

NO. 35054-8

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LAURA SUSAN ARCHER, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kathryn J. Nelson

No. 05-1-06263-2

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is there sufficient evidence to support the jury's verdict convicting defendant of second degree identity theft with regards to the credit cards found in the police car?
2. Is defendant entitled to remand for sentencing when counts I and VIII should have been counted as the same criminal conduct for purposes of determining her offender score?

B. STATEMENT OF THE CASE.

1. Procedure.

On December 19, 2005, the State charged defendant LAURA ARCHER with six counts of identity theft in the second degree. CP 7-9. The jury instructions did not set out which piece of identification related to each count. CP 10-38 (Jury Instructions 13-18). In closing, the State designated the following:

Count I concerned Ms. Harju's driver's license;  
Count VIII concerned Ms. Harju's U.S. Bank card that was used in the casino;  
Count IX, X, and XI concerned Ms. Harju's cards found in the patrol car; and  
Count XII concerned Ms. Rensberger's card found in the patrol car.

RP 231-232. Following a jury trial, defendant was convicted on all counts. CP 39-44. At sentencing defendant argued that the five counts relating to Ms. Harju's cards should be scored as the same criminal

conduct, giving her an offender score of three. RP 265. The court denied the motion, giving defendant a score of seven and sentencing her to the low end of the statutory range. RP 266. Defendant filed a timely notice of appeal. CP 66-79.

2. Facts.

At about 11:00 PM on December 16, 2005, defendant drove Pat Halvorson to Ms. Harju's house where Mr. Halvorson was staying. RP 173-174. Defendant and Mr. Halvorson had already played at a couple casinos earlier that evening where they had not done so well. RP 173. Mr. Halvorson wanted to go back to Ms. Harju's place to get some more money. RP 173. After getting a hundred dollar bill, defendant and Mr. Halvorson went out to the Emerald Queen casino until around 2:00AM. RP 173-175. Defendant then drove Mr. Halvorson back to Ms. Harju's house, but parked one driveway down. RP 205. Mr. Halvorson went up to the house for about ten minutes, then defendant and Mr. Halvorson headed to Chip's Casino. RP 175, 205. On the way there, Mr. Halvorson told defendant that she looked liked Ms. Harju and that defendant should try to use Ms. Harju's credit cards. RP 206. When they got to the parking lot of Chip's Casino, Mr. Halvorson handed defendant Ms. Harju's black wallet. RP 205. Defendant left her real identification in the car. RP 205.

Defendant then went into Chip's Casino and asked Debra Brown, a cashier, if she could get cash advances off credit cards. RP 139, 206.

Defendant and Mr. Halvorson approached Ms. Brown's cashier window together. RP 139. Mr. Halvorson was talking to Ms. Brown, trying to keep her preoccupied. RP 139. Ms. Brown was suspicious of the transaction and called surveillance. RP 141. Defendant then gave Ms. Brown a credit card and driver's license in the name of Erlene Harju and asked for \$500. RP 63,142, 206-207. The first credit card did not go through, so defendant handed Ms. Brown another card. RP 144. Ms. Brown attempted to stall the transaction until the police arrived. RP 144. Brown wrote Harju's driver's license number at the top of the credit card slip, and then had defendant sign the slip. RP 144-145. Defendant signed the slip as Erlene Harju. RP 207. Brown noticed that the signature did not match the one on Erlene Harju's driver's license. RP 145.

At around 3:53 AM, Lakewood Police Officer Karen Herritt arrived at Chips Casino and approached defendant who was at Ms. Brown's cashier window. RP 62. Defendant identified herself as Erlene and stated that she was just gambling. RP 63. Ms. Brown then gave Officer Herritt Ms. Harju's license and credit card, which defendant had tried to use. RP 63. Officer Herritt saw that the physicals on the license did not compare with defendant. RP 64. Officer Herritt then asked defendant to give her real name. RP 64. Defendant did not respond and would not make eye contact with Officer Herritt. RP 64. Officer Herritt detained defendant in handcuffs. RP 64. Defendant then said her name was Laura Warner. RP 64. Defendant then corrected herself and said her

name was actually Laura Archer. RP 64. Officer Herritt told defendant she was under arrest for forgery and advised defendant of her Miranda rights. RP 9.

Defendant told Officer Herritt that a friend, Sue Reed, gave her Ms. Harju's license and credit card and said defendant could use them to get cash if she was in a bad spot. RP 65. Defendant then admitted that she had come to the casino with Mr. Halvorson. RP 65. Mr. Halvorson was arrested by another officer and placed in Officer Herritt's patrol car while Officer Herritt was still inside with defendant. RP 91. Officer Herritt did a weapons pat down of defendant before placing defendant in her patrol car with Mr. Halvorson. RP 66.

There was nothing under Officer Herritt's seat before she transported defendant and Mr. Halvorson to jail. RP 72. After Officer Herritt was done booking them, she found several more cards underneath her back seat. RP 70. While Officer Herritt was transporting defendant and Mr. Halvorson to the jail, she knew that they were hiding something in the back of her car because they were whispering to each other and contorting their bodies in an unusual way. RP 69. While Officer Herritt did not actually see who put the credit cards under the seat, it appeared to her that defendant and Mr. Halvorson were working together to conceal something. RP 79.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT CONVICTING DEFENDANT OF SECOND DEGREE IDENTITY THEFT WITH REGARDS TO THE CREDIT CARDS FOUND IN THE PATROL CAR.

The appellate court reviews a challenge to the sufficiency of the evidence in a light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court will affirm if the trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. The challenge represents an admission of the truth of the State's evidence and all reasonable inferences. Id. Circumstantial evidence is as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The appellate court defers to the trier of fact since it is in the best position to pass on conflicting evidence, witness credibility, and the weight to be assigned to the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To prove second degree identity theft, the State had to prove defendant “knowingly obtain[ed], possess[ed], use[d], or transfer[red] a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1). Specific criminal intent may be inferred from defendant's

conduct where it is "plainly indicated as a matter of logical probability."  
State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Moreover, a person is guilty as an accomplice if, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it[.]" RCW 9A.08.020(3)(a). To prove accomplice liability, the State must prove that the accomplice acted with knowledge that his or her action promoted or facilitated the commission of the crime. State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). An accomplice need not have knowledge of each element of the principal's crime in order to be convicted; general knowledge of "the crime" is sufficient. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000). "Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime." State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993).

The State presented ample evidence to find defendant guilty either as the principle or as an accomplice for identify theft with respect to Ms. Harju's cards found in the patrol car (Counts IX-XI), and Ms. Rensberger's card found in the patrol car (Count XII). Officer Herritt testified that prior to her arrest, defendant had been carrying a black wallet, which contained credit cards that did not belong to defendant. RP

65, 78. The casino cashier confirmed that defendant was trying to fraudulently withdraw money from those credit card accounts. RP 142. Officer Herritt confirmed that there was nothing under her seat before she transported defendant and Mr. Halvorson. RP 72. After Officer Herritt was done transporting defendant, Officer Herritt found several more credit cards underneath her back seat that did not belong to defendant. RP 70.<sup>1</sup>

Because defendant had stolen credit cards in the purse, it is reasonable to infer she may have also possessed and hidden the other stolen cards found under the seat. Because defendant had attempted to fraudulently use the stolen cards in the casino, it is reasonable to believe defendant possessed the stolen cards in the car with the same criminal intent for committing other fraudulent withdrawals. That is, viewing the incriminating evidence found prior to arrest coupled with the evidence found under the seat in the light most favorably to the State, it is

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<sup>1</sup> The State presented the following exhibits of what was found under Officer Herritt's back seat: exhibit number 7 (Erlene Harju's Mastercard), exhibit number 8 (Erlene Harju's AT&T Mastercard), and exhibit number 10 (Kathleen Rensberger's Sears Mastercard). RP 72. The State also presented exhibit number 9 (Erlene Harju's U.S. Bank Visa). RP 72. With regards to exhibit number 9, Officer Herritt stated that, "there was [a card] that the clerk gave me and one either in the wallet or the car. I can't remember if it was in the wallet or the car, and this could have been the one that the clerk gave me. Like I said, I didn't distinguish between the two that I found..." RP 71. Officer Herritt affirmed that there were two U.S. Bank Visa cards with different numbers that said Erlene Harju. RP 71. Officer Herritt later confirmed that one of the U.S. Bank Visa cards was found under her seat. RP 90. Kathleen Rensberger testified that she never applied for a Sears Mastercard, but that her social security was used and that her credit record had been flagged because of this incident. RP 104-105. Erlene Harju testified that her purse, which contained several cards, had been stolen in December. RP 109-110.

reasonable to infer defendant's guilt as the principle. There was enough evidence for the jury to find that defendant had at one time possessed the cards with intent to commit a crime.

Moreover, even if the court assumes Mr. Halvorson possessed the cards, there is ample evidence to prove defendant's guilt as an accomplice. Defendant and Mr. Halvorson had been working together as a team all night. Defendant had received the other stolen cards from Mr. Halvorson and some of the money she was fraudulently trying to withdraw was for him. RP 63,142, 205-206. Officer Herritt testified that while she was transporting defendant and Mr. Halvorson to the jail, she knew that they were hiding something in the back of her car because they were whispering to each other and contorting their bodies in an unusual way. RP 69. While Officer Herritt did not actually see who put the credit cards under the seat, it appeared to her that defendant and Mr. Halvorson were working together to conceal something. RP 79. This evidence shows that defendant was more than merely present when the stolen cards were hidden. Viewing this evidence in the light most favorable to the State, it is reasonable to infer that defendant aided Mr. Halvorson in possessing or transferring someone else's financial information for the purpose of committing a crime.

2. DEFENDANT IS ENTITLED TO REMAND FOR SENTENCING BECAUSE COUNTS I AND VIII SHOULD HAVE BEEN COUNTED AS THE SAME CRIMINAL CONDUCT FOR PURPOSES OF DETERMINING HER OFFENDER SCORE.

Appellate courts give deference to the trial court's same-criminal-conduct determination such that will not reverse a sentence unless the appellate courts find a clear abuse of discretion or misapplication of the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert denied, 498 U.S. 838, 112 L.Ed.2d 80 (1990). Multiple current offenses are counted separately for offender score purposes unless the offenses involve the same criminal conduct. RCW 9.94A.589(1)(a). Multiple crimes encompass the "same criminal conduct" if they result from the same criminal intent, involve the same victim, and occur at the same time and place. RCW 9.94A.589(1)(a).

Two cases that illustrate the time distinction are State v. Deharo, 136 Wn.2d 856, 966 P.2d 1269 (1998), and State v. Burns, 114 Wn.2d 314, 788 P.2d 531 (1990). In Deharo, two defendants were arrested in the midst of a series of heroin sales. Deharo, 136 Wn.2d at 857. Based solely on their possession of six bindles of heroin at the time of arrest, they were convicted of conspiracy to deliver and possession with intent to deliver heroin. Deharo argued that the two counts encompassed the same criminal conduct, and the Supreme Court agreed. Id. at 857-59. The court

concluded that the "'objective intent' underlying the two charges is the same -- to deliver the heroin" in their possession. Id. at 859.

The court also noted that the analysis might differ if there were a time distinction, that is, evidence that Deharo intended to deliver some heroin now and some later. Id. at 859. In Burns, there was evidence of actual delivery of some cocaine in the present, and possession with intent to deliver different cocaine in the future. Burns, 114 Wn.2d at 318-19. This time distinction was a sufficient basis for the trial court to find separate courses of criminal conduct. Id. at 318-19.

In this case, defendant is entitled to remand for sentencing because counts I and VIII should have been counted as the same criminal conduct for purposes of determining her offender score. The lower court mistakenly relied on State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005), for the proposition that each credit card charge could be counted separately for offender score purposes. RP 266. State v. Ose, did not address offender score calculations. See Ose, 156 Wn.2d at 148 (holding that a separate unit of prosecution may be charged where the accused has either possessed, obtained, used, or transferred multiple means of a single individual's financial information or identification with the requisite intent).

Under the appropriate statutory test, some of defendant's crimes for identity theft involving Erlene Harju did encompass the "same criminal conduct."<sup>2</sup> The crimes charged in Count I (Ms. Harju's driver's license used in the casino) and Count VIII (Ms. Harju's U.S. Bank card used in the casino) resulted from the same criminal intent, involved the same victim, and occurred at the same time and place. Therefore, Counts I and VIII should have been counted as one point for offender score purposes.

The crimes charged in Counts IX, X, and XI (Ms. Harju's cards found in the patrol car) resulted from the same criminal intent, involved the same victim, and occurred at the same time and place. While Counts IX, X, and XI should be counted as one point, these counts should not be grouped together with Counts I and VIII for offender score purposes. Counts IX, X, and XI did not occur at the same time and place as Counts I and VIII. Defendant did not attempt to use the cards found in the patrol car in the casino. As argued above, defendant possessed these cards for committing future fraudulent withdraws. Accordingly, Counts IX, X, and XI should be counted as a separate point from Counts I and VIII. In sum, this case should be remanded to correct defendant's offender score and sentences on Counts I and VIII, which should count as one point, and Counts IX, X, and XI, which should count as a separate point.

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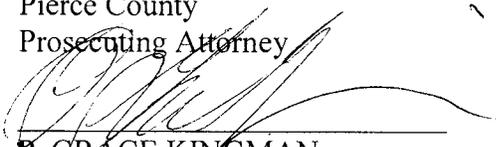
<sup>2</sup> Defendant does not challenge that Count XII concerning Ms. Rensberger should be counted as a separate point.

D. CONCLUSION.

For the foregoing reasons, this Court should affirm the defendant's convictions for identity theft. This court should also remand for resentencing on Counts I, VIII, IX, X, and XI to adjust defendant's offender score and sentence.

DATED: May 8, 2007.

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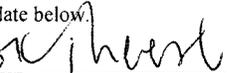


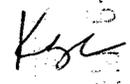
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Levi Larson  
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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