possession of stolen property and two counts of identity theft. CP 101-103. Offenses are the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a).

The Defendant has the burden of proving that current offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-540, 295 P.3d 219 (2013). Because the finding that two crimes constitute the same criminal conduct favors the defendant by lowering his presumed offender score, it is the defendant who must convince the sentencing court to exercise its discretion in his favor. *Id.*

The scheme – and the burden – could not be more straightforward: each of a defendant's convictions counts towards his offender score *unless* he convinces the court that they involved the same criminal intent, time, place and victim. The decision to grant or deny this modification is within the sound discretion of the trial court, and like other circumstances in which the movant invokes the discretion of

the trial court, the defendant bears the burden of production and persuasion.

*Id.*

As discussed above, where a defendant agrees to his history or fails to request the court to exercise its discretion in sentencing, any error in that regard is waived. *See, In Re Goodwin*, 146 Wn.2d at 874. More specifically, the failure of a defendant to argue at sentencing that two crimes constituted the same criminal conduct waives the argument on appeal. *State v. Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013), *review denied*, 182 Wn.2d 1022, 347 P.3d 458 (2015); *see also, In Re Personal Restraint of Shale*, 160 Wn.2d 489, 495, 158 P.3d 588 (2007); *State v. Nitsch*, 100 Wn. App. 512, 520-23, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000) (“failure to identify a factual dispute for the court’s resolution” and “failure to request an exercise of the court’s discretion” waived the challenge to defendant’s offender score).

Because the defendant did not challenge his offender score below, and did not argue that any of his current convictions were the same criminal conduct, that argument has been waived.

3. Defense Counsel Was Not Ineffective for Failing to Argue That Possession of Stolen Property and Identity Theft Constituted the Same Criminal Conduct.

The State agrees that the defendant may argue for the first time on appeal that his attorney was ineffective for failing to argue that his

convictions were the same criminal conduct.<sup>12</sup> Ineffective assistance of counsel claims may be raised for the first time on appeal because such claims are of constitutional magnitude. RAP 2.5; *Phuong*, 174 Wn. App. at 547.

As discussed above, the first element of an ineffective assistance of counsel claim is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Rice*, 118 Wn.2d at 888. In this case, the defendant has not demonstrated either element.

a. *Counsel was not deficient when he did not argue that the current offenses constituted the same criminal conduct.*

Offenses are the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). In this context, "intent" does not mean the particular statutory mens rea required for the crime. *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465, review denied, 178 Wn.2d 1012, 311 P.3d 26 (2013). Rather, it means the defendant's "objective criminal purpose in committing the crime." *Davis*, 174 Wn. App. at 642 (quoting

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<sup>12</sup> In his appeal, the defendant does not proffer any authority allowing the court to consider unpreserved errors for the first time on appeal.

*State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030, 793 P.2d 976 (1990) (“[F]or example, the intent of robbery is to acquire property, and the intent of attempted murder is to kill someone.”)). As part of this analysis, courts also look to whether one crime furthered another. *Graciano*, 176 Wn.2d at 540.

Courts narrowly construe the same criminal conduct rule and if any of the three elements is missing, each conviction must count separately in the calculation of the defendant’s offender score. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). This narrow construction disallows most claims that multiple offenses constitute the same criminal act. *Graciano*, 176 Wn.2d at 540, citing *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

The two crimes of which Mr. Runge was convicted do not share the same intent. Identity theft requires “the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1). Possession of stolen property requires knowledge that the property possessed is stolen and to withhold it from the true owner. RCW 9A.56.140. Thus, identity theft requires the intent to use the stolen property to further some other crime, here, theft and attempted theft from Maverik and Walmart. Possession of stolen property simply requires that the person know that he or she is in possession of a stolen access device and have the intent to withhold it from the true owner – it

does not require an intent to use the stolen property for any specific purpose. Because the objective criminal intent of the crimes is not the same, and the same criminal conduct rule is narrowly construed, it cannot be said that counsel was deficient in arguing same criminal conduct to the sentencing court. This is especially true, in light of the fact that even if the crimes had been determined to be the same criminal conduct, there would have been no change to the defendant's standard range sentence, as discussed below.

*b. The alleged "error" in calculating the defendant's offender score was not prejudicial.*

The failure to make a same criminal conduct argument is prejudicial if the defendant shows that with the argument, the sentencing court would have found that the crimes constituted the same criminal conduct and that the defendant's sentence would have differed. *See, State v. Beasley*, 126 Wn. App. 670, 686, 109 P.3d 849, *review denied*, 155 Wn.2d 1020, 124 P.3d 659 (2005).

A trial court's determination of whether two crimes constitute same criminal conduct is a highly discretionary decision that is subject to review for an abuse of discretion. *Graciano*, 176 Wn.2d at 536. Where the record adequately supports both the conclusion that the crimes were the same criminal conduct or were separate criminal conduct, the matter lies in the court's discretion. *Id.* At a minimum, as discussed above, it would be

logical for the court to have concluded, if the argument had been raised, that the conduct was different. Therefore, Defendant cannot demonstrate that but for the lack of argument by counsel that his crimes were the same conduct, the outcome of the proceeding would have been different.

Even assuming that counts 1 and 2 and counts 1 and 3 are the same criminal conduct pursuant to RCW 9.94A.589, each of those offenses would count against the other as current convictions. Thus, each conviction would add one point to the defendant's prior criminal history of "8" points, resulting in an offender score of 9 on each charge. The defendant was sentenced as a "9+." However, the statutory sentencing scheme does not provide for any standard range penalties for offenders with an offender score above "9." RCW 9.94A.510 (high end of offender score scale on sentencing grid is "9 or more"). Therefore, the defendant's standard range sentence with an offender score of "9" or above a "9" is the same.

Here, the defendant was sentenced within the standard range for an offender with a score of a nine or above. He did not receive an exceptional sentence as a result of his high offender score;<sup>13</sup> in fact, he did not even receive a high-end or mid-point sentence.<sup>14</sup> As such, the defendant is

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<sup>13</sup> See, RCW 9.94A.535(c)-(d).

<sup>14</sup> Defendant's standard range was 43-57 months. CP 124. The midpoint is 50 months. He was sentenced to 45 months, CP 125-126, only two months more than the low-end.

unable to demonstrate any resulting prejudice from the “alleged” miscalculation of his offender score.

## **V. CONCLUSION**

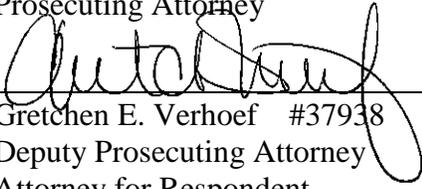
Defense counsel was not ineffective for recommending a low-end standard range sentence. The court considered sentencing the defendant to a DOSA sentence, and did not do so. The defendant cannot show deficient performance in light of the tactical reasons counsel may have requested a standard range sentence. Defendant, therefore, fails to demonstrate either prong of the Strickland test has been met.

Additionally, defendant stipulated to his offender score, and cannot now challenge his current convictions alleging they should have been counted as one, rather than two points, because he failed to raise that issue at sentencing. In any event, none of his current convictions are the same criminal course of conduct, and he is unable to demonstrate any prejudice resulting from the determination that his offender score was above a “9” rather than only “9” because the standard range is the same for either offender score.

The State respectfully requests that the court affirm the defendant's sentence.

Dated this 13 day of December, 2016.

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Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE OTTO RUNGE,

Appellant.

NO. 34371-5-III

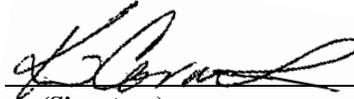
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 13, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Peter B. Tiller  
ptiller@tillerlaw.com

12/13/2016  
(Date)

Spokane, WA  
(Place)

  
(Signature)