

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

STATE OF WASHINGTON,)	No. 67567-2-I
)	
Respondent,)	
)	
v.)	
)	
AVERY CARTRELL WILLIAMS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: January 17, 2012
)	

Ellington, J. — Avery Williams appeals his conviction and sentence of one count second degree identity theft and four counts of second degree theft. He argues, pro se, that there was insufficient evidence to support his identity theft conviction. We agree. We also accept the State’s concession that Williams’ offender score was erroneously calculated. Accordingly, we reverse and remand for resentencing.

BACKGROUND

Williams took a wallet from Nona Munroe’s purse, which he found unattended at the Faith Assembly Church in Lacey, Washington. Munroe and her daughter soon discovered the theft and chased after Williams, who stopped and denied taking the wallet. When police arrived, Williams ran into a nearby housing development, threw the wallet onto a roof, and hid in a backyard. A witness observed Williams’ conduct, retrieved the wallet, and turned it over to police. Munroe indicated nothing was missing from the wallet.

After the police found and arrested Williams, he admitted taking the wallet. The State charged Williams with one count of second degree identity theft and four counts of second degree theft. It alleged Williams stole the wallet and thereby knowingly obtained Munroe's identification with intent to use that information to illegally obtain goods, services, cash, or credit of less than \$1,500, and also intentionally deprived Munroe of four access devices.

A jury convicted Williams as charged, and the court sentenced him to 55 months of incarceration.

DISCUSSION

We first address Williams' pro se challenge to the sufficiency of the evidence of second degree identity theft. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.¹ "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."²

To convict Williams of identity theft in the second degree, the State had to prove, among other things, that Williams took Munroe's means of identification or financial information "with intent to commit or aid or abet any crime."³ Williams contends the State failed to prove he intended to use Munroe's identity information to commit a crime. We

¹ State v. Montgomery, 163 Wn.2d 577, 586, 183 P.3d 267 (2008).

² State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

³ The jury was instructed that "[a] person commits the crime of identity theft in the second degree when, with intent to commit or aid or abet any crime, he or she knowingly obtains, possesses, uses, or transfers a means of identification or financial information of another person." Clerk's Papers at 18; see also RCW 9.35.020(1), (3).

agree.

The prosecutor presented evidence that Munroe's wallet contained financial and identifying information. He argued it was reasonable to infer that Williams knew such information would be found in the wallet, "especially [when its owner is] a woman, obviously middle age" and the wallet is "stuffed quite to the brim."⁴ The prosecutor argued Williams intended to commit or aid or abet another crime, "namely, the theft of that information."⁵

The State's theory that a person commits identity theft simply by stealing another person's means of identification or financial information is untenable. The statute requires proof that the defendant possessed another's information in order to commit, aid, or abet a crime.⁶ Williams' knowing possession of Munroe's information alone does not support a finding that he intended to use the information to commit another crime.

On appeal, the State argues the jury could reasonably infer that "when a person takes another person's credit/debit cards without permission, the intent is to use the cards in future financial transactions for personal gain."⁷ In some circumstances, that might be true. But here, Williams did not take Munroe's identification and financial information alone. Rather, he took a wallet containing over \$200 in cash. To establish that Williams intended to commit some crime beyond this, the State must produce evidence. It did not. Accordingly, we reverse Williams' conviction for second degree identity theft.⁸

⁴ Report of Proceedings (RP) (Aug. 19, 2010) at 253.

⁵ Id. at 242.

⁶ RCWA 9.35.020(1).

⁷ Supplemental Br. of Resp't at 6.

⁸ Given this disposition, we do not reach Williams' argument that his trial counsel

Offender Score

Williams was convicted of one count of second degree identity theft and four counts of second degree theft for the single act of taking Munroe's wallet. He contends the court erred by counting each conviction as a separate offense in calculating his offender score.

When a person is sentenced for two or more current offenses that involve the same criminal conduct, the offenses are counted as a single offense for purposes of calculating the offender score.⁹ "Same criminal conduct" means crimes that require the same intent, were committed at the same time and place, and involved the same victim.¹⁰

We accept the State's concession that the four counts of theft in the second degree here constitute the same criminal conduct and should have been counted in Williams' offender score as one offense. Accordingly, we remand for resentencing.¹¹

Additional Grounds for Review

Williams asserts the court made several other errors during his trial in his pro se statement of additional grounds for review. Most of his allegations center on hearings concerning his physical and mental health, which the court undertook to determine whether Williams should be restrained during trial. Williams contends that allowing jail personnel to testify about his health without first providing notice to the defense violated

was ineffective for failing to propose an instruction on third degree theft as a lesser included offense of second degree identity theft.

⁹ RCW 9.94A.589(1)(a).

¹⁰ Id.

¹¹ The parties dispute whether the court on remand should also consider Williams' conviction for identity theft in the second degree part of that same criminal conduct. Because we reverse the identity theft conviction, that issue is moot.

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