

COURT OF APPEALS
DIVISION II

MARCH 27 1987

STATE OF WASHINGTON
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NO. 41381-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

WILLIAM CATO SELLS,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Factual Background

On the morning of July 15, 2010, Patrice Timpson, an administrative assistant with the North Beach School District, came to work and discovered that the school district offices had been burglarized during the night. (RP 34-35) Credit cards, account payable checks and account receivables had been stolen from a locked cabinet. Three credit cards were missing including a Sears card and a Home Depot card in the name of North Beach School District, as well as a VISA card issued through the Bank of the Pacific in the name of North Beach School District and Stanley Pinnick, the district superintendent. (RP 36, 40, 96)

Ms. Sharon Wilme, the business manager for the school district, confirmed this information. At trial Ms. Wilme identified two previous bank statements for the VISA account in the name of "North Beach School District" and "Mr. Stanley Pinnick". (RP 40-41, Exhibit 28). She also identified a Sears credit card and a Home Depot credit card, each in the name of "North Beach School District", that were found in the defendant's pickup truck on July 18, 2010. (RP 112-113, Exhibit 4)

On the morning of July 15, 2010, the school district's VISA card was used at the Aberdeen AMPM convenience store to purchase gasoline. An employee of the business, Denise Garcia, identified a merchant's copy of the receipt for the transaction. The receipt was imprinted with the last four digits of the school district's account number. (RP 61-62)

Ms. Garcia recalled that two men had come into the store that morning in connection with the use of the credit card. (RP 64) She recalled that one of them was wearing hearing aids. (RP 65) She identified the defendant as the other. They came in three separate times. (RP 65)

The defendant approached Ms. Garcia and told her that his friend, the man with the hearing aids, worked for the Hoquiam School District and needed gas. (RP 65) The store manager, Paul Singh, also recalled that the defendant had told him that his friend worked for a school district. (RP 73-74) Mr. Singh later viewed a photo array and identified the defendant as the person involved in the transaction. (RP 131) Mr. Singh refused a second attempt to use the card because the defendant could not produce identification. (RP 70, 72)

Later that same morning, the defendant went to the Valero gas station in Aberdeen and contacted Amanda Francis, an employee there. She identified a receipt for the purchase of gas and propane made that morning. She identified the defendant as the person who had given her the credit card to pay for the transaction. The receipt contained the last four digits of the school district's VISA account number. (RP 80-81, Exhibit 30)

On that same morning, Ann Burgher-Ring saw Colton Timberman having breakfast with another man at America's Diner, a restaurant in Aberdeen. (RP 87) She explained that she had known Mr. Timberman for

quite a long time and that Timberman wore hearing aids and was hearing impaired. (RP 87)

Roberta Sechler, the waitress at the America's Diner, recalled waiting on the defendant that same morning. She specifically identified the defendant and recalled that he was sitting with a young man who was wearing hearing aids. (RP 90-92) She recalled that the defendant gave her a credit card to pay for the meal. She identified the receipt from the transaction. The receipt contained the last four digits for the VISA account of the North Beach School District. (RP 90, 93, Exhibit 29)

The North Beach School District's VISA account records were introduced at trial. Each of the three transactions was reflected in the records. (RP 96-97, Exhibit 36)

On the morning of July 15, 2010, Detective Peterson of the Grays Harbor County Sheriff's Department was called out to investigate the burglary. Initially, he went to the school district offices. Later that morning, he traveled to Aberdeen where he spoke to Ms. Garcia and Mr. Singh at the Aberdeen AM\PM convenience store. He was able to obtain the surveillance tape from the store. (RP 103) Detective Peterson viewed the surveillance video and identified Mr. Singh, Ms. Garcia and Colton Timberman on the tape. (RP 107)

Detective Peterson went to the residence of the defendant in Copalis Crossing on July 18, 2010. Peterson contacted the defendant and

located the defendant's pickup truck parked on the premises. (RP 108-109) Peterson found the customer receipt for the AM/PM transaction and the America's Diner transaction in the cab of the defendant's pickup truck. (Exhibit 2, RP 110-112) A Home Depot credit card and a Sears credit card, each in the name of the North Beach School District, were seized from the glove box of the defendant's pickup truck. (RP 112-113, Exhibit 4)

Procedural Background

The defendant was charged by Second Amended Information with Identity Theft in the Second Degree, RCW 9.35.020(3), in regard to the use of a means of identification of Stanley Pinnick and financial information of the North Beach School District alleged to have been committed on July 15, 2010. The defendant was also charged with Possession of Stolen Property in the Second Degree, RCW 9A.56.160, in regard to the Sears credit card and the Home Depot credit card seized from the defendant's pickup truck on July 18, 2010. (CP 5-6)

The matter was tried to a jury on September 16 and 17, 2010. The jury returned a verdict of guilty on each count. (CP 28-29)

The sentencing hearing was held on October 21, 2010. The trial court was provided with certified copies of all of the defendant's prior Judgment and Sentences. (Exhibit 1, RP 186) The defendant stipulated

that he was convicted of each of the offenses contained in the exhibit. (RP 187-188) The defendant, however, disagreed as to the computation of his offender score. (RP 187-188)

The trial court found that the defendant had an offender score of 11. (RP 198) The court imposed a sentence of 57 months on Count 1 and 29 months on Count 2, consecutive to the sentence imposed on Count 1, for a total of 86 months. (RP 69) The court entered Findings of Fact in support of the exceptional sentence, determining that because of the defendant's high offender score, a sentence within the standard range would result in no additional punishment for the crime of Possession of Stolen Property in the Second Degree, Count 2. (CP 78-79) RCW 9.94A.535(2)(c).

RESPONSE TO ASSIGNMENTS OF ERROR

1. There was ample evidence to support the defendant's conviction of Identity Theft in the Second Degree (Response to Assignment of Error 1)

The standard for determining the sufficiency of the evidence has long been established. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth

of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, Aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Count 1 of the Information alleged that the defendant possessed and used a means of identification of Mr. Stanley Pinnick and did possess and use financial information of the North Beach School District with intent to commit the crime of theft. (CP5-6) The jury was instructed that in order to convict that the defendant, or person to whom he acted as an accomplice, possessed a means of identification of Mr. Stanley Pinnick with intent to commit the crime of theft. (CP 19-27, Instruction No. 4) The jury was instructed as follows (CP 19-27, Instruction 6):

“Means of identification” means information not describing finances or credit that is personal to or identifiable with an individual. This includes a name or former name of the person.

Mr. Pinnick's name on the VISA card is a “means of identification” independent of the financial information that is also on the card. See *State v. Chang*, 147 Wn.App. 490, 195 P.3d 1008 (2008). By definition, an individual's name is a “means of identification”.

The defendant certainly used and possessed the stolen VISA card. He was with Colton Timberman at the AM\PM convenience store when it was used to purchase gas. He told Ms. Garcia and Mr. Singh that Timberman worked for the school district. (RP 65-73, 74) The defendant gave the credit card to Amanda Francis at the Valero gas station for the

payment of gas and propane. (RP 79) The defendant also paid for a meal at America's Diner with the use of the credit card. (RP 90-92)

The defendant's intent was crystal clear. He intended to obtain goods and services, without paying for them, by use of the VISA card. To that end he gave each merchant the credit card containing Mr. Pinnick's name and the school district's name and financial information.

Now this court is being told by the defendant that in some fashion the State must prove that the defendant assumed the identity of Mr. Pinnick. Counsel has cited no authority for that proposition. State v. Berry, 129 Wn.App. 59, 62, 117 P.3rd 1162 (2005) cited by the defendant does not support his claim. That case simply holds that in order to commit the crime of identity theft, the defendant must possess or use the means of identification of a real person.

There is no requirement that the State prove that the defendant somehow assumed the identity of Mr. Pinnick. In any event, the evidence in the case at hand is that in an attempt to convince them to let him use the card for payment, the defendant told the witnesses at the AMPM convenience store that his friend worked for the school district. (RP 71) Mr. Pinnick is the school district superintendent.

The defendant knew the information on the card. In order to use the card, he had to convince Mr. Singh of his association with the cardholder. Mr. Singh insisted on identification. Mr. Singh certainly was concerned with whether the defendant could prove that he was the person

whose name appeared on the card. (RP 70, 72) This, standing alone, is ample evidence to support the verdict.

This assignment of error must be rejected.

2. The defendant received effective assistance of counsel (Response to Assignment of Error 2)

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show two things: (1) he must first show that defense counsel's conduct was deficient, falling below an objective standard of reasonableness and (2) he must show that if there was a deficient performance that it resulted in prejudice which the courts have defined as "a reasonable possibility that but for the deficient conduct, the outcome of the proceeding would have differed". Strickland v. Washington, 488 U.S. 668, 104 Sup.Ct. 2052, 80 L.Ed.2d 674 (1984).

The short answer to this assignment of error is that defense counsel's representation was not deficient. The defendant was not entitled to instructions for Theft in the Third Degree.

The courts have identified a two part test to be applied to determine whether a lesser included offense instruction is warranted. Each of the elements of the lesser offense must be a necessary element of the charged offense and there must evidence in the case to support an inference that only the lesser crime was committed. State v. Gilmore, 96 Wn.App. 875, 981 P.2d 902, review denied 139 Wn.2d 1023 (1999). If it is possible to commit the greater offense without committing the lesser

offense, the lesser offense is not an included offense. State v. Harris, 121 Wn.2d 317, 849 P.2d 1216 (1993).

The crime of Identity Theft as alleged herein requires use and possession of a means of identification with intent to commit the crime of theft. Theft is not an element of the crime of Identity Theft in the Second Degree. In the case at hand, the defendant was guilty of the crime of Identity Theft in the Second Degree literally at the moment he handed the credit card to the clerk in an attempt to purchase goods. The crime was completed regardless of whether the theft occurred.

The crime of theft requires an additional element not found in the identity theft statute. To convict the defendant of theft, the State must prove beyond a reasonable doubt that the defendant wrongfully obtained the goods with intent to deprive. This same analysis has been applied in the context of a forgery prosecution. State v. Goodlow, 27 Wn.App. 769, 773, 620 P.2d 1013 (1980).

This assignment of error must be denied.

3. The court properly instructed the jury (Response to Assignment of Error 3)

Jury instructions are sufficient when they allow counsel to argue the defendant's theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Contrary to the assertion of the defendant, the instructions are neither deficient nor misleading.

Concerning Count 1, Identity Theft in the Second Degree, the Second Amended Information alleged that the defendant did possess and use a means of identification of Mr. Stanley Pinnick and/or did possess and use financial information of the North Beach School District with intent to commit the crime of theft. The “to convict” instruction for Identity Theft in the Second Degree, however, told the jury that in order to convict one of the elements that they had to find beyond a reasonable doubt was that the defendant “did possess a means of identification of Mr. Stanley Pinnick”. (Instruction No. 4) The alternative means, possession of the financial information of the North Beach School District, was not included in the “to convict” instruction.

This was a conscious choice made by the prosecution. As set forth in the Brief of Appellant, there was a potential issue concerning whether a school district could be a “person” within the meaning of RCW 9A.04.110(17). Accordingly, the State chose to allege the alternative that the defendant possessed a means of identification of Mr. Stanley Pinnick, the school superintendent, whose name was on the credit card. Counsel for the defendant may be correct that RCW 9.35.020 limits victims to human beings. That being said, the listed victim in this case was Mr. Pinnick, the school superintendent. Mr. Pinnick’s name on the credit card was a “means of identification”.

Simply because the State alleges alternative means in the Information, it is not required that each alternative means be placed before the jury and proved beyond a reasonable doubt. A statute which sets out alternative means of committing a crime may be pleaded or charged in the conjunctive if a single offense may be committed in several ways which are not repugnant to each other. State v. Walker, 14 Wn.App. 348, 354, 541 P.2d 1237 (1975); State v. Dixon, 78 Wn.2d 796, 802, 479 P.2d 931 (1971). The State chose to present only the one alternative means to the jury. This was entirely proper.

The defendant alleges that Instruction No. 11 is confusing. That instruction provides as follows:

Evidence has been introduced alleging multiple uses of an access device in the name of Mr. Stanley Pinnick and the North Beach School District. In order to convict William Sells, Jr., as charged in Count 1, you must unanimously agreed that at least one particular act of Identity Theft has been proven beyond a reasonable doubt.

There is nothing in the least bit confusing about the instruction in light of the evidence presented in this case. The only evidence in the case concerning the use of a credit card was the defendant's use of the VISA credit card on July 15, 2010. The only evidence in the case was that the VISA credit card had the name of both the North Beach School District and Mr. Stanley Pinnick on it. The jury clearly understood, based upon the evidence admitted at trial, that it was being told that it had to be unanimous as to one of the multiple transactions alleged to have occurred on the morning of July 15, 2010.

The defendant was found in possession of two other credit cards on July 18, 2010. There was no evidence that he used either one of these cards or had them in his possession on July 15, 2010. There was no evidence that either of one of these cards had both the name of Mr. Pinnick and the North Beach School District. In fact, these two cards contained only the name of the North Beach School District. (RP 41, Ex. 4)

In short, Instruction No. 11 was not confusing. Contrary to the assertion of the defendant in her brief at page 23, Instruction No. 11 talked of multiple uses of an access device in the name of Mr. Stanley Pinnick and the North Beach School District, a single access device in the name of both Mr. Pinnick and the North Beach School District. This could be referring to only one thing, the VISA card used on July 15, 2010.

While Instruction No. 11 talks about multiple uses of the particular access device, the jury is told that they must find unanimously that “at least one particular act of Identity Theft” has been proven beyond a reasonable doubt. The elements of Identity Theft are charged in Instruction No. 4. There was no evidence that the two credit cards seized on July 18, 2010 were ever used to commit Identity Theft. There could be no confusion.

This assignment of error must be denied.

4. The State of Washington did not commit misconduct in final argument (Response to Assignment of Error 4)

The defendant alleges that the following argument by the State improperly shifted the burden on the defendant and commented on his failure to present evidence (RP 183):

Mr. Singh wanted to see identification. Do you suppose that might have been because he saw that it said North Beach School District / Stanley L. Pinnick and wanted to know whether the person standing in front of him was Stanley L. Pinnick? You know, I wish every waitress where I went to buy food was thorough and looked at the card, but they don't always do that. They just take the card and run it. All right. In this case the waitress from the diner remembered North Beach School District. Mr. Singh asked for identification. The answer is this card was different. This card was issued by the bank. It wasn't a Home Depot card and it wasn't a Sears card. It was issued by the bank and it had both their names on it for very good reason, because Mr. Pinnick could use it on school district business, have his name on it. *Is there some evidence here that his name wasn't on the card?* I wish we had the card, but the card was thrown away, lost, going who knows where in those three days. But the answer is, is there reasonable doubt that his name was not on the card? And the answer is no. (Italics added)

This argument was in rebuttal and was in response to the defendant's argument to the jury that there was a reasonable doubt as to whether Mr. Pinnick's name was on the card at all. Specifically, counsel for the defendant made the following argument (RP 176):

Mr. Pinnick was in court yesterday. Why didn't we hear from him? Yeah, name was on that card. There's a reason why we didn't. His name wasn't on the card.

The State did not argue that the defendant failed to present evidence. The State asked the jury to look at all the evidence and consider whether there was any evidence in the case that raised a reasonable doubt about whether Mr. Pinnick's name was on the card. This is not a comment on the defendant's failure to produce evidence or the defendant's failure to testify.

In State v. Ashby, 77 Wn.2d 33, 37, 459 P.2d 403 (1969), the State, during closing argument, commented that it was "not disputed" that the defendant sold the stolen goods to the defendant and also asked, "Has anyone disputed that particular evidence that those articles were sold to Mr. Ashby?". Those comments were found not to be improper. The prosecutor's statement did not improperly draw attention to the fact that the defendant had not testified.

The same result was reached in State v. Jackson, 150 Wn.App. 877, 885, 209 P.3d 553 (2009). In Jackson, the prosecution argued "there was not a single shred of testimony in this case to corroborate [Green's] story". The court in Jackson acknowledged that a prosecutor may commit misconduct if he mentions in closing argument that the defense did not present witnesses or explain the factual basis of the charges or he states that the jury should find the defendant guilty simply because he did not present evidence to support the defense's theory. Jackson, 150 Wn.App. at page 885. That is not what happened in Jackson and that is not what

happened in this case. The court in Jackson held as follows, 150 Wn.App. at page 885-886:

Here, the prosecutor did not commit misconduct. Instead, he explained that the jury was the sole judge of credibility and outlined numerous reasons why it should find the State's witnesses more credible than Jackson's witness, Greene. He mentioned, for instance, that Greene was in a romantic relationship with Jackson, she admitted she was drinking alcohol on the night of the alleged crime, and the events to which she testified seemed very unusual and did not make sense. The prosecutor also mentioned that no evidence corroborated Greene's testimony, while four police officers corroborated each other's testimony. The mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. *See Fleming*, 83 Wash.App. at 215, 921 P.2d 1076; *Traweek*, 43 Wash.App. at 106-07, 715 P.2d 1148. The prosecutor in this case clearly explained to the jury that the State had the burden of proof. He did not imply that Jackson was required to provide evidence nor that the jury should find Jackson guilty based on his decision to present only one defense witness.

A statement by the prosecution in final argument that the evidence is undisputed is not a comment on the defendant's failure to testify or present evidence. State v. Crawford, 21 Wn.App. 146, 584 P.2d 442 (1978). These principles were first enunciated in State v. Litzenberger, 140 Wash. 308, 311, 248 P. 799 (1926):

Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it and, if that results in an inference unfavorable to the accused, he must accept the burden . . . because the choice to testify or not was wholly his.

Other examples abound. In State v. Brett, 126 Wn.2d 136, 176, 892 P.2d 29 (1995), a statement in final argument that “...absolutely no evidence that the shotgun was accidentally discharged” was not a comment on the failure of the defendant to present evidence. More recently, in State v. Morris, 150 Wn.App. 927, 210 P.3d 1025 (2009), the defendant alleged that the prosecution committed misconduct when, during closing argument, he said, “What I am asking you to do is deliberate that there has been no real contradiction of any of these facts and to come back with a verdict of guilty”. The court in Morris, it specifically held that this language was not a comment on the failure of the defendant to testify. Morris, 150 Wn.App. at page 932.

All the State did in final argument in this case was point out that there was no evidence in the case to support the argument of counsel that Mr. Pinnick’s name was not on the VISA card. Simply mentioning that the evidence is lacking does not constitute prosecutorial misconduct.

It is the obligation of the defendant to establish the impropriety of any alleged comments and to establish prejudicial effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). There was no misconduct. In any event, there was no substantial likelihood that the statements made in final argument effected the jury’s verdict. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The comment was not flagrant or ill-intentioned. It did not result in any prejudice. Counsel for

the defendant was not deficient for failing to object to the comment because the comment was not improper.

This assignment of error must be denied.

5. The defendant's convictions do not constitute "same criminal conduct" (Response to Assignment of Error 5)

RCW 9.94A.589 provides as follows:

...if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime...“Same criminal conduct” as used in the subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

If any one of the three elements cannot be demonstrated, then the crimes are not “same criminal conduct”. State v. Lesley, 118 Wn.2d 773, 778, 827 P.2d 996 91992). In determining whether two crimes share the same criminal intent, the trial court is to consider whether the defendant's intent, viewed objectively, changed from one crime to the next and whether the commission of one crime furthered the other. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). A decision by the trial court that multiple offenses do not constitute “same criminal conduct” will not be reversed upon review absent clear abuse of discretion or misapplication of the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. den. 498 U.S. 838 (1990).

The crimes charged in the Second Amended Information do not constitute “same criminal conduct”. They occurred at different times and places. The defendant would have the court assume that the defendant

was directly connected to the burglary, must have stolen the cards and must have been in possession of all of the credit cards on the morning of July 15, 2010. This is speculation.

Aside from the defendant's possession of the credit cards, there is no direct evidence of his involvement in the burglary or any proof of when he acquired possession of the credit cards seized on July 18, 2010. In short, the court could not presume that the defendant possessed all three credit cards at the same time and place. The Sears card and the Home Depot card were found in his vehicle, at his residence in Copalis Crossing some three days later. There is no direct proof concerning when he first came into possession of these two cards and the court should not speculate in order to make a finding of "same criminal conduct."

The meaning of the term "same place" is found in State v. Stockmyer, 136 Wn.App. 212, 219 148 P.3d 1077 (2006). In Stockmyer, the defendant was charged with multiple counts of Unlawful Possession of a Firearm. Four firearms located in a safe at the home of the defendant's friend were found to be "same criminal conduct". Three different firearms found in the three different locations within the defendant's residence were held not to be in the "same place". State v. Stockmyer, 136 Wn.App. at page 219:

In contrast, Stockmyer possessed three different firearms in three different rooms in his residence: (1) in the closet near the entryway; (2) on top of the refrigerator in the kitchen; and (3) in his living room or bedroom, depending on where he was sleeping. Stockmyer thus had ready access to loaded firearms in these three different locations.

Because we narrowly construe the “same place” requirement, we cannot say as a matter of law that Stockmyer’s possession of multiple firearms in these three different locations constituted the same criminal conduct.

State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997) provides little solace for the defendant. The court in Porter found that the multiple drug sales occurred as close in time as they could without being simultaneous. The drug sales occurred at the same place, moments apart. The court in Porter held that the deliveries constituted multiple offenses committed at the same time and place. That is certainly nowhere near what happened in the case at hand.

Likewise, there is really no evidence that one crime furthered the other. An example of the situation in which one crime might further the other would be the commission of a burglary and the theft of property from within the building after the unlawful entry. State v. Rowland, 97 Wn.App. 301, 983 P.2d 696 (1999). In the case at hand, the defendant’s possession of the Sears credit and the Home Depot credit card did not further the fraudulent use the school’s VISA card three days earlier, even if one were to speculate that the defendant possessed the stolen Home Depot card and Sears card on July 15, 2010. There is no evidence that his possession of those cards in any way furthered the fraudulent use of the VISA card.

This assignment of error must be denied.

6. The trial court properly denied the defendant credit for time served (Response to Assignment of Error 6)

On December 28, 2010, the defendant filed a petition with the trial asking for credit for time served. The State filed a written response. The facts are as follows.

At the time of the defendant's arrest on July 18, 2010, he was on parole to the Department of Corrections, State of Nevada. He was being supervised by a community corrections officer with the Washington State Department of Corrections. On July 20, 2010, the Department of Corrections placed a detainer against the defendant for violation of conditions of his parole. An administrative hearing was held on August 10, 2010. The hearing examiner ordered, in the alternative, that the defendant either serve a 90 day sanction or that the State of Nevada issue a warrant for the arrest of the defendant for revocation of his parole following his release from confinement on this charge. On August 24, 2010, the State of Nevada notified the Department of Corrections that a bench warrant had issued for the defendant's arrest and return to the State of Nevada. The Grays Harbor County Sheriff certified credit for the time of the defendant's incarceration prior to his arrest on the Department of Corrections warrant.

The defendant is not entitled to credit for time served. RCW

9.94A.505(6) provides as follows:

The sentencing court shall grant the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

In the case at hand, the defendant was being held both on bail in this matter and under the authority of the Department of Corrections pursuant to proceedings to revoke the defendant's parole in the State of Nevada.

The courts have outlined the purpose of RCW 9.94A.505(6). State v. Watson, 63Wn.App. 854, 859-60, 822 P.2d 327 (1992):

Former RCW 9.94A.120(13) implements a defendant's constitutional right to receive credit for any time that he has been held in custody by reason of that charge. The SRA does not authorize giving credit for time being served on other sentences. Insofar as time served on other charges is relevant, the court may consider that factor in exercising its discretion within the standard range, or in some truly extraordinary case might consider it a reason for an exceptional sentence. Nonetheless, "credit for time served" in a standard plea bargain has a fixed legal meaning which is time served "solely in regard to the offense for which the offender is being sentenced." RCW 9.94A.120(13).

Upon completion of his sentence, the defendant will be returned to the State of Nevada. Upon resolution of that matter, the defendant will be entitled to credit for time served while in custody at the Grays Harbor County Jail pursuant to the authority of the Department of Corrections. To do otherwise would grant the defendant the opportunity to get credit for that time twice.

This assignment of error must be denied.

CONCLUSION

The State asks that the appellant's convictions be affirmed.

DATED this 13 day of April, 2011.

Respectfully Submitted,

By: Gerald R. Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/jfa

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

STATE OF WASHINGTON,

Respondent,

No.: 41381-7-II

v.

DECLARATION OF MAILING

WILLIAM CATO SELLS,

Appellant.

DECLARATION

I, Janie Anderson hereby declare as follows:

On the 13th day of April, 2011, I mailed a copy of the Brief of Respondent to William Cato Sells; #331248; Clallam Bay Corrections Center; 1830 Eagle Crest Way; Clallam Bay WA 98326 9723 and to Jordan McCabe; Attorney at Law; P.O. Box 6324; Bellevue, WA 98008-0324, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Janie Anderson