NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
*See* Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

DIVISION ONE
FILED: 09/20/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

| | |
|---|---|
| STATE OF ARIZONA,<br><br>Appellant,<br><br>v.<br><br>RANDY OWEN TWIGG, JR.,<br><br>Appellee. | 1 CA-CR 10-0213<br><br>DEPARTMENT A<br><br>**MEMORANDUM DECISION**<br>(Not for Publication – Rule 111, Rules of the Arizona Supreme Court) |

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-145461-001 DT

The Honorable Pendleton Gaines, Judge

**AFFIRMED**

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William G. Montgomery, Maricopa County Attorney — Phoenix
by Arthur Hazelton, Deputy County Attorney
Attorneys for Appellant

Maricopa County Public Defender — Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellee

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**I R V I N E**, Judge

**¶1** The State of Arizona timely appeals from the trial court's sentence of Randy Owen Twigg, Jr. based on its finding that he had only one historical prior instead of two because his

forgery and attempted forgery offenses committed on March 19 and 21, 2005, constituted "the same offense." For the reasons that follow, we affirm.

**FACTS AND PROCEDURAL HISTORY**

**¶2** A jury convicted Twigg of burglary in the third degree, a class four felony, for breaking into a jeep. Under the sentencing guidelines, a defendant with two prior historical felonies is a category three repetitive offender subject to a ten-year presumptive prison term. Ariz. Rev. Stat. § 13-703(C), (J) (Supp. 2010).[1] The presumptive term for one historical prior, however, is 4.5 years. *Id.* at § 13-703(B), (I) (category two repetitive offender).

**¶3** The State initially alleged Twigg had four historical prior felonies. During trial, it reduced the allegations to two historical priors: one count of forgery on March 19, 2005, and one count of attempted forgery on March 21, 2005. Twigg moved to strike the amended allegation as "insufficient as a matter of law" because the two alleged offenses "were committed on the same occasion and should only count as one prior felony conviction pursuant to § 13-703(L)." Arizona Revised Statutes § 13-703(L) (Supp. 2010) provides that "[c]onvictions for two or more offenses committed on the same occasion shall be counted as

[1] We cite to the current version of applicable statutes when no revisions material to this decision have occurred.

only one conviction for the purposes” of sentencing a category two or three repetitive offender.

**¶4** Specifically, Twigg argued the prior offenses were:

> 1) Committed at the same location, the JC Penny’s located in the Flagstaff Mall; 2) both of these offenses involved the exact same victim; 3) the two offenses were committed less than 24 hours apart; 4) Mr. Twigg’s actions were continuous and uninterrupted between the time he took the purse and the time that the credit card was confiscated by the JC Penny’s employee; and 5) Mr. Twigg had one criminal objective which was to use the victim’s credit card fraudulently at that JC Penny’s store.

**¶5** The State objected on grounds (1) the offenses were not committed on the same day, (2) the offenses involved different victims, and (3) the nature of the criminal acts were not related. As proof, the State attached a copy of the original indictment showing that the forgery offense was for forging the cardholder’s name at JC Penney on March 19, 2005, and the attempted forgery was for possessing a forged check belonging to a different victim on March 21, 2005. After the State presented fingerprint evidence, the trial court found that Twigg committed both offenses. It continued sentencing, requesting a copy of the plea agreement, indictment, minute entry and the transcript of the change of plea hearing so that it could determine whether the offenses occurred on the “same occasion.”

**¶6** At the next hearing, the State reiterated its position that the forgery and attempted forgery offenses referred to Counts V and VIII of the indictment, which involved completely different conduct, time and victims. Relying only on the transcript, the trial court determined the attempted forgery offense was based on the second time Twigg attempted to use the stolen credit card at JC Penney. Finding this offense involved the "same victim, same card, same method of operation, same location, and temporal proximity, which is within []36 or []48 [hours]," the trial court concluded that the forgery and attempted forgery "should be considered one historical prior for sentencing purposes."

**¶7** Twigg was sentenced to a presumptive term of 4.5 years in prison as a category two repetitive offender with one historical prior felony. The State timely appealed.

**DISCUSSION**

**¶8** On appeal, the State appears to accept the trial court's finding that the attempted forgery was based on the second use of the credit card on March 20 or 21, 2005. The State thus argues the trial court erred in determining that the two offenses occurred on the "same occasion" because the offenses were committed on different days, interrupted by unrelated conduct, and had different criminal objectives. The State argued before the trial court, however, that the forgery and attempted

forgery referred to the signing of the stolen credit card on March 19, and the signing of the forged check on March 21, respectively. Therefore, the two acts involved two different victims and wholly unrelated criminal objectives.

**¶9** The trial court's determination that two offenses were committed on the "same occasion" under A.R.S. § 13-703(L) is a mixed question of fact and law that we review de novo. *State v. Derello*, 199 Ariz. 435, 437, ¶ 8, 18 P.3d 1234, 1236 (App. 2001). In determining this issue, a court analyzes five factors: 1) time, 2) place, 3) number of victims, 4) whether the crimes were continuous and uninterrupted, and 5) whether they were directed to the accomplishment of a single criminal objective. *State v. Kelley*, 190 Ariz. 532, 534, ¶ 6, 950 P.2d 1153, 1155 (1997).

**¶10** When comparing the forgery and attempted forgery offenses in this case, the trial court reviewed the relevant indictment, which shows that Twigg was charged with:

> Count III:
> FRAUDULENT USE OF CREDIT CARD
>
> On or about 03/19/2005, [Twigg], with the intent to defraud, used for the purposes of obtaining or attempting to obtain money, goods, services or any other thing of value, a credit card . . . .
>
> . . . .

Count V
FORGERY

> On or about 03/19/2005, [Twigg], with the intent to defraud, falsely made, completed or altered a written instrument, to wit: JC PENNEY CREDIT CARD RECEIPT, a class 4 felony . . . .
>
> . . . .

Count VIII
FORGERY

> On or about 03/21/2005, [Twigg], with the intent to defraud, falsely made, completed or altered a written instrument, to wit: [T. and D.] C.'S ARIZONA STATE SAVINGS & CREDIT UNION CHECK #3479 PAYABLE TO RANDY OWEN TWIGG IN THE AMOUNT OF $60.00, a class 4 felony . . . .

**¶11** The transcript of the change of plea hearing shows that when asked for a factual basis for each count, the prosecutor explained only that Twigg used a stolen credit card at JC Penney on March 19, 2005, and tried using the same card again on "March 20th or the 21st." Nothing indicates, however, that this described the attempted forgery of a check expressly referred to as "Count VIII." Read together, the indictment and transcript show that the attempted forgery in Count VIII was based on a different criminal objective (obtaining money with a forged check), a different victim (checking account holder), and a different time (March 21st) than the credit-card related offenses in Counts III and V.

**¶12** The trial court may very well have erred by basing its decision only on the factual basis stated in the transcript, but the State does not make that argument here. It argues only that there were two separate forgery offenses based on uses or attempted uses of the stolen credit card. The problem with using these separate acts of forgery as historical priors is that the record is clear that Twigg was only convicted of one count of forgery based on the credit card. The narrow issue presented by the State in its appeal is whether the trial court erred in finding only one historical prior based on use of the credit card. Considering this narrow issue, we find no error.

**CONCLUSION**

**¶13** For these reasons, we affirm.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Chief Judge