

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 28794-7-III

Respondent,

Division Three

v.

SAMUEL EMANUEL ALSTON,

UNPUBLISHED OPINION

Appellant.

Sweeney, J. — The defendant here was convicted of theft and identity theft because he stole a credit card and used it to pay bills. He contends, for the first time on appeal, that the State did not adequately inform him of the nature of the charges against him because the information used the word “cash” and both the evidence at trial and the court’s instructions describe the use of a credit card. We conclude that the information when fairly read, as a whole, adequately informed the defendant of the charges against him. We also conclude that the two crimes do not constitute the same criminal conduct for sentencing purposes but that the court improperly imposed conditions on the defendant’s community custody. We therefore affirm the convictions but reverse the

conditions of community custody.

FACTS

Matthew J. Mahan is a partner in his family's funeral home business. Mr. Mahan, his mother, and his brother each had credit cards issued for the business.

Samuel Alston used Mr. Mahan's card to pay bills for himself and some of his friends, specifically, T-Mobile (\$350.00), Comcast Cable (\$535.36), and Western Union (\$175.00). The charges totaled \$1,060.36.

The State charged Mr. Alston with second degree identity theft and second degree theft. The information read:

Count 1: That the said SAMUEL EMANUEL ALSTON, in the County of Walla Walla, State of Washington, between the 2nd day of January, 2007 and the 3rd day of January, 2007, did knowingly use or transfer a means of identification of another person, to-wit: MATTHEW MAHAN, with the intent to commit or to aid the commission of any crime, and the defendant or an accomplice used said person's means of identification or financial information to obtain an aggregate total of credit, money, goods, services, or anything else of value in an amount less than \$1,500 in value;

Count 2: That the said SAMUEL EMANUEL ALSTON, in the County of Walla Walla, State of Washington, between the 2nd day of January, 2007 and the 3rd day of January, 2007, did wrongfully obtain or exert unauthorized control over the property or services of another of a value exceeding two hundred fifty dollars (\$250.00) but less than one thousand five hundred dollars (\$1,500.00), with intent to deprive him or her of such property or services, to-wit; cash, belonging to MATTHEW MAHAN.

Clerk's Papers (CP) at 4-5; Report of Proceedings (Dec. 21, 2009) (RP) at 6.

A jury found Mr. Alston guilty as charged. The sentencing court calculated his offender score at 9. The court then imposed concurrent high end standard range sentences of 55 months on the second degree identity theft and 29 months on the second degree theft. The court also imposed a term of 12 months' community custody, with specified conditions.

DISCUSSION

Notice of the Charges

Mr. Alston first contends that the State did not give him adequate notice of the charges against him because the information characterizes the theft as one of "cash," when describing his misuse of the credit card, whereas the State only showed the misuse of the victim's credit or credit card. And he maintains that the error was compounded by the court's jury instructions because those instructions made no mention of cash.

We will liberally construe the charging document here in favor of validity because Mr. Alston did not challenge the adequacy of that document in the trial court, where, if necessary, something could have been done about it. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The question then is whether the document provides Mr. Alston with adequate notice of the charges when the document is viewed as a whole and whether any actual prejudice resulted from the wording he complains about. *Id.* at 106.

Mr. Alston's essential argument is that cash is not equivalent to credit card transactions. We understand the argument but are led to conclude otherwise especially when we read the information as a whole and liberally construe it.

The information informed Mr. Alston in count two that he was accused of wrongfully obtaining or exerting unauthorized control over property or services valued at somewhere between \$250 and \$1,500. The document further explains the date and location of the offense. At the end of the document, it specifically identifies the victim and the property stolen as, "cash, belonging to Matthew Mahan." CP at 5. The charging document, then, lists the elements of second degree theft and moreover supports each element with specific facts. *See* RCW 9A.56.020(1)(a).

The State appropriately or, at least not inappropriately, differentiated the crime as being theft of property rather than theft of services by specifying that cash was stolen. It did not identify the stolen property as the credit card because that would not address the monetary value of Mr. Alston's illegal transactions. The card was used to pay bills, just like cash. Mr. Alston made a series of transactions with the business credit card that, in fact, had an immediate cash value. And he intentionally used that cash value for paying bills and transferring money to his cousin. The term is sufficiently accurate for purposes of this case, again, particularly when considered at this stage of these proceedings.

The court instructed the jury, with no objection from Mr. Alston, that:

To convict the defendant of the crime of Count 2: Theft in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between the 2nd day of January, 2007, and the 3rd day of January, 2007, the defendant wrongfully obtained or exerted unauthorized control over property of another;
 - (2) That the property exceeded \$250 in value.
 - (3) That the defendant intended to deprive another of the property;
- and
- (4) That the acts occurred in the State of Washington.

CP at 33; RP at 103 (Instruction 14).

The instruction includes the elements of second degree theft. *See* RCW 9A.56.020(1)(a); former RCW 9A.56.040(1)(a) (1995). The fact that the instruction omits the terms “credit” or “credit card” is of no legal consequence again because the property stolen was appropriately identified as “cash.” He was not then prejudiced by the wording in the charging document or the court’s instructions whether each is read individually or together. Moreover, there is no suggestion in this record that Mr. Alston or his lawyer were in any way confused or disadvantaged by the wording of either the information or the later jury instructions.

Same Criminal Conduct—Identity Theft and Theft

Mr. Alston next contends that identity theft and theft satisfy the requirements for, and therefore should have been characterized by the sentencing court as, the same

No. 28794-7-III
State v. Alston

criminal conduct.

This is a question of law that we will review de novo. *State v. Torngren*, 147 Wn. App. 556, 562-63, 196 P.3d 742 (2008).

Multiple offenses are the same criminal conduct if they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Here, both crimes were committed between January 2 and January 3, 2007. And the victim in both crimes was Matthew Mahan. But the two crimes do not share the same criminal intent. The identity theft statute, former RCW 9.35.020 (2004), does not require proof that the defendant intended to deprive another of property or services; and the theft statute, RCW 9A.56.020, does not require proof that the defendant “obtain, possess, use, or transfer” another person’s identification or financial information with intent to commit a crime. Each crime then includes an element the other does not. *See State v. Milam*, 155 Wn. App. 365, 375, 228 P.3d 788 (identity theft and theft each contain an element that the other does not), *review denied*, 169 Wn.2d 1023 (2010).

The two crimes are not then the same criminal conduct because they have different elements. The sentencing court properly counted the convictions separately in calculating Mr. Alston’s offender score.

Sentencing Conditions—Possession of Alcohol, Drug Treatment

No. 28794-7-III
State v. Alston

Finally, Mr. Alston contends that the court had no statutory authority to prohibit possession of alcohol or require drug treatment as a condition of his community custody. The State agrees and so we therefore strike these conditions.

We then affirm the convictions but strike the two conditions of the sentence that Mr. Alston not possess alcohol and that he undergo drug and alcohol treatment.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, J.

WE CONCUR:

Kulik, C.J.

Korsmo, J.