NO. 45232-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRANK SHANNON BELLUE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Larkin

No. 12-1-02120-3 & 12-1-04771-7

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

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

1. Whether Defendant failed to preserve the issue of whether evidence seized from his motel room and gathered as a result of his arrest should have been suppressed, where he failed to move for its suppression below.

2. Whether, assuming *arguendo* that the issue was preserved, there was no violation of Defendant's 4th amendment or Article I, section 7 rights where discovery of the evidence in question was made in open view and its subsequent seizure justified by a search warrant and his felony arrest in public supported by probable cause.

3. Whether, regardless of the major economic offense sentence enhancement, Defendant's exceptional sentence should be affirmed because it was based on an independent aggravating circumstance, which the sentencing court found to be a sufficient basis for that exceptional sentence.

4. Whether Defendant's convictions should be affirmed where, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt.

5. Whether Defendant's sentence should be affirmed where the sentencing court properly entered findings of fact and conclusions of law in support of its exceptional sentence in cause number 12-1-02120-3.

6. Whether Defendant has failed to show ineffective assistance of counsel where he has failed to show that his trial counsel's performance was deficient.

B. STATEMENT OF THE CASE.

1. Procedure

On June 7, 2012, Frank Shannon Bellue, hereinafter referred to as the defendant, was charged by information filed in Pierce County superior court cause number 12-1-02120-3 with second degree identity theft in count I, forgery in count II, and unlawful possession of a personal identification device in count III. CP 1-2.

On December 21, 2012, the State charged the defendant by information filed in Pierce County cause number 12-1-04772-5 with 18 counts of second degree identity theft, one count of forgery, and one count of unlawful possession of payment instruments. CP 496-506. The State alleged in each count that the crime was aggravated by the fact that "the defendant's high offender score" that would "result in some of the current offenses going unpunished" pursuant to RCW 9.94A.535(2)(c). CP 496-506.

On February 21, 2012, the State filed amended informations in both cause numbers. CP 23-27, 513-25. In cause number 12-1-02120-3, the amended information added four counts of second degree identity theft, one count of unlawful possession of payment instruments, one count of second degree possessing stolen property, and one count of leading organized crime. CP 23-27. In cause number 12-1-04771-7, the amended

information added count XXII, a charge of leading organized crime. CP 513-25.

On March 28, 2013, the State filed a second amended information, in cause number 12-1-02120-3, which added count XI. CP 44-48.

Finally, on June 25, 2013, the State filed a third amended information in cause number 12-1-02120-3 and a second amended information in cause number 12-1-04771-7. CP 54-61, 542-57. *See* RP 502, 515-16. In cause number 12-1-02120-3, that third amended information added two sentencing enhancements to counts I through X: (1) that "the defendant's high offender score" that would "result in some of the current offenses going unpunished" pursuant to RCW 9.94A.535(2)(c) and (2) that the current offense was a major economic offense or series of offenses pursuant to RCW 9.94A.535(3)(d). CP 54-61. It also added the allegation that current offenses would go unpunished to count XI. CP 54-61. In cause number 12-1-04771-7, the second amended information added an additional aggravating circumstance to each count, which alleged that the current offense was a major economic offense or series of offenses. CP 542-57.

On March 8, 2013, the court heard the State's motion to consolidate cause numbers 12-1-02120-3 and 12-1-04771-7 for trial. 03/08/13 RP 4-18. *See* CP 20-22, 32-38, 510-12, 530-36. It granted that motion over defense objection. 03/08/13 RP 17-18; CP 40-43, 538-41.

The case was called for trial on June 12, 2013, and the court heard motions in limine. RP 3-4.

The parties then selected a jury, RP 11, and gave opening statements. RP 16.

The State called Tacoma Police Officer Samuel Lopez Sanchez, RP 17-46, and Teresa Congemi, RP 46-52.

The court conducted a CrR 3.5 hearing at which Tacoma Police Officer Gareth Wurges testified. RP 53-61. It found that the defendant's statements were admissible at trial. RP 59-61.

The State then called Officer Gareth Wurges, RP 62-79, Officer Brandon Cockcroft, RP 80-91, Officer Daniel Hensley, RP 91-102, Jessica Dill, RP 102-06, Tanya McMillan, RP 107-31, Pierce County Corrections Deputy Donald Carn, RP 137-51, Lisa Johnson, RP 151-58, Amber Craig, RP 159-64, Megan Brooke Casey , RP 165-70, Amanda Sheppler, RP 170-73, Detective Roland Hayes, RP 174-82, Detective Joseph Canion, RP 182-224, Crime Scene Technician Shea Wiley, RP 230-56, Officer Sandra Hawkins, RP 256-64, Detective Kimbery Shesky, RP 264-323. Detective Thomas Williams, RP 323-89, Brian Jensen, RP 389-93, Rochelle Moore, RP 393-422, Kristin O'Neil, RP 422-25, Jose Melendez, RP 426-44, and Yolanda Carlson, RP 444-94.

The State published exhibit 122, a disc containing eight recorded telephone conversations, RP 503-06, and rested. RP 506.

The defendant moved to dismiss all counts for insufficient evidence. RP 516-26, 544. The court denied that motion. RP 545.

The defendant chose not to testify, RP 536-37, and apparently rested. *See* RP 536-47.

The parties discussed the State's proposed jury instructions and the defendant objected to accomplice liability language in those instructions. RP 536, 538-44. The court adopted the State's proposed instructions as its own and read them to the jury. RP 546-53. *See* CP 63-121, 558-617

The parties gave closing arguments. RP 553-74 (State's closing argument); 574-81 (Defendant's closing argument); 581-86 (State's rebuttal argument).

After submitting a question, CP 62, 618-19, the jury returned verdicts finding the defendant guilty as charged and returned special verdicts finding each of the aggravating circumstances. CP 124-44, 630-73; RP 597-611.

The defendant moved for arrest of judgment and a new trial, CP 163-74, 678-703; RP 614-22, and the court denied those motions. RP 622-24.

On August 16, 2013, the court sentenced defendant in cause number 12-1-02120-3 to an exceptional sentence of 225 months in total confinement on count X, and to concurrent, standard-range sentences of 60 months on count XI, 57 months on counts I, IV, V, VII, and IX, and 29 months on counts II, III, VI, and VIII. CP 451-67; RP 637-38. In cause

number 12-1-04771-7, it vacated count XXII, leading organized crime and sentenced him to concurrent standard-range sentences of 57 months on counts I, III through VIII, X through XIV, XVI through XVIII, and XIX and XXI, and to 29 months on counts II, IX, and XV. CP 863-82. On May 16, 2014, the court filed findings of fact and conclusions of law supporting its exceptional sentence on count X of cause number 12-1-02120-3. CP 914-18.

On August 22, 2013, the defendant filed timely notice of appeal in each cause. CP 473-90. 890-908. *See* RP 640.

2. Facts

In June, 2012, Rochelle Moore was dating the defendant's son, Frank Spencer Bellue (hereinafter referred to as "Spencer"). RP 393-94. She testified that, between April and June, 2012, they stayed in hotels with the defendant and Yolanda Carlson. RP 394-95.

On June 6, 2012, they were staying at the Morgan Motel in Tacoma. RP 395. That day, she and Frank Spencer Bellue went to the adjacent Rite Aid store to buy cigarettes and some other items. RP 396. She only had a couple dollars, but the defendant gave her an ID in someone else's name and a check apparently drawn on someone else's account. RP 396-97.

Moore testified that when she tried to use the check at Rite Aid, it was declined. RP 399-400. It was apparent to Moore that the store

personnel "knew it was not her pictured on the identification. RP 400. She got scared, and left, returning to the Morgan Motel. RP 400.

The store called 911 to report that two people had attempted to use a check that was determined to be stolen, and Tacoma Police Officer Samuel Lopez Sanchez was dispatched to investigate the possible forgery and or identity theft. RP 17-19.

Lopez Sanchez was given a physical description of the two suspects. RP 19-20. When he arrived in the area, he saw two people standing in front of the Morgan Motel, which is adjacent to and about 100 feet from the Rite Aid. RP 19-20. Lopez Sanchez noted that the 911 caller had stated that the two people with the stolen check had walked towards the Morgan Motel. RP 20.

Lopez Sanchez pulled up to the parking lot, exited his patrol car, and told both people to stop. RP 20. They started running instead. RP 20, 400.

Lopez Sanchez caught up to and detained Moore, who was the female, but Spencer, who was with her, managed to run into room No. 1 of the motel. RP 21-22, 400.

Other officers, including Officers Cockcroft and Wurges, arrived to assist. RP 22. As Officer Cockcroft approached room No. 1 of the motel, the door swung open, and Spencer walked out of the room. RP 24-26, 29-30, 82-83, 89. Cockcroft arrested him and searched him incident to that arrest. RP 24-25, 40, 82-84.

This took place next to the open motel room door, which prompted Officer Lopez Sanchez, out of concern for the officer's safety, to stand next to that door. *See* RP 43, 45.

Tacoma Police Officer Gareth Wurges arrived after the two suspects were detained, and began speaking to Steve Sweney and Tara Zimmerman, who were standing in front of the motel room with a baby. RP 63-66, 74-75, 448. As he spoke to them, he saw more people inside the motel room, and called for additional officers. RP 66. Wurges determined that neither Sweney nor Zimmerman were not involved and released them. RP 67.

Wurges was standing about three to four feet outside the open motel room door when he saw the defendant sitting next to a woman, later identified as Carlson, on the bed inside that room. RP 67-68. *See* RP 27. He asked them some questions, but neither were "very forthcoming" with answers. RP 68.

As officers were speaking to Carlson and the defendant from outside the motel room, they noticed "things out in the open that [were] significant to the case [they] w[ere] investigating," including "lots" of "ripped up checks," drug paraphernalia, and syringes. RP 24-25, 40. Officer Lopez Sanchez saw a couple different names on the torn checks. RP 26. He testified that the ripped up checks were on the floor "in a garbage can that was right inside the room," and perhaps on a nightstand, and that the room itself was "fairly small." RP 40, 43.

Wurges then asked the female to step out of the room, which she did, taking a backpack with her. RP 68-70. Carlson clarified that the officer asked, rather than forced, her to step out of the room. RP 448. She was wearing a backpack when she left the room. RP 449 (exhibit 83).

Inside Yolanda Carlson's backback, police found: (1) a military identification card bearing the name Brandy Michelle Brandenburg, which was later marked as exhibit 60, RP 30-31, (2) a social security card with the name Karlina Yoshitaro, marked as exhibit 61, RP 32, (3) the corner of an apparent personal check that bore the names Lauren R. Carlson and Silvestre Cervantes, marked as exhibit 62, RP 32-33, (4) an apparent driver's license made of paper with the name Lauren R. Carlson, marked as exhibit 63, RP 32, (5) two apparent personal checks with the names Loretta Sutter and Lindsey Jensen, marked as exhibits 64 and 67, RP 33-34, (6) an apparent personal check with the names Brandy Brandenburg and Lindsey Jensen, marked as exhibit 66, RP 34, a driver's license, RP 30-3, (7) a military identification bearing the name Carlena Robert, marked as exhibit 68, RP 34-35, (8) the corner of an apparent check in the name of Lindsey Jensen, marked as exhibit 69, RP 35, (9) a wage statement in the name of Teresa Congemi, marked as exhibit 70, RP 35, (10) a Washington State identification card in the name of Loretta Sutter, marked as exhibit 71, RP 35, and (11) an apparent Arizona driver's license in the name of Karlina Yoshitaro, marked as exhibit 72. RP 35-37. Based on the photographs on the cards, Carlena Robert and Karlina Yoshitaro

appeared to be the same person. RP 330. Exhibit 66 was a check drawn on an actual account owned by Lindsey Jensen with the name Brandy Brandenburg printed above Jensen's name. RP 301-02.

Carlson testified that she had items in her backpack including social security cards, checks, and identification cards, that did not belong to her and which she should not have possessed. RP 451-52. She testified that she had additional items of this sort in a black bag in the trunk of an Audi that she was driving, which was ultimately impounded. RP 450-53.

While an officer was detaining Carlson, the defendant was still sitting with on the bed with a briefcase in front of him. RP 69-70. Wurges noted there was a syringe on the console table that would normally have held a television. RP 69-70. When Wurges asked the defendant for his identification, the defendant voluntarily stepped out of the room and provided it to the officer. RP 70.

Officers eventually detained the defendant and ultimately placed him in handcuffs. RP 71-72. He was subsequently transported to the police station where he was searched. RP 72.

While other officers were dealing with Carlson and the defendant, Officer Lopez Sanchez returned to Moore, who gave him a false name, but whom he was ultimately able to identify as Rochelle Moore. RP 28-29, 400.

Officer Lopez Sanchez also contacted the manager and clerk at the Rite Aid adjacent to the motel. RP 29. They told the officer what

happened, provided handwritten statements to him, and identified Moore and Bellue, Jr. as the ones who had presented a stolen check at the Rite Aid store. RP 29-30.

Moore was arrested and interviewed. RP 401. She told police that the defendant would pay money to people for stolen checkbooks and IDs. RP 401-02. She told the officer that the defendant and Yolanda Carlson then made checks or used a computer to alter the stolen checks. RP 402-03, 409. She said that the defendant would take stolen checks and add names, via a printer, to those checks to match the stolen IDs. RP 402-03. Both Moore and Carlson had witnessed this process. RP 403, 459-60.

Moore testified that the checks were being made so that she could use them to purchase gift cards at Target or Safeway, RP 405-06. *See* RP 471. She would buy either store gift cards or prepaid VISA cards. RP 407. Moore testified that she, Bellue, the defendant and Carlson would then sell these cards for cash. RP 405-07.

According to Moore, when the defendant and Carlson attempted this, the defendant would always wait in the car. RP 406. Carlson testified that she attempted to use a check and identification in Loretta Sutter's name at Target on multiple occasions. RP 453-56. She estimated that she did so about ten times. RP 456.

Officer Daniel Hensley, spoke to the motel manager and determined that the motel room itself had been rented by Konstance

Kendrick for two days and that she was scheduled to check out on June 6, 2012, the day the officers responded to the area. RP 95-96. The defendant did not rent the room. RP 222.

The motel manager told Hensley that the defendant and his group were no longer welcome on the property, and Hensley communicated this to the defendant, stating that should they return, they would be arrested for trespassing. RP 97-98.

Hensley observed two suitcases standing in the room through the room's open door. RP 96-97. When he asked who owned the suitcases, the defendant replied, that he and his girlfriend did. RP 97.

Hensley then entered the room at the motel owner's request to retrieve the room key and the remote control for the television. RP 98. He did not search the room beyond locating the room key. RP 98. Instead, Detective Roland Hayes obtained a search warrant for that room. RP 177-81, 186.

Officer Hensley guarded the room from his patrol car to make sure no one entered that room until that warrant could be served. RP 98-99, 186-87.

Detectives Hayes, Pendrak, and Joseph Canion then served the search warrant. RP 187. They found pieces of torn up checks inside the room. RP 185, 189 (exhibit 74). Detective Hayes testified that when he saw them the checks were inside a police evidence bag on a chair next to the garbage can. RP 217. They appeared to from different accounts at

different institutions. RP 192, 289-90. Detective Sheskey testified that the checks appeared have the names Lauren Carlson and Silvestre Cervantes. RP 290-91. Police also found checkbooks from Silvstre Cervantes' Wells Fargo and Bank of America checking accounts, and a check drawn on an account owned by Silvestre Cervantes. RP 293-94, 295 (exhibit 73). Detective Sheskey testified that the account number on the ripped up checks appeared to match the account number associated with an actual Cervantes account. RP 293-94 (exhibit 75).

Detectives found checks from an account owned by William and Elizabeth Shade at First Federal, and some loose checks with the name "Lauren Carlson" added on top of the Shade's names. RP 296.

Detectives also found a green backpack on the floor by the bed. RP 193-94 (exhibit 83). Inside the backpack, they found (1) a black case, or folio, containing, among other things, a blank check with the names Lorette Sutter and Lindsey Jensen, a speeding ticket issued to the driver of a 1990 Audi Quattro, and a traffic ticket issued to Yolanda Carlson, an anniversary card signed by Yolanda Faye, a bail bond agreement between Aladdin Bail Bonds and Yolanda Faye Carlson, RP 198-202, 271, (2) three thumb drives, RP 202, (3) a knife, RP 202-03, and (4) a black wallet with "identifying documents" of Yloanda Carlson. RP 203-04.

Inside the wallet was, among other items, a social security card for Carlson, a NetSpend MasterCard debit card, the last four digits of which were 5715, a "State of Washington services card" in the name of Carlson,

a medical card in the name of "Yolanda C," some pawn slips, bank account information, including apparently two different account and routing numbers, and micro SD cards. RP 282-83 (exhibit 83).

Detectives found a multi-colored cloth purse "containing various IDs" apparently issued to different people. RP 206-10 (exhibit 91). Among those pieces of identification were a Kansas identification card issued to Teresa Congemi, a Washington state identification card issued to Jamie Lynn Groff, a high school identification card issued to Maddy Groff, and a Washington State driver's license issued to Amber Craig (exhibit 91B). RP 281. They discovered a passport, a checkbook, and some needles hidden under the room's mattress, and two glass pipes commonly used for drugs, and a NetSpend MasterCard bearing the defendant's name (exhibit 82) in the nightstand drawer. RP 211-14.

Detectives found a printer and a receipt for the purchase of an ink cartridge in the room. RP 214-16 (exhibits 26, 100).

They also found a Washington State identification card in the name of the defendant, Frank Shannon Bellue, (exhibit 76), prepaid debit cards in the name of "Frank S Bellue" and "Frank Bellue" (exhibit 77, 79), a Turbo Tax VISA debit card in the name of Angela M. Patterson. (exhibit 78), an identification card, social security cards, gift cards, a passport for Kaitlin Chaput, "other ID items for Kaitlin Chaput," a checkbook for Silvestre Cervante. (Exhibit 29), a Washington Qwest card for Tia Cantzler, (exhibit 81), a NetSpend prepaid VISA in the name of Frank

Bellue, (exhibit (82). RP 284-87, a brown wallet containing a passport for Kaitlin Chaput, a military identification card for Stephanie Fraizer, a University of Rhode Island student identification for Kaitlin Chaput, a BJ's Bingo card for Kaitlin Chaput, a Washington driver's license for Lauren Carlson, RP 296, a black wallet containing a BJ's Bingo card in the name of Frank Spencer Bellue, a Washington State Qwest card in the name of Rochelle Moore, a Tribal One Stop card for Frank Bellue, a Bank of America debit VISA card for Stephanie Raiser, a social security card for Nickolas Scott Draizer, and an Oklahoma Driver's license for Fraizer. RP 296-97.

Tacoma Police Detective Sheskey asked Tanya McMillan, an investigations technician for Target, to review transactions at Target involving any checks that might have been negotiated using the primary account number of Lindsey Jensen. RP 107-11, 302-03. McMillan found the following transactions: (1) a purchase for printer ink and a Verizon prepaid card made on June 4, 2012 at their Puyallup store with a VISA gift card, (2) an attempted purchase of a VISA gift card on June 5, 2012 at their Lakewood store with a personal check and a driver's license that was declined, (3) a purchase of an ACER netbook computer made on May 29, 2012 at their Tacoma store using a Target credit card, (4) an attempted purchase of two gift cards on June 4, 2012 at their Puyallup store with a personal check, (5) an attempted purchase of two VISA gift cards on June 4, 2012 at their Graham store with a personal check, and (6) a purchase of

multiple items on June 4, 2012 at their Puyallup store with a personal check. RP 111-14 (exhibit 89B), 305-07.

McMillan testified that the redemption history of the VISA gift card used at the Target store on June 4, 2012 showed that this card was also used at the Morgan Motel. RP 115-17 (Exhibit 89B). She testified that exhibits 64, a personal check made payable to Target drawn on a joint account purportedly owned by Lorette Sutter and Lindsey Jensen, and 71, a Washington identification card for Loretta Mae Sutter were "consistent" with transaction (5) at the Graham Target store. RP 119-21. *See* RP 306. Detective Sheskey testified that exhibit 64 was actually a check drawn on the account of Lindsey Jensen with the name Lorette Sutter printed on top. RP 301-03.

McMillan also prepared video from Target surveillance cameras for transactions on May 24, May 29, June 4, and June 5 of the person and/or persons who made or attempted to make the transaction entering the store, interacting with the cashier, and exiting the store. RP 122-30, 311 (Exhibit 89A).

Detective Sheskey testified that the video of the May 24 transaction showed Rochelle Moore and Spencer attempting to purchase VISA or MasterCard gift cards with a check. RP 313-14. The check was declined and Spencer paid with cash. RP 314.

With respect to the May 29 transaction, identified as (3) above, Detective Sheskey testified that the video showed Rochelle Moore and

Spencer enter the Target store and.Moore purchase a netbook computer with a prepaid VISA card. RP 314-15.

With respect to the June 4 Puyallup transaction identified as transaction (6) above, Detective Sheskey testified that Yolanda Carlson, Konstance Kendrick, and the defendant entered the Target store. RP 316. Carlson made a purchase using a personal check. RP 317.

Kendrick then appeared to attempt to make a separate purchase, identified as transaction (4) above, of gift cards using a check, but the check was declined. RP 318.

With respect to the June 4 Graham transaction, identified as (5) above, Detective Sheskey testified that the video showed Yolanda Carlson, apparently holding the purse marked as exhibit 91, attempting to purchase gift cards with a personal check. RP 320-21. The check was declined. RP 321. The three then got into a green Audi. RP 319-20.

With respect to the June 5 transaction, identified as (2) above, Detective Sheskey testified that the video showed Carlson getting out of that Audi, and then attempting to make a purchase with a personal check that was declined. RP 320-21.

Carlson was ultimately arrested while in that green Audi. RP 322.

After listening to some of the defendant's telephone calls from jail, Detective Thomas Williams gathered enough information for a search warrant of the defendant's car, which he identified as the green 1990 Audi Quatro. RP 325-26, 331-32. He and Detective Casey Hayes then served

that warrant, finding 61 pieces of evidence, including (1) Amanda Sheppler's Washington state driver's license (exhibit 1), (2) a Washington state driver's license belonging to Taylor Pritchard, (exhibit 2), (3) a Washington state intermediate driver's license for Kristin O'Neil (exhibit 3), (4) an Oregon driver's license for Meagan Casey (exhibit 4), (5) a Washington state driver's license for Navara Dickson (exhibit 5), (6) a Washington State Driver's license issued to Steven Daffer (exhibit 6), (7) a military identification card for Kimberly Panach (exhibit 7), (8) a social security card for Taylor Kathleen Barnes (exhibit 8), (9) social security cards for AJ John Robert, John Robert, John S. Robert, Joana John Robert, Joma Siam Robert, and Atheilia Leah Robert (exhibits 9, 10, 12, 13, 15, 17) in a black bag in the trunk, (10) a social security card in the name of Teresa Congemi, (11) two checks in the name of Theresa Congemi, Samuel A. and Kendra Barns (exhibits 16 and 28), and (12) insurance cards in the name of Nickolas Fraizer and Stephanie Fraizer (exhibits 20, 21), (13) a social security card in the name of Gavin Barnes (exhibit 14), (14) a social security card in the name of Kenra Barns (exhibit 48), RP 330-43, (15) U.S. Bank checks in the name of John W. Johnson and Lisa A. Johnson (exhibits 29, 31), (16) Timberland Bank checks purportedly drawn on an account belonging to Kaitlin Chaput and Susan M. Lewis (exhibit 27), (17) a check purported drawn on an account belonging to Jessica K. Dill, Stephanie M. Fraizer, and Craig Wollmershauser (exhibit 25), (18) a checkbook for an account belonging to Joanne Strand (exhibit

24), (19) identification and a social security number of Brandy Brandenburg (exhibit 32, 60), (20) approximately 50 pages of blank checks (exhibit 33), (21) Checksoft, check-making computer software, contained on a DVD-ROM (exhibit 35), (22) two laptop computers (exhibits 94, 95), (23) checks in the name of Bethany C. Parker (Exhibit 22), (24) a checkbook issued to Susan M. Lewis (exhibit 23), (25) a Bank of America card with a routing and checking account number (exhibit 55), (26) an Oklahoma State Department of Helath nurse's aide certification bearing the name Stephanie Fraizer (exhibit 56), (27) an Oklahoma State Department of Helath nurse's aide certification bearing the name Stephanie Quintano (exhibit 56, 57), and (28) a U.S. Bank bag (exhibit 53) 354-67. It would be possible to use the laptop computers, check making software, blank checks, and printer seized in this case to make checks. RP 363.

Williams was able to either contact or confirm that Sheppler Pritchard, O'Neil, Dickson, Daffer, the Roberts, the Fraizers, the Johnsons, Chaput, Dill, Strand, Brandenburg, and Lewis were real people. RP 334-39, 342-43, 351-59.

Teresa Congemi[1] testified that her social security card, two IPods, a GPS system, $600 in cash, a purse, and wallet were stolen from her car. RP 47-48. She did not know the defendant and testified that he had no

[1] Ms. Congemi had married by the time of trial, and taken the surname, Fillingame. RP 46.

right to possession of her social security card. RP 48. Congemi examined exhibit 58, a personal check that purported to be drawn on a supposed joint account belonging to Congemi, John Johnson and Lisa Johnson. RP 49-50. Congemi testified that she had never had an account with John and Lisa Johnson and did not know who they were. RP 50. The check was made payable to Carquest, dated March 24, 2012, and signed "Teresa Congemi," but Congemi testified that she had never been to Carquest and that the signature on the check was not her signature. RP 50-51.

Jessica Dill testified that a checkbook, some change, a pair of sunglasses, and a firearm were stolen in May, 2012. RP 102-03. She examined exhibit 25, which purported to be a check drawn on a joint Bank of America account owned by her, her husband, and a woman named Stephanie Fraizer. RP 103-04. Dill testified that she did not know Fraizer and had no knowledge of such an account. RP 104-05.

Lisa Johnson testified that her husband's truck had been broken into and that tools and checks were stolen from that truck sometime in 2012. RP 152-53, 157. Johnson identified books of checks, marked as exhibits 29 and 31, as being associated with a joint checking account she owned with her husband. RP 152-54, 156. She also examined a personal check marked as exhibit 58, and testified that, while it had her checking account number printed on it, it also had an additional name, that of Teresa Congemi, added to it, which was not on the account itself. RP 154-55.

Amber Craig testified that in April, 2012, her purse, wallet, an IPod and a camera were stolen from her vehicle. RP 161. She examined exhibit 91B and testified that it was her driver's license. RP 160. She also examined exhibit 91C, and identified it as an apparent personal check with the names Lindsey Jensen and Brian P. Jensen listed on it. RP 162. She did not know either person. RP 162. Nor did she know the defendant, and testified that he would not have a right to be in possession of her driver's license. RP 163-64.

Megan Brooke Casey testified that her car was broken into in Spring, 2010, and that Oregon State identification card was among items stolen from inside. RP 167-68.

Amanda Sheppler testified that her vehicle was broken into in May, 2012 and that her purse was stolen from inside. RP 170-72. Her driver's license and two debit cards were among the items in that purse. RP 172. She identified exhibit 1 as her driver's license. RP 171.

Brian Jensen testified that he was married to Lindsey Jensen. RP 391. In June 2012, their car was broken into and checks were stolen from inside. RP 392.

Kristin O'Neil testified that, sometime around June, 2011, her wallet was stolen from her car while it was parked on South Tacoma Way in Tacoma. RP 424. Her Washington State identification card, debit card, credit card, and some cash were taken with it. RP 423-24.

Jose Melendez worked as a store manager at Carquest auto parts store on 38th Street in Tacoma in March, 2012. RP 427-28. On March 24, 2012, two men and one woman came into the store to order parts for a 1990 Audi V8 Quattro. RP 428. They paid for the items with a check drawn on an account owned by Teresa Congemi. RP 428-31.

Carlson testified that she was the one who wrote the check, posing as Congemi. RP 457-58. She used a stolen check. RP 458. The defendant and a second man were with her at the time. RP 457-58.

The bank told Melendez that the check was stolen, and Melendez called the police. RP 43-34.

Melendez prepared a recording of surveillance video taken of the transaction, which showed that the defendant was one of the two men who tried to purchase the auto parts with the stolen check. RP 434-442 (exhibit 59A).

Carlson testified that the defendant, who was her boyfriend, called while he was in jail pending trial in this case and asked her to write letters to his attorney stating "that he had nothing to do with the charges that came from the car." RP 479-81. Carlson testified that he did not have anything to do with these charges. RP 481. However, Carlson also testified that the defendant "could have" told her not to testify in his trial. RP 482.

C. ARGUMENT.

1. DEFENDANT FAILED TO PRESERVE THE ISSUE OF WHETHER EVIDENCE SEIZED FROM HIS MOTEL ROOM AND GATHERED AS A RESULT OF HIS ARREST SHOULD HAVE BEEN SUPPRESSED BY FAILING TO MOVE FOR ITS SUPPRESSION BELOW.

While a party may generally "raise manifest error affecting a constitutional right for the first time on appeal" under RAP 2.5(a)(3), "'[a] failure to move to suppress evidence... constitutes a waiver of the right to have it excluded.'" ***State v. Lee***, 162 Wn. App. 852, 857, 259 P.3d 294 (2011) (*citing* ***State v. Mierz***, 72 Wn. App. 783, 789, 866 P.2d 65, 875 P.2d 1228 (1994) (*citing* ***State v. Tarica***, 59 Wn. App. 368, 372-73, 798 P.2d 296 (1990), *overruled on other grounds by* ***State v. McFarland***, 127 Wn.2d 322, 337 899 P,.2d 1251 (1995))). *See* ***State v. Baxter***, 68 Wn.2d 416, 423, 413 P.2d 638 (1966)

Thus, where a defendant does "not move to suppress the evidence at trial, the defendant "d[oes] not preserve the issue for review and [this Court will] not address it for the first time on appeal." ***Lee***, 162 Wn. App. at 857.

The purpose of this rule 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.***

Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011) (*quoting* ***State v. Scott***, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)).

There is an exception to the rule only when a defendant makes a suppression challenge for the first time on appeal following substantive changes in the law. *See* ***Lee***, 162 Wn. App. at 856. Thus, the above

> principles of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant and (4) the defendant's trial was completed prior to the new interpretation.

State v. Robinson, 171 Wn.2d 292, 305, 253 P.3d 84 (2011).

In ***Robinson***, "police conducted warrantless vehicle searches that were arguably illegal under [***Arizona v. Gant***, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)], and ***State v. Patton***, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009)." ***Lee***, 162 Wn. App. at 856. "Because the facts of ***Robinson*** met all four conditions, our Supreme Court held that issue preservation was 'simply not applicable' there," and "remanded the cases on review for suppression hearings." *Id.* (*citing* ***Robinson***, 171 Wn.2d at 307).

Such is not the case here. Here, none of these conditions were satisfied. *See* Brief of Appellant (BOA), p. 1-38. Nor did the defendant

move to suppress the evidence found in the motel room or as a result of his arrest prior to or at trial. *See* RP 1-640; BOA, p. 17. Therefore, he did not preserve these issues for review, and this Court should not address them for the first time on appeal. *See* ***Lee***, 162 Wn. App. at 857.

Rather, the defendant's convictions should be affirmed.

2. ASSUMING *ARGUENDO* THAT THE ISSUES WERE PRESERVED, THERE WAS NO VIOLATION OF DEFENDANT'S FOURTH AMENDMENT OR ARTICLE I, SECTION 7 RIGHTS BECAUSE DISCOVERY OF THE EVIDENCE IN QUESTION WAS MADE IN OPEN VIEW AND ITS SUBSEQUENT SEIZURE JUSTIFIED BY A SEARCH WARRANT AND DEFENDANT'S FELONY ARREST IN PUBLIC WAS SUPPORTED BY PROBABLE CAUSE.

Even had Defendant properly preserved the issue of whether evidence should have been suppressed, neither his Fourth Amendment nor Article I, Section 7 rights were violated here.

a. <u>The discovery of the evidence in the motel room was made in open view and its seizure justified by a search warrant</u>.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause."

Article I, section 7 of the Washington State Constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Evidence obtained in violation of these provisions is not admissible in court. ***Mapp v. Ohio***, 367 U.S. 643, 82 S. Ct. 23, 7 L. Ed. 72 (1961); ***State v. Afana***, 169 Wn.2d 169, 180, 233 P.3d 879 (2010).

However, "[a]s a prerequisite to claiming an unconstitutional search, a defendant must demonstrate that he or she had a reasonable expectation of privacy in the item searched." ***State v. Hamilton***, 179 Wn. App. 870, 882, 320 P.3d 142 (2014).

"Generally, a motel guest has the same expectation of privacy ***during his tenancy*** as the owner or renter of a private residence." ***State v. Davis***, 86 Wn. App. 414, 937 P.2d 1110 (1997) (*citing* ***Stoner v. California***, 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L. Ed. 2d 856 (1964); ***State v. York***, 11 Wn. App. 137, 141, 521 P.2d 950 (1974)) (emphasis added); ***State v. Ramirez***, 49 Wn. App. 814, 817, 746 P.2d 344 (1987).

However, a motel room guest's expectation of privacy in the motel room "does not survive the expiration of the tenancy, unless the motel has accepted late payment and/or tolerated overtime stays in the past." ***Davis***, 86 Wn. App. at 419. After the expiration of a guest's tenancy, "the

innkeeper acquires the right to control the premises... and can consent to a warrantless search by law enforcement." *Id.*

"[A] warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement." ***State v. Patton***, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Similarly, "[t]he 'authority of law' requirement of article I, section 7 is satisfied by a valid warrant, subject to a few jealously guarded exceptions." ***State v. Afana***, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010).

For example, "[w]hen a law enforcement officer observes something in open view from a lawful vantage point, the observation is not a 'search' triggering the protections of article I, section 7." ***State v. Swetz***, 160 Wn. App. 122, 134, 247 P.3d 802 (2011) (*citing* ***State v. Kennedy***, 107 Wn.2d 1, 10, 726 P.2d 445 (1986) and ***State v. Seagull***, 95 Wn.2d 898, 901, 632 P.2d 44 (1981)). *Accord* ***State v. Cardenas***, 146 Wn.2d 400, 308, 4 P.3d 127 (2002). Similarly, "[e]vidence discovered in 'open view' is not the product of a "search" within the meaning of the Fourth Amendment." ***State v. Louthan***, 158 Wn. App. 732, 746, 242 P.3d 954 (2010) (*citing* ***State v. Perez***, 41 Wn. App. 481, 483, 704 P.2d 625 (1985) (*citing* ***State v. Seagull***, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981))).

Indeed,

> [u]nder the "open view" doctrine, there is no search because a government agent's "'observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public.'" ***Seagull***, 95 Wash.2d at 902, 632 P.2d 44 (*quoting* ***State v. Kaaheena***, 59 Haw. 23, 28-29, 575 P.2d 462 (1978)). Accordingly, the object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution. ***State v. Kennedy***, 107 Wash.2d 1, 10, 726 P.2d 445 (1986).

State v. Louthan, 158 Wn. App. 732, 746, 242 P.3d 954 (2010).

In the present case, the defendant was not a registered guest of the motel and did not seem to have any possessory interest in the motel room at the time of the search.

Contrary to the defendant's present assertion that he "was legitimately on the premises as an overnight guest," BOA, p. 18, the evidence showed that the room had been rented by Konstance Kendrick, not the defendant. RP 95-96, 222. The room itself was rented for only two days and Kendrick was scheduled to check out of that room on June 6, 2012, RP 95-96, 485, the day police served a search warrant upon it.

According to Yolanda Carlson, who was present with Kendrick when she rented the room, Kendrick left the room at or prior to the defendant's arrival and did not return. RP 484-85. It was then Carlson, who had not rented the room and was apparently not a registered guest, who invited the defendant to stay in the room. RP 486.

Moreover, when police responded to the motel in the late morning of June 6, the date Kendrick's tenancy expired, the motel manager told Officer Henley that the defendant and his group were no longer welcome on the property. RP 81, 97-98. Hensley communicated this to the defendant, stating that he or his group return, they would be arrested for trespassing. RP 97-98.

While "a motel guest has the same expectation of privacy ***during his tenancy*** as the owner or renter of a private residence." ***Davis***, 86 Wn. App. 414, given that the defendant did not rent the room, was apparently not a registered guest, and was only invited to stay in the room by a non-registered guest, he may never have been a legitimate guest of the Morgan Motel. If not, he never had any expectation of privacy in that room, and his 4th amendment and Article I, section 7 rights could not have been violated by a search of that room.

Assuming *arguendo* that he was a guest of the motel and had an expectation of privacy in the room, his tenancy expired before the search at issue occurred. If it hadn't ended by virtue of the original leasehold agreement requiring Kendrick to vacate the room on the day the police arrived, RP 95-96, 485, it ended when the motel manager informed Defendant, via police, that he was no longer welcome on the property, and that he would be arrested for trespassing if he returned. RP 81, 97-98.

Because service of the search warrant occurred after this, *see* RP 95-99, the defendant could not have had a reasonable expectation of privacy in the room when it was searched. *See* ***Davis***, 86 Wn. App. at 419. Therefore, his 4th amendment and Article I, section 7 rights could not have been violated by a search of that room.

However, assuming that Defendant had a reasonable expectation of privacy in that room, neither of these rights were violated because the discovery of the evidence in question was made in open view, and its subsequent seizure justified by a search warrant.

Officer Lopez Sanchez testified that he responded to the area to investigate a report of two suspects trying to "use a check that was determined to be stolen" at the Rite Aid store next to the Morgan Motel. RP 19-20. He then saw two people who matched the suspect descriptions provided by Rite Aid personnel standing outside of the motel room in which Defendant was located. RP 19-21. When he pulled up and told them to stop, both ran, and one ran into the room in which Defendant was sitting. RP 19-21. Officer Cockcroft, who came to assist, then approached the room, when the door opened, and the male suspect walked out. RP 24-26, 29-30, 82-83, 89. Cockcroft arrested him and searched him incident to that arrest. RP 24-25, 40, 82-84.

Given that this took place next to the open motel room door, and that the motel itself had been the scene of many crimes, including

homicides, Officer Lopez Sanchez was concerned for the officer's safety, and stood next to that door while the male was being arrested. *See* RP 23-24, 43, 45.

It was from this position, outside the motel room, that Lopez Sanchez observed "things out in the open [in the motel room] that [were] significant to the case [police] w[ere] investigating," including "lots" of "ripped up checks," drug paraphernalia, and syringes. RP 24-25, 40. Officer Lopez Sanchez saw a couple different names on these torn-up checks. RP 26.

Because Officer Lopez Sanchez made this observation "in open view from a lawful vantage point, the observation is not a 'search' triggering the protections of article I, section 7." ***Swetz***, 160 Wn. App. at 134, or the Fourth Amendment. ***Louthan***, 158 Wn. App. at 746. Therefore, neither provision could have been violated by the observations of Lopez Sanchez.

Although Defendant argues that the officer's testimony that he observed the names on the ripped up checks from outside the room "strains credulity," BOA, p. 20, his conclusion of the officer's credibility is irrelevant. There is nothing in the record to suggest that the officer was lying. Nor was there anything to suggest that he could not see the names on the checks. Lopez Sanchez was standing just outside the motel room door at the time, and at least some of the checks were "in a garbage can

that was right inside the room." RP 40, 43. Thus, the circumstances described by the officer tend to corroborate his statement.

Moreover, his observation provided probable cause for issuance of the subsequent search warrant.

Probable cause exists where the "facts and circumstances [are] sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at the place to be searched." ***State v. Thein***, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

Here, Lopez Sanchez observed a man who had just tried to use a stolen check run into the defendant's motel room. He saw "lots" of "ripped up checks" in different people's names, drug paraphernalia, and syringes sitting in that room along with the defendant. RP 24-26, 40. One could reasonably infer from the facts that (1) the man who ran into the room had just tried to use a stolen check and (2) the "lots" of checks in different people's names inside that room, that this man and "the defendant [were] probably involved in criminal activity and that evidence of the crime may be found [in the motel room]." ***Thein***, 138 Wn.2d at 140. Moreover, one could reasonably infer from the presence of the drug paraphernalia that they were using stolen or fraudulent checks to gain money for illicit drug purchases and use. *See* RP 405-06, 471.

Thus, the observations of Lopez Sanchez provided probable cause for the search warrant for the room, which was then obtained by Detective Hayes. RP 177-81, 186.

Although officers prevented others from entering the room after Carlson and the defendant left it, *see, e.g.*, RP 98-99, 186-87, where probable cause exists, officers may lawfully seize and secure premises in order to preserve the status quo while others, in good faith, are in the process of obtaining a search warrant. ***State v. Solberg***, 66 Wn. App. 66, 77-78, 831 P.2d 754 (1992), *rev'd on other grounds*, 122 Wn.2d 688, 861 P.2d 460 (1993) (*citing* ***Segura v. U.S.***, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984) *and* ***State v. Ng***, 104 Wn.2d 763, 713 P.3d 63 (1985)). *See* ***Illinois v. McArthur***, 531 U.S. 326, 121 S.Ct. 946, 148 L. Ed. 2d 838 (2001).

Thus, even assuming that Defendant had a reasonable expectation of privacy in the motel room, the discovery of the evidence in question was made in open view, the room itself lawfully secured pursuant to probable cause pending the issuance of a search warrant, and the evidence then lawfully seized pursuant to that warrant.

While the defendant argues for the first time on appeal that "prior to obtaining a search warrant, officers seized items from [his] motel room," BOA, p. 20-21, there is no testimony in the record to support this

contention. Defendant simply states that Detective Canion testified that he found the torn checks "already bagged in a police evidence bag and set on a chair," BOA, p. 21, and concludes from this that "[i]t is clear that at least one officer entered the room prior to the search warrant and began seizing items." BOA, p. 21.

The problem with Defendant's argument is that this is not at all clear. Detective Hayes did testify that while serving the search warrant, he found checks inside a police evidence bag on a chair next to the garbage can. RP 217. However, there were at least three detectives, Hayes, Pendrak, and Canion, involved in the service of that warrant, RP 187, and it is not clear whether Canion or Pendrak bagged these checks during the warrant service, prior to Hayes coming upon them. This is especially true given that Pendrak did not testify at trial.

While the defendant notes that "[t]he State produced no witness who could testify how the items came to be bagged before the warrant was executed," BOA, 21, the State was not required to do so. Because the defendant made no motion to suppress in the trial court, the State was not required to justify its search and seizures; it was simply required to prove its case beyond a reasonable doubt.

More than indicating possible nefarious police activity, the defendant's argument illustrates that by failing to raise the issue below, he

failed to preserve it here. Because the State was not made aware that this was an issue, it did not have the opportunity, before or during trial, to clarify how the ripped checks came to be bagged.

"If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown, and the error [if any] is not manifest." ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Therefore, RAP 2.5(a)(3), which allows a party to raise a "***manifest*** error affecting a constitutional right" for the first time on appeal would not apply, and Defendant failed to preserve the issue of whether his Fourth Amendment or Article I, section 7 rights were violated here.

Regardless, there is no direct evidence in the record that any officer searched the motel room or seized any evidence prior to obtaining and serving the search warrant for that room.

Because that warrant was based on probable cause gathered through a lawful open view, neither the defendant's Fourth Amendment nor Article I, Section 7 rights were violated.

Therefore, his convictions should be affirmed.

b. <u>The defendant's ultimate warrantless arrest was supported by probable cause</u>.

Even had Defendant properly preserved the issue of whether evidence obtained as a result of seizure of his person should have been

suppressed, neither his Fourth Amendment not Article I, Section 7 rights were violated here.

Under the Fourth Amendment and article I, section 7,

> a person is seized " 'only when, by means of physical force or a show of authority' " his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter[.] The standard is a "a purely objective one, looking to the actions of the law enforcement officer." [The defendant] has the burden of proving that a seizure occurred in violation of article I, section 7.

State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (citations omitted).

Under Article I, section 7 of the Washington State Constitution, and the Fourth Amendment to the federal constitution, "[a] police officer may make a warrantless felony arrest in a public place so long as it is supported by probable cause." ***State v. Solberg***, 122 Wn.2d 688, 696, 861 P.2d 460 (1993); ***Virginia v. Moore***, 553 U.S. 164, 128 S.Ct. 1598, 170 L. Ed. 2d 559 (2008). *See* RCW 10.31.100.

While probable cause to make a warrantless arrest does not provide a basis for non-consensual entry into a residence, *see, e.g.*, ***Payton v. New York***, 445 U.S. 573, 100 S. Ct. 1371, 1380, 63 L. Ed. 2d 639 (1980), "[p]olice may make a warrantless arrest of a suspect, if it is based upon probable cause, when the suspect voluntarily exits his or her residence to

speak to officers." ***Solberg***, 122 Wn.2d 688, 696-701, 861 P.2d 460 (1993).

Police may also conduct a valid " warrantless, investigatory stop, or ***Terry*** stop," if there are must be "specific and objective facts that provide a reasonable suspicion that the person stopped has committed or is about to commit a crime." ***State v. Cardenas-Muratalla***, 179 Wn. App. 307, 309, 319 P.3d 811 (2014). "In determining whether an investigatory stop and frisk is reasonable, courts look at the totality of the circumstances." ***Cardenas-Muratalla***, 179 Wn. App. at 309.

However, transporting a suspect to a police station converts an investigative detention into a custodial arrest. ***State v. Gonzales***, 46 Wn. App. 388, 396, 731 P.2d 1101 (1986) (*citing* ***Florida v. Royer***, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)). *Cf.* ***State v. Williams***, 102 Wn.2d 733, 737, 689 P.2d 1065 (1984).

In the present case, the defendant argues that police "officers unlawfully entered and removed [him] from his motel room" and "unlawfully detained him by handcuffing him and transporting him to the police station for an interview, without specific and articulable facts pointing to him having committed a crime." BOA, p. 23-24. The record shows otherwise.

First, it shows that officers did *not* unlawfully enter or remove the defendant from the motel room. RP 68-70. *See* RP 448. Officer Wurges testified that he was speaking with the defendant from outside the room when he asked the defendant for identification, and that the defendant stepped out of the room and provided it to him. RP 67-68, 70.

While this was occurring, another officer had detained Carlson and apparently searched her backpack, RP 70, which contained at least five other people's identification cards, another person's social security card, and personal checks or parts of personal checks drawn on accounts in other people's names. RP 35-37. That officer then spoke to Wurges while Wurges was with the defendant outside the motel room. RP 70. Wurges got the sense from this conversation that Carlson was the defendant's girlfriend. RP 70.

It was only then that Officer Hensley took physical custody of the defendant, and escorted him to a police car. RP 70. Wurges indicated that, at this point, the defendant was "not free to leave," but was not handcuffed. RP 71. The defendant was, "at some point" thereafter placed in handcuffs, and "eventually taken to the police station for questioning." RP 72.

Therefore, contrary to Defendant's assertion, officers did not unlawfully enter or remove him from the motel room.

However, by the time the defendant voluntarily exited that room to speak with Officer Wurges, officers had probable cause to arrest him.

"Probable cause exists when an officer has reasonable grounds to believe a suspect has committed or is committing a crime based on circumstances sufficiently strong to warrant that conclusion." ***State v. Gonzales***, 46 Wn. App. 388, 395, 731 P.2d 1101 (1986). "The test is one of reasonableness, considering the time, place, and circumstances and the officer's special expertise in identifying criminal behavior." ***Gonzales***, 46 Wn. App. at 395.

Here, the defendant had been found sitting in a motel room into which a man had fled from police after trying to use a stolen check and in which there were "lots" of other "ripped up checks" in other people's names. RP 21, 24-25, 40. The only other person in the room was the defendant's apparent girlfriend, RP 70, who left that room with a backpack with at least five other people's identification cards, another person's social security card, and personal checks or parts of personal checks drawn on other peoples' accounts. RP 35-37.

An officer, who is assumed to have some "special expertise in identifying criminal behavior," ***Gonzales***, 46 Wn. App. at 395, could have reasonably inferred that the checks found throughout Defendant's room, and drawn on other people's accounts were, like the check used by the suspect who ran into the room, likely stolen or forged. This seems especially likely given that the occupants of that room may have taken measures to destroy or hide them. Officers could have inferred this from

the facts that by the time Bellue, Jr. re-emerged from the room, these checks were "ripped up." RP 21, 24-25, 40.

Moreover, the defendant was seen in at least constructive possession of these stolen or forged checks.

A person is in "constructive possession if he or she has dominion and control over the item." ***State v. Jones***, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002)." "Dominion and control means that the object may be reduced to actual possession immediately." ***Jones***, 146 Wn.2d at 333. Because the defendant was sitting with his girlfriend in a small motel room with "lots" of these checks, he could have reduced some or all to actual possession, and was therefore, in constructive possession of them.

Given that it was reasonable to infer that these checks, drawn on accounts in other people's names, were stolen or forged, and Defendant was seen in possession of them, officers had "reasonable grounds to believe [the defendant] ha[d] committed or [wa]s committing a crime," ***Gonzales***, 46 Wn. App. at 395, such as second degree possessing stolen property, RCW 9A.56.140(1), or forgery, RCW 9A.60.020(1)(a), RCW 9A.56.160(1)(c). They, therefore, had probable cause to arrest the defendant.

Because that arrest did not occur until after the defendant voluntarily exited the room, RP 6-70, and because "[p]olice may make a

warrantless arrest of a suspect, if it is based upon probable cause, when the suspect voluntarily exits his or her residence to speak to officers," ***Solberg***, 122 Wn.2d at 696-701, the defendant's arrest was lawful under both the Fourth Amendment and Article I, section 7.

Therefore, the defendant's convictions should be affirmed.

3. REGARDLESS OF THE MAJOR ECONOMIC OFFENSE SENTENCE ENHANCEMENT, DEFENDANT'S EXCEPTIONAL SENTENCE SHOULD BE AFFIRMED BECAUSE IT WAS BASED ON AN INDEPENDENT AGGRAVATING CIRCUMSTANCE, WHICH THE SENTENCING COURT FOUND TO BE A SUFFICIENT BASIS FOR THAT EXCEPTIONAL SENTENCE.

"A trial court may sentence a defendant to an exceptional sentence if (1) the jury finds by special verdict, beyond a reasonable doubt, one or more aggravating factors alleged by the State; and (2) the trial court determines that the facts are substantial and compelling reasons justifying an exceptional sentence." ***State v. Hayes***, 177 Wn. App. 801, 806, 312 P.3d 784 (2013), *review granted by* ***State v. Hayes***, 180 Wn.2d 1008, 325 P.3d 913 (2014). "To reverse an exceptional sentence, [an appellate court] must find either that the trial court record does not support the sentencing court's articulated reasons, ***that those articulated reasons do not justify a sentence outside the standard range for that offense***, or that the length of

the exceptional sentence was clearly excessive." ***Hayes***, 177 Wn. App. at 807 (emphasis added).

This Court in ***State v. Hayes***, 177 Wn. App. 801, held that "a major economic offense sentence enhancement" could not "be imposed when the trial court instructed the jury that the underlying conviction could be based on accomplice liability" because "the major economic offense sentence enhancement does not indicate legislative intent to extend the enhancement to accomplices."

Here, Defendant argues, based on ***Hayes***, 177 Wn. App. 801, that "because 30 of the counts allowed the jury to convict based on accomplice liability, the major economic offense sentence enhancement should be vacated for those counts," and presumably asks this Court to remand for resentencing. BOA, p. 28.

However, the sentencing court did not impose an exceptional sentence on 30 counts; it imposed an exceptional sentence on only one count: count X of cause number 12-1-02120-3. *See* CP 451-67, 863-82, 914-18; RP 637-38. Moreover, even assuming *arguendo* that this or all major economic offense enhancements should be vacated there would be no need to remand for resentencing.

When a court bases an exceptional sentence on an invalid factor, remand is not required if "the record clearly indicates the court would

have imposed the same sentence absent the factor." ***State v. Hooper***, 100 Wn. App. 179, 188, 997 P.2d 936 (2000). *See* ***State v. Post***, 118 Wn.2d 596, 616–17, 826 P.2d 172, 837 P.2d 599 (1992).

In its conclusions of law for exceptional sentence, the sentencing court specifically found that

> [t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished (i.e., "free crimes"). This is a substantial and compelling reason that justifies an exceptional sentence above the standard range in this case. This reason has been proved beyond a reasonable doubt. ***This reason independently justifies an exceptional sentence.***

CP 917. It went on to state that "[t]he appropriate sentence for the defendant's conduct under Cause No. 12-1-02120-3" was "225 months on count 10." CP 918.

Thus, "the record clearly indicates the court would have imposed the same sentence absent the [challenged major economic offense] factor," ***Hooper***, 100 Wn. App. at 188, and the matter need not be remanded for resentencing.

Rather, though this Court may vacate the major economic offense enhancements, it should otherwise affirm the defendant's sentence, including his 225-month exceptional sentence.

4. DEFENDANT'S CONVICTIONS SHOULD BE AFFIMRED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. ***State v. Lopez***, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" ***State v. Brockob***, 159 Wn.2d 311, 336, P.3d 59 (2006) (*quoting* ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt." ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (*quoting* ***State v. Myers***, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable

inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, "[d]eterminations of credibility are for the fact finder and are not reviewable on appeal." ***Brockob***, 159 Wn.2d at 336; ***State v. Locke***, 175 Wn. App. 779, 788-89, 307 P.3d 771, 776 (2013).

Where the offense at issue is an alternative means crime, the right to a unanimous jury verdict found in article I, section 21 of the Washington State Constitution requires that there be either "sufficient evidence to support each of the alternative means of committing the crime" or "a particularized expression of jury unanimity." ***State v. Owens***, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

In the present case, the defendant makes two arguments.

a. <u>There was sufficient evidence of count X of cause number 12-1-021203, leading organized crime</u>.

The defendant first contends that there was insufficient evidence of count X of cause number 12-1-02120-3, leading organized crime, BOA, p. 28-32. The record shows otherwise.

The trial court instructed the jury that

> [t]o convict the defendant of the crime of leading organized crime as charged in Count X, each of the

following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the period between the 24th day of May, 2012 and 6th day of June, 2012, the defendant organized, managed, directed, supervised or financed three or more persons in the commission of the crimes of identity theft, forgery, possession of stolen property, unlawful possession of payment instruments, and/or unlawful possession of instruments of financial fraud.

(2) That the defendant acted with the intent to engage in a pattern of criminal profiteering activity;

(3) That at least one of the acts contained within the elements listed above occurred in the State of Washington.

CP 63-121 (instruction no. 43)[2]. *See* RCW 9A.82.060(1)(a).

However, here the defendant assumes that leading organized crime is an alternative means crime requiring proof that he "[1] organized, [2] managed, [3] directed, [4] supervised, [and] [5] financed three or more persons," and agues that there was insufficient evidence that he "supervised" or "organized" such persons. BOA, p. 29-32.

His argument is premised on *obiter dictum* in ***State v. Strohm***, 75 Wn. App. 301, 879 P.2d 962 (1994). BOA, p. 29. In ***Strohm***, Division One assumed, without authority or discussion, that leading organized crime was an alternative means offense. ***Strohm***, 75 Wn. App. at 305. However, the issue of whether leading organized crime was an alternative means crime was not before the Court.

---

[2] The defendant did not object to this instruction, *see* RP 536, 538-44, and it therefore, became the law of the case. *See* ***State v. Hickman***, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

In ***Lindsey*** this Court "decline[d] to follow... dicta in ***Strohm***," ***State v. Lindsey***, 177 Wn. App. 233, 243, 311 P.3d 61 (2013), and the Supreme Court ultimately decided that, at least with respect to Divison One's conclusion that former RCW 9A.82.050(2) was an alternative means crime with eight alternative means was, ***Strohm*** was wrongly decided. ***State v. Owens***, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014).

This Court should decline to follow ***Strohm***'s dictum here, as well. Leading organized crime is not an alternative means crime.

"An alternative means crime is one 'that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.'" ***State v. Peterson***, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (*quoting* ***State v. Smith***, 159 Wn.2d 778, 784 P.3d 873 (2007)). "Because the legislature has not defined what constitutes an alternative means crime, whether a statute provides an alternate means for committing a particular crime is left to judicial determination." ***Lindsey***, 177 Wn. App. at 240. Hence, decisional law "suggest[s] some guidelines for analyzing the alternative means issue." *Id.* Among these guidelines are the following: (1) "[m]erely stating methods of committing a crime in the disjunctive does not mean that there are alternative means of committing a crime"; (2) "[d]efinitional statutes do not create additional alternative means for a crime," and (3) "a

statute divided into subparts is more likely to be found to designate alternative means." *Id.* at 240-41.

RCW 9A.82.060(1)(a) provides that "(1) A person commits the offense of leading organized crime by: (a) ***Intentionally*** organizing, managing, directing, supervising, or financing any three or more persons ***with the intent*** to engage in a pattern of criminal profiteering activity" (emphasis added). Reviewing this statute as a whole indicates it does not set forth an alternative means crime for at least two reasons.

First, the placement of the word "[i]ntentionally" suggests that the legislature intended only one means of committing the crime, that of "leading organized crime," and that the terms "organizing, managing, directing, supervising, or financing" simply define "leading organized crime." The word "[i]ntentionally" clearly relates to all the terms in the first part of the statute – "organizing, managing, directing, supervising, or financing"- as a group. If each of these words was interpreted as standing on its own, the "[i]ntentionally" requirement would apply only to "organizing." Similarly, the phrase "any three or more persons" relates to each of these words– "organizing, managing, directing, supervising, or financing"- as a group. As this Court noted in ***Lindsey***, in a parallel analysis of RCW 9A.82.050(1), "[t]reating these terms as a group indicates that they represent multiple facets of a single means of

committing the crime" rather than alternative means unto themselves. ***Lindsey***, 177 Wn. App. at 241.

Second, this group of five terms, like the group of seven terms in RCW 9A.82.050(1), "relate to different aspects of a single category of criminal conduct": here, "leading organized crime." *Id.* at 241-42. They are too closely related to one another to define distinct acts in themselves. For example, one would have trouble "managing" without also "directing" or "supervising." *See* ***Owens***, 180 Wn.2d at 99. "As a result, these terms appear to be definitional," and, "[a]s noted above, definitional statutes do not create multiple alternative means for a crime." *Id.* at 241-42.

Thus, RCW 9A.82.060(1)(a) does not define an alternative means crime, and there need not be either sufficient evidence to support each of the five terms listed there or "a particularized expression of jury unanimity." ***State v. Owens***, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

There need only be sufficient evidence of leading organized crime by "organizing, managing, directing, supervising, ***or*** financing three or more persons in the commission of the crimes of identity theft, forgery, possession of stolen property, unlawful possession of payment instruments, ***and/or*** unlawful possession of instruments of financial fraud." CP 108 (emphasis added). There was.

The jury had before it Moore's statements and testimony (1) that the defendant would pay money to people for stolen checkbooks and IDs, RP 401-02, and (2) that he and Yolanda Carlson would then make checks or use a computer to alter stolen checks. RP 402-03, 409.

Moore testified that the checks were being made so that they could use them to purchase gift cards at Target or Safeway. RP 405-06. They would buy either store gift cards or prepaid VISA cards. RP 407. Moreover, contrary to Defendant's assertion that "the State presented no evidence that Spencer participated in any way" beyond merely being present, BOA, p. 30, Moore testified that she, Spencer, the defendant, and Carlson would then sell these cards for cash. RP 405-07.

Thus, there was evidence that the defendant organized a group of "three of more persons in the commission of the crimes of identity theft, forgery, possession of stolen property, unlawful possession of payment instruments, ***and/or*** unlawful possession of instruments of financial fraud." CP 108. There was also evidence that he directed the roles they would play within that enterprise. There was evidence that the defendant organized and directed a group of people to steal or otherwise acquire stolen checks and identification documents. RP 401-02. There was evidence that he organized, if not directed, a group consisting of at least Carlson, Moore, and Spencer to produce forged or altered checks from the

stolen checks so acquired. RP 402-03, 409, 417. There was evidence that he organized, if not directed, a group consisting of Carlson, Moore, and Spencer to use these forged or altered checks to buy prepaid gift cards, which were then sold at a profit. RP 405-07.

In other words, contrary to defendant's present contention, there was evidence that the defendant "organiz[ed" or "direct[ed]... three or more persons in the commission of the crimes of identity theft, forgery, possession of stolen property, unlawful possession of payment instruments, ***and/or*** unlawful possession of instruments of financial fraud," CP 108, and thus, there was sufficient evidence of the first element of leading organized crime.

Because Defendant makes no challenge to the sufficiency of evidence supporting the remaining elements, there was sufficient evidence from which a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, 'viewing the evidence in the light most favorable to the State.'" ***State v. Brockob***, 159 Wn.2d 311, 336, and Defendant's conviction for leading organized crime should be affirmed.

b. There was sufficient evidence of possession to sustain the convictions of unlawful possession of payment instruments, unlawful possession of instruments of financial fraud, identity theft, and possessing stolen property.

The defendant argues that there was no evidence that he "obtained, used, or possessed a means of identification of financial information necessary for a conviction of identity theft in the second degree, or unlawfully possessed payment instruments, instruments of financial fraud, or stolen property." BOA, p. 33-34. The record shows otherwise.

It included Moore's statements and testimony that the defendant paid money to people for stolen checkbooks and IDs, RP 401-02, and that he and Yolanda Carlson would then use these stolen checks to produce forged or altered checks. RP 402-03, 409.

Hence, it had direct evidence that the defendant obtained, used, and possessed the "means of identification of financial information," the "payment instruments, instruments of financial fraud, [and] stolen property," BOA, p. 33-34, underlying his convictions of unlawful possession of payment instruments, unlawful possession of instruments of financial fraud, identity theft, and possessing stolen property.

Because "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom,"

Cannon, 120 Wn. App. at 90, this evidence must be assumed to be true. When it is, there is sufficient evidence from which a "rational trier of fact could have found the essential elements of the crime[s at issue] beyond a reasonable doubt,'" ***Brockob***, 159 Wn.2d at 336, P.3d 59 (2006).

Therefore, the defendant's convictions should be affirmed.

5. DEFENDANT'S EXCEPTIONAL SENTENCE SHOULD BE AFFIRMED BECAUSE THE SENTENCING COURT PROPERLY ENTERED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ITS EXCEPTIONAL SENTENCE IN CAUSE NUMBER 12-1-02120-3.

RCW 9.94A.535 provides that "[w]henever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law."

In this case, the court imposed an exceptional sentence of 225 months in total confinement on count X of cause number 12-1-02120-3. CP 451-67. *Compare* CP 863-82. While Defendant argues that this Court "should not uphold" his exceptional sentence because "the trial court did not enter any written findings of fact or conclusions of law," BOA, p. 35-36, the record shows otherwise.

It shows that the trial Court entered findings of fact and conclusions of law supporting its exceptional sentence as required by RCW 9.94A.535. CP 914-18.

Therefore, Defendant's exceptional sentence should be affirmed.

6. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE HAS FAILED TO SHOW THAT HIS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT.

"Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X)." ***State v. Yarbrough***, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); ***State v. Johnston***, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. ***Yarbrough***, 151 Wn. App. at 89.

"Washington has adopted the ***Strickland*** test to determine whether a defendant had constitutionally sufficient representation." ***State v. Cienfuegos***, 144 Wn.2d 222, 25 P.3d 1011 (2001) (*citing* ***State v. Bowerman***, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also* ***State v.***

McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "First, the defendant must show that counsel's performance was deficient" and "[s]econd, the defendant must show that the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; ***Cienfuegos***, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Hendrickson***, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); ***In Re Personal Restraint of Rice***, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "A failure to establish either element of the test defeats an ineffective assistance of counsel claim." ***Riofta v. State***, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

The first prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Specifically, "[t]o establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness." ***Johnston***, 143 Wn. App. at 16. "The reasonableness of trial counsel's performance is reviewed in light of all the circumstances of the case at the time of counsel's conduct." *Id.*; ***State v. Garrett***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). "Competency of counsel is determined

based upon the entire record below." ***State v. Townsend***, 142 Wn.2d 838, 15 P.3d 145 (2001) (*citing* ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); ***State v. Gilmore***, 76 Wn.2d 293, 456 P.2d 344 (1969).

With respect to the second prong, "[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Cienfuegos***, 144 Wn.2d at 229.

In the present case, Defendant argues that his trial counsel's performance was deficient for failing "to challenge [admission of evidence found during] the initial entry and search" of the motel room or the search warrant. BOA, p. 36-38.

To prevail on a claim of ineffective assistance of counsel based on a failure to object to or otherwise "challenge the admission of evidence, the defendant must show (1) "the absence of legitimate strategic or tactical reasons supporting the challenged conduct," (2) "***that an objection to the evidence would likely have been sustained***, and (3) that the result of the trial would have been different had the evidence not been admitted." ***State v. Saunders***, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (emphasis added). *Accord* ***State v. Contreras***, 92 Wn. App. 307, 312, 966 P.2d 915 (1998). *See* ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662

(1989). Thus, when the alleged deficiency is a failure to move to suppress, the defendant "must show that the trial court likely would have granted a motion to suppress the seized evidence based on an unlawful warantless search." ***State v. Hamilton***, 179 Wn. App. 870, 882, 320 P.3d 142 (2014).

Here, as demonstrated above, because neither the Defendant's Fourth Amendment nor Article I, section 7 rights were violated, the trial court could not have granted a motion to suppress the seized evidence.

Therefore, Defendant has failed to show ineffective assistance of counsel and his convictions should be affirmed.

D. CONCLUSION.

Defendant failed to preserve the issue of whether evidence seized from his motel room and gathered as a result of his arrest should have been suppressed, because he failed to move for its suppression below.

Even had he preserved the issue, there was no violation of Defendant's 4th amendment or Article I, section 7 rights because discovery of the evidence in question was made in open view and its subsequent seizure justified by a search warrant. Likewise, the defendant's ultimate felony arrest was lawful because it was made in public and supported by probable cause.

Even were the major economic offense sentence enhancements vacated, Defendant's exceptional sentence should be affirmed because it was based on an independent aggravating factor, which the sentencing court found to be a sufficient basis for that exceptional sentence.

Defendant's convictions should be affirmed because, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt.

Defendant's exceptional sentence should be affirmed because the sentencing court properly entered findings of fact and conclusions of law supporting it.

Finally, Defendant has failed to show ineffective assistance of counsel because he has failed to show that his trial counsel's performance was deficient.

Therefore, Defendant's convictions and sentences should be affirmed.

DATED: JULY 18, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney

BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

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

July 18, 2014 - 3:24 PM

Transmittal Letter

Document Uploaded: 452324-Respondent's Brief.pdf

Case Name: STATE V. FRANK SHANNON BELLUE

Court of Appeals Case Number: 45232-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

marietrombley@comcast.net