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

		No. 63860-2-I
STATE OF WASHINGTON, Respondent, v. SUZANNE MELODY AQUINO, Appellant.	)	UNPUBLISHED OPINION FILED: November 23, 2009

Schindler, C.J. — A jury convicted Suzanne Melody Aquino of one count of identity theft in the first degree, seven counts of theft in the second degree, and seven counts of forgery. For the first time on appeal, Aquino argues that the court erred in calculating her offender score by failing to find that the theft and forgery convictions and the forgery and identity theft convictions encompass the same criminal conduct. In the alternative, Aquino argues that her attorney provided ineffective assistance of counsel by not asking the court to engage in a same criminal conduct analysis. Because Aquino waived the right to challenge the offender score for the first time on appeal, and she cannot establish ineffective assistance of counsel, we affirm.

FACTS

Frank and Myrtle Strom were in their eighties in 2004. They hired Suzanne Melody Aquino to do housework. They paid Aquino $65 a week to clean the house and do the laundry. Aquino would also occasionally shop for the Stroms.

The Stroms were very frugal. Myrtle was responsible for the finances and paid the bills. When Myrtle had difficulty writing, Aquino would sometimes fill out a check for her to sign.

In November 2006, Myrtle moved into a nursing home. Frank assumed responsibility for the finances and writing checks to pay the bills, but he did not balance the checking account.

In 2007, Frank's health deteriorated. In May, he moved into the nursing home. Frank and Myrtle gave their son and daughter-in-law, Joe and Jorene Strom, their power of attorney. When Jorene reconciled the bank statements and the checkbook, she noticed that a number of checks were not accounted for and a number of checks were missing.

Jorene contacted the bank. The bank determined a number of missing checks that were cashed were made out to Aquino. Jorene did not recognize the signature on the checks as Myrtle's. Jorene closed the checking account and filed a police report.

The police determined that there were seven checks made out to Aquino between November 2006 and June 2007. The checks signed "Myrtle A. Strom," and cashed at the same "Cash It" check cashing store in Spanaway. The

amounts ranged from $420 to $800. The police report lists the seven checks as follows:

Dated Nov. 30, 2006,	Cleared Jan. 16, 2007	(#3653): $462.00
Dated Dec. 10, 2006,	Cleared Jan. 19, 2007	(#3650): $485.00
Dated March 2, 2007,	Cleared March 29, 2007	(#3651): $421.91
Dated April 24, 2007,	Cleared April 27, 2007	(#3649): $659.52
Dated May 1, 2007,	Cleared May 8, 2007	(#3652): $642.89
Dated May 18, 2007,	Cleared May 21, 2007	(#3604): $495.00
Dated June 1, 2007,	Cleared June 5, 2007	(#3526): $790.35

Pierce County Deputy Sheriff Aloisio interviewed Myrtle at the nursing home. Myrtle told Deputy Aloisio that she did not sign or authorize Aquino to sign, the seven checks made out to Aquino. Deputy Aloisio testified that Myrtle was "real sharp."

Detective Gary Sanders interviewed Aquino at her home in Spanaway. Aquino immediately asked Detective Sanders "[a]m I going to jail?" Detective Sanders informed Aquino of her Miranda[1] rights. Aquino waived her rights and admitted writing and cashing the seven checks. But Aquino said that Myrtle authorized her to write the checks to reimburse her for purchasing "liquor, some clothing, and then home essentials." Aquino did not have receipts for any of the purchases.

Detective Sanders interviewed Myrtle about whether she had authorized Aquino to write the seven checks to reimburse Aquino for any purchases. Myrtle told Detective Sanders that she did not authorize Aquino to write the checks. Detective Sanders testified that Myrtle was lucid and it was clear she was in the

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

nursing home for "physical, not cognitive" reasons.

The State charged Aquino with one count of identity theft in the first degree, seven counts of theft in the second degree, and seven counts of forgery.

Joe and Jorene Strom, nursing home staff, Deputy Alosio, and Detective Sanders testified at trial.[2] Myrtle's trial testimony was presented by videotape. Myrtle identified a number of checks that she had written to Aquino for housework. Myrtle also identified the seven checks written to Aquino between November 2006 and June 2007. Myrtle testified that the signature on the seven checks was not hers and she did not authorize Aquino to write the checks.

Aquino stipulated to admission of the statements she made to Detective Sanders. Aquino's defense at trial was that she was authorized to write the checks as reimbursement for the purchases she made and Myrtle did not remember that she had authorized her to write the checks. The jury convicted Aquino as charged.

At sentencing, there was no dispute that Aquino had no prior criminal history, and no dispute as to the standard range sentence for each conviction. The prosecutor stated the standard range sentence for each of the 15 counts and the State's recommendation for a concurrent 74-month sentence.

> [T]his was a trial before a jury. The jury returned a verdict of guilty as charged. Count I was theft in the first degree. The remaining counts, II through XV, were seven counts of theft in the second degree and seven counts of forgery. . . . Regarding Count I, Your Honor, the standard range is 63 to 84 months in prison. The rest of the counts are all 22 to 29 months in prison. Regarding Count

[2] Frank Storm died in August 2007.

> I, the [S]tate will recommend 74 months in prison. For the rest of the counts, we would recommend high end of 29 months in prison.

Because Aquino had no prior criminal history, Aquino's attorney asked the court to exercise its discretion to impose a first-time offender waiver and sentence her to 0-90 days. Aquino's attorney submitted a number of letters from family and friends describing Aquino's trustworthiness.[3]

> Your Honor, I would ask you to treat her as a first-time offender. This is not a person who is a threat to the community. She has been convicted of 15 felony charges as a result of these incidents, two counts for each of the seven checks, and one count of identity theft for the aggregate total of all checks together. I certainly would concur that if a person would appear before Your Honor and have nine prior convictions or eight prior convictions that they would be very meritorious of that higher end of the sentencing range. This is not a hardened criminal. This is not a person who has had a pattern of recidivism with the Department of Corrections. This is a first-time offender at this stage in her life who has never endured any type of incarceration or contact with the criminal justice system. I believe first-time offender is appropriate for her.

The court denied Aquino's request for a first-time offender waiver. With an offender score of 9+, the court imposed a concurrent standard range sentence of 74 months for identity theft and 29 months for each of the theft and forgery convictions.

> These are very serious offenses that were committed against a very vulnerable victim and her husband. It was a matter that went to trial. I understand that you do believe that you are innocent of these charges, but of course, the evidence was there overwhelmingly and all the jurors were unanimous in convicting you of these offenses.[4]

ANALYSIS

[3] Aquino also wrote a letter asserting her innocence.

[4] The court also ordered Aquino to pay $3,956.67 in restitution.

For the first time on appeal, Aquino argues that the court erred in failing to find that the theft and forgery convictions and the forgery and identity theft convictions encompass the same criminal conduct.

While a defendant has the right to challenge an offender score for the first time on appeal, the doctrine of waiver applies "where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). A same criminal conduct analysis involves both factual determinations and the exercise of discretion. State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000).

A determination of whether crimes constitute the same criminal conduct requires the court to find (1) the same criminal intent, (2) that the crimes were committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a); State v. Williams, 135 Wn.2d 365, 366, 957 P.2d 216 (1998).

In Nitsch, this court held that the defendant's failure to identify a factual dispute at sentencing and the failure to request the court to exercise its discretion to determine whether the crimes encompassed the same criminal conduct, waived the right to challenge the offender score for the first time on appeal. Nitsch, 100 Wn. App. at 520.

> This is not an allegation of pure calculation error . . . Nor is it a case of mutual mistake regarding the calculation mathematics. Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion.

Here, as in Nitsch, Aquino did not identify any factual dispute concerning the offender score and did not ask the court to exercise its discretion to find the convictions constituted the same criminal conduct. On this record, we hold that Aquino waived her right to challenge her offender score for the first time on appeal by arguing the convictions encompass the same criminal conduct.

In the alternative, Aquino contends her attorney provided ineffective assistance of counsel by failing to argue below that the convictions encompass the same criminal conduct. A criminal defendant has the right under the Sixth Amendment to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. Strickland, 466 U.S. at 687. If a defendant fails to satisfy either part of the test, the court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

In order to establish the first prong, the defendant must show that his attorney's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). There is a strong presumption of effective assistance of counsel and the defendant must establish the absence of a strategic reason for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). If the attorney's conduct "can be characterized as legitimate trial strategy or tactics," the conduct cannot be the basis of an ineffective assistance claim. State v. McNeal, 145

Wn.2d 352, 362, 37 P.3d 280 (2002).

RCW 9.94A.650(2) allows the court to waive the imposition of a standard range sentence for a first-time offender and impose a sentence including up to 90 days of confinement. If a defendant qualifies as a first-time offender, the court has "broad discretion" to waive the standard range sentence and impose a first-time offender sentence. State v. Johnson, 97 Wn. App. 679, 682, 988 P.2d 460 (1999). Same criminal conduct also involves the exercise of discretion. Nitsch, 100 Wn. App. at 520-23; Williams, 135 Wn.2d at 366.

Here, there is no dispute that Aquino qualified for a first-time offender waiver. With no previous criminal history, Aquino's attorney asked the court to exercise its discretion to impose a first-time offender sentence. After the court denied Aquino's request for a first-time offender waiver, the attorney's decision to then not request the court to also exercise its discretion to determine whether the convictions encompass the same criminal conduct, can be characterized as a legitimate strategic decision.

Because Aquino cannot establish ineffective assistance of counsel, we affirm.

Schindler, C.J.

WE CONCUR:

Dwyer, A.C.J.