No. 50582-7-II

97341-5

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHN HODGES,

Appellant.

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

The Honorable Elizabeth Martin, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner John Hodges, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Hodges seeks review of the unpublished opinion of the Court of Appeals in cause number 50582-7-II, filed April 23, 2019. *State v. Hodges*, 2019 WL 1785685. A copy of the decision is in the Appendix A at pages A-1 through A-23. The court denied Hodges' motion for reconsideration on May 28, 2019. Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Was Mr. Hodges denied his constitutional right to effective assistance of counsel, when his attorney failed to present two relevant witnesses and failed to impeach a critical prosecution witness regarding her acquisition of a letter written by the petitioner from the jail?

D. STATEMENT OF THE CASE

1. Procedural history:

John Hodges was charged by information filed in Pierce County Superior Court on December 7, 2015 with identity theft in the second degree, contrary to RCW 9.35.020(3), and possession of stolen property in the second degree, contrary to RCW 9A.56.140(1). Clerk's Papers (CP) 3-4. The State alleged that Mr. Hodges used a Direct Express debit card belonging

to Dean Solomon on December 5, 2015 to pay for putt-putt golf for himself, his daughter Ashley Hodges, and his grandson at Tower Greens in Tacoma, Washington. CP 1-2.

Dean Solomon subleased a room in her house in Tacoma to Wally Clark. 2RP at 159-60. Ms. Solomon did not previously know Mr. Clark, who responded to her Craigslist advertisement for a room for rent. 2RP at 160. Mr. Clark moved into Ms. Solomon's house in November, 2015. 2RP at 160. Ms. Solomon received social security disability payments into her account at Bank of America, which she was able to access by using a Direct Express debit card assigned to her. 2RP at 161. She was able to access the card using a Personal Identification Number (PIN) or by using her signature for some transactions. 2RP at 162. She did not share her PIN with anyone else and kept her debit card in her wallet. 2RP at 162-63.

On December 5, 2015, while checking her Bank of America account online in order to pay bills, she discovered that there was $3.00 in her account. 2RP at163. She thought that her account contained approximately $800.00. 2RP at 165. Her transaction history showed that her Direct Express debit card had been recently used to withdraw $142.75 from an ATM, a purchase for $177.46 from a Fred Meyer store, and a purchase for $48.00 from a Goodwill store in Tacoma. 2RP at 165, 185. She stated that although she did not provide her PIN to anyone, the number was written on a piece of paper in her wallet. 2RP at 166. Ms. Solomon believed that her debit card

was in her wallet, which she had left in her truck parked outside her house. 2RP at 170. She had not used her debit card in the week preceding her discovery of the transactions on December 5, 2015. While she was looking at the unauthorized transactions online, she noted that a transaction occurred at Tower Greens in Tacoma using her debit card about ten minutes before she checked her bank account. 2RP at 166.

Ms. Solomon called the Tower Greens bowling alley and told the manger that someone was using her card without authorization. 2RP at 166-67. She testified that the manager told her that the person who used that card was still there and that she would call the police. 2RP at 167. Ms. Solomon also called the police department. 2RP at 167.

After speaking with the police, she went to her truck and realized that it been broken into and that items were missing from her wallet, which was stored in the truck. 2RP at 171. Items missing from her wallet included other debit cards in addition to the missing Direct Express card, her driver's license, checkbook, cell phone, and a bank bag containing cash from a fund raiser yard sale. 2RP at 172. A rent check from Wally Clark contained in the wallet was also gone. 2RP at 175. She had the check in her wallet because Mr. Clark had not signed the check and she was unable to cash it. 2RP at 176. She had locked the truck, but discovered that the lock on the driver's side door had been "punched in." 2RP at 172.

Mr. Clark lived in the house but had a separate bedroom and

bathroom. 2RP at 163. Ms. Solomon asked Mr. Clark to leave approximately a week and a half after the incident because he had not paid his rent. 2RP at 176. Mr. Clark moved out and she had no further contact with him. 2RP at 177.

Trenton Christiansen works at Tower Lanes bowling alley and Tower Greens, which is a miniature golf course located in the same building. 2RP at 206-97. On December 5, 2015, he received a call from Ms. Solomon regarding the unauthorized use of her debit card at Tower Greens. 2RP at 208. He took her information and then contacted the manager and determined that the card was used ten to fifteen minutes before Ms. Solomon's call. 2RP at 208. Mr. Christensen said that the card was used to pay $20.00 for golf for a party of two adults and a minor. 2RP at 209, 210. After determining that the party—identified as Ms. Hodges, his daughter Ashley Hodges and his grandson—were still playing golf, manager Brenda Zimmerman called police. 2RP at 212, 213.

Tacoma police officer Jesse Jahner and another officer arrived at Tower Greene at approximately 5:30 p.m. Officer Jahner testified that he contacted Mr. Christiansen, who pointed out the person who used the debit card. 2RP at 223. Police contacted Mr. Hodge, who was playing miniature golf with his daughter and his grandchild. 2RP at 224. After being questioned about the card, Officer Jahner testified that Mr. Hodges said the was going to call Wally Clark, who gave him the card to use because Mr.

Clark owed him $50 to $60.00. 2RP at 225.

Officer Jahner testified that Mr. Christiansen "walked over and gave us a receipt" of the debit card transaction. 2RP at 226. Officer Jahner stated that after receiving the receipt, Mr. Hodges gave the officers a debit card with the name Dean M. Solomon on it. 2RP at 226. Officer Jahner said that after showing him that card was issued to Dean Solomon, Mr. Hodges stated that he did not even look at the name on the card and just scribbled a name on the receipt. 2RP at 227. Officer Jahner stated that Mr. Hodges said that Wally Clark owed him $50.00 to $60.00 and that Mr. Clark gave him the card and thought that he could spend the money that Mr. Clark owed and then could return it later. 2RP at 228.

Law enforcement did not contact Ms. Solomon regarding the unauthorized purchases at Fred Meyer and Goodwill, or the ATM withdrawal that she described, and did not conduct any further investigation of the losses. 2RP at 190.

Approximately two weeks after the incident and after Mr. Clark had moved out, Ms. Solomon stated that she received a letter in her mailbox. 2RP at 177, 178. She testified that the letter, which was addressed to Wally Clark and dated January 7, 2016, was not in an envelope. 2RP at 178, 181. She stated that she turned the letter over to Tacoma Police. 2RP at 179. She identified the letter entered as Exhibit 2 as the same one that was in her mailbox and the redacted version of the letter was admitted. 2RP at 179, 3RP

at 280.

Mr. Hodges testified that on December 4, 2015 he worked until 8:00 p.m. and was later invited to a party by a friend named Les. 3RP at 261. He agreed to go if he could get a ride and then texted a friend known as "North End Ed" to see if he could get a ride to the party. 3RP at 261. Ed picked up Mr. Hodges and then they stopped at a restaurant parking lot and picked up a man named Wally Clark, whom Mr. Hodges did not know. 3RP at 262. They then drove to Les' house where Mr. Hodges stayed until 7:00 a.m. 3RP at 262. Mr. Hodges stated that he talked with Mr. Clark at the party, and that he had brought two unopened half gallons of alcohol to the party, which he provided to Mr. Clark. 3RP at 271-72. As a result, Mr. Clark owed money to Mr. Hodges, and Mr. Clark gave a debit card to Mr. Hodges to use to repay the amount that he owed to Mr. Hodges. 3RP at 272. Mr. Hodges put the debit card he received from Mr. Clark in his pocket without looking at the name on it, assuming that it was Mr. Clark's card. 3RP at 272. After that Mr. Hodges left the party and went to his job at a car lot and worked until 4:30 or 5:00 p.m. 3RP at 272-73. After work, Mr. Hodges, his daughter, and Mr. Hodges' grandson, went to play miniature golf at Tower Greens. 3RP at 273. At Tower Greens Mr. Hodges used the card at the counter to purchase of a round of golf for two adults and a child. 3RP at 273. Mr. Hodges testified that he used the card to pay the total of $19.00 and a one dollar tip and handed the card to the employee. 3RP at 274. The clerk

handed Mr. Hodges a receipt, and he stated that he "just scribbled in a name like I do when –I used Dan Kuchan's card all the time to go to Home Depot or Lowes." 3RP at 275. He stated that the worked at a car lot for Dan Kuchan and used Mr. Kuchan's card several times a week as part of his job. 3RP at 275. Mr. Hodges, his daughter and grandson were halfway through their round of golf when the supervisor approached him regarding the receipt and the use of the debit card. 3RP at 276. Mr. Hodges testified that he gave her the debit card, and disputed the testimony by Officer Jahner that he gave the card directly police. 3RP at 277.

After being informed that the card could not be used by a Tower Greens employee, Mr. Hodges' daughter paid cash for the game and the supervisor told them that were welcome to stay and finish their game. 3RP at 277. After the supervisor walked away, Mr. Hodges called Wally Clark asked him what was up with this card, at which time Mr. Clark hung up on Mr. Hodges. 3RP at 278.

They continued to play golf and fifteen to twenty minutes, at which time police arrived. 3RP at 278. Mr. Hodges told police that Wally Clark had loaned him money and had given him the card earlier that day and that he was supposed to return it to Mr. Clark that evening. 3RP at 279. He called Mr. Clark a second time while in the presence of the police. 3RP at 279. He told him that the police were there, but Mr. Clark would not respond, and Mr. Hodges then handed his phone to the police, who then handed it back

after receiving no response. 3RP at 279-80.

Mr. Hodges was arrested and while in the jail, wrote a letter to Mr. Clark. 3RP at 281-82. Mr. Hodges testified that that he believed that Dean Solomon was a male and that he was in fact "North Tacoma" Ed, who he only knew by his nickname. 3RP at 281. He thought that after his arrest, that Mr. Clark may have stolen the card from Ed. 3RP at 282. Mr. Hodges stated that he wrote the letter to make Mr. Clark believe that he was not going to get into trouble then he would write a statement that would secure his release from jail. 3RP at 285. He stated that he did not want to alarm Mr. Clark by writing him a letter accusing him of giving Mr. Hodges a stolen access card because Mr. Clark would flee or otherwise not be cooperative. 3RP at 285. The letter stated:

To Wally:

Hey, what's happening? Remember me? Ed (Dean Solomon) and I had picked you up from Motel 6 that Friday night, December 4th, then we went to Les (Doc's) house on East 64th and Portland Avenue til morning. Then I started walking to 72nd Street transit where you and Ed (Dean Solomon) had picked me up. Ed (Dean Solomon) gave us (you and me) a ride home to my motor home downtown at the car lot where my Explorer was. Do you remember when Ed (Dean Solomon) gave me his Direct Express card and told me to go ahead and use it and to sign the name Dean Solomon on any receipt and to get the card back to him later that day? Well, he tried to contact me a few hours later and couldn't reach me. So he got scared he wasn't going to get the card back and decided to call it in stolen and never even attempted to call or text me to inform me he had called it in stolen. So when I used it to pay for putt putt golf at Tower Lanes that Saturday evening with my five-year-old grandson, the card was stolen and I got arrested in front of my grandson. However, you can help by simply writing a statement to my attorney stating you witnessed Ed (Dean Solomon)

give me his card when he dropped me off. You following me on this, buddy? 2RP at 181-82.

Page two of the letter continued:

Of course, you are. I please need you to have my back on this Wally. This means the world to me, and my grandson's little heart is broken wondering where his papa is at. So if you could contact my attorney and state,' I, wally Clark, did witness Dean Solomon give a Direct Express card to John Hodges and did hear Dean Solomon authorize John Hodges to use it and sign the name Dean Solomon,' with Wally Clark's name below that.

That's it man. Nothing else needs to be said. This can be done privately in my attorney's office between you and my attorney. Nothing will happen except the charges against me will be dismissed in court. No, you won't have to come to my court hearings or trial. Just need a signed statement from you. Please, please, please. I will give my attorney your phone number on Monday. Thanks, man. Hope to see you soon. Your friend, John Hodges.

2RP at 181-83.

Mr. Hodges stated that the statement contained in the letter that "Dean Solomon gave me his Direct Express card and told me to go ahead and use it to sign his name "Dean Solomon" on the receipt and to get the card back to him later that day" did not occur, but that he wrote that in order to make Mr. Clark think that was what he thought had occurred. 3RP at 285. Mr. Hodges stated that he wrote the letter to Mr. Clark to make him think that he is "basically giving me a way out" and that he is not going to "tell on me[,] [b]ut yet, I can still help him get out of jail." 3RP at 286.

Mr. Hodges testified that when he used the card at Tower Greens, he did the same thing that he had done in the past when he was allowed to use his boss Dan Kuchan's card to purchase materials at building supply stores;

he signed the name "Dan Kuchan" when using the debit card during the past year with his boss's permission. 3RP at 289-90, 291. He stated that just as when he had used his boss's card, he believed that the use of the card was authorized by its owner, so he signed a name—in his case a scribbled name—as he had done when using Mr. Kuchan's card. 3RP at 292.

The jury found Mr. Hodges guilty of second degree identity theft and second degree possession of stolen property as charged. 3RP at 349; CP 91, 92.

Mr. Hodges appealed his convictions and sentence, arguing that (1) he received ineffective assistance of counsel when counsel (a) failed to investigate and present witnesses and evidence, (b) failed to propose a missing witness instruction, (c) failed to impeach a State witness and object to evidence, (d) invited the jury to convict during closing arguments, (e) failed to argue same criminal conduct at sentencing, and (f) failed to cite relevant case law in his motion for an exceptional sentence downward; and also (2) that the trial court erred by denying his motion for new trial; and (3) the State failed to present sufficient evidence supporting his convictions. By unpublished opinion filed April 23, 2019, the Court of Appeals, Division II, affirmed the convictions. See unpublished opinion.

Mr. Hodges now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. PETITIONER RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant has the constitutional right to the effective assistance of counsel under Wash. Const. art. 1, § 22; U.S. Const. amend. VI. To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. ***State v. Thomas,*** 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The standard for evaluating effectiveness of counsel is set forth in ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The court must decide (1) whether counsel's conduct constituted deficient performance and (2) whether the conduct resulted in prejudice. to prevail, appellant must show (1) that his lawyer's representation was deficient and (2) that the deficient conduct affected the outcome of the trial. ***State v. Aho***, 137 Wn.2d 736, 745, 975 P.2D 512 (1999); ***Strickland***, 466 U.S. at 693-94.

Performance is deficient if it falls "below an objective standard of Reasonableness based on consideration of all the circumstances." ***State v. Kyllo***,

166 Wn.2d 856, 862, 215 P.3d 177 (2009). The defendant need show only a reasonable probability the outcome would have differed in order to undermine confidence in the outcome and demonstrate prejudice. ***Strickland***, 466 U.S. at 693-94. Representation that falls sufficiently below an objective reasonableness standard overcomes the strong presumption of reasonableness. ***Thomas***, 109 Wn.2d at 226.

a. Mr. Hodges' right to effective counsel was violated when his attorney failed to call Wally Clark and Brenda Zimmerman as witnesses

A failure to investigate or interview witnesses is a recognized basis for an ineffective assistance of counsel claim. ***State v. Jones***,183 Wn.2d 327, 339-40, 352 P.3d 776 (2015). A failure to interview witnesses who may provide corroborating testimony may constitute deficient performance. ***State v. Weber***, 137 Wn.App. 852, 858, 155 P.3d 947 (2007), rev. denied, 163 Wn.2d 1001 (2008).

A lawyer has a duty to investigate what information a potential witness possesses. ***Sanders v. Ratelle***, 21 F.3d 1446, 1456-57 (9th Cir. 1994). A failure to interview key witnesses constitutes inadequate investigation. ***Thomas,*** 109 Wn.2d at 231 (defendant received ineffective assistance of counsel where attorney failed to ascertain his expert witnesses credentials and failed to call a different expert witness to testify). "Moreover, the failure to conduct a reasonable investigation is considered especially egregious when the evidence that would have been uncovered is exculpatory." ***Weber***, 137 Wn. App. at 858.

Finally, a failure to subpoena a necessary witness is deficient performance. ***State v. Jury***, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978), rev. denied, 90 Wn.2d 1006.

Wally Clark was a necessary witness because his presence permeates almost every aspect of the case; he is the connection between Ms. Solomon and Mr. Hodges. As the trial court judge noted at sentencing, it is very likely that Mr. Clark committed the theft of the card in question. Therefore, it is reasonable to believe that Mr. Clark could testify that Mr. Hodges had nothing to do with the offenses.

Despite the critical role played by Clark in the case, defense counsel did not call him as a witness. Counsel was reduced to a strawman argument, putting the blame on Mr. Clark during closing argument:

> [Y]ou've got Wally Clark being the roommate. You've got Wally Clark having access. You've got Wally Clark's social security check that's taken out of the purse. You've got Wally Clark with money problems. You've got the thing being—the card being used multiple times before Mr. Hodges ever gets it. You've got somebody that knows the pin number, which would be more likely than not Wally Clark, the roommate. To the reasonable inference and all the evidence is Wally Clark stole the card.

3RP at 334.

Ms. Zimmerman also was a logical witness who would have provided testimony to rebut the officer's testimony that Mr. Hodges had the card in his possession when police arrived. This testimony is relevant because it supports the core defense argument that Mr. Hodges was unaware that the card was stolen

and that even after giving the card to the supervisor, Mr. Hodges, his daughter and his grandson remained in the building and continued to play golf for the twenty to thirty minutes before police arrived. Mr. Hodges argued that he if believed that he had done something wrong, he would have had ample time to leave. His daughter's testimony and testimony of Ms. Zimmerman would have rebutted the officer's testimony that he obtained the card from Mr. Hodges, and that Mr. Hodges therefore was unaware that police had been called or that the card was being questioned.

The cumulative effect of counsel's errors was highly prejudicial to Mr. Hodges. By failing to call both Ms. Zimmerman to testify, counsel effectively deprived Mr. Hodges of his right, under the Sixth Amendment of the United States constitution and article I, section 22 of the Washington constitution, to confront his accusers. The failure to call these witnesses violated his right to present a defense. Without the evidence, the defense theory could not be fully presented and the officer's testimony could not be effectively rebutted.

b. Mr. Hodges received ineffective assistance when trial counsel failed to impeach Dean Soloman regarding her acquisition of the letter to Wally Clark

Defense counsel failed to impeach Dean Soloman, a key witness, regarding her mysterious acquisition of the jailhouse letter by Mr. Hodges. Solomon's testimony was damaging and her credibility needed to be attacked. This Court should accept review because counsel performed deficiently in declining to impeach the witness, which undermines confidence in the outcome.

Dean Solomon was the prosecution's principal witness regarding the theft of the card. Ms. Solomon also testified regarding a letter addressed to Wally Clark that she received in her "garage" mailbox. Mr. Hodges testified that he mailed the letter to Mr. Clark from jail where he was being held after his arrest. Despite Ms. Solomon's pivotal role as a prosecution witness, defense counsel not only stipulated to the letter's admission, but failed to impeach her regarding acquisition of a letter addressed to someone else. Ms. Solomon's testimony regarding the letter was damaging. Mr. Hodges was compelled to explain the letter and the reason he wrote it and was exposed to strenuous cross-examination to explain why he employed a ruse in the letter in his attempt to secure Mr. Clark's cooperation. He explained that the purpose of the letter was to elicit Mr. Clark to come forward and acknowledge that he gave the card to Mr. Hodges at the party. Mr. Hodges explained that he believed the best way to have Mr. Clark admit his role was engage in a ruse and mislead Mr. Clark into believing that he believed that someone else took the card and that Mr. Clark had no culpability. The State capitalized on this during closing by arguing:

> The defendant admitted on the stand that every single thing in this letter was a complete and utter fabrication. He testified—he admitted on the stand that he was willing to take someone lie to the Court in order to get him out from under these charges. He admitted he was willing to perpetrate a fraud on the Court in order to get out from under these charges.

3RP at 312.

ER 608(b) allows impeachment through specific instances of

misconduct, where such conduct is probative. ER 608(b) provides:

> Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The manner by which Ms. Solomon came into the letter is hazy and mysterious, and her credibility should have been challenged by trial counsel. There is no reasonable explanation reason for defense counsel failing to impeach the credibility of a critical State witness regarding her acquisition of the letter. Therefore, reversal on both counts is required because counsel performed deficiently in declining to challenge the admission of the letter and failing to impeach the witness, which undermines confidence in the outcome.

Defense counsel had an opportunity to ask Ms. Solomon about the letter on cross-examination, but inexplicably did not do so. Information elicited regarding the letter would have been useful evidence to help the jury in assessing the truth of her testimony, which was a significant component of the State's case.

Ms. Solomon testified that she obtained the letter to Wally Clark in her mail, which is put through a letter slot in her garage, but that it was not in an envelope. Mr. Hodges, on the other hand, testified that that he mailed the letter from the jail and that it was in an envelope addressed to Wally Clark and sent to his former address at the house he sublet from Ms. Solomon.

Federal law protects mailed matter until it is delivered to the person to whom it is directed or to his authorized agent. 18 U.S.C.A. § 1702 provides:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined under this title or imprisoned not more than five years, or both.

The statute protects mail not yet delivered to the addressee or his or her authorized agent, even though the post office has relinquished possession of the mail matter. See, e. g., ***United States v. Ashford***, 530 F.2d 792 (8th Cir. 1976) (defendant violated section 1702 by appropriating letter delivered "c/o" defendant, where addressee had not authorized defendant to receive his mail).

Counsel was ineffective by not questioning Ms. Solomon how she acquired the letter addressed and mailed to Wally Clark by Mr. Hodges from the jail, and whether she violated federal law if she opened a letter not addressed to her. Although it was not strictly speaking a governmental intrusion, the government reaped the benefits of the alleged mail theft. Absent statutory authorization, private citizens are not and should not be permitted to take property from other private citizens. Defense counsel needed this opportunity to undermine her credibility and call into question her damaging testimony, but inexplicably failed to do so. There is a reasonable probability that but for defense counsel's failure to impeach Ms. Solomon, the result of Mr. Hodges' trial would

have been different.

Not only should the admissibility of the letter have been challenged, but the testimony of Ms. Solomon regarding the letter's content should also have been excluded, because the information about which she testified was obtained in violation of federal law and constituted mail theft.

Counsel's failure to engage in reasonable measures impeach the prosecution's key witness could not have been tactical or strategic. There was simply no reason to not undercut Ms. Solomon's credibility by uncovering and introducing the readily available information casting doubt on Ms. Solomon's veracity.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. ***Thomas***, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Mr. Hodges "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." ***Strickland***, 466 U.S. at 693. Ms. Solomon was an important witness. Juror belief in the credibility of her account of the circumstances under which the debit card was taken, and the manner in which she obtained Mr. Hodges' letter in the garage, was crucial to the State's case. Juror belief in the credibility of the witness was crucial to the State's case. Ms. Solomon was the only person who could testify as to the origin of the letter. Had the jury heard evidence impeaching her credibility as a witness, there would have been a basis to seriously question her account regarding the manner by

which the debit card was acquired by Mr. Clark, and in turn supported Mr. Hodges' contention that he was offered use of the card in good faith and that he had no reason to believe that it was stolen or that Mr. Clark was not authorized to allow him to use the card to pay him for the alcohol from the party.

The prejudice prong of a claim of ineffective assistance of counsel is comparable to harmless error analysis. ***State v. Rodriguez***, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004). "When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial." ***State v. Martin***, 73 Wn.2d 616, 627, 440 P.2d 429 (1968). Such a conclusion is no different than a probability sufficient to undermine confidence in the outcome. ***Thomas***, 109 Wn.2d 226. For the reasons set forth above, that standard is satisfied here. Mr. Hodges "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." ***Strickland***, 466 U.S. at 693. For these reasons, review should be accepted.

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.F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: June 19, 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on June 19, 2019, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Michelle Hyer, Pierce County Prosecutor, and copies were mailed by U.S. mail, postage prepaid, to the following Appellate:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 19, 2019.

PETER B. TILLER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

April 23, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN MICHAEL HODGES, Appellant.	No. 50582-7-II UNPUBLISHED OPINION

WORSWICK, J. — A jury found John Hodges guilty of second degree identity theft and second degree possession of stolen property. Hodges appeals his convictions, arguing that (1) he received ineffective assistance of counsel when counsel (a) failed to investigate and present witnesses and evidence, (b) failed to propose a missing witness instruction, (c) failed to impeach a State witness and object to evidence, (d) invited the jury to convict during closing arguments, (e) failed to argue same criminal conduct at sentencing, and (f) failed to cite relevant case law in his motion for an exceptional sentence downward; (2) the trial court erred by denying his motion for new trial; and (3) the State failed to present sufficient evidence supporting his convictions.

We hold that the State presented sufficient evidence to support his convictions. We also hold that Hodges's counsel was not ineffective, and because Hodges fails to demonstrate that he received ineffective assistance of counsel, he also fails to show that the trial court abused its discretion by denying his motion for new trial on the same grounds. Consequently, we affirm Hodges's convictions.

FACTS

A. *Background Facts*

On December 5, 2015 Hodges went to Tower Lanes to play miniature golf with his daughter and grandson. He used a credit card with the name Dean Solomon to pay the $20.00 fee for the golf game. When signing the receipt, Hodges "scribbled in a name." 3 Verbatim Report of Proceedings (VRP) (Feb. 15, 2017) at 275.

Also on December 5 Solomon discovered unauthorized transactions made on her credit card. She discovered that the card had been used the day before multiple times, and had just been used minutes before at Tower Lanes. She immediately called Tower Lanes and then called the police department. Trenton Christensen, an employee at Tower Lanes, helped locate the transaction and identified Hodges as the person who had used Solomon's card.

When Tacoma Police Officer Jesse Jahner responded to Tower Lanes, Christensen, directed Officer Jahner to Hodges. Officer Jahner told Hodges that he was there because of a stolen credit card. Hodges responded by telling Officer Jahner that he was going to call Walter Clark who had given him the card because Clark owed him $50 or $60. Hodges gave Solomon's card to Officer Jahner.

Christensen also gave Officer Jahner the receipt from Hodges's transaction. Officer Jahner observed that "it appeared [Hodges] had tried to sign a large cursive D, and it looked like the signature 'Dean' on it." 2 VRP (Feb. 14, 2017) at 228.

The State charged Hodges with second degree identity theft and second degree possession of stolen property. Hodges proceeded to a jury trial.

B. *Trial*

Throughout the trial court proceedings, Hodges was represented by three different attorneys. First, he was represented by Michael Maltby. Then, for reasons unclear from the record on appeal, Charles Johnston represented Hodges throughout trial. Finally, after the jury's verdict, but before Hodges was sentenced, a third attorney represented Hodges during his motion for a new trial and sentencing.

Trial was continued multiple times. The State named Clark as a witness and subpoenaed him for two trial dates, which were continued. Clark was not subpoenaed for the final trial date. The State told the court that "Clark is not available to testify," and defense counsel agreed, noting that "Clark is long gone." 3 VRP (Feb. 15, 2017) at 265. Hodges named "Ashley Hodges" as a witness and also told the trial court that he and his trial counsel had discussed whether to have his daughter testify.[1] CP at 221.

At trial, Solomon and Officer Jahner testified consistently with the above facts. Christensen testified that he did not confront Hodges before the police arrived, and that he did not see his supervisor confront Hodges before police arrived. The receipt was admitted into evidence.

Solomon also testified that Clark moved out of her house approximately one week after Hodges used her card. She testified that a few weeks after Hodges used the card, she received a letter in her mailbox. The letter was not in an envelope, but was with the rest of her mail. The letter was written to Clark from Hodges. The court admitted the letter. Hodges did not object to the admission of the letter, and stipulated to the chain of custody. On cross-examination,

[1] It appears that Ashley Hodges is John Hodges's daughter, but the record is not explicit on this point.

Hodges's counsel questioned Solomon about her discovery of the letter. Solomon reiterated that she discovered the letter without an envelope.

The letter stated:

> To Wally,
> Hey, what[']s happening? Remember me? "ED" (Dean Solomon) and I had picked you up from Motel 6 that Friday night, December 4, then we went to Les (Doc's) house on East 64th and Portland Ave. til morning. Then I started walking to the 72nd St. transit center, where you and ED (Dean Solomon) had picked me up. ED (Dean Solomon) gave us (you [and] me) a ride home to my motor home downtown at the car lot where my Explorer was. Do you remember when "ED" (Dean Solomon) gave me his [D]irect [E]xpress card and told me to go ahead and use it and to sign the name Dean Solomon on any receipt and to get the card back to him later that day? Well he tried to contact me a few hours later and couldn't reach me, so he got scared he wasn't gonna get the card back and decided to call it in stolen and never even attempted to call or text me to inform me he had called it in stolen. So when I used it to pay for putt-putt golf at [T]ower [L]anes that Saturday evening with my 5 year old grand-son, the card was stolen and I got arrested in front of my grandson! . . . However, you can help by simply writing a statement to my attorney . . . stating you witnessed "ED" (Dean Solomon) give me his card when he dropped me off. You following me on this buddy?
>
> Of course you are. I please need you to have my back on this. Wally, this means the world to me and my grandson[']s little heart is broken wondering where his papa is at. So if you could contact my attorney
>
> . . .
>
> and state:
>
> I Wally Clark, did witness Dean Solomon give a [D]irect [E]xpress card to John Hodges, and did hear Dean Solomon authorize John Hodges to use it and sign the name Dean Solomon. Wally Clark
>
> . . . .
>
> That's it man. Nothing else needs to be said! This can be done privately in my attorneys [sic] office between you and my attorney. Nothing will happen except the charges against me will be dismissed in court . . . . No you won't have to come to my court hearings or trial. Just need a signed statement from you please please please. I will give my attorney your phone [number] on Monday. Thanks man, hope to see ya soon.

Your friend John Hodges.

Ex. 2.

Hodges testified that on December 4, 2015, he went to a party with his friend "Ed" and Walter Clark, who he met for the first time that night. 3 VRP (Feb. 15, 2017) at 261. Hodges brought bottles of alcohol to the party. Hodges gave the bottles to Clark in exchange for money. As payment, Clark gave Hodges a credit card with the name Dean Solomon on it. Solomon was Clark's roommate.

Hodges testified that when Clark gave him the credit card at the party, he did not look at the name on the card. Hodges assumed that the card belonged to Clark.

Hodges testified that he went to Tower Lanes to play miniature golf, and paid with the card. While playing golf, the supervisor at Tower Lanes approached him, and he understood that the card was not authorized. His daughter paid the supervisor for the golf, and they continued to play. At that point, Hodges called Clark, who hung up on him. He tried to call Clark while talking to Officer Jahner, but Clark would not respond.

Hodges testified that he did not know that he was not authorized to use the card, that the card did not belong to Clark, or that the card was stolen. Hodges denied signing the receipt "Dean," and testified that he "scribbled" a name. 3 VRP (Feb. 15, 2017) at 275. He explained that he regularly used his boss's credit card for work, and would sign a version of his boss's name on the receipt. Hodges testified that "I just scribbled in a name like I do when—I used Dan Kuchan's card all the time to go to Home Depot or Lowe's." 3 VRP (Feb. 15, 2017) at 275.

Hodges testified that he wrote the letter to Clark admitted as exhibit 2, but that he mailed it in an envelope. He explained that, under the belief that Clark was responsible for the stolen

card, the letter was part of his plan to clear his name without scaring Clark away. Hodges believed that Clark stole Solomon's card from Hodges's friend, Ed, because "the first two letters of the name Dean backwards is Ed, so I thought, wow, my friend Ed is Dean Solomon, so I thought [Clark] may have taken the card from my friend Ed." 3 VRP (Feb. 15, 2017) at 282. Hodges was concerned that if he accused Clark, Clark would run. So Hodges "figured that if [he] made [Clark] believe that he wasn't going to get in trouble, that [Clark] might write the statement that would get me out of jail for something I didn't do and then we and my friend Ed could go after him and find out what the deal was." 3 VRP (Feb. 15, 2017) at 285.

Hodges testified that the substance of his letter was untrue, and that Solomon had not given Hodges the card or authorized him to use it. Hodges said he was "shifting the blame to the person that [he] thought owned the card," and that he "would have perpetrated a fraud on [the] Court" in an effort to dismiss his charges. 3 VRP (Feb. 15, 2017) at 294-95. He testified that he would have committed fraud on the court because it was important to him to avoid charges.

During closing arguments, Hodges argued:

> "Well, that looks like a D to me," again, spontaneous. He said, "I didn't know the name that was on that card. I scribbled a name on it." He testified in court that it turned out to be—he scribbles his boss's name because he scribbles his boss's name on the credit card at work. And you'll get this. You know, if you—if you look at this and you say that says "Dean Solomon," I guess you're going to convict him. But if you look at this and say that's a scribble, looks like a D and a scribble, then you know he is telling you the truth. You know he is telling you the truth. You'll have that back there, and you all can study that as long as you can. That does not say Dean Solomon.
>
> And before I leave that point, Mr. Hodges says, "I'm not going to write Wally Clark or anybody—Wally Clark gave me the name. I['m] not going to write Wally Clark's name because I am not Wally Clark. So I just scribble a name on there so I don't get in trouble for writing somebody else's name." So that's—that's a fact. These are things that came from the stand during this trial. Wally Clark, Wally Clark, Wally Clark, Wally Clark. Reasonable inference, stole that card.

> Wally Clark handed that card to Mr. Hodges, and Mr. Hodges' behavior and how he used that card after it was given to him leads to the reasonable, common sense inference that he didn't know it was stolen. He had no knowledge it was stolen. He had no intent to commit a crime when he paid $20—plus, you'll see on the thing $19 on the receipt and he gave Mr. Christensen a dollar tip. It defies logic. It defies common sense that if he knew that card was stolen and if he intended to commit a crime, that that's the crime he chooses to commit with a stolen credit card. Now, come on. Do not lose your common sense. Look at this for what it is, and those are the facts.

3 VRP (Feb. 15, 2017) at 330-31.

The jury found Hodges guilty as charged.

C. *Post Trial*

At the sentencing hearing, Johnston asked to withdraw because Hodges blamed him for the guilty verdict. The court allowed Johnston to withdraw and Hodges to proceed pro se. Hodges, acting pro se, moved for a mistrial and for dismissal. Hodges claimed that he received ineffective assistance of counsel, and that he had "proof that the prosecutor has led all three of our witnesses of committing perjury." 4 VRP (March 10, 2017) at 369-70. The State objected, and Hodges asked the court to appoint new counsel. The court appointed new counsel and set a new hearing date.

Hodges returned with new counsel and filed a motion for new trial under CrR 7.5. He argued he was entitled to a new trial based on CrR 7.5(a)(4), (5), and (8). He claimed that law enforcement's lack of investigation into his claims, Clark, and the case generally constituted misconduct by the prosecution and an irregularity in the proceedings under CrR 7.5(a)(2) and (5). He also claimed that he received ineffective assistance of counsel, entitling him to a new trial under CrR 7.5(a)(8).

In his motion for new trial, Hodges stated, in an unsigned declaration, that Clark e-mailed Maltby, telling him that Hodges was innocent. Hodges also stated that Clark exchanged text messages with Maltby's investigator. Hodges stated that he repeatedly asked Johnston to obtain the e-mails and text messages regarding Clark, but that Johnston did not get the evidence. Hodges also claimed that Christensen's and Officer Jahner's testimony was incorrect because they contradict his testimony that Hodges gave the card to the supervisor at Tower Lanes.[2] Hodges also claimed that Solomon illegally obtained his letter to Clark, and therefore it should not have been admitted. The court denied Hodges's motion for new trial.

At sentencing, Hodges stipulated to his prior offender score, which was 9+. Hodges requested an exceptional sentence downward, based in part on his serious medical conditions and the relatively low value of the transaction. The court considered the request, but found that an exceptional sentence downward was not warranted. The court noted that it was not "entirely an easy case because the circumstances of the case, yes, it was $20. It was for an outing with his grandchild." 6 VRP (June 8, 2017) at 429. But the court found that Hodges's testimony about the letter made it clear that Hodges knew that the card did not belong to him and "that he was willing to put a fraud on the Court in order to get out of liability here." 6 VRP (June 8, 2017) at 429. The court stated that it "cannot find that there are the substantial and compelling circumstances to warrant an exceptional [sentence] downward." 6 VRP (June 8, 2017) at 429.

[2] In support of his motion for a new trial, Hodges cites to exhibits, presumably attached to his declaration. However, the record on appeal does not contain exhibits to Hodges's motion for new trial. It is Hodges's burden to provide this court with an adequate record for review. RAP 9.2(b); *Stiles v. Kearney*, 168 Wn. App. 250, 259, 277 P.3d 9 (2012).

The court acknowledged that although Hodges had an extensive criminal history, he did not have any felony convictions in the last nine years.

The court sentenced Hodges to 48 months of confinement on second degree identity theft, with 12 months of community custody, and 26 months of confinement on second degree possession of stolen property, to run concurrently. Hodges appeals.

ANALYSIS

Hodges argues that the State failed to present sufficient evidence to support his convictions, that he received ineffective assistance of counsel, and that the trial court abused its discretion by denying his motion for new trial. We disagree.

A. *Sufficiency of the Evidence*

Hodges argues that the State presented insufficient evidence of second degree identity theft and second degree possession of stolen property. Specifically, he argues that the State failed to prove that he knew that he was using a stolen credit card. We disagree.

Due process requires the State to prove every element of the charged crimes beyond a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). We review sufficiency of evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a challenge to the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Homan*, 181 Wn.2d at 106. Direct and circumstantial evidence are considered equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). We also "defer to the trier of fact on issues of

conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

1. *Sufficient Evidence Supports Possession of Stolen Property Conviction*

To convict Hodges of possessing stolen property, the State must prove that he possessed the property, that the property was stolen, and that Hodges knew that the property was stolen. RCW 9A.56.160. Knowledge that the item is stolen is an element of second degree possession of stolen property. RCW 9A.56.140, .160. Direct evidence and circumstantial evidence are equally reliable to establish knowledge. *Farnsworth*, 185 Wn.2d at 775. Although mere possession is insufficient to establish knowledge, possession of recently stolen property together with slight corroborative evidence will support a conviction for possession of stolen property. *State v. Scoby*, 117 Wn.2d 55, 61-62, 810 P.2d 1358, 815 P.2d 1362 (1991); *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). The other corroborative evidence can consist of a false or improbable explanation or inconsistent explanations. *State v. Ladely*, 82 Wn.2d 172, 175, 509 P.2d 658 (1973); *State v. Rockett*, 6 Wn. App. 399, 403, 493 P.2d 321 (1972). We defer to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

Taking the evidence in the light most favorable to the State, we hold that Hodges's dubious and inconsistent explanation about the card, and his attempt to sign the receipt with the name of the cardholder was sufficient corroborative evidence to prove that he knew the card was stolen. *See Scoby*, 117 Wn.2d at 62; *see State v. Hatch*, 4 Wn. App. 691, 694, 483 P.2d 864 (1971) (holding that possession of recently stolen property coupled with a dubious account of its acquisition are sufficient facts to support conviction).

2. *Sufficient Evidence Supports Identity Theft Conviction*

Hodges argues that the State failed to present sufficient evidence because the State failed to prove that he knew he was using a stolen card. Specifically, Hodges asserts that an "essential element" of second degree identity theft is that he "knew he was using a stolen" credit card. Br. of Appellant at 44. We disagree.

The essential elements of the crime are those that the prosecution must prove to sustain a conviction. *State v. Mason*, 170 Wn. App. 375, 378-79, 285 P.3d 154 (2012). In determining the essential elements, we first look to the statute. *Mason*, 170 Wn. App. at 379. RCW 9.35.020(1) provides that a person is guilty of identity theft when he or she knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, with the intent to commit any crime.

The State was required to prove that Hodges knowingly used a means of identification or financial information of another person, and that he knew that means of identification or financial information belonged to another person. The State was not, however, required to prove that he knew that the card was stolen. Because the State was not required to prove that Hodges knew he was using a stolen credit card, Hodges's argument that the State failed to present sufficient evidence of second degree identity theft fails.

B. *Ineffective Assistance of Counsel*

Hodges argues that he received ineffective assistance from his trial counsel. We hold that trial counsel was not ineffective.

We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish a claim of ineffective assistance of counsel,

Hodges must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Ineffective assistance of counsel is a two-prong inquiry. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To prevail on an ineffective assistance of counsel claim, a defendant must show that defense counsel's performance was deficient, and the deficient performance prejudiced the defendant. *Grier*, 171 Wn.2d at 32. A failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is no ineffective assistance when counsel's complained of actions are trial tactics or go to the theory of the case. *Grier*, 171 Wn.2d at 33. There is a strong presumption that defense counsel's conduct was not deficient. *McFarland*, 127 Wn.2d at 335. Because of this presumption, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *McFarland*, 127 Wn.2d at 336. The reviewing court will not consider matters outside the record on direct appeal. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018). Issues that require consideration of evidence or facts not in the trial record are more properly the subject of a personal restraint petition. *Linville*, 191 Wn.2d at 525.

1. *Failure To Investigate and Present Evidence*

Hodges argues that he received ineffective assistance from his trial counsel when counsel failed to investigate and present evidence. To be effective, trial counsel must investigate the case. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). This duty to investigate includes interviewing witnesses. *Jones*, 183 Wn.2d at 339. "While [trial] counsel is not required to interview every possible witness, the failure to interview witnesses who may provide

corroborating testimony may constitute deficient performance." *State v. Weber*, 137 Wn. App. 852, 858, 155 P.3d 947 (2007).

Counsel's duty includes making reasonable investigations, or making a reasonable decision that renders particular investigations unnecessary. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 355, 325 P.3d 142 (2014). The decision whether to call a witness is generally presumed to be a matter of trial strategy or tactics, but this presumption may be overcome by showing that the witness was not presented because counsel failed to conduct appropriate investigations. *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987).

a. *Witnesses*

Hodges argues that he received ineffective assistance from his trial counsel when counsel failed to investigate witnesses. Specifically, Hodges argues that defense counsel was ineffective by failing to investigate and present witnesses, namely Clark who could possibly "testify that [Hodges] had nothing to do with the offenses," and his daughter and Zimmerman, who could have corroborated his testimony about the sequence of events at the bowling alley. Br. of Appellant at 26. The record does not show whether Clark, Hodges's daughter, or Zimmerman would have provided testimony beneficial to the defense. Hodges's argument relies on matters outside of the record that this court cannot review. *Linville*, 191 Wn.2d at 525.

Hodges argues that Clark "sent emails and texts to [Maltby] stating that he received the card from Ms. Solomon and corroborating that he provided the card to Mr. Hodges and that he is innocent." Br. of Appellant at 26. To support his assertion that Clark communicated with Maltby, he cites to his motion for new trial. However, Hodges's motion for a new trial contains

an unsigned declaration and cites to exhibits not in the record on appeal. The record does not contain any evidence about what Clark may have known or would have testified to.

Hodges also claims that his daughter and Zimmerman would have testified that Hodges gave the card to Zimmerman before the police arrived, corroborating his testimony and rebutting Officer Jahner's and Christensen's testimony. He argues that offering the "correct sequence" of events would have been pivotal to his defense because it would have demonstrated that he did not know that the card was stolen. Br. of App. at 28. But this argument also relies on evidence outside the record on appeal. The record does not contain any information about what Hodges's daughter or Zimmerman would have testified to.[3]

Hodges relies on matters outside of the record to support each of his ineffective assistance of counsel claims. Matters that are outside of the record cannot be considered on direct appeal. *Linville*, 191 Wn.2d at 525. If Hodges wishes a reviewing court to consider matters outside the record, a personal restraint petition is the appropriate procedure, and we do not address these claims. *Linville*, 191 Wn.2d at 525.

b. *Exculpatory Evidence*

Hodges argues that defense counsel failed to present exculpatory evidence. Specifically, he argues that counsel failed to obtain "exculpatory emails and texts" between Clark and Maltby, and that counsel failed to investigate and present evidence regarding the earlier transactions on the card. Br. of Appellant at 30.

[3] Further, despite Hodges's arguments, the record shows that Hodges named an "Ashley Hodges" as a witness, and that Hodges and his trial counsel discussed whether to have his daughter testify. CP at 221.

As discussed above, full consideration of Hodges's claim regarding communications between Clark and Hodges's former attorney appears to require knowledge of facts and evidence that are not part of this court's record.

Hodges contends that without evidence of who made those earlier transactions on the card, the jury could speculate that Hodges used it the day before, even though he testified that he received it at the party. The record does not contain any information about whether counsel investigated, or any reasons for not investigating. Because his claims rely on matters outside this court's record, we do not consider the issues. *Linville*, 191 Wn.2d at 525.

2. *Missing Witness Instruction*

Hodges asserts that defense counsel was deficient for failing to propose a missing witness instruction for Clark. To show that he received ineffective assistance of counsel based on counsel's failure to request a particular jury instruction, Hodges must show that he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 718, 327 P.3d 660 (2014), *abrogated by State v. Gregory*, 192 Wn.2d 1 (2016).

"A missing witness instruction informs the jury that it may infer from a witness's absence at trial that his or her testimony would have been unfavorable to the party who would have logically called that witness." *State v. Reed*, 168 Wn. App. 553, 571, 278 P.3d 203 (2012). If a party fails to call a particular witness or present certain evidence when it would seem logical to do so, an inference may arise that the evidence or testimony would have been unfavorable to the party. *State v. Montgomery*, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008). A court should give a missing witness instruction only if three criteria are satisfied:

> First, the doctrine applies only if the potential testimony is material and not cumulative. Second, the doctrine applies only if the missing witness is particularly under the control of [one party] rather than being equally available to both parties. Third, the doctrine applies only if the witness's absence is not satisfactorily explained.

Montgomery, 163 Wn.2d at 598-99 (citations omitted).

Hodges has not demonstrated, and the record does not show, that he was entitled to a missing witness instruction for Clark. There is no evidence that Clark would have provided testimony beneficial to Hodges, and there is no evidence that he was particularly available to the State.[4] Further, both parties represented to the trial court that Clark was unavailable, when the State noted that "Clark is not available to testify," and defense counsel agreed that "Clark is long gone." 3 VRP (Feb. 15, 2017) at 265. The record on appeal does not contain any other information about Clark's whereabouts.

Because there is no evidence that Clark was particularly available to the State, Hodges has not demonstrated that he was entitled to a missing witness jury instruction. Therefore, we hold that defense counsel's failure to request a missing witness instruction did not constitute ineffective assistance.

3. *Failure To Impeach Solomon*

Hodges argues that defense counsel provided ineffective assistance by failing to impeach Solomon. Specifically, he argues that counsel should have "impeach[ed] [Solomon] regarding

[4] Hodges states that "Clark was known to be incarcerated at the time therefore available for service." Br. of App. at 9. But, Hodges does not cite to the record to support the assertion.

[her] acquisition of a letter addressed to someone else," and obtained in violation of federal law.[5] Br. of Appellant at 31.

The extent and method of cross-examination is a matter of judgment and trial strategy. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004); *State v. Jonhston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). We will not find ineffective assistance of counsel based on trial counsel's decisions during cross-examination if counsel's performance fell within the range of reasonable representation. *Johnston*, 143 Wn. App. at 20.

Solomon testified that she received the letter with her mail, but that the letter was not in an envelope. Hodges, however, contends that he sent the letter to Clark in an envelope. Hodges posits that therefore, Solomon must have improperly obtained the letter, in violation of federal law. And because Solomon must have improperly obtained the letter, counsel should have impeached her.

On cross-examination, Hodges's counsel questioned Solomon about her discovery of the letter. Consistent with her testimony on direct, Solomon responded that the letter was not in an envelope when she found it in her mailbox. The extent and method of cross-examination is a tactical matter. *Davis*, 152 Wn.2d at 720. Hodges fails to show in the record that defense counsel's failure to impeach Solomon was not a legitimate trial tactic. Thus, Hodges fails to show that counsel's performance was deficient. *Linville*, 191 Wn.2d at 525. We hold that Hodges has failed to demonstrate that counsel was ineffective by failing to impeach Solomon.

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[5] Hodges also contends that counsel provided ineffective assistance by "stipulat[ing] to [its] admission." Br. of Appellant at 3. Hodges's fails to cite to the record to support his claim. The record demonstrates that counsel stipulated to *the chain of custody* of the letter. The record does not show that counsel stipulated to the admission of the letter.

4. *Closing Argument*

Hodges argues that defense counsel provided ineffective assistance by inviting the jury to convict Hodges. Specifically, Hodges argues that counsel's argument relieved "the State of its burden to prove the essential fact of the signature and by conceding it was possible that the name was Dean Solomon instead of 'D' followed by a scribble." Br. of Appellant at 36 (citing 3 VRP (Feb. 15, 2017) at 330).

Counsel made a tactical decision to argue that the evidence was subject to reasonable explanation, and that the State had not met its burden of proof. Hodges cannot show on the record that counsel's argument was not tactical, and thus cannot meet his burden to show that counsel's argument was not tactical. *Linville*, 191 Wn.2d at 525; *Grier*, 171 Wn.2d at 33. The receipt was admitted into evidence, and the jury was able to evaluate the signature for itself. We hold that Hodges fails to demonstrate that counsel's argument was deficient or resulted in prejudice.

5. *Same Criminal Conduct at Sentencing*

Hodges argues that counsel provided ineffective assistance by failing to argue that his convictions for identity theft and possession of stolen property were the same criminal conduct. Hodges's claim fails because he cannot demonstrate prejudice.

At sentencing, the offender score is calculated by adding a specified number of points for each prior offense. RCW 9.94A.525.7. However, for purposes of this calculation, current offenses are treated as prior convictions. RCW 9.94A.589(1)(a). Therefore, a sentencing court's determination that the crimes constitute the same criminal conduct alters the offender score and affects the standard sentencing range. *State v. Aldana Graciano*, 176 Wn.2d 531, 535, 295 P.3d

219 (2013). "Crimes constitute the 'same criminal conduct' when they 'require the same criminal intent, are committed at the same time and place, and involve the same victim.'" *Aldana Graciano*, 176 Wn.2d at 536 (quoting RCW 9.94A.589(1)(a)). The defendant bears the burden of proving that his or her multiple convictions constituted the same criminal conduct. *Aldana Graciano*, 176 Wn.2d at 538-39.

Counsel's failure to make a same criminal conduct argument is prejudicial if the defendant shows that the *sentence* would have differed had counsel made the argument. *State v. Munoz–Rivera*, 190 Wn. App. 870, 887, 361 P.3d 182 (2015). Here, Hodges stipulated to his prior offender score, and concedes that his offender score of 9+ would have been unchanged by a finding of same criminal conduct. We hold that Hodges's claim that counsel provided ineffective assistance by failing to argue same criminal conduct fails because he cannot demonstrate that counsel's performance was prejudicial. *Hendrickson*, 129 Wn.2d at 78.

Hodges contends that a finding of the same criminal conduct "would have at least been supportive of counsel's argument for an exceptional sentence downward." Br. of Appellant at 39. But a showing of prejudice requires that the appellant demonstrate "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Grier*, 171 Wn.2d at 34 (citations omitted). Hodges has not shown that "supporting" counsel's argument for an exceptional sentence downward would have changed the outcome of the proceedings.

6. *Sentencing*

Hodges argues that trial counsel provided ineffective assistance by failing to cite relevant case law when requesting an exceptional downward sentence. Specifically, Hodges contends

that counsel's motion for an exceptional sentence "merely cite[d] basic statutory law and gave no concrete basis for an exceptional sentence," and that counsel should have made arguments based on Hodges's medical issues. Br. of Appellant at 40. Hodges's argument fails.

Counsel is deficient for failing to recognize and cite appropriate case law. *State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009), as amended (Sept. 17, 2009). Hodges requested an exceptional downward sentence, citing the standard provisions allowing a court to consider an exceptional sentence RCW 9.94A.010, .535. At sentencing, Hodges argued that an exceptional downward sentence was appropriate based on Hodges's medical issues. Hodges does not identify what relevant law counsel should have recognized, and thus fails to meet his burden to demonstrate that counsel was deficient.

C. *Motion for New Trial*

Hodges contends that the trial court erred by denying his motion for a new trial. Specifically, he argues that he demonstrated that he was entitled to a new trial based on (1) ineffective assistance of counsel, and (2) inadequate police investigation. Hodges's arguments fail.

We review a trial court's decision whether or not to grant a new trial for an abuse of discretion. *State v. McKenzie*, 157 Wn.2d 44, 51, 134 P.3d 221 (2006). We will not disturb the trial court's ruling absent a clear abuse of discretion. *McKenzie*, 157 Wn.2d at 51-52. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds, or when no reasonable judge would have reached the same decision. *McKenzie*, 157 Wn.2d at 52; *State v. Larson*, 160 Wn. App. 577, 586, 249 P.3d 669 (2011).

A trial court may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

> (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
> (2) Misconduct of the prosecution or jury;
> (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
> (4) Accident or surprise;
> (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
> (6) Error of law occurring at the trial and objected to at the time by the defendant;
> (7) That the verdict or decision is contrary to law and the evidence;
> (8) That substantial justice has not been done.

CrR 7.5(a)(1)-(8).

1. *Ineffective Assistance of Counsel*

Ineffective assistance of counsel may constitute substantial injustice under CrR 7.5(a)(8). *State v. Dawkins*, 71 Wn. App. 902, 906-07, 863 P.2d 124 (1993). However, as discussed above, Hodges's arguments that he received ineffective assistance of counsel fail. Accordingly, his argument that the trial court erred by not granting a new trial based on ineffective assistance of counsel also fails.

2. *Inadequate Police Investigation*

Hodges also argues that he was entitled to a new trial under CrR 7.5(a)(8) because the State and the police department failed to thoroughly investigate the prior charges on Solomon's card. Specifically, Hodges claims that police should have investigated who used the card prior to when he purportedly took possession. The investigation was critical, he contends, because it would have provided information about how Clark acquired the card. And information about

how Clark acquired the card would have "constituted substantive evidence supporting the defense theory at trial that Mr. Hodges was unaware that the card was stolen and unaware that its use was not authorized by Ms. Solomon." Br. of App. at 22. The State correctly notes that Hodges was not charged with making the earlier transactions.

To support his argument, Hodges cites *State v. Jones*, 25 Wn. App. 746, 751, 610 P.2d 934 (1980). But *Jones* is distinguishable. *Jones* held that it was error to prevent the defendant from presenting evidence of the State's witness's bias against the defendant. 25 Wn. App. at 750-51. *Jones* does not stand for the proposition that law enforcement is required to investigate uncharged events to provide support for the defendant's theory.

Regardless of what the police may have found had they investigated the earlier transactions, the State does not have an obligation to search for exculpatory evidence, or to expand the scope of a criminal investigation. *State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373 (2017); *State v. Judge*, 100 Wn.2d 706, 717, 675 P.2d 219 (1984). Hodges has not established that substantial justice was not done by law enforcement's failure to investigate the earlier transactions. The trial court's decision to deny his motion for a new trial based on law enforcement's failure to investigate was not unreasonable or based on untenable grounds. Hodges has not shown that the trial court abused its discretion by denying his motion for a new trial.

D. *Cumulative Error*

Hodges argues that cumulative error and cumulative ineffective assistance of counsel deprived him of a fair trial. The cumulative error doctrine applies when several errors occurred at the trial level, none of which alone warrants reversal, but the combined errors effectively

denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Hodges has not demonstrated that he received ineffective assistance of counsel, or that any error occurred. Accordingly, the cumulative error doctrine does not apply.

We affirm.

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

Worswick, J.

We concur:

Maxa, C.J.

Glasgow

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

May 28, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, JOHN MICHAEL HODGES, Appellant.	No. 50582-7-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the opinion filed April 23, 2019 in the above entitled matter. After consideration the Court denies appellant's motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Worswick, Glasgow

FOR THE COURT:

Maxa, C.J.
CHIEF JUDGE

THE TILLER LAW FIRM

June 19, 2019 - 2:24 PM

Transmittal Information

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Superior Court Case Number:	15-1-04862-9

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