

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

STATE OF WASHINGTON,

Respondent,

v.

AVERY C. WILLIAMS,

Appellant.

11 JUN 25 AM 11:40
STATE OF WASHINGTON
BY [Signature] DEPUTY CLERK

COURT OF APPEALS
DIVISION II

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

The Honorable Christine A. Pomeroy, Judge
The Honorable Thomas McPhee, Judge
The Honorable Gordon Godfrey, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206)623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining To Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural History</u>	2
2. <u>Substantive Facts</u>	4
a. The Incident	4
b. The Defense Strategy	6
C. <u>ARGUMENTS</u>	7
1. COUNSEL'S FAILURE TO REQUEST LESSER INCLUDED OFFENSE INSTRUCTIONS FOR THIRD DEGREE THEFT DEPRIVED WILLIAMS OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL	7
2. IT WAS ERROR TO SENTENCE WILLIAMS BASED ON AN OFFENDER SCORE OF "10"	14
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Shale,
160 Wn.2d 489, 158 P.3d 588 (2007)..... 18

State v. Aho,
137 Wn.2d 736, 975 P.2d 512 (1999)..... 19

State v. Burns,
114 Wn.2d 314, 788 P.2d 531 (1990)..... 16

State v. Calvert,
79 Wn. App. 569, 903 P.2d 1003 (1995),
review denied, 129 Wn.2d 1005 (1996)..... 16

State v. Crawford,
159 Wn.2d 86, 147 P.3d 1288 (2006)..... 19

State v. Davis,
90 Wn. App. 776, 954 P.2d 325 (1998)..... 17

State v. Doogan,
82 Wn. App. 185, 917 P.2d 155 (1996)..... 8

State v. Fernandez-Medina,
141 Wn.2d 448, 6 P.3d 1150 (2000)..... 8

State v. Gentry,
125 Wn. 2d 570, 888 P.2d 1105 (1995)..... 7

State v. Lessley,
118 Wn.2d 773, 827 P.2d 996 (1992)..... 17

State v. Maxfield,
125 Wn.2d 378, 886 P.2d 123 (1994)..... 16

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. McGrew</u> , 156 Wn. App. 546, 234 P.3d 268, review denied, __ P.3d __ (2010)	16
<u>State v. Milam</u> , 155 Wn. App. 365, 228 P.3d 788, review denied, 169 Wn.2d 1023, 238 P.3d 504 (2010)	8
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	7
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	1, 3, 5, 12
<u>State v. Vike</u> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	16
<u>State v. Ward</u> , 125 Wn. App. 243, 104 P.3d 670 (2004).....	12, 13, 14
<u>State v. Woods</u> , 138 Wn. App. 191, 156 P.3d 309 (2007).....	18
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	8, 11

FEDERAL CASES

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	8
--	---

RULES, STATUTES AND OTHER

Chapter 9A.20 RCW	9
Const. art. 1, § 22.....	7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER (Cont'd)</u>	
RAP 10.10.....	3
RCW 9.35.020	9
RCW 9.35.020(1).....	2, 9
RCW 9.35.020(3).....	2, 9
RCW 9.35.060	17
RCW 9.92.020	13
RCW 9.94A.510	19
RCW 9.94A.515	19
RCW 9.94A.525	15
RCW 9.94A.589(1)(a)	15
RCW 9A.52.050	17
RCW 9A.56.020(1)(a)	2
RCW 9A.56.040(1)(c)	2
RCW 9A.56.050(1).....	10, 11
U.S. Const. amend. 6	7

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his right to effective assistance of counsel, both at trial and at sentencing.

2. The trial court erred in sentencing Appellant based upon an offender score of "10".

Issues Pertaining to Assignments of Error

Appellant stole a wallet. As a result, the State charged him with one count of second degree identity theft (for obtaining the identification of the wallet's owner) and four counts of second degree theft (one count for each debit and credit card contained in the wallet). Defense counsel conceded Appellant stole the wallet, but elicited testimony supporting a finding that Appellant never knew the contents of the wallet and therefore he lacked the requisite knowledge and associated intent to commit each of the charged offenses. The jury convicted as charged.

1. Did defense counsel's failure to request instructions that would have allowed the jury to convict Appellant of misdemeanor theft instead of multiple felony thefts deprive of Appellant of his right to effective assistance of counsel at trial?

2. At sentencing, there was no discussion about Appellant's offender score, which was set at "10" for each current conviction based in part by including one point for each other current offense.

a. Was it error to sentence Appellant based on an offender score of 10 when all five current convictions were for a single act committed against the same person, at the same time, and with the same objective intent, and therefore constituted "same criminal conduct" for offender score calculation purposes?

b. To the extent Appellant waived a challenge to his offender score on appeal because his counsel failed to raise it below, was Appellant denied his right to effective assistance of counsel at sentencing?

B. STATEMENT OF THE CASE

1. Procedural History

On April 27, 2010, the Thurston County Prosecutor charged appellant Avery Williams with one count of second degree identity theft and four counts of second degree theft. CP 4-5; RCW 9.35.020(1) & (3); RCW 9A.56.020(1)(a), .040(1)(c). The prosecutor alleged that on April 22, 2010, Williams stole Nona Munroe's wallet and thereby knowingly obtained Munroe's identification with intent to use that identification to illegally obtains goods, services, cash or credit of less than \$1500, and also intentionally deprived Munroe of four "access devices." CP 2-5.

A jury trial was held before the Honorable Thomas McPhee. 2RP.¹ Williams was convicted as charged. CP 26-30. Williams was sentenced to 55 months of incarceration and now appeals. CP 31-53.

Post-sentencing, Williams filed numerous pro se motions and associated documents, in which he sought an appeal bond, dismissal of his convictions, copies of documents associated with his case from trial counsel, modification of his sentence, and termination of his legal financial obligations. CP 75-150. The State filed no written responses. After a brief hearing on October 7, 2010, at which only the prosecutor was present and gave argument, the Honorable Gordon Godfrey denied Williams' motions. CP 151-52; 4RP 3-7.

By ruling entered November 16, 2010, this Court consolidated Williams appeal from his judgment and sentence, with his appeal from Judge Godfrey's order denying his various pro se motions.²

¹ There are five volumes of verbatim report of proceedings referenced as; 1RP - single volume for the dates of 6/30/10, 7/1/10 & 7/15/10 (pretrial before the Honorable Christine A. Pomeroy); 2RP - two-volume consecutively paginated set for the dates of 8/18/10 & 8/19/10 (trial before Judge McPhee); 3RP - 9/9/10 (sentencing before Judge McPhee); and 4RP - 10/7/10 (post-trial before the Honorable Gordon Godfrey).

² There are no issue is raised herein with regard to Judge Godfrey's denial of Williams' pro se motions. Williams, however, may choose to do so in a pro se Statement of Additional Grounds for Review. See RAP 10.10.

2. Substantive Facts

a. The Incident

On April 22, 2010, Nona Munroe went to the Faith Assembly Church in Lacey, Washington to help her daughter "Cristal", a youth pastor, finish some work. 2RP 85. When she entered the church she noticed a man, Williams, using the church phone, while holding a cell phone in the other hand. 2RP 87-88. She continued into the church and found Cristal in a nearby room, who had completed her work except for moving some boxes. 2RP 87-88. When Munroe mentioned the man in the church entry, Cristal commented that she had already told him the church was not open. 2RP 88.

Munroe offered to help Cristal move the boxes, as did Cristal's sister, Stacy Jaynes, who was also at the church working. 2RP 89, 150. After a brief discussion with Cristal about where to leave her purse, Munroe left it on a chair while she and her daughters moved the boxes. 2RP 89-90, 150. When they returned, Munroe saw her purse lying on the floor "wide open" and Williams was gone. 2RP 93.

Munroe's checkbook was still in her purse, but her wallet was missing, which she announced to her daughters. Munroe and Stacy ran outside in search of Williams, who they suspected had taking the wallet.

They saw Williams walking away and ran after him, yelling for him to stop, which he did. 2RP 94-95.

Williams denied taking Munroe's wallet. 2RP 96. When police started arriving, however, Williams ran into a nearby housing development. 2RP 96-97, 151.

Thomas Kleinhans was in the housing development tending his parents' yard when he noticed police running towards a nearby yard. 2RP 157. Kleinhans then saw Williams jump a fence, toss something onto the roof of a house, and then jump another fence. 2RP 157-58. Kleinhans retrieved the item he saw Williams toss on the roof, a wallet, and turned it over to police. 2RP 81, 162-63.

Lacey Police Officers Stephen Bradley and Adam Seig eventually found Williams hiding in a backyard and arrested him. 2RP 165-76, 181-83. According to the officers, Williams eventually admitted taking the wallet. 2RP 176, 185-87, 190.

The officer who received the wallet from Kleinhans, Officer Richard Broeker, returned it to Munroe. 2RP 82. Munroe noted that despite containing numerous credit cards and over \$200 in cash, nothing was missing. 2RP 83, 98-99, 104, 107; Exs. 1 & 2.

b. The Defense Strategy

Defense counsel did not contest whether Williams took Munroe's wallet, seemingly conceding this point early on. For example, defense counsel did not object when Broeker testified that Stacy told him Williams was who stole her mother's wallet. 2RP 83. Nor did defense counsel engage in extensive cross-examination of any of the State's witnesses.³ As to the one witness defense counsel did spend some time examining, Officer Seig, it was only to elicit that Williams admitted taking the wallet, he never saw Williams look in the wallet, Williams never told Seig he had counted the money in the wallet, and that Seig's report failed to state Williams was uncooperative after his capture, despite testimony to that effect during direct examination. 2RP 187-90.

In closing, defense counsel's only substantive argument was that Williams was not guilty of any of the charged offenses because the State

³ See 2RP 83 (cross examination of Broeker consisted of eliciting only that he recovered the wallet, returned it to Munroe, and that she confirmed nothing was missing); 2RP 106-08 (cross examination of Munroe consisted of eliciting only that she got her wallet back and nothing was missing); 2RP 156 (defense counsel declined cross examination of Stacy); 2RP 164 (cross examination of Kleinhans elicits only that he saw Williams jump a fence and throw something on the roof of a house, that Kleinhans recovered the wallet from the roof and gave it to someone else, and that he never saw Williams look inside the wallet); 2RP 177-78 (cross examination of Bradley elicits only that he was a "reserve officer, Seig was the primary officer, Bradley did not write a report, and that he relied on his memory to testify).

failed to prove the requisite knowledge and associated intent elements required for each of the charged offenses. 2RP 243-48. Counsel conceded Williams stole Munroe's wallet, even that he confessed. 2RP 248. The remainder of counsel's argument was to encourage the jury to be thorough and careful in its deliberations because, unlike making a major purchase, rendering a verdict was not a decision they could change their minds about later. 2RP 259-50.

C. ARGUMENTS

1. COUNSEL'S FAILURE TO REQUEST LESSER INCLUDED OFFENSE INSTRUCTIONS FOR THIRD DEGREE THEFT DEPRIVED WILLIAMS OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Williams' trial counsel was ineffective for failing to propose lesser included offense instructions for third degree theft where they were supported in both law and fact, and where the defense theory of the case admitted the commission of the lesser offense. Williams was prejudiced by counsel's error and therefore reversal is required.

Williams had the right to effective assistance of counsel at trial. U.S. Const. amend. 6; Const. art. 1, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); State v. Gentry, 125 Wn. 2d 570, 646-47, 888 P.2d 1105 (1995); State v. Doogan, 82 Wn. App.

185, 188, 917 P.2d 155 (1996). To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. *Doogan*, 82 Wn. App. at 188 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

A defendant is entitled to instructions for a lesser included offense if the proposed instructions meets the legal and factual "prongs" of the *Workman* test. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong is met where each of the elements of the lesser offense are included within the elements of the greater offense, while the factual prong is met where the evidence supports an inference that only the lesser offense was committed. *Id.* On review of the factual prong, a court examines the evidence in the light most favorable to the party seeking the instruction. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

As charged and tried here;

A person commits the crime of identity theft in the second degree identity when, with intent to commit or aid or abet any crime,^[4] he or she knowingly obtains,

⁴ The intent referred to here is the "intent to commit another crime." *State v. Milam*, 155 Wn. App. 365, 371, 228 P.3d 788, review denied, 169 Wn.2d 1023, 238 P.3d 504 (2010).

possesses, uses, or transfers a means of identification or financial information of another person.

CP 18 (Instruction 11)(emphasis added); see also CP 19 (Instruction 15, to-convict instruction for second degree identity theft); RCW 9.35.020(1)(3).⁵

Similarly, as charged and tried here, to convict Williams of the second degree theft charges, the State had to prove beyond a reasonable doubt:

(1) That on or about April 22, 2010, the defendant wrongfully obtained or exerted unauthorized control over property of another;

(2) That the property was an access device,^[6] specifically for this account: a "Juniper" VISA credit card belonging to Nona Munroe;

⁵ RCW 9.35.020 provides:

(1) No person may knowingly obtain, possess, use, or transfer 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.

...

(3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

Emphasis added.

⁶ The jury was instructed that;

Access device means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a

(3) That the defendant intended to deprive Nona Munroe of the access device; and

(4) That the acts occurred in the State of Washington.

...

CP 21 (Instruction 19, to-convict for "Count 2"); see also CP 22-24 (Instructions 20-22, to-convict instruction for Counts 3-5, which are identical to Instruction 19 except for the specific access device account identified).

In comparison, a person is guilty of third degree theft "if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates." RCW 9A.56.050(1). "Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services." CP 19 (Instruction 17).

Accordingly, the only significant differences in the legal elements between second degree identity theft and third degree theft, are that third degree theft does not require proof the accused knew he was taking a person's identification, or proof the accused intended to commit another

transfer originated solely by paper instrument.
CP 20 (Instruction 18).

crime utilizing that identification. Compare CP 18 & 19 (requiring proof accused "knowingly" obtain a means of identification) with RCW 9A.56.050(1) (does not required accused "know" the nature of what was stolen). All of the elements of third degree theft are therefore included within the crime of second degree identity theft and the former is a lesser included offense of the latter under the "legal" prong of Workman.

The same is true in the context of the second degree theft charges. As charged and tried here, to convict Williams of the second degree theft the jury had to find Williams knew or should have known⁷ the various access devises associated with each count were in Munroe's wallet. Thus, the only difference in the legal elements between the second theft charges here and third degree theft was that to convict Williams of third degree theft the jury did not have to find he knew the access devices were in the wallet.

As to the factual prong of Workman, Williams' trial counsel elicited testimony highlighting the lack of evidence that Williams knew what was in the wallet. 2RP 164, 190-91. This provided a factual basis for the jury to conclude Williams never knew what was in Munroe's

⁷ See CP 16 (Instruction 10, noting that the jury *may* infer knowledge if a reasonable person would have known the requisite fact under the circumstances).

wallet, either before or after he took it, and thus Williams lacked the requisite knowledge to commit the charged offenses.

Defense counsel failed, however, to propose instructions that would have allowed the jury to consider convicting him of the lesser included offense of third degree theft. This failure constitutes deficient performance because there was evidence supporting an inference that only the lesser offense was committed. State v. Thomas, 109 Wn.2d 222, 227-28, 743 P.2d 816 (1987) (counsel's failure to request an involuntary intoxication instruction where the evidence supported it constituted ineffective assistance of counsel). Moreover, defense counsel's deficient performance prejudiced Williams.

The facts here are similar to the facts in State v. Ward, 125 Wn. App. 243, 249-50, 104 P.3d 670 (2004). In Ward, this Court held counsel was ineffective for failing to request a lesser included instruction on unlawful display of weapon in an assault case. The Ward court reasoned that given the starkly different penalties for a felony assault and the misdemeanor offense unlawful display of weapon, and the importance the defendant's credibility played at the trial, the failure to request the lesser included instruction was not a legitimate trial strategy. 125 Wn. App. at 250. This Court commented that, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of

some offense, the jury is likely to resolve its doubts in favor of conviction." *Id.* It also found "[t]he all or nothing strategy exposed Ward to a substantial risk that the jury would convict on the only option presented, two second degree assaults." *Id.*

As in Ward, there is a stark difference in penalties for five counts of second degree theft and one count of third degree theft. Williams' standard range sentence for the most serious of his convictions, second degree identity theft conviction,⁸ was 43-57 months, assuming, *arguendo*, that his offender score was correctly calculated as "10." CP 42. For a third degree theft conviction, however, the maximum sentence is only 12 months. RCW 9.92.020.⁹ Thus, the risk of not allowing the jury to consider third degree theft as an alternative was 31-45 months.

⁸ Second degree identity theft is ranked a seriousness level "II" offense whereas second degree theft is merely a seriousness level "I". RCW 9.94A.515.

⁹ RCW 9.92.020 provides:

Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

There does not appear to be any statute setting a different maximum term of confinement for third degree theft.

Moreover, defense counsel conceded in closing that Williams stole Munroe's wallet and that he admitted doing so. 2RP 248. Thus, Williams was clearly guilty of committing a theft. Given no other option, however, the jury likely opted to find him guilty of the charged offenses rather than letting him evade all responsibility for his unlawful conduct. Ward, 125 Wn. App. at 250. That the jury convicted him of all the charges instead of just one means only that the jury was consistent in concluding that if he reasonably should have known Munroe's wallet contained one access device or means of identification, then he also should have known the others were there as well. The "all or nothing strategy" unreasonably exposed Williams "to a substantial risk that the jury would convict on the only option presented," five counts of second degree theft. *Id.*

Under the circumstances, defense counsel's failure to propose lesser included offense instructions for third degree theft constituted deficient performance that prejudiced Williams. This Court should therefore reverse his conviction.

2. IT WAS ERROR TO SENTENCE WILLIAMS BASED ON AN OFFENDER SCORE OF "10".

Williams was convicted of one count of second degree identity theft and four counts of second degree theft for the single act of taking Munroe's wallet. Although the State may have been entitled parse out the charges as it

did, these offenses still constituted "same criminal conduct" for purposes of sentencing because they involved the same objective intent, were committed at the same time and place, and involved the same victim. Under a "same criminal conduct" analysis, Williams' offender score is substantially lower, and as such his standard range sentence is correspondingly less. This Court should reverse Williams' sentence and remand for resentencing where his offender score is correctly calculated before sentence is imposed.

"[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a). If a "same criminal conduct" finding is made, then the offenses are counted as a single offense for purposes of calculating the offender score. *Id.*; RCW 9.94A.525.

"Same criminal conduct" means crimes that require the same intent, were committed at the same time and place, and involved the same victim. *Id.* The test is an objective one that:

takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective. Also relevant is whether one crime furthered the other.

State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). The issue is reviewed for an abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Clearly, the victim here, Munroe, was the same for every offense. It is also beyond dispute that the offenses were committed at the same time and at the same place; April 22, 1010 at the Faith Assembly Church in Lacey, Washington. Thus, the only potential issue is whether the crimes involved the same objective intent. They did.

"The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994); accord State v. McGrew, 156 Wn. App. 546, 552, 234 P.3d 268, review denied, __ P.3d __ (2010). This includes whether the crimes were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996). Also relevant is whether one crime furthered the other. Burns, 114 Wn.2d at 318.

Here, it is apparent Williams had but a single intent -- to steal Munroe's wallet and whatever it contained. Temporally, there was no "one crime to the next." Vike, 125 Wn.2d at 411. They all happened at exactly the same time. Thus, they were necessarily all part of the same scheme or

plan. Finally, to the extent it is relevant or possible, each offense furthered the commission of the others because, for example, by taking Munroe's identification, Williams also acquired her access devices, and vice versa. As such, the objective intent remained the same for each offense. That the State chose after the fact to parse out Williams single unlawful act of taking Munroe's wallet into five separate but inextricably linked offenses is irrelevant to the analysis.

The State may argue Williams' challenge is barred because there is a so-called "anti-merger" provision for the crime of identity theft, similar to that employed in the context of burglary. See 2RP 112; RCW 9.35.060 ("Every person who, in the commission of identity theft, shall commit any other crime may be punished therefor as well as for the identity theft, and may be prosecuted for each crime separately."); RCW 9A.52.050 ("[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."). There is, however, no reason not to conclude that, as in the context of burglary, the court has discretion whether to apply the anti-merger provision, and could reasonably choose not to do so here. *State v. Davis*, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998); *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

Notably, there is no similar "anti-merger" provision for the other theft conviction incurred by Williams. Therefore, to the extent the trial court might choose to apply the anti-merger provision to the identify theft conviction, it does not negate the fact that the four thefts involving the access cards still constitute same criminal conduct and therefore should be treated as a single offense for offender score purposes.

The State may also argue Williams claim is barred because he did not raise it below and therefore it is waived. See In re Pers. Restraint of Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007) (holding that issue waived when the defendant "failed to ask the court to make a discretionary call of any factual dispute regarding the issue of 'same criminal conduct' and he did not contest the issue at the trial level"). To the extent this is correct, then Williams was denied effective assistance of counsel at sentencing and reversal is still required.

"Reasonable attorney conduct includes a duty to investigate the relevant law." State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). A cursory review of the relevant cases would have revealed Williams theft convictions involving the access cards necessarily constituted same criminal conduct, and that the court retained discretion to treat the identity theft conviction as the same criminal conduct as well. Defense counsel was deficient in failing to argue the thefts involving the

access devices involved the "same criminal conduct" and for failing to ask the trial court to exercise its discretion in Williams' favor with regard to the identity theft conviction.

Had the a same criminal conduct argument been properly conducted at sentencing Williams' offender score would have been less than "10" for each count, and his standard range would have been significantly less. See RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (seriousness level of "I" for second degree theft and "II" for second degree identity theft).

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). There is no legitimate tactical reason to agree to or fail to challenge an offender score that increased Williams' term of confinement. This Court should therefore reverse and remand for resentencing.

D. CONCLUSION

Ineffective assistance of trial counsel, both at trial and at sentencing, requires reversal of Williams' judgment and sentence.

DATED this 25th day of January, 2011.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 41171-7-II
)	
AVERY WILLIAMS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF JANUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JOHN SKINDER
THURSTON COUNTY PROSECUTOR'S OFFICE
2000 LAKERIDGE DRIVE SW, BUILDING 2
OLYMPIA, WA 98502-6001

- [X] AVERY WILLIAMS
NO. 210032729
KING COUNTY JAIL
620 W. JAMES STREET
KENT, WA 98032

11 JAN 26 AM 11:50
STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF JANUARY 2011.

x Patrick Mayovsky