Supreme Court No. 97143-9
(COA No. 50814-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARY E. SANDOVAL,

Appellant.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Rules

Legislative Authorities

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1)-RAP 13.4(b)(3), Mary Sandoval, petitioner here and appellant below, asks this Court to accept review of a published Court of Appeals decision affirming her convictions. A copy of the Court of Appeals' opinion, issued on April 2, 2019, is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. When the language of a statute is plain and unambiguous, a court must assume the Legislature meant exactly what it said and apply the statute as written. For a court to do otherwise inappropriately usurps the legislature's authority to define what constitutes a crime and designate the punishment that follows.

The essential elements of possession of a stolen access device require the State to prove the defendant (1) possessed; (2) a stolen; (3) access device. RCW 9A.56.160. In turn, an "access device" is (1) any card, plate, code, account number, or other means of account access; 2) *that can be used*; (3) to obtain; (4) things of value; (5) or *can be used*; (6) to initiate a transfer of funds. The word "can" means "to be able to do, make, or accomplish," and denotes the present tense.

It therefore follows that to convict someone of *possession* of a stolen access device, the State must prove the defendant was able to use the access device in question to obtain something of the value on the date listed in the information.

Here, the Court of Appeals rejected the plain meaning of the "access device" statute, believing reading the statute under its plain meaning "leads to an absurd result."

a. Does the Court of Appeals' opinion conflict with established precedent from this Court requiring courts to apply the plain and unambiguous language of a statute? RAP 13.4(b)(1).

b. Did the Court of Appeals err in concluding adopting the plain meaning of the access device statute would yield absurd results where (1) the legislature still permits the State to punish or prosecute someone for stealing/possessing a deactivated access device under a separate statute; (2) the legislature created a sentencing scheme that punishes individuals for stealing or possessing stolen property based on the value of the stolen goods; and (3) the access device statute still permits the State to charge and convict an individual for a felony offense for stealing an access device the true owner later deactivated? RAP 13.4(b)(1).

2. In *State v. Rose*, 175 Wn.2d 10, 282 P.3d 1087 (2012), this Court reversed a conviction for possession of a stolen access device

because the access device was "not tied to an existing, active account, [and so] affirmative evidence that it could be used to obtain something of value was necessary under the State's burden of proof."

Here, the evidence at trial established the true owner of the access device in question cancelled the card weeks before the police discovered the card in Ms. Sandoval's possession. The State presented no evidence that despite the cancellation, Ms. Sandoval could nevertheless still use the deactivated card to obtain anything of value. Nevertheless, the Court of Appeals believed affirming Ms. Sandoval's conviction was consistent with *Rose*.

Should this Court accept review because the Court of Appeals' decision is inconsistent with this Court's holding in *Rose*? RAP 13.4(b)(1).

3. In *State v. Brush*, 183 Wn.2d 550, 353 P.3d 213 (2015), this Court held, "legal definitions should not be fashioned out of courts' findings regarding legal sufficiency;" accordingly, courts should not insert such definitions into the jury's instructions as this would constitute an unlawful comment on the evidence.

Here, the court issued a jury instruction based on a case involving the sufficiency of the evidence supporting a possession of a stolen access device charge. The Court of Appeals recognized *Brush's* "sweeping

admonition," but held it was (1) not applicable to the present case; and (2) just dicta.

Does the Court of Appeals' opinion conflict with *Brush*? RAP 13.4(b)(1).

4. In *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009) and *State v. Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007), the Court of Appeals held, "where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial."

In the present case, Ms. Sandoval's attorney failed to request an unwitting possession instruction despite Ms. Sandoval's testimony that she unwittingly possessed drugs. As drug possession is a strict liability crime, the only way her counsel could secure her acquittal was through an unwitting possession instruction. But contrary to both *Powell* and *Hubert*, the Court of Appeals held no prejudice resulted from Ms. Sandoval's counsel's deficient performance.

Should this Court accept review because the Court of Appeals' opinion conflicts with *Powell* and *Hubert*? RAP 13.4(b)(2).

C. STATEMENT OF THE CASE

Mary Sandoval entered into a demonstration agreement with a Toyota dealership. RP 125-26. The demonstration agreement allowed Ms.

Sandoval to use a new Toyota for up to three days to see if she liked the car enough to purchase it. RP 126, 129. When Ms. Sandoval did not return the car and fell out of contact with the Toyota dealership, the dealership reported the car stolen. RP 131-32.

Roughly a month later, the police found Ms. Sandoval and her husband in the car. RP 155-56. Ms. Sandoval explained she did not physically return the car to the Toyota dealership after she learned it was reported stolen because she was afraid that the police would pull her over en route to the dealership and arrest her. RP 224. She instead hoped the dealership would pick up the car from the address she listed in the demonstration agreement, as the demonstration agreement contained a clause that allowed the dealership to recover the car on its own. RP 228-29. Additionally, Ms. Sandoval and her husband were undergoing hard times and did not have a home, so they used the car as their shelter. RP 228, 249.

The police searched Ms. Sandoval incident to arrest. RP 159-60. Inside Ms. Sandoval's purse, the police found methamphetamine pipes and a Target credit card that belonged to another person. RP 160. Ms. Sandoval was surprised to learn the police discovered these items in her purse and denied knowingly possessing those items. RP 238.

The State charged Ms. Sandoval with (1) possession of a stolen vehicle; (2) possession of stolen property in the second degree (access device); and (3) possession of a controlled substance (methamphetamine).[1]

Ginger Philips, the owner of the Target credit card, testified during Ms. Sandoval's trial. She explained someone stole her wallet at a hotel in Portland in February of 2017. RP 204. After Ms. Philips discovered someone stole her wallet, she promptly cancelled all of the credit cards in the stolen wallet, including the Target card. RP 208. About six weeks later, a police officer discovered the stolen Target credit card belonging to Ginger Philips in a bag inside Ms. Sandoval's purse. CP 6; RP 160-62, 203-05.

Ms. Sandoval also testified at her trial. During her testimony, she explained how she came to possess the drugs and the Target card. In sum, according to Ms. Sandoval, a misunderstanding occurred between hotel staff and Ms. Sandoval's and husband during her hotel stay in Portland. RP 229-246. During this misunderstanding, one of the hotel maids handed Ms. Sandoval a bag with several items she did not inspect. RP 231, 245-

[1] The State also charged Ms. Sandoval with identity theft in the second degree because she also had her sister's birth certificate in her purse at the time of the arrest. CP 15. However, the jury was hung on this charge, and the State later dismissed it. RP 322-23, 331.

47. Ms. Sandoval simply shoved the bag in her purse, and it was not until her arrest that she learned she possessed a stolen credit card and pipes with methamphetamine. RP 246, 249, 254.

During its closing argument, the State acknowledged Ms. Philips cancelled the Target credit card by the time the police discovered the card in a bag inside Ms. Sandoval's purse. RP 289. However, the State argued to the jury the card's cancellation was irrelevant to its decision to convict Ms. Sandoval of possession of stolen property in the second degree, claiming what mattered was whether the Target card was an access device at the time Ms. Phillips possessed it. RP 289. Moreover, Ms. Sandoval's attorney did not request an unwitting possession instruction.

The jury convicted her of the charges, and the Court of Appeals affirmed her convictions.

D. ARGUMENT

1. This Court should accept review because the Court of Appeals' opinion violates numerous established principles of statutory construction.

This Court should accept review because the Court of Appeals' opinion conflicts with established precedent from this Court requiring courts to apply the plain and unambiguous language of a statute. RAP 13.4(b)(1).

a. The opinion is contrary to the established principle that courts must apply the plain and unambiguous meaning of a statute.

The legislature decides what constitutes a crime and what sentence will accompany it, and so for a court to do so usurps the legislature's authority. *In the Postsentence Review of Leach*, 161 Wn.2d 180, 183, 163 P.3d 782 (2007). Accordingly, courts must strictly construe criminal statutes. *U.S. v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). When the language of a statute is plain and unambiguous, this Court accords the statute with its plain meaning in order to effectuate the Legislature's intent. *See Leach*, 161 Wn.2d at 185. "This Court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission." *Id*. at 186 (*quoting Jenkins v. Bellingham Mun. Court*, 95 Wn.2d 574, 579, 627 P.2d 131 (1981)).

Instead, courts must assume the legislature "meant exactly what it said and apply the statute as written." *HomeStreet, Inc. v. State Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (*quoting Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)).

Here, the State failed to prove every essential element of Ms. Sandoval's charge of possession of stolen property in the second degree—specifically, possession of a stolen access device—because the State relied on an erroneous interpretation of the term "access device" to prove Ms.

Sandoval was guilty of this crime. The essential elements of possession of a stolen access device require the State to prove the defendant (1) possessed; (2) a stolen; (3) access device. RCW 9A.56.160.

In turn, an "access device" is (1) any card, plate, code, account number, or other means of account access; (2) *that can be used*; (3) to obtain; (4) things of value; (5) or *can be used*; (6) to initiate a transfer of funds. RCW 9A.56.010(1). The word "can" means "to be able to do, make, or accomplish," and denotes the present tense. *Can*, Merriam Webster;[2] *see also Can*, Oxford English Dictionary.[3] Therefore, to convict someone of possession of a stolen access device, the State must prove beyond a reasonable doubt that on the date listed in the information, the person (1) possessed; (2) a stolen; (3) access device; (4) *that can be used*; (5) to obtain; (6) things of value; (7) or *can be used*; (8) to initiate a transfer of funds. RCW 9A.56.010(1).

It therefore follows that an access device that cannot be used to obtain anything of value on the date listed in the information fails to support a conviction for possession of stolen property in the second degree (access device). Because the State only presented evidence at trial indicating the Target credit card was long expired by the time the police

[2] https://www.merriam-webster.com/dictionary/can (last visited Mar. 5, 2018).
[3] https://en.oxforddictionaries.com/definition/can (last visited May 1, 2019).

discovered it in Ms. Sandoval's purse, Ms. Sandoval's conviction could cannot stand.

A plain meaning interpretation of the statute is further evidenced by the fact that the prior version of the access device statute explicitly defined the term as any "instrument or device, whether *incomplete, revoked, or expired*." Laws of 1987, ch. 140, § 3 (emphasis added). "When a material change is made in the wording of a statute, a change in legislative purpose must be presumed." *WR Enterprises, Inc. v. Dep't of Labor & Industries*, 147 Wn.2d 213, 222, 53 P.3d 504 (2002).

Despite the plain language of the statute, the Court of Appeals rejected the plain meaning of the statute and instead held the term "can be used" refers to whether the card was operational and capable of being used at the time the last owner possessed it. Opinion at 5-6. In so holding, the Court of Appeals relied on *Schloredt*, which held that to adopt the plain meaning of the "access device" statute would yield "absurd results." 97 Wn. App. at 794; Op. at 6.

For the reasons stated below, no absurd results follow from implementing the plain meaning of the statute.

b. While courts may forego according statutes with their plain meaning if it would yield absurd results, no absurd results follow from according the access device statute its plain meaning.

A court may forego implementing the plain language of a statute only under limited circumstances. One of those circumstances is if adopting the plain language of the statute would yield "absurd" results. *Leach*, 161 Wn.2d at 185.

Here, the Court of Appeals endorsed the view expressed in *State v. Schloredt*, 97 Wn. App. 789, 987 P.2d 647 (1999), which believed plain meaning to the access device statute would yield an absurd result. This was because it believed "it begs reason to assume the legislature intended that a defendant could not be charged with possessing a stolen credit card or other access device solely because the victim discovered the theft and cancelled the account on the stolen card before the defendant was apprehended." Op. at 6 (*quoting Schloredt*, 97 Wn. App. at 794).

But a careful examination of Chapter 9A.56 (theft and robbery statutes) demonstrates no absurd results follow from implementing the plain meaning of the statute. First, it is important to highlight the legislature chose to punish theft/possession of stolen property crimes based on the value of the stolen goods. *See* RCW 9A.56.040-050 (differing degrees of theft); RCW 9A.56.150-170 (differing degrees of

possession of stolen property). The more valuable the property, the higher the classification and punishment for the crime. It therefore makes sense for a court to issue a lesser punishment against an individual if he or she steals/possesses a deactivated credit card, as a deactivated credit card has considerably less value than an active credit card.

Contrary to the Court of Appeals' conclusions in the present case and in *Schloredt*, the State can still convict and punish an individual for stealing/possessing a stolen, but deactivated, access device, albeit to a lesser degree and punishment. *See* RCW 9A.56.170 (possessing stolen property in the third degree: gross misdemeanor); RCW 9A.56.050 (theft in the third degree: gross misdemeanor).

The Court of Appeals' conclusion in the present case and in *Schloredt* also ignores the State can still punish someone for a Class C felony if they *steal* an active access device the owner later deactivates. For example, if an individual steals another person's active credit card and the police find the defendant two days later when the card is already deactivated, the State *can still* charge the individual with theft in the second degree because at the time the defendant stole the card, the card was active and could be used to obtain something of value. *See* RCW 9A.56.040 (theft in the second degree).

And while the Court of Appeals believed the legislature "acquiesced" to *Schloredt's* interpretation of the statute, as the court recognized, "evidence of legislative acquiescence is not conclusive, but is merely one factor to consider" when interpreting a statute. Op. at 4-5 (*quoting Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 39, 384 P.3d 232 (2016)). Moreover, the Court of Appeals' opinion cites to no authority that holds evidence of legislative acquiescence overrules the plain meaning of a statute.

The Court of Appeals' opinion conflicts with numerous established principles of construction. And no absurd results follow from a plain meaning interpretation of the access device statute. Consequently, this Court should accept review and hold (1) insufficient evidence supports Ms. Sandoval's conviction and/or (2) jury instruction 20 contained a misstatement of the law. Op. Br. at 7-17; RAP 13.4(b)(1); RAP 13.4(b)(4).

2. This Court should accept review because the Court of Appeals' opinion conflicts with this Court's decision in *Rose*.

This Court should also accept review because the Court of Appeals' opinion conflicts with this Court's decision in *Rose*. RAP 13.4(b)(1).

In *Rose*, the police searched the defendant incident to arrest and discovered what appeared to be a credit card in the name of Ruth Georges.

175 Wn.2d at 12. At the defendant's bench trial, Ms. Georges testified she threw away a credit card offer she received in the mail the day the police searched the defendant. *Id*. The credit card offer included a plastic credit card with an account number and Ms. Georges' name. *Id*. However, the credit card offer required Ms. Georges to pay $30 to activate the account. *Id*. Because she did not have the necessary $30 to activate the account, Ms. Georges threw the card in the trash. *Id*. Mr. Rose retrieved this card and was convicted of second degree possession of a stolen access device. *Id*.

On appeal, Mr. Rose argued the State failed to prove the card was an "access device" within the meaning of RCW 9A.56.160(1). *Id*. at 13. This was because the card was not linked to an existing, active account, and also because the State failed to prove the card could "be used" to obtain something of value. *Id*. at 14.

This Court agreed. First, the court reasoned it was unclear from the record whether the card the defendant took could be used to obtain anything of value, as the card was never activated. *Id*. at 17. Because it was unclear from the record whether the card could be used to obtain anything of value, the court concluded the State failed to meet its burden. *Id*. at 18.

Ultimately, this Court held that because "the card in question was not tied to an existing, active account…affirmative evidence that it could be used to obtain something of value was necessary under the State's burden of proof." *Id*., n.1; *see also United States v. Onyesoh*, 674 F.3d 1157 (9th Cir. 2012)/

Similarly, here, the State failed to prove the Target credit card was linked to an active account. Instead, the evidence demonstrated Ms. Philips deactivated the Target credit card shortly after she discovered that someone stole her card. RP 208. Thus, under *Rose*, the State bore the burden of proving that Ms. Sandoval could nevertheless use the inactive Target card to obtain something of value. 175 Wn.2d at 18, n.1. But here, the State failed to prove that Ms. Sandoval could use the card in any manner to obtain anything of value at the time the police discovered the card in the bag.

Despite this Court's clear direction, the Court of Appeals refused to apply its reasoning and ruling to Ms. Sandoval's case. Op. at 6-7. This Court should accept review. RAP 13.4(b)(1).

3. This Court should accept review because the Court of Appeals' opinion conflicts with this Court's opinion in *Brush*.

Furthermore, this Court should accept review because the Court of Appeals' opinion conflicts with *Brush*. RAP 13.4(b)(1).

The Washington Constitution forbids judges from "charg[ing] juries with respect to matters of fact, nor comment thereon." Const. art. IV, § 16. Instead, judges "shall declare the law." *Id.* Therefore, judges cannot convey their personal opinion about the merits of a case or instruct the jury the State has established a fact at issue. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

A jury instruction fashioned out of another court's findings and rulings regarding legal sufficiency amount to an unlawful comment on the evidence. *State v. Brush*, 183 Wn.2d 550, 558, 353 P.3d 213 (2015); *see also State v. Sinrud*, 200 Wn. App. 643, 403 P.3d 96 (2017).

On appeal, Ms. Sandoval argued Jury Instruction 20 constituted an impermissible comment on the evidence because it resolved a factual issue in favor of the State and relieved the State of its burden of proving every element of possession of stolen property (access device) in the second degree. *See* CP 47; Br. of Appellant at 16. To illustrate this point, Ms. Sandoval relied on this Court's opinion in *Brush*.

In *Brush*, a jury convicted the defendant of first degree murder for killing his ex-fiancée. 183 Wn.2d at 552. During the penalty phase of the trial, the court instructed the jury to determine whether the crime was an aggravated domestic violence offense. *Id*. at 555. To assess this, the jury had to determine whether the offense was part of an ongoing pattern of

abuse of the victim "manifested by multiple incidents over a *prolonged period of time*" per RCW 9.94A.535(3)(h)(i) (emphasis added). *Id*. The evidence produced at trial tended to show that the defendant perpetrated other acts of abuse two months before the murder. *Id*. The court instructed the jury that a "prolonged period of time" meant "more than a few weeks." *Id*. Based on this jury instruction, the jury found the aggravator applied. *Id*. at 555.

This jury instruction was premised on a Court of Appeals decision that reversed a defendant's domestic violence aggravator for insufficient evidence because it found that two weeks was not a "prolonged period of time" under the applicable statute. *Id*. at 557 (referencing *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001)). The Washington Practice: Washington Pattern Jury Instructions: Criminal (WPIC) later adopted a jury instruction regarding the term "prolonged period of time" based on the court's ruling in *Barnett. Id*. Thus, the trial court in *Brush* instructed the jury regarding the term "prolonged period of time" based on *Barnett* and the WPIC. *Id*.

This Court ruled the instruction was an impermissible comment on the evidence. *Id*. at 559-60. First, this Court reasoned the WPIC constituted an inaccurate representation of the holding in *Barnett* because *Barnett* merely held that two weeks was legally insufficient to constitute a

"prolonged period of time" under the relevant statute. *Id*. at 558. Because this incorrect interpretation of the law relieved the State of its burden to show the pattern of abuse occurred over a "prolonged period of time" and resolved a factual issue in favor of the State, the instruction constituted an impermissible comment on the evidence. Moreover, the State could not meet its burden in proving no prejudice resulted because the instruction likely "lead [the] jury to conclude that the abuse in this case met the given definition of a 'prolonged period of time.'" *Id*. at 559.

Similarly, here, Jury Instruction 20 constituted an impermissible comment on the evidence because it is based on a Court of Appeals ruling in a legal sufficiency case that pre-dates *Rose* (*Schloredt*); moreover, the instruction lead the jury to conclude the State met its burden in proving all of the elements of possession of stolen property in the second degree (access device). Jury instruction 20 was based on 11 Wash. Prac.: Wash. Pattern Jury Instructions: Criminal 79.07 (4th Ed. 2016). This WPIC contains the following language:

> The phrase "can be used" refers to the status of the access device when it was last in possession of its [lawful owner] [an authorized user] regardless of its status at a later time.

Id.

The same language appears in Jury Instruction 20. CP 47.

Interestingly, the WPIC in question contains a comment that notes,

> The phrase "can be used" is open to interpretation, as the statute does not specify whether usability is measured as of the time when a device was taken from the lawful owner, or when the device is found in the defendant's possession, or at some other point.

Wash. Prac.: Wash. Pattern Jury Instructions: Criminal, supra, 79.07.

Just like the jury instruction at issue in *Brush*, Jury Instruction 20 relieved the State of its burden and, essentially, instructed the jury to find Ms. Sandoval guilty of possession of a stolen access device in the second degree.

However, the Court of Appeals rejected this argument, recognizing that while *Brush* contains a "sweeping admonition" stating courts should not fashion legal definitions based on a court's finding regarding legal sufficiency, this admonition was inapplicable to the present case. Op. at 9-11. It also read this admonition as mere dicta. Op. at 11, n.3.

This Court should accept review. RAP 13.4(b)(1).

4. This Court should accept review because the Court of Appeals' opinion conflicts with *Powell* and *Hubert.*

Finally, this Court should also accept review because the Court of Appeals' opinion conflicts with *Powell* and *Hubert*.

To prove ineffective assistance of counsel, the defendant must establish her attorney's performance was deficient and this deficient performance prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In both *Powell* and *Hubert*, the Court of Appeals held, "where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial." *Hubert*, 138 Wn. App. at 932; *accord Powell*, 150 Wn. App. at 156.

Here, the Court of Appeals implicitly agreed Ms. Sandoval's counsel performed deficiently when he neglected to request an unwitting possession instruction, which was the sole available defense she had to her charged crime. Op. at 12-13. But contrary to both cases, the Court of Appeals held no prejudice resulted from this deficient performance. Op. at 14.

As this case conflicts with *Powell* and *Hubert*, this Court should accept review. RAP 13.4(b)(2).

E. CONCLUSION

Based on the foregoing, Ms. Sandoval respectfully requests that this Court accept review.

DATED this 1st day of May, 2019.

Respectfully submitted,

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Filed
Washington State
Court of Appeals
Division Two

April 2, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARY E. SANDOVAL, Appellant.	No. 50814-1-II PUBLISHED OPINION

MELNICK, J. — Mary Sandoval appeals her convictions for possession of stolen property in the second degree and possession of a controlled substance.[1] She argues that insufficient evidence supports the jury's finding that the credit card found in her possession was an "access device," and that the jury instruction defining "access device" misstated the law and constituted an improper comment on the evidence. Sandoval also argues that she received ineffective assistance of counsel when her attorney failed to request an "unwitting possession" jury instruction. Finally, Sandoval argues that we should remand for the trial court to inquire into her ability to pay legal financial obligations (LFOs).

We affirm the convictions but remand for the trial court to reconsider the imposition of LFOs.

[1] The jury also convicted Sandoval of possession of a stolen motor vehicle. She does not raise any issues relating to this conviction.

FACTS

I. INCIDENT

On March 6, Sandoval entered into an agreement with a car dealership. The agreement allowed Sandoval to take home and use a vehicle for three days to determine whether she wanted to purchase it.

After three days, the dealership lost contact with Sandoval and made unsuccessful attempts to retrieve the vehicle. The dealership reported the vehicle stolen.

On April 2, the police found Sandoval and her husband in the stolen vehicle at the address listed in the agreement. The police arrested Sandoval for possession of a stolen vehicle and searched her incident to that arrest. In Sandoval's purse, the police found a credit card with somebody else's name on it, Sandoval's sister's birth certificate, and a pipe with methamphetamine residue.

The credit card had been stolen in early February. At that time, the card was active and could have been used to buy goods. Shortly thereafter, the card's owner cancelled the card.

The State charged Sandoval with possession of a stolen vehicle, possession of stolen property in the second degree, identity theft in the second degree, and possession of a controlled substance.

II. TRIAL AND SENTENCING

As relevant here, the court instructed the jury on the elements of possession of stolen property in the second degree. The court told the jury that the State had to prove beyond a reasonable doubt that the stolen property was an access device.

The court defined an access device as, "any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to

obtain money, goods, services, or anything else of value." Clerk's Papers (CP) at 47. In the same instruction, the court stated, "The phrase 'can be used' refers to the status of the access device when it was last in possession of its lawful owner, regardless of its status at a later time." CP at 47.

The jury convicted Sandoval on all charges except identity theft in the second degree. The State dismissed that charge.

At sentencing, the court imposed numerous LFOs, including a $250 jury-demand fee. Sandoval appeals.

ANALYSIS

I. ACCESS DEVICE DEFINED

Sandoval makes three assignments of error which are premised on her argument that the court incorrectly instructed the jury on the definition of the term "access device." According to Sandoval, an access device must be able to obtain something of value at the time it is found on a defendant, not at the time it was last in the possession of its lawful owner. Sandoval argues that insufficient evidence supports her conviction for possession of stolen property in the second degree, that the trial court erroneously instructed the jury on the definition of access device, and that the court impermissibly commented on the evidence with the instruction. We disagree with Sandoval.

A. Legal Principles

RCW 9A.56.010(1) defines "access device." The definition contains the phrase "can be used." "Can be used" is not statutorily defined. Sandoval argues that the court's jury instruction contained an erroneous definition for the phrase "can be used." Sandoval's argument is two-fold. First, Sandoval argues that we should not follow *State v. Schloredt*, 97 Wn. App. 789, 987 P.2d

647 (1999),[2] which interpreted the phrase "can be used," because it is not supported by sound reasoning. Sandoval argues in the alternative that *State v. Rose*, 175 Wn.2d 10, 282 P.3d 1087 (2012), effectively overruled *Schloredt*. We disagree with both arguments.

We review questions of statutory interpretation de novo. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). Our primary duty in interpreting statutes is to determine and implement the legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). If the statute's plain language and ordinary meaning is clear, we look only to the statute's language to determine intent. *Wentz*, 149 Wn.2d at 346. "[W]e discern plain meaning from 'all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *State v. Sanchez*, 177 Wn.2d 835, 843, 306 P.3d 935 (2013) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). We consider "'all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.'" *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting *State v. Huntzinger*, 92 Wn.2d 128, 133, 594 P.2d 917 (1979)). "[W]e presume the legislature does not intend absurd results and, where possible, interpret ambiguous language to avoid such absurdity." *State v. Ervin*, 169 Wn.2d 815, 823-24, 239 P.3d 354 (2010).

"[L]egislative inaction following a judicial decision interpreting a statute is often deemed to indicate legislative acquiescence in or acceptance of the decision." *State v. Stalker*, 152 Wn. App. 805, 813, 219 P.3d 722 (2009). "'[E]vidence of legislative acquiescence is not conclusive,

[2] Division I of this court decided *Schloredt*. We are not bound by the decisions of another division, but we do respectfully consider them. *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018).

but is merely one factor to consider.'" *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 39, 384 P.3d 232 (2016) (quoting *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 392, 687 P.2d 195 (1984)).

RCW 9A.56.010(1) defines "access device" as

> any card, plate, code, account number, or other means of account access that *can be used* alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

(Emphasis added.)

In *Schloredt*, the court affirmed the defendant's convictions for possession of stolen property in the second degree based on his possession of four stolen credit cards. 97 Wn. App. at 790-91. Schloredt made the same argument that Sandoval makes. He argued that because the term "can be used" in RCW 9A.56.0101(1) is written in the present tense, the state must show that an access device can be used at the time the device is found on a defendant. *Schloredt*, 97 Wn. App. at 793. Thus, Schloredt argued that insufficient evidence supported his convictions because the state "failed to prove [that the cards] were 'operational' on the date [he] possessed them." *Schloredt*, 97 Wn. App. at 793. He argued that cancelled cards cannot be used to obtain something of value and therefore cancelled cards are not "access devices" under the statute. *Schloredt*, 97 Wn. App. at 793.

The court rejected the argument. It concluded that the language "can be used" referred "to the status of the access device when last in possession of its lawful owner." *Schloredt*, 97 Wn. App. at 794. The court looked to the legislative history and intent of RCW 9A.56.010(1), and reasoned that whether a victim cancelled his or her account prior to a defendant's arrest was irrelevant in determining whether stolen credit cards were "access devices" under the statute. *Schloredt*, 97 Wn. App. at 794. The court concluded that a contrary result would be an absurdity

and would contravene the legislature's intent to broadly construe the term "access device." *Schloredt,* 97 Wn. App. at 793-94. "It begs reason to assume the legislature intended that a defendant could not be charged with possessing a stolen credit card or other access device solely because the victim discovered the theft and cancelled the account on the stolen card before the defendant was apprehended." *Schloredt*, 97 Wn. App. at 794. We agree that Sandoval's interpretation leads to an absurd result.

Since *Schloredt* was decided in 1999, the legislature has amended RCW 9A.56.010 four times. LAWS OF 2017 ch. 266, § 7; LAWS OF 2011 ch. 164, § 2; LAWS OF 2006 ch. 277, § 4; LAWS OF 2002 ch. 97, § 1. Not once has the legislature amended the definition of "access device."

We conclude that *Schloredt* accurately interpreted the phrase "can be used" as that phrase is used in the definition of "access device." Moreover, we conclude that the legislature's inaction following *Schloredt* indicates its acquiescence in *Schloredt*'s interpretation of the phrase "can be used."

Sandoval next argues that *Rose* overruled *Schloredt*. In *Rose*, the victim testified that she received a credit card offer which included an unactivated credit card in her name. 175 Wn.2d at 13. The victim never activated the card and threw it away. 175 Wn.2d at 13. Because she never activated the card, no account was associated with it. *Rose*, 175 Wn.2d at 13-15. The card, later found in the defendant's possession, led to the state charging him with possession of stolen property in the second degree. *Rose*, 175 Wn.2d at 12.

The court concluded that because the "card was not linked to an existing, active account," and had not been signed, "[i]t stretche[d] the inference beyond the evidence to conclude that th[e] card could be used to obtain something of value." *Rose*, 175 Wn.2d at 17-18. The court also noted

that although the state may have been able to prove the card could have been used to obtain goods or services, it did not. *Rose*, 175 Wn.2d at 17.

In coming to its conclusion, *Rose* discussed *Schloredt* but did not conclude or even hint that the case had been wrongly decided. *Rose*, 175 Wn.2d at 16-17. Instead, *Rose* factually distinguished *Schloredt*. In *Rose*, the card was never activated, was never linked to an existing account, and required a $30 payment to activate. 175 Wn.2d at 13, 15. The court therefore recognized that, unlike in *Schloredt*, the card could not have been used to obtain something of value when it was last in the possession of its lawful owner. *Rose*, 175 Wn.2d at 17-18. In fact, because the state failed to prove that the card in *Rose* was ever able to be used to obtain something of value, there was no need for the court to examine the appropriate point in time for determining when something "can be used."

Sandoval further argues that *Rose* overruled *Schloredt* because *Rose* "held that if the access device in question is not tied to an existing, active account, the State must present affirmative evidence that the card can be used to obtain something of value." Reply Br. of Appellant at 2-3 (emphasis omitted). This language from *Rose*, however, does not advance Sandoval's argument because it was used to distinguish *State v. Clay*, 144 Wn. App. 894, 184 P.3d 674 (2008), not *Schloredt*. 175 Wn.2d at 18 n.1.

Clay involved an unactivated card linked to an already existing account. 144 Wn. App. at 899. In *Rose*, the court distinguished its facts recognizing that, unlike in *Clay*, the unactivated card was not linked to an existing account. 175 Wn.2d at 18 n.1. Here, the facts are more analogous to *Clay* because, as evidenced by the card owner's ability to purchase items using the credit card, the card was linked to an active account.

Based on the foregoing, we conclude that *Rose* did not overrule *Schloredt* and that *Schloredt* correctly interpreted the phrase "can be used" in RCW 9A.56.010(1).

B. Sufficiency of the Evidence

Sandoval argues that insufficient evidence supports her conviction for possession of stolen property in the second degree because the State never proved she possessed an "access device." We disagree.

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). "In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

Sufficient evidence supports Sandoval's conviction. As discussed above, Sandoval possessed a stolen access device. A reasonable jury could have concluded, when viewing the evidence in the light most favorable to the State, that sufficient evidence supports Sandoval's conviction.

C. Jury Instructions Misstated the Law

Sandoval argues that the trial court erroneously defined the terms "access device" and "can be used" when it instructed the jury. As discussed above, we disagree. The court did not err.

D. Comment on the Evidence

Sandoval argues that the jury instruction defining "access device" and "can be used" constituted an impermissible comment on the evidence by the court because it resolved a factual issue in favor of the State and relieved the State of its burden to prove that Sandoval possessed an

"access device." Sandoval also argues that the jury instruction was an improper comment because its standard is derived from the facts of a previous sufficiency of the evidence case, *Schloredt*. We disagree with Sandoval.

We review jury instructions de novo to determine whether the trial court improperly commented on the evidence. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH. CONST. art. IV, § 16. "A jury instruction that does no more than accurately state the law pertaining to an issue . . . does not constitute an impermissible comment on the evidence." *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). However, a definitional jury instruction that "essentially resolve[s] a contested factual issue" is an improper comment on the evidence because it "effectively relieve[s] the prosecution of its burden of establishing an element of the [crime]." *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

Sandoval relies on *Brush*. In *Brush*, the jury had to decide if the defendant committed an aggravated domestic violence offense. 183 Wn.2d at 554. To make that determination, the jury had to decide if "the offense was part of an ongoing pattern of psychological abuse of the victim 'manifested by multiple incidents over a prolonged period of time.'" *Brush*, 183 Wn.2d at 555 (quoting RCW 9.94A.535(3)(h)(i)). Using a pattern jury instruction, the trial court instructed the jury that "'[t]he term prolonged period of time means more than a few weeks.'" *Brush*, 183 Wn.2d at 555 (internal quotation marks omitted); 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 300.17, at 719 (3d ed. 2008) (WPIC).

That instruction derived from *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001), *abrogated on other grounds by State v. Epefanio*, 156 Wn. App. 378, 234 P.3d 253 (2010). *Brush*, 183 Wn.2d at 557. In *Barnett*, the court concluded that two weeks was not a "prolonged period of

time" as a matter of law; therefore, because the evidence at trial only showed two weeks of abuse, insufficient evidence supported the jury's finding that the defendant's crime was an aggravated domestic violence offense. 104 Wn. App. at 203; *see Brush*, 183 Wn.2d at 557.

In *Brush*, the court reversed and decided that the jury instruction was "an inaccurate interpretation of the holding of *Barnett* because it implies that any abuse that occurs for more than a few weeks is a 'prolonged period of time.'" 183 Wn.2d at 558, 561. The court stated "that two weeks was not legally sufficient to be a 'prolonged period of time'—not that abuse occurring longer than two weeks *would* be legally sufficient." Brush, 183 Wn.2d at 558.

In *Brush*, the jury instruction did not accurately state the law, which in turn meant that the trial court commented on the evidence. But here, the issue is different because, as discussed above, the court's jury instruction accurately stated the law. Furthermore, the trial court did not instruct the jury that the card was active at the time the lawful owner possessed it. Rather it merely stated the law and allowed the jury to determine whether the card was active at the relevant time.

We recognize that *Brush* also contained a sweeping admonition that "legal definitions should not be fashioned out of courts' findings regarding legal sufficiency." 183 Wn.2d at 558. Subsequent courts have recognized that the reason for this admonition is because appellate courts review the sufficiency of evidence for whether any rational jury could have found guilt beyond a reasonable doubt and construe facts in the light most favorable to the state, while juries must find guilt beyond a reasonable doubt. *State v. Sinrud*, 200 Wn. App. 643, 650, 403 P.3d 96 (2017). "Therefore, fashioning a jury instruction based on an appellate court's sufficiency holding effectively replaces the jury standard with the lesser appellate standard." *Sinrud*, 200 Wn. App. at 651.

Here, the jury instruction defining "can be used" was based on *Schloredt*. *See* WPIC 79.07, at 206 (4th ed. 2016). And although *Schloredt* resolved a sufficiency of the evidence challenge, we conclude that the policy implications regarding *Brush*'s admonition are not implicated by the jury instruction in this case.[3]

The language in *Brush* should not be read in isolation. After discussing why the instruction inaccurately interpreted *Barnett*, the court stated:

> Furthermore, the question faced by the court in *Barnett* was whether the specific facts in that case were legally sufficient for the court to uphold an exceptional sentence based on abuse occurring over a "prolonged period of time." This is not an appropriate basis on which to create a jury instruction defining "prolonged period of time." Thus, we clarify that legal definitions should not be fashioned out of courts' findings regarding legal sufficiency.

Brush, 183 Wn.2d at 558. Read in its entirety, it is clear that the court had concerns about defining highly fact-specific terms, such as "prolonged," based on previous sufficiency of the evidence rulings.

Whether abuse occurs over a prolonged period of time is a fact-specific and subjective determination. One jury's finding, based on its facts, should not control or dictate the outcome of later cases, based on their facts.

Thus, *Brush* recognizes that courts should not fashion jury instructions based on previous sufficiency of the evidence cases to define certain terms, e.g., prolonged, which should be left to the sound discretion of the jury. Doing otherwise could constrain later juries in making findings. It also could relieve the State of having to prove guilt beyond a reasonable doubt in subsequent cases.

[3] We note that the admonition in *Brush* was dicta.

In contrast, determining the point in time for a jury to calculate whether an instrument "can be used" is not a fact-specific inquiry. Defining the phrase does not constrain juries in subsequent cases. Unlike a definition of the word "prolonged," the proper definition of the phrase "can be used" is independent of the facts of any given case.

This conclusion is further supported by *Schloredt*'s analysis. *Schloredt* engaged in statutory interpretation to define the phrase "can be used." *See* 97 Wn. App. at 793-94. The court did not construe facts in the state's favor or determine whether any reasonable jury could find that "can be used" is susceptible to the interpretation that the relevant time is the time in which the instrument was last in possession of its lawful owner. Instead, only *after* the court reached its legal conclusion for the appropriate definition of "can be used" did it look to the evidence presented to determine whether sufficient evidence supported the finding that the instrument was an "access device." *Schloredt*, 97 Wn. App. at 794.

Accordingly, the policies behind *Brush*'s admonition are not implicated by the court's instructions in this case. Based on the above, we conclude that the court did not improperly comment on the evidence.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Sandoval argues that she received ineffective assistance of counsel when her attorney failed to request a jury instruction for unwitting possession as an affirmative defense for her possession of a controlled substance charge. We disagree.

A. Legal Principles

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee 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); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. If either prong is not satisfied, the defendant's claim fails. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Unwitting possession is an affirmative defense to the charge of unlawful possession of a controlled substance. *State v. Higgs*, 177 Wn. App. 414, 437, 311 P.3d 1266 (2013). To prove unwitting possession, a defendant must show by a preponderance of the evidence that she did not know that the substance was in her possession or did not know the nature of the substance. *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005).

B. Prejudice

Sandoval argues that she was prejudiced because, without the unwitting possession instruction, "the jury could give no weight to [her] testimony concerning how she inadvertently possessed the methamphetamine." Br. of Appellant at 32. Sandoval argues that without the instruction, the jury was given no choice but to convict her, and therefore, she was denied a fair trial. We disagree.

In an ineffective assistance of counsel claim, prejudice exists if there is a reasonable probability that, except for counsel's errors, the results of the proceedings would have differed. *Grier*, 171 Wn.2d at 34. A reasonable probability is a probability sufficient to undermine

confidence in the outcome after considering the totality of evidence before the jury. *Strickland*, 466 U.S. at 694-95. Such probability is lacking here.

Viewing the evidence, jury instructions, and verdicts leads to the conclusion that the jury disbelieved Sandoval's testimony. For instance, Sandoval testified that she was not aware that another person's credit card was in her purse until after she was arrested. However, in convicting Sandoval of possession of stolen property in the second degree, the jury necessarily found to the contrary. The jury found beyond a reasonable doubt that Sandoval knowingly possessed the credit card.

Furthermore, Sandoval testified that she obtained the credit card and methamphetamine pipe at the same time, and both items were found on Sandoval in the same location. Therefore, if the jury found that the State carried its burden in showing beyond a reasonable doubt that Sandoval *knowingly* possessed the credit card, then it is doubtful that Sandoval could have carried her burden to show, by a preponderance of the evidence, that she *unwittingly* possessed the methamphetamine pipe.

Thus, we conclude that it was not reasonably probable that the jury would have found Sandoval not guilty of possession of a controlled substance if they had been instructed on the unwitting possession defense. Sandoval was not prejudiced by her counsel's failure to request the instruction. Because Sandoval has not met her burden to prove prejudice, her ineffective assistance of counsel claim fails.

III. LFOs

Sandoval argues, and the State agrees, that the sentencing court did not adequately inquire into her ability to pay LFOs and erred when it imposed a discretionary jury-demand LFO. We accept the State's concession.

We remand for the court to reconsider the imposition of LFOs. On remand, the trial court should consider all of the LFOs in light of the 2018 amendments to the LFO provisions, LAWS OF 2018, ch. 269, and *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

CONCLUSION

We affirm the defendant's convictions but remand for the court to reconsider the imposition LFOs.

Melnick, J.

We concur:

Worswick, P.J.

Sutton, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 50814-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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