NO. 30032-3-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KIMBERLY LYNN GRIJALVA,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The amended information charging second degree theft was constitutionally defective – it failed to charge a crime.
2. The evidence was insufficient to find Appellant guilty as charged.
3. The court failed to determine if Appellant had the means to pay legal financial obligations imposed.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The amended information was not defective.
2. The evidence was sufficient for the court to find Appellant guilty as charged.
3. The issue that the court failed to determine Appellant's ability to pay her legal financial obligations is not ripe. In the alternative this court should remand for the trial court to strike those sections which do not impose statutorily mandated costs and assessments.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed. Appellant lists twelve "assignments of error" but addresses these twelve issues in three subheadings list 1-3. The State shall respond to the three subheadings not to the twelve "errors."

III. ARGUMENT.

RESPONSE TO ASSIGNMENTS OF ERROR ONE – AMENDED INFORMATION.

Appellant was charged in Count One as follows;

> On or about or between April 21, 201 0 and June 4, 201 0, in the State of Washington, acting as a principal or an accomplice, you or an accomplice wrongfully obtained and/or exerted unauthorized control over property, telephone services, of a value exceeding $750.00 but not more than $5,000.00, which was not a firearm or a motor vehicle, belonging to Yakima County Department of Corrections, with intent to deprive Yakima County Department of Corrections of that property.

This court will review a challenge to the sufficiency of a charging document de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). A charging document must allege "[a]ll essential elements of a crime, statutory or otherwise" to provide a defendant with sufficient notice of the nature and cause of the accusation against him. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10). To satisfy this requirement, the information must allege (1) "every element of the charged offense" and (2) "particular facts supporting them." State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010) (citing State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) and State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). The primary purpose of the rule is to give the defendant

sufficient notice of his charges so he can prepare an adequate defense. State v. Tandecki, 153 Wn.2d 842, 846, 109 P.3d 398 (2005).

The nature of the information is set forth in CrR 2.1(a)(1)

> 1) Nature. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be alleged that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

Grijalva has not pointed to anything that she was not "apprised" of or to anything which was a surprise to her or her case or the preparation of her defense to the charges due to this alleged improper wording found in the amended Information. Nor has she now nor did she at the trial court demonstrate that she was prejudiced by the language in the Information.

Any claim that Appellant was not informed of the charges against her can be dispelled by looking to the probable cause affidavit which clearly sets forth that the Grijalva engaged in actions which resulted in the theft of services from the Yakima County Department of Corrections

(YCDOC) and Neustar Communications." The PC affidavit then goes on to state with specificity the acts and actions the State alleged that Grijalva had done to steal these monies from the County. (PC statement is contained in Supplemental Clerks Papers filed by the State.)

State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (Wash. 1995) cited by Appellant is distinguishable from this case. The error in the charging document in Vangerpen was the omission of an **essential element.** The State failed to allege that the Vangerpen acted with "premeditation" in the Information that charged him with attempted murder in the first degree. The Information before this court is not lacking any essential elements.

Further, as can be seen from the motions brought and briefing filed by Grijalva in the trial court, these same allegations were raised and dismissed by the trial court both at the "Half-time" motion to dismiss and again later when this exact allegation was raised by Appellant in her motion for a new trial.

The trial court sat as the finder of fact in the trial, ultimately filing Findings and Conclusions supporting the guilty verdict. (RP 455-69, CP 19-43)

Unnecessary allegation in an information may be rejected as surplusage. State v. Ackles, 8 Wash. 462, 36 P. 597 (1894); State v. Kyle,

14 Wash. 550, 45 P. 147 (1896); State v. Denby, 143 Wash. 288, 255 P. 141 (1927).

This court must also distinguish between charging documents that are constitutionally deficient and those that are merely "vague." Leach, 113 Wn.2d at 686-87. A constitutionally deficient information is subject to dismissal for failure to state an offense on the face of the charging document by omitting allegations of the essential elements constituting the offense charged. Leach, 113 Wn.2d at 686-87. An information that states each statutory element of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. Leach, 113 Wn.2d at 687. A defendant may not challenge an information for vagueness on appeal if he did not request a bill of particulars at trial. Leach, 113 Wn.2d at 687.

Appellant did not request a Bill of Particulars nor did she challenge the sufficiency of the information at trial until the State rested. She did challenge the State's failure to use of this specific statute, theft of telecommunication services, based on the facts as she interpreted them. Here Grijalva has raised this sufficiency of the Information challenge after the State had rested therefore this court will construe the information liberally in favor of validity. State v. Brown, 169 Wn.2d 195, 197, 234 P.3d 212 (2010) The test is (1) whether the essential elements appear in

any form, or can be found by any fair construction, in the information; and (2) if so, whether the defendant nonetheless was actually prejudiced by the inartful language used. Brown, 169 Wn.2d at 197-98 (citing Kjorsvik, 117 Wn.2d at 105-06). Objections to the sufficiency or definiteness of an information must be made before the trial commences; if delayed until the beginning of the trial, they are not timely. State v. Thomas, 73 Wn.2d 729, 440 P.2d 488 (1968). (RP 454- 469, CP 50-54, 60)

State v. Stritmatter, 102 Wn.2d 516, 524, 688 P.2d 499 (1984) "We agree with the trial court that the appellant was not prejudiced by the surplus language in the information." See State v. Miller, 71 Wn.2d 143, 146, 426 P.2d 986 (1967) State v. Mendez-Solorio, 108 Wn.App. 823, 830, 33 P.3d 411 (2001) out of this court addressed this issue as follow;

> The Sixth Amendment to the United States Constitution and article I, section 22 (amend.10) of the Washington Constitution require that a charging document include all essential elements of a crime, statutory and nonstatutory, so as to inform the defendant of the charges against him and to allow him to prepare his defense." State v. Phillips, 98 Wash.App. 936, 939, 991 P.2d 1195 (2000) (citing State v. Hopper, 118 Wash.2d 151, 155, 822 P.2d 775 (1992); State v. Kjorsvik, 117 Wash.2d 93, 101-02, 812 P.2d 86 (1991); State v. Ralph, 85 Wash.App. 82, 84, 930 P.2d 1235 (1997)). "Therefore an accused has a protected right, under our state and federal charters, to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial." McCarty, 140 Wash.2d at 425, 998 P.2d 296 (citing State v. Bergeron, 105 Wash.2d 1, 18, 711 P.2d 1000 (1985)).

> "Every material element of the charge, along with all essential supporting facts, must be put forth with clarity." McCarty, 140 Wash.2d at 425, 998 P.2d 296 (citing CrR 2.1(a)(1); *Kjorsvik,* 117 Wash.2d at 97, 812 P.2d 86). "An information omitting essential elements charges no crime at all." State v. Sutherland, 104 Wash.App. 122, 130, 15 P.3d 1051 (2001) (citing State v. Vangerpen, 125 Wash.2d 782, 795, 888 P.2d 1177 (1995); Phillips, 98 Wash.App. at 939-41, 991 P.2d 1195; State v. Hull, 83 Wash.App. 786, 802, 924 P.2d 375 (1996)).
>
> "[W]hen a defendant challenges the sufficiency of a charging document, the standard of review depends on the timing of the objection." State v. Grant, 104 Wash.App. 715, 720, 17 P.3d 674 (2001). If the defendant challenges the sufficiency of the charging document while the State still has the opportunity to amend the information, strict construction applies. Phillips, 98 Wash.App. at 940-43, 991 P.2d 1195; *see also* Vangerpen, 125 Wash.2d at 788, 888 P.2d 1177 (noting State may not amend information after it has rested "unless the amendment is to a lesser degree of the same crime or a lesser included offense"). But if the defendant does not challenge the information until after the State's opportunity to amend the information has been lost, liberal construction applies. *Id.* This difference in standards discourages "sandbagging," the potential defense practice of remaining silent in the face of a constitutionally defective charging document because a timely challenge will merely result in the State amending the information to cure the defect. Kjorsvik, 117 Wash.2d at 103, 812 P.2d 86; Phillips, 98 Wash.App. at 940, 991 P.2d 1195; *see also* 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.2, at 442 n. 36 (1984).

Analyzing the first prong of this test, this Court will read the information "as a whole, according to the common sense and including facts that are implied" to see if the information reasonably apprised the defendant of the elements of the crime charged. Nonog, 169 Wn.2d at 227.

If, as here, the information did apprise Grijalva of all of the essential elements, it did. The defendant may prevail only if he can show that the inartful charging language actually prejudiced him. Nonog, 169 Wn.2d at 227. Under this test's second prong, this court may look beyond the face of the information to determine if the defendant received actual notice of his charges through "other circumstances of the charging process," such as the State's assertions in its certificate of probable cause. See Kjorsvik, 117 Wn.2d at 106, 111; Williams, 162 Wn.2d at 186; State v. Phillips, 98 Wn App. 936, 944, 991 P.2d 1195 (2000).

(The State supplemented the Clerk's Papers with the PC affidavit, numerical designation of that document was not provided by Yakima Superior Court prior to the date this brief was filed therefore the State shall just refer to it as Supplemental CP – PC Statement.)

The County only received compensation they were not the owners of the equipment or the service, therefore with regard to Yakima County, the thing, property, item, taken from the county during the commission of this crime was the money from these telephone services, that was not collected due to the fraud that was perpetrated on the county and its contractual partner, the telecommunication company.

In this case the use of the phrase "telephone service" essentially qualifies and put Grijalva on notice as to the nature and basis for the

charge. This defined the term property in a manner such that the defendant knows what the State is alleging.

The State could not allege that Appellant stole "telecommunications services" as defined in 9A.56.262 based on the theory and the facts the State intended to present because in this instance the State was not alleging that Grijalva or her accomplice stole these services from the telephone company but rather the revenue, money, taken from the County because these calls were not charged out pay calls but were charged as non-lawyer free calls. There was no "telecommunications service" that was owned or controlled by the County, on the proceeds from the contractual arrangement between the County and the telephone company. Yakima County was not and is not a "telecommunications provider" which is a necessary fact which must be proven in order to charge under RCW 9A.56.262, infra, nor could Grijalva have "entered into a prior agreement with a telecommunication service provider to pay for the telecommunication services" with Yakima County. Once again if the victim listed had been the Inmate Calling Solutions (ICS) this issue may have had some validity.

The State is not precluded from charging a "general crime" in lieu of a "specific crime." The rule regarding the use of a specific versus

general statute was set forth in State v. Pestrin, 43 Wn. App. 705, 708, 719 P.2d 137 (1986);

> State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984) sets forth the well established rule of statutory construction that "'where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute.'" Shriner, at 580 (quoting State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)). The determining factor is "that the general statute will be violated in each instance where the special statute has been violated".

The "general" theft statute would clearly not be violated in each instance where the special Telecommunication statute was violated. The elements of that special statute are such that it could not have been charged and successfully prosecuted based on the facts alleged in the information in this case.

There is no defect in the charging document. Appellant states "The definition of "services" does not include telephone services." (Appellant's brief at 17) however Appellant fails to quote the very beginning of that section;

RCW 9A.56.010 Definitions.

(15) "Services" **includes, but is not limited to,** labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water; (Emphasis mine.")

...

(20) "Telecommunication service" includes any service other than subscription television service provided for a charge or compensation to facilitate the transmission, transfer, or reception of a telephonic communication or an electronic communication

The State did not use the legal term "telecommunication service" as defined in subsection (20) listed above. Term used clearly could fall under this inclusive section of "Services." It also can viewed as having been included to further define what was being alleged in this Information. Either means does not somehow negate the rest of the information. The inclusion of these two words does not turn this charging document into an Information that does not charge a crime. Once again the purpose of the Information is to apprised the defendant of the nature and severity of the charges against her.

Obviously what was stolen from Yakima County was property, the proceeds of the contractual arrangement between the County and the Telecommunications company. The WPIC definition of Property is as follows;

WPIC 2.21 Property—Definition; **Property means anything of value**. (Emphasis mine.)

Note on Use

Use this instruction only when the term "property" may not be understood as applied to the facts of a particular case.

Add to this instruction the statutory words relating to tangible or intangible property or real or personal property if required by the particular fact situation.

The State could not charge this criminal act based on the State's theory of the case and based on the specific facts set forth during the trial under the Theft of telecommunication services statute. That statute is inapplicable based on the facts of this case. The crime is set forth in RCW 9A.56.262. **Theft of telecommunication services**;

(1) A person is guilty of theft of telecommunication services if he or she knowingly and with intent to avoid payment:

(a) Uses a telecommunication device to obtain telecommunication services without having entered into a prior agreement with a telecommunication service provider to pay for the telecommunication services; or

(b) Possesses a telecommunication device.

Obviously Yakima County did not own the equipment nor was it the provider of the service, therefore the State could not charge this crime based on the facts presented under this specific statute. If the State had charged the crime and named the telephone company as the victim, there might be a valid argument that this statute was the applicable statute.

Because this was a contractual arrangement between the actual provider and Yakima County, the difficulty arises in actually setting forth what was wrongfully taken. The definition of theft is **§ 9A.56.020. Theft - Definition**

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.010 Definitions.

(15) "Services" includes, but is not limited to, labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water;

(19) "Telecommunication device" means (a) any type of instrument, device, machine, or equipment that is capable of transmitting or receiving telephonic or electronic communications; or (b) any part of such an instrument, device, machine, or equipment, or any computer circuit, computer chip, electronic mechanism, or other component, that is capable of facilitating the transmission or reception of telephonic or electronic communications;

(20) "Telecommunication service" includes any service other than subscription television service provided for a charge or compensation to facilitate the transmission, transfer, or reception of a telephonic communication or an electronic communication

The phrase “telephone services” is preceded by a “comma” and **therefore modifies the word property be these services**. The State, here Yakima County Department of Corrections, did not own the phone nor the

actual "service" it was however the "owner" of one-half of all of the money (property) which was generated by the "service" provided by the telecommunications company. The State did not charge, in this amended information, that Appellant took the service from the actual telecommunications company, just one-half of the money that was owed to the county and which was not realized due to this theft. There was no factual basis to charge this out as a theft of "services" where the County was the victim. If the second amended information had in fact been in place at the time of the actual conviction there might be some weight to Appellant's argument.

There is no better method to address the actions of the trial court then to read the words of that court. After the court determined Appellant was guilty as charged Appellant made a motion for a new trial. That motion was nearly identical to the "Green" or "half-time" motion previously made and denied. The trial court stated the following when it denied this second motion;

> THE COURT: I do not. I have read both briefs and I'm prepared to make a short ruling at this time on that. It does largely parallel the refrain of the half-time motion stating that, first of all, the Information is faulty on its face because it improperly cites either the wrong statute or does not give the correct language in the Information. It's the Defendant's point of view, as stated at the Green motion after the State's case in chief, that there is a distinction between property and services which the

prosecuting attorney's Information failed to appropriately understand and delineate.

My view is that, in light of the fact that it was a motion which was brought after the State's case in chief, 9 a more liberal standard has to be applied to this kind of analysis. The question is whether or not the Information -- the question now, since it was brought at least at the end of the State's case, is whether the Information is a plain, concise and definite written statement of the essential facts of the offense, which I believe that it was; and secondly, and just as importantly, is there prejudice to the Defendant, which the Defendant did not in fact argue?

Do the elements appear in any form, is basically what the question is. And secondly, is there prejudice to the Defendant if the Information is unartfully written? And my view on both of those items is that no, the elements do appear and that there is no prejudice shown by the Defendant. The other motions brought by the Defendant with respect to a new trial are also denied, although I do believe that the motion reiterates the Green motion brought at the end of the case in chief and prepares a record for appeal in appropriate fashion.

RP 855-57

RESPONSE TO ALLEGATION TWO – SUFFICIENCY

Appellant challenges the sufficiency of the evidence to support the conviction. The reviewing court does not weigh evidence or sift through competing testimony. Instead, the question presented is whether there was sufficient evidence to support the determination that each element of the crime was proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A reviewing court will consider the evidence in a light most favorable to the prosecution. Green,

94 Wn.2d at 221. Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact and are not subject to review." *Id.* at 874.

State v. Hovig, 149 Wn.App. 1, 8, 202 P.3d 318, review denied, 166 Wn.2d 1020 (2009);

> We review a trial court's decision following a bench trial to determine whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. State v. Carlson, 143 Wash.App. 507, 519, 178 P.3d 371 (citing Dorsey v. King County, 51 Wash.App. 664, 668-69, 754 P.2d 1255, review denied, 111 Wash.2d 1022 (1988)), review denied, 164 Wash.2d 1026, 195 P.3d 958 (2008).
>
> In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Teal, 152 Wash.2d 333, 337, 96 P.3d 974 (2004); State v. Salinas, 119 Wash.2d 192, 829 P.2d 1068 (1992).
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> > The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wash.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wash.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

State v. Theroff, 25 Wash.App. 590, 593, 608 P.2d 1254, aff'd 95 Wash.2d 385, 622 P.2d 1240 (1980.) Salinas, 119 Wash.2d at 201, 829 P.2d 1068.

Evidence is sufficient to support a conviction if it permits a reasonable fact finder to find each element of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), see also State v Teal, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

This court does not have to decide if it believes that the evidence establishes guilt beyond a reasonable doubt, but rather you must decide if any rational trier of fact could find guilt. State v. Kilburn, 151 Wn.2d 36, 57, 84 P.3d 1215 (2004).

This Court will review findings of fact for substantial supporting evidence. Evidence is substantial if it allows a rational fair-minded person to find the disputed fact. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Conclusions of law must flow from the findings of fact. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) and the elements of that crime can be established by both direct and

circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986)

Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd,* 136 Wash.2d 939, 969 P.2d 90 (1998).

The facts that were presented at trial were clearly more than sufficient to allow the court to find the Grijalva guilty beyond a reasonable doubt. The testimony from Ms. Hubbard along with the information gathered by the investigative officers made it clear that while Appellant may not have been the person who made the thirteen hundred phone calls, The record reflects that approximately 900 of those calls were completed during the period April 21- June 4 – an average of 20 calls per day. As the court stated regarding one day there were forty-six calls made starting at approximately 8:00 AM and continuing until 10:00 PM. (RP 844) It was clear that Grijalva knew of these calls, participated as a third party in some and was heard in the background of some of the calls were the use of the free line was discussed in a round-robin fashion between and inmate, Ms. Hubbard and the Appellant.

This is all reflected in the oral ruling by the court and the lengthy findings and conclusions entered to support the verdict. (RP 837-

A. THEFT IN THE SECOND DEGREE.

Once again the defendant was charged as follows;

> On or about or between April 21, 201 0 and June 4, 201 0, in the State of Washington, acting as a principal or an accomplice, you or an accomplice wrongfully obtained and/or exerted unauthorized control over property, telephone services, of a value exceeding $750.00 but not more than $5,000.00, which was not a firearm or a motor vehicle, belonging to Yakima County Department of Corrections, with intent to deprive Yakima County Department of Corrections of that property.

The court sitting as the fact finder made an oral and written record supporting the finding of guilt. (CP 67-73, RP 842- 54) The details set forth in the oral ruling and the subsequent findings of fact and conclusions of law are, to say the least, extensive. The court went through a step by step analysis in the oral ruling that clearly sets forth the factual basis upon which the conviction rests.

While Appellant indicates that is a challenge to the sufficiency of the evidence presented regarding second degree theft is would appear to be continued regarding whether the information was correct.

The facts presented by the State were more than sufficient for the court to find the defendant guilty beyond a reasonable doubt. The court set forth the evidence fact by fact in the oral ruling and in the findings and conclusions. In this case the written findings and conclusions are complete and support the finding of guilt. While the facts which

established the defendant's guilt were set forth in one series of "facts" it is clear from those facts that the trial court was addressing facts to support each element of both crimes that were charged.

Facts 1- 13 establish Appellant's guilt for count two, Introduction of Contraband

Facts 14-43 mirror the oral ruling made by the court regarding the Theft in the Second Degree charged in count one of the information and establish the elements of Theft in the Second degree beyond a reasonable doubt.

Even if these written facts were incomplete or inadequate, this court can and should look to the trial court's oral findings to aid review. State v. Robertson, 88 Wash.App. 836, 843, 947 P.2d 765 (1997), *review denied,* 135 Wash.2d 1004, 959 P.2d 127 (1998). In its oral ruling before issuing its written findings and conclusions, the trial court here discussed (1) the relevant facts in relation to the law and (2) the way in which the facts and testimony supported the elements of each offense. Reviewing the trial court's written findings and conclusions together with its oral ruling will persuade this court that the trial court clearly and thoroughly considered each element of both offenses.

Further even if the written findings of facts that the trial court did enter were not complete and thorough cases have held that if there is no

probability that the outcome of the bench trial would have differed had the trial court entered additional express findings of fact separately addressing each element of the charged offenses the conviction will stand. *See* State v. Banks, 149 Wn.2d 38, 45-6, 65 P.3d 1198 (Wash. 2003) (court's failure to enter finding on essential element following bench trial was harmless error). There is no doubt based on the findings and conclusions as well as the twelve pages of oral ruling that there would be no possible outcome in this case.

The trial court complied with CrR 6.1(d) which requires entry of written findings of fact and conclusions of law following a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). The purpose for requiring findings and conclusions is to "enable an appellate court to review the questions raised on appeal." *Id.* at 622. Each element must be addressed individually, setting out the factual basis for each conclusion of law. *Id.* at 623; State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). Each finding must also specifically state that an element has been met. Banks, 149 Wn.2d at 43 (citing State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995)).

Absent prejudice to a defendant from the failure to enter the findings and conclusions, the proper remedy is remand to the trial court for entry of findings. Head, 136 Wn.2d at 624.

Appellant admits that "at the most, the State proved that Ms. Grijalva, as an accomplice, deprived the Yakima County Department of Corrections of commission money it would have received from inmate calls that should not have gone through the inmate attorney phone system." Appellant's brief at 21. A party acting as the principle or an "accomplice" "depriving" the victim, Yakima County, of "commissions" is the very definition of theft.

As was stated by the trial court in its oral ruling;

> Ms. Grijalva's address was confirmed as the phone number in question and a cell phone number was obtained where many of the calls were forwarded to. Over 900 completed calls were noted. Approximately a third were attributable to Mr. McCord, and approximately two-thirds were attributable to one Matthew Cornell, another erstwhile inmate at the local jail. This was from about April 21st through June 4th -- April 21st through June 4th.
>
> **...**
>
> ...If all those free calls had been paid for, the investigation revealed, the sum owed to Yakima County and ICS would have been over $2200 or thereabouts, far in excess of the $750 minimum required for a felony.
>
> RP 843
>
> **...**
>
> The evidence was crystal clear that in fact those phone calls were made, and the State proved that with exactitude. Exhibits presented in trial include large lists of the phone calls that were made hour after hour, day after day, for that period of time. The Court selected one day just at random, May 4th. Calls from Matthew Cornell began ringing at the law office home phone of Ms. Grijalva at 7:54 a.m. and they ended at 15 22 -- or about ten o'clock at night -- 2200 at night. And this was not uncommon at all. Fact, it was the rule rather than the exception that these calls started early and ended late. These calls were oftentimes up to the entire 15 minutes in duration. On this particular day, over five hours of calls were made and there were 46 calls made. So Mr. Cornell was on the phone 46 separate times calling the Grijalva phone land line, law office

over that period of time and, again, that happened day after day after day for many hundreds and hundreds of calls and hours. I believe the Defense largely concedes this point. Ms. Grijalva's defense and position is not that those calls did not get made, it's that she had nothing to do with them.

RP 844-5

...

But theft is theft. If it's proved beyond a reasonable doubt that Ms. Grijalva set up the free phone call protocol or that she knew about it and encouraged it, she must own this violation. Furthermore, even if she instituted this and in the process somehow it exceeded her expectations, or Autumn Scribner abused something, then she cannot avoid liability that way either. In this case, it's in for a penny, in for a pound. If you give someone the means to commit a crime, but you have the expectation that they will only commit a little crime and not a big one and they do commit a big one beyond your earlier expectations, you're still out of luck. If the Defendant, for reasons of her own, suggested the free land line usage between Scribner and her lovers in the jail -- and there were a couple -- and Scribner abused that privilege and made a felony's worth of calls rather than a misdemeanor's worth of calls, the Defendant still owns the violation as an accomplice.

RP 848

...

At some point in mid-April, according to Autumn Scribner, Ms. Grijalva offered the use of the land line at her house. The land line phone number was 697-4882. During the weeks in question, this was the law office land 2 line of the Defendant utilized for her practice, which was a busy private law practice.

RP 849-50

...

According to Scribner, these calls were routinely forwarded to the cell phone over a course of some weeks, and we see that in the records, all with the Defendant's knowledge, complicity and even encouragement. On April 22nd, 2010, a recorded call from Matthew Cornell to Scribner is in evidence, and the Court heard parts of this call several times. The Defendant is in the background, occasionally participating in the call. Cornell states on the phone, I can call Kim's office free, she don't need no code or nothing. According to Scribner, the Defendant was not only present, but encouraged them to try to use the land line to thus avoid the cost of calling from the jail in the usual way. As to the call forwarding, Scribner testified that the Defendant set that up also. Scribner testified she was instructed by Ms. Grijalva to answer the phone, law office, as she had

free range of the house, and that the Defendant was around during these phone calls about half the time.

RP 850-1

...

It's clear from the audio testimony that the Defendant was present when the subject of the free land line came up. Scribner turns to Ms. Grijalva and includes her in the conversation. Scribner herself, in my view, was in no position to figure out the con and to pull it off on her own. I also believe there's an intimacy in these three way conversations that belies Ms. Grijalva's protestations to the contrary. If there's a smoking gun in this case, it is that audio.

Ms. Grijalva's house was a law office and, given the sheer number of calls to the land line and forwarded to Scribner, the Defendant dissimulated, in my view, when she testified that she didn't know the calls were coming in. The number and length of the calls coming in while she was home, that alone could not have been unnoticed. It was a law office of a busy sole practitioner. The phone rang constantly and was forwarded constantly while the Defendant was present.

Ms. Grijalva, for reasons of her own, made the vast mistake of bringing Scribner into her home and indulging her with privileges. Those privileges included free range of the house and free use of the free phone to talk to inmates.

RP 851-2

...

What happened was this. Ms. Grijalva had a closer relationship with Scribner than she admitted on the stand For a while they socialized regularly and, as indicated by a letter that Ms. Grijalva wrote later on that year, they had some kind of de facto secretary like relationship, as evidenced by Ms. Grijalva using the word termination when she described how she had taken Ms. Scribner out of her professional life. Additionally, Ms. Grijalva also felt that she was a kind of de facto parent for Scribner's son, Marshall, who was not attended to properly.

And she knew that Matthew Cornell and Scribner were burning through their phone money constantly, and she knew that Scribner was routinely mooching off her. In a disastrous decision with far-reaching consequences to her

personal life, Ms. Grijalva, with misplaced generosity, suggested the use of the free land line and helped to setit up. She knew these free calls were circumventing the jail's pay for calls policy.

That Scribner abused this privilege and made far, far more calls than the Defendant knew about does not avail Ms. Grijalva in this case for the reasons previously stated. Beyond a reasonable doubt, Ms. Grijalva encouraged and/or aided Autumn Scribner and her various paramours to circumvent the county jail phone policy, resulting in a loss of money to the county in excess of $750.

As a result, Ms. Grijalva, you are guilty of Theft in the Second Degree. You have the right to appeal both of my decisions. Please talk to your attorney about that as soon as possible about that.
RP 851-54

The key witness was Amber Scribner-Hubbard. Her testimony covered approximately one hundred pages of the verbatim report of proceedings. During that testimony portions of calls that were in fact recorded were played to the court and for Hubbard to identify. Hubbard identifies the third person recorded in these calls as the Appellant. This type of conversation goes on call after call after call where Appellant was there in the background or at times actually on the phone. She was the person who authorized Hubbard to use the phone in this manner and even got the forwarding fixed or tried to so that these calls would go to Hubbards cell not stay on the home phone. (RP 213-19, 245) Hubbard states "We never discussed who I could and couldn't talk to. She fixed the phone line so I could use it." (RP 245) Hubbard was also informed to answer the calls "law office" (RP 246-47) This is confirmed by Grijalva in her own testimony, however she attempts to spin the confirmation. Grijalva states that she wrote a letter to the jail indicating she had

terminated Hubbard as an employee but this was done because Hubbard "put that out there." (RP 706-7, 734-37)

The State demonstrates that Appellant was with Amber on one particular date when Amber was speaking with an inmate. At the end of that call the inmate is told to call Amber "at home" which is the home where she and Appellant lived. On cross the State demonstrated that there were numerous calls that went directly to the home phone number. (RP 744-8) Grijalva explains away that fact that the was not aware that these calls came to her home as follows;

Q Now, would it surprise you if you learned that none of those calls were forwarded, they just came into the land line and stayed on the land line?
A Would it surprise me? Sure.
Q Because you were going with Autumn home; isn't that correct?
A My house is huge. Yeah, I went home, but I didn't sit next to her the entire time I'm home. I'm at home with Marshall playing and reading and doing other stuff.
Q Okay. Would you not hear the phone ring?
A Absolutely not. I don't hear the phone ring.
Q Oh.
A The ringers are turned really low and it's in my office because that's my home, too. If I'm not working, I don't want my phone bombarding me, so no. (RP 747-8)

Appellant acknowledges that if her line was being used as the State portrayed that that would be an "inappropriate" use of that line and that if she knew of those acts she too would be culpable. (RP 715) She also acknowledged that she knew that calls were being forwarded by Hubbard but qualified this by stating she did not know the volume of those calls.

(RP 730-4) The State then plays a section of a call where the Appellant is being spoken to by Hubbard, the discussion is clearly three-way between the Appellant, Mr. Cornell and Ms. Hubbard. Questions are being directed to Appellant. Amber Hubbard and Mr. Cornell discuss that fact that he can call the home number. He states that he did in fact call the number to find out if it was set up to receive inmate calls and it worked, no code needed, they only needed to press a number to accept the calls. After this discussion Amber Hubbard states to Appellant "I guess they might have set your inmate calls up, Ms. Grijalva." (RP 751) Appellant denied that she remembered that part of the call because Hubbard and Cornell were talking about a PIN (RP 751) however Mr. Cornell next states that when he tried calling the home number it says you have a "free call" this portion of the conversation from Mr. Cornell is then relayed to Appellant "He said it says, you have a free call from. If that's the case, then that's cool." (RP 752)

A portion of the recoding that includes Appellant's voice is then played for her but she denies that it is her voice on the recording. (RP 753-4)

The State has Appellant read from the exhibit containing the record of the calls made to the home number/landline, she then reads into the record seven calls all approximately fifteen minutes apart. They occur

directly after the call where it is clear that the Appellant was with Amber Hubbard while she was discussing with Mr. Cornell the use and method of use of the free calls to the home/landline. (RP 755-7)

On redirect Appellant once again disavows any knowledge that Amber Hubbard was using her home/landline to talk to people at the jail. (RP 767) She then states that she knew that Hubbard was forwarding calls from that very same number. (RP 768)

Q Were you aware that Autumn was utilizing your land line to talk to people at the jail?
A No, I did not know she was using my land line phone, no. (RP 767)
...
A I found out -- I guess I knew the one time that she had forwarded it because she told me she'd talked to Cosmo. I found out she'd forwarded the phone by calling my phone because my son said something was wrong with it. I knew about that.
Q And about when was that?
A Wow, I would say -- I don't -- it was after May 4th because Brad was arrested on May 4th and he was in jail. So I knew that one day she had done that. I told her very explicitly, under no circumstances was she to do that again. I did not know that she would continue to forward my calls. I had no idea that she was doing that.
(RP 768)

A representative from Inmate calling solutions (ICS) testified regarding the cost of calls and the method by which the monies were divided. (RP 367-8, 370-1) Officer Charlton also testified as to the contractual arrangement and the loss to the county. (RP 59-60, 61-2)

There is no doubt that the actions of Grijalva meet the definition of theft. **RCW 9A.56.020. Theft - Definition, defense**

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

B. INTRODUCTION OF CONTRABAND IN THE THIRD DEGREE.

The State has set forth the law that pertains to this allegation at the beginning of response to allegation three and will therefore not repeat that here.

Appellant was charged as follows;

> On or about October 23, 2010, in the State of Washington, you knowingly and unlawfully provided contraband, a cellular telephone, to a person in a detention facility.

The court set forth findings of fact that addresses this issue. They are delineated as Findings 1-14 found at CP 67-69. The trial court also issued its oral ruling and covered this charge extensively. (RP 837-842)

Appellant did not dispute and in fact admitted to having handed her cell phone to inmate George, allegedly so that he could tell his mother to pay Appellant for work she was to perform for Mr. George.

Appellant's argument was that because the jail set the rules as to what was and was not contraband and the jail had always allowed attorney's to bring in their person cell phones into the jail, therefore she did not introduce contraband into that facility she merely was acting in conformity with the past practices of the jail. The court set this forth in its ruling as follows;

...it is clear from the evidence that the signs apply to some persons and not to others. So the Defendant was allowed to have the cell phone at that window. What is charged as a crime is the act of piercing the imaginary line of the window between herself and her prospective client and placing it into her client's possession. That's what introducing means, and that's how an object becomes contraband. What is innocent on one side of the barrier is prohibited on the other.
RP 839-40

The testimony of the officers in that facility and administrative officers are more than sufficient to support the finding by the trial court that Appellant was guilty beyond a reasonable doubt.

Officer Schuknecht testified as to the policy in place, in writing, as to what could and could not be provide to an inmate. The policy stated at the time;

A. Professional visitors with contact room access may provide legal papers to inmates without staples or metal clips or binders. Stapled items may be left by permission of the staff on duty at the time. Professional visitors may not provide inmate with any other items, including but not limited to food, medications, books, magazines, letters from family members or witnesses, or pens or pencils except temporary use for signing documents or filling out forms.
Q And that policy went into effect?

A May 19th, 2008.
(RP 52)

Officer Calva testified that "I saw him return a cell phone across -- in the visiting room across the little window to the lady on the other side, Kimberly." (RP 166)

Corporal Rodriguez testified extensively regarding what was and was not contraband. The Corporal testified that she was told by another officer that he had observed inmate George with a cell phone. Corporal Rodriguez went to Room 8 and "That's when I saw --- observed the cell phone going – being passed through the hole underneath the pane of glass and that when I noticed Ms. Grijalva scoop the phone towards her." RP 83 This officer testified the actions of Grijalva appeared to be an attempt to conceal the phone from vision. (RP 84) Corporal Rodriguez immediately confronted Grijalva;

A I opened the door and I asked her -- I asked Ms. Grijalva. I says, what are you doing? And she said, nothing. I says, why does the inmate -- why is the inmate using your cell phone? And she told me that he needed to contact his mother to make arrangements to pay for his legal fees.
Q Okay. And anything else?
A Well, that's when I told her that, you know, as an officer of the court, she should know better than to let the inmates use the cell phone, and that what she's doing was passing contraband and before she left the building, she needed to make contact with my supervisor.
Q And what did she say to you?
A She said okay.
Q All right. Did she say anything else in regards to?
A She just said, I'm sorry, I made a mistake.
(RP 85, Emphasis mine.)

It is very important to note that the information regarding what was said by Grijalva as a reason for passing the phone to the inmate and testified to by this officer comports with the reason Grijalva gave in her own testimony when she admitted that she had given the phone to the inmate the difference in testimony Grijalva denies being furtive or admitting she knew her act was wrong;

A I had tried to get in touch with his mother before. It was difficult for me to contact her.
Q Okay. So what did you do?
A We -- I actually dialed the phone to get his mother at that point in time. She got on the phone. I told her what the purpose was. She said she needed to hear it from her son. I said, all right and tried to accomplish that through speaker phone. She couldn't hear him, so I said, here, Calvin, tell your mother, and put the phone through and he did.
Q Okay. When you put it through, where did you put it through?
A Through the little pass -- the little three-inch thing that we talked about earlier -- the pass-through. (RP 674-5)
...
Q Okay. Did you at any time tell her that you knew that what you had done was wrong?
A No.
Q Why not?
A Because I don't think I did anything wrong.
(RP 668)

This "reason" for passing the phone and the admission of wrong doing was repeated by Grijalva to Sgt. Hernandez;

Q All right. Now, did you come into contact with her, then, after?
A Yes.
Q And did you speak with her?
A Yes, out in the lobby.
Q And what was the nature of that conversation?

A Well, as soon as I walked out there, she saw me. She didn't even wait for me to say anything. She's, like, I know I screwed up, I'm sorry, I apologize, I wasn't thinking. She said that the reason she had given the inmate the phone number is because she was just hired by him as her attorney and she was trying to get him to tell his mom to give her some money. And that she had tried to use the speaker phone, but it wasn't working, so that's why she handed him the phone. And I told her that she should have made the officers aware that there was a problem and they would have been able to try to help her, either by giving the inmate the phone call so he can call the mom or whatever. She says, yes, I understand I screwed up, I wasn't thinking.

(RP 179-80)

Several employees of the Yakima County Department of Corrections testified regarding the various signs indicating that cell phones could not brought into the jail. It is not disputed that this policy was waive with regard to a lawyer bringing in their cell phones for their own use.

Grijalva testified that all three of the officers who had previously testified that she had acknowledged that the introduction of the cell phone into the jail was wrong were not telling the truth about those statements and in fact she disavowed all of the statements. She also testified that Corporal Rodriguez was being dishonest when she testified that she had observed the Appellant putting the cell phone back into her purse. RP (719-21) Grijalva acknowledges that she would meet clients in the "tank" down in the jail and she did not think that it would be appropriate to give them her cell phone there but it was OK in the interview room on the max floor. (RP 721)

The court concluded its oral ruling as follows:

So the first question, then, is, did she have knowledge that would lead a reasonable person in the same situation to believe the fact that passing the cell phone was against the rules? And in my view, she did. (RP 840)
...
Contraband is literally anything that is prohibited by statute or by rule or by any other regulation. In other words, contraband is anything the jail says it is, and that's virtually anything. Cell phones are contraband if given to an inmate, and there is no question that the Defendant knew that.
...
My position is that when she pierced the plain of the security window slot, she introduced the object when she knew or had reason to know the phone was contraband and the jail was not obligated to anticipate that very act in some affirmative way.
There are sound policy reasons to put lawyers on notice of what is expected of them, of course, the rules and regulations of interaction, but an attorney can be expected to know that giving anything not allowed to an inmate is a violation of the law.
To convict the Defendant of the crime of Third Degree Introducing Contraband, each of the following elements must be proved beyond a reasonable doubt:
That on or about October 23rd, 2010, Ms. Grijalva provided contraband, a cellular telephone, to another person in a detention facility; that the Defendant acted knowingly and unlawfully; and finally, that the act occurred in the State of Washington. I do find beyond a reasonable doubt that she introduced contraband into the local jail against the law, and that she is guilty beyond a reasonable doubt.

This ruling is based entirely on the testimony of the numerous witness and takes into account the disingenuous nature of the testimony of Grijalva. This charge proven beyond a reasonable doubt and the finding of the trial court should not be disturbed.

RESPONSE TO ALLEGATION THREE – PAYMENTS.

There was discussion by counsel for Appellant regarding her ability to do court ordered community service hours. During this discussion the court and Grijalva's counsel discussed her employment situation and there financial situation. While the defendant herself was not queried her representative did address her ability to earn a living. Therefore it is the position of the State that this requirement set forth in State v. Bertrand, infra, have been met. The State would also point out to this court that the court issuing the opinion in Bertrand has limited that ruling in. This occurs while Appellant's counsel is addressing the court regarding the timing of her completion of community service. (RP 882-3)

Under RCW 9.94A.760(1), the trial court may impose LFOs as part of the sentence, designating the total amount and segregating that amount according to separate assessments for restitution, costs, fines, and other required assessments. Under RCW 9.94A.760(2), it may require the offender to pay for the costs of incarceration up to the maximum authorized by the statute. But a defendant cannot be ordered to pay costs unless he or she is or will be able to pay them. RCW 10.01.160(3). A trial court is not required to enter formal findings of fact about a defendant's present or future ability to pay LFOs. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303,311,818 P.2d 1116,837 P.2d 646 (1991)). However, "the record

must be sufficient for us to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs." *ld.* (quoting Baldwin, 63 Wn. App. at 312). This court will review a trial court's findings as to a defendant's resources and ability to pay under the clearly erroneous standard. *ld.* at 403-04 & n.B.

The discussion between the court and counsel while not extensive is sufficient to allow this court to find that consideration was given of Grijalva's ability to pay this one minimal cost. This imposition of this cost should not be disturbed by this court.

IV. CONCLUSION

The actions of the trial court should be upheld this appeal should be dismissed.

Respectfully submitted this 3rd day of October 2013

s/ David B. Trefry
By: David B. Trefry WSBA # 16050
Special Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane, WA 99220
Telephone: 1.509-534-3505
Fax: 1-509-534-3505
Email: TrefryLaw@wegowireless.com

DECLARATION OF SERVICE

I, David B. Trefry, state that on October 2, 2013, be agreement of the parties, I emailed a copy of the Respondent's Brief to: David N. Gasch at gaschlaw@msn.com and by United States mail to, Kimberly Lynn Grijalva 3167 Wildwood Drive Longview, WA 98632

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of October, 2013 at Spokane, Washington.

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Special Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
Fax: (509) 534-3505
TrefryLaw@wegowireless.com