IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID EARL HEWSON, Appellant.	No. 38423-0-II UNPUBLISHED OPINION

Bridgewater, J. — David Earl Hewson appeals his convictions of first degree identity theft, first degree theft, and forgery; and he appeals his sentence. We affirm the convictions and the sentence, except we vacate the provision of the off-limits order and remand to the sentencing court to correct the judgment by striking the off-limits provision.

FACTS

On October 19, 2007, a man claiming to be Jimmy Findley, but later identified as Hewson, walked into the Timberland Bank in Gig Harbor, Washington. He presented bank teller, Deborah Ash, a partially completed withdrawal slip, and asked for Findley's account balance. Hewson presented a credible Washington State driver's license identifying him as Findley. After Ash told Hewson the balance, he asked to withdraw $2,000 from the account. Hewson signed the deposit slip as Findley in front of Ash.

To further verify Hewson's supposed identity, Ash attempted to pull up an electronic copy of Findley's signature card, a card each customer signs when opening a new account. Ash and her supervisor, Teresa Thayer, could not obtain a copy of the signature card and Ash did not believe she could deny the transaction because she had verified the man's identity with his Washington State driver's license. Ash gave Hewson the money and he left the bank.

When Findley disputed the transaction, Thayer and Ash obtained a copy of Findley's signature card and verified that the signatures on the withdrawal slip and signature card did not match. After reviewing the bank's security video and viewing a police photo montage, Ash and Thayer identified the man in the bank as Hewson. Although nearly certain in their identification, both women expressed some doubt because of differences in Hewson's physical appearance between his photo montage picture and his appearance at the bank.

The State charged Hewson with first degree identity theft, first degree theft, and forgery. The jury found Hewson guilty of all three counts.

ANALYSIS

I. Prosecutorial Misconduct

First, Hewson argues that the State committed prosecutorial misconduct when it accused defense counsel of trying to intimidate the jury and scare them into acquitting Hewson rather than seeing justice done. Hewson contends that the record does not support the State's argument because, instead, defense counsel encouraged the jury to pay attention to the evidence and find Hewson not guilty. The State argues that the prosecutor did not commit misconduct because her remarks were part of "an exchange of arguments regarding the quantum of evidence and proof"

and that defense counsel "was exaggerating the State's burden and flaws in the State's case." Br. of Resp't at 6.

An appellant claiming prosecutorial misconduct must establish the impropriety of the prosecution's comments and its prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A prosecutor makes prejudicial comments only where there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). When determining the prejudicial effects of the prosecutor's comments, we look at the remarks in context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Brown*, 132 Wn.2d at 561. Additionally, where an appellant failed to object to an improper comment, he or she waived the error unless the comment is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice" that a curative instruction could not have neutralized. *Brown*, 132 Wn.2d at 561.

Both sides agreed that the only issue in this case was the identity of the man who went into Timberland Bank on October 19, 2007, and took $2,000. During closing argument, defense counsel detailed perceived inconsistencies in witnesses' identification of Hewson. In rebuttal, the prosecutor reiterated the evidence she felt identified Hewson as the perpetrator and then stated:

> Ladies and Gentlemen, there's a mountain of evidence that David Hewson is the person in the video. Don't let [defense counsel] scare you out of saying as much. Don't let [defense counsel] intimidate you so that you're afraid to come back and see justice is done. David Hewson is guilty beyond a reasonable doubt. Don't be afraid to say that.

6 VRP at 399. Hewson did not object.

Hewson argues that the prosecutor's comments improperly disparaged the role of his defense counsel and drew a cloak of righteousness around the State. A prosecutor's closing arguments are improper if he or she makes comments that demean defense counsel or defense counsel's role. *See State v. Warren,* 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 2007 (2009); *see also State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002), *review denied*, 148 Wn.2d 1012 (2003). Such comments impugn the integrity of the adversary system and are inconsistent with the prosecutor's obligation to ensure a verdict free from prejudice and based on reason rather than passion. *Viereck v. United States,* 318 U.S. 236, 247-48, 63 S. Ct. 561, 87 L. Ed. 734 (1943); *State v. Echevarria,* 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

Hewson argues that his case is similar to *Gonzales*, where the Court of Appeals found misconduct when the prosecutor implied that his job was to seek justice, and the defense attorney's was not. *Gonzales*, 111 Wn. App. at 283. On appeal, Division One of this court found the comment rose to the level of prosecutorial misconduct because it disparaged defense counsel and sought to "'draw a cloak of righteousness'" around the State's position. *Gonzales*, 111 Wn. App. at 282. In addition, because the trial court repeatedly overruled defense counsel's objection to the comments and allowed the prosecutor to further develop this theme, the court found that it had the potential to affect the jury's verdict. *Gonzales*, 111 Wn. App. at 284.

The prosecutor here argued that defense counsel wanted to intimidate or scare jurors, and thus implied that only the prosecutor was truthful and brave. We disapprove of such arguments; they are improper. But we do not find them flagrant or ill intentioned because they were not

repeated nor made the part of any theme.

II. Same Criminal Conduct

Second, Hewson contends that the sentencing court should have determined that his forgery and first degree theft convictions encompassed the same criminal conduct for the purpose of calculating his offender score.

A. Raised for the First Time on Appeal

While Hewson acknowledges that he did not object to the calculation of his offender score below, he argues that he may challenge his offender score calculation for the first time on appeal. As the State notes, Hewson did not raise this issue at sentencing and waived it. *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494-96, 158 P.3d 588 (2007) (holding that issue waived when defendant failed to ask the sentencing court to make a discretionary call of any factual dispute regarding the issue of same criminal conduct and did not contest the issue at sentencing); *see also In re Pers. Restraint of Goodwin,* 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (defendant waives challenge to same criminal conduct where alleged error involves an agreement to facts).[1] But we address this issue because Hewson argues that his trial counsel provided ineffective assistance of counsel when she failed to raise a same criminal conduct challenge.

B. Same Criminal Conduct: First Degree Theft and Forgery

Hewson asserts that his forgery and theft convictions were intimately related because he committed them for the single purpose of fraudulently obtaining money. He argues that he

[1] Hewson calls *Shale* a plurality opinion. While five justices concurred with the majority, they did so on a separate issue. *Shale*, 160 Wn.2d at 496-97, 502. All nine justices agreed as to the majority's same criminal conduct analysis.

committed the two offenses simultaneously at the same place against the same victim, Timberland Bank. The State argues that forgery and first degree theft require different criminal intents.

We will not reverse a trial court's determination of what constitutes the same criminal conduct absent an abuse of discretion or misapplication of the law. *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). Where two or more offenses encompass the same criminal conduct, the sentencing court counts them as a single crime when calculating the defendant's offender score. RCW 9.94A.589(1)(a). "Same criminal conduct" means two or more crimes that require the same criminal intent, were committed at the same time and place, and involved the same victim. RCW 9.94A.589(1)(a). If any one of these elements is missing, the sentencing court must count the offenses separately when calculating the offender score. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). The parties do not dispute that the crimes occurred at the same time and place. Instead, the State argues that the two crimes are not the same criminal conduct because they have different intents and victims. The State is correct.

To determine if two crimes share criminal intent, we focus on whether the offender's intent, objectively viewed, changed from one crime to the next. *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030 (1990). We consider multiple factors to determine objective intent, including: (1) how intimately related the crimes are, (2) whether the criminal objective intent substantially changed between the crimes, (3) whether one crime furthered another, and (4) whether both crimes were part of a recognizable scheme or plan. *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

Hewson's two convictions are not the same criminal conduct. The State argues that Hewson's case is similar to *Adame*. In *Adame*, the court found separate intents for convictions of unlawful possession of cocaine and unlawful possession of a firearm. *Adame*, 56 Wn. App. at 811. *Adame* reasoned that a person who possessed cocaine intended to use or sell it, while a person who possessed a firearm likely intended to use the firearm to facilitate the commission of some other crime. *Adame*, 56 Wn. App. at 811.

Similarly, first degree theft and forgery have different objective intents. First degree theft, as charged by the State, is committed with "intent to deprive" the owner of property or services. RCW 9A.56.020(1)(a). Forgery, by contrast, is falsely making, completing, or altering a written instrument with "intent to injure or defraud." RCW 9A.60.020(1)(a). First degree forgery and first degree theft therefore have different criminal intents.

The two crimes also had different victims. The forgery victim was the account-holder, Findley. Both the bank and Findley were victims of the theft because Hewson deprived both of $2,000.[2] Thus because first degree theft and first degree forgery have different criminal intents and different victims, Hewson's convictions are not same criminal conduct. Because his convictions are not the same criminal conduct, his trial counsel's performance was not deficient and therefore did not provide ineffective assistance of counsel when she did not raise a same criminal conduct challenge. *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 673, 101 P.3d 1 (2004); *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[2] The bank credited Findley's account $2,000 when Findley reported the money missing.

III. "Off-Limits" Order

Finally, Hewson argues that the trial court lacked authority to impose an off-limits order under RCW 10.66.020 because he was not convicted of drug trafficking.

We review sentencing conditions, including crime related prohibitions, for abuse of discretion. *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008). A sentencing court may impose crime-related prohibitions as part of any sentence. RCW 9.94A.505(8). A prohibition is crime-related if the prohibition directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). When sentencing a "known drug trafficker," the sentencing court may enter an off-limits order, forbidding the defendant from entering a protected-against-drug-trafficking (PADT) area. RCW 10.66.020(5). A known drug trafficker is someone who, after being convicted of a drug offense, has been subsequently arrested for another drug offense. RCW 10.66.010(3).

The sentencing court imposed an off-limits order in the judgment and sentence: "**4.8 OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: Timberland Bank." CP at 55. Hewson had been previously convicted of unlawful possession of a controlled substance—methamphetamine. Hewson also had been arrested for another drug offense. But the sentencing court was not sentencing him on a drug offense. There is also no evidence that the bank was a PADT area. The sentencing court therefore had no authority to impose an off-limits order under RCW 10.66.020.

Hewson is correct and the State conceded this error in oral argument. Where the trial

court lacked authority to impose a specific community custody condition, the appropriate remedy is remand. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). The sentencing court lacked authority to impose an off-limits order under RCW 10.66.020.

We affirm the convictions and the sentence but we remand to the sentencing court to strike paragraph 4.8 in the judgment and sentence pertaining to the off-limits order.

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.

Bridgewater, J.

We concur:

Armstrong, J.

Penoyar, A.C.J.