

NO. 38644-5

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

STATE OF WASHINGTON, RESPONDENT

v.

DEXTER LAMAR PETRIE, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman, Judge

No. 07-1-05117-3

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Does defendant's argument that his convictions for identity theft and theft violate double jeopardy fail where the Legislature has articulated its intent that every crime associated with identity theft is to be punished separately?..... 1

 2. Does defendant's argument that his convictions for identity theft and theft violate double jeopardy fail where, under the *Blockburger* test, the crimes are not the same in law and fact? 1

 3. Has defendant failed to show that his counsel's performance was deficient where counsel declined to argue a meritless claim and defendant suffered no prejudice?..... 1

B. STATEMENT OF THE CASE. 1

 1. Procedure..... 1

 2. Facts 4

C. ARGUMENT..... 9

 1. DEFENDANT'S CONVICTIONS FOR IDENTITY THEFT AND THEFT DO NOT VIOLATE DOUBLE JEOPARDY AS THE LEGISLATURE HAS ARTICULATED ITS INTENT THAT EVERY CRIME ASSOCIATED WITH IDENTITY THEFT IS TO BE PUNISHED SEPARATELY; FURTHERMORE, THE CRIMES ARE NOT THE SAME IN LAW OR FACT 9

 2. COUNSEL'S PERFORMANCE WAS NOT DEFICIENT WHERE HE DECLINED TO MAKE ARGUMENTS THAT WERE CONTRARY TO LAW AND HE HAS FAILED TO SHOW EITHER DEFICIENT PERFORMANCE OR PREJUDICE..... 17

D. CONCLUSION. 24

Table of Authorities

State Cases

<i>In re Fletcher</i> , 113 Wn.2d 42, 49, 776 P.2d 114 (1989)	14
<i>In re Matteson</i> , 142 Wn.2d 298, 308-09, 12 P.3d 585 (2000).....	12
<i>State v. Baldwin</i> , 150 Wn.2d 448, 454, 78 P.3d 1005 (2003).....	9, 13, 15
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	18
<i>State v. Bunker</i> , 144 Wn. App. 407, 417, 183 P.3d 1086 (2008)	12
<i>State v. Calle</i> , 125 Wn.2d 769, 776, 888 P.2d 155 (1995).....	10, 11
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	19
<i>State v. Davison</i> , 56 Wn. App. 554, 784 P.2d 1268 (1990)	11
<i>State v. Freeman</i> , 153 Wn.2d 765, 776, 108 P.3d 753 (2005)	10, 14
<i>State v. Garrett</i> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994).....	18
<i>State v. Garza-Villarreal</i> , 123 Wn.2d 42, 47, 864 P.2d 1378 (1993)	20
<i>State v. Gocken</i> , 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).....	10
<i>State v. Graham</i> , 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).....	10, 13
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).....	18
<i>State v. Kane</i> , 101 Wn. App. 607, 613, 5 P.3d 741 (2000)	12
<i>State v. Lessley</i> , 59 Wn. App. 461, 798 P.2d 302 (1990).....	11
<i>State v. Leyda</i> , 157 Wn.2d 335, 138 P.3d 610 (2006).....	12

<i>State v. Louis</i> , 155 Wn.2d 563, 568, 120 P.3d 936 (2005)	10
<i>State v. Lynn</i> , 67 Wn. App. 339, 345, 835 P.2d 251 (1992).....	22
<i>State v. MacKenzie</i> , 114 Wn. App. 687, 699, 60 P.3d 607 (2002)	12
<i>State v. McCorkell</i> , 63 Wn. App. 798, 800, 822 P.2d 795 (1992), review denied, 119 Wn.2d 1004, 832 P.2d 487 (1992)	22
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....	22
<i>State v. Price</i> , 103 Wn. App. 845, 855, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014, 22 P.3d 803 (2001).....	20
<i>State v. Rupe</i> , 101 Wn.2d 664, 693, 683 P.2d 571 (1984).....	15
<i>State v. Thomas</i> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	18
<i>State v. Turner</i> , 31 Wn. App. 843, 846-47, 644 P.2d 1224 (1982).....	15
<i>State v. Tvedt</i> , 153 Wn.2d 705, 715-16, 107 P.3d 728 (2005)	15

Federal and Other Jurisdictions

<i>Blockburger v. United States</i> , 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).....	11, 13
<i>Cuffle v. Goldsmith</i> , 906 F.2d 385, 388 (9th Cir.1990).....	19
<i>Hendricks v. Calderon</i> , 70 F.3d 1032, 1040 (C.A. 9, 1995).....	19
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305, (1986).....	18, 19
<i>Missouri v. Hunter</i> , 459 U.S. 359, 366, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983).....	10, 11, 13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).....	18

U.S. v. Barsumyan, 517 F.3d 1154 (Cal. 2008).....8

United States v. Cronin, 466 U.S. 648, 656, 80 L.Ed.2d 657,
104 S. Ct. 2045 (1984)..... 17

Constitutional Provisions

Fifth Amendment.....9

Sixth Amendment.....17

Washington State Constitution, article I, section 99

Statutes

LAWS OF 2008, ch. 207, § 112

RCW 9.35.005(5)15

RCW 9.35.02011, 13

RCW 9.35.020(1)14

RCW 9.35.020(5)23

RCW 9.35.020(6)11

RCW 9.94A.030(49).....16

RCW 9.94A.589(1)(a)20

RCW 9A.52.05011

RCW 9A.56.020(b).....14

Rules and Regulations

CrR 5.1.....21

RAP 2.5(a)(3)22

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

1. Does defendant's argument that his convictions for identity theft and theft violate double jeopardy fail where the Legislature has articulated its intent that every crime associated with identity theft is to be punished separately?
2. Does defendant's argument that his convictions for identity theft and theft violate double jeopardy fail where, under the *Blockburger* test, the crimes are not the same in law and fact?
3. Has defendant failed to show that his counsel's performance was deficient where counsel declined to argue a meritless claim and defendant suffered no prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On October 17, 2007, the State charged DEXTER LAMAR PETRIE, JR., hereinafter "defendant," with three counts of identity theft in the second degree, and four counts of theft in the second degree. CP 1-4. On March 10, 2008, the State filed an amended information, to add several counts based on several incidents which occurred while defendant was awaiting trial. CP 7-11. Defendant ultimately proceeded to trial on two counts of identity theft in the second degree (Counts I and II), two counts

of identity theft in the first degree (Counts III and VIII), four counts of theft in the second degree (Counts IV, V, VI, and VII), and one count of theft in the first degree (Count IX). CP 7-11. Given the number of counts and the evidence presented at trial, the following chart may be helpful to the court:

Count	Crime	Credit card holder	Credit card used
I	Identity theft 2	Pamela Mesick	
II	Identity theft 2	Jean Swanson	
III	Identity theft 1	Kristen Costello	
IV	Theft 2	Pamela Mesick	Zebra Club
V	Theft 2	Jean Swanson	Niketown
VI	Theft 2	Jean Swanson	Nordstrom
VII	Theft 2	Kristen Costello	Fred Meyer
VIII	Identity theft 1	Kathleen Montante	
IX	Theft 1	Kathleen Montante Rory Turner	Gene Juarez

CP 1-4, 7-11.

Jury trial commenced before the Honorable John R. Hickman on October 13, 2008. RP 1. Defendant moved for appointment of a visiting judge and special prosecutor as one of the victims in the case was the wife of a Pierce County deputy prosecutor, alleging that the victim's connection to the prosecutor's office was affecting pretrial negotiations. RP 3. The State opposed the motion, noting that defendant had initially been offered a first time offender sentencing option as part of a plea agreement, but that offer was revoked when defendant committed

additional crimes while the case was pending. RP 5. The court denied defendant's motion. RP 9.

Prior to *voir dire*, defendant's co-defendant, Erica David, entered a guilty plea and agreed to testify on behalf of the State. RP 28. Defendant moved for a continuance which was denied by the court. RP 35, 41.

The jury received the case on October 20, 2008. RP 367. On October 22nd, the jury returned guilty verdicts on all counts. CP 60, 61, 62, 63, 64, 65, 66, 67, 68; RP 390. The jury also returned special verdicts, finding that counts I, II, III, VIII, and IX were all major economic offenses. CP 69, 70, 71, 72, 73; RP 391.

On December 4, 2008, defendant moved to continue the sentencing date until after Ms. David's sentencing, so they could receive the same sentence. RP 401-02. The court denied defendant's motion. RP 402. The State requested an exceptional sentence of 84 months, based on the jury's finding of aggravating factors, or for a high-end, standard-range sentence of 70¹ months. RP 403. Defendant argued for merger of the identity theft in the first degree and theft in the first degree charges. RP 406. Counsel argued that a sentence of 70 months would be unconscionable for a first time offender and suggested that 90 days was

¹ With an offender score of 8, defendant's standard range sentences were as follows: Counts I, II – 33-43; Counts III, VIII – 53-70; Counts IV, V, VI, VII – 17-22; Count IX – 33-43. CP 95-107. The State's calculation for the exceptional sentence was the high end of an offender score of 9 for identity theft in the first degree. RP 403.

more appropriate, though he admitted that he did not expect the court to grant that. RP 408. During allocution, defendant argued for a first time offender sentence. RP 410. The court imposed 54 months: the low end of the standard range for identity theft in the first degree, plus one month for the aggravating factors. RP 419-20. The court also imposed low end sentences on all the other counts, with all counts running concurrent. CP 95-107.

Defendant filed this timely notice of appeal. CP 108.

2. Facts

On June 23, 2007, Pamela Mesick and Jean Swanson met with a group of fellow retired school teachers for their monthly reunion lunch at Indochine Restaurant in Tacoma, Washington. RP 78-79, 93. The women received excellent service from their waitress, a young woman named Erica. RP 80, 90, 98. At the end of the meal, they and two other women paid their bills by credit card, while the other women paid in cash. RP 79, 88, 94, 98. In the following days, all four women who had paid with credit card received calls from their banks indicating there had been unauthorized charges on those cards. RP 81, 88-89, 94, 99.

Ms. Mesick² discovered that her credit card had been charged for purchases from GameStop (\$ 653.39), Zebra Club (\$ 497.67), and Champs (\$ 195.00). RP 81-82. Ms. Swanson's credit card had been charged for purchases from Niketown (\$ 430.15), Nordstrom (\$ 473.72), Bebe (\$266), and charges had been attempted at 7-11. RP 95. Neither of the women had given anyone permission to use their credit cards. RP 83, 95.

On July 6, 2007, Kristen Costello also dined at Indochine restaurant and paid by credit card. RP 124-25. Two days later, Ms. Costello's bank called to tell her of suspicious activity on her credit card account. RP 126. Two television sets had been purchased in the early morning hours at two different Fred Meyer stores; one for \$ 1,295.88 and the other for \$ 1,181.52. RP 127-28. Ms. Costello had not given anyone permission to use her credit card. RP 128.

Tacoma Police Detective Randi Goetz originally received the case on June 24, 2007. RP 140. She contacted the stores where Ms. Mesick's credit card had been used, which were all located in Bellevue, Washington. RP 141-42. Then she contacted the stores where Ms. Swanson's credit card had been used, which were in Seattle and Tacoma,

² Of the four women whose credit card information was taken, only Ms. Mesick and Ms. Swanson's were the basis of the identity theft charges in this case. Carol Echert received a call from her credit card company to tell her that charges had been denied at Zebra Club (\$497.00) and Chaps (\$200.00). RP 89. Eloise Wooley also testified that her credit card company called to tell her of unauthorized charges, but the specific stores were not made part of the record. RP 99.

Washington. RP 145. Niketown and Nordstrom provided her with surveillance videos, photographs, and receipts of the suspicious transactions. RP 146, 147.

On July 13, 2007, Detective Goetz received the report regarding Ms. Costello's credit card. RP 151. The loss prevention department of the Fred Meyer store in Renton provided her a copy of a video tape and photographs related to the suspicious transaction. RP 152.

During the course of her investigation, Detective Goetz discovered that all of the victims had used their credit cards at Indochine. RP 156. She contacted the manager, Russell Brunton, and showed him the photographs of the suspects. RP 157. Mr. Brunton identified the woman as Erica David, one of the servers at the restaurant, and "Dex," her boyfriend. RP 157-58. Detective Goetz ran a search of people named "Dex," and returned with photos of several people, including defendant. RP 158. Mr. Brunton identified defendant as "Dex." RP 158.

Defendant and Ms. David were summonsed to court for arraignment on these incidents on October 17, 2007. CP 118; RP 286, 295-99; Exhibit 27, 28, 29. At arraignment, the court ordered defendant to have no contact with Ms. David. CP 119-20; RP 267, 286; Exhibit 27.

Judith Seto is a loss prevention specialist for Gene Juarez Salon. RP 174. On November 28, 2007, employees informed her that customers in the Tacoma salon had been acting suspiciously. RP 176. The couple had used a paper gift card purchased over the internet to buy services and

products in excess of \$ 1,000.00. RP 177. The female had stayed in the salon all day, having various services; the male went in and out of the salon throughout the day. RP 177.

In the course of her investigation, Ms. Seto discovered that two gift cards had been purchased using credit card information belonging to Rory Turner. RP 178-81. The first one was purchased on November 27, 2008, for \$ 1,000.00. RP 180. The second was for \$ 1,200.00 and was purchased online while the female customer was in the salon having services performed. RP 180-81. She contacted Mr. Turner, who told her that he had not made any such purchases. RP 178-79. Mr. Turner's bank initiated a "charge back³" to his credit card. RP 179.

The following day, the couple was at the Gene Juarez in Southcenter Mall, with another \$ 1,200.00 gift card. RP 182. The couple purchased \$ 1,200.00 worth of products using the gift card. RP 185. Ms. Seto traced that gift card back to an online purchase made from Kathleen Montante's credit card. She also discovered another gift card charged to Ms. Montante's credit card for \$ 650.00 that was purchased on December 1, 2007. RP 185. Ms. Seto calculated the total loss to Gene Juarez was \$2,751.00.

³ When a merchant receives a credit card payment not authorized by the card holder, the card holder is liable to the merchant for a \$50.00 fee, but not for the amount of the purchase. The merchant bears the burden of the remaining loss. RP 179.

Ms. Seto retrieved surveillance videos from the stores and store employees identified the couple as defendant and Erica David. RP 158-59, 182, 198-99, 208, 222, 230.

Ms. Montante testified that her credit card had been used to purchase the Gene Juarez gift cards, as well as airline tickets and tickets to a Seattle sports stadium. RP 170. She did not give anyone permission to use her credit card. RP 170.

As part of a plea agreement, Erica David testified on behalf of the State. RP 233, 246. Ms. David testified that defendant was her ex-boyfriend. RP 234. While they were dating, defendant had given her a credit card skimmer⁴, told her how to use it, and asked her to scan her Indochine customers' credit cards. RP 236. She agreed. RP 237. Ms. David used the skimmer at the restaurant and then returned it to defendant a few days later. RP 236-38. She and defendant then visited "this guy in Seattle," who transferred all of the information in the skimmer to blank credit cards. RP 237. They used the new cards at Nordstrom, Zebra Club, Niketown, and Fred Meyer. RP 238-42.

⁴ "Skimmer" appears to be a street term for a credit card reader. A person swipes the credit card through the skimmer, which electronically reads and stores all of the financial information from the card. Then the skimmer is hooked up to a computer with a credit card recoder attached. Blank credit card stock is swiped through the recoder, transferring all of the original credit card information to the blank card. See RP 237; see also, *U.S. v. Barsumyan*, 517 F.3d 1154 (Cal. 2008).

Ms. David also testified that defendant had the credit card information used to purchase the Gene Juarez gift cards, and that they bought them together. RP 243, 266. Ms. David admitted that she did not have permission to use any of the credit cards and that she agreed to the scheme because she “wanted free stuff.” RP 246-47.

Defendant testified on his own behalf. RP 269. According to defendant, he did not give the skimmer to Ms. David. RP 271-72. Defendant claimed that he had no idea that any illegal activity was going on until Detective Goetz started investigating. RP 273. Defendant did admit that he continued to go shopping with Ms. David even after he was arraigned on the initial charges, but claimed he was still unaware of any illegal activity. RP 286, 299.

C. ARGUMENT.

1. DEFENDANT’S CONVICTIONS FOR IDENTITY THEFT AND THEFT DO NOT VIOLATE DOUBLE JEOPARDY AS THE LEGISLATURE HAS ARTICULATED ITS INTENT THAT EVERY CRIME ASSOCIATED WITH IDENTITY THEFT IS TO BE PUNISHED SEPARATELY; FURTHERMORE, THE CRIMES ARE NOT THE SAME IN LAW OR FACT.

The Washington State Constitution, article I, section 9, and the Fifth Amendment to the federal constitution prohibit multiple prosecutions or punishments for the same offense. *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). The state constitution provides the same

protection against double jeopardy as the federal constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The Legislature has the power to define criminal conduct and to assign punishment. *State v. Louis*, 155 Wn.2d 563, 568, 120 P.3d 936 (2005); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). “The Double Jeopardy Clause does no more than to prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983). When a claim of improper multiple punishments is raised, the appellate court must determine that the lower court did not exceed the punishment authorized by the legislature. *See Calle*, 125 Wn.2d at 776.

Double jeopardy is not violated simply because two charges arose from the same incident. Where a defendant contends that he has been punished twice for a single act under separate criminal statutes, two questions arise. The first is whether the Legislature intended to punish each crime separately. *State v. Freeman*, 153 Wn.2d 765, 776, 108 P.3d 753 (2005). The second is “whether, in light of legislative intent, the charged crimes constitute the same offense.” *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).

- a. The Legislature has expressed its intent to punish all crimes associated with identity theft separately.

In 2008, the Legislature amended RCW 9.35.020 to include the following language:

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). This language mirrors that of the burglary “anti-merger⁵” statute. Washington courts have held that this language in the burglary statute shows that the Legislature expressly intended cumulative punishment for crimes committed during the commission of a burglary. See *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995); *State v. Lessley*, 59 Wn. App. 461, 798 P.2d 302 (1990); *State v. Davison*, 56 Wn. App. 554, 784 P.2d 1268 (1990).

Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under the *Blockburger* test, a court’s task of statutory construction is at an end and multiple punishments are permissible. *Hunter*, 459 U.S. at 368-69.

⁵ RCW 9A.52.050 provides: “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.”

As a general rule, a statutory amendment, if it is clearly curative or remedial, will be applied retroactively even though it is completely silent as to legislative intent for retroactive application. *State v. Kane*, 101 Wn. App. 607, 613, 5 P.3d 741 (2000). “When a statute or regulation is adopted to clarify an internal inconsistency to help it conform to its original intent, it may properly be retroactive as curative.” *State v. MacKenzie*, 114 Wn. App. 687, 699, 60 P.3d 607 (2002) (citing *In re Matteson*, 142 Wn.2d 298, 308-09, 12 P.3d 585 (2000)). Also, where an amendment clarifies existing law and does not contravene previous constructions of the law, it may be considered curative, remedial, and retroactive. *State v. Bunker*, 144 Wn. App. 407, 417, 183 P.3d 1086 (2008).

The Legislature has expressed its intent to punish any crime that is performed while in the commission of identity theft as a separate crime. This section of the amendment clarifies the existing law and it does not contravene any previous construction⁶. While the statute was amended after defendant committed his crimes, it was merely a clarification of existing law. The amendment should apply in this case. As the

⁶ The Legislature amended the statute in light of the Washington Supreme Court’s ruling in *State v. Leyda*, 157 Wn.2d 335, 138 P.3d 610 (2006). LAWS OF 2008, ch. 207, § 1. In *Leyda*, the Court held that four counts of identity theft violated double jeopardy where a single piece of another person’s financial information was used on four separate occasions. *Leyda*, 157 Wn.2d at 351. Notably, the Court affirmed separate counts of theft that were the result of the defendant’s use of the financial information. *Id.*

Legislature has expressed its intent for crimes committed during the commission of identity theft to be punished separately, defendant's convictions for identity theft and theft do not violate double jeopardy.

- b. If this court does rule that the amendment to RCW 9.35.020 does not apply to the present case, defendant's convictions for identity theft and theft do not violate double jeopardy as they are not the same in law and fact.

Only if the relevant statutes do not expressly authorize multiple punishments, courts should apply the *Blockburger* or "same evidence" tests. *Graham*, 153 Wn.2d at 404, citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), see also, *Hunter*, 459 U.S. at 368-69.

Under the *Blockburger* test, double jeopardy arises if the offenses are identical both in law and in fact. *Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). Even if this court finds that the Legislature has not expressly authorized multiple punishments for identity theft and theft, defendant's convictions do not violate double jeopardy as they are not the same in law or fact.

- i. **The crimes of theft and identity theft are not the same in law.**

Under the same evidence test, offenses must be identical in law to invoke double jeopardy. *Baldwin*, 150 Wn.2d at 454. If each offense includes elements not included in the other, the offenses are not identical

in law, and multiple punishments can be imposed. *In re Fletcher*, 113 Wn.2d 42, 49, 776 P.2d 114 (1989).

A person commits 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, or to aid or abet, any crime. RCW 9.35.020(1). A person commits theft when he, by color or aid of deception, obtains 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(b).

Each of these crimes contains elements not found in the other. Theft does not require the use of a means of identification or financial information of another. Identity theft does not require obtaining control over the property of another with the intent to deprive that person of the property.

As these crimes are not the same in law, defendant could be punished for both crimes without implicating double jeopardy.

ii. Defendant's crimes of theft and identity theft are not the same in fact.

Criminal offenses are the same in fact where "the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other." *Freeman*, 153 Wn.2d 776. Crimes which harm different victims are not factually the

same for the purpose of double jeopardy. *Baldwin*, 150 Wn.2d at 457. Even multiple crimes arising from a single act will support separate convictions if there are separate victims. See *State v. Tvedt*, 153 Wn.2d 705, 715-16, 107 P.3d 728 (2005) (convictions for four robberies was proper where there were two separate victims in two separate locations); *State v. Rupe*, 101 Wn.2d 664, 693, 683 P.2d 571 (1984) (one act of robbing a bank supported two counts of robbery where the defendant took cash from the tills of two different tellers); *State v. Turner*, 31 Wn. App. 843, 846-47, 644 P.2d 1224 (1982) (convictions for two robberies were proper where the defendant took separate items of property from separate persons at their home).

While these cases involve the crime of robbery, the analysis is applicable in the present case. Where separate victims are specifically harmed by a single act, separate convictions are appropriate. Defendant's crimes of identity theft, and each associated theft, do not violate double jeopardy as they are not the same in fact by virtue of harming different victims.

The victim of identity theft is the person "whose means of identification or financial information has been used or transferred with the intent to commit, or to aid or abet, any unlawful activity." RCW 9.35.005(5). The theft statutes do not define the term "victim," yet the Sentencing Reform Act defines a victim is "any person who has sustained emotional, psychological, physical, or financial injury to person or

property as a direct result of the crime charged.” RCW 9.94A.030(49).

Hence, the victim of theft would be the person who bears the actual loss of the value of goods or services taken, who may, or may not, be the person whose means of identification or financial information was used.

Defendant claims that his convictions for identity theft and theft violate double jeopardy. *See* Appellant’s brief at 7-12. Yet defendant is never entirely clear on his position of which convictions should merge and which should remain. The State will assume that defendant’s claim is specifically that Count VI should be vacated as it merged with Count I; Counts IV and V should be merged into Count II; Count VII should be merged with Count III; and Count IX should be merged with Count VIII. Under defendant’s analysis, this would leave defendant’s sentences in place for Counts I, II, III, and VIII only.

Defendant was convicted of two counts of first degree identity theft for using the financial information belonging to Ms. Costello and Ms. Montante (Counts III and VIII). CP 27-55 (Jury instructions 15, 20). He was convicted of two counts of identity theft in the second degree for using the financial information of Ms. Mesick and Ms. Swanson (Counts I and II). CP 27-55 (Jury instructions 13, 14). Defendant’s convictions for theft were all based on the individual retail stores where defendant used the stolen financial information. Both the information and the State’s argument at closing identified the merchants as the victims of the thefts. The charges of theft in the second degree were based on defendant’s acts

of obtaining goods at Niketown, Nordstrom, Zebra Club, and Fred Meyer (Counts IV – VII). CP 1-4, 5-6; RP 342-44. The charge of theft in the first degree was based on defendant’s obtaining goods and services at Gene Juarez Salon (Count IX). CP 7-11; RP 347.

Since each crime involved a different victim, each crime was not the same in fact. As the crimes are the same in fact, defendant’s conviction on each count of identity theft and theft does not violate double jeopardy.

2. COUNSEL’S PERFORMANCE WAS NOT DEFICIENT WHERE HE DECLINED TO MAKE ARGUMENTS THAT WERE CONTRARY TO LAW AND HE HAS FAILED TO SHOW EITHER DEFICIENT PERFORMANCE OR PREJUDICE.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 80 L.Ed.2d 657, 104 S. Ct. 2045 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered

suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305, (1986).

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. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) (emphasis added); *see also, State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If either part of the test is not satisfied, defendant’s claim of ineffective assistance of counsel must fail. *Hendrickson*, 129 Wn.2d at 78.

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988).

- a. Identity theft and theft are not same criminal conduct where each offense had a different criminal intent, happened at a different time and place, and involved a different victim.

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*, 477 U.S. at 375. An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir.1990).

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 argued above, since each of these crimes involved a different victim they could never be considered same criminal conduct. Even if counsel had made a same criminal conduct argument, it is unlikely the court would have agreed, again because each crime involved separate victims.

Defendant attempts to avoid the issue of separate victims by using a blanket assertion that the credit card holders, merchants, and credit card companies were all victims for each crime. *See* Appellant’s brief at 15. Specifically, that 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.” Yet merely because crimes

occurred as part of a series of transactions, it strains reason to argue that the victims are the same for each crime.

For instance, Ms. Montante's credit card information was taken by defendant and used at Gene Juarez Salon, where defendant and Ms. David received several thousand dollars' worth of services and merchandise. Defendant offers no explanation as to how the Gene Juarez Salon could possibly be the victim of identity theft when defendant did not obtain, possess, use, or transfer any means of identification or financial information of the Gene Juarez Salon. Nor was there any evidence offered at trial that defendant used the identification or financial information of Niketown, Nordstrom, Zebra Club, or Fred Meyer. None of these entities were the victims of identity theft.

Because the crimes of identity theft and theft involved different victims, the crimes were not the same criminal conduct. Counsel's performance was not deficient for failing to raise a meritless claim.

- b. Defendant's claim of ineffective assistance of counsel for counsel's failure to challenge venue fails as defendant cannot show prejudice.

Under CrR 5.1, all actions shall be commenced 1) in the county where the offense was committed, or 2) in any county wherein an element of the offense was committed or occurred. Proper venue is not an element

of a crime and is not a matter of jurisdiction. *State v. McCorkell*, 63 Wn. App. 798, 800, 822 P.2d 795 (1992), *review denied*, 119 Wn.2d 1004, 832 P.2d 487 (1992). Rather, proper venue is a constitutional right which is waived if a challenge is not timely made. *McCorkell*, 63 Wn. App. at 800. A defendant waives a challenge to venue when he fails to present it by the time jeopardy attaches. *McCorkell*, 63 Wn. App. at 801.

To raise a constitutional error for the first time on appeal, “[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *see also* RAP 2.5(a)(3). “Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Here, defendant did not object to venue in Pierce County in the trial court, so it was not preserved for appellate review. Defendant is now raising this issue by framing it as ineffective assistance of counsel for counsel’s failure to object to venue on Counts I through VII. Defendant’s assertion fails as he cannot show that the court would have granted his motion for a change in venue, even if one had been made and he has utterly failed to show prejudice.

Defendant has challenged venue for Counts I, II, III, IV, V, VI, and VII. He claims that Counts I, II, and III occurred in King County, as that was the location where the stolen financial information was used. Yet defendant ignores RCW 9.35.020(5), which states, “In a proceeding under this section, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was actually in that locality.” The financial information was acquired in Tacoma, Washington, making venue in Pierce County appropriate.

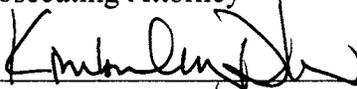
Defendant also makes no showing as to how his trial in Pierce County had a practical or identifiable consequence in his case. There was no showing of unusual publicity in Pierce County or any indication that the jury pool was tainted. The evidence that was presented at trial in Pierce County was the same as evidence that would have been presented in King County. Since there was no practical or identifiable consequence, defendant cannot show that his trial in Pierce County was unfair. As defendant cannot show prejudice, his claim must fail.

D. CONCLUSION.

Defendant's convictions for identity theft and theft do not violate double jeopardy, and his counsel's performance was not deficient. For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions.

DATED: September 2, 2009.

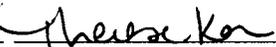
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail of 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.

9.2.09 
Date Signature

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