

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Stephanie C. Cunningham
DEPUTY

No. 38644-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DEXTER LAMAR PETRIE, JR.,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 07-1-05117-3
The Honorable John R. Hickman, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court violated Appellant's double jeopardy protections when it entered judgment for both identity theft and theft relating each single act.
2. Appellant was denied his right to effective assistance of counsel as guaranteed under the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington State Constitution, when his trial counsel failed to request that Appellant's convictions be treated as the same criminal conduct at sentencing.
3. Appellant was denied his right to effective assistance of counsel as guaranteed under the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington State Constitution, when his trial counsel failed to object to trial being held in Pierce County on counts one through seven.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the facts used to prove the greater crimes of identity theft were the same as those used to prove the lesser crimes of theft, and where each crime of theft was necessarily established by proof of identity theft, were

Appellant's double jeopardy protections violated when the court entered judgment for both identity theft and theft relating to each act? (Assignment of Error 1)

2. Where each incident of identity theft occurred at the same time and place as one incident of theft, and where the intent and victims were the same for identity theft and theft, was Appellant denied his right to effective assistance of counsel when his trial counsel failed to request that Appellant's convictions be treated as the same criminal conduct at sentencing? (Assignment of Error 2)

3. Where both the Washington Constitution and Court Rules require that a defendant be tried in the county where the crimes were alleged to have been committed, and where the State's evidence clearly established that the crimes alleged in counts one through seven were committed in King County, was Appellant denied effective assistance of counsel when his trial counsel failed to object to the improper venue, or to request the inclusion of the element of venue in the jury instructions? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. Substantive Facts

In the summer of 2007, Erica David worked as a waitress at a Tacoma restaurant called Indochine. (RP 106-07, 233-34) Her boyfriend at the time, Dexter Petrie, would occasionally drop her off, pick her up, or visit her at work. (RP 108-09, 235) According to David, Petrie asked her to use an electronic “skimmer” to read and collect information from credit cards. (RP 236) David agreed, and used the “skimmer” on cards given to her for payment by Indichine customers. (RP 236-37) David testified that Petrie took the “skimmer” to a man who used a computer program and other equipment to create duplicate credit cards using the information collected from the original cards. (RP 237)

David testified that she and Petrie used these duplicate credit cards at various stores throughout the Puget Sound area, including Nordstrom, Zebra Club, Niketown, and Fred Meyer. (RP 238-40) They used the cards to purchase clothing, accessories, shoes, and televisions. (RP 238-40) David testified that she and Petrie also purchased gift certificates from the Gene Juarez Salon web site, which they later redeemed for services and products at various Gene Juarez locations. (RP 242-43, 266) Although most

of the items and services were purchased for David, a few items were chosen and purchased for Petrie as well. (RP 239-40, 241-42, 247, 264-65)

Pamela Mesick and Jean Swanson ate lunch at Indochine on June 23, 2007. (RP 79, 93) Their server was named "Erica", and both paid for their meals using a credit card. (RP 79, 80, 93, 94) Kristen Costello dined at Indochine on July 6, 2007, and paid with her credit card. (RP 125)

These three women were subsequently contacted by their credit card companies regarding suspicious activity on their accounts. (RP 81, 94, 126) Purchases had been made on Mesick's card at several stores without her authorization, including a \$497.67 charge at Zebra Club clothing store in Bellevue. (RP 81-82; Exh. P4) An unauthorized purchase was made on Swanson's card for \$430.15 at Niketown in Seattle, and for \$437.72 at Nordstrom in Seattle. (RP 95; Exh. P8, P12) Unauthorized purchases were made on Costello's card at a Fred Meyer store in Renton and a Fred Meyer Store in Federal Way, for \$1,295.88 and \$1,181.52 each. (RP 127, 128)

Surveillance photos and videos from several of the stores showed David and Petrie shopping together. (RP 145-46, 147-48,

152, 154, 305; Exh. P5, P7, P9, P17-P18) A video from the Renton Fred Meyer appeared to show Petrie signing a charge slip. (RP 152; Exh. P9) But none of the other evidence indicated that Petrie signed for any of the other purchases. (RP 165)

Subsequent investigation and use of the surveillance photos led police to Indochine and David. (RP 136-39, 110, 156-57) The manager immediately fired David. (RP 111) The State filed criminal charges against David and Petrie in October of 2007. (CP 1-4; RP 158)

Kathleen Montante testified that she noticed several unauthorized charges on her credit card, including several from Gene Juarez Salon. (RP 169-70) A gift certificate in the amount of \$1,000.00 and a second in the amount of \$650.00 were presented by David at different Gene Juarez salon locations in November and December of 2007. (RP 176, 185, 187, 209, 224) The certificates had been purchased on the internet during those same months, using Montante's credit card. (RP 185, 187)

Employees at the Tacoma Mall Gene Juarez testified that they saw David and Petrie together at their salons. (RP 198-99, 207-08, 222, 227, 229-30) Petrie only received one treatment at one of the salon locations, and was not seen choosing any

products for purchase. (RP 195, 208, 223-24) He also left and returned several times throughout the day as David received her various spa treatments. (RP 205)

Petrie testified that when he first met David, he noticed that she had expensive taste and an expensive wardrobe. (RP 271) He denied providing David with a credit card “skimmer,” and denied encouraging or aiding her in obtaining other peoples’ credit card information. (RP 271-72) He said he did not know that the purchases were improper until after David was fired from Indochine. (RP 273) He also testified that David told him the Gene Juarez gift certificates were a gift from a relative. (RP 276-77)

B. Procedural History

The State charged Petrie by Amended Information with two counts of second degree identity theft (RCW 9.35.020(3)), four counts of second degree theft (RCW 9A.56.020(1)(b)), two counts of first degree identity theft (RCW 9.35.020(1)(2)(a)), and one count of first degree theft (RCW 9A.56.020(1)(a)). (CP 7-11) The State also alleged as an aggravating factor that five of the crimes were major economic offenses (RCW 9.94A.535(3)(d)). (CP 7-11) The State also charged David, but she entered a guilty plea and agreed to testify against Petrie. (RP 28-31, 33, 260)

In closing arguments, the prosecutor connected each count with a particular act:

<i>count</i>	<i>charge</i>	<i>cardholder</i>	<i>merchant(s)</i>
1	Identity Theft 2°	Mesick	Zebra Club
2	Identity Theft 2°	Swanson	Nordstrom, Niketown
3	Identity Theft 1°	Costello	Fred Meyer x2
4	Theft 2°	Swanson	Niketown
5	Theft 2°	Swanson	Nordstrom
6	Theft 2°	Mesick	Zebra Club
7	Theft 2°	Costello	Fred Meyer
8	Identity Theft 1°	Montante	Gene Juarez
9	Theft 1°	Montante	Gene Juarez

(RP 338, 340-44, 346-47)

The jury convicted Petrie on all nine counts, and found that the four identity theft incidents and the single first degree theft incident were major economic offenses. (CP 61-73; RP 390-92) The court sentenced Petrie to concurrent standard range sentences on each count, totaling 54 months of confinement. (CP 99, 102; RP 420) This appeal timely follows. (CP 108)

IV. ARGUMENT & AUTHORITIES

- A. Petrie's convictions for both identity theft and theft violate his double jeopardy protections.

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy is implicated regardless of whether sentences are

imposed to run concurrently. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000); see also *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2001) (citing RAP 2.5(a); *Adel*, 136 Wn.2d at 631).

If a statute constitutes a lesser included offense of another statute, conviction for both offenses violates double jeopardy. *State v. Jackman*, 156 Wn.2d 736, 749, 132 P.3d 136 (2006). Even if one statute is not invariably a lesser included offense of the other, “if a court concludes that the facts the State must prove to convict the defendant under the two statutes are the same, the convictions violate double jeopardy and the analysis ends.” *Jackman*, 156 Wn.2d at 750.

The Washington Supreme Court has established a two-part test for determining whether an offense is a lesser included offense of another. *State v. Berlin*, 133 Wn.2d 541, 545, 947 P.2d 700 (1997). “First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was

committed.” *Berlin*, 133 Wn.2d at 545-46.

The lesser included offense analysis is applied “to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute.” *Berlin*, 133 Wn.2d at 548. When the evidence required to prove one crime is the same as what is required to prove the other crime, double jeopardy is violated. *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005), *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 817-20, 100 P.3d 291 (2004).

As prosecuted in this case, the elements of first degree identity theft are:

1. That . . . the Defendant, or an accomplice, knowingly obtained, possessed, used or transferred a means of identification or financial information of another person[;]
2. That the Defendant did so with intent to commit, or to aid or abet any crime;
3. That the Defendant or an accomplice used such person’s means of identification or financial information to obtain credit, money, goods, services, or other things having an aggregate value totaling more than \$1,500.00[.]

(CP 48) The elements of second degree identity theft are nearly identical:

1. That . . . the defendant, or an accomplice, did knowingly use a means of identification or financial information belonging to [another person;]

2. That the defendant's use of the means of identification or financial information was done with intent to commit a crime;
3. That the Defendant or an accomplice used such person's means of identification or financial information to obtain credit, money, goods, services, or other things having an aggregate value less than \$1,500.00[.]

(CP 41, 42)

As prosecuted in this case, the elements of first degree theft are:

1. That . . . the defendant, by color or aid of deception, obtained control over property or services of another;
2. That the property exceeded \$1,500 in value;
3. That the defendant intended to deprive the other person of the property or services[.]

(CP 49) And the elements of second degree theft are:

1. That . . . the defendant, by color or aid of deception, obtained control over property or services of another;
2. That the property exceeded \$250.00 in value but did not exceed \$1,500 in value;
3. That the defendant intended to deprive the other person of the property or services[.]

(CP 44-47) "By color or aid of deception means that the deception operated to bring about the obtaining of the property or services."

(CP 39)¹

¹ The jury instructions did not include accomplice language in every to-convict instruction, but the court did give a general instruction that defined accomplice liability and applied the definition to all of the charged crimes. (CP 34)

As prosecuted in this case, it is not possible to commit identity theft without also committing theft. If the State proved that Petrie or David “used or transferred a means of identification or financial information of another person,” the State necessarily proved that Petrie or David acted with “aid of deception,” because use of another person’s credit card information is an inherently deceptive act. If the State proved that Petrie or David intended to commit a crime when they “used such person’s means of identification or financial information to obtain” goods or services, the State necessarily proved that Petrie or David “intended to deprive the other person” of the goods or services obtained. And identity theft and theft both require the State to prove that Petrie or David obtained property or services of a particular value: less than \$1,500.00 for the second degree crimes and more than \$1,500.00 for the first degree crimes.

Each element of theft was a necessary element of identity theft as charged and prosecuted in this case, and the facts used to establish each of the elements of the two crimes were the same. Therefore, the theft convictions are lesser included offenses of the identity theft convictions in this case. Petrie’s convictions for both identity theft and theft for each use of the credit cards violate

double jeopardy, and the theft convictions must be vacated.

B. Petrie was deprived of his right to effective assistance of counsel.

Effective assistance of counsel is guaranteed by both the Federal and State constitutions. U.S. Const., amd. 6; Wash. Const. art. I, § 22 (amend. x); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove: (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987).

1. *Trial counsel provided ineffective assistance when he failed to request that the court treat the identity theft and corresponding theft convictions as the same criminal conduct.*

When two or more crimes require the same criminal intent, are committed at the same time and place, and involve the same victim, they constitute the same criminal conduct and the sentencing court must count them as one offense when computing the defendant's criminal history at sentencing. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). This concept is narrowly construed, and the court will not find the same criminal conduct if any of the three elements are missing. *State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004).

First, in this case, the State relied on Petrie or David's use of Mesick's financial information to obtain goods at Zebra Club to prove both identity theft in count one and theft in count six; on Petrie or David's use of Swanson's financial information to obtain goods at Nordstrom and Niketown to prove identity theft in count two and theft in counts four and five; on Petrie or David's use of Costello's financial information to obtain goods at Fred Meyer to prove both identity theft in count three and theft in count seven; and

on Petrie or David's use of Montante's financial information to obtain goods and services at Gene Juarez to prove both identity theft in count eight and theft in count nine. (RP 338, 340-44, 346-47) Accordingly, the acts relied upon to prove each of these identity theft charges and corresponding theft charges occurred at the same time and place.

Second, in determining whether the crimes had the same intent, the court should focus on "the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). To determine this, the court looks objectively at whether one crime furthered the other, or whether there was a substantial change in the nature of the criminal purpose. *Dunaway*, 109 Wn.2d at 215; *State v. Edwards*, 45 Wn. App. 378, 382, 725 P.2d 442 (1986).² In this case, the intent did not change from one crime to the other—Petrie or David's intent was to obtain items or services without paying for them by using other peoples' credit card information. The identity theft furthered the theft, and the theft furthered the identity theft. The intent for both crimes cannot be distinguished.

² *Overruled on other grounds by Dunaway*, 109 Wn2d at 215.

Finally, the victims for each of the crimes were the same—the cardholders, the merchants and the credit card companies. For each crime, the cardholder's information was used without authorization, charges were made to a credit card account issued by a financial institution, and goods or services were obtained from a merchant accepting the unauthorized card for payment.

The identity theft convictions and theft convictions are clearly the same criminal conduct, and the theft convictions should not have been counted in Petrie's offender score calculation. If trial counsel had raised this issue at sentencing, it would have been successful, resulting in a lower offender score and lower standard range, and therefore a shorter sentence for Petrie. Petrie's sentence should therefore be reversed, and his case remanded for resentencing.

2. *Trial counsel provided ineffective assistance when he failed to challenge venue in Pierce County for counts one through seven.*

The right to be tried in the place where the crimes were alleged to have occurred is guaranteed by both the Federal and state constitutions. The Sixth Amendment to the United States Constitution provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy

the right to a . . . trial, by an impartial jury of the state and district wherein the crime shall have been committed[.]

Art. I, § 22 of the Washington State Constitution also provides, in relevant part:

In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offenses charged have been committed[.]

In addition, CrR 5.1(a)(1) provides that all actions shall be commenced “[i]n the county where the offense was committed[.]” It is clear from a review of the record in this case that, although the trial was held in Pierce County, the acts establishing the crimes charged in counts one through seven occurred in King County.

To prove identity theft, the State had to establish that Petrie or David used another person’s personal or financial information to obtain goods or services, totaling up to \$1,500.00 for second degree and over \$1,500.00 for first degree. (CP 7-11, 41-42) See RCW 9.35.020. To prove the crime of second degree theft, the State had to establish that Petrie or David used deception to obtain control over property or services valued between \$250.00 and \$1,500.00. (CP 7-11, 44-47) See RCW 9A.56.020, .040. However, the evidence established that, for counts one through

seven, each of the uses of information and all of the obtaining of goods and services occurred at stores located in King County. Mesick's information was used to obtain goods at Zebra Club in Bellevue (counts one and six). (RP 82) Swanson's information was used to obtain goods at Nordstrom and Niketown in Seattle (counts two, four and five). (RP 95) Costello's information was used to obtain goods at Fred Meyer in Renton and Federal Way (counts three and seven). (RP 127-28)

Accordingly, Pierce County was not the proper venue for trial on these charges. When it becomes clear that a case has been filed in the incorrect county, the remedy is to request a change of venue. CrR 5.1(c). If there is a genuine issue of fact regarding venue, "it becomes a matter for resolution by the trier of fact", and the jury should be instructed that the State must prove proper venue by a preponderance of the evidence. *State v. Dent*, 123 Wn.2d 467, 480-81, 869 P.2d 392 (1994).

However, Petrie's trial counsel did not raise the issue of venue below. And failure to object to improper venue is waived if not challenged during the course of the trial. *Dent*, 123 Wn.2d at 479-80. But Petrie has a due process right to be tried in the county

where the acts allegedly occurred,³ and the State has the burden of proving all the elements of the charges,⁴ so trial counsel's failure to object to a trial in Pierce County constituted ineffective assistance of counsel.

First, trial counsel's failure to object to the venue falls below the objective standard of reasonableness. Proper venue is such a basic and fundamental matter, that counsel should have recognized the counts one through seven were filed in the wrong county. At that point, trial counsel should have moved to dismiss those charges. See CrR 5.1(c). If it was unclear to counsel at the start of trial whether any or all of the acts occurred in Pierce or King County, counsel should have at least requested that the jury instructions include the element of venue. *Dent*, 123 Wn.2d at 480. Failing to do either of these things amounts to deficient representation.

Second, if a motion to dismiss based on improper venue had been made, it would have been granted because the evidence clearly shows that all the relevant acts occurred in King County. Trial counsel's failure to so move impacted Petrie's constitutional

³ See U.S. Const., amd. VI; Wash. Const. art. I, § 22.

⁴ See *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992).

right to a fair trial, and his due process right to be tried where the alleged acts occurred by a jury pulled from that county. Similarly, a request to include the element of venue in the jury instructions would have been granted, and counsel's failure to do so relieved the State of its burden of proof.

The acts necessary to prove the elements of crimes charged in counts one through seven all occurred in cities within the boundaries of King County, Washington. Petrie has a right, under the Federal and State constitutions and court rules, to be tried in the county where the crimes took place, and to have the State prove all the elements of the charges, including venue. Trial counsel's failure to move to change venue to King County or to request the inclusion of venue in the jury instructions constitutes ineffective assistance of counsel, and Petrie was deprived of basic and fundamental due process rights. As a result, his convictions for counts one through seven must be reversed and dismissed with prejudice.

V. CONCLUSION

Because each theft is a lesser included offense of each identity theft as prosecuted in this case, judgment on both crimes violates Petrie's double jeopardy protections. The theft convictions

must be vacated. In addition, Petrie was denied his right to effective assistance of counsel because the crimes charged in counts one through seven occurred outside Pierce County. Finally, Petrie was also denied his right to effective assistance of counsel because the theft convictions are the same criminal conduct as the identity theft convictions and therefore should not have been counted in his offender score.

DATED: June 1, 2009



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CERTIFICATE OF MAILING

I certify that on 06/01/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Dexter Petrie Jr. DOC# 325684, Monroe Correctional Complex-MSU, Post Office Box 7001, Monroe, WA 98272-7001.



STEPHANIE C. CUNNINGHAM
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