NO. 45487-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEOVIGILDO PEREZ GUTIERREA, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 13-1-00555-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether there is sufficient evidence to support Defendant's convictions where Defendant attempted to aid Visario cash a forged check, attempted to conceal his possession of the stolen credit card in his wallet, and possessed other stolen financial information and forged items.

2. Whether Defendant failed to meet his burden of showing prosecutorial misconduct where the prosecutor correctly stated the law and the State's burden of proof.

3. Whether Defendant failed to meet his burden of showing defense counsel was ineffective by failing to object to the allegedly improper statements made by the prosecutor where defense counsel addressed the prosecutor's comments and consistently advocated on behalf of Defendant throughout trial.

4. Although not ripe for review and not properly preserved at trial, whether the trial court properly exercised its discretion in ordering legal financial obligations where Defendant's future ability to pay was established by a finding in the judgment and sentence and supported by the evidence.

B. STATEMENT OF THE CASE.

1. Procedure

On February 8, 2013, Leovigildo Perez Gutierrez, Jr. ("Defendant"), was charged by information with one count of identity theft in the second degree (Count I) and one count of forgery (Count II). CP 1-2. On September 4, the State amended the information to additionally charge Defendant with two counts of identity theft in the second degree (Count III, and Count IV), one count of forgery (Count II), and possessing stolen property in the second degree (Count V). CP 59-61.

The case proceeded to jury trial on October 2, 2013 before the Honorable John A. McCarthy. 2 RP 1.[1] The court conducted a CrR 3.5 hearing, and determined the statements made by Defendant to Detective Malave before his arrest would not be admissible at trial. 3 RP 341. Defendant made a motion to dismiss Counts III through VI, which the court denied. 3 RP 389. The jury convicted Defendant of Count I, Count II, Count IV, and Count V, and could not agree on Count III and Count VI. CP 103-108.

The court sentenced Defendant to the following standard range sentences, to be served concurrently: 12 months on Count I; 6 months on Count II; 12 months on Count IV; and 6 months on Count V. CP 109-121.

[1] The State will refer to the Verbatim Report of Proceedings as follows: The four sequentially paginated volumes of transcript that contain the trial proceedings will be referred to by volume number followed by RP. The sentencing proceedings on 10/18/2013 will be referred to as SRP. All other volumes will be referred to by date.

The court also imposed 12 months of community custody and $2,300 of legal financial obligations, consisting of a mandatory $500 crime victim assessment, $100 DNA database fee, $200 criminal filing fee, as well as a discretionary $1,500 to recoup the cost of Defendant's court appointed attorney and defense. *Id.*

Defendant timely filed his notice of appeal. CP 125.

2. Facts

On February 7, 2014, Defendant and his friend, Jimmy Visario, entered a Checkmate store and attempted to cash a forged check from Valley Medical Center purportedly made out to Visario for $1,034.74. 2 RP 251, 292. The men arrived in the same vehicle. 2 RP 296-97. Defendant sat in the waiting area while Viasario presented the check and his Washington State identification to Jeanette Abdon, a Checkmate employee. 2 RP 292, 304.

Ms. Abdon noted the company listed on the check was different than the check Visario used to open his Checkmate account several days prior, and informed Visario she needed to verify that the check was issued to him. 2 RP 292. Abdon called Valley Medical Center, and was informed by Lien Dang, a senior accountant, that the check had been issued to Mary Franklin, a nurse at Valley Medical Center, not to Visario. 2 RP 276, 292-93.

When Abdon informed Visario and Defendant she was going to call the police, Defendant became upset, agitated, and angry and approached the window where she was working. 2 RP 294-96, 308. Defendant raised his voice, demanded that Abdon return Visario's ID so they could leave, and told her they no longer wanted to cash the check. 2 RP 294-95.

Four officers from the Fife Police Department responded to the call. 2 RP 183, 229; 3 RP 358, 371. Detective Malave approached Defendant, informed him that he was going to be detained, patted him down, and put him in handcuffs. 3 RP 360-61. Detective Malave located an Alaska Airlines Visa credit card with the name Wilbur Bowen, and other financial documents in Defendant's wallet. 3 RP 364-65. Visario was also detained. 3 RP 372. The officers questioned two individuals that were sitting in Visario's vehicle, but released them after determining they were not involved with the incident. 2 RP 185-86.

Detective Nolta obtained Visario's consent to search his vehicle and located a vinyl envelope in the center console, which was accessible to both the passenger and the driver of the vehicle. 2 RP 235-36, 239. It contained the following items: two valid checks for Visario's account; a check from US Bank for $30 with the payee information erased; a check from Banner Bank for $406 with the payee information erased and replaced with "Jimmy Visario;" and an American Express credit card

application filled out with Vickie D. Friends's personal information and Defendant's address. 2 RP 243-48.

Mary Franklin received her paychecks by mail every two weeks, but in January 2013, her check did not arrive. 2 RP 266. Wilbur Bowen was expecting new credit card at the end of 2012, which never arrived. 2 RP 279. Vickie Friend did not have an American Express card, but recognized her name, date of birth, and social security number from the credit card application located in Visario's vehicle. 2 RP 311. None of the three witnesses knew Defendant or Visario or had given them permission to possess their financial or personal information. 2 RP 181-82, 269-70, 312.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE AT TRIAL TO SUPPORT DEFENDANT'S CONVICTIONS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). *See also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing* ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

a. <u>There was sufficient evidence to show Defendant acted as an accomplice to the commission of Counts I and II.</u>

The jury convicted Defendant of identity theft in the second degree (Count I) and forgery (Count II) based on the attempt to cash the forged check made out to Visario.

The court instructed the jury on the elements the State must prove beyond a reasonable doubt to find Defendant guilty of identity theft in the second degree:

> (1) That on or about the 7th day of February, 2013, the defendant or an accomplice knowingly obtained, possessed, or transferred or used a means of identification or financial information of another person, to wit: M. Franklin and/or Valley Medical Center;
>
> (2) That the defendant acted with the intent to commit or aid or abet any crime;
>
> (3) That the defendant obtained credit, money, goods or anything else that is $1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods or other items of value; and
>
> (4) That any of these acts occurred in the State of Washington.

CP 81 (Instruction #11). The court also instructed the jury on the elements the State must prove beyond a reasonable doubt to find Defendant guilty of forgery:

> (1) That on or about the 7th day of February, 2013, the defendant or an accomplice possessed, offered or put off as true a written instrument which had been falsely made, completed or altered, to wit: check #17408;
>
> (2) That the defendant knew that the instrument had been falsely made, completed or altered;
>
> (3) That the defendant acted with intent to injury or defraud; and
>
> (4) That this act occurred in the State of Washington.

CP 82 (Instruction #12). The jury was provided a definitional instruction on accomplice liability:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of a crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 77 (Instruction #7). *See* RCW 9A.09.020.

Thus, a person is guilty of a crime committed by another if he is an accomplice to the commission of the crime. RCW 9A.08.020(1), (2)(c). The culpability of an accomplice does not extend beyond the crimes of which the accomplice has actual knowledge. ***State v. Roberts***, 142 Wn.2d 471, 510, 14 P.3d 713, (2000). A person knows or acts with knowledge when he is aware of facts or circumstances described by a statute defining

an offense or he has information that would lead a reasonable person in the same situation to believe that such facts exist. RCW 9A.08.010(1)(b). "[The] individual must have acted with knowledge that he or she was promoting of facilitating *the* crime for which that individual was eventually charged." ***State v. Cronin***, 142 Wn.2d. 568, 579, 14 P.3d 752 (2000) (emphasis in original).

A person aids or abets a crime by associating himself with the undertaking, participating in it as in something he desires to bring about, and seeking by his action to make it succeed. ***In re Welfare of Wilson***, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Physical presence and assent, without more, are insufficient to establish accomplice liability. ***State v. Allen***, 178 Wn. App. 893, 903, 317 P.3d 494 (2014). For presence to rise to the level of complicity, the defendant must be "ready to assist" in the commission of the crime. ***State v. Rotunno***, 95 Wn.2d 931, 933, 631 P.2d 951 (1981).

In this case, although Defendant argues there was insufficient evidence to prove he acted as an accomplice in the commission of the crimes charged in Counts I and II, the record shows otherwise. Br.App. 7.

The testimony shows Defendant was ready to assist Visario by his presence in the commission of the crime. He accompanied Visario into Checkmate, while the other two individuals waited in the car. There is no

evidence Defendant went to Checkmate for another purpose than to accompany his friend. He did not merely inquire as to the issue with Visario's check. On the contrary, he ceased to be a bystander and became involved in the commission of the crime as soon as he heard Abdon was calling the police, and aggressively attempted to recover Visario's ID so that they could leave before the police arrived.

A jury could reasonably infer that Defendant's aggression while demanding the return of Visario's ID demonstrates Defendant had knowledge that Visario was attempting to cash a forged check. It is recognized that evidence of flight may be circumstantial evidence of guilty knowledge. ***State v. Bruton***, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). This is because "flight is an instinctive or impulsive reaction to consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution." *Id.* at 112. A reasonable jury could find Defendant's efforts recover Visario's ID and flee showed he knew the consequences of police involvement and was aware of Visario's criminal acts.

In addition, the evidence of the stolen credit card in Defendant's possession as well as the stolen financial information and forged documents in the car in which Defendant arrived implies that the attempt to cash the forged check was not an isolated event. A jury could thus

reasonably infer that Defendant was involved in this criminal activity and had knowledge of Visario's involvement.

Defendant argues he was a bystander to Visario's criminal acts, and that there is no evidence Defendant "ever touched the check." Br.App. 9. Yet, there was no requirement that Defendant physically touch the check because his presence at the scene, ready to assist in aiding in the commission of the crime, and actions while demanding the return of the ID, is sufficient basis for a conviction.

Viewing the evidence in the light most favorable to the State, the evidence is sufficient to support Defendant's conviction on Count I and II based on accomplice liability.

b. There was sufficient evidence to support Defendant's convictions of Counts IV and V.

The jury convicted Defendant of identity theft in the second degree (Count IV) and possessing stolen property in the second degree (Count V) on the basis of his possession of Wilbur Bowen's Alaska Airlines Visa credit card.

The court instructed the jury the State must prove each of the following elements in order to find Defendant guilty of identity theft in the second degree, as charged in Count IV:

> (1) That on or about the 7th day of February, 2013, the defendant or an accomplice knowingly obtained, possessed, or transferred or used a means of identification or financial information of another person, to wit: W. Bowen;
>
> (2) That the defendant acted with the intent to commit or aid or abet any crime;
>
> (3) That the defendant obtained credit, money, goods or anything else that is $1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods or other items of value; and
>
> (4) That any of these acts occurred in the State of Washington.

CP 84 (Instruction #14). The jury was further instructed in order to convict Defendant of the crime of possessing stolen property in the second degree, as charged in Count V, the State must prove each of the following elements:

> (1) That on or about the 7th day of February, 2013, the defendant knowingly received, retained, possessed, concealed or disposed of stolen property, to wit: Alaska Airlines VISA card issued to W. Bowen:
>
> (2) That the defendant acted with knowledge that the property had been stolen;
>
> (3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
>
> (4) That the stolen property was an access device; and

(5) That any of these acts occurred in the State of Washington.

CP 85 (Instruction #15).

The identity theft statute proscribes "knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). Second degree identity theft involves credit, money, goods, services, or anything else of value less than $1,500. RCW 9.35.020(2)[2]; RCW 9.35.020(3)[3]. Actual use of another's means of identification is not required. ***State v. Berry***, 129 Wn. App. 59, 70, 117 P.3d 1162 (2005); ***State v. Sells***, 166 Wn. App. 918, 271 P.3d 952 (2012), *review denied*, 176 Wn.2d 1001, 297 P.3d 67 (2013); ***State v. Fisher***, 139 Wn. App. 578, 161 P.3d 1054 (2007). The State is not required to prove the specific crime defendant had intent to commit in order to secure an identity theft conviction. ***State v. Fedorov***, __ Wn. App. __, 324 P.3d 784 (2014). Specific intent to commit a crime may be inferred as a logical

[2] RCW 9.35.020(2): "Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW."

[3] RCW 9.35.020(3): "A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW."

probably from all the facts and circumstances. ***State v. Wilson***, 125 Wn.2d 212, 883 P.2d 320 (1994).

In the present case, Defendant argues there was insufficient evidence to show he possessed the credit card with criminal intent, or that he was aware that the credit card had been stolen. Br.App. 15. The record shows otherwise.

Upon arriving at Checkmate, Detective Malave informed Defendant that he was going to be detained. 3 RP 360-61. Although Defendant was reluctant to be patted down and attempted to keep his hands in his pockets, Detective Malave successfully conducted the search of his person, located his wallet, and put him in handcuffs. 3 RP 360-61, 364. The wallet contained Wilbur Bowen's Alaska Airlines Visa Credit Card, a Safeco Insurance billing statement addressed to Jimmy Visario and Sandra Cardena, and a partially completed Western Union money transfer in Defendant's name. 3 RP 364-65. Bowen confirmed the credit card belonged to him, and he had been expecting a new card which never arrived. 2 RP 279.

Bowen did not know Defendant or authorize him to possess the credit card. Defendant did not attempt to return the credit card to its rightful owner by giving it to the police, but attempted to conceal his possession by not informing Detective Malave that the item was in his

wallet. The facts also support the reasonable inference of Defendant's criminal intent because not only did he possess the documents of three other individuals in his wallet, he arrived at Checkmate in a vehicle that contained stolen personal and financial information and forged documents, and aided Visario in cashing a forged check.

The legislative intent of the identity theft statute demonstrates the legislature's recognition of the harm caused by merely possessing another person's information, before actually using it:

> The legislature finds that means of identification and financial information are personal and sensitive information such that if unlawfully obtained, possessed, used, or transferred by others may result in significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain , possess, use, and transfer another person's means of identification or financial information.

RCW 9.35.001. Defendant's possession of Bowen's credit card is the exact harm the legislature aimed to remedy. The evidence, viewed in the light most favorable to the State, was sufficient to allow a rational jury to find Defendant guilty beyond a reasonable doubt of identity theft.

The evidence presented at trial was sufficient to support the conclusion that Defendant knew the credit card was stolen and was properly convicted of possessing stolen property in the second degree. A person is guilty of possessing stolen property in the second degree if he or

she possesses a stolen access device. RCW 9A.56.160(1)(c). The person must know that the property was stolen, not just that it was wrongfully appropriated. RCW 9A.56.140(1); ***State v. Thompson***, 68 Wn.2d 536, 413 P.2d 951 (1966). Mere possession of recently stolen property is insufficient to establish that the possessor knew the property was stolen. ***State v. Couet***, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); ***State v. Hatch***, 4 Wn. App. 691, 694, 483 P.2d 864 (1971). But possession of recently stolen property, coupled with "slight corroborative evidence," is sufficient to prove knowledge. ***State v. Womble***, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999). The fact finder may infer knowledge if "a reasonable person would have knowledge under similar circumstances." *Id.* (citing ***State v. Shipp***, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980)).

In this case, the court provided the jury an instruction defining "knowledge:"

> A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact . . .
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact . . .

CP 86 (Instruction #18).

The record supports the inference that a reasonable person in the same situation as Defendant would believe that the credit card was stolen. Defendant possessed the credit card without Bowen's permission. The evidence adduced at trial suggests Defendant was involved in consistent criminal activity involving identity theft and forgery. Defendant aggressively demanded Abdon return Visario's ID in order to flee before the police arrived, and after being detained, he resisted the pat down. A jury could infer that this suspicious behavior demonstrated Defendant knew of the criminal nature of his acts.

Considering the evidence in the light most favorable to the State, sufficient evidence was presented at trial to prove Defendant had knowledge the credit card was stolen.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT.

In a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. ***State v. Emery***, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Whether a prosecutor has made improper argument is determined by examining the total context of the trial, the issues in the case, the evidence, and the jury instructions. ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prosecutors possess "wide latitude" in making arguments, and

a prosecutor may permissibly draw reasonable inferences from the record. ***State v. Thorgerson***, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). The jury is "presumed to follow the instruction that counsel's arguments are not evidence." ***State v. Warren***, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

A defendant has a duty to object to a prosecutor's allegedly improper argument at the time it is made. ***State v. Emery***, 174 Wn.2d 741, 761-762, 278 P.3d 653 (2012). Objections are required to prevent counsel from making additional improper remarks as well as prevent potential abuse of the appellate process. *Id.* The trial court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See* ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). When a defendant fails to object to a prosecutor's remarks, it "strongly suggests" that it did not appear critically prejudicial to the defense. ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011) (*quoting* ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

Where the defendant fails to object to the challenged portions of the prosecutor's argument, he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that a curative instruction would not have cured the resulting prejudice. ***Emery***, 174 Wn.2d at 760-61. Under this heightened standard, the defendant must show that (1) no curative instruction would have eliminated the prejudicial effect and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *Id.*

Defendant alleges that the prosecutor misstated the law of accomplice liability, which constituted serious, prejudicial and ill-intentioned flagrant misconduct.

During his opening statement, the deputy prosecutor told the jury:

> If you are in for a penny, you are in for a pound. Sometimes when you lie down with the dogs, you get fleas. This is a case about two men who were acting in concert on February 7, 2013, to commit fraud. Only one of those men, the defendant, Mr. Gutierrez, is on trial.

2 RP 169.[4] The prosecutor described Defendant and Visario's criminal acts at Checkmate, including Defendant's behavior when Abdon called the police:

> [T]he defendant . . . was more than nervous. He was actually agitated, worked up. He was demanding that the clerk give his friend's property back to him so they could get the heck out of there.

2 RP 170. He informed the jury of the elements that the State hoped to prove in trial:

> We believe we will be able to prove Identity Theft in the Second Degree because we will be able to show the defendant or his accomplice knowingly obtained, possessed or transferred or used a means of identification or financial information of another person, and that would be Ms. Franklin. That the defendant acted with the intent to commit or aid or abet that crime; that he had the intent to aid or abet Mr. Visario when he tried to pass that check, and that the defendant or his accomplice either obtained

[4] Defendant refers to the following phrases as the prosecutor's "theme:" "if you are in for a penny, you are in for a pound" and "if you lie down with the dogs, you get fleas." Br.App. 12.

> less than $1,500 worth of stuff, that's why it's second degree, or obtained nothing.

2 RP 175.

During closing statements, the prosecutor stated:

> At the outset of this case, I told you that when you are in for a penny, you are in for a pound, and sometimes when you lie down with the dogs, you get fleas.
>
> And the reason I use those metaphors is because that's what we are dealing with in this case . . . Visario and the defendant . . . were working together that day . . . And because of that, they became responsible for each other's criminal activities.

3 RP 406-407. After reading the definitional instruction of accomplice liability out loud to the jury, he reviewed the instruction defining circumstantial and direct evidence and the evidence presented at trial. 3 RP 407-08; CP 73 (Instruction #3); CP 77 (Instruction #7). He argued that the Alaska Airlines credit card and Visario's insurance statement located in Defendant's wallet, and the American Express credit card application with Defendant's address located in Visario's vehicle showed that Defendant and Visario were working together. 3 RP 409-410. Furthermore, he argued:

> [W]hen [Visario] presents that check to the Checkmate store with the defendant standing right there, going into the store with him, not just moral support, but actually encouraging and aiding him after the fact and trying to get him out of there, when he is going off while the clerk's holding onto the ID and to the bogus check, they are acting in concert. He is liable for his own conduct, yes, but also

> for Mr. Visario's conduct because he has chosen to make himself an accomplice. He has chosen to become involved in this enterprise with Mr. Visario.

3 RP 410-11. During the rebuttal closing argument, the prosecutor readdressed the accomplice liability instruction and argued that defendant had a "very important" role to play "in coming to his friend's aid." 3 RP 455-56. In addition, he consistently acknowledged and repeated the State had the burden to prove all of the elements of the crimes. 4 RP 408, 412, 416, 418, 421. The defense attorney did not object to the statements or request a curative instruction at trial. 3 RP 425-26.[5]

As Defendant did not object to the prosecutor's statements at trial, he waived any potential claim of misconduct. Defendant also failed to make the necessary showing to prove the prosecutor's theme constituted flagrant and ill-intentioned misconduct.

Defendant failed to show "no curative instruction would have obviated any prejudicial effect on the jury." ***Thorgerson***, 172 Wn.2d at 455. First, the prosecutor did not misstate the law of accomplice liability. During opening statements and closing argument, he directed the jury to the instructions and argued the evidence presented was sufficient to prove

[5] On the contrary, he addressed the contested phrase in his closing argument: The prosecutor has a nice catchphrase: You lie down with the dogs, you might catch fleas. This is true, if you lie down with dogs, you may get fleas. But nothing about that little catchphrase tells you anything about whether or not Mr. Gutierrez is guilty of the crimes he's charged with. These crimes are defined by law, not by a catchphrase. They have specific and unique definitions that if they cannot meet, he cannot be guilty.

each of the elements. Second, the prosecutor did not impermissibly shift the burden of proof to Defendant, or suggest that the State did not have the obligation to prove each element of the crimes beyond a reasonable doubt, but rather explicitly acknowledged the State's burden during his opening statements and closing arguments. The theme "you're in for a penny, in for a pound" and "if you lie down with dogs, you get fleas" did not relieve the State of its burden, but were descriptive metaphors used to provide a general understanding of accomplice liability.

Lastly, the prosecutor's comments did not rise to the level of inflammatory and blatantly prejudicial comments which courts have held cannot be neutralized by a curative instruction. *See* ***State v. Belgarde***, 110 Wn.2d 504, 506-07, 755 P.2d 174 (1988) (prosecutor stated the American Indian group with which defendant was affiliated was "'*a deadly group of madmen*'" and "'*butchers*,'" and told them to remember "'*Wounded Knee, South Dakota*'" (quoting VRP)); ***State v. Monday***, 171 Wn.2d at 674 (holding that prosecutor committed egregious racial misconduct by repeatedly referring to the police as "po-leese" and arguing that "black folk don't testify against black folk"). The prosecutor's statements do not reflect an effort to employ racist, classist, or other prejudicial arguments to achieve a conviction. He properly argued reasonable inferences that could be drawn from the evidence presented at trial.

Defendant also fails to prove the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." ***Thorgerson***, 172 Wn.2d at 455. The jury heard consistent testimony about defendant's behavior from Abdon and four law enforcement officers. It also heard uncontradicted testimony on the specific involvement and actions taken by defendant and Visario and received instructions properly stating the elements of each crime charged, defining accomplice liability, and clarifying which evidence it could consider. The prosecutor's theme explaining the general concept of accomplice liability were not likely to have altered the outcome of this case.

Defendant claims the prosecutor's argument could not be cured by an instruction because it was "easy to remember and likely to be consistent with the everyday beliefs of jurors about when someone is responsible, at least in some way, for the acts of another." Br. App. 13. This argument directly contradicts the established principle that the jury is presumed to follow the trial court's instructions. ***State v. Allen***, 89 Wn.2d 651, 574 P.2d 1182 (1978); ***Warren***, 165 Wn.2d at 29. Here, the court properly instructed the jury on the law of accomplice liability, and the deputy prosecutor pointed the jury to this instruction. 3 RP 407-08.

Defendant also argues the "in for a penny, in for a pound" argument suggests a person who engages is *any* criminal conduct with some may be held liable for *all* the crimes that person ends up committing,

citing ***State v. Cronin***, 142 Wn.2d at 578-79. Br.App. 12. Yet, the concern addressed in ***Cronin*** and previously in ***State v. Roberts***, in which the Supreme Court held an accomplice must have actual knowledge of the crime charged, not just any crime, is not at issue in the present case because the prosecutor argued that defendant had knowledge of the specific crimes that Visario committed when he attempted to cash a forged check. 3 RP 410-11. At no point did he argue it was not necessary to prove Defendant's knowledge of the crime or Defendant could be held liable for all of Visario's actions. 3 RP 406-24, 451-60.

As Defendant did not show that the statements were so inflammatory they could not have been diffused by an instruction and they resulted in prejudice, he failed to prove the prosecutor's statements were flagrant and ill-intentioned misconduct.

3. DEFENDANT FAILED TO SHOW DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT FOR FAILING TO OBJECT TO THE PROSECUTOR'S THEME.

Defendant argues even if the prosecutor's statements could have been cured, defense counsel was ineffective for his failure to object to the allegedly improper statements. Br.App. 14.

A Defendant claiming ineffective assistance of counsel must show that his counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced his trial.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d (1984); ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption of effective representation of counsel, and the defendant must show there was no legitimate strategic or tactical reason for the challenged conduct. ***McFarland***, 127 Wn.2d at 335-36. To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. ***In re Personal Restraint of Pirtle***, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If the appellate court concludes that either prong has not been met, it need not address the other prong. ***Strickland***, 466 U.S. at 700. The Appellate Court reviews claims of ineffective assistance of counsel de novo. ***State v. Sutherby***, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (citing ***In re Personal Restraint of Fleming***, 142 Wn.2d 853, 865, 16 P.3d 610 (2001)).

Defendant's argument in the present case fails on both prongs of the ***Strickland*** test. First, he does not show that his counsel's performance fell below an objective standard of reasonableness at trial when he did not object to the prosecutor's statements. Defense counsel addressed the prosecutor's theme multiple times during his closing argument. 3 RP 432. After reading the accomplice liability instruction to the jury, he states:

> That last sentence right there tells you lying down with the dogs getting fleas isn't making you an accomplice. You can have terrible friends. You can know that they are committing crimes.

3 RP 433. He goes on to argue that evidence does not demonstrate that defendant acted as an accomplice, thereby effectively addressing and rebutting the prosecutor's statements. Furthermore, the record indicates defense counsel consistently advocated on behalf of Defendant throughout the trial.[6]

Second, as discussed above, Defendant fails to show the prosecutor's theme prejudiced Defendant at trial. Given the strong presumption of effective representation, Defendant fails to show his counsel was deficient for failure to object to the prosecutor's statements.

4. THIS COURT SHOULD REJECT DEFENDANT'S CHALLENGE TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BECAUSE THE ISSUE WAS NOT PRESERVED FOR APPEAL, IS NOT RIPE FOR REVIEW, AND FAILS ON ITS MERITS.

The sentencing court's authority to impose court costs and fees is statutory. *See* ***State v. Hathaway***, 161 Wn. App. 634, 652, 251 P.3d 253 (2011). While the question of whether a trial court had statutory authority to impose legal financial obligations (LFOs) is reviewed de novo, the court's determination of a defendant's ability to pay discretionary LFOs is reviewed under the clearly erroneous standard. *See* ***State v. Smith***, 119

[6] Throughout the pre-trial, trial, and sentencing proceedings, defense counsel competently questioned witnesses, made objections and motions, and presented well supported arguments in favor of his client. E.g., 1 RP 49, 156-158, 2 RP 174, 177-81, 195, 289, 3 RP 334-35, 345-348, 361-62, 380-84, 418, 425-43, 445-51, SRP 4-6.

Wn.2d 385, 389, 831 P.2d 1082 (1992); ***State v. Bertrand***, 165 Wn. App. 393, 404 n. 13, 267 P.3d 511 (2011) (citing ***State v. Baldwin***, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1992)), *review denied*, 175 Wn.2d 1014 (2012). Such findings are only clearly erroneous when a review of all the evidence results in a definite conviction a mistake has been made. ***State v. Lundy***, 176 Wn. App. 96, 105, 308 P.3d 755 (2013).

In this case, the sentencing hearing occurred on October 18, 2013, before the Honorable Judge A. McCarthy. SRP 1. The State requested the court to impose the mandatory $500 crime victim penalty assessment, $200 for court costs, a $100 DNA sample fee, as well as a discretionary sum of $1,500 for DAC recoupment. SRP 3. The court followed the State's recommendation and imposed a total of $2,300 in LFOs. SRP 7; CP 112. Paragraph 2.5 of Defendant's judgment and sentence contains the following finding of Defendant's ability to pay LFOs:

> This court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 112. Defendant did not object to the imposition of LFOs or offer any information contradicting the court's assessment of his ability to pay. SRP 4-9.

a. The issue is not ripe for review.

The time to challenge an order establishing LFOs that does not limit a defendant's liberty is when the State attempts to curtail a defendant's liberty by enforcing them. ***Lundy***, 176 Wn. App. at 108; ***Baldwin***, 63 Wn. App. at 310; ***State v. Smits***, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009); *see also* ***State v. Blank***, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. ***Baldwin***, 63 Wn. App. at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." ***Blank***, 131 Wn.2d 230, 241–242.

Nothing in the record indicates that the State has sought to collect costs from Defendant or when Defendant is expected to begin payment. There is no evidence the State has attempted to collect LFOs from Defendant. Nor does the record indicate an express payment commencement date. *See* 1-4 RP, SRP, 8/1/13 RP, 3/20/13 RP. *Compare with* ***Bertrand***, 165 Wn. App. at 404-405) (reviewing the merits of the trial

court's sentencing conditions because a disabled defendant was ordered to commence payment of LFOs within 60 days of entry of judgment and sentence while still incarcerated). The time to challenge the costs is at the time the State seeks to collect them because while the defendant may or may not have assets at this time, the defendant's future ability to pay is speculative. In addition, the defendant can take advantage of the protections provided by statute at the time the State seeks to collect the costs and petition the court to modify the costs imposed. RCW 10.01.160(4).[7] Therefore, Defendant's challenge to the imposed LFOs is not ripe for review.

b. The issue was not preserved for appeal.

RAP 2.5(a) grants the Appellate Court discretion in refusing to review claims of error not raised at the trial court level. RAP 2.5(a) also provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error

[7] RCW 10.01.160(4):
A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

affecting a constitutional right. *Id.* This Court has consistently declined to allow a defendant to challenge the imposition of LFOs for the first time on appeal. *See e.g.*, ***State v. Blazina***, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *rev. granted*, ***State v. Blazina***, Wn.2d 1010, 311 P.3d 27 (2013).

Defendant did not object to the imposition of LFOs at trial, nor did he claim any of the three circumstances listed under RAP 2.5(a) in which an issue could be raised for the first time on appeal. "The purpose underlying issue preservation rules is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." ***State v. Hamilton***, 179 Wn. App. 870, 878, 320 P.3d 142 (2014). Allowing Defendant to challenge the LFOs for the first time on appeal would undermine that purpose since the trial court was better situated to resolve disagreements about Defendant's ability to pay. Both Defendant and his counsel were given an opportunity to allocute at sentencing; neither excepted to the imposition of LFOs. Judicial resources should not be wasted because Defendant did not bother to raise the issue below. His unpreserved challenge to the lawfully imposed LFOs should be rejected without review.

c. The trial court acted within its statutory authority when it imposed LFOs on Defendant.

Sentencing courts are vested with statutory authority to impose court costs and fees on convicted defendants. A number of LFOs are mandatory. *See e.g.*, RCW 7.68.035(1)(a) (crime victim assessment fee). The court may also impose discretionary fines pursuant to RCW 10.01.160.

On appeal, Defendant argues the sentencing court acted outside its statutory authority in ordering him to pay $2,300 in LFOs. Br.App. 17. Yet, Defendant fails to make the necessary distinction between mandatory and discretionary LFOs.

i. Defendant's meritless claim that the trial court abused its discretion by imposing mandatory fines should be rejected.

It is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: a criminal filing fee, a

crime victim assessment fee, and a DNA database fee. RCW 36.18.020(h)[8]; RCW 7.68.035[9]; RCW 43.43.754[10]; RCW 43.43.754(1)[11].

Mandatory financial obligations are required by statute and do not permit the trial court to consider the offender's past, present, or future ability to pay. ***Lundy***, 176 Wn. App at 102; ***State v. Kuster***, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013). Mandatory obligations are constitutional as long as "there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants." ***State v. Curry***, 118 Wn.2d 911, 918, 829 P.2d 166 (1992) (emphasis in original).

Defendant was convicted of identity theft in the second degree, and forgery, and possession of stolen property in the second degree, which are class C felonies. RCW 9.35.020(3); 9A.60.020(3); 9A.56.161. Thus, the trial court properly imposed the $800 in mandatory fees including the $500 crime victim assessment fee, the $100 DNA database fee, and the $200 criminal filing fee as required by statute. As a result, the review on

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[8] RCW 36.18.020(1): Clerks of superior courts shall collect the following fees for their official services: . . . (h) Upon conviction or plea of guilty . . . a defendant in a criminal case shall be liable for a fee of two hundred dollars.

[9] RCW 7.68.035(1)(a): When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment. The assessment . . . shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony . . .

[10] RCW 43.43.754(1): A biological sample must be collected for purposes of DNA identification analysis from: (a) Every adult . . . convicted of a felony . . .

[11] RCW 43.43.754(1): Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.

appeal only concerns the discretionary imposition of the $1,500 DAC recoupment.

ii. Defendant's meritless challenge to the properly imposed discretionary LFOs should also be rejected.

RCW 10.01.160 authorizes the sentencing court to require a convicted defendant to pay court costs and other assessments incurred in prosecuting the defendant:

> The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

RCW 10.01.160(2). The imposition of these costs is a factual matter within the trial court's discretion. ***Curry***, 62 Wn.2d at 916; ***State v. Calvin***, __ Wn. App. __, 316 P.3d 496 (2013).

Before imposing discretionary LFOs, the trial court is required to consider a defendant's ability to pay:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Although a formal finding of a defendant's ability to pay is unnecessary, where such a finding is made, it is reviewed under the clearly erroneous standard. ***Lundy***, 308 P.3d at 760; ***Baldwin***, 63 Wn. App. at 312. "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" ***Schryvers v. Coulee Cmty. Hosp.***, 138 Wn. App 648, 654, 158 P.3d 113 (2007) (quoting ***Wenatchee Sportsmen Ass'n v. Chelan County***, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

In this case, the trial court imposed a $1,500 discretionary fee pursuant to RCW 10.01.160 to recoup the costs for Defendant's court-appointed attorney and defense, having found in paragraph 2.5 of the judgment and sentence Defendant was able to pay for those services. CP 112; SRP 7.

The decision to impose recoupment of attorney fees is reviewed for an abuse of discretion. ***Baldwin***, 63 Wn. App. at 312. The court must balance the defendant's ability to pay costs against the burden of his obligation before imposing attorney fees. *Id.* In very limited situations, the court has found that the imposition of LFOs was clearly erroneous because the defendant's ability to pay was not supported in the record. ***Bertrand***, 165 Wn. App. 393 (holding that the trial court's finding that

defendant, a disabled person, had the present or future ability to pay LFOs was clearly erroneous).

A defendant's poverty does not immunize him from punishment or the requirement to pay legal financial obligations. ***Blank***, 131 Wn.2d at 241, quoting ***Curry***, 118 Wn.2d at 918. While a court may not incarcerate an offender who truly cannot pay LFOs, every offender must make a good faith effort to satisfy these obligations by seeking employment, borrowing money, or otherwise legally acquiring resources to pay their court ordered financial obligations. ***State v. Woodward***, 116 Wn. App. 697, 703-704, P.3d 530 (2003). Furthermore, defendants who claim indigency must do more than plead poverty in general terms when seeking remission or modification of LFOs. *Id.* at 704.

The trial court's finding Defendant had the ability to pay the costs of his defense was supported by the evidence adduced at trial.[12] The evidence demonstrates Defendant is an able bodied man who could walk into Checkmate and resist arrest. He had the ability to be verbally aggressive to Abdon and coherently speak with law enforcement. Defendant did not claim the imposition of LFOs would be an undue burden on his financial resources or ability to pay living expenses.

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[12] The Honorable John A. McCarthy presided over defendant's entire jury trial. As a result, he was capable of taking judicial notice of the adjudicative facts adduced at trial in deciding an appropriate sentence. *See* ER 201.

Defendant did not present any evidence to call the trial court's finding into question, which is undoubtedly why he rightly does not claim an inability to pay on appeal. As a result, the trial court did not enter findings of any extraordinary circumstances that would make restitution or payment of nonmandatory LFOs inappropriate on the Judgment and Sentence. CP 112-13. Unlike ***Bertrand***, there was no evidence Defendant suffered from any mental or physical disabilities that might limit his present or future ability to earn income. *See e.g.*, 165 Wn. App. at 404-05. The absence of such a record renders Defendant's citation to the ACLU study on the impact of LFOs on people incapable of providing for life's necessities an irrelevant distraction from the relevant facts and issues of this case.

The finding that Defendant had the present or likely future ability to pay LFOs was not clearly erroneous because it was supported by the uncontroverted evidence adduced at trial. There is no evidence to suggest a mistake was made. The trial court did not abuse its discretion in imposing $1,500 for attorney fee recoupment.

iii. The trial court's well supported finding of Defendant's ability to pay was not transformed into a clearly erroneous decision by the mere fact it was communicated through unobjected to standard form language in defendant's judgment and sentence.

Neither RCW 10.01.160 "nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." ***Curry***, 118 Wn.2d at 916. Under the statute, the trial court must only "take account" of the defendant's ability to pay and the burden that payment of costs will impose. RCW 10.01.160(3). In similar cases, the appellate courts have never found the standard form language finding of defendant's ability to pay LFOs to be clearly erroneous. *See e.g.*, ***Lundy***, 176 Wn. App. at 108; ***Blazina***, 174 Wn. App. at 911; ***State v. Calvin***, 316 P.3d at 496. Rather, the courts consistently emphasize that the record must be sufficient to review on appeal whether the trial court considered the defendant's financial resources. ***Bertrand***, 165 Wn. App. at 404; ***Calvin***, 316 P.3d at 508 (noting that "striking the boilerplate finding would not require reversal of the court's discretionary decision unless the

record affirmatively showed that the defendant had an inability to pay both at present and in the future").[13]

In this case, the inclusion of paragraph 2.5 in the Judgment and Sentence demonstrates the trial court did "take account" of Defendant's present or likely future ability to pay LFOs. Since there is no legal requirement for the trial court to enter formal findings, there is nothing improper about its decision to enter a factually supported finding by adopting the language provided in court-approved judgment and sentence document. The court had the authority and opportunity to strike or modify paragraph 2.5 if it was inconsistent with its determination of defendant's ability to pay costs. The unaltered quality of paragraph 2.5 and the absence of an objection or discussion on the record evidences the trial court was convinced defendant had the ability to reimburse the community for the defense it paid for him to receive.

Contrary to Defendant's negative characterization of paragraph 2.5, in practice, it provides an additional safeguard by ensuring the trial court always considers a Defendant's ability to pay. In the absence of a statutory requirement for a formal finding, 2.5 reminds judges and litigants to take account of the defendant's ability to pay in every case and

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[13] At worst, the standard form language finding of defendant's ability to pay would be more appropriately placed on a subsequent order to pay than on a judgment and sentence, as noted by this Court in ***State v. Lundy***. 176 Wn. App. at 105, n. 7.

encourages them to address the issue at the trial court before the judgment and sentence is issued, thereby promoting judicial efficiency.

In this case, paragraph 2.5 reflects the evidence adduced at trial and fulfils the trial court's statutory requirement to consider the defendant's ability to pay LFOs.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm Defendant's conviction and sentence.

DATED: SEPTEMBER 10, 2014

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date Signature

PIERCE COUNTY PROSECUTOR

September 12, 2014 - 10:00 AM

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