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COURT OF APPEALS
DIVISION II

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NO. 37510-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRENDA MARIE JOHNSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Susan Serko, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove the essential element that appellant knowingly deceived the bank to obtain funds illegally.
2. The sentencing court should not have counted each crime separately for calculating appellant's offender score.
3. Each count constituted the same criminal conduct for calculating the offender score.
4. Appellant was prejudiced by her attorney's failure to argue that each offense constituted the same or similar criminal conduct for calculating her offender score.

Issues Pertaining to Assignments of Error

1. Was the evidence insufficient to establish beyond a reasonable doubt that appellant knowingly tried to deceive to unlawfully deprive the owners of their property?
2. For calculating appellant's offender score, did the sentencing court err as a matter of law by failing to count each offense as the same criminal conduct?
3. Was appellant prejudiced by her attorney's failure to argue that each offense constituted the same or similar criminal conduct for calculating her offender score?

B. STATEMENT OF THE CASE

1. Procedural Facts

By amended information Brenda M. Johnson was charged with five counts of theft in the first degree in violation of RCW 9A.56.020(1)(b) and (1)(a) "by color or aid of deception". CP 3-5. Following a 3.5 hearing, the Court admitted Johnson's statements to

officers. CP 45-48. Following a jury trial, the honorable Susan Serko presiding, Johnson was found guilty as charged. CP 37-41. This timely appeal follows. 64.

2. Substantive Facts

Brenda Marie Johnson received a series of e-mails from Nigeria in 2004 and 2005. The e-mails indicated that she had inherited a large sum of money in the millions, but to obtain the inheritance she had to wire money to Nigeria to cover fees and expenses. RPII 114-117, 152-53. Johnson received 2 checks from Nigeria that bounced. RPII 121-22. After some e-mail wrangling, and demands for money, Johnson indicated that she had no money to send to Nigeria. Thereafter the Nigerian contact sent her a Washington Mutual (WAMU) account number where Johnson could withdraw money to send back to Nigeria. RPII 118. Johnson was instructed to use her identification to access the WAMU account. Id.

Johnson undertook measures to verify the legitimacy of the Nigerian e-mails by researching the ECONO Bank, calling Nigeria and various courier services. RPII 116-117, 121-22. Johnson worked at WAMU briefly from December 2004 and April 2005. RPI 69. During her employment, Johnson was required to use a PIN identification that allowed bank officials to monitor and review all of Johnson's computer access. RPI 80; RPII 111-112. There was no

evidence that Johnson ever had any unlawful access to a WAMU computer. RPI 80-81.

Johnson proceeded as directed and went to WAMU on five different occasions and retrieved money totaling \$32,500 from the designated account. RPII 157. These transactions involved the same account # 0601564008 and occurred between June 21, 2005 and June 29, 2004. RPI 39-40, 49-50, 54, 59-60, 64. During the first visit to WAMU, Johnson was instructed by a bank employee that she needed to write a check for \$185.56 to obtain access to the funds in the WAMU account. Johnson followed the instruction and wrote the check. RPII 114, 124-25, 127.

Each time Johnson withdrew money from the WAMU account she presented her driver's license which contained her middle name "Marie" written in full and another piece of identification also containing her middle name. RPII 123, 128. Due to a gambling problem and a need for money, Johnson did not send money back to Nigeria. RPII 134. Johnson lost to gambling 98% of the money obtained from WAMU account. RPII 134.

Johnson was not aware that the account belonged to another person because each time she went to the bank she presented her own identification which always contained middle name and each time she was successful in withdrawing funds. RPII 134-35. Johnson stopped accessing the WAMU account on June 29, 2005 because

the Nigerian contacts were fighting and arguing and she did not know whom to trust RPII 131-33.

Johnson was contacted by the Tacoma Police Department 11 months after she cashed the last WAMU check. RPII 130. Johnson had access to \$73,000 but did not attempt to use this amount. RPI 77. The owner's of the WAMU account Leslie and Brenda Lynette Johnson had not made any withdrawals from their line of credit and had not authorized any one else to make withdrawals. RPII 62-65, 67. Leslie and Brenda L. Johnson became aware of the June 2005 withdrawals after receiving a bank statement for that period. RPII 62. The Johnson's immediately contacted WAMU. RPII 63. WAMU employee Rachael McCarter began an investigation in August 2005. RPI 77-78.

The investigation revealed that each time Johnson obtained funds from the WAMU account she presented identification and that identification was presented to a supervisor who approved each transaction. RPI 72-73, 75.

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT KNOWINGLY DECEIVED THE BANK TELLERS AT WAMU TO OBTAIN FUNDS ILLEGALLY.

Due process requires the state prove each and every element of the crimes charged. In re Winship, 397 U.S. 358, 364,

25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). On a challenge to the sufficiency of the evidence, the appellate courts view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Using deception to obtain the property of another with the intent to deprive the other is theft. RCW 9A.56.020(1)(b); State v. Mora, 110 Wn. App. 850, 858, 43 P.3d 38 (2002). Deception occurs when an actor knowingly (a) creates or confirms a false impression in the mind of another which the actor knows to be false, (b) fails to correct another's impression which the actor previously has created or confirmed, or (c) transfers property without disclosing a legal impediment to the enjoyment of the property. RCW 9A.56.010(5)(a)-(b),(d). A person acts knowingly when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b).

pretend to be anyone other than herself and that a WAMU supervisor approved each withdrawal. RPI 72-73, 75.

Johnson testified that she was directed by her Nigerian correspondence to access the WAMU account and that she did not know that it belonged to Leslie and Brenda Lynette Johnson and that she never intended to steal from them. RPII 118, 134-135

The State argued at trial that Johnson used deception by pretending to be Lynette Johnson. However there was no evidence that Johnson ever attempted to deceive the bank regarding her true identification; rather she always presented her own picture identification with her middle name Marie.

Examining the evidence presented even viewed in the light most favorable to the prosecution, it is insufficient to demonstrate that Johnson attempted to deceive the bank. In sum, the state failed to present sufficient evidence to allow a reasonable trier of fact to find that Johnson knew that she did not have the legal right to access the account or that she intended to deceive the bank. For these reasons, Johnson's five theft convictions should be reversed and dismissed. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. FOR PURPOSES OF CALCULATING
APPELLANT'S OFFENDER SCORE
HER FIVE THEFT CONVICTIONS
ENCOMPASSTHE SAME CRIMINAL
CONDUCT.

For offender score calculation purposes, crimes that have the “same criminal conduct” are not counted separately. “Same criminal conduct” is defined as crimes that have the same objective criminal intent, are committed at the same time and place and that involve the same victims are not counted separately. RCW 9.94A.589; State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 816 (1998), citing, State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The Court in Porter, 133 Wn.2d 177, 182, 942 P.2d 974 (1997), citing Vike, 125 Wn.2d at 412, reiterated that “simultaneity is not required” for the intent to be the same.¹

¹Several Court of Appeals decisions have rejected a simultaneity requirement. See *State v. Calvert*, 79 Wn. App. 569, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996) (two check forgeries occurring at the same bank on the same day treated as same criminal conduct even though it was unknown whether the checks were forged at the same time); *State v. Dolen*, 83 Wn. App. 361, 365, 921 P.2d 590 (1996) (defendant's convictions for child rape and child molestation, which could not have [**977] been committed at the same time, treated as same criminal conduct because the offenses were “continuous sexual behavior over a short period of time”); *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993)

Although the statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act, there is one clear category of cases where two crimes will encompass the same criminal conduct - - "the repeated commission of the *same crime* against the same victim over a short period of time." 13A SETH AARON FINE, WASHINGTON PRACTICE § 2810, at 112 (Supp. 1996).

Porter, 133 Wn.2d at 181-82.

If the criminal intent is the same, the second inquiry is whether the defendant committed the crimes for different purposes. If the purpose and intent of each crime was the same, the sentencing court must find that the crimes involved the same criminal conduct. State v. Haddock, 141 Wn.2d at 112-13.

Interpretation of a statutory provision is a question of law, and is reviewed de novo. Haddock, 141 Wn.2d at 110. However, an appellate court, reviews sentences under the Sentencing Reform Act for abuse of discretion. *Id.* In Haddock, the Supreme

(defendant's act of fellatio on a child, constituting second degree rape, encompassed the same criminal conduct as the defendant's subsequent attempted anal intercourse with the same victim, constituting attempted second degree rape).

Court held that the trial court either abused its discretion or made an error of law or both in counting separately Haddock's 14 possession of stolen property and possession of stolen firearm counts. The correct sentence required a finding that the crimes were committed at the same time and place, the mental element for the crimes was the same and the purpose for committing the crimes was also the same. Haddock, 141 Wn.2d at 111-16.

Similarly in Williams, the defendant's two deliveries of a controlled substance at the same time to two different buyers constituted "the same criminal conduct" even though Williams sold the drugs to two different buyers. This is so because the public and not the buyers are the victims. Williams, 135 Wn.2d at 368, citing, State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

In the instant case, as in Haddock, where the state charged 14 different crimes and the Court held that each was part of the same criminal conduct, Johnson's five thefts encompassed the same criminal conduct. Haddock, 141 Wn.2d at 111-16. First, the thefts were committed at the same time and place, and the victim was also the same. Second, the criminal intent was the same and

finally, the purpose was also the same. Haddock, 141 Wn.2d at 111-16.

The evidence demonstrated Johnson went to WAMU on five separate occasions over a short period of time (eight days) to withdraw funds from the same WAMU account. Johnson did not possess a separate intent, rather each withdrawal encompassed the "same criminal conduct" and contained the same "intent" and should not have been counted separately for the calculation of Johnson's offender score. Haddock, 141 Wn.2d at 115-16; State v. Williams, 135 Wn.2d at 368; Porter, 133 Wn.2d at 181-82.

This Court should reverse and remand for a reduction in Johnson's offender score by three points.

a. Appellant Did Not Waive Offender Score Calculation Error

Generally, a defendant cannot waive a challenge to a miscalculated offender score. In re Personal Restraint Petition of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). See also State v. McCorkle, 137 Wn.2d 490, 496, 973 P.2d 461 (1999) (court's failure to calculate the standard range based on classification of prior convictions was "legal error" subject to review). Further a court

In relevant part, the “to-convict” theft jury instructions 6,7,8,9,10 each defined the elements as follows:

(1) ...the defendant by color or aid of deception obtained control over the property of another....(3) That the defendant intended to deprive the other person of the property.

Jury instructions 6,7,8,9,10. In addition to the “to-convict” theft instructions, instruction 13 defined Deception as:

...when an actor knowingly creates or confirms another’s false impression which the actor knows to be false or fails to correct another’s impression which the actor previously has created.

Id.

In Johnson’s case, to prove theft by deception, the State had to present sufficient evidence to allow a reasonable trier of fact to find that during the five transactions in late June 2005, Johnson knew that the WAMU account in the name of Brenda Johnson where she presented her identification was not an account she had permission to use and that she knowingly tried to deceive the bank into believing that the account was her own.

The State presented evidence that each time Johnson went to WAMU to withdraw funds she presented her own photograph identification which always included her full middle name “Marie”. RPII 123, 128. The evidence also indicated that Johnson did not

is not bound by an erroneous concession related to a matter of law. Goodwin, 146 Wn.2d at 875. The remedy for an erroneous sentence in reversal of the erroneous portion of the sentence. Goodwin at 887.

However, the court in State v. Shale, 160 Wn.2d 489, 494, 158 P.3d 588 (2007), citing, State v. Nitsche, 100 Wn. App, 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000), reiterated that a defendant can waive a challenge to the trial court's failure to determine whether the defendant's current offenses were the same criminal conduct under RCW 9.94A.589 because in its view the decision to find "same criminal conduct is discretionary". Shale, 160 Wn.2d at 494; Nitche, 100 Wn. App. at 523.

Although Johnson stipulated to both her offender score and to the calculation of her current offenses, she did not do so after being properly advised by competent counsel. Counsel's failure to properly advise Johnson of the consequences of stipulating to an improperly calculated offender score and counsel's failure to request the court engage in a same criminal conduct analysis constituted ineffective assistance of counsel which denied Johnson her Federal and State constitutional rights to due process. United

States Constitution, Fourteenth Amendment; Washington State Constitution, Article 1 subsection 3; State v. Walsh, 143 Wn.2d 1, 8-9, 17 P.2d 591 (2001) (defendant's reliance on miscalculation of improperly calculated offender score could be raised for the first time on appeal).

3. APPELLANT' WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY FAILED TO REQUIRE THE COURT TO CONDUCT A SAME CRIMINAL CONDUCT ANALYSIS AND WHERE COUNSEL STIPULATED TO APPELLANT'S OFFENDER SCORE.

Counsel's failure to object to the calculation of Johnson's offender score and his agreement to the offender score constitute ineffective assistance of counsel. A criminal defendant has the constitutional right to effective assistance of counsel. The state and federal constitutions guarantee defendants reasonably effective representation by counsel at all critical stages of a proceeding. U.S. Const., amend 6; Wash. Const. art 1 sect. 22; Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A

stage of a proceeding is considered critical if it “presents a possibility of prejudice to the defendant.” State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996), citing, Garrison v. Rhay, 75 Wn. App. 98, 102, 449 P.2d 92 (1968). It is defense counsel’s effective representation that is supposed to ensure that the defendant is able “to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or to take an appeal.” Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct 3308, 77 L.Ed.2d 987 (1983).

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must establish that: (1) his counsel’s performance was deficient; and (2) the deficient performance prejudiced his case. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). An attorney’s failure to engage in reasonable investigation can result in ineffective assistance of counsel. Personal Restraint Petition of Rice, 118 Wn.2d 876, 909, 828 P.2d 1086 (1992), citing, Code v Montgomery, 799 F.2d 1481.

Additionally, while the invited error doctrine precludes review of error caused by the defendant,² the same doctrine does not act as a bar to review of a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996), citing, State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995).

In the instant case, both prongs of the test for ineffective assistance of counsel were met. For the first prong, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to the calculation of the offender score when the five theft charges constituted the same criminal conduct. There is also no possible tactical or strategic reason why counsel would have permitted Johnson to stipulate to the offender score because under Haddock, 141 Wn.2d at 115-16 and State v. Williams, 135 Wn.2d at 368. the theft charges were part of the same criminal conduct.

Counsel's failure to advise Johnson of the availability of a "same criminal conduct" analysis and his failure to advise Johnson that her multiple current offenses should not have counted as four points constituted deficient performance of counsel. As stated,

² See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

supra, the instant case is similar to Haddock where the court reversed the separate calculation of each offense for Haddock's offender score. In Johnson's case as in Haddock, because there was no possible tactical reason for the failure to argue "Same criminal conduct", counsel's performance was deficient.

Second, the prejudice is self-evident. Had counsel: (i) objected to the calculation of the offender score; (ii) requested the court engage in a "same criminal conduct" analysis under RCW 9.94A.589(1)(a) and .400(1)(a); (iii) and not permitted Johnson to stipulate to her offender score, the trial court would not have imposed a sentence in excess of that permitted under RCW 9.94A.589(1)(a) and .400(1)(a). Johnson's offender score should be one point.

D. CONCLUSION

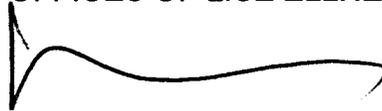
The state's failure to prove that Johnson knew that she did not have permission to access the funds in the WAMU account or that she knowingly intended to deceive WAMU, both essential elements of the charges of theft in the first degree, requires reversal of the five convictions. In the alternative, the judgment and sentence

should be vacated and the matter remanded for re-sentencing with a finding that for offender score calculation purposes, each charge contains the same criminal conduct.

DATED this 24th day of August 2008.

Respectfully submitted,

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STATE OF WASHINGTON
BY _____
DEPUTY

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor 930 Tacoma Ave S. Rm. 946 Tacoma, WA 98492 and Brenda Johnson c/o Hester Paige 4334 S. Puget Sound Ave. Tacoma, WA 98409 a true copy of the document to which this certificate is affixed, On August 25, 2008. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.
