

NO. 38423-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID EARL HEWSON,

Appellant.

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STATE OF WASHINGTON  
BY *em*  
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COURT OF APPEALS  
DIVISION II

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

The Honorable Sergio Armijo, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor's disparaging comments about defense counsel during rebuttal argument denied appellant a fair trial.

2. The court's failure to treat two of appellant's offenses as the same criminal conduct when calculating his offender score requires remand for resentencing.

3. Trial counsel's failure to raise the same criminal conduct issue constitutes ineffective assistance of counsel.

4. The sentencing court lacked authority to impose an "off-limits" order.

Issues pertaining to assignments of error

1. In rebuttal argument, the prosecutor told the jury not to let defense counsel scare them out of returning a guilty verdict or intimidate them out of seeing that justice is done. Where there is a substantial likelihood the prosecutor's unsupported disparaging remarks caused the jury to disregard appellant's legitimate defense, was appellant denied a fair trial?

2. Appellant was convicted of identity theft, theft, and forgery, based on a single act of obtaining money with a fraudulent withdrawal slip. Where the theft and forgery involved the same victim,

the bank, and thus encompassed the same criminal conduct, did the court err in counting the offenses separately in appellant's offender score?

3. Did trial counsel's failure to raise the same criminal conduct issue or object to the offender score calculation constitute ineffective assistance of counsel?

4. The court imposed an "off-limits" order pursuant to RCW 10.66.020, which authorizes the court to impose such an order as a condition of sentence for a drug offense. Where appellant was not sentenced for a drug offense, must the unauthorized order be stricken?

B. STATEMENT OF THE CASE

1. Procedural History

On December 7, 2007, the Pierce County Prosecuting Attorney charged appellant David Hewson with first degree identity theft, first degree theft, and forgery. CP 1-2; RCW 9.35.020(1)(2)(a); RCW 9A.56.202(1)(a); RCW 9A.60.020(1)(a)(b). The case proceeded to jury trial before the Honorable Sergio Armijo, and the jury returned guilty verdicts. CP 19-21. The court imposed standard range sentences, and Hewson filed this timely appeal. CP 53, 64.

2. Substantive Facts

On October 19, 2007, a man entered the Gig Harbor Branch of Timberland Bank, presented the teller with a withdrawal slip for an

account belonging to Jimmy Findley, and asked the balance on the account. 2RP<sup>1</sup> 114, 122. The teller, Deborah Ash, asked for identification, and the customer presented a driver's license. 3RP 141. The license appeared authentic, and Ash believed that the photograph looked like the customer and that the signature on the driver's license matched the signature on the withdrawal slip. 2RP 121; 3RP 143. Ash told the customer the account balance, and he asked to withdraw \$2,000, most of the money in the account. 2RP 113, 124.

Ash then attempted to verify the customer's signature with the account signature card. She called the Edgewood branch, where the account was opened, and asked for the signature card to be faxed to the Gig Harbor branch. 3RP 147. The signature card was never faxed, however, and after waiting for about 15 minutes for the fax to arrive, Ash's supervisor, Teresa Thayer, approved the transaction. 3RP 148-50, 234. Ash handed the customer \$2,000. 3RP 153.

Ash and Thayer later learned that Findley had disputed the withdrawal from his account. 3RP 154, 235. On October 31, 2007, the Gig Harbor branch received a faxed copy of Findley's signature card. 3RP 155. Ash and Thayer compared it to a copy of the withdrawal slip

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<sup>1</sup> The Verbatim Report of Proceedings is contained in nine volumes, designated as follows: RP (pre-trial)—9/9/08; 1(A)RP—9/10/08 (a.m.); 1(B)RP—9/10/08 (p.m.); 2RP—9/15/08; 3RP—9/16/08; 4RP—9/17/08; 5RP—9/18/08; 6RP—9/22/08; 7RP—10/3/08.

from October 19 and determined that the signatures did not match. 3RP 156, 237. After they watched a video of the transaction from the bank's security system, they called the police. 3RP 156, 236, 238.

Detective Fred Douglas of the Gig Harbor Police obtained a still photo from the bank video. 4RP 276. While Douglas was at the Edgewood branch of the Pierce County Sheriff's department, he showed the photo to Deputy David Barnhill. 3RP 209. Barnhill thought the man in the photo might be David Hewson, a resident of Edgewood he knew from previous contacts. 3RP 211<sup>2</sup>.

Douglas created a montage including a photograph of Hewson and showed it to Ash and Thayer, both of whom identified Hewson. 4RP 291, 297. Ash wrote on the montage that she was not 100 percent certain of her choice, but her first impulse had been to pick Hewson's photograph. 4RP 301.

Hewson was charged with identity theft, theft, and forgery. CP 1-2. At trial, Ash and Thayer testified about the transaction, and Barnhill and Douglas testified about the investigation. In addition, Findley testified that the signature on the withdrawal slip used to access his account was

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<sup>2</sup> Douglas's memory of this part of the investigation differed from Barnhill's. Douglas testified that a patrol officer had made stills from the video and sent them to Mrs. Findley. She showed them to Barnhill, who recognized Hewson and contacted Douglas. 4RP 276-79.

not his. 3RP 194. He did not withdraw \$2,000 from his account, and he did not authorize anyone else to make the withdrawal. 3RP 194, 196.

Hewson presented testimony from Michael Perius in his defense. Perius testified that Hewson had been working on some landscaping equipment at his house in Auburn on October 19, 2007. 4RP 324-25. Perius was certain of the date because the day before was his 25<sup>th</sup> birthday. He had gone out to dinner with Hewson and some others, and he asked Hewson at that time to come over the next day to work on the equipment. 4RP 323-24. Hewson arrived on the morning of the 19<sup>th</sup> while Perius was still sleeping, and he stayed until evening, when he received a call from his girlfriend who needed his help. 4RP 324-26.

Although Ash identified Hewson at trial, she also said that Hewson's hair was shorter than the person who presented the withdrawal slip. 3RP 140. She explained that the reason she hesitated in identifying Hewson from the montage was that she could not see the back of his head, and she remembered that the man in the bank had had longer hair. 3RP 177. Similarly, Thayer hesitated in identifying Hewson in court, saying she was only 75 percent sure he was the man who had been in the bank. 3RP 252. She had seen the man in the bank from the side and noticed a ponytail hanging down the back of his neck, pulled very tight, which Hewson did not have. 3RP 253.

In response, Hewson presented testimony from Philip Thornton, an attorney who represented Hewson on a separate matter. 6RP 356. Thornton testified that he saw Hewson in court on the morning of October 18, 2007, the day before the bank transaction at issue, and he had short hair at that time. 6RP 356. Thornton always tells clients that when they go to court they should look as though they are going for a business job interview, and he recalled that Hewson's hair was similar to his own, which has never been long enough to pull into a ponytail. 6RP 357, 359-60. Thornton testified that he had never seen Hewson with long hair. 6RP 357. In addition, Deputy Barnhill testified that the last time he had seen Hewson, in September or October 2007, his hair had been short. 3RP 217. Moreover, Perius testified that he had known Hewson for a couple of years and never knew him to have hair below his ears. 4RP 327.

In closing argument, defense counsel told the jury that there was no question someone had fraudulently withdrawn \$2,000 from Jimmy Findley's account. The question for the jury was whether that person was Hewson. 6RP 390. Counsel pointed out that the witnesses had testified that the suspect had long hair pulled into a ponytail, while the evidence showed Hewson had short hair at the time. 6RP 390-91. Counsel agreed that the person in the bank security video looked similar to Hewson, but she argued that because Hewson did not have hair long enough to wear in

a ponytail like the man in the video, this was a case of mistaken identity. 6RP 392-94.

Counsel reminded the jury that the state bears the burden of proving the allegations beyond a reasonable doubt and argued that there were numerous reasons to doubt that Hewson was the man in the video. 6RP 395. She told the jury she would not have a chance to respond to the prosecutor's rebuttal and asked the jury to imagine what she might say if she had the chance. 6RP 395. Counsel closed by saying, "I think if you really look hard at the evidence, pay attention to what everyone said, pay attention to that video, pay attention to the man you see in this courtroom, you will find that he's not guilty of any one of these three crimes." 6RP 396.

The prosecutor then gave her rebuttal argument, telling the jury the case was not about long hair but about identity, and she argued that Hewson had been identified by the witnesses. 6RP 396-98. After summarizing the state's evidence, she closed by saying,

Ladies and Gentlemen, there's a mountain of evidence that David Hewson is the person in the video. Don't let [defense counsel] scare you out of saying as much. Don't let [defense counsel] intimidate you so that you're afraid to come back and see justice is done. David Hewson is guilty beyond a reasonable doubt. Don't be afraid to say that.

6RP 399.

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10). Reed, 102 Wn.2d at 145. A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice, reversal is required. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

The prosecutor committed misconduct in this case when, during rebuttal argument, she accused defense counsel of trying to intimidate the jury and scare them into acquitting Hewson rather than seeing that justice is done. 6RP 399. The prosecutor's unsubstantiated accusations constitute flagrant misconduct.

While a prosecutor has latitude to express reasonable inferences from the evidence, "a prosecutor may not make statements that are unsupported by the record and prejudice the defendant." State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993) (citing State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991)), review denied, 124 Wn.2d 1018 (1994).

It is improper for the state, which bears the burden of proof, to argue facts that are not in evidence. Belgarde, 110 Wn.2d at 506-510.

There is nothing in the record to support the prosecutor's accusation that defense counsel was attempting to intimidate or frighten the jury. In fact, defense counsel focused her argument on evidence which tended to show the witnesses had misidentified Hewson, suggesting that if the jury paid close attention to the evidence, it would find Hewson was not guilty. Counsel merely pointed out reasons to doubt the state's allegations, as is the job of defense counsel. She would have rendered deficient performance had she not done so.

The misconduct in this case goes further than arguing facts not in evidence. It is also serious misconduct for the prosecutor to disparage defense counsel's role or to impugn counsel's integrity in closing argument. Reed, 102 Wn.2d at 145-46; State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003), Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984).

In Gonzales, the Court of Appeals found the prosecutor committed misconduct by disparaging the role of defense counsel in closing argument. The prosecutor there told the jury,

I have a very different job than the defense attorney. I do not have a client, and I do not have a responsibility to convict. I have an oath and an obligation to see that justice is served....[Defense counsel] has a client to represent, I don't. Justice, that's my responsibility and justice is holding him responsible for the crime he committed . . . .

Gonzales, 111 Wn. App. at 283. The Court of Appeals held that this argument improperly disparaged the role of defense counsel while drawing “a cloak of righteousness” around the prosecutor’s status as a government attorney, establishing in the jurors’ minds the false notion that, unlike the defense attorney, the prosecutor’s job is to see that justice is served. Gonzales, 111 Wn. App. at 283-84.

Here, as in Gonzales, the prosecutor blatantly disparaged defense counsel’s role, accusing defense counsel of attempting to intimidate and frighten the jury in order to obtain a favorable verdict, rather than seeking justice like the prosecutor. While defense counsel argued for acquittal based on fair and reasonable inferences from the evidence, the prosecutor implied that counsel was merely resorting to scare tactics in an abominable attempt to obscure the truth. The prosecutor’s comments constituted flagrant misconduct.

Defense counsel’s failure to object to the prosecutor’s misconduct does not preclude review. Reversal is required, notwithstanding the lack of defense objection, if the prosecutorial misconduct was so flagrant and

ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); Belgarde, 110 Wn.2d at 507. When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor's comments affected the verdict. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978); Belgarde, 110 Wn.2d at 508. The prosecutor's misconduct cannot be deemed harmless unless the record shows there would have been a conviction regardless of the misconduct. Charlton, 90 Wn.2d at 664.

The prejudice from the prosecutor's flagrant misconduct could not have been remedied by a curative instruction. There were significant questions as to the accuracy of the witnesses' identification of Hewson, given the undisputed testimony that he had short hair the day before the transaction at issue, while the man conducting the transaction had a ponytail down the back of his neck. Had the prosecutor not disparaged defense counsel, the jury may have been more apt to consider this inconsistency as well as Hewson's alibi. Once the argument was made that defense counsel's legitimate argument should be disregarded as merely an attempt to frighten and intimidate, however, the damage was done. The prosecutor's suggestion that she alone was seeking justice could not have been undone by counsel requesting a curative instruction.

See e.g. State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993) (comments that clearly reflected prosecutor's personal assurances of defendant's guilt so prejudicial that could not be cured despite court's instructions); State v. Powell, 62 Wn. App. 914, 920, 816 P.2d 86 (1991) (Where misconduct strikes at the heart of the defense case, a curative instruction is ineffective to "unring the bell."), review denied, 118 Wn.2d 1013 (1992). There is a substantial likelihood the prosecutor's improper closing argument affected the jury's verdict and thus denied Hewson a fair trial. The Court should reverse and remand for a new trial.

2. THE TRIAL COURT'S FAILURE TO RECOGNIZE THAT THE THEFT AND FORGERY CONVICTIONS ENCOMPASS THE SAME CRIMINAL CONDUCT FOR CALCULATION OF HEWSON'S OFFENDER SCORE REQUIRES REMAND FOR RESENTENCING.

Under the Sentencing Reform Act, multiple current offenses are generally counted separately in determining the offender score. If the sentencing court finds that two or more offenses encompass the same criminal conduct, however, those offenses are counted as a single crime. RCW 9.94A.589(1)(a). Crimes encompass the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. While the sentencing court has discretion to determine whether offenses encompass the same criminal conduct, an appellate court must reverse a decision that is manifestly

unreasonable or based on untenable grounds. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Offenses are to be treated as a single crime when “one criminal event is ‘intimately related or connected to’ the other.” State v. Adame, 56 Wn. App. 803, 810, 785 P.2d 1144 (quoting State v. Dunaway, 109 Wn.2d 207, 214, 743 P.2d 1237 (1987)), review denied, 114 Wn.2d 1030 (1990). “The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next.” State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999).

Here, there is no question that Hewson’s convictions for theft and forgery encompass the same criminal conduct. The offenses were intimately related, both offenses being committed for the single purpose of fraudulently obtaining money. They were committed simultaneously, or in rapid succession, at the same place. And they involved the same victim, Timberland Bank.<sup>3</sup> Nonetheless, the prosecutor counted each of these offenses separately when calculating Hewson’s offender score, and neither defense counsel nor the court addressed the same criminal conduct issue. CP 50.

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<sup>3</sup> Thayer testified that Timberland Bank lost \$2,000 as a result of the crimes because it reimbursed Findley. 3RP 249.

a. **Hewson may challenge his offender score calculation for the first time on appeal.**

Hewson may raise this issue on appeal, despite trial counsel's failure to object to the state's offender score calculation. An offender score calculation may be challenged for the first time on appeal, because the sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002); State v. Soper, 135 Wn. App. 89, 104 n.11, 143 P.3d 335 (2006) (holding same criminal conduct issue could be raised for first time on appeal), review denied 161 Wn.2d 1004 (2007); but see In re Pers. Restraint of Shale, 160 Wn.2d 489, 158 P.3d 588 (2007) (plurality opinion, where defendant affirmatively agreed to offender score calculation in plea agreement, same criminal conduct issue could not be raised for first time on appeal).

Under RCW 9.94A.589(1)(a), Hewson's convictions for theft and forgery encompassed the same criminal conduct and thus should have been counted as a single offense when calculating his offender score, resulting in an offender score of 3. Instead, the offenses were counted separately, resulting in a score of 4. The miscalculation requires remand for resentencing. See State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

b. **In the alternative, defense counsel's failure to raise the same criminal conduct issue denied Hewson effective representation.**

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). In this case, defense counsel's failure to raise the same criminal conduct issue constituted ineffective assistance of counsel.

A similar situation occurred in State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004). There, the defendant was convicted of kidnapping, rape, robbery and murder. The crimes involved the same victim at the same place and occurred within a limited time period. Because the intent for the rape was arguably similar to the motivation for kidnapping, this Court held that defense counsel was deficient for failing to argue that the offenses encompassed the same criminal conduct. Saunders, 120 Wn. App. at 825. Moreover, since case law provided strong support for the argument, counsel's failure was prejudicial. Id.

As in Saunders, Hewson's offenses involved the same victim, time, place, and intent. There is no question they encompass the same criminal conduct, and counsel's decision not to challenge the offender score calculation constitutes ineffective assistance of counsel. Remand for resentencing is required. See Saunders, 120 Wn. App. at 825.

3. THE COURT LACKED AUTHORITY TO INCLUDE AN OFF-LIMITS ORDER AS A CONDITION OF HEWSON'S SENTENCE.

Under RCW 10.66.020, a court may enter an off-limits order to prevent a known drug trafficker from frequenting areas known for high levels of drug activity. State v. McBride, 74 Wn. App. 460, 464, 565, 873 P.2d 589 (1994). The statute authorizes such an order "[a]s a condition of sentencing of any known drug trafficker convicted of a drug offense." RCW 10.66.020(5). A drug offense is defined as a felony violation of RCW 69.50 or 69.52. RCW 10.66.010(3).

Here, although Hewson has a prior conviction for possession of methamphetamine, he was being sentenced in this case for identity theft, theft, and forgery. CP 49-50. Because these are not drug offenses, the court lacked authority to impose an off-limits order as a condition of his sentence. The unauthorized order must be stricken.

D. CONCLUSION

The prosecutor's unsupported accusations about defense counsel denied Hewson a fair trial and require reversal. Moreover, because the two current offenses which encompassed the same criminal conduct were counted separately in Hewson's offender score, the case must be remanded for resentencing. The unauthorized off-limits order must also be stricken.

DATED this 5<sup>th</sup> day of March, 2009.

Respectfully submitted,



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Certification of Service by Mail

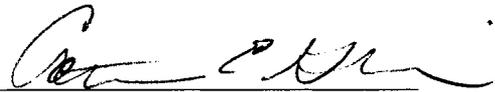
Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

*State v. David Earl Hewson*, Cause No. 38423-0-II, directed to:

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



Catherine E. Glinski  
Done in Port Orchard, WA  
March 5, 2009

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