No. 33987-4-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SHANE SAYER MORGAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Judge Scott R. Sparks, III

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Shane Sayer Morgan appeals following a jury trial where he was found guilty of the following eight counts: second degree theft (count 1); second degree identity theft (counts 2, 5, 7); third degree theft (counts 3, 4); and attempted third degree theft (counts 6, 8).

Mr. Morgan first requests this Court reverse and dismiss with prejudice all of his convictions, because the evidence presented at trial was insufficient to convict him. In the alternative, Mr. Morgan requests his convictions be reversed and remanded for a new trial because: (1) the trial court erred in instructing the jury on alternative means that are not contained in the charging document on counts 1, 3, 4, 6, and 8; (2) the trial court violated his right to a unanimous jury verdict on counts 1, 3, 4, 6, and 8; (3) the trial court erred by failing to give a unanimity instruction for second degree identity theft, as charged in count 2; and (4) he received ineffective assistance of counsel when defense counsel's failed to object to the admission of Joshua Snyder's police interview.

At a minimum, Mr. Morgan requests the case be remanded for resentencing so Counts 5 and 7 can be counted as one crime (as same criminal conduct), and because his sentence exceeds the 60 month statutory maximum for the crimes. Mr. Morgan also preemptively objects to any costs on appeal.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Morgan guilty of counts 1-8, where the evidence was insufficient.

2. The trial court erred in instructing the jury on alternative means that are not contained in the charging document counts 1, 3, 4, 6, and 8.

3. The trial court violated Mr. Morgan's right to a unanimous jury verdict on counts 1, 3, 4, 6, and 8.

4. The trial court violated Mr. Morgan's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for second degree identity theft, as charged in count 2.

5. Mr. Morgan was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the admission of Mr. Snyder's police interview.

6. The trial court erred in failing to count counts 5 and 7 as "same criminal conduct" in calculating the offender score.

7. The trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum.

8. An award of costs on appeal against the defendant would be improper.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Morgan guilty of counts 1-8, where the evidence was insufficient.

a. Whether the trial court erred in finding Mr. Morgan guilty of second degree theft (counts 1).

b. Whether the trial court erred in finding Mr. Morgan guilty of third degree theft and attempted third degree theft (counts 3, 4, 6, 8).

c. Whether the trial court erred in finding Mr. Morgan guilty of second degree identity theft (counts 2, 5, 7).

Issue 2: Whether the trial court erred in instructing the jury on alternative means that are not contained in the charging document on counts 1, 3, 4, 6, and 8.

a. Whether the trial court erred in instructing the jury on alternative means not contained in the charging document, for second degree theft and third degree theft (counts 1, 3, 4).

b. Whether the trial court erred in instructing the jury on alternative means not contained in the charging document, for attempted third degree theft (counts 6, 8).

Issue 3: Whether the trial court violated Mr. Morgan's right to a unanimous jury verdict on counts 1, 3, 4, 6, and 8.

Issue 4: Whether the trial court violated Mr. Morgan's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for second degree identity theft, as charged in count 2.

Issue 5: Whether Mr. Morgan was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the admission of Mr. Snyder's police interview.

Issue 6: Whether the trial court erred in failing to count counts 5 and 7 as "same criminal conduct" in calculating the offender score.

Issue 7: Whether the trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum.

Issue 8: Whether this Court should refuse to impose costs on appeal.

D. STATEMENT OF THE CASE

Maureen Webb had a Chase Bank credit card. (RP 89-90, 96). On June 11, 2014, Maureen[1] let her teenage daughter Elizabeth Webb use this

[1] Because Maureen Webb and Elizabeth Webb have the same surname, they are referred to herein by their first names. No disrespect is intended.

credit card to purchase gasoline for her car. (RP 90, 96-97). Elizabeth left work around 5:30 or 6:00 p.m., stopped and purchased gas, and went home. (RP 97-98, 100).

Maureen later received a text message from Chase Bank fraud protection, asking if she made a purchase at Fred Meyer in Ellensburg. (RP 90-92, 102). Maureen then contacted Elizabeth, who informed Maureen she did not have the credit card. (RP 91, 97). Elizabeth had not gone to Fred Meyer in Ellensburg. (RP 99). Maureen called the police to report the credit card as stolen. (RP 92-93).

City of Cle Elum Police Officer Jennifer Rogers worked with Maureen to obtain records for Maureen's credit card from Chase Bank. (RP 102-104; Pl.'s Ex. 1). From these records, Officer Rogers identified two approved transactions and two declined transactions at Fred Meyer. (RP 108-109). Officer Rogers next requested video footage from Fred Meyer for these four transactions, and she received copies of three surveillance videos. (RP 109-111; Pl. Exs. 2, 3, 4).

The first surveillance video showed two men at a self-checkout kiosk, identified as Shane Morgan and Joshua Snyder. (RP 111-112; Pl. Ex. 2). The video shows Mr. Snyder (wearing black) scan two drinks; then Mr. Morgan (wearing gray) pushing some buttons on the kiosk; Mr.

Snyder sliding the credit card and putting it away; and each man grabbing a drink and walking away. (RP 111; Pl. Ex. 2).

The second surveillance video showed Mr. Snyder purchasing clothing and shoes at a check-out, with Mr. Morgan in the area. (RP 112; Pl. Ex. 3). Mr. Morgan does not help Mr. Snyder check out. (Pl. Ex. 3).

The third surveillance video showed store personnel at a customer service counter, with no other individuals visible. (RP 112; Pl. Ex. 4).

Officer Rogers also obtained records from Fred Meyer for the four transactions. (RP 113-119; Pl. Exs. 15-19). There were four transactions using Maureen's credit card: (1) a purchase of two drinks for $4.61 at a self-checkout kiosk; (2) a purchase of clothing and shoes for $538.92; (3) a declined transaction for the attempted purchase of an iPad for $538.92; and (4) a second declined transaction for the attempted purchase of an iPad for $538.92. (RP 115-119, 139-140, 142, 181-182; Pl. Exs. 1, 15-19).

For the first declined transaction (3), the credit card was swiped at 22:36:32, and the charge came through to the host credit card at 1:37:26 a.m. eastern standard time, or 22:37:26 in Ellensburg. (RP 106-107, 140; Pl. Exs. 1, 17). For the second declined transaction (4), the credit card was swiped at 22:36:54, and the charge came through to the host credit card at 1:37:47 a.m. eastern standard time, or 22:37:47 in Ellensburg. (RP

106-107, 140; Pl. Exs. 1, 18, 19). Both declined transactions occurred at the same cash register. (Pl. Exs. 17, 18).

Based on these events, the State charged Mr. Morgan, as a principal or an accomplice, with following eight counts[2]: second degree theft (count 1); second degree identity theft (counts 2, 5, 7); third degree theft (counts 3, 4); and attempted third degree theft (counts 6, 8).[3] (CP 303-307).

The case proceeded to a jury trial. (RP 51-324). On the morning of trial, the State offered into evidence a police interview of Mr. Snyder, conducted by Officer Rogers. (RP 61-64; Pl.'s Ex. 5). In this interview, Mr. Snyder denied any involvement in, or having any knowledge of, the incidents in question. (RP 122-132; Pl.'s Ex. 5). Defense counsel objected to the admission of the interview, questioning its relevance. (RP 62). The State told the trial court he would talk to defense counsel and find out what the objections to the interview are, and also told the trial court that he may be able to address defense counsel's concerns and reach an agreement. (RP 63-64).

[2] The State also charged Mr. Morgan with eight additional counts (counts 9-16 in the third amended Amended Information), but he was acquitted of these charges. (CP 307-311, 388-395; RP 320-321). Therefore, these charges are not part of this appeal.

[3] For ease of reference, the (third) Amended Information is attached as Appendix A.

At trial, the Chase Bank records, the Fred Meyer records, and the three surveillance videos were admitted as exhibits. (Pl.'s Ex. 1-4, 15-19).

Witnesses testified consistent with the facts stated above. (RP 89-203). In addition, Maureen testified she did not make any of the charges on the date in question. (RP 93-94). She testified she did not give Mr. Snyder or Mr. Morgan permission to possess or use her credit card. (RP 94-95).

Elizabeth testified she remembers putting the credit card in her wallet, like she always does after she uses it at a gas pump, "so it could been someone went into my car and grabbed it, or I could have dropped it." (RP 98). She testified she did not give Mr. Snyder or Mr. Morgan permission to possess or use Maureen's credit card. (RP 98-99).

During Officer Rogers' testimony, prior to the trial testimony of Mr. Snyder, the State offered Mr. Snyder's police interview into evidence, and defense counsel did not object. (RP 121-132; Pl.'s Ex. 5). The oral interview was played for the jury. (RP 121-132). At the end of the interview, Mr. Snyder answered "yes" to Officer Rogers' question, "[d]o you hereby declare under penalty of perjury under the laws of the State of Washington that the statement you have just provided is true and correct . . . ." (RP 131-132; Pl.'s Ex. 5).

Fred Meyer Loss Prevention Specialist Perry Lomax testified he was contacted by Officer Rogers regarding the transactions made with Maureen's credit card. (RP 136-138). He testified he provided Officer Rogers with the three surveillance videos. (RP 140-141; Pl. Ex. 2, 3, 4). Mr. Lomax testified by viewing other surveillance camera footage, he was able to track Mr. Snyder and Mr. Morgan "[f]or the most part" in the store. (RP 141). He testified the two men first went to the apparel register; then went briefly back through the apparel department; then through the main part of the store "together walk[ed] to the cold beverage coolers, where the check . . . lanes are, grab[bed] a small cold beverage, r[a]ng it up through U-scan, walk[ed] through the front of the store"; and then came back in the store and attempted to purchase an iPad from the photo-electronics department, and exited the store. (RP 142, 154-155, 160).

From his viewing of the store video, Mr. Lomax testified "when they bought the . . . small drink item, it looks as though they both rang in the item, where one gentleman swiped the card and the other gentleman pushed the buttons on the PIN pad, and then picked up said drink[.]" (RP 160). He testified he could not see how many times the other gentleman pushed the buttons on the PIN pad. (RP 162-163). Mr. Lomax testified "it didn't seem like [the two men] they ever split up." (RP 160).

Mr. Lomax testified Fred Meyer was paid by the credit card company for the items purchased, so the store did not lose any money. (RP 161).

Mr. Snyder pleaded guilty to offenses related to this incident prior to trial, and testified for the State. (RP 169-203). He testified he found a credit card sitting on top of a gas pump, and he took the credit card for his own use. (RP 175-177). Mr. Snyder testified that after he took the credit card, he went and picked up Mr. Morgan, and the two of them went to Fred Meyer in Ellensburg. (RP 172-175, 177-181). He admitted he purchased two drinks with the credit card at a self-checkout kiosk. (RP 181-182, 189, 197). He testified he then went shopping, and that Mr. Morgan was in the store, and at times they were together. (RP 182-183, 185). Mr. Snyder admitted he purchased clothing and shoes using the credit card. (RP 183, 197). He testified he does not remember trying to purchase an iPad. (RP 186-187).

Mr. Snyder testified Mr. Morgan did not know the credit card he used at Fred Meyer was not his card. (RP 197, 199). He testified Mr. Morgan would have no reason to question it, because Mr. Snyder was driving a brand new Jeep and had been working. (RP 197). When asked why Mr. Morgan pushed the buttons on the PIN pad at the self-checkout kiosk, Mr. Snyder testified he did not exactly recall, but that maybe he was

not able to operate the machine, because he usually goes to a cashier rather than the self-checkout. (RP 199, 201).

Defense counsel proposed a jury instruction defining theft as "to wrongfully obtain or exert unauthorized control over the property or services or another, or the value thereof, with intent to deprive that person or such property or services[,]" as charged in the information. (CP 155, 304-307). Defense counsel objected to the State's proposed jury instruction defining theft on the basis that it contained all three definitions of theft, rather than only the one type of theft charged in the information. (CP 228, 304-307; RP 225-237). The trial court overruled the objection and gave the State's proposed jury instruction:

> Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services or by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services or to appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive that person of such property or services.

(CP 228, 328; RP 266).

Defense counsel also objected to the State's proposed corresponding jury instructions defining "by color or aid of deception" and "appropriate lost or misdelivered property or services." (CP 230-232; RP

226-235). The trial court overruled the objections and gave the requested instructions. (CP 230-232, 330-332; RP 234, 267).

Defense counsel proposed to-convict jury instructions for second degree theft (count 1) and third degree theft (counts 3, 4) that only included the one type of theft charged in the information. (CP 162, 169, 304-307). Defense counsel objected to the State's proposed to-convict jury instructions for second degree theft (count 1) and third degree theft (counts 3, 4), on the basis that they contained all three definitions of theft, rather than only the one type of theft charged in the information. . (CP 236, 244, 304-307; RP 235-237, 239). The trial court overruled the objections and gave the requested to-convict instructions. (CP 236, 244, 336, 343; RP 236-237, 268-269, 272-273).

Defense counsel did not objected to the State's proposed to-convict jury instructions for second degree identity theft (counts 2, 5, 7) and attempted third degree theft (counts 6, 8), and the trial court gave the requested instructions. (CP 240, 246, 340, 345; RP 239-240, 271, 273-274). The trial court instructed the jury that in order to convict Mr. Morgan of attempted third degree theft, it had to find the following elements beyond a reasonable doubt:

> 1) That on or about June 11, 2014, the defendant did an act that was a substantial step toward the commission of Theft in the Third Degree;

> 2) That the act was done with the intent to commit Theft in the Third Degree; and
> 3) That the act occurred in the State of Washington.

(CP 345).

The trial court also instructed the jury on accomplice liability. (CP 326; RP 265-266).

In its closing argument, the State argued that Mr. Snyder was not a credible witness. (RP 294-295). The State asked the jury, "[w]ere his statements even consistent with his own statements[?]" (RP 295).

The jury found Mr. Morgan guilty of all eight counts. (CP 380-387; RP 319-320).

At sentencing, defense counsel argued the four felony convictions (counts 1, 2, 5, 7) are the same criminal conduct. (CP 537-541; RP 347, 353-357, 360). After hearing argument, the trial court took the matter under advisement. (RP 366). The next day, the trial court issued a letter ruling regarding sentencing. (CP 590-591). The court ruled that the four felony convictions were not same criminal conduct, stating "each use of the credit card was a distinctive act that furthered a different, distinct criminal purpose." (CP 590).

The trial court imposed a sentence of 57 months confinement and 12 months of community custody. (CP 551-552, 591). The judgment and sentence includes the following notation: "[n]ote: combined term of

confinement and community custody for any particular offense cannot exceed the statutory maximum." (CP 552).

The trial court imposed restitution to Chase Bank, in the amount of the two transactions made at Fred Meyer. (CP 544-545, 553).

The trial court asked Mr. Morgan "if there's anything that prevents him from working[,]" and Mr. Morgan responded that mental health issues prevent him from working, and that he has been receiving social security benefits for approximately six months. (RP 370).

The Judgment and Sentence contains the following boilerplate language:

> **2.5 Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

(CP 550).

The Judgment and Sentence also contains the following boilerplate language: "[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations." (CP 554).

Mr. Morgan timely appealed. (CP 564). The trial court entered an Order of Indigency, granting Mr. Morgan a right to review at public expense. (CP 572-573).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Morgan guilty of Counts 1-8, where the evidence was insufficient.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

"Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App.

872, 880, 86 P.3d 1224, 1228 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

a. Whether the trial court erred in finding Mr. Morgan guilty of second degree theft (counts 1).

To find Mr. Morgan guilty of second degree theft, the jury had to find:

> 1) That on or about June 11, 2014 the defendant
> a) wrongfully obtained or exerted unauthorized control over property of another; or
> b) by color or aid of deception, obtained control over property of another; or
> c) appropriated lost or misdelivered property of another; and
> 2) That the property was an access device;
> 3) That the defendant intended to deprive the other person of the access device; and
> 4) That this act occurred in the State of Washington.

(CP 336); *see also* RCW 9A.56.040(1)(d), RCW 9A.56.020(1).

The alleged access device was Maureen Webb's credit card. (CP 304).

Because Mr. Snyder was the person who took Maureen Webb's credit card from the gas station, the only theory under which Mr. Morgan could have been found guilty was as an accomplice to Mr. Snyder's taking of the credit card. (RP 175-177).

A person is guilty as an accomplice if, "with knowledge that it will promote or facilitate the commission of the crime," he solicits, commands, encourages or requests that someone commit a crime or aids or agrees to aid that person in planning or committing the crime. RCW 9A.08.020(3); *see also* CP 326. In this context, "the crime" means "the charged offense," so that an accomplice cannot be found guilty of crimes he did not know would be committed but only those crimes he was proved to have had knowledge that his "accomplice" acts would facilitate. *See State v. Roberts*, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 578-82, 14 P.3d 752 (2000).

Further, "[a]n accomplice need not have the same state of mind as a principal, but he or she must know that his or her actions will encourage or promote the principal's commission of the crime." *State v. LaRue*, 74 Wn. App. 757, 762, 875 P.2d 701 (1994). "[A]n accomplice must associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed." *Id*.

Here, there was insufficient evidence to prove that Mr. Morgan was an accomplice to Mr. Snyder's taking of Maureen Webb's credit card. There was no evidence that Mr. Morgan was present when Mr. Snyder took the credit card. (RP 175-177). To the contrary, Mr. Snyder testified he went and picked up Mr. Morgan *after* he took the credit card. (RP 177). Further, there was no evidence that Mr. Morgan aided Mr. Snyder in planning or committing the crime, or that he encouraged or requested that Mr. Snyder commit the crime. *See* RCW 9A.08.020(3). There was no evidence presented from which the jury could determine that Mr. Morgan participated in Mr. Snyder's taking of Maureen Webb's credit card.

A rational jury could not have found Mr. Morgan guilty of second degree theft, beyond a reasonable doubt, where there was insufficient evidence to prove he was an accomplice to this crime. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). Count 1 should be reversed and dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (stating this remedy).

b. Whether the trial court erred in finding Mr. Morgan guilty of third degree theft and attempted third degree theft (counts 3, 4, 6, 8).

For the third degree theft counts (counts 3 and 4), the jury had to find that Mr. Morgan, committed theft from Fred Meyer in one of the

three ways enumerated in RCW 9A.56.020(1), each requiring "intent to deprive [Fred Meyer] of such property or services." (CP 304-305, 343); *see also* RCW 9A.56.020(1).

For the attempted third degree theft counts (counts 6 and 8), the jury had to find that Mr. Morgan, with intent to commit third degree theft, did an act that was a substantial step towards committing that crime, which required committing theft from Fred Meyer in one of the three ways enumerated in RCW 9A.56.020(1), each requiring "intent to deprive [Fred Meyer] of such property or services." (CP 306-307, 328, 342, 345); *see also* RCW 9A.56.020(1).

The use of Maureen Webb's credit card to make purchases, or to attempt to make purchases at Fred Meyer, was not done with the intent to deprive Fred Meyer or property or services. *See* RCW 9A.56.020(1). While the credit card itself was stolen, there was no theft or attempted theft from Fred Meyer, as payment was offered for the items. *See State v. Graham*, 182 Wn. App. 180, 327 P.3d 717 (2014).

In *Graham*, a trafficking in stolen property case, this Court affirmed the dismissal of the charge by the trial court. *Graham*, 182 Wn. App. at 182-87. The defendant entered a Wal-Mart, removed items from a store shelf, and took the items to customer service to return them. *Id*. at 182. Wal-Mart issued a gift card to the defendant for the value of the

returned items. *Id*. The defendant then used the gift card to purchase an item from Wal-Mart, which she later returned for cash. *Id*.

One issue before this Court was whether (1) the items returned in exchange for a gift card and (2) item she purchased with the gift card and later returned for cash were "stolen property." *Id*. at 183. This Court set forth the following applicable law:

> "'Stolen property' means property that has been obtained by theft, robbery, or extortion." RCW 9A.82.010(16). "Theft" requires intent to deprive the owner of such property. RCW 9A.56.020(1).

Id.

This Court agreed with the trial court that the defendant's use of the gift card to purchase an item "did not amount to a separate theft 'since the defendant used the gift card as 'cash.'" *Id*. at 186. This Court cited the trial court's reasoning: "[i]n other words, had defendant stolen $50 from her neighbor, using it to purchase [the item she later returned for cash] would not constitute theft of [that item]." *Id*. at 187.

Thus, here, because payment was offered for the purchase of the drinks at the self-checkout kiosk (count 3); the purchase of clothing and shoes (count 4); and the two attempted purchases of an iPad (counts 6 and 8), there was no theft or attempted theft of these items from Fred Meyer. Like the gift card in *Graham*, the defendant here used the credit card as cash. *Graham*, 182 Wn. App. at 186.

Fred Meyer was paid by the credit card company for the items purchased. (RP 161). The trial court imposed restitution to Chase Bank, not to Fred Meyer. (CP 544-545, 553). Fred Meyer was not a victim of theft or attempted theft.

A rational jury could not have found Mr. Morgan guilty of third degree theft and attempted third degree theft, beyond a reasonable doubt, where there was no intent to deprive Fred Meyer of property or services. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). Payment was proffered for the items purchased or attempted to be purchased. Counts 3, 4, 6, and 8 should be reversed and dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (stating this remedy).

c. Whether the trial court erred in finding Mr. Morgan guilty of second degree identity theft (counts 2, 5, 7).

To find Mr. Morgan guilty of second degree identity theft, the jury had to find:

> 1) That on or about June 11, 2014 the defendant knowingly obtained, possessed, or used a means of identification or financial information of another person, living or dead;
> 2) That the defendant acted with the intent to commit, aid or abet any crime; and
> 3) That any of these acts occurred in the State of Washington.

(CP 340); *see also* RCW 9.35.020(1), (3).

Because Mr. Snyder was the person who obtained, possessed, and used Maureen Webb's credit card, the only theory under which Mr. Morgan could have been found guilty was as an accomplice.

"[O]ne's presence at the commission of a crime, even coupled with a knowledge that one's presence would aid in the commission of the crime, will not subject an accused to accomplice liability." *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). "To prove that one present is an aider, it must be established that one is ready to assist in the commission of the crime." *Id*. (internal quotation marks omitted) (quoting *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.3d 1161 (1979)). "[M]ere presence is not enough for criminal liability." *State v. Landon*, 69 Wn. App. 83, 91, 848 P.2d 724, 728 (1993); *see also* CP 326.

For Count 2, (as further explained in Issue 4 below), there were three distinct acts that could have formed the basis for the charge: (1) the obtaining of the credit card itself; (2) the use (or possession) of the credit card to purchase drinks at a Fred Meyer self-checkout kiosk; and (3) the use (or possession) of the credit card to purchase clothing and shoes at Fred Meyer. (RP 90-95, 97-99, 102, 142, 154-155, 160, 162-163, 175-177, 181-183, 185, 189, 197, 199, 201; Pl.'s Ex. 1, 2, 3, 4, 15-19).

At most, the evidence of these three acts shows only Mr. Morgan's mere presence, which was insufficient for the jury to find him guilty as an

accomplice. For (1) above (obtaining of the credit card), Mr. Morgan was not present at the time Maureen Webb's credit card was taken. (RP 175-177).

For (2) above (self-checkout purchase), Mr. Morgan was present. (RP 111-112, 142, 154-155, 160, 162-163; Pl.'s Ex. 2). Although Mr. Morgan pushed some buttons at the self-checkout kiosk, it was Mr. Snyder who slid the credit card and then put it away. (Pl.'s Ex. 2). There is no evidence that Mr. Morgan knew this credit card was stolen, rather than belonging to Mr. Snyder. Mr. Morgan could not see the name on the credit card when Mr. Snyder slid the card, and Mr. Snyder testified Mr. Morgan did not know it was not his card. (RP 197, 199; Pl.'s Ex. 2). Because Mr. Morgan did not know the card did not belong to Mr. Snyder, the evidence does not establish that Mr. Morgan was ready to assist in the commission of crime. *See Rotunno*, 95 Wn.2d at 933 (quoting *Wilson*, 91 Wn.2d at 491).

For (3) above (clothing and shoe purchase), Mr. Morgan was present. (RP 112, 142, 154-155, 160; Pl. Ex. 3). However, Mr. Morgan did not help Mr. Snyder check out. (Pl. Ex. 3). For this transaction, there is also no evidence that Mr. Morgan knew this credit card was stolen, rather than belonging to Mr. Snyder. Mr. Morgan could not see the name

on the credit card as Mr. Snyder checked out, and Mr. Snyder testified Mr. Morgan did not know it was not his card. (RP 197, 199; Pl.'s Ex. 3).

For Counts 5 and 7, the only evidence linking Mr. Morgan to these two declined transactions (attempted iPad purchases) was Mr. Lomax's testimony that Mr. Snyder and Mr. Morgan attempted to purchase an iPad from the photo-electronics department. (RP 142, 160). This establishes no more than Mr. Morgan's mere presence, which is insufficient to establish Mr. Morgan was an accomplice. *See Landon*, 69 Wn. App. at 91; *see also* CP 326.

A rational jury could not have found Mr. Morgan guilty of second degree identity theft, beyond a reasonable doubt, where there was insufficient evidence to prove that Mr. Morgan was more than just a bystander to Mr. Snyder's crimes. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). There was no evidence that Mr. Morgan knew the credit card did not belong to Mr. Snyder himself. (RP 197, 199; Pl.'s Exs. 2, 3). Counts 2, 5, and 7 should be reversed and dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (stating this remedy).

Issue 2: Whether the trial court erred in instructing the jury on alternative means that are not contained in the charging document on counts 1, 3, 4, 6, and 8.

In general, a defendant cannot be tried for an uncharged offense. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1998); *State v. Chino*,

117 Wn. App. 531, 539-40, 72 P.3d 256 (2003). Our State Supreme Court "ha[s] long held that it is error for a trial court to instruct the jury on uncharged alternative means." *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 536, 309 P.3d 498 (2013) (citing *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942)). "Where the information alleges solely one statutory alternative means of committing a crime, it is error for the trial court to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence." *Chino*, 117 Wn. App. at 540; *see also State v. Brewczynski*, 173 Wn. App. 541, 549, 294 P.3d 825 (2013) ("It is error to instruct the jury on alternative means that are not contained in the charging document.").

"In uncharged alternative means cases on direct appeal, Washington courts have held that instructing the jury on uncharged alternative means is presumed to be prejudicial unless the State can show that the error was harmless." *In re Brockie*, 178 Wn.2d at 538-39; *see also Chino*, 117 Wn. App. at 540. "An error in instructing the jury on an uncharged method of committing a crime may be harmless if 'in subsequent instructions the crime charged was clearly and specifically defined to the jury.'" *Bray*, 52 Wn. App. at 35 (quoting *Severns*, 13 Wn.2d at 549); *see also Chino*, 117 Wn. App. at 540. For the error to be

harmless, the other jury instructions must "clearly limit the crime to the charged alternative." *Brewczynski*, 173 Wn. App. at 549.

Whether a jury instruction accurately states the law without misleading the jury is an issue subject to de novo review. *Chino*, 117 Wn. App. at 538. The sufficiency of a to-convict jury instruction is reviewed *de novo*. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007); *see also State v. Aguilar*, 153 Wn. App. 265, 278-79, 223 P.3d 1158 (2009).

a. Whether the trial court erred in instructing the jury on alternative means not contained in the charging document, for second degree theft and third degree theft (counts 1, 3, 4).

A person commits theft in three alternative ways:

> [1] To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
> [2] By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
> [3] To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.020(1)(a)-(c); *see also State v. Linehan*, 147 Wn.2d 638, 647, 56 P.3d 542 (2002) (acknowledging that "theft is an alternative means crime.").

In counts 1, 3, and 4, the State charged Mr. Morgan with committing theft by the first alternative means. (CP 304-305); *see also* RCW 9A.56.020(1)(a). However, the to-convict jury instructions for these

three counts included all three alternative means of committing theft. (CP 336, 343); *see also* RCW 9A.56.020(1)(a)-(c).

Therefore, for both **s**econd degree theft and third degree theft, as charged in counts 1, 3, and 4, the trial court erred in instructing the jury on the two uncharged alternative means of committing theft. *See* RCW 9A.56.020(1)(b)-(c); *see also* CP 304-305, 336, 343; *Chino*, 117 Wn. App. at 540; *Brewczynski*, 173 Wn. App. at 549.

This error was not harmless. None of the remaining jury instructions limited the jury to consider only the first alternative means of committing theft. RCW 9A.56.020(1)(a); *see also* CP 314-371; *Chino*, 117 Wn. App. at 540; *Brewczynski*, 173 Wn. App. at 549.

Mr. Morgan's convictions for **s**econd degree theft and third degree theft, as charged in counts 1, 3, and 4, must be reversed and remanded for a new trial due to the error in the jury instructions. *See Chino*, 117 Wn. App. at 540-41; *Brewczynski*, 173 Wn. App. at 550.

b. Whether the trial court erred in instructing the jury on alternative means not contained in the charging document, for attempted third degree theft (counts 6, 8).

In counts 6 and 8, the State charged Mr. Morgan with committing attempted third degree theft by the first alternative means. (CP 306-307); *see also* RCW 9A.56.020(1)(a). The to-convict instruction for these two counts instructed the jury that it had to find that Mr. Morgan "did an act

that was a substantial step toward the commission of Theft in the Third Degree . . . [and] [t]hat the act was done with the intent to commit Theft in the Third Degree." (CP 345). The jury instruction defining theft, given over defense objection, included all three alternative means of committing theft. (CP 328; RP 225-237); *see also* RCW 9A.56.020(1)(a)-(c).

Therefore, for attempted third degree theft, as charged in counts 6 and 8, the trial court erred in instructing the jury on the two uncharged alternative means of committing theft. *See* RCW 9A.56.020(1)(b)-(c); *see also* CP 306-307, 328, 345; *Chino*, 117 Wn. App. at 540; *Brewczynski*, 173 Wn. App. at 549.

This error was not harmless. None of the remaining jury instructions limited the jury to consider only the first alternative means of committing theft. RCW 9A.56.020(1)(a); *see also* CP 314-371; *Chino*, 117 Wn. App. at 540; *Brewczynski*, 173 Wn. App. at 549.

Mr. Morgan's convictions for attempted third degree theft, as charged in counts 6 and 8, must be reversed and remanded for a new trial due to the error in the jury instructions. *See Chino*, 117 Wn. App. at 540-41; *Brewczynski*, 173 Wn. App. at 550.

Issue 3: Whether the trial court violated Mr. Morgan's right to a unanimous jury verdict on counts 1, 3, 4, 6, and 8.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707,

881 P.2d 231 (1994). "[T]he right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal." *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985).

"The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged." *State v. Emery*, 161 Wn. App. 172, 198, 253 P.3d 413 (2011) (*citing Ortega-Martinez*, 124 Wn.2d at 707). "The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury." *Ortega-Martinez*, 124 Wn.2d at 707. "Unanimity is not required, however, as to the *means* by which the crime was committed so long as substantial evidence supports each alternative means." *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). "In reviewing an alternative means case, the court must determine whether a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt." *Id*. at 410-11.

The to-convict jury instructions for second degree theft and third degree theft, as charged in counts 1, 3, and 4, included all three alternative means of committing theft. (CP 336, 343); *see also* RCW 9A.56.020(1).

For attempted third degree theft, as charged in counts 6 and 8, the jury instruction defining theft, given over defense objection, included all three alternative means of committing theft. (CP 328; RP 225-237); *see also* RCW 9A.56.020(1).

Thus, because theft is an alternative means crime, Mr. Morgan has the right to express jury unanimity on the means by which he committed the crime. *See Emery*, 161 Wn. App. at 198 (*citing Ortega-Martinez*, 124 Wn.2d at 707); *see also Linehan*, 147 Wn.2d at 647 (acknowledging that "theft is an alternative means crime."). Each alternative means must be supported by substantial evidence. *Kitchen*, 110 Wn.2d at 410.

Substantial evidence does not support the alternative means of committing theft, "[b]y color or aid of deception." RCW 9A.56.020(1)(b). "'By color or aid of deception' means that the deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services[.]" RCW 9A.56.010(4); *see also* CP 330. The issue is whether the victim relied upon the defendant's deception. *State v. Casey*, 81 Wn. App. 524, 527–531, 915 P.2d 587, *review denied*, 130 Wash.2d 1009, 928 P.2d 412 (1996).

Here, there was no evidence of deception related to the procurement of the credit card from Elizabeth Webb or the property from

Fred Meyer. Elizabeth Webb was not deceived; the credit card was not taken directly from her. (RP 98). Fred Meyer was not deceived; payment was offered, with no loss to the business. (RP 161).

In addition, for counts 3, 4, 6 and 8, substantial evidence does not support the alternative means of committing theft, "[t]o appropriate lost or misdelivered property." RCW 9A.56.020(1)(c). There is no evidence that the property Mr. Snyder purchased (or attempted to purchase) from Fred Meyer fits this definition. *See* RCW 9A.56.010(2) ("defining [a]ppropriate lost or misdelivered property or services"); *see also* CP 332.

Because substantial evidence does not support each alternative means for committing theft as charged in counts 1, 3, 4, 6, and 8, the trial court violated Mr. Morgan's right to a unanimous jury verdict on these counts. Mr. Morgan's convictions for second degree theft, third degree theft, and attempted third degree theft, as charged in counts 1, 3, 4, 6, and 8, must be reversed and remanded for a new trial.

Issue 4: Whether the trial court violated Mr. Morgan's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for second degree identity theft, as charged in count 2.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. 1, § 21; *Ortega-Martinez*, 124 Wn.2d at 707. This issue may be raised for the first time on appeal. *See Handyside*, 42 Wn. App. at 415.

In order to convict a defendant of a criminal charge, the jury must be unanimous that the criminal act charged has been committed. *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990); *see also State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *modified in part by Kitchen*, 110 Wn.2d at 405-06. In cases where multiple acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. *Kitchen*, 110 Wn.2d at 411; *see also Petrich*, 101 Wn.2d at 572. In such a multiple acts case, the State must either "elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act." *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

A trial court's failure to give a necessary unanimity instruction is constitutional error. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). Therefore, the constitutional harmless error analysis applies. *Id*. In order to find a constitutional error harmless, the appellate court must find the error harmless beyond a reasonable doubt. *Camarillo*, 115 Wn.2d at 65. Prejudice is presumed. *Coleman*, 159 Wn.2d at 512. "The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Id*. (citing *Kitchen*, 110 Wn.2d at 411-12); *see also Camarillo*, 115 Wn.2d at 65.

In *State v. King*, the defendant was found guilty of one count of possession of cocaine. *State v. King*, 75 Wn. App. 899, 901, 878 P.2d 466 (1994). The court noted two possible distinct acts could have formed the basis of the conviction because cocaine was found in two different places. *Id*. at 903–04. No unanimity instruction had been given and the State offered both of the distinct acts to seek a conviction. *Id*. at 903. In reversing and remanding for a new trial, the court determined it could not "say that no rational trier of fact would entertain a reasonable doubt about [the defendant's] responsibility" for the two different possessions. *Id*. at 904. The evidence was conflicting as to who constructively possessed the first portion of cocaine and whether the second portion of cocaine had been planted by law enforcement. *Id*. at 904.

Here, the trial court should have issued a unanimity instruction for second degree identify theft, as charged in count 2. The State charged that Mr. Morgan, as a principal or an accomplice, "did knowingly obtain or possess . . . with the intent to commit or to aid or abet and crime . . . Maureen Webb's credit card[.]" (CP 304). But, the State alleged Mr. Morgan obtained or possessed Maureen Webb's credit card in three distinct ways: (1) the obtaining of the credit card itself; (2) the use (or possession) of the credit card to purchase drinks at a Fred Meyer self-checkout kiosk; and (3) the use (or possession) of the credit card to

purchase clothing and shoes at Fred Meyer. (RP 90-95, 97-99, 102, 142, 154-155, 160, 162-163, 175-177, 181-183, 185, 189, 197, 199, 201; Pl.'s Ex. 1, 2, 3, 4, 15-19).

The State did not elect one act upon which to seek a conviction. (RP 276-295, 306-313). The trial court's failure to instruct the jury on unanimity was a constitutional error. (CP 314-371).

This error was not harmless. A rational juror could have had reasonable doubt as to Mr. Morgan's involvement in the alleged incidents. *See Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-12) (setting forth the constitutional harmless error analysis).

First, a rational juror could have had reasonable doubt as to whether Ms. Morgan, as either a principal or an accomplice, knowingly obtained the credit card itself. There was no evidence that Mr. Morgan was present when Mr. Snyder obtained the credit card. (RP 175-177). There was no evidence presented from which the jury could determine that Mr. Morgan participated in Mr. Snyder's obtaining of the credit card.

Second, a rational juror could have had reasonable doubt as to whether Ms. Morgan, as either a principal or an accomplice, knowingly used (or possessed) the credit card to purchase drinks at a Fred Meyer self-checkout kiosk. Although Mr. Morgan pushed some buttons at the self-checkout kiosk, there is no evidence that Mr. Morgan knew this credit card

was stolen, rather than belonging to Mr. Snyder. (RP 197, 199; Pl.'s Ex. 2). Further, it was Mr. Snyder, not Mr. Morgan, who slid the credit card. (RP 197, 199, Pl.'s Ex. 2).

Third, a rational juror could have had reasonable doubt as to whether Ms. Morgan, as either a principal or an accomplice, knowingly used (or possessed) the credit card to purchase clothing and shoes at Fred Meyer. Mr. Morgan did not help Mr. Snyder check out. (Pl. Ex. 3). There is also no evidence that Mr. Morgan knew this credit card was stolen. (RP 197, 199; Pl. Ex.'s 3).

Under the facts presented at trial here, it cannot be said that no rational juror could have a reasonable doubt as to any of the incidents alleged. *See Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-12). The trial court erred in its failure to give a unanimity instruction for second degree identity theft, as charged in count 2, and this error was not harmless beyond a reasonable doubt. *See Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-12). This court should reverse Mr. Morgan's conviction for second degree identify theft as charged in Count 2 and remand for a new trial.

Issue 5: Whether Mr. Morgan was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the admission of Mr. Snyder's police interview.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that "'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." ER 802.

> A prior statement made by a witness is not hearsay if:
>
> The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition[.]

ER 801(d)(1)(i).

This rule has been interpreted to include sworn, written statements given to police officers. *See State v. Smith*, 97 Wn.2d 856, 857, 651 P.2d 207 (1982). However, oral statements given to police officers are not admissible under this rule. *See State v. Johnson*, 40 Wn. App. 371, 377-79, 699 P.3d 221 (1985) (where a witness' oral or unsigned statements to the police were admitted at trial, it was proper to instruct the jury the statements were impeachment, not substantive evidence); *State v. Comas*, 186 Wn. App. 307, 319, 345 P.3d 36 (2015) (the trial court erred in

admitting a witness' prior oral statement to the police as substantive evidence under ER 801(d)(1)(i), where the witness did not review, sign, and date the transcription of the oral statement).

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show "that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]"and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). "[S]trategy must be based on reasoned decision-making[.]" *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Here, defense counsel's failure to object to the admission of Mr. Snyder's police interview fell below prevailing professional norms. *See Sexsmith*, 138 Wn. App. at 509. An objection to the admission of the police interview as inadmissible hearsay would have been sustained. *See* ER 801(d)(1)(i); *Johnson*, 40 Wn. App. at 377-79; *Comas*, 186 Wn. App. at 319. Mr. Snyder's police interview was not admissible under ER 801(d)(1)(i), because it was oral and unsigned. *See Johnson*, 40 Wn. App. at 377-79; *Comas*, 186 Wn. App. at 319. The fact that Mr. Snyder orally declared, under the penalty of perjury, that his statement was true and

correct, does not make the statement admissible under the rule. *See Comas*, 186 Wn. App. at 309, 319 (finding the trial court erred in admitting the witness' prior oral statement to the police, despite the fact that the witness made this same oral declaration).

In addition, an objection to the police interview as more prejudicial than probative would have been sustained. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." ER 403. In the police interview, Mr. Snyder denied any involvement in, or having any knowledge of, the incidents in question. (RP 122-132; Pl.'s Ex. 5). Because Mr. Snyder later testified at trial that he was involved, and that Mr. Morgan did not know the credit card he used at Fred Meyer was not his card, the only purpose for admitting the police interview was to discredit Mr. Snyder as a trial witness. (RP 175-177, 181-183, 186-187, 189, 197, 199). Any probative value of the police interview was outweighed by unfair prejudice, the insinuation that Mr. Snyder lied in his trial testimony.

Further, the police interview was not proper impeachment evidence, because it was offered *before* Mr. Snyder testified at trial. (RP 121-132; Pl.'s Ex. 5); *see* ER 613(b) (governing extrinsic evidence of prior inconsistent statements of a witness). Because Mr. Snyder had not yet testified, there was nothing to impeach. *See State v. Newbern*, 95 Wn.

App. 277, 292, 975 P.2d 1041 (1999) (stating that "[i]n general, a witness's prior statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony.").

Defense counsel's failure to object was not tactical. The key issue in this case was Mr. Morgan's knowledge and involvement in the charged incidents, and the admission of Mr. Snyder's police interview as substantive evidence served to discredit Mr. Snyder's trial testimony that Mr. Morgan had did not know the credit card Mr. Snyder used at Fred Meyer was not his card. (RP 197, 199).

Had defense counsel objected to the admission of Mr. Snyder police interview, the result of the trial would have been different. *See Sexsmith*, 138 Wn. App. at 509. Mr. Snyder's trial testimony showed that Mr. Morgan had no knowledge that the credit card used did not belong to Mr. Snyder himself. (RP 197, 199). The admission of Mr. Snyder's police interview as substantive evidence was an attempt to discredit Mr. Snyder as a witness. The prejudice to Mr. Morgan was furthered by the State's closing argument, where the State argued that Mr. Snyder was not a credible witness, and asked the jury if Mr. Snyder's own statements were consistent. (RP 294-295). In addition, there was not overwhelming evidence of Mr. Morgan's guilt. *Cf. Comas*, 186 Wn. App. at 319-320 (error in admitting the witness' prior oral statement to the police was

harmless, where there was overwhelming evidence of the defendant's guilt). For Count 1, there was no evidence that Mr. Morgan was present when Mr. Snyder took Maureen Webb's credit card. For the remaining counts involving the transactions at Fred Meyer, there was insufficient evidence to find Mr. Morgan was an accomplice; the evidence established only his mere presence.

Mr. Morgan has proven that the failure to object to the admission of Mr. Snyder's police interview constituted ineffective assistance of counsel. *Sexsmith*, 138 Wn. App. at 509. His convictions should be reversed and remanded for a new trial.

Issue 6: Whether the trial court erred in failing to count Counts 5 and 7 as "same criminal conduct" in calculating the offender score.

RCW 9.94A.589(1)(a) sets forth when two or more current offenses should be counted as one crime for sentencing purposes:

> …whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the [1] same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim . . .

RCW 9.94A.589(1)(a).

In order for the trial court to find same criminal conduct, all three requirements set forth in RCW 9.94A.589(1)(a) must be met. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citing *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994)). "An appellate court will reverse a sentencing court's decision only if it finds a clear abuse of discretion or misapplication of the law." *Porter*, 133 Wn. 2d at 181.

Counts 5 and 7 are both second degree identity theft for an attempted purchase of an iPad from Fred Meyer. (CP 305-306). The trial court ruled that the four felony convictions, including counts 5 and 7, were not same criminal conduct, stating "each use of the credit card was a distinctive act that furthered a different, distinct criminal purpose." (CP 590). The trial court abused its discretion in failing to count counts 5 and 7 as same criminal conduct in calculating Mr. Morgan's offender score, because the three requirements set forth in RCW 9.94A.589(1)(a) are met.

First, both count 5 and count 7 involve the same victim: Maureen Webb.

Second, the counts were committed at the same place and the same time. The attempted purchases occurred at the same place, the same cash register at Fred Meyer. (Pl. Exs. 17, 18). The attempted purchases also occurred at the same time, where the purchases occurred 22 seconds apart,

and came through to the host credit card 21 seconds apart. (RP 106-107, 140; Pl. Exs. 1, 17, 18, 19).

"A finding of 'same criminal conduct' does not require simultaneity of crimes." *State v. Channon*, 105 Wn. App. 869, 877 n.6, 20 P.3d 476, 480 (2001) (citing *Porter*, 133 Wn.2d at 182-83). In *Porter*, our Supreme Court held that two drug sales, occurring back to back within a 10 minute period of time satisfied the "same time" requirement, reasoning "[t]he sales were part of a continuous, uninterrupted sequence of conduct over a very short period of time." *Porter*, 133 Wn.2d at 183. Here, the two attempted purchases of an iPad, occurring seconds apart, satisfy the "same time" requirement. *See id.*; *see also State v. Tili*, 139 Wn.2d 107, 119, 123, 985 P.2d 365 (1999).

Third, the criminal intent for both counts was the same: use Maureen's credit card to purchase an iPad from Fred Meyer.

"As to intent, the relevant inquiry is to what extent the criminal intent, when viewed objectively, changed from one crime to the next." *State v. Wright*, 183 Wn. App. 719, 734, 334 P.3d 22 (2014) (citing *Tili*, 139 Wn.2d at 123). In *Tili*, our Supreme Court found the "same criminal intent" requirement was met for the three separate rape convictions, where "[the defendant's] unchanging pattern of conduct, coupled with an extremely close time frame [two minutes], strongly supports the

conclusion that his criminal intent, objectively viewed, did not change from one penetration to the next." *Tili*, 139 Wn.2d at 124.

Here, Mr. Morgan's pattern of conduct, attempting to purchase an iPad, did not change between the first purchase attempt and the second; coupled with an extremely close time frame of 21 seconds, this supports the conclusion that Mr. Morgan's criminal intent did not change between the two attempted purchases. *See Tili*, 139 Wn.2d at 124. Therefore, the "same criminal intent" requirement is met.

Counts 5 and 7 meet the three requirements for same criminal conduct. *See* RCW 9.94A.589(1)(a). The case should be remanded for resentencing so Counts 5 and 7 can be counted as one crime.

Issue 7: Whether the trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum.

Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that "'[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'"). "The interpretation of provisions of the SRA [Sentencing Reform Act] involves questions of law that we review de novo." *State v. Winborne*, 167 Wn. App. 320, 326, 273 P.3d 454 (2012) (citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)).

In *In re Personal Restraint of Brooks*, our Supreme Court held that "when the trial court imposes an aggregate term of confinement and community custody that potentially exceeds the statutory maximum, it must include a notation clarifying that the total term of confinement and community custody actually served may not exceed the statutory maximum." *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012) (citing *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009)). Subsequent to *Brooks*, the following amendment to the SRA became effective:

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9).

In *Winborne*, the defendant was sentenced to 60 months of confinement and 12 months of community custody following his conviction of felony violation of a domestic violence no-contact order under RCW 26.50.110(5). *Winborne*, 167 Wn. App. at 322. The judgment and sentence included a *Brooks* notation: "the total terms of confinement and community custody must not exceed the statutory maximum sentence of 60 months." *Id*. at 322-23; *see also Brooks*, 166 Wn.2d at 674.

On appeal, the defendant argued that because he was sentenced to the statutory maximum term of confinement of five years, RCW 9.94A.701(9) required the trial court to reduce his term of community custody to zero. *Id*. at 326. This Court agreed, holding that RCW 9.94A.701(9) no longer permits a sentencing court to make a *Brooks* notation to ensure the validity of a sentence. *Id*. at 322, 327-31. This Court found that RCW 9.94A.701(9) plainly presents a three-step process for the sentencing court to follow: "impose the term of confinement, impose the term of community custody, then reduce the term of community custody if necessary[.]" *Id*. at 329. This Court then remanded the case for resentencing. *Id*. at 331.

Subsequently, in *Boyd*, our Supreme Court reached the same result when interpreting RCW 9.94A.701(9). *See Boyd*, 174 Wn.2d at 471-73. There, the defendant was sentenced to a term of confinement and a term of community custody that together exceeded the statutory maximum sentence for the crime. *Id*. at 471-72. The judgment and sentence included a *Brooks* notation. *Id*. at 471; *see also Brooks*, 166 Wn.2d at 674.

In reversing and remanding the case for resentencing, the Court held "[t]he trial court here erred in imposing a total term of confinement and community custody in excess of the statutory maximum,

notwithstanding the *Brooks* notation." *Id*. at 473. The Court reasoned that RCW 9.94A.701(9) required "the trial court . . . to reduce [the defendant's] term of community custody to avoid a sentence in excess of the statutory maximum." *Id*.

Here, Mr. Morgan was convicted of four felonies: one count of second degree theft (count 1) and three counts of second degree identity theft (counts 2, 5, 7). (CP 380-387, 551; RP 319-320). Both crimes are class C felonies. RCW 9A.56.040(2) (second degree theft); RCW 9.35.020(3) (second degree identity theft). The statutory maximum for a class C felony is five years, or 60 months. RCW 9A.20.021(1)(c). A community custody term of 12 months is authorized for second degree identity theft. *See* RCW 9.94A.701(3)(a) (authorizing one year of community custody for an offender sentenced to a crime against persons); RCW 9.94A.411(2) (listing second degree identity theft as a crime against persons).

The trial court sentenced Mr. Morgan to 57 months of confinement and 12 months of community custody, which totals 69 months. (CP 551-552, 591). Thus, the term of confinement and the term of community custody together exceed the 60 month statutory maximum for the crimes. *See* RCW 9A.56.040(2) (second degree theft is a class C felony); RCW 9.35.020(3) (second degree identity theft is a class C felony); RCW

9A.20.021(1)(c) (statutory maximum for a class C felony). Pursuant to RCW 9.94A.701(9), this Court should remand the case to resentence Mr. Morgan so that the combined terms of incarceration and community custody do not exceed 60 months. *See* RCW 9.94A.701(9); *Winborne*, 167 Wn. App. at 322, 327-31; *Boyd*, 174 Wn.2d at 471-73.

Issue 8: Whether this Court should refuse to impose costs on appeal.

Mr. Morgan anticipates being the prevailing party in this appeal, so it is unlikely this Court will reach this issue. Nonetheless, Mr. Morgan preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016.

The trial court entered an Order of Indigency, granting Mr. Morgan a right to review at public expense. (CP 572-573). Mr. Morgan likely remains indigent and unable to pay costs that may be imposed on appeal. Appellate counsel anticipates filing a report as to Mr. Morgan's continued indigency and likely inability to pay an award of costs, no later than 60 days following the filing of this brief, as required by this Court's General Court Order issued on June 10, 2016. The imposition of costs would be inconsistent with those principles enumerated in *State v. Blazina*. *See State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015).

The Judgment and Sentence contains boilerplate language stating the "court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." (CP 550). The trial court asked Mr. Morgan "if there's anything that prevents him from working[,]" and Mr. Morgan responded that mental health issues prevent him from working, and that he has been receiving social security benefits for approximately six months. (RP 370).

In *Blazina*, our Supreme Court stated:

> [W]hen determining a defendant's ability to pay . . . Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, *such as Social Security* or food stamps . . . Although the ways to establish indigent status remain nonexhaustive . . . *if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs*.

Blazina, 182 Wn.2d at 838-39 (internal citations omitted) (emphasis added).

Because Mr. Morgan cannot work and receives social security benefits, the record demonstrates he does not have the ability to pay costs on appeal. *See id*. Mr. Morgan also requests this Court review any

subsequently filed report as to Mr. Morgan's continued indigency and likely inability to pay an award of costs, as evidence of his inability to pay costs on appeal.

For these reasons, Mr. Morgan respectfully requests that no costs on appeal be assigned to him.

F. CONCLUSION

The evidence presented at trial was insufficient to find Mr. Morgan guilty of counts 1-8. These convictions should be reversed and the charge dismissed with prejudice.

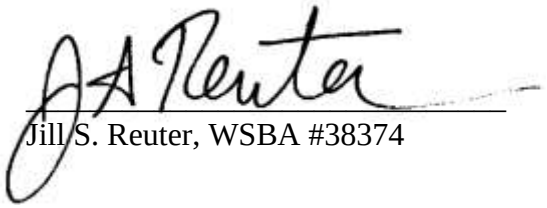
In the alternative, the convictions should be reversed and remanded for a new trial because: (1) the trial court erred in instructing the jury on alternative means that are not contained in the charging document on counts 1, 3, 4, 6, and 8; (2) the trial court violated Mr. Morgan's right to a unanimous jury verdict on counts 1, 3, 4, 6, and 8; (3) the trial court erred in its failure to give a unanimity instruction for second degree identity theft, as charged in count 2; and (4) Mr. Morgan received ineffective assistance of counsel when defense counsel's failed to object to the admission of Mr. Snyder's police interview.

At a minimum, the case should be remanded for resentencing, (1) so Counts 5 and 7 can be counted as one crime; and (2) so that the

combined terms of incarceration and community custody do not exceed 60 months.

Mr. Morgan also objects to any appellate costs should the State prevail on appeal. The record does not reflect that Mr. Morgan has the ability to pay.

Respectfully submitted this 27th day of June, 2016.



Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent vs. SHANE SAYER MORGAN Defendant/Appellant	)	COA No. 33987-4-III PROOF OF SERVICE

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC and Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 27, 2016, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Shane Sayer Morgan, #374829
Monroe Correctional Center
PO Box 7001
Monroe, WA 98272

Having obtained prior permission from the Kittitas County Prosecutor's Office, I also served the Respondent State of Washington at prosecutor@co.kittitas.wa.us using Division III's e-service feature.

Dated this 27th day of June, 2016.

Jill S. Reuter, Of Counsel, WSBA #38374
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com

APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOSHUA CALEB SNYDER, SHANE SAYER MORGAN, Defendants.	)	No. 15-1-00069-1 ✓ 15-1-00072-1 ✓ AMENDED INFORMATION

COMES NOW, GREGORY L. ZEMPEL, Prosecuting Attorney of Kittitas County, Washington, and by this Information accuses the Defendant of the crime(s) committed as follows:

1. THEFT IN THE SECOND DEGREE
2. IDENTITY THEFT IN THE SECOND DEGREE
3. THEFT IN THE THIRD DEGREE
4. THEFT IN THE THIRD DEGREE
5. IDENTITY THEFT IN THE SECOND DEGREE
6. ATTEMPTED THEFT IN THE THIRD DEGREE
7. IDENTITY THEFT IN THE SECOND DEGREE
8. ATTEMPTED THEFT IN THE THIRD DEGREE
9. IDENTITY THEFT IN THE SECOND DEGREE
10. ATTEMPTED THEFT IN THE THIRD DEGREE
11. IDENTITY THEFT IN THE SECOND DEGREE
12. ATTEMPTED THEFT IN THE THIRD DEGREE
13. IDENTITY THEFT IN THE SECOND DEGREE
14. ATTEMPTED THEFT IN THE THIRD DEGREE
15. IDENTITY THEFT IN THE SECOND DEGREE
16. ATTEMPTED THEFT IN THE THIRD DEGREE

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Ellensburg, WA 98926
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Count One:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, did wrongfully obtain or exert unauthorized control over an access device of another, to-wit: Maureen Webb's credit card, with intent to deprive such other of such property; thereby committing the felony crime of THEFT IN THE SECOND DEGREE; contrary to Revised Code of Washington 9A.56.040(1)(d), 9A.56.020(1), and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

Count Two:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, did knowingly obtain or possess 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, to-wit: Maureen Webb's credit card; under circumstances not amounting to identity theft in the first degree; thereby committing the felony crime of IDENTITY THEFT IN THE SECOND DEGREE; contrary to Revised Code of Washington 9.35.020(1) and (3) and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

Count Three:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, under circumstances not amounting to theft in the First or Second Degree, did wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services which does not exceed seven hundred fifty dollars ($750.00) in value, to-wit: $4.61 merchandise from Fred Meyer, in Ellensburg, WA; thereby committing the gross misdemeanor crime of THEFT IN THE THIRD DEGREE; contrary to Revised Code of Washington 9A.56.050(1)(a), 9A.56.020 and 9A.08.020.

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AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

Count Four:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, under circumstances not amounting to theft in the First or Second Degree, did wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services which does not exceed seven hundred fifty dollars ($750.00) in value, to-wit: $539.23 merchandise from Fred Meyer, in Ellensburg, WA; thereby committing the gross misdemeanor crime of THEFT IN THE THIRD DEGREE; contrary to Revised Code of Washington 9A.56.050(1)(a), 9A.56.020 and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

Count Five:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, did knowingly obtain or possess 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, to-wit: Maureen Webb's credit card, attempted to purchase iPad from Fred Meyer, in Ellensburg, WA; under circumstances not amounting to identity theft in the first degree; thereby committing the felony crime of IDENTITY THEFT IN THE SECOND DEGREE; contrary to Revised Code of Washington 9.35.020(1) and (3), and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

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Count Six:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, under circumstances not amounting to theft in the First or Second Degree, with intent to commit theft, did do an act which was a substantial step towards the commission of that crime, to wit: Fred Meyer, in Ellensburg, WA, did wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services which does not exceed seven hundred fifty dollars ($750.00) in value, to-wit: attempted to purchase iPad with a value of $538.92; thereby committing the gross misdemeanor crime of ATTEMPTED THEFT IN THE THIRD DEGREE; contrary to Revised Code of Washington 9A.56.050(1)(a), 9A.56.020, 9A.28.020, and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

Count Seven:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, did knowingly obtain or possess 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, to-wit: Maureen Webb's credit card, attempted to purchase an iPad from Fred Meyer, in Ellensburg, WA; under circumstances not amounting to identity theft in the first degree; thereby committing the felony crime of IDENTITY THEFT IN THE SECOND DEGREE; contrary to Revised Code of Washington 9.35.020(1) and (3), and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

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Count Eight:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, under circumstances not amounting to theft in the First or Second Degree, with intent to commit theft, did do an act which was a substantial step towards the commission of that crime, to wit: Fred Meyer, in Ellensburg, WA, did wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services which does not exceed seven hundred fifty dollars ($750.00) in value, to-wit: attempted a second time to purchase iPad with a value of $538.92; thereby committing the gross misdemeanor crime of ATTEMPTED THEFT IN THE THIRD DEGREE; contrary to Revised Code of Washington 9A.56.050(1)(a), 9A.56.020, 9A.28.020, and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

Count Nine:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, did knowingly obtain or possess 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, to-wit: Maureen Webb's credit card, attempted to purchase merchandise from Loves Travel Stores in Ellensburg, WA; under circumstances not amounting to identity theft in the first degree; thereby committing the felony crime of IDENTITY THEFT IN THE SECOND DEGREE; contrary to Revised Code of Washington 9.35.020(1) and (3), and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

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Count Ten:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, under circumstances not amounting to theft in the First or Second Degree, with intent to commit theft, did do an act which was a substantial step towards the commission of that crime, to wit: Loves Travel Store, in Ellensburg, WA, did wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services which does not exceed seven hundred fifty dollars ($750.00) in value, to-wit: attempted to purchase merchandise with a value of $319.66; thereby committing the gross misdemeanor crime of ATTEMPTED THEFT IN THE THIRD DEGREE; contrary to Revised Code of Washington 9A.56.050(1)(a), 9A.56.020, 9A.28.020, and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

Count Eleven:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, did knowingly obtain or possess 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, to-wit: Maureen Webb's credit card, attempted to purchase fuel from Smitty's Conoco in Ellensburg, WA; under circumstances not amounting to identity theft in the first degree; thereby committing the felony crime of IDENTITY THEFT IN THE SECOND DEGREE; contrary to Revised Code of Washington 9.35.020(1) and (3), and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

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Count Twelve:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 11, 2014, under circumstances not amounting to theft in the First or Second Degree, with intent to commit theft, did do an act which was a substantial step towards the commission of that crime, to wit: Smitty's Conoco, in Ellensburg, WA, did wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services which does not exceed seven hundred fifty dollars ($750.00) in value, to-wit: attempted to purchase fuel with a value of $1.00; thereby committing the gross misdemeanor crime of ATTEMPTED THEFT IN THE THIRD DEGREE; contrary to Revised Code of Washington 9A.56.050(1)(a), 9A.56.020, 9A.28.020, and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

Count Thirteen:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 12, 2014, did knowingly obtain or possess 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, to-wit: Maureen Webb's credit card, attempted to purchase fuel from Union 76 in Cle Elum, WA; under circumstances not amounting to identity theft in the first degree; thereby committing the felony crime of IDENTITY THEFT IN THE SECOND DEGREE; contrary to Revised Code of Washington 9.35.020(1) and (3), and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

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Count Fourteen:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 12, 2014, under circumstances not amounting to theft in the First or Second Degree, with intent to commit theft, did do an act which was a substantial step towards the commission of that crime, to wit: Union 76 in Cle Elum, WA, did wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services which does not exceed seven hundred fifty dollars ($750.00) in value, to-wit: attempted to purchase fuel with a value of $1.00; thereby committing the gross misdemeanor crime of ATTEMPTED THEFT IN THE THIRD DEGREE; contrary to Revised Code of Washington 9A.56.050(1)(a), 9A.56.020, 9A.28.020, and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

Count Fifteen:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 12, 2014, did knowingly obtain or possess 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, to-wit: Maureen Webb's credit card, attempted to purchase fuel from Union 76 in Cle Elum, WA; under circumstances not amounting to identity theft in the first degree; thereby committing the felony crime of IDENTITY THEFT IN THE SECOND DEGREE; contrary to Revised Code of Washington 9.35.020(1) and (3), and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

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Count Sixteen:

They, the said, JOSHUA C. SNYDER and SHANE S. MORGAN, in the State of Washington, as principal or accomplice, on or about June 12, 2014, under circumstances not amounting to theft in the First or Second Degree, with intent to commit theft, did do an act which was a substantial step towards the commission of that crime, to wit: Union 76 in Cle Elum, WA, did wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services which does not exceed seven hundred fifty dollars ($750.00) in value, to-wit: attempted to purchase fuel with a value of $1.00; thereby committing the gross misdemeanor crime of ATTEMPTED THEFT IN THE THIRD DEGREE; contrary to Revised Code of Washington 9A.56.050(1)(a), 9A.56.020, 9A.28.020, and 9A.08.020.

AGGRAVATING CIRCUMSTANCES: The State of Washington further alleges that the defendant's prior un-scored misdemeanor criminal history, multiple current offenses, high offender score results in some of the current offenses going unpunished, and the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation, result in a presumptive sentence that is clearly too lenient in light of the purposes of 9.94A RCW, in violation of 9.94A.535 (2)(b)(c) and (d).

DATED this 20 day of October, 2015.

GREGORY L. ZEMPEL
WSBA # 19125
Prosecuting Attorney

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