SUPREME COURT NO. 97080-7
COA NO. 49810-3-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRUCE J. BROOKS,

Petitioner.

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

The Honorable Gretchen Leanderson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Bruce Brooks asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Brooks requests review of the decision in State v. Bruce Brooks, Court of Appeals No. 49810-3-II (slip op. filed Jan. 23, 2019), attached as appendix A. The order denying the motion for reconsideration, entered March 15, 2019, is attached as appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether RAP 2.5(a) allows appellants to rely on objections made by co-defendants to preserve an evidentiary error for appeal, notwithstanding a contrary indication in State v. Davis, 141 Wn.2d 798, 10 P.3d 977 (2000)?

2. Where the State did not produce the digital version of photographs police officers used to identify petitioner as a participant in the burglary, whether police testimony on the content of the photos violated the best evidence rule under ER 1002?

3. Whether police officer testimony identifying the person in a photo as the defendant constituted an improper opinion because it invaded the province of the jury as trier of fact?

4. Whether defense counsel was ineffective in failing to move to strike objectionable police opinion on guilt and profiling?

5. Whether cumulative error violated petitioner's due process right to a fair trial?

6. Whether the evidence is insufficient to convict for identity theft because the State failed to prove petitioner (a) knowingly possessed a means of identification or personal information or (b) intended to commit a crime with them?

D. STATEMENT OF THE CASE

The State charged Bruce Brooks with residential burglary and second degree identity theft. CP 1-2. His case was tried together with co-defendant Michael Coats. 1RP[1] 1; CP 33.

Around noon on April 25, 2016, Steven Coe was in his front yard when he saw a female walk through his neighbor's yard across the street and into the back door of the residence. 1RP 249-52, 263. A Blazer pulled into the neighbor's driveway. 1RP 251. The female came out and talked to the driver, then went back into the house. 1RP 251. A few minutes later, she and another man came out, loaded things into the car,

[1] Citation to the verbatim report of proceedings is as follows: 1RP - five consecutively paginated volumes consisting of 10/25/16, 10/31/16, 11/1/16, 11/3/16, 11/7/16, 11/8/16, 11/9/16, 11/14/16, 11/15/16; 2RP - 10/31/16 (voir dire); 3RP - 11/1/16 (voir dire); 4RP -12/2/16.

and left. 1RP 251-55. The driver never left the car. 1RP 253. Coe was unable to get a good look at the driver's face. 1RP 257-58. According to Coe, the man had a buzz cut; he wasn't bald. 1RP 258, 267. Coe took digital photos on his cell phone as the event unfolded, including photos of the driver. 1RP 256, 272, 274; Ex. 258-262. Various items were taken from the residence shared by Ms. Shanburn and Mr. Jones, including a state identification card and financial documents. 1RP 281-94, 308-09, 313-16, 329, 592-94.

Officer Thiry responded to the 911 call. 1RP 187. Coe showed him the digital photos he took on his cell phone. 1RP 191, 268-69. The phone had a feature that could zoom in and expand the photo. 1RP 274. There were things that could be seen in the photographs that were not clearly visible in the paper photos admitted as Exhibits 258-262. 1RP 274-75. After enlarging the photos on his patrol car computer, Thiry identified the vehicle as a red Nissan Pathfinder and noted its license plate number. 1RP 192-93. Over defense objection, Thiry testified a photo showed the driver of the vehicle was a "bald black male." 1RP 194-95.

At the scene, Thiry showed the photos to Officer Tiffany. 1RP 354-56. Thiry ran a record check on the vehicle and determined its registered owner, Jamal Block, lived nearby. 1RP 199, 207. On cross examination, Brooks's counsel elicited Tiffany's testimony that the person

in one of the photos was a black male that closely resembled Block, and that the vehicle in the photo belonged to Block. 1RP 374. Over defense objection, Tiffany testified on redirect that Brooks closely resembled the driver in the photo. 1RP 384-89.

Officers surveilled the address where the vehicle was registered. 1RP 203-04, 362-63. The Pathfinder arrived. 1RP 204-06, 362-63. Officers contacted Block and Michelle Killgore at the residence. 1RP 208, 363. Items taken from the residence were found in Block's Pathfinder and on Killgore. 1RP 208-09, 212, 394-95, 405-07, 440-41, 532-33, 613-15. At some point during the investigation that day, police stopped a Jeep Cherokee containing Brooks and Coats. 1RP 240-41. Stolen property from the residence was found inside. 1RP 433-34, 438-41, 533-34, 613.

Coats and Brooks were taken to police headquarters. 1RP 214, 242-43. Thiry was there when they arrived. 1RP 214-15. Thiry had "minimal contact to basically check on them while they awaited to be interviewed." 1RP 215. Coats wore items that matched the description of items taken from the residence. 1RP 222-26. Over defense objection, Thiry testified that Brooks wore what appeared to be the coat that the driver of the Pathfinder wore in the photo taken by Coe. 1RP 215-17.

During interrogation, Brooks said he picked up a male acquaintance at 10 a.m. and dropped him off an hour later at a store. 1RP

510. Brooks went home and then later went to Block's house at 4:30 p.m. 1RP 510. Brooks said he was with Killgore that day, with the detective inferring sometime between 11 a.m. and 4:30 p.m. 1RP 511, 534-36. After the interrogation, police searched Brooks's residence and found items taken from the Shanburn/Jones residence. 1RP 525-26, 531-32, 557-59, 588-93. Documents containing personal information, including Jones's ID, were found in a bag. 1RP 592-94.

The jury found Brooks guilty on both counts. CP 45-46. Brooks raised various arguments seeking reversal of the convictions, all of which were rejected by the Court of Appeals. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE APPELLATE COURT'S REFUSAL TO ALLOW BROOKS TO RELY ON HIS CO-DEFENDANT'S OBJECTIONS AT TRIAL LEVEL TO RAISE ISSUES ON APPEAL CONFLICTS WITH THE PLAIN LANGUAGE OF RAP 2.5(a).

RAP 2.5(a) categorically states: "A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court." In addressing the best evidence and profile testimony issues, the Court of Appeals nonetheless did not allow Brooks to rely on his co-defendant's objections to preserve errors for appeal. Slip op. at 11 n.3, 13 n.4.

"Court rules are interpreted in the same manner as statutes." Jafar v. Webb, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013). The language of a court rule "must be given its plain meaning according to English grammar usage. When the language of a rule is clear, a court cannot construe it contrary to its plain statement." State v. Raper, 47 Wn. App. 530, 536, 736 P.2d 680, review denied, 108 Wn.2d 1023 (1987). The plain language of RAP 2.5(a) allows Brooks to raise his claims of error on appeal because his co-defendant — the party on the same side of the case — raised the claim in the trial court. RAP 2.5(a) does not make any exception for evidentiary errors. All errors are subject to the rule.

"[T]he purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). This purpose is fulfilled regardless of whether it was Brooks himself or his co-defendant who made the objection. Either way, the trial court was given the opportunity to correct the error.

In its decision, the Court of Appeals cited State v. Davis, 141 Wn.2d 798, 850, 10 P.3d 977 (2000) for the proposition that "[a]ppellant cannot rely upon the objection of a codefendant's counsel to preserve an evidentiary error on appeal." Slip op. at 11 n.3. Davis is not controlling because no RAP 2.5(a) argument was advanced or addressed in that case

on the evidentiary issue. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). RAP 2.5(a) controls here, not Davis. The rules of appellate procedure provide guidance to litigants and a uniform, even-handed procedure for fair review. Litigants should be able to rely on the rules of appellate procedure without having the proverbial rug pulled out from under them. Davis has unintentionally created procedural mischief where none should be. Review should be granted to clarify that objections made by co-defendants preserve errors for appeal under RAP 2.5(a). RAP 13.4(b)(4).

2. POLICE TESTIMONY DESCRIBING AND IDENTIFYING THE DRIVER OF THE VEHICLE IN THE PHOTOGRAPHS VIOLATED THE BEST EVIDENCE RULE AND CONSTITUTED IMPROPER OPINION TESTIMONY.

A crucial issue at trial was identity: who was the driver of the vehicle outside the burgled house? Police testimony on the identity of the person depicted in the photos violated the best evidence rule and constituted improper opinion that invaded the province of the jury. Brooks seeks review under RAP 13.4(b)(4).

a. Over defense objection, the court admitted police officer testimony about who and what was depicted in photographs.

Officer Thiry testified that the driver of the Pathfinder, as depicted in Coe's photo, was "a bald black male." 1RP 194-95. Brooks's counsel objected "on foundation grounds for testimony about photos that have not been admitted or adequate foundation being laid." 1RP 194. The court allowed the testimony. 1RP 195.[2] Thiry later testified that Brooks wore what appeared to be the coat that the driver of the Pathfinder wore in the photo taken by Coe. 1RP 215-16. Defense counsel objected: "We don't have these photos. He's testifying about photos and what appears to be *his opinion as to what the photos depict*. I'm going to object and move to strike that testimony. I think the photos ought to be - come in upon proper foundation, and *it should be a jury question.*" 1RP 216. The judge ruled that the witness could testify from personal observations. 1RP 216.

Officer Tiffany testified that when he arrived on the scene, Thiry showed him Coe's photos. 1RP 354-56. On cross examination, defense counsel elicited Tiffany's testimony that the driver in one of the photos was a black male that closely resembled Block, and that the vehicle belonged to Block. 1RP 374. On redirect, the prosecutor elicited Tiffany's testimony that the photos taken by Coe were taken from a

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[2] In closing argument, the State emphasized the importance of Thiry zooming in on the photo and describing the driver as a bald, black male, which fit Brooks. 1RP 644-45, 653, 696.

distance and it was difficult to distinguish individual details of the driver. 1RP 384. The prosecutor asked how he was able to see the distinguishing features. 1RP 384. Defense counsel objected, "there isn't a foundation. It's not admitted. We do have photographs that have been admitted. I don't think this testimony is proper because --" 1RP 384-85. The prosecutor cut Brooks's counsel off before he could finish his sentence, saying Tiffany's testimony was based on his personal observations. 1RP 385. The court overruled the objection. 1RP 385.

Tiffany responded, "It was zoomed in." 1RP 386. The prosecutor asked if the photos observed on Thiry's phone resembled anyone in the courtroom, and Tiffany answered yes. 1RP 386. Defense counsel objected when the prosecutor asked Tiffany to point the person out. 1RP 386. The court overruled the objection. 1RP 387. Tiffany identified "the defendant with the black jacket and flannel shirt on." 1RP 387. On re-cross, Tiffany confirmed he wrote in his report that the black male seen in the photo closely resembled Block. 1RP 388. On further redirect, Tiffany identified Brooks as closely resembling the person in the photo. 1RP 389. Tiffany acknowledged he had not seen Brooks before testifying in court that day. 1RP 390.

b. Testimony provided by officers Thiry and Tiffany describing the content of the zoomed-in digital photographs violated the best evidence rule.

ER 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute." This is known as the best evidence rule. The best evidence rule "generally requires that 'the best possible evidence be produced.'" State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (quoting Larson v. A.W. Larson Constr. Co., 36 Wn.2d 271, 279, 217 P.2d 789 (1950)). By its terms, the best evidence rule encompasses photographs as well as writings and recordings. ER 1002. The rule applies "when a witness seeks to testify about the contents of a . . . photograph without producing the physical item itself - particularly when the witness was not privy to the events those contents describe." United States v. Bennett, 363 F.3d 947, 953 (9th Cir. 2004).

Officer Thiry testified that the man in the zoomed-in digital photo was a bald black man and that Brooks wore the same clothes as the man in that photo. Officer Tiffany testified the man in the zoomed-in digital photo resembled Brooks. The digital photos upon which these officers relied as the basis for their testimony were never admitted into evidence. Paper photos were later admitted, but they were not the zoomed-in digital version upon which Thiry and Tiffany relied to describe their contents. Neither officer had first-hand knowledge of who was present at the scene

of the burglary. Neither officer was present when the burglary occurred and so they were not privy to the events described in the photographs. The State sought to prove the contents of the digital photos — that it depicted Brooks— through officer testimony about what the photos depicted. The best evidence rule precludes a witness from simply recounting what he previously saw in a photo.

The Court of Appeals held there was no best evidence error because Coe's photos were admitted into evidence and a zoomed-in copy would simply be a duplicate. Slip op. at 13. The Court of Appeals missed the mark. The officers relied on the zoomed-in version as the basis for their damaging identification testimony without the jury being privy to that evidence. In that circumstance, the best evidence is the zoomed-in version of the photos, which would have allowed the jury to make their own assessment.

c. Police testimony describing and identifying the driver of the vehicle in the photographs constituted improper opinion testimony.

The right to have factual questions decided by the jury is crucial to the constitutional right to a jury trial. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citing U.S. Const. amend. VII; Wash. Const. art. I, §§ 21, 22). A lay witness may give opinion testimony only if it is (1) rationally based on the perception of the witness and (2) helpful to

a clear understanding of the testimony or the fact in issue. ER 701. But the identity of a person portrayed in a photograph or video is generally a factual question for the jury. State v. George, 150 Wn. App. 110, 118, 206 P.3d 697 (2009).

Opinion testimony identifying the defendant in a photo runs "the risk of invading the province of the jury and unfairly prejudicing [the defendant]." Id. (quoting United States v. La Pierre, 998 F.2d 1460, 1465 (9th Cir. 1993)). Lay opinion as to the identity of a person is therefore inadmissible unless "there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." George, 150 Wn. App. at 118 (quoting State v. Hardy, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994)). Opinion testimony may be appropriate when the witness has had sufficient contacts with the person or when the person's appearance before the jury differs from his or her appearance in the photograph. Id. (citing La Pierre, 998 F.2d at 1465).

The Court of Appeals held Brooks waived the objection to Thiry's identification of the driver as a bald, black male. Slip op. at 15-16. Defense counsel objected based on lack of foundation. 1RP 194. Improper police testimony about what a photo or surveillance video depicts is a foundational issue under ER 701 because the State must establish the witness is more likely than the jury to correctly identify the

defendant before the testimony can be admitted. George, 150 Wn. App. at 119; Hardy, 76 Wn. App. at 190-91. Without that foundation, the testimony impermissibly invades the province of the jury on an issue of fact. Id. The propriety of an evidence ruling will be examined on appeal if the ground for objection is apparent from the context. State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987). Counsel's foundation objection was sufficient to put the court on notice that improper opinion was at issue. See In re Detention of Pouncy, 144 Wn. App. 609, 623, 184 P.3d 651 (2008) (foundation objection sufficient to preserve error predicated on improper expert testimony), aff'd, 168 Wn.2d 382, 229 P.3d 678 (2010).

Even if the objection was insufficiently specific, the record shows an objection to this testimony on the basis of improper opinion would have been futile because the court later overruled an objection based on improper opinion. 1RP 216; see State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (failure to properly object may be excused where it would have been a useless endeavor).

Officer Thiry had previous contact with Brooks, but not sufficient contact to place him in a better position than the jury. Thiry only saw Brooks at the police station, when he was brought in and searched. 1RP 214-15, 226-27. Thiry described the contact as "minimal." 1RP 215. The Court of Appeals held Thiry had special knowledge about the clothing

Brooks was wearing when he was arrested. Slip op. at 15. But Thiry had no more contact here than there was in George. In George, opinion testimony remained unjustified where the officer observed one defendant as he exited the van and ran away and at the hospital that evening and observed the other defendant when the latter exited the van and was handcuffed and later at the police station in an interview room. George, 150 Wn. App. at 119.

Officer Tiffany, meanwhile, admitted he had not seen Brooks in person before seeing him in the courtroom on the day of Tiffany's testimony. 1RP 390. Tiffany had no prior contact with Brooks whatsoever. For this reason, Tiffany was no more likely to correctly identify Brooks in the photo than the jury. In fact, he is less likely because the jury had the advantage of personally observing Brooks during several days of trial, whereas Tiffany saw Brooks only while testifying.

The Court of Appeals held defense counsel opened the door to Tiffany's opinion testimony. Slip op. at 16-17. When the issue was discussed below, defense counsel pointed out the State had already raised the issue when Thiry gave his opinion of what the photo showed. 1RP 376. "Generally, once a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence." State v. Crow, __Wn. App. 2d__ __P.3d__, 2019 WL 1528692, at *11 (slip op.

filed Apr. 9, 2019). The State, not the defense, raised the issue first. The State cannot open its own door and then be allowed to exploit the opening when defense counsel seeks to mitigate the damage.

3. COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO STRIKE IMPROPER POLICE TESTIMONY ON GUILT AND PROFILING.

On direct examination, a detective testified "It's common practice that we come across documents that are stolen during the course of a burglary, especially financial documents, credits cards, ID cards, passports, mail, anything with somebody's name on there that's used to facilitate future crimes." 1RP 603. The pre-trial order prohibited the State from eliciting opinions on guilt. CP 7-8; 1RP 126-27. The court sustained defense counsel's objection. 1RP 603-609.

"Opinions on guilt are improper whether made directly or by inference." State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). The inference to be drawn from the detective's testimony is that Brooks was guilty of identity theft because his actions dovetailed with those who had committed that crime. More specifically, the testimony constituted impermissible profile evidence. Testimony implying guilt based on the characteristics of known offenders is inadmissible because it invites the jury to conclude that, because a defendant shares some of the characteristics, he is more likely to have committed the crime. State v.

Braham, 67 Wn. App. 930, 936, 841 P.2d 785 (1992). "Profile evidence cannot be used as substantive proof of guilt because of the risk that a defendant will be convicted not for what he did but for what others are doing." Crow, 2019 WL 1528692, at *7 (citing ER 402, ER 402, ER 702). The detective, in testifying it was common to come across documents stolen during burglaries that are used to facilitate future crimes, lumped Brooks in with that group of criminals because his alleged actions mirror the profile of those who commit identity theft in this manner.

The detective's testimony was objectionable. The problem is that the jury was not informed of the ruling on the objection and the jury was not instructed to disregard the testimony. That is counsel's failing.

The accused in a criminal case is guaranteed 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); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687.

"When an objection is sustained with no further motion to strike the testimony and no further instruction for the jury to disregard the testimony, the testimony remains in the record for the jury's consideration." State v. Stackhouse, 90 Wn. App. 344, 361, 957 P.2d 218

(1998). Defense counsel's failure to move to strike the testimony allowed the jury to consider the improper testimony and use it against Brooks in deliberating on his fate. The Court of Appeals agreed counsel was deficient in failing to move to strike the testimony. Slip op. at 18.

But it held Brooks could not show prejudice on the identity theft count because the documents selected from the Shanburn/Jones residence were found in Brooks's home. Slip op. at 18-19. Brooks disagrees. He challenges the sufficiency of evidence on this count (see section E.5. infra). But assuming the evidence is sufficient, it is at best weak. There is no evidence that Brooks used the documents to commit a crime. There is no evidence that Brooks examined the documents stuffed in the bag. Brooks seeks review under RAP 13.4(b)(3).

4. CUMULATIVE ERROR VIOLATED BROOKS'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible, cumulatively produce an unfair trial by affecting the outcome, in violation of due process. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007); U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. An accumulation of errors affected the outcome and produced an unfair

trial in Brooks's case, including (1) best evidence violation and improper opinion testimony (section E.2, supra); and (2) ineffective assistance of counsel (section E.3., supra). Brooks seeks review under RAP 13.4(b)(3).

5. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE IDENTITY THEFT CONVICTION BECAUSE THE STATE FAILED TO PROVE THE MENTAL ELEMENTS OF THE OFFENSE.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The identity theft statute provides: "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1).

The State did not prove Brooks "knowingly" possessed a means of identification or financial information. The identification card and documents containing personal information were found in a bag in

Brooks's residence. 1RP 592-94. Another person took that bag from the Shanburn/Jones residence. See 1RP 253 (driver never left the car). The Court of Appeals said some of the documents were easily recognizable as identification or financial information through a "cursory examination." Slip op. at 8. The State, however, produced no evidence that Brooks ever looked in the bag or emptied its contents.

The Court of Appeals also stated the documents were specifically selected as part of the theft. Slip op. at 8. That may be so, but someone else did the selecting. Brooks did not go into the Shanburn/Jones residence. Unlike the "to convict" instruction for the burglary count, the "to convict" instruction for the identity theft count did not include the accomplice option. CP 32, 39. The State argued Brooks was guilty as an accomplice to burglary (1RP 651-55) but did not argue a theory of accomplice liability in relation to the identity theft count. 1RP 655-59. That someone else selected the documents does not show Brooks's knowledge of them under a principal liability theory.

Alternatively, the State failed to prove Brooks possessed the items with "the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). "When intent is an element of the crime, 'intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical

probability.'" State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013) (quoting State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)). Intent cannot be inferred from "patently equivocal" evidence. Vasquez, 178 Wn.2d at 8 (quoting Woods, 63 Wn. App. at 592). For crimes where possession and intent are both elements and there are no defined inferences, an inference cannot be based on mere possession. Id. at 8.

The Court of Appeals held the evidence was sufficient to prove intent because more than possession was shown here, as the documents were specifically selected. Slip op. at 9. Again, this holding relies on an accomplice liability theory, which is inapplicable to the identity theft count. Brooks did not select the documents. He merely possessed them. That is not enough to prove criminal intent under a principal liability theory. Brooks seeks review under RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated, Brooks requests that this Court grant review.

DATED this 15th day of April 2019.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

January 23, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRUCE J. BROOKS, Appellant.	No. 49810-3-II UNPUBLISHED OPINION

BJORGEN, J. — Bruce Brooks appeals from his convictions and sentence for one count of residential burglary and one count of second degree identity theft.

Brooks argues that (1) the State did not present sufficient evidence for a jury to convict him of second degree identity theft, (2) the trial court abused its discretion by permitting testimony in violation of the best evidence rule, (3) the trial court abused its discretion by allowing improper opinion testimony on identity and guilt, (4) he received ineffective assistance of counsel, (5) cumulative error deprived him of a fair trial, (6) the trial court erred by imposing a combined sentence on the second degree identity theft conviction in excess of the statutory maximum sentence, and (7) the trial court erred in imposing certain legal financial obligations (LFOs).

We affirm Brooks' convictions. We also remand for the trial court to resentence Brooks on his second degree identity theft conviction so that the combined term of confinement and community custody does not exceed 60 months and to strike the $1,500 LFO for trial counsel

compensation, the $200 criminal filing fee, and the $100 DNA (deoxyribonucleic acid) collection fee.

FACTS

On April 25, 2016, Steven Coe saw an unknown woman enter the home of Jennifer Shanburn and Ricky Lynn Jones while they were at work. After a few minutes, Coe saw a red Nissan Pathfinder pull into Shanburn and Jones' driveway, at which point the woman came out of the house to speak with the man driving the car.[1] The woman then went back into the house, and a few minutes later, she and another man came out with a flat-screen television and "an armload of stuff," and loaded them into the car. Verbatim Report of Proceedings (VRP) (Vol. II) at 251-53. After they finished loading the car, they got into it and the three left the area. Coe saw the burglars make only one trip into the house. Coe took several photographs with his phone as the incident was occurring and called the police after the car drove away. Coe could not see the driver of the Pathfinder very well, but was able to take a partial picture of the driver's face.

Officer Jeffery Thiry responded to Coe's 911 call. Thiry viewed the photographs that Coe had taken on his cellphone and asked Coe to send him copies. By zooming in on one of the photographs using his laptop, Thiry was able to identify the Pathfinder's license plate number.

Thiry gave the information provided by Coe to Officer Jared Tiffany, who began looking for the Pathfinder. Tiffany went to the home of Jamal Block, the registered owner of the Pathfinder, and spoke with Block and Michelle Killgore. Block directed Tiffany to Brooks' home.

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[1] Although Coe testified that the car was a Chevy Blazer, other witnesses identified the car as a Nissan Pathfinder.

The police obtained a warrant to search Brooks' home and recovered several items that Shanburn and Jones reported stolen, such as a Samsung television, a PlayStation, and several bags. The police also found a bag with documents containing Shanburn's and Jones' personal information, such as medical documents, tax papers, bank statements, and Jones' driver's license. According to Jones, the financial documents were normally kept in his bedroom or in the kitchen with the other mail, and his driver's license was kept in his dresser drawer.

The State charged Brooks with one count of residential burglary as an accomplice and one count of second degree identity theft.

At trial, Thiry testified that the driver of the Pathfinder in Coe's photographs appeared to be "a bald black male." VRP (Vol. II) at 195. Brooks is African American. Brooks' counsel objected to Thiry's description, stating, "I'm going to object on foundation grounds for testimony about photos that have not been admitted or adequate foundation being laid," but the court overruled the objection. VRP (Vol. II) at 194-95. Thiry also testified that the coat Brooks was wearing when he was arrested appeared to be the coat that the driver of the Pathfinder was wearing in Coe's photograph. Defense counsel objected:

> Your Honor, I will object to this. We don't have these photos. He's testifying about photos and what appears to be his opinion as to what the photos depict. I'm going to object and move to strike that testimony.
>
> I think the photos ought to be – come in upon proper foundation, and it should be a jury question.

VRP (Vol. II) at 216. The trial court overruled the objection.

On cross-examination, Brooks elicited from Tiffany that at least one of the photographs that Coe had showed him presented a side profile of a male black driver that closely resembled Block. On redirect, the State inquired into Tiffany's impressions of the photograph:

[Prosecution]: How much detail is shown in those photographs compared to what you could see in Officer Thiry's phone?

[Tiffany]: Well, there's – it's a decent picture, but it's from a distance. So it's difficult to distinguish individual details of the driver.

[Prosecution]: Okay. And how were you – you said that from – it's taken, obviously, from a distance. And so it's difficult to distinguish features of the driver.
How were you able to see those distinguishing features?

[Defense]: Your Honor, I'm going to object. We're not – he's asking to testify about a thing that is – that happened in the field. It's not before the jury or the Court. And so –

[Prosecution]: Goes –

[Defense]: – there isn't a foundation. It's not admitted. We do have photographs that have been admitted.

. . . .

[Court]: Overruled.

VRP (Vol. III) at 384-87. The prosecutor then elicited from Tiffany that he was able to see those distinguishing features on Officer Thiry's phone because it was zoomed in and that the individual depicted resembled Brooks, as well as Block.

The State also called Detective Thomas Williams to testify about some of the items found during the search of Brooks' home. Williams testified that he had investigated close to 1,000 property crimes in the past 16 years, including crimes involving bank statements being taken from a residence or mailbox. Williams explained,

> It's common practice that we come across documents that are stolen during the course of a burglary, especially financial documents, credit cards, ID [(identification)] cards, passports, mail, anything with somebody's name on there that's used to facilitate future crimes.

VRP (Vol. IV) at 603. Defense counsel objected to this statement on the grounds that it violated the court's order on a prior motion in limine. The court sustained the objection outside the presence of the jury. Defense counsel did not move to strike Williams' statement.

In closing argument, the State urged the jury that it could infer Brooks' intent to commit a crime using the victims' financial information:

> How do we know that [Brooks acted with intent to commit a crime]? How do we infer what his objective or purpose was? Well, what other purpose would you have of obtaining that specific type of information? If you were to go to a bank or to anywhere else, one of the things that they're going to ask for, if you want any information about an account, they want an ID. They want your date of birth. They want Social Security numbers. All of that information was available to Mr. Brooks at the time that he obtained or possessed that information.
>
> You can infer from that, if you believe that the evidence supports such an inference, that it was possessed with the intent to commit any crime.

VRP (Vol. V) at 657-58.

The jury found Brooks guilty of residential burglary and second degree identity theft.

The trial court imposed a 72-month sentence for the residential burglary conviction, and 50 months, with an additional 12 months' community custody, for the second degree identity theft conviction, to be served concurrently. The court also inquired into Brooks' ability to pay LFOs:

> Court: In terms of – did you have a job, sir, prior to –
>
> [Brooks]: Yes. I worked remodeling homes.
>
> Court: Okay. And were you doing that at the time?
>
> [Brooks]: At the time, I was – wasn't working when it happened; but, yes, I was working.
>
> Court: Well, the fact that you're going to be on a DOSA and you will be out a little bit sooner than if you were not on a DOSA, I am going to impose

> the [$]1500 DAC [(Department of Assigned Counsel)] recoupment. You will need to pay that, and that's for your attorney's time.
>
> I am not hearing that you would not be able to be gainfully employed back in that line of work. When you are out, is there anything else that I would need to know that would indicate that you would not be available to obtain any type of employment when you got out, sir?
>
> [Brooks]: Well, hopefully I will be able to get employment. Definitely will be seeking employment.
>
> Court: Okay. Well, I think that you need to be paying that as part of your paying the $1500 so I will require that.

Suppl. VRP (Dec. 2, 2016) at 21-22. The trial court also required Brooks to pay a $200 criminal filing fee and a $100 DNA collection fee, among others.

Brooks appeals his conviction, sentence, and imposition of the $200 criminal filing fee, the $100 DNA collection fee, and the $1,500 LFO for trial counsel compensation.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Brooks argues that the State did not present sufficient evidence for a jury to convict him of second degree identity theft. We disagree.

A. Legal Principles and Standard of Review

In evaluating the sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* We do not review credibility determinations, which are reserved for the trier of fact. *Id.* We have also explained that the knowledge element of an offense "may be inferred when the defendant's conduct indicates the requisite knowledge as 'a matter of logical

probability.'" *State v. Warfield*, 119 Wn. App. 871, 884, 80 P.3d 625 (2003) (quoting *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991)). Furthermore, we consider direct and circumstantial evidence equally reliable in evaluating the sufficiency of the evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

Under former RCW 9.35.020 (2008)[2]:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.
> . . . .
> (3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree.

B. Knowing Possession

Brooks contends that the State did not present sufficient evidence that he knowingly possessed a means of identification or financial information of another person. He argues that the evidence is insufficient because the State did not provide any evidence that he looked into the bag containing Shanburn's and Jones' financial information and identification that was recovered during the execution of the search warrant.

In *Warfield*, we considered whether the State had produced sufficient evidence for a jury to find that the defendant knowingly possessed a firearm. 119 Wn. App. at 884-85. We determined that the evidence, while circumstantial, was sufficient to sustain the defendant's conviction because:

> [A] rational jury could conclude that Warfield knowingly possessed the firearm. Officers found the firearm in Warfield's bedroom closet, which was inside the apartment that Warfield leased and was currently, though possibly sporadically,

[2] RCW 9.35.020 was amended in 2016, after Brooks was charged. However, the relevant provisions were unaffected by the amendment.

> residing at; and the evidence shows that the bedroom and closet were filled with Warfield's personal effects.

Id. at 885.

In the present case, the jury heard evidence that soon after the burglary, the bag containing the victims' identification and financial information was found in Brooks' home, along with several other pieces of property taken during the burglary. Some of the documents recovered, such as Jones' driver's license and the tax information, were easily recognizable as identification or financial information through even a cursory examination. In addition, as discussed below in Part I. C., the evidence also shows that these documents had been specifically selected as part of the theft. Therefore, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Brooks knowingly possessed another person's identification or financial information based on when the information was recovered, where the information was recovered, and the fact that the documents were readily identifiable as identification or financial information.

C. Intent

Brooks also maintains that the State did not produce sufficient evidence that he intended to commit any crime as part of the second degree identity theft charge. We disagree.

Our Supreme Court has held that for "crimes where possession and intent are elements of the crime, Washington courts do not permit inferences based on naked possession." *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013). "'[I]ntent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.'" *Id.* (quoting *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)). Possession alone is not sufficient to infer intent, but possession together with

"'slight corroborating evidence'" can be. *Id.* (quoting *State v. Esquivel*, 71 Wn. App. 868, 870, 863 P.2d 113 (1993)).

That corroborating evidence is present. The record shows that selected items containing personal and financial information, including medical documents, tax papers, bank statements, and Jones' driver's license, were taken from Shanburn and Jones' house and were recovered in Brooks' house. Jones testified that he kept his financial documents in his bedroom or in the kitchen with the other mail, and his driver's license was kept in his dresser drawer. A rational jury could find beyond a reasonable doubt that the fact that these documents were individually gathered, placed in a bag, and carried away suggests an intent to select and specifically take those documents containing personal and financial information in order to later use the information.

The specific selection of personal and financial documents constitutes corroborating evidence that, in addition to evidence of possession, is sufficient to show intent. *See Vasquez*, 178 Wn.2d at 8. We accordingly hold that the State presented sufficient evidence for a jury to find beyond a reasonable doubt that Brooks intended to commit a crime with the victim's identification and financial information.

II. EVIDENTIARY CHALLENGES

Brooks argues the trial court made several errors in ruling on evidentiary challenges. We disagree.

A. Legal Principles and Standard of Review

Interpretation of the rules of evidence presents a question of law that we review de novo. *State v. Griffin*, 173 Wn.2d 467, 473, 286 P.3d 924 (2012). "'Once the rule is correctly

interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.'" *Id.* (quoting *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)).

A trial court abuses its discretion if its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *Id.* A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, reaches an outcome that is outside the range of acceptable choices, such that no reasonable person could arrive at that outcome. *Id.* A court's exercise of discretion is unreasonable when it is premised on a legal error. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The trial court's failure to enforce the requirements of a rule of evidence also constitutes an abuse of discretion. *Griffin*, 173 Wn.2d at 473.

B. Best Evidence Rule

Brooks argues that the trial court erred by allowing Thiry and Tiffany to testify about their observations of Coe's zoomed-in photographs in violation of the best evidence rule. Washington's best evidence rule states, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute." ER 1002.

1. Waiver of challenge[3]

At the outset, we consider whether Brooks waived his best evidence challenges by failing to object on this basis at trial. We review de novo whether a party has preserved an issue for appeal. *State v. Fenwick*, 164 Wn. App. 392, 398, 264 P.3d 284 (2011).

Generally, a party waives an evidentiary error by failing to object during trial. *State v. Finch*, 137 Wn.2d 792, 819, 975 P.2d 967 (1999). "A party may assign evidentiary error on appeal only on a specific ground made at trial." *State v Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). We examine the propriety of an evidentiary ruling on appeal if the "specific basis for the objection is 'apparent from the context.'" *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (quoting *State v. Pittman*, 54 Wn. App. 58, 66, 772 P.2d 516 (1989)).

Brooks asserts that his counsel's objection to Thiry's testimony about the coat Brooks was wearing should be interpreted as an objection under the best evidence rule. As part of his objection, defense counsel stated, "We don't have these photos. . . . I think the photos ought to be – come in upon proper foundation, and it should be a jury question." VRP (Vol. II) at 216.

Brooks also argues that his counsel's objection to Thiry's testimony that the driver of the Pathfinder was a bald, black male should be interpreted as an objection under the best evidence rule. As part of this objection, counsel stated, "I'm going to object on foundation grounds for testimony about photos that have not been admitted or adequate foundation being laid [sic]." VRP (Vol. II) at 194.

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[3] Although Brooks mentions several instances where his codefendant's counsel objected, those objections are insufficient to preserve those evidentiary issues for review in Brooks' appeal. *See State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000) ("Appellant cannot rely upon the objection of a codefendant's counsel to preserve an evidentiary error on appeal.").

Although Brooks' counsel did not use the phrase "best evidence" or mention ER 1002, the references to the photographs could reasonably be interpreted as arguing that the State was required to put the photographs described by Thiry into evidence. Therefore, Brooks' counsel made sufficiently specific objections to permit appellate review of this best evidence challenge.

Brooks also contends that his counsel's objection to Tiffany's description of the driver in the zoomed-in photograph should be interpreted as an objection under the best evidence rule. As part of his objection, Brooks' counsel stated, "[H]e's asking to testify about a thing that is – that happened in the field. . . . [T]here isn't a foundation. It's not admitted. We do have the photographs that have been admitted." VRP (Vol. III) at 384-85.

In contrast to counsel's objection to Thiry's testimony, the mention of photographs already admitted into evidence suggests that the objection was not based on the best evidence rule, but rather on lack of foundation. Therefore, we conclude that Brooks' counsel did not make a sufficiently specific objection to permit appellate review of his best evidence challenge to Tiffany's testimony. Therefore, Brooks has waived this challenge.

2. Photographs

Brooks maintains that the trial court abused its discretion by permitting Thiry to testify about the contents of Coe's zoomed-in photographs that depicted the driver of the Pathfinder and what the driver was wearing without the photographs being admitted into evidence. The trial court, however, admitted copies of Coe's photographs into evidence at defense counsel's request. Brooks appears to argue that the State was required to provide zoomed-in versions of Coe's photographs, similar to the manner in which Thiry viewed the photographs on his laptop. We disagree.

ER 1002 requires the "original" photograph be admitted in order to prove the photograph's content. ER 1001(c) states, in part, "An 'original' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" ER 1001(d) also defines a "duplicate" in relevant part as "a counterpart produced by the same impression as the original . . . including enlargements and miniatures." Under ER 1003, "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

Coe took photographs of the burglary with his phone. Defense counsel confirmed with Coe that the printouts of his photographs that were admitted into evidence were accurate depictions of the photographs he took with his phone. The printout copies of Coe's photographs are originals under ER 1001(c) and were admitted into evidence at trial. A zoomed-in copy of the photograph would simply be an enlargement of the original, and so would be a duplicate under ER 1001(d). The absence of a zoomed-in copy therefore would not violate ER 1002.

C. Opinion Testimony

Brooks argues that the trial court abused its discretion by allowing several of the State's witnesses to give improper opinion testimony.[4] We disagree.

[4] Brooks also argues that Williams gave improper profile testimony, and that this argument is preserved through his co-defendant's counsel's objection at trial. As explained above, a defendant may not rely on his co-defendant's objection to preserve an evidentiary issue for appeal. *Davis*, 141 Wn.2d at 850. Therefore, we decline to consider this argument because he did not object on this basis at trial.

A lay witness may offer opinions or inferences that are: (1) based on rational perceptions, (2) helpful to the jury, and (3) not based on scientific or specialized knowledge. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing ER 701). The live testimony of a law enforcement officer may be particularly influential because an officer frequently carries an "'aura of special reliability and trustworthiness.'" *State v. Demery*, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001) (quoting *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987)).

1. Thiry's Testimony

Brooks argues that Thiry gave improper opinion testimony by testifying that Brooks was wearing the same coat as the driver of the Pathfinder when he encountered him at police headquarters.

A lay witness may offer opinion testimony as to the identity of a person in a photograph, but only if "'there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.'" *State v. George*, 150 Wn. App. 110, 118, 206 P.3d 697 (2009) (quoting *State v. Hardy*, 76 Wn. App. 188, 190, 884 P.2d 8 (1994)). A witness may not offer an opinion that a defendant is depicted in a photograph if the witness's "knowledge of defendant's appearance placed them in no better position to make that critical determination." *State v. Jamison*, 93 Wn.2d 794, 799, 613 P.2d 776 (1980). That is, when the defendant is present at trial, the photographs are admitted into evidence, and the witness has no special knowledge of the defendant, a witness's opinion that a defendant is depicted in a photograph is "an impermissible invasion of the jury's province." *Id.* However,

our Supreme Court has explained that a witness may testify about whether a defendant wore similar clothing to a suspect depicted in a photograph:

> A witness with knowledge of a defendant's appearance at or about the time the surveillance photographs were taken may state whether the person in the photograph was wearing clothing similar to that worn or owned by the defendant. In such a case, the witness has special knowledge concerning the subject matter of the testimony beyond that possessed by the jury. Since such perception and knowledge are not directly available to the fact finder, opinion testimony based thereon does not impinge upon the jury's province.

Id. at 799-800 (citation omitted).

Thiry testified that when Brooks was arrested, Brooks was wearing a jacket that "appeared to be the coat that the driver of the Pathfinder was wearing from the picture that Mr. Coe provided." VRP (Vol. II) at 215-16. This statement goes to Thiry's special knowledge about the clothing Brooks was wearing when he was arrested. Because the jury was not in a position to know Brooks' appearance at the time of his arrest, this statement is permissible opinion testimony. Brooks' argument fails.

Brooks also asserts that Thiry gave improper opinion testimony by testifying that he thought the driver of the Pathfinder was a bald, black male. Brooks did not object to this testimony at trial on the grounds that it would have been an improper opinion, but argues that we should consider his argument because his objection at trial would have been futile.[5]

We conclude that it would not have been futile for Brooks to object. Brooks appears to argue that because the trial court allowed Thiry's testimony regarding Brooks' jacket, it would

[5] The cases cited by Brooks concern challenges to a trial court's jury instructions and prosecutorial misconduct, not evidentiary challenges. *State v. McCreven*, 170 Wn. App. 444, 473, 284 P.3d 793 (2012) (prosecutorial misconduct); *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996) (jury instruction).

have been futile to object to the statement regarding the characteristics of the driver. However, Brooks has not demonstrated that an objection to Thiry's testimony about the driver's characteristics would have been futile. Indeed, Thiry testified about the appearance of the driver *before* he testified about Brooks' jacket, so there was no reason for Brooks to believe that the court would not have considered an objection to Thiry's testimony about the driver. Because Brooks does not show an objection would have been futile, he has not preserved this claimed error for review on appeal.

2. Tiffany's Testimony

Brooks contends that Tiffany gave improper opinion testimony by testifying that the driver of the Pathfinder in Coe's photograph resembled Brooks.[6] We disagree.

Under the open door rule, "[a] party's introduction of evidence that would be inadmissible if offered by the opposing party 'opens the door' to explanation or contradiction of that evidence." *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006) (quoting *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995)). This rule "is intended to preserve fairness" by preventing the introduction of one-sided testimony that the opposing party has no opportunity to rebut. *Avendano-Lopez*, 70 Wn. App. at 714.

Brooks' counsel cross-examined Tiffany and asked him whether he had concluded in his initial report that the driver of the Pathfinder resembled Block, the registered owner of the Pathfinder. Tiffany responded affirmatively. On redirect, the State elicited testimony that Tiffany also thought that the driver of the Pathfinder resembled Brooks. Under the open door

[6] As noted above, defense counsel's objection referencing the photographs is sufficiently specific to permit review of his challenge to Tiffany's opinion testimony.

rule, Brooks cannot now argue that the trial court erred by permitting Tiffany's testimony regarding the identity of the driver after his counsel had asked Tiffany about his opinion on the same issue. Brooks' argument fails.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Brooks asserts that he received ineffective assistance of counsel when his trial attorney failed to ask the trial court to strike Williams' testimony after the court sustained an objection to that testimony outside the presence of the jury.[7] Brooks had objected to Williams' testimony that "[i]t's common practice that we come across documents that are stolen during the course of a burglary, especially financial documents, credit cards, ID cards, passports, mail, anything with somebody's name on there that's used to facilitate future crimes." VRP (Vol. IV) at 603. We agree that counsel's performance was deficient, but Brooks fails to show any prejudice as a result of counsel's performance.

A. Legal Principles and Standard of Review

To establish ineffective assistance of counsel, Brooks must demonstrate that: (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness under the circumstances and (2) he was prejudiced as a result of counsel's performance. *State v. Larios-Lopez*, 156 Wn. App. 257, 262, 233 P.3d 899 (2010). A defendant is prejudiced by counsel's deficient performance if, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322,

[7] Brooks also argues that the trial court improperly admitted this testimony. Because his objection was sustained, there was no error by the trial court. We therefore consider only his argument in the alternative: that his counsel's failure to ask the court to strike Williams' testimony constituted ineffective assistance of counsel.

335, 889 P.2d 1251 (1995). To overcome the presumption that defense counsel's representation was effective, Brooks must demonstrate that there was no legitimate or strategic reason for defense counsel's conduct. *Id.* at 336.

B. Failure to Move to Strike

Williams testified that it was common to find identification and financial information taken during the commission of a burglary that is used to facilitate future crimes. Brooks' counsel objected that Williams' testimony was improper opinion testimony and the trial court sustained the objection outside the presence of the jury. Counsel did not move to strike the testimony after the trial court sustained the objection, and the court did not instruct the jury to disregard the testimony. "When an objection is sustained with no further motion to strike the testimony and no further instruction for the jury to disregard the testimony, the testimony remains in the record for the jury's consideration." *State v. Stackhouse*, 90 Wn. App. 344, 361, 957 P.2d 218 (1998).

The trial court's ruling sustaining the objection was outside the presence of the jury, so the jury did not hear that the objection had been sustained. Without a motion to strike, this left the testimony that had been ruled inadmissible available for the jury's consideration under *Stackhouse*. Having recognized the improper nature of the testimony and having made an objection, there was no legitimate tactical or strategic reason for counsel to allow the testimony to be considered by the jury after the objection was sustained. Therefore, we hold that defense counsel was deficient.

Although Brooks has established deficient performance, he does not show that he was prejudiced in light of the strength of the State's case against him. As discussed above, the fact

that documents selected from Shanburn and Jones' house containing their personal and financial information were found in Brooks' home was sufficient on its own to support the jury's finding that he intended to commit a crime with that information. With this strong evidence apart from Williams' testimony supporting conviction, we hold that Brooks was not prejudiced.

IV. CUMULATIVE ERROR

Brooks argues that cumulative error deprived him of a fair trial. Under the cumulative error doctrine, "a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). Reversal is not required where the errors are few and have little to no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

As discussed above, we hold against Brooks on his claims of insufficient evidence and evidentiary error. On his claim of ineffective assistance of counsel, we hold that counsel performed deficiently in not moving to strike, but that Brooks did not suffer prejudice from it. Hence, there is no cumulative error.

V. SENTENCING ERROR

Brooks argues that the trial court erred by imposing a combined total sentence of 62 months (50 months in custody with 12 months of community custody) for his second degree identity theft conviction, which was in excess of the statutory maximum. The State concedes that Brooks' sentence for this conviction exceeds the statutory maximum. We agree that the trial court erred.

We review erroneous sentencing claims de novo. *State v. Hernandez*, 185 Wn. App. 680, 688, 342 P.3d 820 (2015). A trial court errs when it imposes a total term of confinement and

community custody exceeding the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). Second degree identity theft is a class C felony. Former RCW 9.35.020(3). The maximum sentence for a class C felony is 5 years or 60 months. RCW 9A.20.021(1)(c).

In *Boyd*, our Supreme Court reasoned that "the trial court, not the Department of Corrections, [is] required to reduce [the defendant]'s term of community custody to avoid a sentence in excess of the statutory maximum." 174 Wn.2d at 473. We accordingly remand to the trial court to resentence Brooks on his conviction of second degree identity theft so that his aggregate term of confinement and community custody for that conviction does not exceed 60 months.[8]

VI. LFOs

Brooks argues, alternatively, that (1) because the trial court declared him indigent, the 2018 amendments to RCW 10.01.160(3) bar imposition of the $1,500 discretionary LFO related to his trial attorney's compensation and (2) the trial court failed to properly inquire into his ability to pay that LFO under *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). Brooks also challenges the imposition of the $200 criminal filing fee and the $100 DNA collection fee.

The State argues that Brooks has waived his challenge to the imposition of LFOs by failing to object at trial. Although RAP 2.5(a) generally precludes review of an error that is raised for the first time on appeal, the rule permits us to exercise discretion to reach such issues. In *State v. Blazina*, our Supreme Court exercised its discretion under RAP 2.5(a) to reach the

[8] We note that because Brooks' sentences run concurrently, his actual term of confinement of 72 months based on his conviction for residential burglary will remain unaffected.

merits of an LFO issue raised for the first time on appeal. 182 Wn.2d 827, 835, 344 P.3d 680 (2015). We likewise exercise our discretion to reach this LFO issue for the first time on appeal.

In 2018 the legislature amended RCW 36.18.020 to bar imposition of the $200 criminal filing fee on those who were indigent at the time of sentencing under RCW 10.101.010(3)(a)-(c). LAWS OF 2018, ch. 269, § 17. RCW 10.101.010(3) defines indigency for the purpose of appointing counsel in criminal cases, among other matters. The sentencing court deemed Brooks indigent for the purpose of appointing appellate counsel. In its supplemental brief of December 3, 2018, the State acknowledged this and conceded that the $200 criminal filing fee should be stricken for that reason under the 2018 statute. The State is correct in its reading of RCW 36.18.020, and we accept its concession.

The $1,500 charge for trial attorney compensation is a discretionary LFO. The 2018 statute amended RCW 10.01.160 to bar the imposition of discretionary LFOs on those who were indigent at the time of sentencing under RCW 10.101.010(3)(a)-(c). LAWS OF 2018, ch. 269, § 6. As noted, RCW 10.101.010(3) defines indigency for the purpose of appointing counsel in criminal cases. The sentencing court deemed Brooks indigent for the purpose of appointing appellate counsel. Therefore, RCW 10.01.160 bars imposition of the $1,500 LFO on Brooks.

Finally, the 2018 statute barred imposition of the $100 DNA collection fee if the State had already collected the offender's DNA as the result of a previous conviction. LAWS OF 2018, ch. 269, § 18. In its supplemental brief of December 3, 2018, the State acknowledged that Brooks' DNA had already been collected and asked that this LFO also be stricken. We agree with the State.

We accordingly remand for the trial court to strike the $1,500 LFO for trial counsel reimbursement, the $200 criminal filing fee, and the $100 DNA collection fee.

CONCLUSION

We affirm Brooks' convictions. We also remand to the trial court (1) to resentence Brooks on his conviction of second degree identity theft so that the combined term of confinement and community custody does not exceed 60 months and (2) to strike the $1,500 LFO for trial counsel reimbursement, the $200 criminal filing fee, and the $100 DNA collection fee.

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

Bjorgen, J.
Bjorgen, J.

We concur:

A.C.J.
Lee, A.C.J.

Melnick J.
Melnick, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Filed
Washington State
Court of Appeals
Division Two

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRUCE J. BROOKS,

Appellant.

No. 49810-3-II

March 15, 2019

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant has filed a motion for reconsideration of the opinion that was filed on January 23, 2019. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

Jjs.: Lee, Bjorgen, Melnick

FOR THE COURT:

Lee, A.C.J.

I dissent.

Bjorgen, J.T.*

* Judge Thomas Bjorgen is serving as a judge pro tempore for the Court of Appeals, pursuant to RCW 2.06.150.

NIELSEN BROMAN & KOCH, PLLC

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