

62456-3

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NO. 62456-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN H. RAWLS,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 31 AM 10:28

BRIEF OF RESPONDENT

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I. ISSUES

1. Was the evidence sufficient to prove the defendant committed the crime of Second Degree Identity Theft as charged in count XIV involving Ms. Pamela Hanson's identification and financial information?

2. Has the defendant established that he is entitled to a new trial for either prosecutorial misconduct or ineffective assistance of counsel when the prosecutor misstated the elements of the crime in his rebuttal closing and his attorney did not object?

3. Where the combined term of incarceration and community custody time could conceivably exceed the statutory maximum, but the court ordered that it shall not do so, is the sentence imposed in excess of the statutory maximum?

4. Does the sentence imposed violate the Separation of Powers Doctrine?

II. STATEMENT OF THE CASE

Between November 2007 and April 2008 Glenn Williams, David Bowlin, Amanda Brown, Nanette Retz, Tania Daniels, Diana Lamb, Rodney Rutt, Dung Nguyen, Edward Wallace, and William Moore, had their identity or financial information used without their permission. checks that had been made out to a payee by the

check owner had been altered to make the payee John Rawls, the defendant. Some of the altered checks also had the amount of check altered as well. 9-29-08 RP 43-46, 49-51, 55-58, 121-126; 9-30-08 RP 6-8, 50-53, 58-60, 110-111, 113-115; 10-1-08 RP 141-144.

Matthew Davidson is president of Clear Choice Sales. Schuyler Hadnot works for Boeing. A check was cashed using Mr. Hadnot's checking account number and Clear Choice Sales name. The payee of that check was the defendant. Neither Mr. Davidson nor Mr. Hadnot gave anyone permission to use or possess their identity or financial information. 9-30-08 RP 32-34, 36-38.

Pamela Hanson's name and account number was also printed on two checks that were made out to the defendant. The checks did not look like the checks Ms. Hanson used. Ms. Hanson had made the checks payable to credit card companies. They had been changed to be payable to the defendant. The defendant's driver's license number was printed on top of the check. No one including the defendant had permission to possess or use her identification or financial information. 9-30-08 RP 103-106.

The defendant presented checks in the name of David Bowlin, Nanette Retz, Tania Daniels, Clear Choice Sales, and

Diana Lamb to be cashed. 9-29-08 RP 62, 66, 76-77, 84, 129; 9-30-08 RP 11-12, 22-26, 41-45, 119-121.

On April 28, 2008 the defendant entered Boeing Employee Credit Union to present David Bowlin's check for cashing. Rachel Vaughn was working as a teller at the time and assisted the defendant with the check. Following the procedure outlined by the credit union for cashing non-member's checks she was alerted that the check had been stolen. Ms. Vaughn's supervisor called security who then called the police. 9-29-08 RP 62-66, 76-79.

Everett police officer Carman responded to the 911 call. Officer Carman observed a blue mini-van parked next to the front door at the credit union. The officer ran the license plates and learned the registered owner, Angela Garcia, had an outstanding warrant. A female identified as Angela Garcia was sitting in the front passenger seat of the van. Ms. Garcia and the defendant were arrested and the van was searched. Inside the van Officer Carman found a box that contained check blanks for making computer generated checks. The officer also found a court document with the defendant's name on it. The van was then impounded. 9-29-08 RP 95-101, 105, 110.

On April 30, 2008 Detective French executed a search warrant on the van. Detective French found a safe located in the

middle of the back seat, between the driver and front passenger seat. The detective found more court paperwork with the defendant's name on it and several checks in the safe. Those checks included a check in the names of Rodney Rutt, Dung Nguyen, and Edward Wallace. 9-30-08 RP 75, 87-89.

The defendant was charged with 14 counts of Second Degree Identity Theft and one count of Possession of a Stolen Firearm. 1 CP 126-128.¹ At trial the defendant testified that he received the personal checks at issue as payment from a third person who the defendant hired to sell some personal items. Ms. Hanson's check was one of the checks he got and tried to cash in this manner. 10-1-08 RP 148-152, 167, 177-178.

The defendant was convicted of counts 1, 3-7, and 9-14. The defendant was sentenced to serve 50 months on each count, with a community custody term or 9-18 months, all counts to run concurrently. The court ordered that the combined term of community custody and confinement shall not exceed the statutory maximum. 1 CP 20, 26-27.

¹ The trial court dismissed the firearms count. 9-30-08 RP 159-160.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT OF COUNT XIV INVOLVING PAMELA HANSEN'S IDENTITY.

In order to convict the defendant of Second Degree Identity Theft as charged in Count XIV of the Information the State was required to prove beyond a reasonable doubt that the defendant, on or about the 20th of October 2007, knowingly obtained, possessed, used, or transferred a means of identification or financial information of Pamela Hanson, and he did so with intent to commit, or to aid or abet any crime, and the acts occurred in the State of Washington. RCW 9.35.020(1) and (3), 1 CP 70. The defendant contends the evidence was insufficient to prove that he possessed a means of identification or financial information belonging to Ms. Hanson.

Evidence is sufficient if, after viewing the evidence in a light most favorable to the State any rational trier of fact could find the defendant guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), abrogated on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). When a defendant challenges the sufficiency of the evidence after being convicted he admits the truth of the State's evidence and all reasonable inferences that can be drawn

there from. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in favor of the State, and most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). It is not necessary that the reviewing court be convinced beyond a reasonable doubt. State v. Smith, 31 Wn. App. 226, 228, 640 P.2d 25 (1982).

The jury was instructed that in considering whether any proposition had been proved it should consider all of the evidence introduced by all parties bearing on the question. "Every party is entitled to the benefit of all of the evidence whether produced by that party or by another party." 1 CP 52. The State produced evidence of two checks written to the defendant on Ms. Hanson's account. 9-30-08 RP 103-104, Ex. 34, 35. The defendant testified that he tried to cash Ms. Hanson's check. He verified the check was made out to him, and that it contained his signature on it. 10-1-08 RP 177-178. If the defendant signed the check and tried to cash it he necessarily possessed it. The evidence was therefore sufficient to convict him of the charge.

B. THE PROSECUTOR'S CLOSING ARGUMENT DID NOT AFFECT THE JURY'S VERDICT. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL.

Defense counsel argued in closing argument that the State had not proved the defendant possessed the checks located in the

locked container in Ms. Garcia's van. Counsel also argued the two main issues for the jury to consider was the elements of knowledge and intent. 10-1-08 RP 221-22, 225, 227-28. In response the prosecutor argued the defendant was charged with possessing financial or identification information with intent to commit or aid in the commission of a crime such as theft. "Now he's not accused of knowingly possessing it." 10-1-08 RP 230. The defendant asserts the prosecutor's argument is grounds for a new trial on two bases; (1) it constitutes prosecutorial misconduct, and (2) because his attorney did not object to the argument he received ineffective assistance of counsel.

1. Prosecutorial Error.

When a defendant claims the prosecutor's argument is improper he bears the burden of establishing the impropriety of the prosecutor's comments as well as their prejudicial effect. A prosecutor's remarks during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). Prejudice resulting from a prosecutor's closing remarks is established only when "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Carver, 122 Wn. App. 300, 306,

93 P.3d 947 (2004). Failure to object to an allegedly improper argument waives the issue for review unless the comment is so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Classen, 143 Wn. App. 45, 64, 176 P.3d 582, review denied, 164 Wn.2d 1016, 195 P.3d 88 (2008).

Here the defense did not object to the prosecutor's argument that the State need only prove possession of a victim's financial or identification information. The jury instructions clearly told jurors that one element of the offense was knowingly obtains, possesses, uses or transfers a means of identification or financial information of another person, with intent to commit, or aid or abet, any crime. 1 CP 58 (emphasis added). The prosecutor's statement that the defendant was not accused of knowingly possessing those things was in error.

The error is similar to the one committed by the prosecutor in Classen, supra. There the defendant was charged with first degree murder. The Court gave lesser included instructions for first and second degree manslaughter. The prosecutor argued in closing that "manslaughter was an accident" and the defendant's actions in killing his wife were no accident. Classen, 143 Wn. App. at 53. The Court held the statement was not so flagrant and ill-intentioned

that it could not have been cured by an instruction. Classen, 143 Wn. App. at 64.

Like the argument in Classen, had the defense timely objected the court could have cured any possible prejudice. The comment was not designed to inflame the passions of the jury. Rather it was a mistake regarding what the charge entailed. Had the defense objected the court could have cured the mistake by instructing the jury that the court's instructions were the standard by which to measure the defendant's guilt, and that the jury had been instructed that knowing possession was an element of the offense. The defendant has thus failed to preserve the issue of prosecutorial error for review.

Even if the Court were to consider the issue, the defendant has failed to establish resulting prejudice. A defendant is prejudiced by a prosecutor's erroneous argument if there is a substantial likelihood that the error affected the verdict. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). When considering whether prejudice has been established the Court looks to the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. State v.

Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008), cert. denied, ___ U.S. ___, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).

In Classen the Court went on to state that even if it were to address the second prong of the analysis the defendant had failed to establish the necessary prejudice to entitle him to a new trial. The court had correctly instructed the jury on the law, and there was no evidence, such as a jury question, that suggested the jury considered the allegedly improper remark during deliberations. Classen, 143 Wn. App. at 65 n. 13. The Court has also found no prejudice when the prosecutor did not dwell on the improper comment, and the court had instructed the jury to disregard any argument that was not supported by the law given to the jury by the judge. State v. Rice, 110 Wn.2d 577, 602, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 707 (1989).

It is not substantially likely that the prosecutor's limited argument affected the verdict here. Although it was incorrect to state the defendant was not charged with knowing possession, the prosecutor did not dwell on this subject. The court instructed the jury on the elements of the offense including the knowledge element. 1 CP 58-70. The court further instructed the jury that the attorney's remarks, statements and argument should be

disregarded if it was not supported by the evidence or the law as stated by the court. 1 CP 52. Jurors are presumed to follow the court's instructions. Classen, 143 Wn. App. at 65, n.13. The jurors posed no questions during deliberations. Thus there is no evidence jurors may have relied on the prosecutor's misstatement regarding the elements of the offense. The defendant has not shown that he was prejudiced by the prosecutor's argument so that he is entitled to a new trial.

2. Ineffective Assistance Of Counsel.

To establish ineffective assistance of counsel the defendant must show that (1) his attorney's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances and (2) that he was prejudiced. A defendant is prejudiced by counsel's conduct when there is a reasonable probability that the result of the proceeding would be different. State v. McFarland, 127 Wn.2d 322, 334-35, 889 P.2d 1251 (1995). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2552, 2068, 80 L.Ed.2d 674 (1984).

Both prongs must be met. If the defendant fails to establish either prong the Court does not consider the remaining prong.

State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Here the defendant fails to show he was prejudiced by counsel's failure to object to the erroneous statement for the same reasons stated above. It was a brief comment in rebuttal closing. The trial court correctly instructed the jury on the law, and also instructed the jury to disregard any misstatements of the law made by counsel. There is no evidence the jury had any difficulty in following the court's instructions.

In addition, the evidence showed the defendant did knowingly possess the checks. The defendant testified that all of the checks in issue were received from Jesse Quincy when he sold personal property through Quincy. 10-1-08 RP 148-153. Although the defendant testified that he did not know how the checks in the blue minivan got there on the date he was arrested, he did not reverse his original testimony that they were part payment received from Quincy. As such he had possession of the checks at some time.

Whether the defendant knowingly possessed the checks was not the central issue at trial as the defendant now claims. BOA at 16. Rather the issue was whether he knew the checks were fraudulent, and therefore possessed the checks with intent to

commit a crime. The defendant testified that each check came from Jesse Quincy with a notation on a post it note attached to the checks informing him what item the check was payment for. He specifically testified that he did not go into the bank knowing the checks had been forged. 10-1-08 RP 156.

The defendant's assertion that he was prejudiced by counsel's failure to object because he could raise the issue only in the context of the ineffective assistance of counsel claim should also be rejected. He did raise the issue as prosecutorial misconduct as well. If he really could only raise the issue in the context of ineffective assistance of counsel he in effect is admitting that the prosecutor's argument was not so flagrant or ill intentioned that an instruction could have cured any prejudice to him, and therefore that he waived that issue.

C. THE COURT CORRECTLY SENTENCED THE DEFENDANT.

Second degree identity theft is a class C felony which carries a maximum penalty of 60 months. RCW 9A.20.020(3), RCW 9A.20.021(1)(c). The defendant was sentenced to serve 50 months confinement on each count to run concurrently and a term of 9 to 18 months of community custody. In addition the court ordered "the combined term of community placement or community custody and confinement shall not exceed the statutory maximum." 1 CP 26-27.

1. The Sentence Imposed Does Not Exceed The Statutory Maximum, Nor Is It An Indeterminate Sentence.

The defendant contends his sentence is illegal because it exceeds the statutory maximum penalty and it is not a determinate sentence. He relies on State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008). In Linerud this Court held a sentence which included a period of confinement and a community custody range which was greater than that statutory maximum was invalid on its face. It violated RCW 9.94A.505(5) and was indeterminate because it left to the Department of Corrections the responsibility for assuring the combination of confinement and community custody did not exceed the statutory maximum. Linerud, 147 Wn. App. at 950.

After the defendant filed his opening brief in this appeal the Supreme Court decided In re Brooks, ___ Wn.2d ___, ___ P.3d ___ (case no. 90704-3, 2009). The Court rejected the reasoning in Linerud and held that where a judgment and sentence orders that the total term of confinement and community custody shall not exceed the statutory maximum, the court has ordered a determinate sentence which does not exceed the statutory maximum. Thus, the trial court did not err when it sentenced the defendant as it did in this case.

2. The Sentence Does Not Violate The Separation Of Powers Doctrine.

The defendant also asserts that the sentence in this case violated the separation of powers doctrine.² While there is no separation of powers clause in the Washington Constitution, the division of government into three branches has historically been presumed to give rise to a separation of powers doctrine. Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The separation of powers doctrine is designed to prevent one branch of the government from encroaching on the fundamental functions of another branch. State v. Moreno, 147 Wn.2d 500, 505, 48 P.3d 265 (2002).

The defendant contends that the Separation of Powers Doctrine was violated because the court imposed a sentence in excess of its statutory authority, and then delegated to the Department of Corrections the authority to fix the actual term. However, under Brooks, the sentence in this case did not exceed the statutory maximum because the court specifically directed that it not do so. As in Brooks, the department need only look to the terms of the judgment and sentence to determine when the

² This issue was raised but not decided in both Linerud and Brooks.

defendant must be discharged from either total confinement or community custody.

The department does not fix the actual term of confinement. It only determines the amount of earned early release the offender should be awarded, a function specifically given to it by the Legislature. RCW 9.94A.715(4), RCW 9.94A.728. Fixing punishment for crimes is a legislative function. State v. Thorne, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). Thus, the Separation of Powers Doctrine was not violated by the sentence imposed in this case where the department calculates an award of earned early release time, and then applies it to the terms of the judgment and sentence to determine when the defendant is released from confinement or community custody.

IV. CONCLUSION

The evidence was sufficient to convict the defendant of count XIV involving the unlawful possession of Pamela Hanson's identity or financial information because the defendant admitted he possessed it. The prosecutor's misstatement regarding the knowledge element of Second Degree Identity Theft did not prejudice the defendant because the court properly instructed the jury on the elements of the offense and instructed the jury to disregard any statement by the attorneys which was not supported

by the law as given to them by the court. The sentence imposed was lawful. For the forgoing reasons the State requests that the Court affirmed the defendant's conviction and sentence.

Respectfully submitted on July 29, 2009.

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