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## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court violated Appellant's double jeopardy protections when it entered judgment on both the forgery conviction and the identity theft conviction.
2. The State failed to prove beyond a reasonable doubt the essential element of knowledge when it convicted Appellant of unlawful possession of a firearm.
3. The trial court abused its discretion when it failed to find that Appellant's convictions for forgery and identity theft were the same criminal conduct for the purpose of calculating Appellant's offender score at sentencing.

### **B. Issues Pertaining to the Assignments of Error**

1. Were Appellant's double jeopardy protections violated where the State relied on a single act and a single intent to support convictions for both forgery and identity theft? (Assignment of Error 1)
2. Did the State establish that Appellant knowingly possessed a firearm, where the evidence showed that the firearm was not in plain view, there was another individual in the car where the firearm was found, and that other individual was alone in

the car for several minutes after Appellant was removed by the arresting officer? (Assignment of Error 2)

3. Did the trial court abuse its discretion when it failed to find that Appellant's convictions for forgery and identity theft were the same criminal conduct, where a single act occurring at the same time and place and involving the same criminal intent against a single victim formed the basis for both convictions? (Assignment of Error 3)

## II. STATEMENT OF THE CASE

Elizabeth Smith works as a shift supervisor at a Milton, Washington Rite Aid drug store. (TRP2 20)<sup>1</sup> On the evening of November 7, 2005, she observed a customer she later identified as Steven Kie Chang complete a transaction at a nearby checkout counter. (TRP2 20, 21, 47) The checker, who had just recently been hired, called Smith over after the transaction was complete. (TRP2 20, 21) The checker told Smith that she had accepted a personal check as payment for a \$400 gift card. (TRP2 20) The checker had processed the check through the store's verification

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<sup>1</sup> Reference to the trial proceedings, contained in volumes labeled 1, 2, 3, and 4, will be to TRP# followed by the page number. Reference to the sentencing proceedings, contained in volumes labeled Sentencing 1 and Sentencing 2, will be to SRP1 and SRP2 followed by the page number.

system and it cleared. (TRP2 21) However, the checker was suspicious because the customer was of Asian descent, but the name listed on the check was not Asian. (TRP2 20) Smith also became concerned because Rite Aid store policy states that only credit cards, debit cards and cash are acceptable forms of payment for gift cards. (TRP2 21)

Smith left the store and approached Chang as he sat in his car. (TRP2 22) She told Chang that she could not accept a check as payment for the gift card, and asked him to return to the store so she could return the check and he could return the gift card. (TRP2 22) Chang refused, and said in broken English that he would go to an ATM machine. (TRP22) Smith told Chang that if he did not return the gift card she would call the police. (TRP2 22) Chang again refused to come back or return the gift card, then drove away. (TRP2 22) Smith made a note of the car's description and license plate number, then went inside the store and called the police. (TRP2 22-23)

Milton Police Officer Nils Luckman arrived a short time later, and took the vehicle information and the check from Smith. (TRP2 46) He checked the license plate number in the Department of Licensing database, and determined that the vehicle described by

Smith was registered to Chang. (TRP2 47) While on routine patrol a few weeks later, he saw a similar vehicle. (TRP2 48) He checked the license plate number, and determined that it was Chang's car. (TRP2 48) He called for back up and, when he saw additional officers approaching, he initiated a traffic stop. (TRP2 48) Luckman immediately removed Chang from the driver's seat of the car and placed him under arrest. (TRP2 48-49) Luckman also noticed a large man sitting in the passenger seat. (TRP2 48) Other officers later removed, questioned and released the passenger. (TRP2 50-51) Luckman conducted a search of the vehicle, and found a firearm lying under the front driver-side floor mat. (TRP2 52, 63)

The State subsequently charged Chang by Information with one count of second degree identity theft (RCW 9.35.020), one count of forgery (RCW 9A.60.020), one count of second degree theft (RCW 9A.56.020, .040), and one count of unlawful possession of a firearm (RCW 9.41.101, .040).<sup>2</sup> (CP 1-3)

At trial, Frank Poulsen testified that the check presented by

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<sup>2</sup> The State also initially charged Chang with one additional count of unlawful possession of a controlled substance with intent to deliver and one additional count of possession of stolen property, but these charges were later dismissed and were not considered by the jury. (CP 1-3, 6-7; TRP1 4-5, TRP2 76-77)

Chang came from a batch of checks that his wife had ordered for their checking account, but had never received. (TRP2 35) Poulsen testified that he had not written the check himself, that he had not authorized Chang to use the check, and that he was not in Milton on November 7, 2005. (TRP2 34, 35-36)

Chang testified that the gun did not belong to him, and he did not know that it was in his car. (TRP3 107-08) Chang also testified that the passenger was still in the car when Luckman removed him and escorted him to the back of the car, so the passenger could have hidden the gun under the floor mat at that time. (TRP3 101-03, 104-05)

The jury convicted Chang as charged. (TRP4 152; CP 8, 39-41) The trial court denied Chang's request to find the identity theft and forgery to be the same criminal conduct for the purpose of calculating Chang's offender score. (SRP2 7, 17) The court sentenced Chang to standard range, concurrent sentences using an offender score of five. (SRP2 16017; CP 45, 48) This appeal timely follows. (CP 55-59)

### III. ARGUMENT & AUTHORITIES

#### A. Chang's convictions for both forgery and identity theft violate his double jeopardy protections.

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy is implicated regardless of whether sentences are imposed to run concurrently. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000); *see also State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2001) (citing RAP 2.5(a); *Adel*, 136 Wn.2d at 631).

Because "[t]he legislature has the power to define offenses and set punishments," the issue of whether multiple crimes constitute a single offense requires determining legislative intent. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). In other words, did the Legislature intend to authorize multiple punishments for criminal conduct that violates more than one criminal statute. *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155

(1995).

The initial inquiry is whether the language of the statute expressly allows convictions under both statutes for the same act or transaction. *Calle*, 125 Wn.2d at 776. The statutes defining forgery and identity theft do not contain explicit legislative intent regarding separate punishments for a single act which violates both provisions. See *State v. Baldwin*, 150 Wn.2d 448, 455, 78 P.3d 1005 (2003); RCW 9A.60.020; RCW 9.35.020. The offenses are therefore not automatically immune from double jeopardy analysis. *In re Personal Restraint of Burchfield*, 111 Wn. App. 892, 896, 46 P.3d 840 (2002).

When, as here, the Legislature has not expressly authorized multiple punishments for the same act, the reviewing court should apply the “*Blockburger*” or “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Burchfield*, 111 Wn. App. at 896; *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Our Supreme Court has rejected an abstract application of the test in favor of a comparison of the facts actually used to prove the statutory elements in a particular case:

When applying the *Blockburger* test, we do not

consider the elements of the crime on an abstract level. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

*Freeman*, 153 Wn.2d at 772 (quoting *In the Personal Restraint of Orange*, 152 Wn.2d 795, 817, 100 P.3d 291 (2004) (quoting *Blockburger*, 284 U.S. at 304)). Therefore, when the evidence required to prove one crime is the same as what is required to prove the other crime, double jeopardy is violated. *Freeman*, 153 Wn.2d at 772, *Orange*, 152 Wn.2d at 817-20.

Applying this standard to the evidence in this case, it is clear that Chang's convictions for both forgery and identity theft violate double jeopardy. As charged and instructed in this case, Chang committed the crime of forgery if "with intent to injure or defraud[,]" he "possessed or offered or disposed of or put off as true" a written instrument that he knew had been forged. (CP 1-2, CP 24 (Instruction 13)) See also RCW 9A.60.020(1). As charged and instructed in this case, Chang committed the crime of identity theft if he "knowingly obtained, possessed, used or transferred a means of identification or financial information" with the "intent to commit . . . any crime[,]" and that he obtained "anything of value in excess of

“250.00[.]” (CP 1, CP 20 (Instruction 9)). See also RCW 9.35.020(1).

To prove the elements of these two crimes, the State relied on the same evidence: that Chang presented a completed check, drawn on Poulsen’s checking account, to the Rite Aid cashier in order to purchase a \$400 gift card. (CP 4; TRP3 122-24) The State’s use of Chang’s single act (presenting a forged check) and the single intent (to wrongfully obtain a \$400 gift card) to convict of two separate crimes violates Chang’s double jeopardy protections, and the two convictions cannot stand.

“Where there have been convictions on two charges, and only one may stand, the conviction of the lesser offense must be set aside, as it is included in the conviction of the greater.” *State v. Springfield*, 28 Wn. App. 446, 453, 624 P.2d 208 (1981) (citing *State v. Waldenburg*, 9 Wn. App. 529, 533, 513 P.2d 577 (1973)). Both second degree identity theft and forgery are class C felonies, but for sentencing purposes identity theft has a higher seriousness level (identity theft has a seriousness level of II, while forgery has a seriousness level of I). RCW 9.35.020(3); RCW 9A.60.020(3); RCW 9.94A.515. Therefore, second degree identity theft is the greater offense, and Chang’s forgery conviction must be vacated.

**B. The State presented insufficient evidence to convict Chang of unlawful possession of a firearm because it failed to establish the element of knowledge.**

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

A person commits the crime of second degree unlawful possession of a firearm if he or she “owns, has in his or her possession, or has in his or her control any firearm” and the person has previously been convicted of certain listed crimes. RCW 9.41.040(2)(a). Knowledge of possession is an essential element of the crime of second degree unlawful possession of a firearm.

*State v. Anderson*, 141 Wn.2d 357, 362-63, 5 P.3d 1247 (2000).

The State did not present sufficient evidence in this case to prove that Chang knowingly possessed the firearm found under the floor mat. Chang was immediately removed from the vehicle by Officer Luckman, but the passenger remained in Chang's car for several minutes unmonitored. (TRP2 50-51; TRP3 104, 105) The State did not present any additional evidence to establish ownership or possession, such as registration documents or fingerprint analysis. The State only proved the presence of a firearm, but it did not show, beyond a reasonable doubt, that the firearm belonged to Chang, or that Chang had any knowledge of its existence. The State therefore failed to prove the essential element of knowledge, and Chang's conviction for unlawful possession of a firearm should be reversed.

**C. The trial court abused its discretion when it found that Chang's identity theft and forgery convictions were not the same criminal conduct for sentencing purposes.**

When two or more crimes require the same criminal intent, are committed at the same time and place, and involve the same victim, they constitute the same criminal conduct and the sentencing court must count them as one offense when computing

the defendant's criminal history at sentencing. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). This concept is narrowly construed, and the court will not find the same criminal conduct if any of the three elements are missing. *State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004).

The trial court should also focus on “the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.” *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). To determine this, the court looks objectively at whether one crime furthered the other, or whether there was a substantial change in the nature of the criminal purpose. *Dunaway*, 109 Wn.2d at 215; *State v. Edwards*, 45 Wn. App. 378, 382, 725 P.2d 442 (1986)<sup>3</sup>. A trial court's decision on the same criminal conduct issue should be reversed if the court abused its discretion or misapplied the law. *See State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

In this case, Chang requested that the forgery and identity theft convictions be treated as the same criminal conduct. (SRP2

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<sup>3</sup> *Overruled on other grounds by Dunaway*, 109 Wn2d at 215.

7, 14) The trial court at first declined to do so without any analysis or explanation. (SRP2 16-17) When asked by defense counsel to express for the record why he did not find that they were the same criminal conduct, the court states:

Why didn't I combine them? I guess I ran them concurrently. I didn't combine them because I think they're separate incidents. It is one thing to take the identity; it is another thing to try to do something with it. It's another step, so that is why.

(SRP2 17) The trial court's failure to conduct a proper analysis of the issue, and its finding that the two crimes do not encompass the same criminal conduct, were both in error.

First, a review of the facts used to support both convictions show that the same time and place, victim and intent requirements are met. The act relied upon by the State was Chang presenting the forged check to the Rite Aid cashier. Clearly, the crimes occurred at the same time and place.

Poulsen was the only victim in both crimes. The check was written against Poulsen's checking account and his identity was used when the check was presented to the Rite Aid cashier. (TRP2 35, 38) Rite Aid was not a victim, as they did not cash the check and immediately canceled the gift card after Chang drove away. (TRP2 33) Poulsen's bank was also not a victim because the

check was never cashed by Rite Aid. (TRP2 33)

The intent was the same in both crimes. The State even argued as much in closing, stating that Chang's intent when committing identity theft was "to obtain that [gift] card," and his intent when committing the forgery was to "get a \$400 [gift] card[.]" (TRP3 123, 124) Chang's criminal intent did not change from one crime to the next, and each crime furthered the other. Under the facts of this case, the forgery could not have been committed without the identity theft, and the identity theft could not have been committed without the forgery. The two crimes could not be more intertwined—they are clearly the same criminal conduct.

The trial court abused its discretion when it failed to consider these crimes as the same criminal conduct at sentencing. These crimes should have been counted as one in the calculation of Chang's offender score, and his sentence should be reversed.

#### **IV. CONCLUSION**

Chang's double jeopardy protections were violated when the trial court entered convictions on both second degree identity theft and forgery, and his forgery conviction must therefore be vacated. Alternatively, those two crimes should have been considered as the same criminal conduct when calculating Chang's offender score,

and Chang must be resentenced. Finally, the State failed to prove that Chang knowingly possessed the firearm found in his car, and this conviction should be reversed.

DATED: November 27, 2007



STEPHANIE C. CUNNINGHAM

WSBA No. 26436

Attorney for Steven Kie Chang

**CERTIFICATE OF MAILING**

I certify that on 11/27/2007, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

Kathleen Proctor, DPA  
Prosecuting Attorney's Office  
930 Tacoma Ave. S., Rm. 946  
Tacoma, WA 98402

Steven Kie Chang, Reg#27354-086  
Federal Detention Center - SeaTac  
P.O. Box 13900  
Seattle, WA 98198



STEPHANIE C. CUNNINGHAM  
WSBA No. 26436

BY:  STATE OF WASHINGTON  
NOV 29 PM 1:56  
FEDERAL DETENTION CENTER - SEATAC