

No. 41667-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES L. ROBINSON, JR.,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Thomas J. Felnagle, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Charles L. Robinson, Jr., was deprived of his Fifth Amendment and Article I, § 9 rights to be free from double jeopardy.
2. In the alternative, the sentencing court erred in failing to find that the convictions for forgery and theft were the same criminal conduct under RCW 9.94A.589(1) where they were based on the exact same act.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Robinson was alleged to have given several counterfeit \$100 bills to the victim in exchange for a computer. He was charged with and convicted of both forgery (for passing the notes with the intent to use them to acquire the computer) and second-degree theft (for acquiring the computer through deception by passing the notes). Were his rights to be free from double jeopardy violated by these multiple convictions where they involved the same evidence?
2. Under RCW 9.94A.589(1), crimes shall be treated as one for the purposes of sentencing when they amount to the "same criminal conduct." Crimes amount to the "same criminal conduct" when they are committed at the same time and place, against the same victim, and the criminal intent of the defendant did not change from one crime to the next.

In this case, even though Robinson was convicted both of theft for having gotten the computer by passing the counterfeit bills and of forgery for "uttering" those notes by passing them to get the computer, the sentencing court held that the forgery and theft were not the "same criminal conduct." It based this decision on application of double jeopardy standards and consideration of general social issues which were not applicable to the facts of this case.

Did the court err in failing to find that these two crimes, committed at exactly the same time and place, with the same victim for the same purpose - and which were, in fact, the same act - were not the "same criminal conduct?"

Did the court err and act outside its authority in failing to apply the statutory requirements of RCW 9.94A.589(1) and instead applying the different standards applicable for double jeopardy and inapplicable social considerations?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Charles L. Robinson, Jr., was charged by information with forgery and second-degree theft. CP 1-2; RCW 9A.60.020(1)(a)(b), RCW 9A.56.020(1)(b) and RCW 9A.56.040(1)(a).

Trial was held before the Honorable Thomas J. Felnagle on September 28-30 and October 1, 2010, after which the jury found the Robinson guilty as charged. RP 1; CP 65-66. After post-trial motions on October 22 and December 3, 2010, on January 7, 2011, Judge Felnagle ordered Robinson to serve a standard-range sentence. RP 180-92; CP 168-80.

Robinson appealed and this pleading follows. See CP 190.

2. Testimony at trial

On May 21, 2009, Matthew Staerk went to meet someone at a restaurant in order to sell his laptop computer, which he had advertised on “Craigslist.” RP 24-25, 28. Staerk, who had asked \$1,500 for the computer, had agreed to take \$1,450 after talking to a man named “Mark” or “Marcus” who had initially called Staerk the day after the Craigslist posting went online. RP 26. Staerk said “[t]hey were trying to haggle the price” and he was pretty set on \$1,500 initially but after three phone contacts and about six days had passed Staerk agreed to the lower price. RP 27, 41.

Staerk and the man chose a restaurant in Fife as the meeting place because it was between their two homes. RP 27. According to Staerk, the man said he “lived off 320th in Federal Way.” RP 27.

Staerk arrived at the restaurant parking lot at about 8:30 or 9 p.m. RP 28, 42-43. Although the lighting was “dim” outside, Staerk said, he parked underneath a bright parking light. RP 28, 42-43. After about 10-15 minutes, Staerk was sitting on his back bumper when a 1990's Chevy Blazer or similar sport utility vehicle (SUV) drove up and parked “kitty-corner” to him. RP 29.

At that point, a man got out of the SUV and said he was “Mark” or “Marcus.” RP 30. He also introduced a woman with him as his wife, Kristine. RP 30. Staerk showed them the computer and they were acting like it was a gift for the woman, so Staerk focused his comments and attention towards her. RP 31. Kristine ultimately said she wanted the computer and Marc or Marcus said okay, then pulled out a bank envelope out of which he took 15 \$100 bills. RP 31. He then gave them to Staerk. RP 31.

Staerk counted the money and thought it was weird that it was \$50 more than the agreed price, but was not going to draw attention to it. RP 31-32, 42. The woman took the computer Staerk said thanks and shook hands with her and with Marc. RP 32. A moment later, Staerk got into his car and held the money up to the “dome” light inside. RP 32. Staerk could see that the money did not appear to have “basic security features,” like watermarks, and that some of the bills had the same serial number on them. RP 32.

Staerk thought only 30 seconds had passed since he got the money, shook hands, gave the woman the computer, got back into his car and examined the bills sufficiently to know there was a problem. RP 33. In

that time, however, the SUV had apparently driven away, because Staerk did not see it when he looked up. RP 33. Staerk drove around the parking lot and then looked for the SUV on the street. RP 33. When he did not see it, he went to his girlfriend's home, all the while "freaking out." RP 34. After getting her advice, Staerk ended up going to the Fife Police Department (FPD) with her, where he filed a police report and gave police the \$100 bills. RP 34.

A special agent with the Secret Service and Department of Homeland Security testified that normally, each bill would have a separate, unique security number and have certain embedded fibers and a security strip, as well as a watermark and "color shifting ink" in the lower right-hand corner. RP 67. The agent examined the bills Staerk gave to police and gave his opinion that they were not legal tender as they lacked many of those features. RP 71-78.

After making the police report, Staerk said, he tried to call the phone number from which the man had called him. RP 40, 48. The first two times Staerk called, the outgoing message on the phone appeared to be from an answering machine for a limited liability company. RP 40, 48. Staerk thought the voice on the recording was "his voice, though," referring to the man with whom he had interacted that day. RP 48. Staerk also said the company's name was something like "Marcus LLC." RP 48. The third time Staerk called the number, there was no longer an outgoing message. RP 41.

Staerk gave a description of the man with whom he had met. RP 34. That man was black, "in his 30's, and had short hair, a beard that was

short, and was heavier, about five [feet] 10 [inches tall].” RP 34. Staerk also remembered that the man was a little taller than him. RP 35.

Although the man was black and Staerk was not, Staerk maintained that he had “contact” with other African-Americans “[t]hroughout my whole life, school, friends.” RP 51.

According to Staerk, he was “face to face” with the man during the 15-20 minutes of the transaction, although Staerk also said Staerk was directing his comments and explanations to the woman and showing her the computer. RP 30-31, 43. On cross-examination, however, Staerk admitted that the man was wearing sunglasses throughout the entire incident and thus Staerk could not see the man’s eyes. RP 45. Staerk then said, “[f]rom the side sometimes” he was able to see the man’s eyes and other parts of the man’s face which had been covered by the big glasses. RP 45. But, Staerk conceded, he could not see those things when he and the man were facing “straight on” - or “face to face.” RP 30-31, 45.

Months after the incident, on August 28, 2009, Staerk was shown a photographic montage by police. RP 37-38, 59. Staerk picked out a picture of someone he was only 80-85% sure was the person who had given him the money for the computer. RP 37-38, 59. Staerk conceded there was “always” the chance that he had misidentified the person or that he was mistaken, although he did not think he was. RP 47, 49. At trial, he identified Charles Robinson, Jr., as the person he had gotten the money from that day. RP 30.

Staerk said he was identifying Robinson because “[j]ust, I can recognize him from that night.” RP 48. Staerk also noted he had seen the

defendant “[a] couple of months ago” in the courthouse “a couple of floors down” and was “able to recognize him at that point.” RP 39, 51. Staerk said seeing the man then, he was not “at all confused” about “who it was” he was “looking at” in the courthouse. RP 51.¹

It was Robinson whose picture Staerk had been about 80% sure depicted the man involved in the incident. RP 50. Staerk admitted that he had selected Robinson’s picture even though it did not look just like the man involved, because police had told Staerk that the photos could look different than the suspect had looked that day, for reasons like hair length and “things like that” which might have “changed.” RP 38.

Staerk admitted that, in the photo of Robinson, the “hair is different, beard is different, you know, just things like that” from the man involved. RP 39. The man in the incident had a short full beard, very trimmed, and a “partial mustache.” RP 45. In the pictures, Robinson had a “more cleaned up” beard, not as far around the face, and “thinner a little bit.” RP 50. The hair was trimmed against the head and he did not have “additional hair with the little ponytails or whatever it is that’s coming out” in the pictures. RP 50. Staerk said the man’s facial hair was “more raggedy like.” RP 50. However, a few moments before, he had described the man as having a short full beard, very trimmed, and a “partial mustache.” RP 45.

¹In closing argument, the prosecutor relied on Staerk having seen Robinson “two months ago” in a courtroom, noting he “didn’t have any difficulty in identifying him whatsoever” at that point. RP 131. She again noted that “identification” of Robinson when he was in court for this case in rebuttal closing argument. RP 145. Counsel did not object and there was no pretrial motion brought to suppress the identification as tainted by the suggestiveness of seeing Robinson in court. RP 131.

Staerk said both that the man had a dark t-shirt and shorts and that he was wearing pants, eventually settling on shorts. RP 45. The man was also “pretty heavy set” and weighed about 250 pounds. RP 46. To Staerk, the only picture he was shown in the montage depicting someone who appeared “heavy set” like the man with whom he had interacted was the one he picked - the one of Robinson. RP 47, 50.

Staerk conceded there was “always” the chance that he had misidentified Robinson, “[b]ecause of the hair, and also because maybe the lighting conditions weren’t as optimal as they could have been, and the sunglasses.” RP 47.

Staerk was not, apparently, shown a montage of the woman, but described her as wearing jeans overalls and a t-shirt during the incident. RP 46. Staerk was sure she was not pregnant. RP 44. Indeed, Staerk said, she was “very slim” and white, so much so that he testified that the “condition of the female physically like, seemed like she was a drug addict, kind of thing.” RP 44, 52.

Robinson’s fiancé was four months pregnant and “showing” at the time of the incident. RP 99.

FPD patrol officer Michael Malave determined that Robinson lived on 32nd Avenue S.W. in Federal Way. RP 57. That was about a mile away from the area of “320th in Federal Way” where the man involved in the incident had said he lived. RP 57.

The phone number associated with Robinson’s address was for

Helen White Eagle², and it was the same as the number from which Staerk said he had received the calls. RP 28, 58.

Robinson's nephew, Benjamin Johns, was 23 at the time of the trial and said that, on May 21, 2009, the date of the incident, Johns was having a late birthday party at Robinson's home. RP 83. The party had been held late because, although his birthday was earlier in May, they had not had any money to "really like do anything" until later. RP 83.

Johns said the party started about 2 p.m. and did not end until around 10:00. RP 84. There were a lot of people there but Johns said he never saw Robinson leave and thought he was there the "whole time." RP 84. Robinson and Johns played video games together a couple of times, then Robinson was playing pinochle and dominos, too. RP 85. Johns said the place was not really big and Robinson was either inside the kitchen or in the garage or living room, where Johns was, most of the time. RP 85.

Robinson did not tell Johns about the charges until about two months before trial, and had not told him the date it was alleged to have happened when he first told him about it. RP 87. Johns did not drink and did not think anyone else had, either - at least that he noticed. RP 89.

Bud White Eagle, Helen's dad, also remembered the day of the birthday party. RP 91-92. White Eagle, who was at the party, thought it went from about 1:30 to "about 10:00 at night, or later." RP 92. White Eagle was helping his "Sonny Boy," Robinson, with the party and the barbecue "and all that stuff." RP 92. White Eagle was also "hanging out,"

²Because she shares the same last name as her father, who also testified, Ms. White Eagle will be referred to by her first name. No disrespect is intended.

playing pinochle and dominos. RP 92. They were making chicken, ribs, hot dogs, hamburgers, “all kinds of food” on the barbecue and White Eagle said Robinson did not leave “that whole entire day.” RP 93.

White Eagle, who also lived at the home at the time, said that a lot of Robinson’s friends were there and the older man recognized their faces but not all of the names. RP 93-94. White Eagle spent most of his time playing pinochle at the kitchen/dining area table but he also went out to the garage to smoke, because Robinson and Helen did not let anyone smoke around their baby. RP 93, 96. White Eagle started the barbecue at 1:30 or so and Robinson took over at some point. RP 94.

During the party, White Eagle was drinking beer outside the house, starting about 3 in the afternoon. RP 94-95. He said he had “maybe two 24 ounce” from 3 in the afternoon until 10 that night. RP 95. During that same time, he also played games and ate. RP 95.

White Eagle thought the party was actually held on the date of the nephew’s birthday but did not know Robinson’s nephew well enough to know his full name, only knowing him as “T.J.” RP 96.

Helen said there were quite a few people at the home that day for the party, which started at 2 and ended around 10 p.m. RP 98. She, too, said Robinson did not leave at any point, noting that he was helping her cook. RP 99. She was four months pregnant at the time and could not do everything by herself so he was there helping out. RP 99. She would “season up the meat” and hand it to Robinson who was barbecuing outside, probably with the help of Helen’s father. RP 101. Robinson would go into the garage sometimes during the party but was never gone

for long, never out of her sight for more than 10 or 15 minutes. RP 100.

Helen thought the party was being held on that day instead of his birthday in early May because the birthday boy was out of state staying “with his aunty” at the time of the actual birthday. RP 106.

Helen herself did not go outside during the party. RP 102. She explained that she did not have people in the house who were not the “main family” and, in general, she does not allow people she does not know into the house. RP 103, 105. As a result, if someone wanted to use a phone, they would not be allowed to use the house phone but would be given the cell phone to use. RP 107. There were some calls made on the phone that night, which Helen had noticed in looking at the phone later. RP 107. Although she thought only she and Robinson used that phone and that he had the phone during the party, she was not present when someone made those calls and did not know who had actually made them. RP 99, 104, 107.

Helen said that family members had stayed inside the house even after 10 that night, although Robinson mentioned to her that the others who had been outside in the garage started leaving at about ten. RP 105.

At the time of the incident, Helen drove a 2006 Nissan Maxima. RP 100. Neither she nor anyone she knew owned a Blazer or other SUV. RP 100.

Charles Robinson, Jr., testified that the birthday party had happened on that day because he had gotten some financial “help” from an uncle to hold it. RP 110, 117. They “had a little barbecue” where lots of people came, with most of them hanging out in the garage. RP 110, 117.

Robinson spent the party playing Dominos, pinochle, “doing a little bit of everything, trying to help cook,” and taking “orders” from Helen about what she needed done. RP 110. Robinson said others started leaving the party around 10 p.m. or a little later. RP 110. Those others included friends of his nephew “and then maybe his friends had brought a few” friends and Robinson’s friends might have done the same, so that Robinson did not know “who everybody was that they brought.” RP 117.

Robinson remembered several times during the party when people asked to use the phone and were allowed to use the cellphone. RP 112. He explained that people were not allowed to use the “landline” in the house because someone had charged a bunch of long distance to it without permission and without paying. RP 112. Robinson said the phone did not disappear during the night but people would use the phone in the garage and he would peek out occasionally to make sure things were not “rowdy” or whatever. RP 116.

The people who asked to use the cellphone that night included someone named Jay Jackson, a man named Dontae and Dontae’s girlfriend. RP 112. Jackson had come over several times in the days before the party, too. RP 113. Robinson did not “sit there and talk with people when they ask to use the phone” so he did not know what Jackson had said or who he had called at those times. RP 113. Robinson also said he, his wife and friends used the phone all that month, that it was “back and forth” with Helen having it sometimes, him having it sometimes “or somebody needs to use the phone, or whatnot, we will let them use the phone.” RP 113-14.

Robinson was adamant that he was not the man involved in the incident. RP 110. He had never seen Staerk in his life, never left the home that day and never attempted to purchase a computer from Staerk. RP112. Indeed, he said, he already has a laptop, a Toshiba, which was purchased from Rent-A-Center. RP 112. He said he and his family told the police they were welcome to look in the house for the item they thought he had stolen but “[t]hey chose not to.” RP 112-13.

D. ARGUMENT

1. ROBINSON’S RIGHTS TO BE FREE FROM DOUBLE JEOPARDY WERE VIOLATED

Both the state and federal double jeopardy clauses protect against, *inter alia*, multiple punishments and multiple convictions for the same offense. See State v. Womac, 160 Wn.2d 643, 650-62, 160 P.3d 40 (2007); In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004); Fifth Amend.; Art. I, § 9. In this case, Mr. Robinson’s rights to be free from double jeopardy were violated by his convictions for both theft and forgery, because those convictions were for the exact same criminal act.

At the outset, this issue is properly before the Court. A violation of double jeopardy prohibitions is a manifest constitutional error which may be raised for the first time on appeal. See, State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

On review, this Court should reverse and dismiss one of the two convictions, with prejudice. In general, where there are two convictions under separate statutes for the same criminal act, the Court must first determine whether the Legislature has explicitly intended for such multiple

punishments to be imposed. See State v. Borrero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007), cert denied sub nom Borrero v. Washington, 552 U.S. 1154 (2008); State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The first part of this determination is to look at the language of the criminal statutes to see whether they expressly disclose legislative intent with respect to multiple punishments. Borrero, 161 Wn.2d at 536. For example, with the burglary anti-merger statute, the Legislature has disclosed an intent that separate punishments be imposed in cases where there is a burglary and an underlying crime. See, Calle, 125 Wn.2d at 776; RCW 9A.52.050.

Here, the forgery and theft statutes do not disclose such an intent. See RCW 9A.60.020 (forgery); RCW 9A.56.020(1)(b) (theft by deception). Because the statutes are silent, the Court then applies principles of statutory construction. Jackman, 156 Wn.2d at 746. The primary rule used in this state is the “same evidence” rule, often called the Blockburger test after the seminal case on this issue in federal courts, Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). See State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). With this test, if each offense contains an element the other does not, or if each offense requires proof of a fact the other does not, the offenses are not the same. Orange, 152 Wn.2d at 816-18; see Calle, 125 Wn.2d at 777-78.

The Blockburger test has been called the “same evidence” test, but the proper interpretation of that test has changed over time. At one point, courts were routinely applying the test by using an abstract comparison of

the statutory elements of the two crimes. See Orange, 152 Wn.2d at 817-19; see Jackman, 156 Wn.2d at 749. But in Orange, the Supreme Court rejected this analysis as based upon a “misconception about the Blockburger test.” Orange, 152 Wn.2d at 819. The defendant in Orange was convicted of, *inter alia*, first-degree attempted murder and first-degree assault of a man named Walker, for firing at least 11 shots at people at a gas station, one of which struck and wounded Walker. 152 Wn.2d at 800. Orange argued that, because the two crimes were “based on the same shot in the same incident,” the two convictions violated double jeopardy. 152 Wn.2d at 816. The court of appeals rejected the argument, interpreting the Blockburger test as requiring “nothing more than” comparison of “the statutory elements at their most abstract level” and concluding that there was no double jeopardy violation because the two crimes *could*, in the abstract, involve different elements. Orange, 152 Wn.2d at 818.

On review, the Supreme Court faulted the Court of Appeals for this analysis, declaring that, in applying it, the lower appellate court was only “[p]urporting to apply the [Blockburger] test.” Orange, 152 Wn.2d at 817. The Court declared that:

The . . . reluctance to look at the facts used to prove the statutory elements exposes a misperception about the Blockburger test. That the test has been alternatively called the “same elements” and the “same evidence” test underscores that the Blockburger test requires the court to determine “whether each provision *requires proof of a fact which the other does not.*” Unless the abstract term . . . is given a factual definition, there is simply no way to assess whether [one crime] . . . requires proof of a *fact* not required in proving the [other crime].

Orange, 152 Wn.2d at 818 (emphasis in original; citations omitted).

Because the Court of Appeals had mistakenly believed that the “same

elements' test requires a court to compare a generic element in one offense to a specific element in a second offense," that lower appellate court had reached the wrong conclusion, the Supreme Court held. Orange, 152 Wn.2d at 819-20.

In addition, the Court declared that cases following the reasoning of the Court of Appeals in Orange and so construing Blockburger were wrong, the Supreme Court said, because the "'same elements' test" in fact mean that "double jeopardy will be violated 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.'" Orange, 152 Wn.2d at 820, quoting, State v. Reiff, 14 Wash. 664, 667, 45 P.3d 318 (1896) (quotations omitted). The Orange Court concluded that, under Blockburger, the first-degree attempted murder by taking the "substantial step" of shooting at Walker and the first-degree assault of Walker, committed with a firearm, "were the same in fact and law" even though they involved different statutory elements, because

[t]he two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first[-]degree attempted murder was sufficient to convict Orange of first[-]degree assault.

152 Wn.2d at 820.

Orange was followed by other cases, in which the Supreme Court again reaffirmed the Orange analysis. In State v. Freeman, 153 Wn2d 765, 108 P.3d 753 (2005), for example, the Court quoted Orange and declared that, "[w]hen applying the Blockburger test, we do not consider the elements of the crime on an abstract level." Freeman, 153 Wn.2d at 776.

Indeed, the Freeman Court declared, “[u]nder Blockburger, we presume that the legislature did not intend to punish criminal conduct twice when “*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 at 777 (emphasis in original), quoting, Orange, 152 Wn.2d at 820 (internal quotations omitted). While the fact that the same conduct is used to prove each crime is not necessarily dispositive, the Court said, it is necessary to look at the crimes as “charged *and proved*,” rather than at the level “of an abstract articulation of the elements.” Freeman, 153 Wn.2d at 777.

And in Womac, supra, the Court again which further cemented the propriety of the Orange analysis. In Womac, the defendant was convicted of homicide by abuse, second-degree felony murder and first-degree assault for the death of his son. 160 Wn.2d at 647. The Supreme Court applied the “same evidence” rule as articulated in Orange, noting that, using that analysis, double jeopardy violations can be found “*despite* a determination that the offenses involved clearly contained different legal elements.” 160 Wn.2d at 652 (emphasis in original).

These cases recognize the principle that defendants should not be subjected to multiple convictions based upon “spurious distinctions between the charges.” See Jackman, 156 Wn.2d at 749, quoting, State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1988). They also highlight the danger of relying on pre-Orange caselaw as dispositive when a double jeopardy issue is raised.

State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), for

example, is instructive. In that case, decided before Orange and its progeny, the defendant was found guilty of three counts of identity theft and two counts of forgery for representing herself as someone else, forging that person's name to two deeds of trust given to other people and using the name on an "adjustable rate rider" given to the loan holder, who was a different person. Baldwin, 150 Wn.2d at 451. A driver's license with the defendant's picture and the false name on it was also found, as were credit cards and vehicle titles in that name, as well as in two others. Id.

On appeal, the Supreme Court described the Blockburger test as asking whether "each offense includes an element not included in the other," and whether "proof of one would not necessarily prove the other." Baldwin, 150 Wn.2d at 454-55, quoting, Blockburger, 284 U.S. at 304. After noting that the two statutes did not "expressly allow punishment under both statutes for the same act or transaction," the Court concluded that they did not satisfy the "same evidence" test for the sole reason that "each offense contains an element not contained in the other." Baldwin, 150 Wn.2d at 455.

And in reaching this conclusion, the Court rejected Baldwin's argument that "the Court of Appeals should have compared the elements in light of what actually occurred," adhering to the belief that it was the statutory elements in abstract which had to be examined. Baldwin, 150 Wn.2d at 456-57.

Thus, the holding of Baldwin - and similar cases - no longer retains currency after Orange. And this is so even though the analysis in Baldwin was ultimately converted into *dicta*, because the Baldwin Court ultimately

rested its decision on the belief that, “when offenses harm different victims, the offenses are not factually the same for the purposes of double jeopardy,” and the various crimes involved different victims. Baldwin, 150 Wn.2d at 457 (citations omitted); see Pedersen v. Klinkert, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960) (*dicta* is language not necessary to the decision in a particular case).

Applying the proper analysis here leads to the inexorable conclusion that Robinson’s double jeopardy rights were violated by the two convictions. The two convictions, as proven, rested on the very same evidence. Robinson was convicted of committing the forgery for passing the fake money with knowledge that it was fake, with the intent to defraud the victim to gain the computer. And he was convicted of committing the theft by “color or aid of deception,” for passing the fake money, with the intent to deprive the victim of the computer. Under Orange, these two crimes constituted the same offense for the purposes of double jeopardy and one of them cannot stand.

Indeed, the prosecutor’s own closing arguments make this point clear. In arguing that Robinson was guilty of the forgery, the prosecutor argued that she had proved guilt because his act of passing the bills to try to get the laptop was an uttering with intent to defraud. RP 125-26. She also argued that the very same evidence proved the “theft by deception,” with the “deception” being the passing of the counterfeit bills in order to get that computer. RP 125-26.

Later, in rebuttal closing argument, the prosecutor argued that she was not required to prove where the bills were made, where Robinson got

them from or anything like that because he was only charged with “having taken the counterfeit bills, the forgeries, and then using them to commit the theft by deception, by getting this particular laptop.” RP 146. Put simply, she said, “[h]e had them, he passed them,” and that was what he was charged with doing in relation to the forgery. RP 146. And it was this same act of passing them which proved the theft by deception.

The prosecutor’s arguments in closing and rebuttal establish that, in this case, the same evidence was used to prove both offenses and, applying Orange, Robinson’s double jeopardy rights were violated.

In response, the prosecution may attempt to rely on cases it cited to below, but any such reliance would be misplaced. At sentencing in arguing that the “same criminal conduct” test had not been met, the prosecutor based the argument on two pre-Orange cases which addressed double jeopardy, arguing that the same analysis should be used and that those cases controlled. RP 162-64, citing, State v. Barton, 28 Wn. App. 690, 626 P.2d 509, review denied, 125 Wn.2d 1027 (1981); and, State v. Goodlow, 27 Wn. App. 769, 620 P.2d 1015 (1980). The impropriety of confusing those two standards is addressed, *infra*.

But it should also be noted that, for double jeopardy purposes, those cases are no longer good law after Orange. In Goodlow, for example, the defendant was charged with four counts of forgery and one count of second-degree theft for allegedly altering cashier’s checks and cashing them. 27 Wn. App. at 772. Without detailed analysis or looking at the facts of the particular case, the Goodlow Court simply declared that the elements of the two crimes were different because theft required

actually gaining control over property and “[t]hat element need not be proven to convict a defendant of forgery.” 27 Wn. App. at 773. Barton simply cited two and relied on Goodlow for its declaration that “[t]he two offenses” of theft and forgery were “separate and distinct.” 28 Wn. App. at 695.

Thus, both of these cases engaged in the abstract comparison of statutory elements which was condemned in Orange, Freeman, Womac and other Supreme Court cases. They retain no currency here.

Because Robinson’s convictions for theft and forgery violated his state and federal rights to be free from double jeopardy, this Court should reverse and dismiss.

2. IN THE ALTERNATIVE, THE SENTENCING COURT
ERRED IN FAILING TO FIND THE TWO CRIMES
WERE THE “SAME CRIMINAL CONDUCT” UNDER
RCW 9.94A.589

Under RCW 9.94A.589(1)(a) when offenses are tried together and involve the “same criminal conduct,” they are treated as one crime when calculating the defendant’s offender score. See State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In this case, even if this Court finds that Mr. Robinson’s rights to be free from double jeopardy were not violated when he was convicted of two separate crimes for the exact same act, reversal is nevertheless required, because the sentencing court erred in finding that the forgery and theft were not the “same criminal conduct” and in counting them separately at sentencing.

a. Relevant facts

When the parties appeared before the court for sentencing, they

argued about the proper offender score. RP 158-61. The court's main concern was "the two current offenses" and the prosecutor's argument that they "need to be identical to be counted as the same criminal conduct." RP 161. The court thought instead that the only requirement was "that the intent be the same," and felt that this standard was met in this case because the "intents" were "in the one situation, an intent to deprive, and in the other, an intent to defraud." RP 162.

The prosecutor's position was that the forgery and theft convictions had been "specifically been found in the caselaw. . .to be separate and distinct offenses." RP 162. The court noted, however, that the prosecutor's arguments were based on Goodlow and Barton, cases which involved double jeopardy. RP 162. The prosecutor then said that the double jeopardy issue was the same and the same analysis was used for double jeopardy questions and those of "same criminal conduct" because "you are still talking about merging." RP 162. Put another way, the prosecutor said that if crimes were the "same criminal conduct for double jeopardy purposes, they have to merge," and "if they are not the same criminal conduct for double jeopardy purposes and for SRA they don't merge." RP 163. She also argued that the cases involving double jeopardy controlled because "even though they speak in terms of double jeopardy [it] is the same analysis that you would use under the same criminal conduct" inquiry. RP 163.

When the court again questioned whether crimes had to "be on all fours with regard to the elements" in order to be the "same criminal conduct" for sentencing purposes, the prosecutor then argued that the two

crimes did not share the same intent based upon their statutory requirements. RP 163-64. Because the statutory definition of forgery required “intent to injure or defraud,” she claimed, the “intent” for the forgery was “intent to injure,” not the same intent required for the theft. RP 164. And again, the prosecutor declared, “basically for purposes of the same criminal conduct and double jeopardy, it’s the same thing.” RP 164. She told the court there were “lots of unpublished decisions” so holding but then backtracked, admitting “we can’t go ahead and use that” as authority. RP 165.

The court next asked questions about facts different than those present in this case, wanting to know whether there was a differing intent when someone created counterfeit money with the intent to use it to take someone’s property and then did so. RP 165. The prosecutor responded that one involved “just the intent to do something” while the other involved “actual injury” of theft. RP 165.

When finally asked to participate, counsel said that the question of “same criminal conduct” is actually “very fact related,” noting that all that was proven was that Robinson used counterfeit bills to buy a laptop. RP 166.

The court responded that it had “trouble with this whole concept” that a crime should not be “treated separately and distinctly” when it was charged separately because “it’s one kind of criminal behavior to want to steal from somebody” but another kind to “create a document that can be used” for that purpose. RP 167. Counsel reminded the court that Robinson was not convicted of creating the documents but instead just

using or “uttering” them in furtherance of getting the property. RP 167. The court expressed the thought that it might be “worse” for someone to “take your wallet by use of some device I’ve created rather than just snatching your wallet, saying “[h]e ought not to get the benefit of just stealing when he’s actually done two bad things,” which were “[h]e’s stolen, and he’s created this device to help him steal.” RP 167-68.

Again, however, counsel pointed out that there was no evidence whatsoever introduced to prove that Robinson created the fake money and, again, that he was found guilty specifically of the “uttering” of the documents i.e., giving them to the victim to purchase the laptop. RP 168. Counsel also pointed out the crimes occurred at the same time and place, to the same victim, so the only question was “intent,” which he argued was the same for both crimes in this case - the intent to deprive the victim of his property. RP 168.

In ruling on the issue, the court declared that it was “really a puzzle” and the court had gone back and forth several times. RP 171-72. The court said the “end result is the same for both the forgery and theft, and that’s to get the laptop,” but then went on:

And I really don’t know whether I am going to be right or wrong on this, but I guess what I see, if you truly look at the intent, there’s something somewhat different and somewhat worse when you combine these two things than when you do just one or the other.

RP 171-72. The court said the use of the “added device” was significant for the forgery because someone could use the device “not just to defraud in the sense of getting something for themselves, stealing something,” but also to “annoy, vex or injure” by putting this in the “stream of commerce.”

RP 172. The court concluded:

And you've put this instrumentality into the stream of commerce, if you will, and you've injured and vexed and disturbed somebody else and potentially other people, so it has a whole different set of social ramifications, problems attached to it, and potentially a different intent. And I may be an angel dancing on the head of a pin, but I do see that as a significant enough difference to justify another point for the current offense.

RP 172. Judge Felnagle later sentenced Robinson based on an offender score which included a point for each current offense counting against the other. CP 168-80.

b. The trial court erred, abused its discretion and violated the doctrine of separation of powers

Even if this Court were to somehow conclude that the two convictions for the exact same act did not violate Robinson's rights to be free from double jeopardy, reversal and remand for resentencing would still be required because the trial court applied the wrong standards and acted outside its statutory authority in refusing to count the current convictions as "same criminal conduct" for sentencing purposes.

As a threshold matter, this issue is properly before the Court, because Mr. Robinson specifically raised it below. See, State v. Beasley, 126 Wn. App. 670, 685, 109 P.3d 849, review denied, 155 Wn.2d 1020 (2005).

On review, this Court should reverse. Under the Sentencing Reform Act (SRA), unlike in pre-SRA sentencing, the court does not have unlimited, unfettered discretion. See, e.g., State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Instead, it is required to act within the statutory boundaries set up by the Legislature - boundaries which were

specifically crafted by that body after consideration and balancing of the relevant policies behind sentencing, such as punishment, accountability, proportionality and community safety. See RCW 9.94A.010; see, e.g., State v. Pascal, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987) (Legislature is presumed to have considered all these interests in establishing the standard sentencing scheme).

Taking into consideration all of those interests, the Legislature drafted the statute on “same criminal conduct” for sentencing, currently numbered in RCW 9.94A.589. That statute provides that, if two offenses “encompass the same criminal conduct then those current offenses shall be counted as one crime.” RCW 9.94A.589(1)(a). Further, the statute provides a statutory definition to be used by trial courts in determining whether crimes encompass “the same criminal conduct,” providing:

“Same criminal conduct,” as used in this 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.

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

With this statutory scheme, the Supreme Court has held, the Legislature has “accept[ed] the possibility that a single act may result in multiple convictions” and chose to place “limits [on] the consequences of such convictions.” Calle, 125 Wn.2d at 781-82.

Offenses amount to the “same criminal conduct” under the statute if they involve the “same criminal intent, are committed at the same time and place, and involve the same victim.” See State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1996). To determine whether two crimes share the same criminal intent, the court does not look at the statutory mental

state for each crime; rather it looks at whether, viewed objectively, the defendant's intent changed from one crime to the next and whether the commission of one crime furthered the other or were part of the same overall criminal purpose. See Vike, 125 Wn.2d at 411. Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted incident. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Thus, in State v. Calvert, 79 Wn. App. 569, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996), the appellate court upheld the superior court's conclusion that two forgery convictions should be counted as "same criminal conduct" for sentencing purposes where the defendant's wife stole a checkbook from her mother's home and the defendant then deposited several checks his wife forged into a bank account. 79 Wn. App. at 572. In making its conclusion below, the sentencing court had relied on the fact that two of the checks were presented to the bank on the same day. 79 Wn. App. at 574. On appeal, the prosecution argued that the court erred in treating the two counts for those checks as the same criminal conduct, because the forgeries did not "further each other." 79 Wn. App. at 578.

The appellate court rejected the state's argument, noting that the "furthering" test is not "the only test to be applied" in making a "same criminal conduct" determination. Id. Instead, the court noted, the question is whether the defendant's "criminal intent, as objectively viewed, changed from one crime to the next," an analysis which includes "but is not limited" to asking whether one crime furthered another, whether they were

part of the “same scheme or plan,” and whether the “criminal objectives” of the defendant changed from one crime to the other. Id. Regardless of the fact that the two forgeries did not “further” each other, both forged checks were deposited in the same account on the same date, “as part of the same scheme, with the same criminal objective: to defraud.” Id. Under those circumstances, the Court held, the two crimes were properly held to be the “same criminal conduct.” Id.

Here, the transactions not only occurred on the same date, as part of the same scheme, for the purposes of defrauding the victim. They occurred at exactly the same moment. They were the very same act - the passing of the fake bills to buy the laptop. Logically, it is questionable whether it is even possible for Robinson’s “objective criminal intent” to change from the commission of one crime to the other when the crimes were the same act, committed at the very same moment in time. See, e.g., State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). And in fact, cases finding that there has been a change in intent have found it only when the defendant was able “to form a new criminal intent before his second criminal act because his ‘crimes were sequential, not simultaneous or continuous.’” Tili, 139 Wn.2d at 124, quoting, State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997).

Here, of course, the crimes were simultaneous. Because they were committed against the same victim, at the same time and place, with the same criminal intent of defrauding the victim out of the computer, the forgery and the theft were the same criminal conduct under RCW 9.94A.589 and should have been treated as such.

In reaching a contrary conclusion, the sentencing court abused its discretion and, indeed, ran afoul of the statutory limits of the court's authority and the constitutional doctrine of separation of powers. It is an abuse of discretion when the court, *inter alia*, "applies the wrong legal standard, or bases its ruling on an erroneous view of the law." State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

Here, the sentencing court did both. First, it abused its discretion in applying the wrong standard by relying on the judge's beliefs about the "societal harm" that is likely, in general, in every case where there are two crimes charged. Relying on facts not involved in this case (i.e., if someone had "created this device to help him steal" documents), the court felt that there was more "societal harm" implicit in the commitment of two crimes in general as opposed to a single crime, declaring "[h]e ought not to get the benefit of just stealing when he's actually done two bad things." RP 167-68, 171-72. The court also relied on its opinion that, as a general rule, anyone who commits an act which is chargeable as two crimes by definition should not get the "free pass" of concurrent sentences. RP 171-72.

But those policy considerations were not for the sentencing court to decide. It is beyond settled that it is the role of the Legislature to define the punishment which will follow a crime. See State v. Varga, 151 Wn.2d 179, 193, 86 P.3d 139 (2004). And the "fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary." State v. Thorne, 129 Wn.2d 736, 767, 921 P.2d 514 (1996).

Applicable to this case, the Legislature has specifically defined, in RCW 9.94A.589 the standards to be used in making the “same criminal conduct” determination, even amending the statute in 1987 for the purpose of providing that definition. See, Laws of 1987, ch. 456, § 5; see also, State v. Farmer, 116 Wn.2d 414, 427, 805 P.2d 200, 812 P.2d 858 (1991). Nothing in the definition or the statute vests the sentencing judge to decide, as a matter of policy, not to follow the statute because he did not believe it furthered social goals in which he believed. Nor did the Legislature, in crafting the statute, authorize the court to override the legislative determination that, in fact, multiple convictions for the same act should have limited consequences. See, e.g., Calle, 125 Wn.2d at 781-82. Again, it is presumed that the statute reflects the Legislature’s balancing of all of those social goals already, and it is not for a sentencing court to spontaneously decide not to follow the statute based on its own decision of how the balancing should occur. See RCW 9.94A.010; Pascal, 108 Wn.2d at 137-38.

Further, the sentencing court’s refusal to apply the legislatively mandated standards for analyzing when crimes are the “same criminal conduct” for sentencing purposes runs afoul of the constitutional doctrine of separation of powers. See, e.g., State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). That doctrine reflects the constitutional distribution of authority among the legislative, executive and judicial branches. Id. Where, as here, the legislature chooses to set forth the standards for determining a particular issue in relation to sentencing, it is offensive to the authority of that body for a court to so completely ignore those

standards and instead impose its own beliefs about what proper sentencing policy should be.

Further, the trial court abused its discretion to the extent that it accepted the prosecutor's argument that double jeopardy analysis applied and was dispositive. Again, the statute specifically provides the standard to be used. And the Supreme Court has repeatedly declared that, in fact, "[a] double jeopardy violation claim is distinct from a 'same criminal conduct' claim and requires a separate analysis." See Tili, 139 Wn.2d at 119 n. 5 ("the 'same criminal conduct' analysis under the Sentencing Reform Act of 1981, and the . . . analysis of double jeopardy are distinct"); State v. French, 157 Wn.2d 593, 611, 141 P.3d 54 (2006) (same). Thus, in Tili, the Supreme Court held that, while the defendant's rights to be free from double jeopardy were not violated by multiple convictions for multiple penetrations of the same victim during the same lengthy incident, the sentencing court erred in failing to find that the offenses were "same criminal conduct" for sentencing purposes. Tili, 139 Wn.2d at 121.

Here, as argued, *infra*, applying the double jeopardy standards properly results in the conclusion that the two convictions violated Robinson's rights to be free from double jeopardy. In addition, even if this Court somehow were to disagree, reversal and remand for resentencing would nevertheless be required, because the two convictions were the "same criminal conduct" and the trial court abused its discretion and violated the doctrine of separation of powers in holding otherwise.

E. CONCLUSION

For the reasons stated herein, reversal and dismissal of one of the convictions is required, because the two convictions violated Robinson's rights to be free from double jeopardy. In the alternative, the two crimes were the "same criminal conduct" and resentencing is required.

DATED this 15th day of May, 2011.

Respectfully submitted,



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