

66078-1

66078-1

NO. 66078-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JACOB LIN,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL J. FOX

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Should this Court follow current caselaw that holds that the "unit of prosecution" for theft is each unauthorized withdrawal or discrete taking, and reject the defendant's claim that the unit of prosecution for theft is dependent upon a defendant's "criminal impulses?"

2. The defendant asserts that the jury instructions for counts 24, 25, 27 and 28 created a jury unanimity issue because the "to convict" instructions did not include specific language as articulated in State v. Borsheim.¹ Should this Court reject the defendant's claim because the instructions do, in fact, include the required language?

3. For the first time on appeal the defendant contests his offender score. Should this Court reject the defendant's offender score challenge because he agreed to his offender score below and because his offender score was properly calculated?

4. The defendant contends that there was a jury instruction error involving the charged aggravating circumstances. While the jury found the existence of the aggravating circumstances, the sentencing court opted not to impose an exceptional sentence.

¹ 140 Wn. App. 357, 165 P.3d 417 (2007).

Should this Court reject the defendant's argument that the underlying charges must be dismissed when there is an error in the jury instructions regarding the aggravating circumstances?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with 1 count of third-degree theft, 17 counts of second-degree theft, and 11 counts of first-degree theft. CP 10-29. A jury convicted the defendant as charged. CP 30-55, 57, 59, 61. The court imposed a total sentence of 43 months confinement.² CP 152-60.

2. SUBSTANTIVE FACTS

Chunshu "Linette" Zhang is the sole owner of a small import/export business. 1RP³ 133-35. Usually she has just two employees, herself and a personal assistant. 1RP 135.

In February of 2008, Zhang hired the defendant as her personal assistant. 1RP 136. The defendant had applied through

² The 43 months was a low-end standard range sentence for first-degree theft. All other counts were served concurrently--with equal or lesser terms of confinement. CP 152-63.

³ The verbatim report of proceedings is cited as: 1RP--6/1, 6/2, 6/3, & 6/4/10; 2RP--6/4, 6/7, 6/8 & 7/30/10; 3RP--7/30 & 9/3/10 (the State ordered transcription of opening statement--it has not yet arrived).

an online posting. 1RP 136. As part of his duties, the defendant was responsible for receiving billings, presenting the bills to Zhang, and then sending out the checks that Zhang would print on the computer and sign. 1RP 138. The defendant did not have authority to sign checks and did not have authority to use the business credit cards. 1RP 138-39.

In mid June, after returning from a business trip to China, Zhang noticed that there were a couple of large dollar amounts listed on the business credit card statement that she knew were not expenditures she had made. 1RP 146-47. It was ultimately discovered that "convenience checks" had been drawn and cashed against the account.⁴ 1RP 147.

On June 18th, Zhang asked the defendant about the checks. 1RP 149. The defendant professed that he needed the money because his mother was ill. 1RP 149. Zhang told the defendant that if he had just told her about the problem, she would have lent him some money, but that he could not forge her signature and take company money. 1RP 149. The defendant said he would pay the money back within 24 hours. 1RP 149. However, after the

⁴ Convenience checks are blank checks sent by credit card companies to customers that can be written for cash and debited against the credit card account. 2RP 217. Zhang never used convenience checks. 1RP 147.

defendant dropped off a token amount of money, Zhang never saw the defendant again. 1RP 151. Zhang soon discovered the full extent of the defendant's criminal conduct.

While it took a great deal of effort because the defendant had erased everything on the company computer, Zhang discovered that the defendant had been writing and forging checks for some time and that he had changed the mailing address for the company credit cards to a PO box near his home in Redmond. 1RP 154-54, 168-69. In fact, the defendant continued to forge checks against the company account even after having been confronted by Zhang and the police.⁵ See Exhibit 67.

At trial, 29 checks were introduced, with the defendant having forged Zhang's signature on each and every one of them. 1RP 157-67; Exhibits 4 through 32. Each forged check corresponded to one of the 29 charged counts. See Exhibit 67; 2RP 279-80.

⁵ Bellevue Police Officer John Nourse confronted the defendant on June 30 and asked him about the forged checks. 2RP 244-45. The defendant told Officer Nourse that it was just a big misunderstanding. 2RP 245. The defendant was booked and released per department policy for property crimes. 2RP 254-55. It was discovered shortly thereafter that the defendant was continuing to forge and cash checks against Zhang's business. 2RP 256.

The defendant testified at trial, admitted that he forged Zhang's signature and cashed the checks, but claimed that he did so for a valid reason; he needed to pay the company bills. 2RP 287. However, the defendant was actually depositing the checks into his own personal account. 2RP 291. The defendant had an explanation for this. He claimed that each time he deposited company money into his personal account he immediately obtained a money order and sent the money order to the company vendors to pay the bills. 2RP 291-92, 317. The defendant claimed he conducted these transactions in this unusual manner because he did not feel comfortable sending checks to vendors with forged signatures, and that sending money orders was more secure. 2RP 292. The defendant did not provide any evidence to support his claim.

On cross-examination, the prosecutor asked the defendant if his story was true why it was that his bank records showed that virtually every time he deposited one of the forged checks into his account, he obtained cash back. 2RP 322-23. Shortly thereafter the court took a brief recess. 2RP 328. However, when trial

resumed, the defendant failed to return to the courtroom.⁶

2RP 328. By stipulation, the jury was informed that in 2005 the defendant had been convicted of three counts of theft in the first degree and one count of theft in the second degree. 2RP 314.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. **THE "UNIT OF PROSECUTION" FOR THEFT DOES NOT DEPEND ON A DEFENDANT'S "CRIMINAL IMPULSES."**

The defendant contends that all of his convictions, save two, must be vacated because they constitute but two "units of prosecution," one before being confronted by Zhang and the police and one after. The defendant's claim must be rejected. This issue is governed by settled law. What constitutes a "unit of prosecution" is a pure question of legislative intent. This Court has previously ruled that the unit of prosecution for theft is each discrete taking.

See State v. Kinneman, 120 Wn. App. 327, 338, 84 P.3d 882

(2003), rev. denied, 152 Wn.2d 1022 (2004).

⁶ The court issued a bench warrant for the defendant's arrest. With the court finding that the defendant voluntarily absented himself from the proceedings, the trial continued in the defendant's absence. The defendant was picked up on the warrant after the trial had concluded. 2RP 331, 341; 3RP 406.

The double jeopardy clause of the United States Constitution guarantees that no person shall "be subject for the same offense to twice be put in jeopardy of life or limb." U.S. Const. amend. V. The Washington Constitution offers the same protection. Const. art. I, § 9; State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

When a defendant is convicted of violating one statute multiple times, the proper double jeopardy inquiry is what "unit of prosecution" has the legislature intended as the punishable act under the specific criminal statute. State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998); Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). When the legislature defines the scope of a criminal act, double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime, or "unit of prosecution." Adel, 136 Wn.2d at 634. Thus, the question here is what act or course of conduct has the legislature defined as the punishable act for theft.

In determining the unit of prosecution for a particular statute, the court must first examine the language of the statute at issue. State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005) (each possession of an access device is one "unit of prosecution," even

where the defendant possesses multiple access devices at one time).

In pertinent part, a "person is guilty of theft in the first degree if he or she commits theft of property or services which exceed(s) one thousand five hundred dollars in value." See CP 72; RCW 9A.56.030(1)(a).⁷

In pertinent part, a "person is guilty of theft in the second degree if he or she commits theft of property or services which exceed(s) two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value." CP 73; RCW 9A.56.040(1)(a).⁸

In pertinent part, a "person is guilty of theft in the third degree if he or she commits theft of property or services which do not exceed two hundred fifty dollars in value." CP 74; RCW 9A.56.050(1)(a).⁹

⁷ The legislature has since increased the dollar amount for theft in the first degree to exceeding \$5000. See Laws 2009, ch. 431, § 7.

⁸ The legislature has since increased the dollar amount for theft in the second degree to exceeding \$750. See Laws 2009, ch. 431, § 8.

⁹ The legislature has since increased the dollar amount for theft in the third degree to not exceeding \$750. See Laws 2009, ch. 431, § 9.

As pertinent here, "theft" means "to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof." CP 105; RCW 9A.56.020(1)(a).¹⁰

The principal focus in determining whether the legislature intended multiple acts to constitute but one crime is whether the legislature intended the punishable offense to be a continuing offense. Ex parte Snow, 120 U.S. 274, 7 S. Ct. 556, 30 L. Ed. 658 (1887). This is in contrast to statutes aimed at offenses that can be committed *uno actu*, or in a single act. Snow, 120 U.S. at 286.

In Snow, the defendant was convicted of three counts of bigamy, each count identical in all respects except that each count covered a different time span that was part of a continuous period of time. Snow, at 276. The Court noted that bigamy is "inherently a continuous offense, having duration, and not an offense consisting of an isolated act." Snow, at 281. Because bigamy is a continuing offense, the Court held that the defendant committed but one offense. The Court specifically distinguished between statutes

¹⁰ Although not charged here, theft can also be committed by two other alternative means. Specifically, theft also means "[b]y color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services," or "[t]o appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.050(1)(b) and (c).

aimed at offenses continuous in character versus statutes violated *uno actu*. Snow, at 286.

In contrast, in Ebeling v. Morgan, 237 U.S. 625, 35 S. Ct. 710, 59 L. Ed. 1151 (1915), the Court found that Ebeling's six counts of feloniously injuring a mail bag did not constitute one continuous offense.¹¹ The Court noted that each offense was complete irrespective of any attack upon any other mail bag. Ebeling, 237 U.S. at 629. The Court distinguished "continuous offenses where the crime is necessarily, and because of its nature, a single one, though committed over a period of time." Ebeling, at 629-30.

Consistent with the rationale of Snow and Ebeling, this Court has previously held that the unit of prosecution for theft is "each unauthorized withdrawal" or "discrete" act of theft. Kinneman, 120 Wn. App. at 338. Kinneman, a lawyer, made 67 withdrawals from his IOLTA account and diverted the proceeds to his own use. He was charged and convicted of 28 counts of theft in the first degree and 39 counts of theft in the second degree. This Court held that "[t]he State had the discretionary authority to charge Kinneman with

¹¹ At a single time and place (upon entry into a postal railcar), Ebeling cut open six separate mail pouches with the intent to steal the contents therein. Ebeling, 237 US. at 627.

a separate count of theft for each discrete, unauthorized withdrawal he made from his IOLTA account." Kinneman, 120 Wn. App. at 338.

The legislature has not seen fit to amend the theft statute as a result of Kinneman. In other words, the legislature is in agreement with this Court's unit of prosecution result. See State v. Edwards, 84 Wn. App. 5, 12-13, 924 P.2d 397 (1996) (the legislature's failure to amend a law in response to a court's interpretation implies agreement with that interpretation), rev. denied 131 Wn.2d 1016 (1997); Soproni v. Polygon Apartment Partners, 137 Wn.2d 319 n.3, 971 P.2d 500 (1999) (the legislature is presumed to be aware of judicial interpretations of legislation and the failure to amend a law following a judicial decision interpreting a statute indicates legislative acquiescence in that decision).

Kinneman is directly on point. Both Kinneman and Lin made discrete takings of funds belonging to others. Kinneman made separate withdrawals of funds belonging to others from his IOLTA account. Lin wrote checks to himself from the company account and deposited checks made out to the business into his own personal account, in both cases for his own personal use. As this Court has previously held, the legislature intended that each

separate unauthorized taking constitutes a single unit of prosecution.

The defendant's reliance on State v. Turner, 102 Wn. App. 202, 6 P.3d 1226 (2000), rev denied, 143 Wn.2d 1009 (2001) is misplaced. As this Court recognized in Kinneman, the court in Turner was not asked to determine what separate acts constituted a unit of prosecution under the theft statute, rather, the court in Turner was asked to determine whether the different alternative means of committing theft--the three methods listed in RCW 9A.56.050--constituted separate units of prosecution. See Kinneman, at 335-36. They do not. Turner, 102 Wn. App. at 212. The issue raised and decided in Turner has no application here.

The defendant's claim that a unit of prosecution under the theft statutes depends on a defendant's "criminal impulses" or "course of conduct" is also unavailing. What constitutes a unit of prosecution is a question of law, a pure question of legislative intent. See Adel, at 633-34 (what constitutes a unit of prosecution is a question of legislative intent). The case relied on by the defendant, State v. Vining,¹² involves the concept of a "continuing

¹² 2 Wn. App. 802, 472 P.2d 564 (1970).

course of conduct," a charging and jury instruction issue that is based on the facts of a particular case--not legislative intent.

The defendant cites the following quote from Vining: "If each taking is the result of a separate, independent criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking." Def. br. at 12-13. What the defendant leaves out is the very next sentence from the court, "[t]his is a factual question which must be determined by the jury." Vining, 2 Wn. App. at 809. Vining is not a double jeopardy unit of prosecution case. In fact, those terms do not even appear in the decision.

Rather, when several acts constitute a "continuing course of conduct," the State may choose to charge a single count--the acts constituting a single act for charging and jury instructions purposes. See State v. Handran, 113 Wn.2d 11, 17-18, 775 P.2d 453 (1989). This concept involves a factual determination that is reviewed in a "common sense" manner based on the time frame the acts occur, the criminal motivation involved, the number of victims and the place the acts occurred. Id. A few examples will prove illustrative.

In State v. Marko,¹³ the court found that multiple separate threats made over an hour and a half time period constituted a single continuing act of intimidating a witness. In Handran, supra, the Supreme Court held that the defendant's unwanted kissing of the victim, and his later striking of her in the face, was a continuous course of assault. In both of the above cases, the reviewing courts agreed that the "acts," although multiple, really constituted but a single continuing course of conduct, and thus no Petrich¹⁴ or unanimity instruction was required. This is in contrast to the unit of prosecution concept that goes to "the very power of the State to bring the defendant into court to answer the charge." State v. Knight, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008).

Theft is a choate crime, complete when a single taking occurs. Under this Court's previous rulings, the defendant's convictions do not violate principles of double jeopardy.

¹³ 107 Wn. App. 215, 220-21, 27 P.3d 228 (2001).

¹⁴ Referring to State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

2. THE DEFENDANT'S CLAIM THAT THE JURY INSTRUCTIONS CREATED A JURY UNANIMITY PROBLEM IS INCORRECT.

The defendant asserts that the jury instructions created a Borsheim or jury unanimity problem. He is wrong. Contrary to his claim, the jury instructions included the specific language that this Court has repeatedly held eliminates any "Borsheim" or jury unanimity issue.

In State v. Borsheim, *supra*, this Court held that where multiple counts are alleged to have occurred within the same charging period, an instruction that the jury must find "separate and distinct" acts for convictions on each count is required. If the jury is not so instructed, there is the possibility that the jury may not be unanimous as to which act constitutes a particular charged count of criminal conduct. Id. at 365. However, if the jury is instructed that it must find "separate and distinct" acts for each count, there is no unanimity issue. State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788, *rev. denied*, 130 Wn.2d 1013 (1996).

Here, counts 24 and 25 listed the same charging date. CP 25-26. The same is true for counts 27 and 28.¹⁵ CP 27-28. Without quoting the jury instructions, the defendant claims that "the instructions failed to inform the jury that each count was required to be based on an act separate and distinct from the other counts." Def. br. at 2. The defendant is wrong.

For count 24, the jury was instructed as follows:

To convict the defendant of the crime of Theft in the Second Degree, as charged in Count XXIV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during the period of time intervening between June 10, 2008 and July 2, 2008, the defendant wrongfully obtained or exerted unauthorized control over property of another or the value thereof, ***separate and distinct from the property in all other counts***;
- (2) That the property exceeded \$250 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That this act occurred in the State of Washington.

CP 99. The jury was similarly instructed on counts 25, 27 and 28.

CP 100, 102-03. Thus, contrary to the defendant's assertion, the

¹⁵ While the dates were the same, the charging document did list the specific check supporting each count by check number, the amount of the check, and the account the check was drawn. CP 25-28.

jury was properly instructed and his unanimity claim is without merit.¹⁶

3. THE DEFENDANT'S OFFENDER SCORE WAS PROPERLY CALCULATED.

The defendant contends that his offender score for his current convictions should be a 1, that all the thefts he committed before being contacted by the police constitute the "same criminal conduct" for scoring purposes, and all the thefts he committed after being contacted by the police constitute the "same criminal conduct" for scoring purposes.¹⁷ This claim should be rejected for two reasons. By agreeing to his offender score below, this claim

¹⁶ In addition, this issue is not properly before the court. The defendant specifically agreed to the instructions given and thus invited any error. 2RP 274; State v. Corbett, 158 Wn. App. 576, 591-93, 242 P.3d 52 (2010) (invited error doctrine precludes review even as to alleged constitutional error).

Further, there were 29 counts, each corresponding to a specific unauthorized check referenced by check number, amount and financial institution. See CP 10-29. There were also 29 exhibits--29 checks corresponding directly with each of the 29 counts. See Exhibits 4 through 32. If that weren't enough, exhibit 67 listed each count by number and indicated which check corresponded to each count. See Exhibit 67. There was no possible confusion or unanimity issue here. See State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (citing State v. Bland, 71 Wn. App. 345, 351, 860 P.2d 1046 (1993)) (the evidence and circumstances at trial can show a clear election); see also State v. Bodenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009) (in situations where the jury must believe all acts occurred if they believed one or more of the acts occurred, any Petrich error is harmless).

¹⁷ The defendant also has four prior felony convictions for theft. CP 159. Thus, under the defense theory, his total offender score would be a 5.

has been waived. In any event, the defendant's application of the test for determining whether crimes constitute the "same criminal conduct" for scoring purposes is misguided.

a. The Issue Has Been Waived.

If two current offenses encompass the "same criminal conduct," they count as one point in calculating a defendant's offender score. RCW 9.94A.589(1)(a). Crimes are considered the "same criminal conduct" if the trial court determines the crimes require the same criminal intent, are committed at the same time, the same place, and involve the same victim. RCW 9.94A.589(1)(a); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

A defendant can waive a same criminal conduct claim. The Supreme Court has stated "that waiver can be found where the alleged [sentencing] error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." In re Shale, 160 Wn.2d 489, 495, 158 P.3d 588 (2007) (citing In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)).

In Shale, the defendant was informed when he pled guilty that the State calculated his offender score as a nine. Shale, 160

Wn.2d at 495. Shale argued on appeal that the sentencing court erroneously failed to treat some of his crimes as the "same criminal conduct," even though he never asked the sentencing court to make this part factual, part discretionary, determination. Id. The Supreme Court rejected Shale's claim that he could raise a "same criminal conduct" claim for the first time on appeal. Shale, at 495; see also State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000) (cited with approval in Shale at 494-95, the same criminal conduct inquiry involves factual determinations and the exercise of discretion, and the "failure to identify a factual dispute for the court's resolution and... [the] failure to request an exercise of the court's discretion," waives the challenge to the offender score); and State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (Jackson's failure to raise a same criminal conduct claim at his sentencing constitutes waiver of the right to appeal), rev. denied, 167 Wn.2d 1007 (2009).

Shale, Nitsch, and Jackson are directly on point. A defendant may not raise a same criminal conduct claim on appeal when he either agrees to his offender score below or does not alert the sentencing court to the factual discretionary issues involved. That is exactly what occurred here. The defendant never asked the

sentencing court to make a "same criminal conduct" determination. In fact, he specifically agreed that the State's calculation of his offender score was correct.

At his sentencing hearing, the State provided the court with a sentencing document with the defendant's offender score and standard range calculated. CP 267-96; also CP 128-33. The scoring forms listed the defendant's offender score for each count as 31; one point each for his four prior theft convictions (4 points), and one point each for his other 27 current theft convictions (27 points). Id. The defendant did not dispute the State's calculation of his offender score. In fact, he agreed to it. In his sentencing memorandum, he claimed that the high offender score was due to the way he was charged and that if the State had charged him with forgeries instead of first-degree theft charges, "the defendant would have the same offender score and a guideline range of twenty two to twenty nine months."¹⁸ CP 134; also 3RP 435-36.

¹⁸ Forgery is a level I offense with a maximum standard range of 22 to 29 months--once a defendant's offender score reaches 9. See RCW 9.94A.515; RCW 9.94A.510. First-degree theft is a level II offense with a maximum standard range of 43 to 57 months. Id.

Contrary to the defendant's assertion on appeal, he never asked the trial court to find that his crimes were the "same criminal conduct" for scoring purposes. The only issue the defendant raised below regarding his offender score was his claim that once a person reached 9 on the sentencing grid--the point at which you reach the maximum possible standard range, the offender score on the Judgment and Sentence should be listed as a 9. 3RP 447. The court disagreed and listed the offender score as 31 in the Judgment and Sentence. 3RP 447; CP 153. Thus, the defendant's non-constitutional factual argument that his crimes constitute the same criminal conduct is waived.

In an attempt to avoid waiver, the defendant claims his trial counsel was constitutionally ineffective for failing to raise this single issue. The defendant should not be able to raise a waived issue merely by recasting a single issue under the pretext of a claim of ineffective assistance of counsel.

In any event, to establish ineffective assistance of counsel, a defendant must prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The first element is met by showing that counsel's conduct

fell below an objective standard of reasonableness based on the entire record. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceedings would have been different. Failure under either prong ends the inquiry. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

In making this determination, a reviewing court will not "second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim." In re Stenson, 142 Wn.2d 710, 733-34, 16 P.3d 1 (2001) (citing Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)). Nothing in the Constitution requires such a rigorous standard. Id.; see also City of Tacoma v. Durham, 95 Wn. App. 876, 882, 978 P.2d 514 (1999) ("Just as an appellate lawyer is not considered ineffective for failing to raise every conceivable non-frivolous claim of error, a trial lawyer cannot be faulted for failing to make a record of every such allegation"). Simply the fact that an issue could be determined in a defendant's favor is not enough. The defendant fails to show that the failure of trial counsel to raise a single issue, a factual issue that is subject to the court's discretion, can constitute ineffective assistance of counsel.

**b. The Defendant's Convictions Do Not
Constitute The Same Criminal Conduct.**

Even if the defendant could raise this issue, he cannot show that it would have been an abuse of discretion for the trial court to find his convictions did not constitute the same criminal conduct for sentencing purposes.

As stated above, two crimes encompass the same criminal conduct if the crimes involve the same criminal intent, are committed at the same time, the same place, and against the same victim. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). In regards to the intent element, the court focuses on whether the defendant's intent, viewed objectively, changed from one crime to the next. State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997).

The absence of any single factor precludes a same criminal conduct finding. Vike, 125 Wn.2d at 410. Further, the statute is purposely narrowly constructed to disallow most assertions of same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999).

A finding that two crimes do not arise from the same criminal conduct--necessarily a partly factual determination--will not be

disturbed on appeal absent an abuse of discretion. State v. Elliot, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990). An abuse of discretion is shown when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). If the facts are sufficient to support a finding either way, then the matter lies within the trial court's discretion, and an appellate court will defer to the trial court's determination. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, rev. denied, 118 Wn.2d 1006 (1991).

Here, of all the required elements for a finding of same criminal conduct the only factor common to all three crimes is that each crime involved the same victim. Otherwise, all of the other factors differ. First, the crimes did not occur at the same time or same place. The defendant asserts that all the crimes occurred at the victim's work location, but this claim cannot be logically supported. No taking occurred at the victim's work location. The takings occurred when the defendant obtained the money that did

not belong to him. Thus, each theft occurred at the time and place the defendant cashed the forged checks.¹⁹ The thefts also occurred over an approximately four month period, and while the crimes need not occur simultaneously, the crimes do have to have been committed over a short period of time. See State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997) (court finds sequential drug sales that "occurred as closely in time as they could without being simultaneous" will be considered as having been committed at the same time for scoring purposes), and State v. Price, 103 Wn. App. 845, 856, 14 P.3d 841 (2000) (shots fired from a vehicle followed by a short chase with more shots fired was not found to have occurred at the same time or place), rev. denied, 143 Wn.2d 1014 (2001). The defendant has cited no case wherein separate thefts or acts occurring over a four month period has been found to constitute having occurred at the same time for scoring purposes.

Second, the defendant did not possess the same criminal intent. In regards to the intent element for purposes of RCW

¹⁹ This factor highlights the reason why this factual issue has been waived. While each check is stamped on the back with accounting information and codes that likely indicate the branch location each check was cashed or deposited, the information appears to be indecipherable to a layperson. See Exhibits 4 through 32. This is an example of the type of factual issue that must be raised and resolved in the trial court.

9.94A.589(1)(a), the court focuses on whether the defendant's intent, viewed objectively, changed from one crime to the next. Grantham, 84 Wn. App. at 932. As the Supreme Court has noted, having time "to pause and reflect" between acts defeats a claim of same criminal conduct as it shows the acts did not occur at the same time and the defendant's criminal intent is formed anew. State v. French, 157 Wn.2d 593, 613-14, 141 P.3d 54 (2006). Here, there can be no question but that the defendant had time, sometimes substantial time, between each act of theft to pause and reflect upon his criminal acts.

Under these facts, the defendant cannot prove that the trial court abused its discretion in finding that his offender score was properly calculated.

4. THE DEFENDANT'S ASSERTION THAT HIS UNDERLYING CONVICTIONS MUST BE VACATED DUE TO A "BASHAW" JURY INSTRUCTION VIOLATION IS MISGUIDED.

The defendant contends that his convictions on counts 26 through 29 must be vacated because of a claimed Bashaw²⁰ jury instruction error regarding the aggravating circumstance charged

²⁰ Referring to State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

along with each of the four counts. The defendant bases his claim on the assertion that the jurors were improperly instructed that they had to be unanimous either to find, or to reject, the aggravator. The defendant's argument is misguided. First, the defendant invited any error by expressly stipulating to the instructions proposed. Second, the defendant did not receive an exceptional sentence. The defendant's reliance on State v. Siers,²¹ to then argue that his underlying convictions must be vacated is misguided. Siers dealt with the appropriate remedy where the evidence of an aggravating circumstance was presented to the jury and the jury actually found the existence of the aggravating circumstance but the aggravator was never charged in the Information. Here, the defendant was properly charged; Siers is not applicable to this case.

The defendant was charged with a jury-considered aggravating circumstance on counts 26 through 29. CP 26-29. Specifically, it was alleged that "the defendant demonstrated or displayed an egregious lack of remorse." Id.; RCW 9.94A.535(3)(q). The jury returned a special verdict on counts 26 through 29 finding the defendant did demonstrate an egregious lack of remorse. CP 56, 58, 60, 62. The aggravating circumstance

²¹ 158 Wn. App. 686, 244 P.3d 15 (2010), rev. granted, 171 Wn.2d 1009 (2011).

finding permitted the sentencing court to impose an exceptional sentence above the standard range. See RCW 9.94A.535.

However, the court declined to do so, instead imposing a low-end standard range sentence. CP 152-60.

The invited error doctrine dictates that a party may not set up a potential error at trial and then claim that the trial court erred on that basis on appeal. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Under the invited error doctrine, a claim of trial court error cannot be raised "if the party asserting such error materially contributed thereto." In re K.R., 128 Wn.2d at 147. Such material contribution may include acquiescence as well as direct participation. See State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990); State v. Lewis, 15 Wn. App. 172, 548 P.2d 587, rev. denied, 87 Wn.2d 1005 (1976). The invited error doctrine bars a claim even if that claim impacts a constitutional right. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).

In this case, the court gave the standard WPIC special verdict concluding instruction that states in pertinent part that "[b]ecause this is a criminal case, each of you must agree for you to return a verdict." CP 117; WPIC 160.00. The defendant expressly

stipulated to the WPIC instructions proposed and given. 2RP 274; CP 173-266 (instruction 52). Accordingly, the invited error doctrine bars consideration of this claim on appeal. State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (failure to object bars review), rev. granted, 2011 WL 35223949, contrast, State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, rev. granted, 2011 WL 3523833.

But even considering this claim on the merits, the defendant cannot show that the instruction was erroneous because the relevant statute requires jury unanimity for any kind of verdict, whether "yes" or "no." See RCW 9.94A.537(3). Bashaw involved a school bus route enhancement, and the relevant statute is silent as to whether the jury must be unanimous in order to answer "no." See RCW 69.50.435. Accordingly, while the Bashaw court made a policy decision that a non-unanimous jury can reject a drug crime sentencing enhancement, that decision runs afoul of express statutory language in the context of aggravating circumstances.²²

Finally, even if there was a Bashaw error as to the aggravating circumstances, the defendant's claimed remedy--vacation of the underlying convictions, is not available. The

²² The State is aware that this Court recently rejected this argument in Ryan, supra. The State argues the issue here in order to preserve it for further review.

defendant's only support for his claimed remedy is his citation to Siers, supra. But Siers is a case involving a faulty charging document. It has no application to this case.

Siers was charged with second-degree assault. No aggravating circumstance was charged in the information. The State took the position that aggravating circumstances did not need to be charged in the information. Siers, 158 Wn. App. at 691. Still, the State pursued the aggravator at trial and the jury answered "yes" on the special verdict form.²³ Despite the jury's finding, the sentencing court did not impose an exceptional sentence.

On appeal, Siers challenged his conviction claiming that the State was required to charge the aggravating circumstance in the Information and that the failure to do so required vacation of his underlying conviction. This Court agreed, holding that "when the defendant had to defend at trial against an uncharged factor that was the 'functional equivalent' of an element" the remedy is vacation of the underlying conviction. Siers, at 700.

Here, the aggravating circumstance was properly charged in the Information on counts 26 through 29. The defendant did not

²³ The aggravating circumstance pursued was that "[t]he defendant committed the offense against a victim who was acting as a good samaritan." Siers, at 690; RCW 9.94A.535(3)(w).

have to defend against an uncharged allegation. His reliance on Siers in seeking the remedy of vacation of the underlying conviction for an alleged jury instruction error on the aggravator is without merit.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's convictions and sentence.

DATED this 19 day of August, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. LIN, Cause No. 66078-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

8/19/11

Date