# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, Respondent, v. JOHN H. RAWLS, Appellant. | ) | No. 62456-3-I |
| | ) | DIVISION ONE |
| | ) | UNPUBLISHED OPINION |
| | ) | FILED: November 23, 2009 |

Grosse, J. — An admission by the defendant that he must have tried to cash or deposit a check is sufficient to establish that the defendant "knowingly" possessed the victim's means of identification, one of the elements of second degree identity theft. Here, the defendant testified that it was his license number and handwriting on the victim's check. A rational trier of fact could find from this evidence that the defendant knowingly possessed the victim's means of identification.

The prosecutor's comment in closing argument that it was not necessary to establish that the defendant knowingly possessed the victim's means of identification, while error, did not amount to prosecutorial misconduct. To establish prosecutorial misconduct, the defendant must establish both error and prejudice. Here, the defendant is unable to show any prejudice as the jury was properly instructed on the elements it needed to find in order to convict the defendant of second degree identity theft.

We affirm the trial court.

## FACTS

Following a jury trial, John Rawls was convicted of twelve counts of second degree identity theft involving stolen checks. Each of the twelve victims testified that he or she wrote a check on his or her bank account and placed the check in an envelope in an outgoing mailbox with the red flag raised, or, in one instance, a lock box to pay the rent. The checks were removed, but none of the victims knew by whom. For six of the counts, through testimony of various bank tellers, the State presented evidence that Rawls actually possessed and tried to cash the checks.

For five of the remaining six counts (I, X, XI, XII, XIII), the State proved that he constructively possessed the checks. The police seized the checks on April 28, 2008, when responding to a call from the Boeing Employees Credit Union where Rawls was attempting to cash a check from one of the victims. As he was responding to the call, Everett Police Officer Kelly Carman noticed a blue minivan parked near the front door of the credit union. Officer Carman ran the van license and learned the registered owner, Angela Garcia, had an outstanding warrant. Carman arrested Garcia, who was sitting in the front passenger seat of the van. Rawls was also arrested. In a search pursuant to the arrest, the police discovered a box that contained check blanks for making computer generated checks and a court document with Rawls' name on it. A subsequent search of the van pursuant to a warrant revealed a safe located in the middle of the back seat between the driver and front passenger seats. Inside, the police found more checks made out to other people and more of Rawls' court paperwork. Rawls was convicted of twelve counts of second degree identity theft and one count of possession of a stolen firearm. He appeals, alleging insufficient evidence

as to one count. Rawls also contends that the prosecutor committed misconduct in his closing argument and that he was denied effective counsel because his counsel failed to object to the prosecutor's misconduct.

ANALYSIS

Sufficiency of the Evidence

Rawls challenges the sufficiency of the evidence as to one count, contending that the State failed to prove that he knowingly obtained, possessed, used or transferred a check. Such knowledge is an essential element of the charge.

When reviewing a challenge to the sufficiency of the evidence we must determine, considering the evidence in the light most favorable to the prosecution, whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[1] We assume the truth of the prosecution's evidence and all inferences that the trier of fact could reasonably draw from it.[2] We defer to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses.[3] "Circumstantial evidence is as probative as direct evidence."[4]

A person commits the crime of identity theft if they "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."[5] The challenged conviction, count XIV, involved a check written by Pamela Hanson. Hanson testified that she had written the check to pay her credit card bill and placed it in the mailbox in

[1] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).
[2] State v. Wilson, 71 Wn. App. 880, 891, 863 P.2d 116 (1993), rev'd in part on other grounds, 125 Wn.2d 212 (1994).
[3] State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998).
[4] State v. Vermillion, 66 Wn. App. 332, 342, 832 P.2d 95 (1992), review denied, 120 Wn.2d 1030 (1993).
[5] RCW 9.35.020(1).

front of her house. The check's payee was altered to John Rawls. When asked by the prosecutor whether he cashed or attempted to cash Hanson's check Rawls testified, "Well, I see my handwriting at the top, so yeah, I must have tried to cash it or deposit it." The jury could infer possession from this statement that he wrote on the check and that he either tried to cash or deposit it. While Rawls claimed that he did not know the checks were fraudulent and that they were given to him for transactions on e-bay and in payment for services, we defer to the jury's credibility determinations which will not be overturned on appeal.[6] The evidence was sufficient to convict him of the charge of second degree identity theft.

Prosecutorial Misconduct

Rawls argues that the prosecutor committed prejudicial misconduct by arguing in rebuttal that the State was not required to prove Rawls "knowingly" possessed the victims' means of identification. To prevail on a claim of prosecutorial misconduct, Rawls bears the burden of establishing both improper conduct and resulting prejudice.[7] As noted in State v. Brown,[8] we must review allegedly improper remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Even improper remarks are not grounds for reversal if they respond to a defense argument and not so prejudicial as to be incurable by an instruction.[9] Improper argument that amounts to prosecutorial misconduct requires reversal only if there is a substantial likelihood that the

[6] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).
[7] State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).
[8] 132 Wn.2d 529, 561, 940 P.2d 546 (1997).
[9] State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

misconduct affected the verdict.[10]

During closing argument, defense counsel argued that the central issue in the case was whether Rawls knowingly possessed the victims' means of identification or financial information with the intent to commit a crime. Defense counsel argued that it was reasonable to believe that Rawls did not know the checks were fraudulent because several of the bank employees testified that they did not know the checks were fraudulent. In rebuttal, the prosecutor stated:

> The defendant in this case is charged with a crime of identity theft, and that is essentially possessing, if you will, financial or identification information. And you have to be satisfied beyond a reasonable doubt that he intended to commit or aid in the commission of a crime such as theft.
>
> Now he's not accused of knowingly possessing it. There is no knowingly instruction that the Court's read to you. You need to be satisfied that he possessed it. And there really is no question about that, either when he presented to the bank or in the van that he probably drove with Angela Garcia in the passenger seat, and had his possessions in it, he possessed that.
>
> The question is whether he intended to commit a crime or not.

The State in its brief concedes that the prosecutor's statement that the defendant was not accused of "knowingly" possessing the checks was error. But a prosecutor's misstatement of the law in closing argument does not warrant a new trial where the jury was properly instructed.[11] Here, the jury was correctly instructed on each of the elements it needed to find in order to convict Rawls. A jury is presumed to follow the instructions given.[12]

Rawls also contends that his attorney's failure to object to the prosecutor's

[10] State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).
[11] State v. Classen, 143 Wn. App. 45, 64-65 n.13, 176 P.3d 582 (2008).
[12] State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

improper rebuttal argument amounts to ineffective assistance of counsel.[13] To prevail on a claim of ineffective assistance of counsel, Rawls must show both deficient performance and resulting prejudice.[14] If he fails to satisfy either part of the test, we need not inquire further. Prejudice is established if it is reasonably probable that, if not for counsel's deficient performance, the outcome would have been different.[15] For the same reasons enunciated above, Rawls fails to establish prejudice. The trial court properly instructed the jury on the law and to disregard any misstatements of the law made by counsel and the jury is presumed to have followed the instructions.[16]

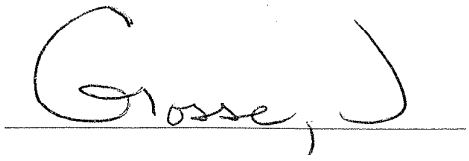
Sentence

Rawls asserts that his sentence was invalid because the combined term of confinement and community custody could exceed the statutory maximum in violation of RCW 9.94A.505(5). A recent decision of the Supreme Court, In re Personal Restraint of Brooks,[17] held that when a defendant's term of confinement and community custody could potentially exceed the statutory maximum, the appropriate remedy is to remand to the trial court "to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum." Here, the trial court ordered that "[t]he combined term of community placement or community custody and confinement shall not exceed the statutory maximum." When a sentence is clarified in this manner, it does not exceed the

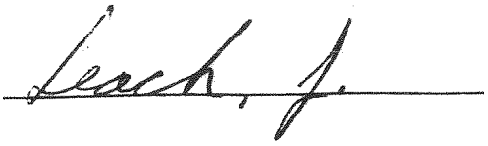
[13] Classen, 143 Wn. App. at 64 (Generally, a defendant must object to an alleged error at trial when it can be corrected; otherwise, he fails to preserve the error for appeal.).
[14] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
[15] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).
[16] Stein, 144 Wn.2d at 247.
[17] 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

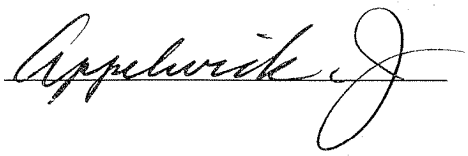
statutory maximum and is not indeterminate or otherwise invalid.[18] We find no error in the sentence.

Affirmed.



WE CONCUR:





[18] Brooks, 166 Wn.2d at 673-74.