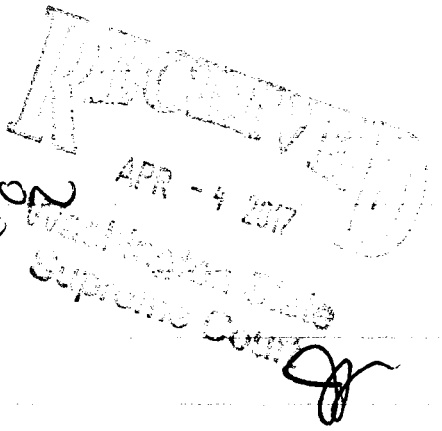
NO. 94249-8

The Supreme court of washington
State



State of washington
respondent

V.

Earl Polley
petitioner

on appeal from the Superior court of the State of washington for Pierce County

Brief of Petitioner

Earl Polley
petitioner

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2) The State failed to prove beyond a reasonable doubt that Mr. Polley committed forgery.

3) The trial court abused its discretion in admitting cell phone texts without a proper foundation.

4) Mr. Polley was denied his right to present a defense by the trial court suppressing other suspect evidence.

5) Mr. Polley was denied his right to present a defense by the trial court suppressing exculpatory evidence.

Issues Presented on Appeal

1.) Did the State fail to prove beyond reasonable doubt that Mr Polley committed Identity fraud where there was insufficient evidence connecting him to the Stolen Items?

2.) Did the State fail to prove beyond a reasonable doubt that Mr. Polley committed forgery where there was insufficient evidence connecting him to the checks in the backpack?

3.) Did the trial court abuse its discretion in admitting cell phone texts without a proper foundation when no one could verify that the cell phone number belonged to Mr. Polley?

4.) Was Mr. Polley denied his right to present a defense by the trial court suppressing other suspect evidence including evidence that others were charged with possessing the same personal Identification and finacial information located in the backpack?

5.) Was Mr Polley denied his right to present a defense by the trial court suppressing exculpatory evidence?

Earl Polley was charged with driving with a suspended license third degree, forgery, and nine counts of Identity theft against: Debbie Anderson, Aaron Bedeken, Willie Horace (deceased), Scott Jester, Ronald Chrum, Keith Jester, David Estes, Brandon Cohen, Christopher Lennox, and Brittany Radar. CP 1-6. Mr. Polley was convicted as charged. CP 66-67, 78-92

A. Trial facts

Someone obtained, possessed, and used personal and financial information regarding a large group of people, named as victims in this case. CP 1-6. Doreen Silvernail, Mr. Polley's aunt found a backpack in her garage where Mr Polley's father resided. RP 136. She believed the backpack belonged to one of her grandchildren. RP 139. Mr. Polley was not permitted to stay in the garage, but Ms. Silvernail saw him come onto her property and enter the garage in march 2015. RP 137-38.

Inside the backpack Ms. Silvernail discovered personal and financial information regarding many people she did not know, including, checks, mail, W-2 Forms, driver's licenses, and Social Security cards. RP 141.

Ms. Silvernail did not recollect seeing any mail addressed to Mr. Polley inside the backpack, but the police located mail addressed to Mr. Polley at 10415 Broadway Avenue South, Tacoma Washington the same address on his suspended driver's license. RP 142, 223, 293-94. there was also mail addressed to Mr. Polley at 308 197th St. E Spanaway, wa 98387, but Mr. Polley never recieved any mail at that address, RP 217-223, 478.

Ms. Silvernail asked Mr. Polley's Father for Mr. Polley's cell phone number. RP 142.

Ms. Silvernail made a telephone call to the number and texted to that number a message indicating that if the backpack was not retrieved by 10:00 she would call the Sheriff. RP 112, 146-147.

Ms. Silvernail called the Sheriff because no one retrieved the backpack. RP 148, 164. Prior to the Police arriving, Ms. Silvernail emptied the contents of the backpack onto her living room Table. RP 164-65. Officer Alexa Moss reviewed the material which contained different Social Security cards, Identity cards, bank accounts from different banks in others names, checks made out to Mr. Polley and Steve McClendon, credit cards, W-2-forms, Sears accounts, money grams, public Storage business cards with a gate access code

and mail addressed to Mr. Polley. RP 162-248. The backpack also contained checks numbered #21506 and #21526 with Mr. Polley's name and a signature.

Officer Moss could not determine who wrote Mr. Polley's name on any of the documents or checks, and none of the checks with Polley's name on them had been cashed. RP 251. The Police did not attempt to conduct any fingerprint or DNA analysis on the backpack or its contents. RP 249. The police also did not present any handwriting analysis to determine who wrote the checks with Mr. Polley's and Mr. McClendons names.

Mr. Polley unsuccessfully moved to admit evidence regarding Daniel Espinoza and Rachel Thorsness who were also charged with Identity fraud related to the contents of the backpack. RP 6-21

b. Cell Phone text.

On grounds of lack of a foundation, the defense unsuccessfully moved to suppress a cell phone text allegedly sent to Mr. Polley from Ms. Silvernail, and allegedly responded to by Mr. Polley. RP 75-80. Ms. Silvernail made a Telephone call to a number Mr. Polley's father

gave her. RP 105-07, 146-47. Ms. Silvernail was not sure that the number was actually Mr. Polley's. Id. In response to the call, someone texted: "who is this?" RP 110-11, 113, 146-47. In response, Ms. Silvernail texted: "your aunt you're always leaving things here, I am not happy with what I found. you need to get your things out now. if you dont get your things tonight, I will turn them over to the Sheriff" RP 110-11, 146-47 "you have until 10:00." RP 110-11, 146-47. In response to those texts, someone texted. "yep. will, and there is no way you could have found it was put away." and if I had a ride, I would have already been there to get the backpack." "wow" RP 110-11, 146-47. Ms. Silvernail never had any other communication from the person with whom she texted. RP 112, 148.

c. Trial facts continued

Deputy Sheriff Chad Helligso contacted Mr. Polley on march 27, 2015 while Mr. Polley was driving a friend's car. RP 344. Mr. Polley was arrested for driving with a suspended license and read his miranda rights. RP 357-58. Helligso testified

That he informed Polley that he was going to Jail regarding an Item left at a relative's house. RP 360, 444-45. the officer testified that he never mentioned a "backpack". RP 360-62. Mr. Polley testified that Hellgso informed him that a backpack was left at his aunts house. RP 444-45

All of the named victims, Testified that they did not know Mr. Polley and never gave him permission to obtain or use any of their personal or financial information. RP 191-92, 255-280, 298-312, 335-340, 374-389.

Mr. Polley Testified that he had never seen the backpack, or it contents. Id Mr. Polley has received mail at 10415 broadway Ave. South Tacoma, wa 98444 but never at 308 197th Street South, Spanaway, wa 98444. RP 468.

Mr. Polley testified that the cell phone number his aunt used was not his. RP 412-446. Mr. Polley never gave his father his cell phone number, Ms. Silvernail never called him and Mr. Polley never received a telephone call or texts from ms. Silvernail, RP 412-446

1.) The State failed to Prove beyond a Reasonable doubt the elements of the Nine Counts of Identity theft in the Second degree.

The State failed to prove beyond a reasonable doubt that Mr. Polley committed nine counts of Identity theft in the Second degree.

Due process requires the State to prove every element of the charged beyond a reasonable doubt. (State v. Kalebaugh, 183 wn.2d 578, 584, 355 P.3d 253, (2015). To determine if the State Presented Sufficient evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (State v. Condon, 182 wn.2d 307, 314, 343 P.3d 357 (2015).

An appellant's claim of insufficient evedence admits the truth of the States evidence and "all inferences that reasonably can be drawn from it. (Condon, 182 wn.2d at 314) (Alteration in original) (quoting State v. Salinas, 119 Wbn.2d 192, 201, 829 P.2d 1068 (1992)).

To Prove Identity theft in the second degree under Rcw 9.35.020, the State must establish beyond a reasonable doubt that Mr. Polley knowingly obtained, possessed, used, or transferred a means of Identification or finacial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime. Rcw 9.35.020(1). (State v. Sells, 166 wn. App. 918, 923, 271 P.3d 952 (2012), review denied, 176 wn.2d 1001 (2013)). The State must prove that the defendant intended to commit a crime. (State v. Fedorov, 181 wn. App. 187, 197-98, 324 P.3d 784, review denied, 181 wn.2d 1009 (2014)).

Possession alone does not support an inference of intent to commit a crime. (State v. Vasquez, 178 wn.2d 1, 8, 309 P.3d 318 (2013)). When intentent is an element of a crime, it may be inferred "if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability." Vasquez, 178 wn.2d at 8 (internal quotations omitted). In Vasquez the Court instructed that although intent is typically proved from circumstantial evidence, it may not be inferred from evidence that is "patently equivocal."

Rather, the State must offer possession together with some corroborating evidence. Vasquez, 178 Wn.2d at 8 In, Vasquez. the Issue was whether the evidence was sufficient to show the intent to injure or defraud that is needed to prove forgery. Vasquez, 178 Wn.2d at 13. The Court held that the defendants possession of forged Identification cards alone was not sufficent to prove the necessary intent, and noted that the defendants ready admission to a Security gaurd that the cards were forged refuted the intent that he intended to defraud the gaurd. Vasquez, 178 Wn.2d at 14-16.

Here, the State did not prove; (1) that polley possesd other persons personal finacal and Identification information; (2) with intent to commit a crime. the State proved that there were many finacal and Identification documents in a backpack in Mr. Polleys aunt's garage. the State did not however prove beyond a reasonable doubt that the backpack Containg this Contraband belonged to Mr. Polley or that he had even possessed the backpack.

The police did not attempt to take fingerprint evidence. The police did not attempt to obtain a signature analysis and there was no one who could identify the backpack as belonging to Mr. Polley.

Mr. Polley testified that after his arrest, the officer informed him that he was being arrested based on the contents of a backpack left at a relatives. RP 444-45 The officer testified that he never mentioned a "backpack". RP 360-62. regardless, Mr. Polley's response that he had a backpack later described as camouflage, did not establish that Polley possessed the non-camouflage backpack in the aunt's garage RP 415. Mr. Polley was adament that he never possessed any of the items retrieved from the backpack his aunt located in her garage. Rp 416-44, 470-77, 481.

According to Ms. Silvernail, She texted to a cell number She obtained from Polley's father. RP 142. Ms. Silvernail admitted that She could not verify that the number belonged to Mr. Polley's cell phone and She also admitted that She did not know who texted her in response to her telephone call. RP 143-44 after She called the number given by

Mr. Polley's father, MS. Silvernail received a text stating "who is this?". RP 145. after MS. Silvernail Identified herself she never received confirmation that Mr. Polley was the person responding. RP 148. Mr. Polley testified that his father did not have his cell phone number and Mr. Polley never received a text from his aunt. RP 413-14.

This information taken in the light most favorable to the State does not support an inference beyond a reasonable doubt Mr. Polley possessed the backpack containing the personal information of other persons.

2) The State failed to prove beyond a Reasonable doubt the elements of fraud.

To prove fraud, the State was required to prove:

(1) A person is guilty of forgery if, with intent to injure or defraud,
(A) he or she falsely makes, completes, or alters a written instrument or,
(B) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.
Rcw. 9A.60.020.

like the Identity fraud charges, the State was unable to prove beyond a reasonable doubt that Mr. Polley possessed or altered the fraudulent checks. the evidence established that the checks were in the backpack in Ms. Silvernail's garage, but there was no Handwriting analysis, Dna or fingerprints analysis to connect Mr. Polley, the backpack and checks.

Even when viewing the evidence in the light most favorable to the State, the reasonable inferences do not establish the essential elements of the crime of forgery. Rather the State presented evidence to establish the mere possibility that Mr. Polley was involved in the forgery- which is insufficient to establish the essential elements beyond a reasonable doubt. Condon, 182 Wn. 2d at 314.

3) Mr. Polley was Prejudiced by the trial Court's abuse of discretion in Admitting evidence of cell phone texts without a Proper foundation

over repeated objection, the trial court allowed the State to Present the content of

Text messages Ms. Silvernail received from a cell phone she believed was Polley's but in fact she did not know who sent the texts, RP 143; Exhibit 41, 42. The State asserted, but could not prove that these texts were sent by Mr Polley. RP 105-156. Mr. Polley argued unsuccessfully that the State had not presented sufficient proof of authenticity of the texts or the Identity of the Sender. RP 119-23.

A trial court's admission of evidence is reviewed for abuse of discretion. (State v. Mogers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008)). Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds. Mogers, 164 Wn.2d at 181. the purpose of authentication is to establish that "the thing" authenticated is what it purports to be. (State v. Monson, 113 Wn.2d 833, 837, 784 P.2d 485 (1989).)

Pursuant to Er 901(a) "the requirement of authentication or Identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims". This requirement

is met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." (State v. Bradford, 175 Wn. App. 912, 928, 308 P.3d 736 (2013)), review denied, 179 Wn.2d 1010, 316 P.3d 494 (2014)) (citing State v. Danielson, 37 Wn. app. 469, 477, 681 P.2d 260 (1984)).

For example, in Bradford, Division One found that the State introduced sufficient evedence to support a finding that text messages read to the Jury and contained in an examination report had been authenticated and were what the State purported them to be, namely text messages written and sent to a stalking victims friend by the defendant (Bradford, 175 Wn. app. at 928.) the evidence included testimony that: for a substantial period of time, Bradford telephoned the victim and appeared at her place of employment on a frequent basis; Bradford also regulary appeared outside of the victims house; and the content of the texts messages themselves indicated that Bradford was the individual who sent them. Bradford, 175 Wn. App. at 928-29.

The State charged Mr. Polley with identity theft, which it attempted to confirm by virtue of the text message it attributed to Mr Polley indicating that Ms. Silvernail could not have found the backpack. Without the text messages, there was NO factual support connecting Mr Polley to the backpack and insufficient evidence connecting Mr. Polley to these charges and convictions.

Unlike in Bradford, the State did not provide sufficent supporting evidence that Mr. Polley was the individual responsible for sending the text messages to Ms. Silvernails cellular phone. Silvernail did not know Mr Polleys telephone number, She obtained the number from Mr Polley's father who did not testify, and Mr Polley testified that his father did not have his cell phone number. RP 413

Mr Polley also Presented evidence that he had a different cell phone number. RP 413. that State did not present any evidence that Mr. Polley owned or ever possessed the phone that the text messages were sent from

There was simply no evidence to establish that the texts messages were actully what they purported to be

Accordingly, the State failed to sufficiently authenticate the text messages, and the trial court erred by admitting them over defense objection to Mr Polley prejudice.

a. Error Prejudical

This court will reverse an error in admitting evidence where the error is prejudical to the defendant. (State v. Thomas 150 wn.2d 821, 871, 83 P.3d 970 (2004)). when the error is based on violation of an evidentiary rule rather than a constitutional mandate, the reviewing Courts apply the test where evidentiary error is prejudicial when within reasonable probabilities the trial's outcome would have differed had the error not occured because there was insufficient evidence connecting Mr Polley to the backpack and its contents.

4.) The Trial Court denied Mr Polley his due process right to present a defense.

The trial court violated mr Polley's right to present a defense by prohibiting him from introducing Other Suspect evidence and exculpatory evidence.

The Court reviews a trials court decision to admit or exclude evidence for abuse of discretion. (State v. Franklin, 180 WN. 2d 371, 377 N.2, 325 P.3d 159, (2014)) The Court reviews the denial of this Sixth amendment right de novo, (State v. Jones. 168 WN. 2d 713, 719, 230 P.3d 576 (2010)). an erroneous evidetary ruling that violates the defendants constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. Franklin; 180 WN. 2d at 377 N.2; (State v. Dye, 178 WN. 2d 541, 548, 309 P.3d 1192 (2013)). Both the Sixth amendment of the United States constitution and article 1, Section 22 of the washington constitution gaarantee the criminal defendants right to present a defense. (State v. Starbuck, 189 WN. App. 740, 750 355 P.3d 1167 (2015) review denied 185 WN. 2d 1008 2016.)

A criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence. (Starbuck 189 Wn. App. at 750)

The Standard for the relevance of other suspect evidence is whether it tends to connect someone other than the defendant with the crime. Franklin, 180 Wn. 2d at 381; (State v. Downs 168 Wn 664, 667, 13 P. 2d 1 (1932)). Before the trial court admits "other suspect" evidence, the defendant must present a combination of facts or circumstances pointing to a non-speculative link between the other suspect and the crime. Franklin, 180 Wn. 2d at 381. the inquiry focuses on whether the evidence tends to create a reasonable doubt as to the defendant's guilt, and not on whether it establishes the the third party's guilt beyond a reasonable doubt.

The defendant bears the burden of establishing the relevance and materiality of "other suspect" evidence. Starbuck, 189 Wn. App. at 750-51. in establishing a foundation for admission, the defendant must show a clear nexus between the other

person and the crime. Id. The proposed evidence also must show that the third party took a step indicating an intent to act on the motive or opportunity to commit the crime. The defendant must show more a possibility that the third party committed the crime. (State v. Rehak, 67 Wn App. 157, 163, 834 P. 2d 651 (1992)).

a) The court ruling Prohibiting other suspect evidence violated Polley's right to Present a defense.

The trial court erred because Mr. Polley demonstrated motive and opportunity by both other suspects and Thorsness was charged with Identity fraud. RP 8. The trial court in this case excluded evidence showing that other people had both the motive and opportunity to commit the crimes. more than that, the excluded evidence. Taken together, amounts to a chain of circumstances that tends to create reasonable doubt as to Polley's guilt

Here, the "other Suspect" evidence would have provided several important facts to support Mr. Polley's defense. First, Tina James recieved Mr. Polley's mail for 3 years but that ended and She gave all of his mail and documents To a third Party She believed was Taking those Items to Ms. Silvernails house. RP 7-8. Second, MS. Silvernail called 911 to report that a friend of Mr. Polley's, Mr. Espinoza, dropped off the backpack at her house, RP 8. Third Rachel Thorsness and Mr. Espinoza were also Charged with possessing one of the victims, Brittany Rader's Identifying information. RP. 8.

The evidence is a more than vague link between the other Suspects and the Crimes, it is a clear Nexus between Thorsness and espinoza and the Crimes. The evidence also Shows that Thorsness and Espinoza Committed a Crime and possessed Identifying information and also indicates an intent to act on the motive or opportunity to Commit more Identity theft Crimes. This evidence is more than a mere possibility that Thorsness and Espinoza Committed the Crimes

The other evidence that James and Espinoza along with Ms. Silvernail knew That Someone else dropped off the backpack, when viewed as a whole, creates a reasonable doubt as to Mr Polley's guilt. Accordingly, the trial court abused its discretion in denying other suspect evidence to Mr Polley's prejudice.

Contrary to the Courts ruling that Mr. Polley could argue reasonable inferance from the evidence, he could not in any manner present his defense with out the other suspect evidence RP 8-9

b The Error was not Harmless.

The trial courts error directly affected Polley's right, under both the State and federal constitutions, to present witnesses on his own behalf. Franklin, 180 Wn. 2d at 382. The error is therefore constitutional in natere,

Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. a Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable Jury would have reached

The same result in the absence of the error. (State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

Here, the State could not connect mr. Polley to the backpack. No one saw mr. Polley deliver the backpack. The State did not have any fingerprint, or Dna evidence, or handwriting analysis, evidence connecting mr. Polley to the backpack, and the other suspect evidence creates reasonable doubt that the Jury could have reached the same verdict had it know of these other suspects and heard the other evidence that someone else dropped of the backpack at ms. Silvernails house.

The trial court's refusal to permit this evidence denied Mr Polley his right to explain that someone else delivered the backpack, and others were charged with Identity fraud related to some of the same victims This was prejudicial because if the Jury had been allowed to consider all of the other suspect evidence, It may have reached a different verdict

Accordingly, the trial court erred in excluding other suspect evidence in this case, and the error was not harmless beyond a reasonable doubt

D) Conclusion

I Mr. Polley respectfully request this court reverse and dismiss the Nine Identity theft and one Forgery conviction for insufficient evedence in the alternative, to satisfy due process, I request reversal and remand for a new trial.

Dated this day 29TH march 2017

Earl Polley

Earl Polley
appellant

Filed
Washington State
Court of Appeals
Division Two

February 28, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EARL ALVIN POLLEY, Appellant.	No. 48289-4-II UNPUBLISHED OPINION

LEE, J. — Earl Alvin Polley was convicted of 10 counts of second degree identity theft, one count of forgery, and one count of third degree driving with a suspended license. On appeal, Polley argues that (1) the trial court abused its discretion in admitting text messages without proper foundation and in not admitting other suspect evidence; (2) the State presented insufficient evidence to convict Polley on all of the identity theft and forgery charges; (3) the trial court abused its discretion in failing to investigate alleged juror misconduct; and (4) he received ineffective assistance of counsel when his counsel failed to move for mistrial or to voir dire when the potential juror misconduct was alleged.

We hold that (1) the trial court did not abuse its discretion in making the challenged evidentiary rulings; (2) the evidence presented was sufficient to convict Polley on all of the identity theft and forgery counts; (3) the trial court did not abuse its discretion in failing to inquire into the alleged juror misconduct; and (4) Polley fails to allege or argue that he was prejudiced by his attorney's claimed ineffectiveness. Accordingly, we affirm.

FACTS

A. THE INCIDENT

On March 18, 2015, Polley's aunt, Doreen Silvernail, found an unfamiliar backpack in her garage. Polley's father, Earl Thomas, lived in Silvernail's garage and, despite Silvernail's orders to Thomas that Polley was not allowed on the property, Silvernail caught Thomas letting Polley into the backyard by the garage about a week before the backpack was discovered. Silvernail assumed the backpack belonged to one of her several grandchildren who lived in the area, so she brought it inside her house. Silvernail opened the backpack and discovered checks, mail, W-2 forms, driver's licenses, and Social Security cards. At this point, Silvernail suspected the backpack belonged to Polley and asked Thomas for Polley's phone number.

Silvernail called the number and got an automated voicemail. A short time later, Silvernail received a text message from the number asking, "Who's this," to which Silvernail responded,

> Your aunt. I found the backpack and opened it as my grandson is always leaving things here. I am not happy with what I found. You need to . . . get your things out now. If you don't get your things tonight, I will turn . . . them over to the sheriff.

3 Verbatim Report of Proceedings (VRP) at 146 (internal quotations omitted). The response was, "Yep i will n their [sic] is no way u could have found it was put away n if i had a ride i would have already been there to get the back pack [sic]." Clerk's Papers (CP) at 50; *see* 3 VRP at 147. Silvernail reported the incident to law enforcement later that day, and Pierce County Sheriff's Deputy Alexa Moss responded.

Deputy Moss took the backpack and its contents into evidence. In the backpack, law enforcement found financial documents, personal information, mail, and checks belonging to Robert Hoover, Steven McClendon, Jason Lisonbee, Flor Rivera, Peter Dorros, Joesph Baley,

Keith Jester, Dina Franz, Myong Chin, Judson Webb, Michael Lawrence, Aaron Bedker, Willie Horace, Debbie Anderson, Scott Jester, Ronald Chrum, David Estes, Brandon Cohen, Christopher Lennox, and Britney Rader.

On March 27, Polley was stopped by police for driving a vehicle registered to an individual with outstanding warrants. Polley was driving with a suspended driver's license. Polley was arrested and read his *Miranda*[1] rights. Polley acknowledged that he understood his rights and wished to speak with the arresting officer. Polley asked the arresting officer if he was under arrest for driving with a suspended license. The arresting officer told Polley that he was under arrest "for items that he left at a relative's house," not mentioning that the item was a backpack or that it was left at Silvernail's home. 4 VRP at 360. Polley replied, "That wasn't [his] backpack." 4 VRP at 362. When the officer asked Polley what backpack Polley was talking about, Polley said, "The one at my aunt's house." 4 VRP at 362 (internal quotations omitted).

B. THE CHARGES

Polley was charged with 10 counts of second degree identity theft (counts I, III-X, and XII), one count of forgery (count II), and one count of third degree driving with a suspended license (count XI). Counts I and II were for the articles recovered from the backpack that related to Debbie Anderson. These articles included mail addressed to Anderson, checks associated with her Sears MasterCard, and two checks made payable to Polley "for work." 3 VRP at 168. Anderson testified that she had never written a check to Polley, Polley had never done any work for her, she did not

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

know Polley, had not given Polley permission to possess her mail or use her name, and the signature on the checks purporting to be hers was not.

Count III was for articles recovered from the backpack that related to Aaron Bedker. These articles included mail addressed to Bedker, Bedker's driver's license attached to a letter from the Department of Licensing, and a check to be drawn from "Aaron Bedker Trucking, Inc." to "Michael Lawrence." 3 VRP at 206. The letter from the Department of Licensing had what appeared to be a credit card number and another number written on it. Bedker testified that he did not own the trucking company, did not know Polley, and had not given Polley permission to use his name or possess the articles recovered.

Count IV was for articles recovered from the backpack that related to Willie Horace. These articles included checks made out to Polley for "work," and to "Michael Lawrence." 3 VRP at 190-92. Horace died over three years before the checks purporting to be from him were dated.

Count V was for articles recovered from the backpack that related to Scott Jester. These articles included a notebook page containing personal financial information with Scott Jester's name, birthday, mother's maiden name, and Social Security number, along with several of Jester's credit card, debit card, and bank account numbers. Scott Jester testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count VI was for articles recovered from the backpack that related to Ronald Chrum. These articles included Chrum's driver's license, birth certificate, and certification of road test. There was also an e-mail address written on a piece of notebook paper that read "Chrum1971@hotmail." 3 VRP at 258. Chrum testified that he was born in 1971 but that he had

not created that e-mail address. Chrum further testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count VII was for articles recovered from the backpack that related to Keith Jester. Keith Jester is Scott Jester's son. These articles included a piece of notebook paper containing Keith Jester's account numbers, log-in names, routing numbers, birthdate, physical address, e-mail addresses, tax ID number, driver's license number, phone number, social security number, and partial debit card number. Keith Jester testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count VIII was for a W-2 form belonging to David Estes that was recovered from the backpack. Estes's W-2 form contained Estes's Social Security number, physical address, and wages. Estes testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count IX was for a W-2 form belonging to Brandon Cohen that was recovered from the backpack. Cohen's W-2 listed Cohen's Social Security number, wages, and other personal and financial information. Cohen testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count X was for a W-2 form belonging to Christopher Lennox that was recovered from the backpack. Lennox's W-2 listed Lennox's Social Security number, wages, physical address, and other personal and financial information. Lennox testified that he had never met Polley and had never given Polley permission to possess his personal information.

Count XI was for Polley driving with a suspended license when he was pulled over on March 27. Polley does not contest this charge, nor his subsequent conviction for it, in this appeal.

Count XII was for articles recovered from the backpack that related to Brittnay Rader. These articles included a checkbook with several blank checks purporting to be from Rader's bank account, and checks from the same account payable to Polley. Polley endorsed the back of one of the checks made payable to him. The checks had Rader's name at the top, but had a different address, a different phone number, and a signature that was not Rader's. Rader testified that she had never ordered these checks, did not know Polley, had never given Polley permission to possess her personal information, and had never given Polley permission to create a checking account or write a check in her name.

C. PROCEEDINGS

Before trial, Polley sought permission to introduce other suspect evidence. Specifically, Polley sought to introduce evidence relating to a person named Daniel Espinoza and another person named Rachel Thorsness. The trial court ruled against the other suspect evidence being proffered, stating, "There isn't the appropriate tendency to show that another person committed the crime." 1 VRP at 16. Based on the trial court's ruling, the State moved to excluded references to Espinoza and Thorsness. The trial court granted the State's motion excluding specific references to Espinoza and Thorsness.

Polley also objected to the admission of the text messages exchanged between Silvernail and the number Thomas provided to her as Polley's phone number. Polley argued that the State could not establish a foundation for Polley being the person responding to Silvernail in the text messages. The trial court admitted the text messages, stating that the defense was still entitled to

argue to the jury that someone other than Polley was the person responding to Silvernail's text messages.

At trial, Polley testified in his own defense. Polley testified that his father did not have his phone number, but he also recited a phone number to the court that he had given his father. Polley said that he did not receive a phone call or text messages from Silvernail at that phone number on March 18, 2015, and that he was not the person who responded to the text messages Silvernail had sent.

Additionally, Polley testified that the officer told him that he was under arrest for driving with a suspended license. Polley testified that he asked the arresting officer "if he was really taking me to jail for driving [with a suspended license] and he said, yeah. Then he said, and for something left at somebody's house." 5 VRP at 445. Polley said that when he asked the officer what it was, the officer responded, "A backpack." 5 VRP at 445 (internal quotations omitted).

Polley was convicted on counts I through XII as charged. After the verdict was read, Matthew Brooks, a friend of Polley's told defense counsel that he had seen juror 11 leaving a casino that morning intoxicated. Defense counsel made a record of Brooks's allegations regarding juror 11 and no further action was taken. Polley appeals.

ANALYSIS

A. EVIDENTIARY RULINGS

Polley argues that the trial court abused its discretion in admitting the text messages and excluding other suspect evidence. We disagree.

1. Standard of Review

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014); *State v. Young*, 192 Wn. App. 850, 854, 369 P.3d 205, *review denied*, 185 Wn.2d 1042 (2016). An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or is based on untenable grounds. *Young*, 192 Wn. App. at 854.

2. Text Messages

Polley argues the superior court abused its discretion in admitting the text messages because the State failed to lay a proper foundation. Specifically, Polley argues that the State did not provide sufficient evidence to support its assertion that Polley was the person who sent the text messages to Silvernail and that Polley would likely not have been convicted but-for the admission of the text messages. We hold the trial court did not abuse its discretion.

Polley's lack of foundation argument is grounded in ER 901, which requires authentication as a precondition for admissibility. "The requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). When considering verbal electronic transmissions, the "contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims." ER 901(b)(10). The methods for authenticating e-mails apply to text messages. *See Young*, 192 Wn. App. at 856 (citing *In re Det. of H.N.*, 188 Wn. App. 744, 759, 355 P.3d 294 (2015), *review denied*, 185 Wn.2d 1005 (2016)).

The party moving for admission of the evidence need only make a prima facie showing of authenticity for purposes of establishing admissibility under ER 901. A prima facie showing is made "'if the proponent shows enough proof for a reasonable fact finder to find in favor of authenticity.'" *In re H.N.*, 188 Wn. App. at 751 (quoting *State v. Payne*, 117 Wn. App. 99, 108, 69 P.3d 889 (2003), *review denied*, 150 Wn.2d 1028 (2004)). Challenges to authenticity go to weight of the evidence, not its admissibility. *Young*, 192 Wn. App. at 857.

In *Young*, this court held that the recipient's personal knowledge of the sender's phone number and the contents of the texts were sufficient evidence to permit a reasonable trier of fact to find that the defendant was the sender of the text messages. 192 Wn. App. at 857. The recipient of the text messages in *Young* had personal knowledge of the defendant's phone number because it was listed as a contact in the phone, and the content of the text messages corroborated the recipient's testimony describing the defendant's conduct. *Id.*

Here, the State made a prima facie showing of authenticity for the text messages. Silvernail testified that Thomas provided that number as Polley's phone number, establishing the personal belief that the phone number belonged to Polley. The contents, substance, and distinctive characteristics of the text message exchange further establish the prima facie showing. Silvernail responded to, "Who's this," with, "Your aunt" and a detailed explanation of the backpack and its contents, her presumption that the backpack and its contents belonged to Polley, and an order for Polley to come get the backpack and its contents or she would call law enforcement. 3 VRP at 145. The response of, "Yep i will n their [sic] is no way u could have found it it was put away n if i had a ride i would have already been there to get the back pack [sic]," shows confirmation of Silvernail's presumption and acquiescence to Silvernail's order. CP at 50; *see* 3 VRP at 147.

Polley's testimony that he did not respond to Silvernail's text messages and that his father did not have his phone number go to the weight of the evidence, not its admissibility. *Young*, 192 Wn. App. at 857. Therefore, we hold that the trial court did not err in admitting the text messages.

3. Other Suspect Evidence

Polley argues that the trial court erred in denying his motion to introduce other suspect evidence. We hold that the trial court did not err in excluding Polley's other suspect evidence.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the criminal defendant's right to present a defense. *State v. Starbuck*, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016). Alleging that a ruling violated the defendant's right to a fair trial does not change the standard of review from abuse of discretion, but an erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 377 n.2; *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). A criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence. *Starbuck*, 189 Wn. App. at 750.

The standard for the relevance of other suspect evidence is whether it tends to connect someone other than the defendant with the crime. *Franklin*, 180 Wn.2d at 381; *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932). Before the trial court admits "other suspect" evidence, the defendant must present a combination of facts or circumstances pointing to a nonspeculative link between the other suspect and the crime. *Franklin*, 180 Wn.2d at 381. The defendant bears the burden of establishing the relevance and materiality of other suspect evidence. *Starbuck*, 189 Wn. App. at 752. A showing that it was possible for the third party to commit the crime is insufficient.

State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, and *cert. denied*, 508 U.S. 953 (1993). Importantly, the inquiry focuses on whether the evidence tends to create a reasonable doubt as to the defendant's guilt, and not on whether it establishes the third party's guilt beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 381.

Here, Polley contends that the "other suspect" evidence would have provided that: (1) "Tina James received Mr. Polley's mail for three years but that ended and she gave all his mail and documents to a third party she believed was taking those items to Ms. Silvernail's house"; (2) "Silvernail called 911 to report that [Espinoza] dropped off the backpack at her house"; and (3) "Thorsness and Mr. Espinoza were also charged with possessing . . . Brittany Rader's, identification information." Br. of Appellant at 21. Polley's argument that the trial court erred in excluding the other suspect evidence fails because none of the evidence that Polley argues should have been admitted creates a reasonable doubt as to Polley's guilt.

At best, the evidence that Polley argues should have been admitted supports a theory that Espinoza and Thorsness may *also* be guilty, but does not create reasonable doubt as to Polley's guilt. *Franklin* holds that "other suspect" evidence is relevant where it "'tend[s] to connect' *someone other than the defendant* with the crime," 180 Wn.2d at 381 (quoting *Downs*, 168 Wash. at 677) (emphasis added), but that, when considering the admission of "other suspect" evidence, the proper focus is "'whether the evidence offered tends to create a reasonable doubt as to the *defendant's* guilt.'" 180 Wn.2d at 381 (quoting *Smithart v. State*, 988 P.2d 583, 588 & n.21 (Alaska 1999)). Therefore, we hold that the trial court did not err in excluding Polley's other suspect evidence.

B. SUFFICIENCY OF THE EVIDENCE

Polley argues that the State did not present sufficient evidence to convict him of identity theft or fraud. We disagree.

1. Standard of Review

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence. *Id.* All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.*

2. Identity Theft—Counts I, III-X, and XII

Polley first argues that the State did not present sufficient evidence to convict him of identity theft because the State did not present sufficient evidence to prove that (1) he possessed the victim's personal and financial information, and did so (2) with intent to commit a crime. In support, Polley argues that the State did not prove that the backpack belonged to him, nor that he ever possessed the backpack. We hold that State presented sufficient evidence to establish that Polley possessed the victim's personal and financial information with intent to commit a crime, especially as the truth of the State's evidence is admitted and all reasonable inferences are drawn in the State's favor.

RCW 9.35.020 proscribes identity theft. The statute states in relevant part:

> (1) No person may 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.
>
> . . . .
>
> (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.

RCW 9.35.020.

Here, the testimony presented by Silvernail, law enforcement, and the victims was sufficient to convict Polley on all counts of second degree identity theft. Where the truth of the State's evidence is admitted and the reasonable inferences are drawn in the State's favor, the evidence presented in Silvernail's testimony established that: (1) Silvernail found a backpack containing the victims' personal and financial information in her garage; (2) Silvernail assumed the backpack belonged to Polley, based on the several pieces of mail addressed to, and checks made out to, Polley in the backpack; and (3) Silvernail's suspicions were confirmed when Polley responded to Silvernail's text message acknowledging that the backpack was his, disputing how Silvernail could have found the backpack, and his intent to come retrieve the backpack. The testimony of the officer who arrested Polley is further evidence that the backpack belonged to Polley because it was Polley who identified the backpack at his aunt's house when being told he was under arrest "for items that he left at a relative's home." 4 VRP at 360. This evidence is sufficient for rational trier of fact to find that Polley possessed the victims' personal and financial information beyond a reasonable doubt.

The testimony of Deputy Moss and the victims, where truth of the evidence is admitted and the reasonable inferences therefrom are drawn in favor of the State, is sufficient for a rational trier of fact to find that Polley intended to use the victims' personal and financial information to commit a crime. Deputy Moss testified that the articles relating to each of the victims' personal and financial information were recovered from Polley's backpack. Each victim who was still alive testified that Polley was not given permission to use or possess the articles containing their personal and financial information. One victim did not testify, but the State presented evidence that the victim had passed away over three years before the checks purporting to be from him were dated. The reasonable inference that may be drawn from the numerous articles of personal and financial documents belonging to at least 12 people other than Polley,[2] where Polley did not have permission to be in possession of the articles belonging to at least the 10 victims, is that Polley was possessing the victims' personal and financial information with the intent to commit a crime.

Therefore, we hold that the State provided sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that Polley possessed the victims' personal and financial information with intent to commit a crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201. And, accordingly, we hold that Polley's challenges to the sufficiency of the evidence for his convictions for second degree identity theft fail.

[2] The 12 people are the 10 named victims plus "Steve McClendon" and "Michael Lawrence."

3. Forgery—Count II

Polley argues that the State did not present sufficient evidence to convict him of forgery because it did not present sufficient evidence to prove that he "possessed or altered the fraudulent checks." Br. of Appellant at 13. We hold that Polley's challenge to the sufficiency of the evidence for his conviction for forgery fails.

RCW 9A.60.020 provides in relevant part:

> (1) A person is guilty of forgery if, with intent to injure or defraud:
>
> (a) He . . . falsely makes, completes, or alters a written instrument or;
>
> (b) He . . . possesses, utters, offers, disposes of, or puts off as true a written instrument which he . . . knows to be forged."

Polley's argument is that "[t]he evidence established that the checks were in the backpack in Ms. Silvernail's garage, but there was no handwriting analysis, DNA or fingerprint analysis to connect Mr. Polley to the backpack and checks." Br. of Appellant at 13. However, for the same reasons explained in the preceding subsection, the State present sufficient evidence to establish Polley possessed the forged checks. *See* subsection 2, *supra* (reasoning that when the truth of the State's evidence is admitted and the reasonable inferences drawn in the State's favor, the State's evidence was sufficient to convince a rational fact finder that Polley possessed the backpack and its contents). Therefore, we hold that the State provided sufficient evidence to convince a rational trier of fact that Polley possessed the forged checks beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201. And, accordingly, we hold that Polley's challenge to the sufficiency of the evidence for his conviction for forgery fails.

C. JUROR MISCONDUCT

Polley argues he was denied his right to a fair trial when the trial court did not inquire into juror 11's fitness. We disagree.

RCW 2.36.110 governs the removal of unfit jurors and provides in pertinent part:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

Similarly, CrR 6.5 provides, "If at any time before submission of the case to the jury a juror is found unable to perform the duties[,] the court shall order the juror discharged."

Polley's argument fails because while the statute and court rule place an "obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror," they do not create obligations regarding the investigation of alleged misconduct. *State v. Jorden*, 103 Wn. App. 221, 227, 228-29, 11 P.3d 866 (2000), *review denied*, 143 Wn.2d 1015 (2001). Rather, the investigation and resolution of misconduct allegations are discretionary with the trial court. *Turner v. Stime*, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009) ("A trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct."). Thus, we hold that the trial court did not abuse its discretion here because the trial court and both attorneys had the opportunity to view juror 11 throughout the day's proceedings, and neither attorney nor the trial court determined further inquiry was warranted after the allegation was made. Therefore, because the trial court did not abuse its discretion for failing to inquire into the alleged misconduct, Polley's argument that he was denied a fair trial for the trial court's failure to inquire further fails.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Polley argues he received ineffective assistance of counsel when his defense attorney did not "move for a mistrial or move to voir dire" when the potential juror misconduct was alleged. Br. of Appellant at 28. We hold that Polley fails to establish he was prejudiced by his attorney's failure to make either motion, and therefore, Polley's argument fails.

The right to effective assistance of counsel is afforded to criminal defendants by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To establish ineffective assistance of counsel, Polley must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If Polley fails to establish either deficient performance or resulting prejudice, the court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). To establish prejudice, Polley must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335.

We hold that Polley's arguments that he received ineffective assistance of counsel fail because Polley fails to argue, or even allege, prejudice. *Hendrickson*, 129 Wn.2d at 78 (holding that failure to establish either deficient performance of prejudice is fatal to an ineffective assistance of counsel claim). Even if Polley had alleged prejudice, his claim would fail because he fails to show that either motion would have been granted had his attorney made either motion. Therefore, we hold that Polley's claim of ineffective assistance of counsel for his attorney's failure to move for a mistrial or to voir dire juror 11 fails.

In conclusion, we hold that the trial court did not abuse its discretion in making the challenged evidentiary rulings or in failing to inquire into the alleged juror misconduct; the evidence presented was sufficient to convict Polley on all of the identity theft and forgery counts; and Polley's ineffective counsel claim fails. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, A.C.J.

Melnick, J.