NO. 73798-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARGARET COLSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

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2. Whether there is sufficient evidence to support the conviction for Count 2 where there was circumstantial evidence that the victim was a real person and not a fictitious identity.

3. Whether there is sufficient evidence to support the convictions for Counts 3 and 5 through 10 where the jury was properly instructed on the scope of accomplice liability and there was ample proof that Colson knowingly participated in these crimes, and the addition of the phrase "or an accomplice" in a single jury instruction did not alter the State's burden of proof.

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B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Margaret Colson was found guilty by a jury of eight counts of identity theft in the second degree (Counts 1-3, 5-6, and 8-10), one count of identity theft in the first degree (Count 7), and one count of possession of stolen mail (Count 4). CP 204-07. The court imposed a standard range sentence of 50 months of total confinement plus a prison-based Drug Offender Sentencing Alternative. CP 207.

2. FACTS OF THE CRIMES.

On February 16, 2012, Kirkland resident David Liddle was working from home when he saw a car stealing mail from the mailboxes in his neighborhood. RP 7/14/15 9-14. He wrote down the license plate of the car and called the police. RP 7/14/15 15, 23.

Kirkland Police stopped the car on a nearby freeway. RP 7/14/15 31-36. The defendant, Margaret Colson, was in the

passenger seat. RP 7/14/15 35-36. Stolen mail was strewn throughout the car. RP 7/14/15 35. The driver, Shawn Schulze, confessed to stealing mail. RP 7/14/15 52. Witness Liddle was transported to the scene of the stop and identified the car and the occupants as the people he had seen stealing mail in his neighborhood. RP 7/14/15 24-25. Police obtained a search warrant for the car, a Dodge Charger that belonged to Colson. RP 7/14/15 69. They found a multitude of stolen mail in the passenger compartment and in the trunk. RP 7/14/15 70-73.

Two months later, on the afternoon of April 10, 2012, security officers at Bellevue Square shopping mall observed three men in the parking lot behaving suspiciously. RP 7/15/15 66-71, 83. The men had many Nordstrom bags in the trunk of the car, and were taking pictures of items from the bags. RP 7/15/15 66-68, 83. The security officers called the police, and Bellevue Police stopped the car, Colson's Charger, as it exited the parking lot. RP 7/15/15 86; RP 7/20/15 6, 38. The occupants, Vikram Chopra, Melvin Eisenhower and Shawn Schulze, were arrested, and Chopra and Schulze confessed. RP 7/20/15 9. Police obtained another search warrant for the car, and found additional stolen mail and evidence of retail theft. RP 7/20/15 18-35.

Vikram Chopra testified at Colson's trial. RP 7/20/15 142. He had pled guilty to 25 counts of identity theft in Snohomish County and was serving an 85-month prison sentence. RP 7/20/15 144. Chopra and Schulze were partners, and moved in with Colson and her husband in December of 2011 because they had become homeless due to their drug use. RP 7/20/15 156-57. Chopra used heroin and opiates, and often used methamphetamines with Colson. RP 7/20/15 152, 160. After Chopra and Schulze moved in with Colson, the three began committing mail theft and identity theft together. RP 7/20/15 164-65. They would usually drive Colson's Charger to wealthy neighborhoods such as Bellevue, Medina and Mercer Island, and steal mail from mailboxes. RP 7/20/15 165-66. They would use bank statements or credit card statements to commit identify theft and retail theft. RP 7/20/15 167. A common scheme that they repeatedly utilized was to obtain a Nordstrom account number, make a purchase by phone of expensive items, pick up the merchandise and then return it for a cash refund, usually on the same day or the next day. RP 7/20/15 167-72. Nordstrom's liberal return policy made the scheme possible. RP 7/20/15 57-59, 168; RP 7/21/15 120. The three worked

together and they all shared the cash proceeds of each transaction. RP 7/20/15 165-72; RP 7/21/15 10-12.

Schulze also testified to participating in the identity theft scheme with Colson and Chopra. RP 7/21/15 72. He, like Chopra, pled guilty to 25 counts of identity theft in Snohomish County, and was serving a 9-year sentence. RP 7/21/15 73-74. Schulze also used methamphetamines with Colson. RP 7/21/15 82. He corroborated Chopra's testimony about the mail thefts and the scheme to commit multiple retail thefts from Nordstrom using phone orders and cash returns. RP 7/21/15 86-93. They shared the money from the thefts with Colson. RP 7/21/15 84, 119.

The testimony of Chopra and Schulze was corroborated by the testimony of Elizabeth LaFave, a loss prevention investigator for Nordstrom. RP 7/20/15 51-55. She was able to track many of the transactions through data retained by Nordstrom. RP 7/20/15 62. This included the records of purchases and returns with the exact time, date and location of the transactions, and the signatures of the "customer" involved. RP 7/20/15 62-65; Ex. 40. She was able to obtain surveillance photos and video of most of these transactions. RP 7/20/15 67-70; Ex. 40. She prepared a

PowerPoint presentation with this information, which was admitted and shown to the jury as Exhibit 41. RP 7/20/15 76-77.[1]

The jury also heard a recording of a jail call placed by Colson after she was charged with the present crimes. RP 7/15/15 139-41. In the call, Colson states, "I'm back. I was doin' paper crime, mailboxin', and fucking getting 'counts, and going to Nordstrom's and shit like that, and chargin' on people's accounts . . . I think some of the charges I did do." RP 7/15/15 141.

The defense presented no evidence at trial. RP 7/21/15 145.

a. Facts Related To Count 1.

In Count 1, Colson was charged with identity theft in the second degree committed against Brett Stanewich on or about February 16, 2012. CP 29. When Colson was stopped by the Kirkland Police on February 16, 2012, they found a check from Brett Stanewich written to Joe Eskridge, and a debit card belonging to Stanewich in Colson's car. RP 7/14/15 81-83. Stanewich testified that his checks and the debit card were stolen from his mail. RP 7/14/15 105-07. He never wrote a check to Eskridge, and

[1] Ex. 40 is a hard copy and Ex. 41 is the electronic copy of LaFave's PowerPoint. RP 7/20/15 77.

did not give anyone permission to have his checks or debit card. RP 7/14/15 107. Chopra testified to the fact that he, Colson and Schulze used the debit card to make purchases and deposited one of Stanewich's checks into a bank account that they had opened online. RP 7/21/15 30-33.

b. Facts Related To Count 2.

In Count 2, Colson was charged with identity theft in the second degree committed against Rafic Farah on or about February 16, 2012. CP 30. Chopra testified that he, Schulze and Colson stole checks belonging to Farah when stealing mail from Farah's mailbox and used the checks to deposit money into a fraudulent account they had set up. RP 7/2/15 34-35. Chopra testified that they had no permission from Farah to use his checks. RP 7/21/15 35. A copy of the check written on Farah's account found in Colson's car on February 16, 2012, was admitted. RP 7/14/15 82; Ex. 12, p. 6. (Farah did not testify at trial because he had moved to Pittsburgh. RP 7/21/15 137.)

c. Facts Related To Count 3.

In Count 3, Colson was charged with identity theft in the second degree committed against Joe Eskridge on or about February 16, 2012. CP 30. Joe Eskridge was contacted by police about checks deposited into an Ally Bank account that had been opened in his name. RP 7/14/15 98-101. Eskridge did not open an account with Ally Bank and did not give anyone permission to do so in his name. RP 7/14/15 102. Chopra testified that based on information obtained from stolen mail, Colson, Chopra and Schulze had enough information to open a fraudulent bank account in the name of Joe Eskridge, and that they also applied for a debit card in Eskridge's name which they used to make purchases. RP 7/21/15 31-37. Checks written to Joe Eskridge and the debit card were found in Colson's car on February 16, 2012, and copies were admitted as evidence. RP 7/14/15 81-82. A bank statement from the fraudulent account was also admitted into evidence. RP 7/14/15 101.

d. Facts Related To Count 4.

In Count 4, Colson was charged with possession of stolen mail on or about February 16, 2012. CP 30. Multiple pieces of mail

belonging to Peggy Hotes, Brooke Catano, Kelsey Hoffman and Christine Frankl were found by police in Colson's car on February 16, 2012. RP 7/14/15 85-91. Hotes, Catano, Hoffman and Frankl testified and identified these pieces of mail as theirs, and testified that no one had permission to take their mail. RP 7/14/15 108-17, 128-35, 145-50; RP 7/15/15 47-53.

e. Facts Related To Count 5.

In Count 5, Colson was charged with identity theft in the second degree committed against Douglas Rogers between March 28, 2012, and April 12, 2012. CP 31. Douglas Rogers testified that he had a Nordstrom account on which someone charged $1100 in gift cards and made other purchases without his permission. RP 7/14/15 122-25. Records and surveillance video from Nordstrom showed Chopra picking up merchandise charged to Rogers' account and Chopra and Schulze returning the merchandise for cash multiple times from March 28 to April 7, 2012. RP 7/20/15 78-95; Ex. 40, pp. 16-28. Chopra testified to the trio using Rogers' account to obtain cash. RP 7/21/15 13.

f. Facts Related To Count 6.

In Count 6, Colson was charged with identity theft in the second degree committed against John Rubenis between April 25, 2012, and April 26, 2012. CP 31. John Rubenis testified that he had a Nordstrom account and was notified by Nordstrom of unauthorized purchases on his account. RP 7/14/15 138-41. He did not give anyone permission to take his mail or use his Nordstrom account. RP 7/14/15 144. Records and surveillance video showed purchases made on Rubenis's account on April 25 and 26, 2012, with Chopra receiving cash in return and Colson present in the background at the time of the transaction. RP 7/21/15 106-07; Ex. 40, pp. 29-32.

g. Facts Related To Count 7.

In Count 7, Colson was charged with identity theft in the first degree committed against Janice Conner between April 22, 2012, and April 24, 2012. CP 32. Janice Conner testified that she had a Nordstrom account and was informed by Nordstrom that a second unauthorized account had been opened in her name. RP 7/15/15 132-35. She did not give anyone permission to take her mail or use her Nordstrom account. RP 7/15/15 138. Records and video from

Nordstrom showed a phone order placed on Conner's account for an $854 purchase on April 22, 2012, which was returned for cash three hours later. RP 7/20/15 107-08. Another phone order for a $1654 purchase was placed that same day, and returned for $974 in cash the next day. RP 7/20/15 112. A third phone order for a $905 purchase was placed on April 22, 2012, and returned for $684 in cash on April 24, 2012. RP 7/20/15 113. Kelsey Peterson, who Chopra and Schulze testified sometimes assisted them and had briefly lived with Colson, is seen on surveillance video conducting the transactions with Colson sitting in the background. RP 7/20/15 107-11, 161; 7/21/15 84, 112; Ex. 40, pp. 33-41.

h. Facts Related To Count 8.

In Count 8, Colson was charged with identity theft in the second degree committed against William Hagge between March 4, 2012, and March 11, 2012. CP 32. William Hagge testified that he had a Nordstrom account and was alerted by Nordstrom of transactions he did not authorize. RP 7/15/15 145-47. He did not give anyone permission to take his mail or make purchases on his Nordstrom account. RP 7/15/15 149-50. Records and video from Nordstrom showed phone orders on Hagge's account on March 4

and 5, with the merchandise being returned for cash between March 5 and 11, 2012, by both Chopra and Colson. RP 7/20/15 114-17; Ex. 40, pp. 42-51. Chopra identified himself in these videos. RP 7/21/15 14-17.

i. Facts Related To Count 9.

In Count 9, Colson was charged with identity theft in the second degree committed against Steven Klein between March 26, 2012, and March 29, 2012. CP 32-33. Klein had a Nordstrom account and was notified by Nordstrom of unusual activity on his account. RP 7/21/15 4-7. He did not give anyone permission to take his mail or use his Nordstrom account. RP 7/21/15 7. Records and video from Nordstrom show phone orders on Klein's account between March 26 and March 29, 2012, with the merchandise being returned for cash by Schulze and Colson. Ex. 40, pp. 52-59; RP 7/21/15 27.

j. Facts Related To Count 10.

In Count 10, Colson was charged with identity theft in the second degree committed against Lawrence Meitl between January 30, 2012, and February 19, 2012. CP 33. Lawrence Meitl testified

that he had a Nordstrom account and discovered unauthorized purchases on that account. RP 7/15/15 30-33. He did not give anyone beyond his immediate family permission to take his mail or use his Nordstrom account. RP 7/15/15 34. Records and videos from Nordstrom show phone orders on Meitl's account between January 30 and February 7, 2012, with Colson and Chopra signing for cash refunds. Ex. 40, pp. 60-68.

C. ARGUMENT.

1. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S VERDICTS ON COUNTS 1 AND 2.

Colson claims on appeal that the jury's verdicts on Counts 1 and 2 are not supported by the evidence because there was not sufficient evidence that those crimes were committed on the date charged: February 16, 2012. Colson argues that the evidence shows those crimes were actually committed prior to that date. Colson also argues that because Rafic Farah, the named victim in Count 2, did not testify there was insufficient evidence that he was a real person. These claims are without merit. The State need not prove the precise date of the crime, and there was sufficient circumstantial evidence that Farah was not a fictitious identity.

A person commits identity theft when she knowingly obtains, possesses, uses or transfers a means of identification or financial information of another person with the intent to commit a crime. RCW 9.35.020(1). Identity theft in the first degree occurs when the person uses the financial information to obtain money, goods or services in excess of $1500 in value. RCW 9.35.020(2). When the person does not obtain more than $1500 of money, goods or services, the crime is identity theft in the second degree. RCW 9.35.030(3). The statute, like burglary, requires proof of intent to commit any crime, and does not require proof of intent to commit a particular crime. State v. Fedorov, 181 Wn. App. 187, 197-98, 324 P.3d 784 (2014). The unit of prosecution is the possession of a single victim's means of identification or financial information with intent to commit a crime. State v. Fisher, 139 Wn. App. 578, 585, 161 P.3d 1054 (2007). Actual use of the means of identification or financial information is not required. State v. Sells, 166 Wn. App. 918, 924, 271 P.3d 952 (2012). The means of identification or financial information must belong to a real natural person or corporation, not a fictitious one. Id.; RCW 9A.04.110(17).

"A sufficiency challenge admits the truth of the State's evidence and accepts the reasonable inferences to be made from

it." State v. O'Neal, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007). Appellate courts will reverse a conviction "only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt." State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

Drawing all reasonable inferences in favor of the State there was substantial evidence that Colson used Stanewich's and Farah's financial information prior to February 16th and continued to possess that information on February 16th with the intent to commit further crimes. The debit card and checks were found in the small metal box that Chopra and Schulze testified was used to store fraudulent credit cards. RP 7/14/15 80-81; RP 7/21/15 37-39, 125-26. It is a reasonable inference from the evidence that on February 16, 2012, Colson possessed the checks and debit card in Stanewich and Farah's name with the intent to commit further crimes with the financial information contained on those items.

Moreover, the date of the crime is not a material element of the crime. "[W]here time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi." State v. Hayes, 81 Wn. App. 425, 432, 914

P.2d 788 (1996). The information and instructions alleged that the crime occurred "on or about" February 16, 2012. CP 19-30. That language does not require the State to prove that the crime occurred precisely on February 16th. In United States v. Shea, 493 F.3d 1110, 1118 (9th Cir. 2007), the defendant claimed the evidence was insufficient to prove that he committed the offense on or about January 29th as alleged in the indictment where the evidence suggested the crime occurred on January 7th. The Ninth Circuit rejected his argument, stating "A variance typically is immaterial if the government has proven that the criminal act occurred on a date 'reasonably near' the date cited in the indictment." Id. In the present case, even assuming the only reasonable inference is that identity theft regarding Stanewich and Farah occurred in early February, that date was reasonably near the date charged.

Similarly, drawing all reasonable inferences in favor of the State there was sufficient evidence that Rafic Farah was a real person, although he did not testify at trial. Evidence can be direct or circumstantial and both can be considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Chopra testified that they had stolen Farah's checks from a

mailbox, and then used one of the checks to make a deposit into the fraudulent account set up in Eskridge's name. RP 7/21/15 34. Schulze also testified that the check was successfully cashed and they were able to withdraw the funds from the account. RP 7/21/15 35-36. The fact that Farah's checks were stolen from the mail, and that the check was successfully used to obtain money, is circumstantial evidence that Farah was a real person and not a fictitious identity. The jury was free to draw the reasonable inference that Farah was a real person based on the circumstantial evidence presented.

2. THE STATE WAS NOT REQUIRED TO PROVE THAT COLSON ACTED ALONE IN COMMITTING THE CRIMES.

Colson argues that because the words "or an accomplice" were added to one element in the instructions for Count 7, the State undertook the burden of "proving principal liability" as to all other elements and all the other counts. Colson is mistaken. Her argument misapplies the law of the case doctrine and misapprehends the nature of accomplice liability. There was sufficient evidence that Colson knowingly participated in all the crimes of which she was convicted.

Colson cites State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998), for the proposition that the law of the case doctrine provides that the State assumes the burden of proving any superfluous elements added to the "to-convict" instruction. However, Hickman, was recently overruled by the United States Supreme Court.

In Musacchio v. United States, __ U.S. __, 136 S. Ct. 709, 714, 193 L. Ed. 2d 639 (2016), the Court clarified that the law of the case doctrine has no application to "erroneously heightened jury instructions." The Court held that "when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." Id. at 715. The Court explained that the sufficiency inquiry does not rest on how the jury was instructed, but whether the jury made all the findings that due process requires. Id. If the jury has been instructed to find guilt based on all the elements of the charged crime beyond a reasonable doubt, then due process has been achieved. Id. "The Government's failure to introduce evidence of an additional element

does not implicate the principles that sufficiency review protects." Id.

The Court also clarified that the law of the case doctrine has no application to the appellate court's review of the sufficiency of the evidence. The Court explained that when a party fails to object below, appellate review can be constrained by other doctrines, such as waiver and forfeiture, but not by the law of the case doctrine. The law of the case doctrine describes an appellate court's decision not to depart from a ruling that it made in a prior appeal in the same case; it does not affect the appellate court's ability to review the lower court's rulings. Id. The law of the case doctrine "does not bear on how to assess a sufficiency challenge." Id.

To the extent that Hickman holds otherwise, it is no longer good law. Hickman cited the law of the case doctrine as providing that "jury instructions not objected to become the law of the case," meaning the State assumes the burden of providing unnecessary elements added to the "to-convict" instructions. 135 Wn.2d at 102. The rule cited in Hickman is not based on any independent state constitutional right, or a differing interpretation of the due process clause contained in the state constitution. The Washington due

process clause is coextensive with and does not provide greater protection than the federal due process clause. Nielsen v. Washington State Dept. of Licensing, 177 Wn. App. 45, 52 n.5, 309 P.3d 1221 (2013) (citing State v. Manussier, 129 Wn.2d 652, 679, 921 P.3d 473 (1996)).

Moreover, there were no superfluous elements added to the jury instructions in this case. The law of the case doctrine as stated in Hickman would not apply in this case because the "to convict" instruction for Count 7 did not add an unnecessary element by using the phrase "or an accomplice." Accomplice liability is not an element of the crime charged, nor is it an alternative means of committing the crime. State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003). The same criminal liability attaches to everyone who knowingly participates in a crime. State v. Rodriguez, 78 Wn. App. 769, 772-73, 898 P.2d 871 (1995). "Any person who participates in the commission of the crime is guilty of the crime and is charged as a principal." State v. Silva-Baltazar, 125 Wn.2d 472, 480, 886 P.2d 138 (1994). Accomplice liability need not be alleged in the charging document. Teal, 117 Wn. App. at 838. The jury need only be instructed as to the scope of accomplice liability, when applicable, with a separate instruction. Id. Accomplice

language need not be incorporated into the "to convict" instruction. Id. In Colson's case, the jury received an accurate separate instruction explaining accomplice liability. CP 134.

The addition of "or an accomplice" in one of the "to convict" instructions did not alter the law of complicity in this case. There was ample proof that Colson knowingly participated, aided and profited from all the crimes charged, and was thus properly found guilty of each.

3. THERE WAS SUFFICIENT EVIDENCE OF THE SINGLE MEANS OF COMMITTING POSSESSION OF STOLEN MAIL.

Colson contends that her conviction for possession of stolen mail must be reversed because there was no evidence of each alternative means presented to the jury. However, Colson acknowledges the flaw in her argument: the words "receive, retain, possess, conceal or dispose" in the statute are not separate alternative means. Brief of Appellant, at 32. Only one means of committing the crime was presented to the jury, and there was sufficient evidence of that means.

The crime of possession of stolen mail is defined in RCW 9A.56.380. The statute prohibits the possession of at least ten

separate pieces of stolen mail addressed to at least three different mailboxes. RCW 9A.56.380(a). The statute defines "possesses stolen mail" as "to knowingly receive, retain, possess, conceal or dispose of stolen mail knowing that it has been stolen." RCW 9A.56.380(2). In this respect, the statute mirrors the statute defining possessing stolen property, RCW 9A.56.140. That statute defines possessing stolen property as "knowingly to receive, retain, possess, conceal or dispose of stolen property." RCW 9A.56.140(1). This phrase is definitional and does not create alternative means of committing the crime. State v. Hayes, 164 Wn. App. 459, 477, 262 P.3d 538 (2011). See also State v. Makekau, __ Wn. App. __, __ P.3d __, 2016 WL 3188944 (2016) (holding that definition of possession in possession of a stolen motor vehicle statute does not create alternative means).

Whether a statute creates alternative means is a question of statutory interpretation. State v. Sandholm, 184 Wn.2d 726, 732, 364 P.3d 87 (2015). The legislature's use of the disjunctive "or" does not in itself create alternative means. Id. at 733. Nor is the use of subsections dispositive. Id. The analysis should focus on whether each alleged alternative describes distinct acts or "minor nuances inhering in the same act." Id. If the terms are closely

related with substantial overlap then they do not describe distinct means. State v. Owens, 180 Wn.2d 90, 98-99, 323 P.3d 1030 (2014). Applying this principle to the crime of possession of stolen mail, the terms receive, retain, possess, conceal or dispose are closely related with substantial overlap. It is hard to imagine receiving stolen mail without also retaining and possessing it, as well as concealing it from the owner and disposing of it in some manner. These terms are "minor nuances inhering the same act" and are definitional. They are not alternative means of committing the crime of possessing stolen mail.

If a statute creates alternative means of committing the crime, and two or more alternative means are presented to the jury, there must be substantial evidence of each alternative means to affirm the conviction. Owens, 180 Wn.2d at 95. "When there is sufficient evidence to support each alternative means of committing the crime, express jury unanimity as to which means is not required." Id. If there is insufficient evidence to support one of the means presented to the jury, the conviction must be reversed for insufficient evidence unless there is an expression of jury unanimity as to supported means, because the jury might have based the verdict on the means unsupported by substantial evidence. Id.;

State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994); State v. Green, 94 Wn.2d 216, 231-33, 616 P.2d 628 (1980). In contrast, if the statute does not create alternative means, then there is no requirement that the jury find each prong of a definition presented in the instructions. Sandholm, 184 Wn.2d at 732.

Colson's relies on State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004). In that case, this Court held that where a multi-faceted definition of an element is included in the "to-convict" instruction, all of the terms become alternative means that the State must prove. Lillard's conclusion is obviously flawed. First, it relies on the law of the case doctrine, which does not alter the State's burden of proof as explained above. Second, it confuses the meaning of the word of "element." In this case, the element in question is "possession." Possession is a single element. Possession does not become five elements by including the definition of the term in the jury instructions. Thus, including the definition in the instruction does not add superfluous elements. The State respectfully requests that this Court decline to follow Lillard's reasoning.

Indeed, the reasoning of Lillard has been implicitly rejected by the Washington Supreme Court. In State v. Sandholm, supra, the defendant was charged with DUI, and the issue on appeal was whether that crime has two or three alternative means. 184 Wn.2d at 729. The court held that the statute has two alternative means: (1) driving with a BAC over .08; and (2) driving while under the influence of or affected by liquor, drugs or the combined influence of liquor and any drug. Id. at 735. The jury in Sandholm was instructed as to only one of these two alternative means: that Sandholm was under the influence of alcohol or drugs or the combined influence of alcohol and drugs. Id. at 730. Sandholm argued that his conviction must be reversed because there was no evidence he was under the influence of a drug. Id. at 731. The supreme court disagreed, holding that because there was sufficient evidence that Sandholm drove under the influence of alcohol, his conviction was affirmed. Id. at 746. The definitional language pertaining to drugs did not become something the State had to prove under the so-called law of the case doctrine. The result in Sandholm demonstrates that there need not be evidence of every definitional term presented in the "to-convict" instruction.

In the present case, the jury was presented with a single means of committing the crime, not alternative means, and thus there is no sufficiency issue. There can be no question that the State presented substantial evidence that Colson knowingly received, retained, possessed and concealed at least ten items of stolen mail addressed to at least three different addresses. The conviction for possessing stolen mail, Count 4, should be affirmed.

4. THE VALIDITY OF THE AGGRAVATING CIRCUMSTANCE IS A MOOT QUESTION BECAUSE THE COURT DID NOT IMPOSE AN EXCEPTIONAL SENTENCE.

Colson argues that there was insufficient evidence to support the aggravating circumstance that was submitted to the jury as to Counts 5 through 10. This issue is moot because the sentencing court did not impose an exceptional sentence.

In regard to Counts 5 through 10, the State alleged that each of these offenses was a major economic offense as defined in RCW 9.94A.535(3)(d). CP 31-33. As to each of these crimes, the jury was instructed to answer whether the offense was a major economic offense. CP 135-40. The jury was instructed that in order to find a major economic offense, the State must prove

beyond a reasonable doubt that the crime (1) involved multiple victims or multiple incidents per victim; or (2) involved attempted or actual monetary loss substantially greater than typical for the crime, or (3) involved a high degree of sophistication or planning or occurred over a lengthy period of time. CP 141. The jury answered yes as to each count. CP 156, 158, 161, 163, 165, 167. However, the court did not impose an exceptional sentence. CP 205, 207.

A moot issue is an issue that involves an abstract question because effective relief cannot be given. State v. Sansone, 127 Wn. App. 630, 636, 111 P.3d 1251 (2005). The issue as to the aggravating circumstance is a moot issue, because it does not affect the validity of the standard range sentence imposed by the court. The issue is abstract. Because this is not an issue of continuing and substantial public interest, this Court need not address it. Id.

Moreover, the jury properly found the aggravating circumstances. Colson relies on State v. Hayes, 182 Wn.2d 556, 342 P.3d 1144 (2015), to argue that the aggravating circumstance is invalid. In Hayes, the defendant was convicted as an accomplice, and appealed her exceptional sentence based on the

major economic offense aggravating factor. Id. at 562-63. On appeal, the court noted that it looks to whether the defendant's own misconduct satisfies the language of the statute in reviewing a sentence aggravator. Id. at 563.

Here, overwhelming evidence shows that Colson knew that the Nordstrom phone order/cash return identity theft scheme involved multiple incidents per victim. The evidence allowed the jury to find that Colson's own actions satisfied the major economic offense aggravator.

5. APPELLATE COSTS SHOULD BE AWARDED.

Colson requests that no appellate costs be awarded should the State prevail on appeal. Recently, this Court held that the appellate court must make an individualized inquiry into the defendant's likely ability to pay in order to award appellate costs. See State v. Sinclair, 192 Wn. App. 380, 391, 367 P.3d 612 (2016). Often, the record on appeal will be insufficient to make this determination. For this reason, Division 3 of this Court recently enacted a procedure whereby an adult offender must cite to the record in support of a claim of inability to pay, and must also file a report as to continued indigency, signed by the offender under

penalty of perjury. See In re the Matter of Court Administration Order Re: Request to Deny Cost Award, dated June 10, 2016 (available at http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=021&div=III).

In the present case, the record supports a finding that Colson has the ability to pay appellate costs. Colson cites to no facts other than the sentencing court's waiver of discretionary legal financial obligations to support her request that costs not be awarded. In a declaration submitted to obtain the order for indigency, Colson provided no information whatsoever about her employment history or assets. Supp CP __ (sub 103, Declaration of Margaret Colson). However, at sentencing, there was sufficient information offered for this court to determine that Colson has the ability to pay appellate costs. Colson is 46 years old. RP 7/29/15 5. Colson told the sentencing court that she was gainfully employed in human resources for 20 years, and is retired. RP 7/29/15 9. Colson has no children to support, and she and her husband own a home in Snohomish County. RP 7/29/15 9-10. Colson received a prison sentence of 50 months, meaning she will likely be no older than 50 when released from prison. RP 7/29/15 14. Colson was not ordered to pay restitution, and was only

ordered to pay $600 in legal financial obligations by the trial court. In light of these facts, there is sufficient evidence in the record for this Court to determine that Colson has the ability to pay appellate costs. If the State prevails on appeal, appellate costs should be ordered.

D. CONCLUSION.

All of Colson's convictions should be affirmed.

DATED this 9th day of August, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Richard W Lechich, the attorney for the appellant, at richard@washapp.org, containing a copy of the Brief of Respondent, in State v. Margaret Elizabeth Colson, Cause No. 73798-8, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 9 day of August, 2016.

Name:
Done in Seattle, Washington