SUPREME COURT NO. 97012-2

COA NO. 79063-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SHARYL SMITH,
Petitioner.

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

Kitsap County Cause No. 16-1-00733-1

The Honorable Jeffrey P. Bassett, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Sharyl Smith, the appellant below, asks the Court to review the decision of Division I of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Sharyl Smith seeks review of the Court of Appeals unpublished opinion entered on February 25, 2019. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

> **ISSUE:** A trial court violates an accused person's right to present a defense by excluding relevant, admissible evidence necessary to that defense. Did the trial court violate Ms. Smith's right to present a defense by erroneously excluding admissible evidence that she had kept track of her overtime hours and that her boss had given her permission to complete the allegedly stolen checks when her defense rested on her claims that the money she was alleged to have stolen was actually payment for overtime work?

IV. STATEMENT OF THE CASE

Sharyl Smith worked for the moving company Spaeth Transfer as a bookkeeper for three years. RP (7/20/17) 110. She was hired, in part, for her ability to computerize the company's outdated pen-and-paper system. RP (7/20/17) 241.

When the bookkeeper for one of Spaeth's sister companies left, Ms. Smith took on significant additional duties. RP (7/20/17) 243. She

also ended up picking up the receptionist's work when she left. RP (7/20/17) 244.

Bob Loidhamer, the company's owner, was battling cancer and going through surgery so Ms. Smith did not push him to hire additional help even though she was falling behind on her work. RP (7/20/17) 244. But she did end up working significant overtime hours on evenings and weekends to keep up. RP (7/20/17) 258.

Ms. Smith's husband worked for the company as a truck driver. RP (7/20/17) 252. He came into the office almost every day to talk to Loidhamer. RP (7/20/17) 253.

Comdata is a money transfer system typically used to pay truck drivers while they are on the road. RP (7/20/17) 117-20. Ms. Smith's husband cashed $264,500 worth of Comdata checks, which Ms. Smith had made out to him at Loidhamer's request. RP (7/20/17) 216, 252. Other truckers who contracted with the company made $300,000 or more in the same period of time. RP (7/20/17) 249-50.

Ms. Smith was also paid $6,200 for her overtime work. Ex. 6. She was paid with Comdata checks instead of through regular payroll because Loidhamer did not want the other employees to know that she was getting overtime hours. RP (7/20/17) 259. Ms. Smith deposited the Comdata checks into her bank account. Ex. 6; RP (7/20/17) 194-205.

Ms. Smith was eventually fired from her job for falling asleep at her desk. RP (7/20/17) 111.

After Ms. Smith left, Jenay Ingalls from the sales department took over as bookkeeper. RP (7/20/17) 112. She saw that Ms. Smith had been making payments to Comdata online. RP (7/20/17) 116. She thought this was unusual because she was accustomed to Loidhamer paying bills with checks. RP (7/20/17) 116. She also thought it was unusual that Ms. Smith had been using physical Comdata checks when Comdata payments were usually made using only an electronic code. RP (7/20/17) 121-23. Ingalls became suspicious when she saw that the amount of money being paid out to Comdata was more than double what went out in an average year. RP (7/20/17) 124.

Ingalls also thought it was suspicious that Ms. Smith had used the company debit card to make cash withdrawals at ATM machines. RP (7/20/17) 144-47. Ingalls and Loidhamer called the police. RP (7/20/17) 56, 124.

The state charged Ms. Smith with two counts of first degree theft, two counts of first degree identity theft, and four counts of forgery. CP 56-65. The state also alleged that Ms. Smith had abused a position of trust, had committed a major economic offense, and that the victim of the offenses had been particularly vulnerable. CP 56-65.

A short time later, Loidhamer died of cancer. RP (7/20/17) 163. He sold the company to Ingalls shortly before his death. RP (7/20/17) 109-10.

The trial court granted the state's motion *in limine* to exclude the documents Ms. Smith had used to keep track of her overtime hours. RP (7/18/17) 14. The court ruled that those documents were only admissible if someone else could verify their authenticity. RP (7/18/17) 14.

At trial, Ingalls testified that no one at the company ever worked overtime. RP (7/20/17) 138-39. She also said that no bills were ever paid online. RP (7/20/17) 116-17. But she admitted on that she had only worked in the sales department before Ms. Smith left and was only in the office for one or two hours each day. RP (7/20/17) 165.

Ingalls also testified that Ms. Smith's husband never worked for the company. RP (7/20/17) 128. She said that she knew all of the employees and he was not one of them. RP (7/20/17) 128. But she also admitted that many of the truckers were private contractors, not company employees. RP (7/20/17) 130. She said she was "generally" familiar with who the truckers were. RP (7/20/17) 130. Ingalls also testified that there was no reason to pay a trucker contractor through Comdata. RP (7/20/17) 134.

Ms. Smith testified at trial. She tried to tell the jury that Loidhamer had authorized the Comdata checks she deposited as payment for her overtime work but the court sustained the state's hearsay objection. RP (7/20/17) 258-59. The court also sustained a hearsay objection when she tried to say that she had permission to write the checks. RP (7/20/17) 259.

The court also prohibited Ms. Smith from testifying that she kept track of the overtime hours that she worked. RP (7/20/17) 260-66. The trial court ruled that she could not even allude to keeping any kind of document because the court had already ruled that the documents themselves were inadmissible. RP (7/20/17) 263.

The court also would not allow Ms. Smith to testify that her husband had worked at the company as a trucker. RP (7/20/17) 254. The court ruled that it would be hearsay for her to tell the jury that she knew that her husband worked for Loidhamer because of conversations that she had with him. RP (7/20/17) 254.

Ms. Smith admitted at trial to using the company's debit card without permission to take out about $9,000 cash because she was behind on her bills. RP (7/20/17) 256.

The jury found Ms. Smith guilty of all eight counts and answered yes to each of the special interrogatories for the sentencing aggravators.

CP 122-35. The court sentenced Ms. Smith to an exceptional sentence of 100 months. RP (9/15/17) 33.

Ms. Smith timely appealed. CP 203. The Court of Appeals affirmed her convictions. *See* Opinion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

> The Supreme Court should accept review and hold that the trial court violated Ms. Smith's constitutional right to present a defense by prohibiting her from testifying that the checks she cashed were authorized by the company to pay for her overtime work and for her husband's work as a truck driver. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

Ms. Smith's entire defense was that the funds she and her husband received via Comdata checks were not stolen but were payment for work they had done for Loidhamer – either for Ms. Smith's overtime hours or for her husband's contract work as a trucker. RP (7/24/17) 362-74.

Ms. Smith testified at trial and admitted to the jury that she had used the company debit card without permission, essentially confessing to counts I and II. RP (7/20/17) 256. But she also sought to inform the jury through her testimony that she had completed the Comdata checks with permission from Loidhamer as payment for work by herself and her husband, making her not guilty of counts III through VIII. RP (7/20/17) 258-59.

But the court did not permit Ms. Smith to tell the jury that she completed and deposited the Comdata checks with her boss's permission. Instead, the trial court held that any reference to having been given permission to make the Comdata checks out to herself and her husband would be inadmissible hearsay. RP (7/20/17) 258-59. The trial court ruled that the documents Ms. Smith had created keeping track of her overtime hours were inadmissible because they could not be authenticated by someone else. RP (7/18/17) 14. The court also prohibited Ms. Smith from telling the jury even that she kept track of her overtime hours because that would be a reference to an inadmissible exhibit. RP (7/20/17) 260-66. Finally, the court prohibited Ms. Smith from testifying that she knew that her husband worked for the company as a trucker because she had spoken to him about it. RP (7/20/17) 254.

The result of these rulings was that Ms. Smith was completely unable to present her defense to the jury. The court's rulings violated Ms. Smith's constitutional rights.

An accused person has a constitutional right to present his/her defense to the jury. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 3, 22; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973);

Holmes v. S. Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)).[1]

The right to present a defense includes the right to introduce relevant[2] and admissible evidence. *Jones*, 168 Wn.2d at 720.

Once the accused has established that proffered evidence is relevant and admissible, it can only be excluded if the state proves that the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Id.* No state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

If there are questions of the strength or accuracy of evidence that is critical to the defense, those weaknesses must be established by cross-examination, not by exclusion:

> [T]he trial court should admit probative evidence [offered by the defense], even if it is suspect. In this manner, the jury will retain its role as the trier of fact, and *it* will determine whether the evidence is weak or false.

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[1] A claim that the trial court violated an accused person's right to present a defense is reviewed *de novo*. *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017), *as amended on denial of reconsideration* (Oct. 31, 2017).

Ms. Smith forcefully argued for the admission of the evidence discussed below. RP (7/18/17) 14; RP (7/20/17) 237-71. Her attorney argued that she needed the evidence in order to explain to the jury why she was not guilty. RP (7/20/17) 265. Insofar as she did not raise these exact constitutional arguments in the trial court, they present manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

[2] Evidence is relevant if it has any tendency to prove a material fact. ER 401. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

Duarte Vela, 200 Wn. App. at 321 (emphasis in original).

The exclusion of evidence offered by the defense violates the Sixth Amendment right to present a defense when "the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist." *Id.* at 326 (*citing United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006)).

Evidentiary rulings concerning evidence offered by the defense are reviewed for an abuse of discretion. *Id* at 317. But "the more the exclusion of that evidence prejudices an articulated defense theory, the more likely [an appellate court] will find that the trial court abused its discretion. *Id.* (*citing Jones*, 168 Wn.2d at 720).

Violation of the right to present a defense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382.

Here, the Court of Appeals held that the exclusion of the evidence that Ms. Smith had been given permission to complete the allegedly-stolen checks in exchange for work by herself and her husband was proper because the evidence was inadmissible. *See* Opinion, pp. 3-9. For the reasons set forth below, the Court of Appeals' rulings regarding the admissibility of the evidence are mistaken.

1. The evidence that Loidhamer had given Ms. Smith permission to complete the Comdata checks for herself and her husband was not hearsay under the verbal acts doctrine.

The trial court precluded Ms. Smith from testifying that she completed the Comdata checks with permission from Loidhamer, ruling that the evidence constituted inadmissible hearsay. RP (7/20/17) 252, 258-59.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). A "verbal act" is not hearsay because it is not offered for the truth of the matter asserted:

> Such verbal acts are not in the first instance assertive statements and not offered to prove the truth of the matter asserted. Likewise, out-of-court declarations that are more in the nature of an order or a request" and that, to a large degree, [are] not even capable of being true or false are also not hearsay.

United States v. Rivera, 780 F.3d 1084, 1092 (11th Cir. 2015)[3] (internal citation omitted); *See also*. *State v. Rangel-Reyes*, 119 Wn. App. 494, 498, 81 P.3d 157 (2003).

[3] Several of the cases cited herein address the federal rules of evidence concerning hearsay. But the federal hearsay rules are identical to the Washington state rules and federal cases are regularly cited by Washington courts in construing the bounds of the state rules. *See e.g. State v. Smith*, 97 Wn.2d 856, 859, 651 P.2d 207 (1982) (The Washington hearsay rules are taken verbatim from the federal rules, so it is proper to look to the federal rule's construction when construing the Washington rule.

A hearsay statement is one that "narrate[s], describe[s], or otherwise convey[s] information and so [is] judged by [its] truth value." *United States v. Montana*, 199 F.3d 947, 950 (7th Cir.1999). A verbal act, on the other hand, such as "a promise, offer, or demand," serves to "commit the speaker to a course of action." *Id.*

Accordingly, a statement that is offered only as evidence of "legally operative verbal conduct" affecting the legal rights of the parties is a verbal act, not hearsay." *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004); *Robertson v. U.S. Bank, N.A.*, 831 F.3d 757, 764 (6th Cir. 2016). A quintessential example of a verbal act is a statement granting or withholding permission to do something. *See United States v. Moreno*, 233 F.3d 937, 940 (7th Cir. 2000) (collecting examples).

In Ms. Smith's case, the evidence that Loidhamer gave Ms. Smith permission to complete the Comdata checks was a verbal act, not hearsay. The significance of the evidence lay in the fact that the action was taken, not in the truth value of any statement itself. *Rivera*, 780 F.3d at 1092; *Rangel-Reyes*, 119 Wn. App. at 498. The trial court erred by excluding the evidence as hearsay. *Id.*

Even so, the Court of Appeals ruled that the evidence was inadmissible because "…there is no dispute that 'the action was taken' because Smith admitted that she wrote the checks." Opinion, p. 5.

Additionally, the Court held that Loidhamer's statements were, in fact, offered for their truth because they were offered to prove that Ms. Smith did, in fact, have permission to write the checks. Opinion, p. 5.

The Court of Appeals does not even address the significant authority holding that a statement granting or withholding permission constitutes a classic example of a "verbal act." *See* Opinion. The Court's logic is unavailing.

The trial court's evidentiary error violated Ms. Smith's Sixth Amendment right to present a defense because the evidence that Ms. Smith had completed the checks with Loidhamer's permission was critical to the defense – indeed, it was the entire defense. *Jones*, 168 Wn.2d at 720. If believed, the evidence would have created a reasonable doubt that did not otherwise exist. *Duarte Vela*, 200 Wn. App. at 326. The state cannot show that this error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382.

The trial court abused its discretion and violated Ms. Smith's constitutional right to present a defense by prohibiting her from testifying that she had completed and deposited the Comdata checks with Loidhamer's permission. *Jones*, 168 Wn.2d at 720; *Duarte Vela*, 200 Wn. App. at 326; *Rivera*, 780 F.3d at 1092; *Rangel-Reyes*, 119 Wn. App. at

498. The Court of Appeals should have reversed Ms. Smith's convictions. *Id.*

2. The evidence that Ms. Smith had kept track of her overtime hours and provided that information to Loidhamer was admissible because the documentation could be authenticated by Ms. Smith and was not hearsay.

The trial court prohibited the admission of the documents Ms. Smith created to keep track of her overtime hours, ruling that they were inadmissible unless someone other than Ms. Smith could "verify their authenticity." RP (7/18/17) 13-14.

Then, during Ms. Smith's testimony, the court ruled that Ms. Smith could not even tell the jury that she had kept track of her overtime hours at all because that testimony would *allude* to the existence of a document that had been excluded by the court. RP (7/20/17) 259, 263.

In order to authenticate a piece of evidence under ER 901, the proponent must merely provide evidence "sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). One way to authenticate a document is for a witness with knowledge to testify that it "is what it is claimed to be." ERP 901(b)(1). There is no requirement that such testimony be provided by someone other than the person who created the document. *See* ER 901.

In the context of evidence that is critical to the defense, questions of authenticity should be left to the jury in order to permit the jury to "retain its role as the trier of fact." *Duarte Vela*, 200 Wn. App. at 321 ([in the context of the Sixth Amendment right to present a defense], "the trial court should admit evidence, even if suspect, and allow it to be tested by cross-examination.")

Here, Ms. Smith's testimony that she created the documents in order to keep track of her overtime hours was sufficient to authenticate them under ER 901. ER 901(b)(1). The court's ruling that the exhibits were inadmissible unless they could also be authenticated by a third party was an abuse of discretion.

The documents keeping track of Ms. Smith's overtime hours were also not hearsay. They were not offered in order to establish their truth or falsity in terms of how many hours she worked on any given day. Rather, the documents were offered only to show that she kept track of her overtime hours.

Even so, the Court of Appeals ruled that the trial court properly excluded the documents because Ms. Smith never provided them to the court in order for the court to make a ruling as to their authenticity. Opinion, p. 8. But the trial court had already excluded the documents, based on part on the idea that any testimony by Ms. Smith would be

inadequate to establish their authenticity. RP (7/18/17) 13-14. Ms. Smith's failure to insist upon providing that testimony anyway would not have made any difference.

Additionally, even if the documents themselves had been inadmissible for some reason, Ms. Smith still should have been permitted to testify that she kept track of her overtime hours. There is no rule of evidence prohibiting testimony which alludes to the existence of an inadmissible exhibit, but the trial court excluded her testimony on that very basis. RP (7/18/17) 14. The trial court abused its discretion.

The Court of Appeals attempts to skirt this error by relying on the best evidence rule to hold that such testimony would have been inadmissible in the absence of the admission of the records, themselves. Opinion, p. 9. But Ms. Smith's testimony that engaged in a practice of keeping track of her overtime hours would not have required any specifics regarding the days and times on which she worked, as memorialized in the records. The Court's reliance on the best evidence rule is misplaced.

Again, the trial court's improper evidentiary ruling violated Ms. Smith's constitutional right to present a defense because the evidence that she had kept track of her overtime hours and submitted that information to Loidhamer was a critical link in the defense theory that the Comdata checks had actually been payment for her overtime work. *Jones*, 168

Wn.2d at 720; *Duarte Vela*, 200 Wn. App. at 326. The state cannot prove that this error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382.

The trial court violated Ms. Smith's Sixth Amendment right to present a defense by excluding exhibits on which she kept track of her overtime hours and by prohibiting her from testifying that she had kept track of those hours even once the documents had been excluded. *Jones I*, 168 Wn.2d at 720; *Duarte Vela*, 200 Wn. App. at 326. The Court of Appeals should have reversed Ms. Smith's convictions. *Id.*

VI. CONCLUSION

The issue here is significant under the Constitutions of the United States and of Washington. Furthermore, because it could impact a large number of criminal cases, it is of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted March 27, 2019.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Sharyl Smith/DOC#830800
Washington Corrections Center for Women
9601 Bujacich Rd. NW
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and I sent an electronic copy to

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on March 27, 2019.

_____
Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

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

STATE OF WASHINGTON, Respondent, v. SHARYL M. SMITH, Appellant.	No. 79063-3-I UNPUBLISHED OPINION FILED: February 25, 2019

VERELLEN, J. — Sharyl Smith appeals her judgment and sentence for multiple counts of first degree identity theft, first degree theft, and forgery. Smith argues that erroneous trial court rulings violated constitutional right to present a defense, that her attorney provided ineffective assistance of counsel, and that the State's charging documents provided inadequate notice of her alleged crimes. Because she fails to demonstrate any erroneous ruling or prejudicial error, we affirm her conviction and sentence. But the State concedes a $200 filing fee and a $100 DNA[1] testing fee should not have been imposed on Smith because the court found her indigent.

Therefore, we affirm Smith's conviction and sentence except that we remand for the court to strike those fees.

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[1] Deoxyribonucleic acid.

FACTS

Smith was the sole bookkeeper for Spaeth Transfer, Inc., a moving and storage company, from October of 2012 through October of 2015. After Spaeth fired Smith for sleeping on the job and failing to complete tasks on time, it discovered over $200,000 in accounting irregularities and called the police. The police investigation found that Smith issued unauthorized checks to herself and her husband and that Smith's husband cashed a "whole binder" of checks at various check cashing locations around Kitsap County.[2] The investigation also discovered unauthorized automated teller machine (ATM) withdrawals using a company debit card. Eventually, Smith and her husband were arrested and tried separately. Smith's husband was tried first and received a "massive sentence."[3]

The State charged Smith with eight criminal counts: first degree identity theft and first degree theft for the unauthorized ATM withdrawals, first degree identify theft and first degree theft for the unauthorized checks, and four counts of forgery. Each charge included aggravating circumstances for abusing a position of trust and targeting a particularly vulnerable victim. The particularly vulnerable victim was Spaeth's owner, Bob Loidhamer, whom Smith knew was being treated for terminal melanoma. Loidhamer died before Smith or her husband were tried.

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[2] Report of Proceedings (RP) (July 20, 2017) at 83.

[3] RP (July 17, 2017) at 51.

The morning of Smith's trial, she moved for a continuance to look into documents her attorney had not investigated. The court denied the motion because she failed to show good cause to grant the continuance.

A jury found Smith guilty of all eight charges and found aggravating circumstances for each charge. Because of the aggravating circumstances, the court imposed an exceptional sentence of 100 months for identity theft, 29 months for theft, and 18 months for forgery, all running concurrently. The court also imposed legal financial obligations.

Smith appeals.

ANALYSIS

Smith's Right To Present A Defense Was Not Harmed

Both the United States and Washington constitutions guarantee a defendant's right to present a complete defense by offering testimony and compelling the attendance of witnesses.[4] But "[t]hese rights are not absolute."[5] "The defendant's right to present a defense is subject to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'"[6] Accordingly, we review the court's decision to exclude evidence for abuse of discretion.[7] A court abuses its

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[4] State v. Lizarraga, 191 Wn. App. 530, 551, 364 P.3d 810 (2015).

[5] State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

[6] Lizarraga, 191 Wn. App. at 553 (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

[7] State v. Franklin, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014).

discretion if its decision is based on untenable grounds or reasons, such as lacking a "lawful justification" for its ruling.[8]

Smith's case theory was that Loidhamer told her to write the checks she and her husband cashed as payment for working for Spaeth.[9] Smith contends the court made three erroneous evidentiary rulings that prevented her from presenting this defense, thereby violating her constitutional rights. Neither the law nor the record supports her arguments.

First, Smith argues the court vitiated "her entire defense" by ruling she could not testify Loidhamer gave her permission to write checks for herself and her husband. But the specific rulings she challenges are narrow in scope. Smith sought to testify that she wrote out checks to her husband "[b]ecause Bob would come to me and ask me to write out the checks."[10] She also tried to explain she wrote checks to herself as overtime pay because "[Bob] told me to write those checks."[11] The court excluded both statements as hearsay.

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[8] State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

[9] See, e.g., RP (July 24, 2017) at 363 (arguing at closing that "[t]he government wants to prosecute someone for going to work and doing what their boss told them to do.")

[10] RP (July 20, 2017) at 252.

[11] Id. at 258.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[12] Relevant testimony may be excluded if it is hearsay.[13] Smith proffered her testimony to prove the truth of her theory of the case: that Loidhamer gave her permission to write checks to herself and her husband. Smith's testimony was quintessential hearsay.

Smith contends that the statements were nonhearsay "verbal acts" whose "significance lay in the fact that the action was taken, not in the truth value of any statement itself."[14] An example of such a verbal act is a statement accepting an offer to form a contract. The statement itself establishes the action taken in forming a contract. But here, there is no dispute that "the action was taken" because Smith admitted she wrote the checks.[15] Instead, Smith sought to prove that "she had completed the [checks] with permission from Loidhamer."[16] This required proving the truth of Loidhamer's alleged statements that Smith had permission to write the checks. Consequently, Smith argued for her authority to write checks by testifying that Loidhamer signed them.[17] But the narrow rulings

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[12] ER 801(c).

[13] Garcia, 179 Wn.2d at 276; ER 802.

[14] Appellant's Br. at 15.

[15] See, e.g., RP (July 20, 2017) at 247 ("I made [the checks] payable to, like an accounts payable person would do.").

[16] Appellant's Br. at 10.

[17] E.g., RP (July 20, 2017) at 246 ("I mean, Bob was signing checks . . . for a long time."); 258 ("Bob signed for every single one of those [checks]."); 271 ("[Those checks] were signed by the owner [of Spaeth].").

Smith challenges excluded only Loidhamer's statements that he directed Smith to write checks. This was not a "verbal act." The court properly excluded this testimony as hearsay.

Second, Smith contends the court erroneously prevented her from arguing that her husband worked for Spaeth because it excluded testimony in which she "did not attempt to testify to any out-of-court statement made by her husband."[18] But her testimony does not support her argument.

Q: And so let's talk about [Smith's husband].

. . . .

Q: What was [he] doing?

A: [He] was driving for Bob also.

Q: Okay. How do you know that?

. . . .

Q: So what sort of things did you observe that led you to believe that [he] was driving a truck[?]

A: [He] drove it—he wore a driver's shirt for Allied [Van Lines] and Spaeth.

Q: Did he ever come into the office?

A: Lots of times.

Q: Lots of times? Six? Seven?

A: He would come in almost every day.

Q: Okay. And he would come to see [you], no?

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[18] Appellant's Br. at 16.

A: Not most of the time. Most of the time, he would come into the office and walk past me and go right into Bob's office.

. . . .

Q: So did you—you must have—I'm not asking you about the content and what was said because that gets into something that we can't present here. *So did you ever have conversations with [your husband] about his work there?*

A: Yes.

Q: Okay. And when you tried to talk to him, what would [his] reaction be?

A: *He would say he's working for Bob.*

[Prosecutor]: Objection, Your Honor.

[Defense counsel]: *You can't say what he said.*

The court: Again, sustained. Jury, please disregard.

. . . .

Q: So what other things did you observe about [your husband] that led you to believe that he worked there?

A: That he came in all the time and spoke to Bob all the time.

Q: Okay.

A: And he wore their clothing.

. . . .

Q: Did you ever make monies payable to [him]?

A: I did—I did make—

Q: When you were not supposed to?

A: No. No, I did not.[19]

Contrary to Smith's contention, she testified about an out-of-court statement from her husband about "working for Bob" to prove the facts asserted in the statement itself.[20] The court properly excluded it as hearsay. And she was allowed to otherwise testify to her observations that her husband worked for Spaeth. Smith's argument on appeal is not supported by her trial testimony.

Third, Smith argues the court erred by excluding documents she created and by preventing her from testifying to their contents. The day before trial, Smith sent the State additional discovery documents purporting to be time cards she used to keep track of overtime she worked at home. Smith never asked the court to voir dire the documents nor did she move to admit them into evidence. On the State's motion, the court excluded the unauthenticated documents as hearsay. Two days later, Smith testified that she recorded and submitted the overtime she worked. The court struck Smith's testimony and prohibited her from testifying about recording or submitting overtime because her testimony relied on unauthenticated hearsay. However, she was able to testify generally about working overtime.[21]

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[19] RP (July 20, 2017) at 252-55, 257 (emphasis added).

[20] ER 801(c).

[21] E.g., RP (July 20, 2017) at 267-68 (testifying "I did overtime," "I was taking home work almost every day," and "I was [appropriately paid for my overtime].").

Smith contends her testimony should have been sufficient to authenticate her overtime records under ER 901. But Smith never provided the records to the court, so it never had the opportunity to compare them to her testimony and make a finding about their authenticity.

Smith also argues the court should have allowed her testimony anyway because "[t]here is no rule of evidence prohibiting testimony which alludes to the existence of an inadmissible exhibit."[22] She is mistaken. ER 1001-08, commonly known as the "best evidence rule," applies when a party is attempting to prove the contents of a writing.[23] The rule typically requires the use of an original or duplicate writing to prove the writing's contents.[24] Because Smith's counsel was "asking her to testify about the records" and their contents,[25] the best evidence rule required the records themselves unless an exception applied.[26]

Because the constitutional right to present a defense is limited by the rules of evidence[27] and Smith fails to show the court abused its discretion when enforcing the rules, the court properly restricted Smith's testimony and did not harm her constitutional rights.

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[22] Appellant's Br. at 19.

[23] In re Pers. Restraint of Adolph, 170 Wn.2d 556, 567, 243 P.3d 540 (2010).

[24] Id. (citing ER 1002-03).

[25] RP (July 20, 2017) at 261.

[26] ER 1002, 1004.

[27] Lizarraga, 191 Wn. App. at 553.

Smith Received Effective Assistance Of Counsel

Smith argues her counsel was deficient because, first, he did not conduct an adequate investigation, and second, he did not object at sentencing to how the court calculated her offender score. We review claims of ineffective assistance of counsel de novo.[28]

To prove she received ineffective assistance of counsel, a defendant must prove (1) that her counsel's performance was deficient and (2) caused her prejudice.[29] We presume that a defense counsel's representation was not deficient unless the defendant shows "'no conceivable legitimate tactic explain[s] counsel's performance.'"[30] "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'"[31] A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome."[32]

First, Smith argues her trial counsel failed to provide effective assistance because he overlooked and did not investigate records purportedly documenting

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[28] State v. Lopez, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018).

[29] Id. at 109.

[30] State v. Fedoruk, 184 Wn. App. 866, 880, 339 P.3d 233 (2014) (alteration in original) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

[31] Lopez, 190 Wn.2d at 116 (quoting State v. Estes, 188 Wn.2d 450, 458, 295 P.3d 1045 (2017).

[32] Id. (quoting Estes, 188 Wn.2d at 458).

her husband's work for Spaeth until shortly before trial. Even assuming that Smith's counsel's conducted an inadequate investigation, she does not demonstrate any resulting prejudice. The documents at issue were purported to be Smith's husband's records of his time working for Spaeth as a truck driver, which Smith wanted to use to bolster her case theory. But Smith presented this part of her theory without the documents. And the State effectively undercut her with uncontested evidence from the Washington Department of Licensing that showed Smith's husband did not have a commercial driver's license, which Spaeth required its drivers to have. Because these facts do not create a reasonable probability that the outcome of trial would have been different had Smith's counsel investigated the documents, Smith fails to show she received ineffective assistance of counsel.

Second, Smith argues her trial counsel provided deficient representation by failing to object or otherwise argue at sentencing that her convictions for first degree identity theft and first degree theft constitute the same criminal conduct for sentencing purposes.[33] But other than her conclusory assertion that first degree identity theft and theft are the same criminal conduct, Smith does not address the

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[33] Smith separately suggests her case be remanded for resentencing because, apart from any ineffective assistance, the trial court miscalculated her offender score by not treating first degree identity theft and first degree theft as the same criminal conduct. But Smith acknowledges that her counsel did not object or otherwise raise this at trial. Accordingly, she waived it as a separately appealable issue. State v. Phuong, 174 Wn. App. 494, 547, 299 P.3d 37 (2013).

criminal intent and time and place requirements to prove same criminal conduct.[34] Even if she had explained, she does not argue her counsel's performance caused her any prejudice. Accordingly, Smith does not carry her burden of showing her counsel's performance at sentencing was deficient.

The State's Charging Document Was Adequate

Smith requests that we reverse her conviction and dismiss the charges against her without prejudice because the second amended information did not provide adequate notice of the charges against her. Specifically, she contends the information was inadequate because it did not identify who she allegedly stole from or what she allegedly stole.[35]

We review de novo whether a charging document is constitutionally adequate.[36] Where, as here, the defendant challenges the adequacy of a charging document for the first time on appeal and, as here, she does not allege prejudice, we liberally construe the charging document to determine if there is any fair construction by which the essential elements are all contained within it.[37]

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[34] See RCW 9.94A.589(1)(a) ("'Same criminal conduct,' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.")

[35] Smith does not challenge the adequacy of the two counts of identity theft or the four counts of forgery in the second amended information.

[36] State v. Goss, 186 Wn.2d 372, 376, 378 P.3d 154 (2016).

[37] Id.; State v. Kjorsvik, 117 Wn.2d 93, 105, 812 P.2d 86 (1991).

The identity of the property owner is not an element of crimes involving larceny or theft,[38] and an information alleging theft is not constitutionally inadequate where it fails to name the victim.[39] Although the "clearest and easiest way to protect the accused against a second prosecution for the same crime, and to avoid misleading or embarrassing the accused in the preparation of his or her defense, would be to name the owner of the allegedly embezzled property or the victim of the alleged theft by putting in the information," this fact is not required.[40] Because Washington does not require naming the victim of theft in a charging document, the second amended information was not inadequate for failing to name Spaeth.[41]

Smith also faults the charging document for "not provid[ing] any allegations regarding the nature or character of the property or services" she allegedly stole.[42] The second amended information charges Smith with two counts of first degree theft. Chapter 9A.56 RCW defines "first degree theft" as "wrongfully obtain[ing] or exert[ing] unauthorized control over the property or services of another or the

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[38] State v. McReynolds, 117 Wn. App. 309, 335-36, 71 P.3d 663 (2003).

[39] State v. Greathouse, 113 Wn. App. 889, 904-05, 56 P.3d 569 (2002) (quoting State v. Easton, 69 Wn.2d 965, 967, 422 P.2d 7 (1966) ("It is not necessary under our code or under any system of pleading to allege in the indictment for larceny in whose possession the property is, but it is sufficient to allege and prove that the property stolen was the property of another.") (internal quotation marks omitted)).

[40] Id.

[41] We note that both the original information and first amended information named Spaeth Transfer as the owner of the allegedly stolen property.

[42] Appellant's Br. at 26-27 (internal quotation marks omitted).

value thereof, with intent to deprive him or her of such"[43] "[p]roperty or services which exceed(s) five thousand dollars in value other than a firearm."[44] The statute also contains specific provisions for theft of a search and rescue dog and certain types of "metal property."[45] Because the State was not charging Smith with stealing any of the specific property listed in the statute and we liberally construe the information, the exact nature or character of the allegedly stolen property is not required to the inform Smith of the charge against her.[46]

Smith does not allege any other defects with the charging document. Because neither the identity of a theft victim nor the exact nature of the stolen property were needed to adequately inform Smith of the charges against her, the second amended information was not constitutionally inadequate.

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[43] RCW 9A.56.020(1)(a).

[44] RCW 9A.56.030(1)(a).

[45] RCW 9A.56.030(1)(b)-(d).

[46] See State v. Tresenriter, 101 Wn. App. 486, 495, 4 P.3d 145 (2000) (the description of stolen property and the location of stolen property are not essential elements of a possession of stolen property charge required in a charging document.)

Smith analogizes to a foreign case, Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005), for support. But Valentine is readily distinguishable because the charging document in that case made "carbon-copy" allegations that were "identically worded," including the dates of the different offenses alleged. Id. at 628-29. Here, each of the two theft charges are differentiated by their distinct date ranges.

Erroneous Imposition of Legal Financial Obligations

As part of Smith's sentence, the court imposed a $200 filing fee and a $100 DNA testing fee. The State concedes those fees should be stricken. We accept the concession. As in State v. Ramirez,[47] a resentencing hearing is unnecessary.

CONCLUSION

Therefore, we affirm in part, reverse in part, and remand for the trial court to strike the DNA fee and the filing fee.

WE CONCUR:

[47] 191 Wn.2d 732, 750, 426 P.3d 714 (2018).

LAW OFFICE OF SKYLAR BRETT

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