

NO. 38423-0-II

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

STATE OF WASHINGTON, RESPONDENT

v.

DAVID HEWSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Sergio Armijo

No. 07-1-06141-1

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**Brief of Respondent**

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FILED  
COURT OF APPEALS  
DIVISION II  
09 MAY 27 PM 1:18  
STATE OF WASHINGTON  
BY  DEPUTY

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

1. Whether the deputy prosecuting attorney committed misconduct in her rebuttal argument?
2. If the prosecutor's remarks were improper, were they so flagrant and ill-intentioned that admonition or instruction by the court could not cure any prejudice?
3. May the defendant raise the issue of calculation of his offender score for the first time on appeal where he agreed to the calculation in the trial court?
4. Has the defendant demonstrated that his trial counsel was ineffective for failing to raise the issue of same criminal conduct in the trial court?
5. Whether forgery and theft are the same criminal conduct where they have different victims and different intents?
6. Whether the off limits order in paragraph 4.8 of the Judgment and Sentence applies to the defendant's crimes?

B. STATEMENT OF THE CASE.

1. Procedure

On December 7, 2007, the Pierce County Prosecuting Attorney charged David Earl Hewson, hereinafter referred to as the defendant, with

one count of identity theft in the first degree, one count of theft in the first degree, and one count of forgery. CP 1-2. On September 10, 2008, the case was assigned to Hon. Sergio Armijo for trial. 1A RP ff. At the conclusion of the trial, the jury found the defendant guilty of identity theft, theft in the first degree, and forgery, as charged. CP 19-21. On October 3, 2008, the court sentenced the defendant to 15 months in prison. CP 53. The court also ordered the defendant to have no contact with victims Jimmy Findlay and Timberland Bank. CP 55, 59. The defendant filed his notice of appeal at that time. 7 RP 423, CP 64.

## 2. Facts

The Timberland Bank (bank) branch in Gig Harbor is not very busy. They serve approximately 20 customers per day. 2 RP 99. The low volume of traffic permitted teller Deborah Ash and her supervisor, Teresa Thayer, to be especially attentive to their customers. 3 RP 101, 152.

On October 19, 2007, at approximately 10:15 a.m., the defendant entered the bank and approached teller Ash. 2 RP 104, 3 RP139. The defendant identified himself with a Washington driver's license, not as David Hewson, but as James Findley. 2 RP 120, 3 RP 138. He presented a signed withdrawal slip and asked the teller how much was in the account. 3 RP 140. He requested to withdraw \$2,000 from the account. 2 RP 114.

As careful bank employees, Ash and Thayer checked to verify the identification and the signatures on the identification and the withdrawal slip. 3 RP 143. They attempted to pull up the account signature card on

their computer, but were unable to do so. The account was at the Edgewood branch. 3 RP 147. The Edgewood branch had not scanned the account card into the computer system. 3 RP 147. Thayer called the Edgewood branch to have a copy of the account card faxed over. 3 RP 226. However, the Edgewood branch was too busy to do so. 3 RP 149. For 10-15 minutes, Ash and Thayer waited for the fax and made repeated calls to the Edgewood branch.

Meanwhile, the defendant paced in the bank. 3 RP 151. Ash watched the defendant and was attentive to the customer because the transaction was taking so long. 3 RP 152. Eventually, Ash and Thayer processed the transaction without getting the account card. Ash paid out \$2,000 from the account. 2 RP 114, 3 RP 153. When the account card finally arrived on October 31, Ash could see that the valid signature was completely different than that on the withdrawal slip presented by the defendant. 3 RP 155, 156. The bank employees then called the police to report the crime. 3 RP 236.

The bank has a video surveillance system. 3 RP 156. The transaction with the defendant was videotaped. 3 RP 157, 238. Gig Harbor police assembled a photo montage, including the defendant's photograph. 3 RP 291. Ash and Thayer each identified the defendant in the montages as the person who came to the bank and withdrew the money from Findley's account. 3 RP 169, 174, 251, 291, 297. Ash and Thayer also identified the defendant on the videotape. 3 RP 161, 260.

The driver's license the defendant presented for his identification at the bank had an invalid license number. 3 RP 304. The license was therefore either counterfeit or a forgery. 3 RP 305.

C. ARGUMENT.

1. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN STATE'S REBUTTAL.

To prevail on a claim of trial prosecutorial misconduct, the defendant must demonstrate 1) that the comments were improper, and 2) that the comments were prejudicial. *State v. Warren*, 165 Wn. 2d 17, 26, 195 P.3d 940 (2008). To show prejudice, the defendant must demonstrate that the comments affected the outcome of the trial. *State v. Yates*, 161 Wn. 2d 714, 776, 168 P. 3d 359 (2008). Arguments are viewed in the context of the entire argument, the issues in the case, the evidence discussed in argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn. 2d 559, 578, 79 P.3d (2003).

Counsel are given wide latitude in arguing the evidence and law to the jury. *State v. Stenson*, 132 Wn. 2d 668, 727, 940 P.2d 1239 (1997). However, the prosecuting attorney may not disparage defense counsel. *See, State v. Reed*, 102 Wn. 2d 140, 684 P. 2d 699 (1984).

Defense counsel is required to give the court the opportunity to try to correct or cure improper argument. *See, Warren*, 165 Wn. 2d at 29. Counsel cannot remain silent during improper argument, and then hope that the appellate court will order a new trial. If defense counsel does not object to the argument at the trial, the issue is waived unless the prosecutor's argument was extreme. Such an argument must be so flagrant and ill-intentioned that any resulting prejudice could not have been neutralized by an admonition or instruction to the jury. *Stenson, supra*, at 719.

*State v. Reed*, 102 Wn. 2d 140, 684 P.2d 699 (1984) is a well-known example of an extreme closing argument by a prosecuting attorney. In a murder trial in rural Pacific County, the prosecutor urged the jurors not to be swayed by the "big-city" defense lawyers and expert witnesses who drove down to the rural courthouse in their Mercedes-Benz automobiles. He openly mocked and disparaged the defense. The prosecutor called the defendant a liar several times in closing. He expressed his personal opinion regarding evidence. *Id.*, at 145-146.

*State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002) reversed an assault conviction for an error in jury selection. In dicta, the Court commented upon inappropriate closing argument by the prosecutor. The prosecutor had disparaged the role of defense counsel by arguing that the prosecutor had the role to seek justice, while implying that defense counsel's obligation to his client did not. *Id.*, at 283.

In the present case, the attorneys were arguing two very basic issues: the quantum of evidence, and whether the State has met its burden. The central issue was identity. The defense was alibi. The State argued that the evidence that the defendant was the perpetrator was strong. The defense argued that it was inconclusive. Defense counsel argued that the State has a heavy burden of proving his case beyond a reasonable doubt. 6 RP 395. She reminded them that she had brought to their attention several reasons to doubt. 6 RP 395-396.

The prosecutor did not commit any of the errors discussed in *Reed* or *Gonzales*. She did not disparage defense counsel in any way. The prosecutor's remarks were part of an exchange of arguments regarding the quantum of evidence and proof. The prosecutor was arguing that the defense was exaggerating the State's burden and flaws in the State's case. She was encouraging the jury to stand firm in its belief in the evidence. She did not commit misconduct.

2. THE SENTENCE IMPOSED BY THE TRIAL COURT WAS CORRECT.

- a. The defendant waived any objection to the offender score by failing to raise the issue in the trial court.

Only an illegal or erroneous sentence is reviewable for the first time on appeal. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). While a defendant may not waive his objection to an illegal sentence, he may explicitly or implicitly waive an objection to calculation

of his offender score. *In re Personal Restraint of Goodwin*, 146 Wn. 2d 861, 874, 50 P.3d 618 (2002).

A defendant generally cannot waive a challenge to an incorrect offender score. *Goodwin*, at 874. Exceptions to this rule exist, however, where the alleged error involves a stipulation to incorrect facts, or a matter of trial court discretion. *Id.* The same criminal conduct doctrine involves both factual determinations and matters of trial court discretion. *Id.*, at 875. Thus, a defendant may waive an alleged error regarding same criminal conduct if he fails to assert this argument at sentencing. *See Goodwin*, at 875 (favorably citing *Nitsch*, 100 Wn. App. at 521); *see also In re Pers. Restraint of Connick*, 144 Wn.2d 442, 464, 28 P.3d 729 (2001) (once a defendant agrees to an offender score that counts his prior offenses separately, he cannot subsequently challenge the sentencing court's failure to consider some of those prior offenses as the same criminal conduct).

In *Nitsch*, the defendant agreed to the representation of his standard range and requested an exceptional below the standard range. The court rejected his request and sentenced him to the high end of the range. On appeal, he argued that his score had been miscalculated. He claimed for the first time that his crimes were the same criminal conduct. He argued that the sentencing court should have considered the same criminal conduct issue *sua sponte*.

The Court of Appeals rejected this contention and held that he was barred from raising the issue for the first time on appeal. 100 Wn. App. at 525. The Court observed that the determination of whether two crimes are the same criminal conduct for scoring purposes is discretionary with the trial court. *Id.*, at 523. Nitsch failed to identify that factual issue for the trial court to resolve in an exercise of discretion. *Id.*, at 520. When he agreed to his standard range, he implicitly agreed to the calculation of his score, i.e. that the two crimes were scored separately. *Id.*, at 522. He therefore waived his argument regarding same criminal conduct and that objection to the calculation of his offender score.

In the present case, the prosecutor told the court:

The defendant's score, *I think we both agree*, was 2 before this. At this point his score is 4.

7 RP 414 (emphasis added.) The defense did not object to this statement of calculation. The defendant requested the low end of the standard range: 15 months for the identity theft, 12 and a day for the theft in the first degree; and 3 months for the forgery. 7 RP 417. As in *Nitsch*, the range requested by the defendant required a score of 4, as represented by the prosecutor. If the forgery and theft were the same criminal conduct, the score would have remained a 2. The defendant thereby waived his opportunity to raise the issue of same criminal conduct.

- b. Counsel was not ineffective when she did not raise the issue of same criminal conduct below.

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Under the first prong, the appellate court will presume the defendant was properly represented. *Id.*, at 77. The defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). In order to prevail on a claim of ineffective assistance of counsel, both prongs of the test must be met for a defendant to prevail on an ineffective assistance claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). If either part of the test is not satisfied, the inquiry ends.

Under the first prong, the defendant in the present case cannot show that counsel's performance was deficient. As argued below, the two crimes are not the same criminal conduct. Therefore, failing to raise the issue is not deficient conduct.

Under the second prong, the defendant cannot demonstrate prejudice. The defendant must show that, but for counsel's deficient performance, the outcome would have been different. The determination of whether a series of crimes are the same criminal conduct is discretionary with the trial court. *State v. Elliot*, 114 Wn. 2d 6, 17, 785 P.2d 440 (1990). Here, the defendant does not explain why or how, given the opportunity, the trial court would necessarily have exercised its discretion in his favor. Therefore, if in fact counsel's performance was deficient, he cannot show how he was prejudiced.

- c. The offender score was calculated correctly where the forgery and theft were not the same criminal conduct.

Under RCW 9.94A.589(1)(a), two crimes shall be considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *Id.*, at 778. The Legislature intended the phrase "same criminal conduct" to be construed narrowly, so that most crimes are not considered the same criminal conduct. *State v. Stockmeyer*, 136 Wn. App. 212, 218, 148 P.3d 1077 (2006); *State v. Flake*, 76 Wn.

App. 174, 180, 883 P.2d 341 (1994). In deciding whether two crimes involve the same criminal intent for purposes of determining same criminal conduct, the reviewing court examines and compares the statute underlying each crime to determine whether the required intents are the same or different. *State v. Hernandez*, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). If the intents are different, the offenses will count as separate crimes. *Id.*

In the present case, the forgery and theft of the money are separate acts that have different statutory intents and different victims. In forgery: “A person is guilty of forgery if, with *intent to injure or defraud...*” RCW 9A.60.020(1) (emphasis added.).

The forgery occurred and was complete when the defendant presented the forged withdrawal slip as a genuine document to the bank teller. *See, State v. Daniels*, 106 Wn. 2d 571, 23 P.3d 1125 (2001). The defendant presented the withdrawal slip with the intent to defraud the bank. Forgery does not require that anyone actually be defrauded. *State v. Esquivel*, 71 Wn. App. 868, 863 P.2d 113 (1993). It does not require any financial damage. The victim of the forgery was the account-holder, Findley, whose name and signature were used.

Theft means:

To 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 or services[.]

RCW 9A.56.020(1)(a) (emphasis added.)

The theft occurred when the defendant took the \$2,000 in payment. He intended to deprive someone of the money. It makes no difference whether the money came from the bank directly, or Findley's account through the bank. The theft has two victims: the bank, which paid the money; and Findley, whose account was charged for the \$2,000.

The present case is unlike *State v. Tili*, 139 Wn. 2d 107, 985 P.2d 365 (1999), cited by the defendant. Tili was convicted of multiple counts of the same crime, rape. The multiple counts were repeated acts of intercourse in rapid succession against the same victim, in the space of approximately two minutes. The intent element was exactly the same for each crime. In the present case, different crimes with different intent elements were charged and proven.

In *State v. Adame*, 56 Wn. App. 803, 785 P.2d 1144 (1990), also cited by the defendant, the defendant was convicted of possession of controlled substance and illegal possession of a firearm. He contended that they were the same criminal conduct for calculation of his offender score.

The Court of Appeals rejected his argument and affirmed his sentence.

Although the “intent” in each crime was to possess something illegal, the objective purpose in each crime was different: the possession of drugs had one purpose; the purpose to possess the firearm was another. *Id.*, at 811.

The intent to defraud, in the forgery; and the intent to deprive, in the theft, are different. Findley is the victim of the forgery. Findley and the bank are victims of the theft. Because the necessary elements of criminal intent and victims are missing, the theft and forgery are not the same criminal conduct.

3. ALTHOUGH THE COURT WAS AUTHORIZED TO ORDER, AS A CONDITION OF THE SENTENCE, THAT DEFENDANT HAVE NO CONTACT WITH THE VICTIMS, THE “OFF LIMITS ORDER” DOES NOT APPLY TO THE DEFENDANT.

RCW 9.94A.505(8) authorizes a sentencing court to impose crime-related prohibitions as part of a defendant’s sentence. Such crime-related prohibitions may include orders prohibiting contact with victims or witnesses. *State v. Armendariz*, 160 Wn. 2d 106, 156 P.3d 201 (2007).

In *Armendariz*, the Supreme Court did a detailed analysis of RCW 9.94A.505(8) and its predecessor, RCW 9.94A.120(20). The Court concluded that although the statute had been amended, and language changed, 9.94A.505(8) plainly authorized trial courts to impose no-contact orders as a crime-related prohibition. *Id.*, at 112-113.

In the present case, paragraph 4.3 of the Judgment and Sentence orders that the defendant have no contact with Timberland Bank or Jimmy Findley, the victims in this case. CP 52. This order is clearly legal. The defendant apparently does not challenge this section of the sentence.

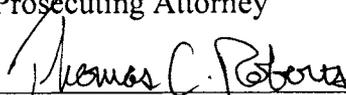
Paragraph 4.8 is entitled “Off Limits Order” and specifically refers to RCW 10.66.020, which applies to known drug traffickers and designated drug trafficking areas. CP 55. At sentencing, the court was clearly concerned with the effect of drug abuse on the defendant’s criminal behavior. 7 RP 420. However, there does not appear to be any finding that the current crimes were regarding drug trafficking or that the prohibited area is a drug trafficking area. Therefore, this section is inapplicable to the defendant. It appears to be surplusage or a redundancy of the no-contact order in paragraph 4.3. The Judgment and sentence should be corrected to remove the off-limits order in paragraph 4.8.

D. CONCLUSION.

The defendant received a fair trial where the issues were fairly argued in closing. The prosecuting attorney did not commit misconduct. The offender score was calculated correctly. The defendant had the opportunity to object or raise any issues at sentencing. He did not. The State respectfully requests that the judgment be affirmed.

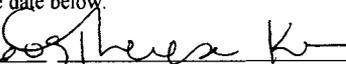
DATED: May 26, 2009.

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Certificate of Service:

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

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