

NO. 38379-9

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

STATE OF WASHINGTON, RESPONDENT

v.

SUZANNE MELODY AQUINO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 07-1-05587-0

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BRIEF OF RESPONDENT

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

1. Is defendant precluded from raising the issue of same criminal conduct on appeal where she failed to pursue it below?
2. Has defendant failed to show ineffective assistance of counsel simply because her attorney did not argue a meritless claim?

B. STATEMENT OF THE CASE.

1. Procedure

On October 31, 2007, the State charged SUZANNE AQUINO, hereinafter “defendant,” with one count of first degree identity theft (Count I), five counts of second degree theft (Counts II, IV, VI, VIII, X), and five counts of forgery (Counts III, V, VII, IX, XI). CP 1-5. On August 27, the State filed a first amended information adding two additional counts of second degree theft (Counts XII, XIV), and two additional counts of forgery (Counts XIII, XV) . CP 11-16. The charges arose from defendant’s forging and cashing seven checks from the checking account of her employers, Frank and Myrtle Strom. CP 6. Defendant also stipulated to the admissibility of her statements made during her interview with Detective Sanders. RP 3.

Jury trial commenced September 2, 2008, before the Honorable Rosanne Buckner. RP 38. The jury heard testimony from the victim's family, nursing home staff, law enforcement officers, and a fraud investigator from Columbia Bank. RP 46, 97, 130, 148, 170, 196. Due to Myrtle's¹ extremely poor health, the court allowed her testimony by way of a video deposition². RP 6, 140. Defendant presented testimony from her mother and husband. RP 214, 231.

On September 9, 2008, the jury returned guilty verdicts on all fifteen counts. CP 142-56; RP 351-54. The court declined defendant's request to sentence her as a first time offender, and instead imposed a mid-range sentence of 74 months on Count I and high-end, standard-range sentences of 29 months on all other counts, all to run concurrently. CP 157-71; RP 374.

Defendant filed a timely notice of appeal. CP 172.

2. Facts

Frank and Myrtle Strom were a retired couple in their eighties when they hired defendant to do some house work for them in 2004. RP 105-08. They paid defendant \$65.00 per visit for her to vacuum, dust,

¹ For the sake of clarity, all the Stroms are referred to by first name. The State does not intend any disrespect.

² Citations to Myrtle's deposition will be to the CP followed by the page number of the transcript, e.g., CP 69-138 (transcript at 1).

wash dishes, and do laundry. CP 69-138 (transcript at 11, 15); RP 109. Defendant performed these tasks one day per week and occasionally brought her husband to help. RP 55, 110, 235. Over the course of her employment, defendant developed a friendship with Myrtle. RP 117, 217, 244.

The Stroms were conservative with their money; they did not have credit cards and paid for everything by cash or check. RP 57, 64, 103. They left their checkbook on the kitchen table, \$200.00 to \$300.00 in cash under the placemats, and a Band Aid tin with approximately \$3,000.00 in cash under the sink. RP 57, 67. They kept their unused checkbooks on a shelf in the garage. RP 66-67.

Myrtle handled the couple's finances until she had to go live in a nursing home in 2006. CP 69-138 (transcript at 12); RP 57, 61, 87, 107. Myrtle's health was extremely poor and she was transferred between the nursing home and the hospital several times between 2006 and 2008. RP 154-56. Along with her physical ailments, Myrtle was on several different types of pain medication. RP 112. Usually she was alert³, but on any

³ At the time of trial, Myrtle's nurse testified that Myrtle had been exhibiting short-term memory loss for only the previous six months. RP 156.

given day, her medication could make her seem “drunk.” RP 75, 112.

Myrtle never went back to the home she shared with Frank⁴. RP 125, 154-56.

After Myrtle left, Frank took over the finances, but he never reconciled bank statements with the checkbook. RP 62. He started voicing concerns he had about defendant to his step-son, Joe, and Joe’s wife, Jorene. RP 89-90, 113. Frank noticed that things were missing, such as a pellet gun, a copy of a CD worth \$130,000, checks, and the Band-Aid box under the sink. RP 68, 92-94, 116. During this time, defendant was still coming to the house to clean, but sporadically. RP 56, 61. Eventually, defendant stopped coming. RP 127-28.

Frank went to the nursing home in May, 2007. RP 114. At that time, he and Myrtle transferred power of attorney to Joe and Jorene. RP 65. Frank passed away from heart failure in August, 2007. RP 154.

On May 11, 2007, Jorene wrote checks from Frank and Myrtle’s account to pay for Frank and Myrtle’s household upkeep, nursing home care, pharmacy bills, and medical plan. RP 66. Jorene also reconciled that month’s bank statement with the checkbook. RP 67. She noticed that four checks, in sequence, were missing from the checkbook currently in

⁴ The State has no information regarding Myrtle’s current health. At the time of the trial, her nurse believed she had no more than six months to live. RP 151.

use. RP 69-70. She also discovered two checks missing from the unused checkbooks in the garage. RP 69-70.

Believing Frank and Myrtle were too “tight” with money to forget about six checks, Jorene went to the bank. RP 71-72. She found that two of the checks had cleared, two were in the process of clearing, and two were still unknown. RP 72. The cleared checks were made out to defendant and were signed with Myrtle’s name. RP 73-74. Upon closer examination, Jorene did not recognize the signature as Myrtle’s, and she knew that Myrtle did not have a checkbook at the nursing home. RP 75, 90.

Jorene asked Frank and Myrtle; neither of them knew about the checks. RP 74. In June, 2007, Jorene got permission from Frank to close the account and she contacted police to file a report. RP 74, 134-35.

Deputy Aloisio contacted Jorene on June 27, 2007. RP 133-35. Jorene identified seven checks made out to defendant that she thought were suspicious and provided him with copies. RP 136. The checks were:

| Number | Amount | Date written | Date cleared |
|--------|-----------|--------------|--------------|
| 3526 | \$ 790.35 | 06/01/07 | 06/05/07 |
| 3604 | \$ 495.00 | 05/18/07 | 05/21/07 |
| 3649 | \$ 659.52 | 04/24/07 | 04/27/07 |
| 3650 | \$ 485.00 | 12/10/06 | 01/19/07 |
| 3651 | \$ 421.91 | 03/02/07 | 03/29/07 |
| 3652 | \$ 642.89 | 05/01/07 | 05/08/07 |
| 3653 | \$ 462.00 | 11/30/06 | 01/16/07 |

CP (Exhibit 64, 65, 66, 67, 68, 69, 70); RP 201-06; Appendix A. All the checks had been cashed at “Cash It” in Spanaway, Washington. RP 201;

Appendix A. These checks had been paid out of the Stroms' account; the bank did not reimburse the Stroms for any of the checks⁵. RP 208.

Deputy Aloisio then went to the nursing home to speak to Myrtle about the checks. RP 137. Deputy Aloisio's impression of Myrtle's mental state was that she was "real sharp." RP 137. Myrtle told him that she did not write the checks and that she would not pay defendant that much money⁶. RP 137-38.

Detective Sanders was assigned to the case in early July, 2007. RP 172. He first contacted defendant at her home in Spanaway. RP 173-74. Detective Sanders introduced himself and told defendant he wanted to speak to her about her relationship with the Stroms. RP 174. Defendant invited the detective in and asked, "am I going to jail?" RP 174. Detective Sanders gave defendant her *Miranda*⁷ warnings, which she waived and agreed to speak to him. RP 175-77. Detective Sanders asked defendant about the checks. RP 177-78.

During the interview, defendant told Detective Sanders that she had written all the checks and cashed them at the Cash It on Pacific Avenue. RP 178. She told him that all the checks were reimbursements for her purchases of alcohol, clothing, and home essentials for the Stroms.

⁵ The bank required customers to report fraud within 90 days; however, as the transactions were continuous from January to June 2007, with the same suspect, the bank refused to reimburse the Stroms for any of the checks. RP 208.

⁶ This information came in without objection by defendant. RP 137-38.

⁷ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

RP 180. Detective Sanders asked defendant for receipts for the purchases and defendant promised him she would look for them. RP 180. She never told the detective that the money was for extra work defendant may have performed. RP 183.

Detective Sanders asked defendant how she could afford to front the Stroms the large amounts reflected on the checks when both she and her husband were unemployed, but defendant had no explanation. RP 180. She also could not explain to the detective how her purchases of liquor, a couple pair of shoes, and a couple pair of pants could add up to over \$600.00. RP 183. Defendant never provided any receipts to Detective Sanders. RP 181, 195.

After interviewing defendant, Detective Sanders contacted Myrtle at the nursing home. RP 184. He found Myrtle lucid and it was obvious that she was in the nursing home for “physical, not cognitive” reasons. RP 185. Myrtle was upset about the checks and indicated that she had not authorized defendant to write them. RP 186.

Frank died of heart failure August 3, 2007, while residing at the nursing home. CP 69-138 (transcript at 48); RP 154.

During a video-taped deposition taken August 1, 2008, Myrtle stated that she had loaned defendant money in the past, but defendant had paid her back. CP 69-138 (transcript at 23, 41, 46, 49). Myrtle identified those checks she wrote to defendant as loans. CP 69-138 (transcript at 23, 41, 46, 49). Myrtle stated that the signatures on the checks that were the

basis for the charged crimes were not hers, and that she did not give defendant any of those checks. CP 69-138 (transcript at 50-57).

Defendant's mother, Maria Garcia, testified on defendant's behalf. RP 214. Ms. Garcia testified that she was jealous of Myrtle because defendant spent so much time with her. RP 217. She did not know how long defendant worked for the Stroms, but knew she had been hearing about Myrtle for approximately three years. RP 226. She believed that defendant stopped cleaning for the Stroms two to three years prior to trial. RP 229. Remarkably, Ms. Garcia was not sure how old defendant was or what defendant's husband did for a living, but she did know that she paid defendant's rent for two years. RP 214, 224, 228.

Defendant's husband, Art Armenta, also testified on defendant's behalf. RP 232. He testified that he and defendant had been married for thirteen to fourteen years, and that they had a business together, cleaning houses. RP 232. Mr. Armenta testified that he and defendant cleaned for the Stroms sometime between 2000 and 2005. RP 236. He stated that not only would they clean, but they would also buy groceries for the Stroms. RP 236, 239. He and defendant would make the grocery purchases with their own money, and the Stroms would reimburse them. RP 240.

Mr. Armenta testified that he did not handle any of the business' finances and had no idea how much money he and defendant made, or how much was expended on bills. RP 247-48. He did know that the grocery bills for the Stroms would not exceed \$100.00. RP 256. They

never fronted the Stroms the amount of money that appeared on the checks. RP 259. Mr. Armenta stated that defendant never told him she had a check from the Stroms for \$790.35, and he had no idea why the Stroms would pay her that much money. RP 260.

C. ARGUMENT.

1. AS DEFENDANT FAILED TO REQUEST THAT THE SENTENCING COURT FIND HER CONVICTIONS TO BE THE SAME CRIMINAL CONDUCT, SHE IS PRECLUDED FROM RAISING THIS ISSUE FOR THE FIRST TIME ON APPEAL.

Generally, issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.59(a); *State v. Nitsch*, 100 Wn. App. 512, 519, 997 P.2d 1000 (2000), *review denied*, 141 Wn.2d 1030 (2000). This rule does not apply to illegal or erroneous sentences. *See Nitsch* 100 Wn. App at 519. A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

While a defendant may challenge a sentence for the first time on appeal, he waives his right to raise the issue where the “alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.” *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). The application of the same criminal

conduct inquiry involves both factual determinations and the exercise of discretion. *Nitsch*, 100 Wn. App at 520-21.

In *Nitsch*, Division I held that the defendant's failure to identify a factual dispute for the sentencing court's resolution and failure to request an exercise of the court's discretion waived the challenge to his offender score. *Id.* at 520-23. Here, defendant attempts to make the same type of argument that was rejected in *Nitsch*. A defendant waives the same criminal conduct issue by failing to raise it at sentencing. Merely couching the error as a miscalculation of an offender score does not elevate the issue to one of constitutional magnitude. As the court held in *Nitsch*:

This is not an allegation of pure calculation error . . . Nor is it a case of mutual mistake regarding the calculation mathematics. Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion.

Nitsch, 100 Wn. App at 520 (internal citations omitted).

The record is clear that defendant did not request the sentencing court to consider any of her convictions to be the same criminal conduct as any other. RP 363-69. Nor does defendant include any citations to the record or argument that she did preserve the issue for appeal. *See* Appellant's brief at 7-9. Because defendant failed to request the court to review her convictions to determine whether they constituted the same criminal conduct, she is precluded from raising this issue on appeal.

Moreover, defendant appears to be confusing the same criminal conduct analysis with the merger doctrine. *See* Appellant's brief at 9. Defendant uses the word "merge" to describe how "[a]ll the convictions in this case merge into a single offense – identity theft." *Id.* "Merge" refers to the merger doctrine, which, of course, implicates protections against double jeopardy. *State v. Torngren*, 147 Wn. App. 556, 563, 196 P.3d 742 (2008) (citing *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983)). Under the merger doctrine, crimes merge when proof of one is necessary to prove an element or the degree of another crime. *Vladovic*, 99 Wn.2d at 419. When two crimes merge, the trial court sentences a defendant only to the one offense into which the other offenses merge. *See State v. Parmelee*, 108 Wn. App. 702, 711, 32 P.3d 1029 (2001).

Under the same criminal conduct standard, the question is not whether a defendant is sentenced on fewer convictions, which would be the case under "merger," but whether each of his convictions is counted separately for sentencing. *See* RCW 9.94A.589(1)(a).

[W]henever a person is to be *sentenced* for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

RCW 9.94A.589(1)(a) (emphasis added). Under this statute, each current conviction receives an offender score, but the score does not include points for those current convictions that constitute same criminal conduct.

Defendant's argument is based on a same criminal conduct analysis, but her conclusion is based on the merger doctrine. Defendant argues that Counts II and III are same criminal conduct, as are Counts IV and V, Counts VI and VII, etc. She does *not* argue that Counts II or III are the same criminal conduct as Counts IV, V, VI, etc. She then states that Count I is the same criminal conduct as all the other counts, giving her an offender score of zero. Assuming, without conceding, the validity of defendant's argument, her conclusion is in error. Under defendant's argument she may have an offender score of zero for the identity theft, but she would still have an offender score of six for each of the second degree theft and forgery convictions, because each of the checks were cashed on a different day, precluding them from being same course of conduct to each other.

2. DEFENDANT’S COUNSEL’S PERFORMANCE WAS NOT DEFICIENT WHEN HE FAILED TO REQUEST THE COURT TO FIND DEFENDANT’S CONVICTIONS WERE SAME CRIMINAL CONDUCT AS THE THEFTS AND FORGERIES WERE NOT THE SAME CRIMINAL CONDUCT AND THE LEGISLATURE INTENDED IDENTITY THEFT TO BE PUNISHED SEPARATELY FROM CRIMES THAT ARE THE SAME COURSE OF CONDUCT.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also, State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). A defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness *and* that he or she was prejudiced by the deficient representation. *Strickland*, 466 U.S. at 687. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also, Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996);

Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

Perhaps realizing that she did not properly preserve a direct challenge to the determination of same criminal conduct, defendant also seeks to raise this issue via an ineffective assistance of counsel claim. To succeed on this claim, defendant must show that not only was there a basis for making this argument, but also that the court would have ruled in her favor. Defendant cannot make this showing.

- a. The second degree thefts and forgeries for each check were not the same criminal conduct.

Same criminal conduct means "two or more crimes that require the same criminal intent, are committed at the same time and place, and

involve the same victim.” RCW 9.94A.589(1)(a). “If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score....” *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993) (internal citations omitted). Washington courts narrowly construe the statute to disallow most assertions of same criminal conduct. *State v. Price*, 103 Wn. App. 845, 855, 14 P.3d 841 (2000), *review denied*, 143 Wn.2d 1014, 22 P.3d 803 (2001).

Here, defendant’s crimes do not encompass the same criminal conduct as they occurred at different times, they involved different victims, and they involve different intents.

i. Each check is separate criminal conduct because they were presented at different times.

The State charged defendant with one count of second degree theft and one count of forgery for each check. CP 28-68. Each check was drawn on Frank and Myrtle’s checking account, and each was presented at the same Cash It store, but each was presented on a different day. *See* Appendix A. Since the checks were all presented on different days, they are not the same criminal conduct.

Defendant claims that each count of second degree theft encompasses the corresponding forgery for the individual checks. *See* Appellant's Brief at 8. Defendant's argument here fails as the crimes have different victims, and involve different intents.

ii. Theft and forgery have different victims.

A person is guilty of second degree theft when he commits theft of property or services which exceed \$250.00 in value but does not exceed \$1,500.00 in value. RCW 9A.56.040. "Theft" is defined as "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property." RCW 9A.56.020(1)(a). It is clear in this case that Frank and Myrtle were the victims of the thefts as defendant wrongfully obtained money from their checking account.

A person is guilty of forgery if, with intent to injure or defraud, he falsely makes, completes, or alters a written instrument. RCW 9A.60.020. Forgery does not require that anyone be actually defrauded. *State v. Esquivel*, 71 Wn. App. 868, 871, 863 P.2d 113 (1993). The forgery is complete when the check is presented with the intent to defraud. *See* RCW 9A.60.020; *see also, Esquivel*, 71 Wn. App. at 872. Defendant intended to defraud Cash It, as well as Frank and Myrtle, when she presented the checks to Cash It, making Cash It a victim of the forgeries as well as Frank and Myrtle.

The fact that there is some overlap in victims does not meet the criteria for same victim. For example, in *State v. Lessley*, 118 Wn.2d 773, 778-79, 827 P.2d 996 (1992), the Supreme Court refused to treat a burglary and a kidnapping as the same criminal conduct. The court reasoned that while the kidnapping victim was also a victim of the burglary, the burglary involved additional victims- her parents with whom she lived; therefore the victims of the two crimes were not the same. *Id.*

Since Frank and Myrtle were the victims of the thefts, and Frank, Myrtle, and Cash It were the victims of the forgeries, the crimes for each check do not have the same victims and cannot encompass the same criminal conduct.

iii. Theft and forgery check involve different objective criminal intent.

The standard of the “same criminal intent” prong is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *State v. Price*, 103 Wn. App. 845, 857, 14 P.3d 841 (200) (*citing State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994)). The defendant’s subjective intent is not considered. *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). First, courts must objectively view each underlying criminal statute, and determine whether the required intents are the same or different for each count. *Price*, 103 Wn. App. at 857 (*citing State v. Hernandez*, 95 Wn. App. 480, 484, 976 P.2d 165 (1999)). If the

intents are the same in the statute, the court then objectively views the facts usable at sentencing to determine whether the defendant's intent was the same or different with respect to each count. *Price*, 103 Wn. App. at 857 (citing *Hernandez*, 95 Wn. App. at 484).

As noted above, a person commits theft when he wrongfully obtains or exerts unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property. RCW 9A.56.020(1)(a). Forgery involves falsely making, completing, or altering a written instrument with the intent to injure or defraud. RCW 9A.60.020. "Injure" means "to inflict material damage or loss on." *State v. Simmons*, 113 Wn. App. 29, 32, 51 P.3d 828 (2002) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1164 (1969)). "Defraud" means "[t]o cause injury or loss to ... by deceit." *Simmons*, 113 Wn. App. at 32 (citing BLACK'S LAW DICTIONARY, 434 (7th ed.1999)). The statutory intents of both crimes differ in that theft involves intent to deprive a person of their property, and forgery involves the intent to injure by deceit.

The facts in the present case also show that defendant's objective intent changed from one crime to the next. Defendant's objective intent under the theft was to deprive Frank and Myrtle of their money. Her objective intent with the forgeries was to trick Cash It, Frank and Myrtle's

bank, and Frank and Myrtle into giving her Frank and Myrtle's money. Whether defendant's subjective intent for both crimes was just to get money, is irrelevant.

Since defendant's objective intent changed from theft to forgery, the thefts cannot encompass the same criminal conduct as the forgeries.

All of defendant's convictions for second degree theft and forgery were distinct acts of criminal conduct as they all either occurred in different times and places, had different victims, and had different criminal intents. The court would have committed legal error in treating the crimes as the same criminal conduct. Defendant's attorney was not deficient for failing to ask the court to treat them as such because the motion was without merit.

- b. As the legislature authorized separate punishment for identity theft from the crimes which may constitute same criminal conduct, defendant cannot show that she was prejudiced by counsel's failure to raise this issue below.

A person is guilty of identity theft when he knowingly obtains, possesses, uses, or transfers a means of identification or financial information of another person, living or dead, with the intent to commit any crime. RCW 9.35.020(1). Identity theft is charged as first degree when that person obtains credit, money, goods, services, or anything else

of value in excess of \$1,500.00 in value. RCW 9.35.020(1), (2).

Whenever any series of transactions involving a single person's means of identification or financial information which constitute identity theft would, when considered separately, constitute identity theft in the second degree because of value, and the series of transactions are a part of a common scheme or plan, then the transactions may be aggregated into one count and the sum of the value of all of the transactions shall be the value considered in determining the degree of identity theft involved.

RCW 9.35.020(5). The legislature also enacted an "anti-merger" section to the statute. "Every person who, in the commission of identity theft, shall commit any other crime may be punished therefore as well as for the identity theft, and may be prosecuted for each crime separately." RCW 9.35.020(6).

The language in RCW 9.35.020(6) mirrors that of RCW 9A.52.050, also known as the burglary anti-merger statute. Under RCW 9A.52.050, every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately. Washington courts have held that the burglary anti-merger statute clearly expressed the legislature's intent to punish a single act with multiple convictions. See *State v. Bonds*, 98 Wn.2d 1, 15-16, 653 P.2d 1024 (1982), *cert. denied*,

464 U.S. 831 (1983). Because of the anti-burglary statute, a sentencing judge has the discretion to punish burglary separately, even if it and another crime encompass the same criminal conduct. *Lessley*, 118 Wn.2d at 781.

Since the language in RCW 9.35.020(6) is identical to the burglary anti-merger statute, it is clear that the legislature intended the same result. *Compare* RCW 9.35.020(6) *and* RCW 9A.52.050. A sentencing judge has the discretion to punish identity theft, even if it and another crime encompass the same criminal conduct.

Defendant claims that each count of forgery is the same criminal conduct as the single count of identity theft. *See* Appellant's brief at 8-9. As noted above, defendant failed to ask the court to exercise its discretion by finding that the identity theft was the same course of conduct as the thefts and forgeries. Defendant must now show prejudice. Per RCW 9.35.020(6), the court was under no legal obligation to sentence other than it did below. Thus, defendant cannot meet her burden of showing that the court would have granted this motion had it been brought unless she can demonstrate that the court wanted to sentence defendant less harshly than she did.

The record does not support a conclusion that the court wanted to sentence defendant less harshly. Counsel argued for a first time offender sentencing option, citing defendant's belief in her innocence, the lack of payment after Myrtle went into the nursing home, the absence of any

criminal history, and letters from defendant's friends and family which described her reliability and trustworthiness. RP 363-69. The court was not persuaded and noted that defendant's crimes were "very serious offenses that were committed against a very vulnerable victim and her husband." RP 374.

Not only did the court deny counsel's request to sentence defendant as a first time offender, but the court also imposed a mid-range sentence for the identity theft and high-end sentences for the thefts and forgeries. RP 374. Based on the court's denial of the first time offender option, her comments during sentencing, and her refusal to impose a low-end sentence, it does not appear that the court wanted to impose a less harsh sentence. Defendant cannot show that, but for counsel's failure to argue for the same criminal conduct, the outcome would have been different.

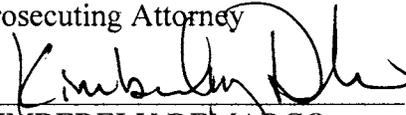
Defendant has failed to meet her burden of showing ineffective assistance of counsel.

D. CONCLUSION.

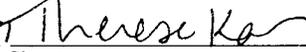
Defendant is precluded from raising the issue on appeal of same criminal conduct where she did not raise it at sentencing. Defendant received effective assistance of counsel. For the above reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence.

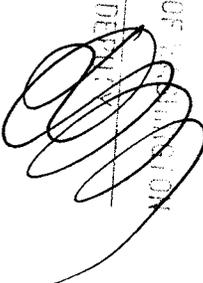
DATED: May 19, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KIMBERELY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

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.

5/19/09 
Date Signature

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DIVISION II
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STATE OF WASHINGTON
BY  DEMARCO

APPENDIX "A"

FRANK O. STROM
 MYRTLE A. STROM
 1227 - 58TH AVE. NE 253-927-7128
 TACOMA, WA 98422

34-827/1251
 1100433679

3526

DATE 06/01/08

PAY TO THE ORDER OF J. Aquino Fremell \$ 790.35

Seven Hundred and ninety and 35/100 DOLLARS

Columbia State Bank
 1501 9th Ave. East
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MEMO Myrtle A. Strom

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 Cash in Spain
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Account:1100433679 Serial:3526 Amount:\$790.35 Sequence:107447580 ABA:125108272 Trancode:0 Date:06-05-2007 (D)ebit / (C)redit:D

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 H. Strom

FRANK O. STROM
 MYRTLE A. STROM
 1227 - 58TH AVE. NE 253-927-7128
 TACOMA, WA 98422

34-827/1251
 1100433679

3604

DATE 05-18-07

PAY TO THE ORDER OF Suzanne Aquino \$ 495⁰⁰/₁₀₀

Four Hundred and Ninety Five DOLLARS

Columbia State Bank
 1501 64th Ave East
 P.O. WA 98424

MEMO Myrtle A. Strom

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 M. Strom

FRANK O. STROM:
MYRTLE A. STROM

1227 - 58TH AVE. NE 253-927-7128
TACOMA, WA 98422

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DATE 3-02-07

PAY TO THE
ORDER OF

Suzanne Aquino

\$ 421⁹¹/₁₀₀

Four twenty one and 91/100

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1501 9th Ave East
Tacoma, WA 98424

Myrtle A. Strom

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M. Strom

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FRANK O. STROM
MYRTLE A. STROM
1227 - 58TH AVE. NE 253-927-7128
TACOMA, WA 98422

34-827/1251
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3653

DATE 11/30/06

PAY TO THE ORDER OF

Suzanne Aquino

\$ 462.00

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1501 54th Ave East
Tacoma, WA 98424

MEMO

Myrtle A Strom

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