Supreme Court No. 99086-7
COA No. 37351-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK MILLER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

The Honorable Gregory Gonzalez

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Mark Miller was the appellant in COA No. 52721-9-III.

B. COURT OF APPEALS DECISION

Mr. Miller seeks review of the decision entered September 1, 2020. Appendix A.

C. ISSUES PRESENTED ON REVIEW

1. Did the trial court improperly give the jury an accomplice liability instruction over defense objection, where there was no evidence that Mr. Miller, and Mr. Besaw – the State's witness who Mr. Miller alleged was the actual perpetrator - were complicit?

2. Did the court violate Mr. Miller's Sixth and Fourteenth Amendment rights by giving the accomplice liability instruction, after the defense focused at trial on showing that Ed Besaw was the person who committed the theft, rendering Mr. Miller's trial unfair and requiring reversal of all the counts?

D. STATEMENT OF THE CASE

1. Charging and trial.

Mr. Miller was charged with first degree theft pursuant to RCW 9A.56.030(1)(a). CP 8 (count 1), CP 51-52. In addition, he was charged with count 2, criminal impersonation per RCW 9A.60.040(1)(a), and count 3, attempted first degree theft. CP 8-9, CP 51-52 (RCW 9A.56.030(1)(a)

and RCW 9A.28.020(3)(c)). The charges were brought at the urging of persons including a social services coordinator at a care facility, and an Adult Protective Services investigator, believing they were protecting Ms. Lillian Meador, but wrongly believing that Mr. Miller had engaged in malfeasance. CP 7. Lillian was an 88-year old woman who lived primarily at Brookdale Retirement Community, a nursing home in Vancouver, Washington. CP 7.

The facts are as otherwise set forth in the Court of Appeals decision of September 1, 2020. Appendix A.

(a). Opening statements and Mr. Miller's defense - that the $50,000 theft was committed by Ed Besaw.

(i). State's opening statement - prosecution argues that Meador's withdrawal of $50,000 from her bank was arranged by Mr. Miller tricking Ed Besaw into being the "fall guy."

The State's attorney told the jury in opening statement that when Mark Miller met Lillian Meador as a financial advisor at JPMorgan, this was at a time when he had a large civil judgment against him arising out of prior bankruptcy proceedings. RP 254. The prosecutor urged that Mr. Miller had charmed Lillian and ingratiated himself with her at her nursing care facilities, and continued to advise her after he left JPMorgan, but with wrongful intent. He then allegedly used his past business colleague Ed Besaw as a "fall guy," persuading Besaw to accept $5,000 for escorting Lillian to her Chase bank branch, where she would ultimately withdraw

$50,000 cash. RP 256-58. According to the State, Miller had told Meador he was going to use the money to invest in gold for her. RP 257. Besaw, the State claimed, innocently deposited $5,000 into his bank account after delivering $45,000 to Miller at a club in Portland, which Miller allegedly kept. RP 258-6.

(ii). Defense opening - None of this happened, Ed Besaw was the malfeasor, and he conned Ms. Meador into withdrawing $50,000 from the bank.

In the defense opening, counsel focused on attacking the prosecution theory - the same theory the State had been advancing since the affidavit of probable cause filed 14 months earlier - that Miller used Besaw as an innocent fall guy and persuaded him to escort Lillian to the bank to withdraw the $50,000. See CP 8-9, 51-52.

The defense argued that Besaw, who had gone from failed career to failed career, and tried to get Mark Miller to help him in business and loan him money, secured Lillian Meador's contact information from Miller, and then visited her at Prestige Care with no apparent relationship that justified it. RP 268. Besaw later could be seen on surveillance video surreptitiously bringing Meador to the bank for the $50,000 withdrawal and then taking all the money from her. RP 266-69.

(iii). Criminal impersonation and attempted theft.

Regarding the other charges (counts 2 and 3), the State told the jury

in opening that Mr. Miller called Standard Insurance, referred to himself as Ms. Meador's nephew, and said that she needed to cash out her annuities to pay for her care at the nursing home and other facilities. RP 259-60. Mr. Miller denied that this was wrongful representation or any attempt at theft. RP 270.

(b). Trial.

(i). Mr. Miller's work as a financial advisor at JPMorgan.

In 2016, Ms. Meador was a client of Mr. Miller's at JPMorgan, where he worked as a financial advisor. CP 7. Miller had been a financial advisor and an insurance agent since 2000, when he first began working for Pacific Benefits Group, and then American Express Financial Advisors. His work at JPMorgan was a position that involved meeting clients at numerous company branches in southern Washington, and at their homes. RP 1129-33, 1141-42.

At JPMorgan, Ms. Meador had been an endearing but high-maintenance client who set meetings with Mr. Miller on almost a weekly basis, to chat with him, often bringing gifts of food. RP 352, 1142. Mr. Miller could tell that Ms. Meador was lonely - for the first six months of meetings, she did not make any new investments or initiate any business. RP 1141-42. JPMorgan supervisor Al Tu told Miller to keep meeting with Ms. Meador. RP 1141-42. When Mr. Miller indicated to Meador that he

could not continue to come to the Orchards branch of JPMorgan weekly to see her, Ms. Meador stated that she had $100,000 in a savings account that she would like to invest. RP 1142-43.

Mr. Miller set Ms. Meador up to begin the process of having JPMorgan determine what investments might be appropriate, including assessing what Ms. Miller's goals and risk tolerances were. RP 1143. Ms. Meador's wealth was well known to Miller and the staff at JPMorgan, including the fact that she had a net worth of approximately 1.5 million dollars, consisting mostly of land. RP 1145. During this process Mr. Miller occasionally met with Ms. Meador at her nursing home, Brookdale, sometimes bringing employee Rilee King with him, and frequently bringing Ms. Meador's JPMorgan file with him to the meetings, per standard practice. RP 1143-47.

(ii). Ed Besaw obtains Ms. Meador's client information.

Mr. Miller had met Ed Besaw years earlier, when they both worked at Pacific Benefits Group, a firm that assisted people with selecting medical insurance. RP 1129. Some years later, Besaw began telephoning Miller at JPMorgan asking him to refer clients for Besaw's new business venture, involving Medicaid and insurance coverage, and apparently annuities. RP 1130-33. Mr. Miller would occasionally include Mr. Besaw's name on a list of insurance agents that he would provide to JPMorgan clients, for

purposes including annuities, but he emphasized to the clients that they should do their own due diligence before selecting any agent. RP 1132-34.

In July of 2016, Mr. Besaw asked Mr. Miller if he would lend him $30,000; Mr. Miller declined. RP 1139. Mr. Miller also learned that Mr. Besaw had been using business cards with his name on it, but falsely representing that he worked for Mr. Miller's new company, Timberline Wealth Strategies. RP 1230. Mr. Miller told Besaw that he would take legal action against Besaw if he continued to do this. RP 1230-31.

However, Mr. Miller at some point had given Ed Besaw's business telephone number to Lillian Meador. RP 113-34. According to the supervisor at Ms. Meador's care facility, Mr. Besaw visited Ms. Meador there at least once, if not more times. RP 315-20. But Miller had not known that Besaw and Meador had met, and he did not know that Besaw had cultivated a relationship with Ms. Meador, until many months later, when Mr. Miller was charged with theft. RP 1134-35, 1202-03. This entire incident started, for Miller at least, when Ms. Meador telephoned him and said he had stole from her, which Mr. Miller told her was ridiculous, although he offered to speak with her again when she stopped saying this. RP 1232-33.

(iii). Mr. Miller's family illnesses and his efforts to informally assist Ms. Meador with her own illness-related financial affairs at the same time.

In the Fall of 2016, Mr. Miller left JPMorgan to deal with the illness and death of close relatives, including his father. RP 1148-55. During that time, Mr. Miller worked to establish his own financial services firm. At the same time, he informally assisted Ms. Meador with her financial affairs. RP 1127-33, 1141. During the Fall, Ms. Meador was hospitalized, and then temporarily spent multiple weeks at the Prestige Care facility in Vancouver, after suffering a UTI infection. See RP 574-76 (testimony of Adult Protective Services investigator Max Harvey).

Mr. Miller, as he testified, informally advised Ms. Meador during this time, trying to help her with financial concerns regarding payment for these expensive services she needed at three different facilities - her nursing home, the hospital, and the intensive Prestige Care facility. RP 1183-84. He visited Ms. Meador numerous times at her facilities, including Prestige Care. RP 1146, 1169-72, see RP 294, 296, 299, 301-03 (testimony of Prestige Care supervisor Stephanie Williams).

Mr. Miller became concerned, however, when he learned that the Prestige Care facility was having Lillian sign multiple blank checks, which he confronted supervisor Stephanie Williams about, and which she admitted at trial. RP 1190, see RP 314. Mr. Miller was worried that Ms. Meador

was being "railroaded," and his primary goal was to see that Ms. Meador gained the assistance of others such as a lawyer so that he would be able to step away from the burden of helping her with her financial affairs. RP 1195-96, 1200.

(iv). Lillian Meador testimony.

Lillian Meador's testimony was brief. Meador, age 90 at trial, said that she visited Mr. Miller at JPMorgan about every week when he worked there. RP 352. After he left JPMorgan, Ms. Meador said, Mr. Miller wanted her to obtain money from the Chase bank at Fred Meyer in order to invest in gold coins. RP 353-54. Meador also stated that she had two annuities at Standard Insurance, and that Mark Miller "wanted the money so that he could buy some - a cashier's check and buy gold coins." RP 357-58. Meador stated of the annuities, that "we didn't cash them out." RP 357.

When cross-examined, Meador recalled that a gold investment was something she had asked Mr. Miller about. RP 360. She stated that the trip to the bank was arranged by Mr. Miller. RP 355, 361-62. But it turned out that this was what Ed Besaw had told her. RP 360-61. Meador testified that Mr. Besaw gave Mr. Miller the withdrawn money. RP 354-55.

(v). Mark Miller's denials of any wrongdoing.

Regarding the annuities, Mr. Miller testified that Ms. Meador said that she wished to make some investments in gold, and although Mr. Miller

advised her that this was not a good idea, and unnecessary, he helped her begin the process of surrendering her annuities. RP 1180-81. It appeared that Lillian wanted to purchase gold because she believed it would be a means of gifting some of her wealth to her grandchildren, and not her children. RP 1181-82. Mr. Miller explained that sending gold to her grandchildren at their family's homes would not achieve this goal. RP 1181. He hoped and assumed that Ms. Meador had taken his advice to not buy gold, because she said that this made sense, and did not raise the matter again. RP 1181-82.

Lillian did have concerns about her finances and her ability to pay for her ongoing care. RP 1182-83. Ms. Meador had significant wealth, and long-term care insurance, but that insurance did not pay for the Prestige Care facility, only the Brookdale nursing home. RP 1182-83. She appeared to be aware of the requirement of the Medicare "spend down," and wanted to spend the capital from her annuities, but Mr. Miller advised that this should not be done until absolutely necessary, especially because it would incur a penalty. RP 1185-86.

However, Ms. Meador stated that she wanted to surrender the polices, so Mr. Miller called Standard Insurance. RP 1182-83. He referred to himself as Ms. Meador's nephew on the telephone call simply to facilitate the call. RP 1187-88. He received the forms by email, printed

them out, and gave them to Lillian, who stated that she would think about them. RP 1189. He did not know until much later that she had sent them in to Standard. RP 1189.

Some weeks later, when Ms. Meador returned to Brookdale nursing home, she telephoned Mr. Miller, and when Mr. Miller said that he would come and see her when he had time, she accused him of stealing money from her. RP 1201-02. Mr. Miller soon found himself accused, and in a case deposition, told that he had committed theft. RP 1202-03.

Regarding the bank withdrawal, Mr. Miller did not make any request of Ed Besaw to escort Ms. Meador to her bank, or hire him, or do any other act of asking him or paying him to obtain any cashier's check or $50,000 in cash from Meador's bank. RP 1210. He never had Mr. Besaw meet him at the Safari Club in Portland, a place Mr. Miller had never even been to, and he never received money from Besaw there. RP 1209. On August 26, the night the police had focused on and obtained records for, Mr. Miller did receive a cell phone call from Ed Besaw; this was a few weeks after Miller had returned from his father's funeral. RP 1207. Besaw telephoned after Mr. Miller had left his Vancouver home and was on his way to The Lamp restaurant in Portland, and during the call he fended off the usual financial and business entreaties from Besaw. RP 1207-08. Miller may have accidentally pocket-dialed Besaw's number a short time

later that evening. RP 1208.

(vi). Ed Besaw testimony

At trial, Mr. Besaw claimed that he was asked to escort Ms. Meador to the Chase bank by Mark Miller, and said that he gave $45,000 to Miller at the Safari Club in Portland, Oregon. RP 377-86. Ed Besaw denied ever visiting Lillian Meador at any facility, and said that the first time he met her was when they went to Chase bank together. RP 378-79. He denied that he had ever visited Ms. Meador at Prestige Care, and claimed that his signatures logging in as a visitor were not his. RP 399.

(vii). Stephanie Williams. Stephanie Williams, a supervisor at Prestige Care, testified that she did not recall Ed Besaw visiting Lillian -- but admitted that she told defense counsel that he had, and then ultimately testified that this was true. RP 315-20.

2. <u>Verdicts and sentencing</u>.

The jury convicted Mr. Miller on all three counts, and on aggravating factors that Ms. Meador was particularly vulnerable, that the crimes were major economic offenses, and that Mr. Miller used a position of trust to commit the crimes. CP 89-96. The trial court imposed an exceptional sentence of 27 months. CP 101.

E. ARGUMENT

THE TRIAL COURT ERRED IN GIVING AN UNTIMELY ACCOMPLICE LIABILITY INSTRUCTION, WHICH ALSO VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS

(a). Review by the Supreme Court is warranted.

The Court of Appeals erroneously held that Mr. Miller's trial court properly gave an accomplice liability instruction, despite the fact that the defendant had been countering the State's case claiming principal liability throughout trial. Appendix A, at pp. 10-12.

Review of this issue is warranted where the evidentiary error was contrary to decisions of this Court and the Court of Appeals, and the error violated Mr. Miller's constitutional rights. See RAP 13.4(b)(1), (2), (3).

(b). A trial court may only give a jury instruction warranted by the evidence.

"It is error to submit to the jury a theory for which there is insufficient evidence." State v. Munden, 81 Wn. App. 192, 195, 913 P.2d 421 (1996). And mere speculation about potential criminal culpability is not a basis for a jury instruction. Rather, "some evidence must be presented affirmatively to establish" the theory for which a jury instruction is sought. State v. Rodriguez, 48 Wn. App. 815, 820, 740 P.2d 904 (1987) (quoting State v. Wheeler, 22 Wn. App. 792, 797, 593 P.2d 550 (1979)).

Thus a party is entitled to an instruction on its theory of the case only "if there is evidence to support that theory." State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980) (jury instructions can encompass only those theories of liability which are supported by substantial evidence). Here, there was no evidence to support the giving of an accomplice liability instruction, as the State successfully requested, as to the charge of first degree theft. See CP 70 (Instr. 15).

The defense objected vigorously. During discussion of jury instructions, the State contended – for the first time - that guilt to first degree theft (count 1) could be predicated on accomplice liability under a theory that Miller and Besaw acted together to commit the offense, and that therefore as to Besaw, "[i]t may be that he has criminal culpability." RP 1271-72, see RP 1236-37, 1248, 1268.

The court ruled that the jury would be instructed on accomplice liability because of the general rule that all accomplices need not be charged. RP 1273. Mr. Miller's more specific objections and subsequent exception were noted. RP 1273, see also RP 1298.

But accomplice liability requires knowing participation in the commission of the crime with another. RCW 9A.08.020(3); State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). Thus Mr. Besaw and Mr. Miller cannot be deemed to have committed the first degree theft under

an accomplice liability theory upon mere speculation that they knowingly acted together. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (accomplice liability may not rest on speculation about knowledge).

Accordingly the trial court abused its discretion, and prejudiced Mr. Miller, when it overruled the defense objections that an accomplice instruction was not warranted by the evidence. RP 1273. The court simply may not instruct the jury on a legal principle that is factually "outside of the issues in the case," because it "introduces a rule of law inapplicable to the facts." Bowen v. Odland, 200 Wash. 257, 263, 93 P.2d 366 (1939).

(c). Furthermore, where the defense has defended the case against the State's claims since inception of the charge that the prosecution's star witness was in fact the perpetrator, allowing the State an accomplice instruction is not harmless beyond a reasonable doubt.

When a court sets forth accomplice liability in the jury instructions, jurors may convict the accused as an accomplice – this is the initial category of prejudice Mr. Miller suffered here. State v. Teal, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004). But more importantly, as Mr. Miller argued repeatedly in objecting to accomplice liability instructions: "We've not been fighting an accomplice case this whole time. It's a general denial, and to now bring up accomplice at the last second seems – it's unfair." RP 1269. Mr. Miller argued that the State's theory and "everything they presented" was that Mr. Besaw was the fall guy, and everything the defense did at trial

was to show that Besaw in fact was a lying wrongdoer. RP 1269-70.

Thus, giving the jury instruction caused Mr. Miller to have unwittingly *helped the State's case* at trial. Where the defense spent the trial showing how likely it was that Mr. Besaw was a dishonest, criminal schemer, for the State to now announce that Mr. Miller could be guilty by working together with that wrongdoer, was extraordinarily prejudicial when it culminated in the instructional error.

For example, in State v. Fair, the trial court *refused* to give an accomplice instruction. State v. Fair, 5 Wn. App. 2d 1034 (COA No. 77180-9-I) (October 8, 2018, at p. 2) (unpublished, cited pursuant to GR 14.1). As the Court of Appeals recognized, in affirming the trial court's refusal to give the instruction, where there was no evidence that the defendant and the other suspect the defendant pointed to at trial were complicit, an accomplice instruction is unwarranted, and the defense's proper argument that the crime was committed by another does not create an exception to the rule requiring evidence of complicity in the record. State v. Fair, at p. 4.

The Washington Courts have recognized that harmlessness beyond a reasonable doubt must be shown by the State where instructional error allows the jury to convict the defendant on an unsupported theory of criminal liability. See, e.g., State v. Longshore, 197 Wn. App. 1019, 2016

WL 7403795 (2016), amended on denial of reconsideration, Mar. 14, 2017 (reversing a murder conviction because the court gave an accomplice instruction when the evidence did not support accomplice liability), review denied, 189 Wn.2d 1003 (2017) (unpublished, cited pursuant to GR 14.1). The case involved an instruction which allowed the jury to convict despite a lack of evidence that the defendant and the other person acted together to commit the specific crime charged, and most importantly, the Court reiterated the standard of prejudice: An erroneous instruction given on behalf of a party in whose favor a verdict is returned is presumed prejudicial unless it affirmatively appears the error was harmless. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). An error is harmless only if it appears beyond a reasonable doubt that the error did not contribute to the ultimate verdict. State v. Berube, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003). Reversal is required here under that standard. The defense was thoroughly prejudiced by the erroneously given accomplice instruction. In the defense opening statement, counsel focused on the prosecution theory - the same one and the only one, that the prosecutor had been making since the affidavit of probable cause filed 14 months earlier - that Miller, the malfeasor, used his past colleague Besaw as an innocent and persuaded him to escort Lillian to withdraw $50,000. See CP 8. The defense attacked Ed Besaw as the real perpetrator, having the need, the motive and the means to

escort Ms. Meador to the bank, and commit the theft of the $50,000. As defense counsel argued,

> [t]he evidence will show -- and there's no question that Eddie Besaw is the one who took $50,000 cash from Lillian Meador. No question about that.

RP 270. Then, during trial, the State examined its star witness, Besaw, eliciting testimony to portray to the jury that he was the fall guy for Miller. Besaw justified his belief in the merit of being paid the money he alleged he was, saying that he had been working with Mr. Miller on annuities for several months, and, he said, "I typically make more than that on that." RP 382. The State also elicited that Besaw believed he was due a larger amount of money from Miller based on past business dealings. RP 32-84.

Then on cross-examination, defending against the State's theory of the case that Ed Besaw was an innocent who Miller had tricked, the defense elicited that Besaw was seen wearing sunglasses in the video surveillance photos of him and Ms. Meador at the Chase bank. RP 408. Under cross-examination, the defense got Besaw to admit that he took the money that Ms. Meador had withdrawn, and placed it under his shirt and in his back waistband. RP 412. And the defense noted that Mr. Besaw also had changed his name from Edwin Pearl to Edwin Besaw. RP 416.

In re-direct, the State continued to examine Besaw by eliciting testimony that would show him to have been tricked by Mr. Miller, eliciting

reasons why his testimony about speaking on the phone with Mr. Miller, and giving Miller $45,000 in Portland, might have some understandable inconsistencies. RP 416-17. And, in final cross-examination, the defense continued to attempt to show Besaw's guilty character, asking whether he had boasted to past co-workers that he was able to write the same words on a whiteboard with two markers in his hand. RP 422. In closing argument, however – having secured an accomplice instruction - the State now asserted that Mr. Miller committed theft either by paying Ed Besaw to escort Ms. Meador to her bank and make the withdrawal, or under a theory that Miller "orchestrated" the plan, together with Besaw. See RP 1320 (State's closing argument).

This requires reversal. "[I]t is prejudicial error to submit an issue to the jury where there is not substantial evidence concerning it." State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). And an instructional error is harmless only if it appears beyond a reasonable doubt that the error did not contribute to the ultimate verdict. (Emphasis added.) Berube, 150 Wn.2d at 505. This standard of harmless error is particularly appropriate here. Mr. Miller has a constitutional right to argue that the prosecution has not proven its case, and may point to evidence logically connecting another person to the crime. See State v. Ortuno-Perez, 196 Wn. App. 771, 790, 385 P.3d 218 (2016); U.S. Const. amend. VI. And if the jury concludes

another is the culpable party, jurors have a reasonable doubt, requiring acquittal under Due Process. Mr. Miller had a right to present his defense theory, which was violated when his trial efforts to do so were negated by an instruction allowing the jury to find criminal liability regardless. Whether rooted directly in the fair trial guarantee of Due Process or the Sixth Amendment right to defend, the Constitution guarantees criminal defendants a *meaningful* opportunity to present a complete defense. See Crane v. Kentucky, 476 U.S. 683, 689–690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); U.S. Const. amends. VI, XIV.

Here, it cannot be shown that the jury did not predicate guilt on a theory that Mr. Besaw and Mr. Miller acted together, particularly where the defense spent the bulk of trial as to Ed Besaw showing his need for money, motive and opportunity to commit the crime, as an other suspect – in other words, doing everything it could to implicate the person that the State would later announce at the last second was actually part of a complicit team with the accused. State v. Stein, 94 Wn. App. 616, 625, 972 P.2d 505, 510 (1999), affirmed on other grounds, 144 Wn.2d 236, 27 P.3d 184 (2001) ("We presume that an instructional error is prejudicial unless the State satisfies its burden of affirmatively showing harmless error.") (citing State v. Smith, 131 Wn.2d 258, 263–64, 930 P.2d 917 (1997)). Reversal is

required. Importantly, the need to reverse extends to all three counts – a conviction for theft secured by the jury believing that Miller actually acted together with Besaw (who the defense had spent all of trial showing to be a thief) would have directly informed the jury's consideration of whether Miller was guilty of the other charges. The court's admonition to consider each count separately, CP 63, does not prohibit the jury from considering the evidence in its totality, as the jury here would have done as to counts 2 and 3 when deliberating on the *mens reas* associated with those offenses.

F. CONCLUSION

Mr. Miller asks that the Court accept review and reverse his judgment and sentence.

DATED this 1ST day of October, 2020.

Respectfully submitted,
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CASE # 373517
State of Washington, Respondent v. Mark Allan Miller, Appellant
CLARK COUNTY SUPERIOR COURT No. 171012173

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Attachment

c: **E-mail**—Hon. Gregory M. Gonzalez

c: Mark Allan Miller, #410984
Washington Corrections Center
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FILED
SEPTEMBER 1, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. MARK ALLAN MILLER, Appellant.	)))))))))	No. 37351-7-III OPINION PUBLISHED IN PART

SIDDOWAY, J. — Mark Miller, a former financial advisor, appeals his convictions following a jury trial for first degree theft, first degree criminal impersonation, and attempted first degree theft. The victim was an almost 87-year-old woman who was a client of Mr. Miller's prior to his June 2016 resignation from J.P. MorganChase (Chase). After he resigned, he guided or assisted his elderly former client in withdrawing substantial financial assets, some, but not all of which, he succeeded in misappropriating.

He assigns error to an accomplice liability instruction given over his objection, challenges the sufficiency of the evidence to support the criminal impersonation and attempted theft counts, challenges the criminal impersonation conviction on double jeopardy grounds, and points out a scrivener's error in the judgment and sentence. We remand with directions to correct the scrivener's error but otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

Lillian Meador was living in the Brookdale Orchards assisted living facility in Vancouver in the summer of 2016 when she suffered an infection and was hospitalized. She was discharged for recovery in early August to Prestige Care, a nursing and rehabilitation center, where her initial assessment and care plan were assigned to Stephanie Williams, a social services director. Mark Miller, who Ms. Williams learned was Ms. Meador's financial advisor and friend, was identified as her emergency contact. Ms. Williams phoned Mr. Miller on August 15 because she wanted to set up a care conference and determine whether someone held a power of attorney for Ms. Meador.

Mr. Miller told Ms. Williams that someone did hold a power of attorney, but since that person had not been involved for many years, steps were being taken to appoint Mr. Miller as Ms. Meador's attorney-in-fact. In a conversation with Mr. Miller in Ms. Meador's room two days later, Ms. Williams again asked for the name of the existing attorney-in-fact, explaining that because Ms. Meador performed poorly on a cognitive test, Prestige needed to find someone who could assist with planning for her discharge. Mr. Miller became upset, telling Ms. Williams that he needed to be present for any cognitive testing of Ms. Meador, to make sure that the questioning was done appropriately. He provided Ms. Williams with a name of the existing attorney-in-fact but did not provide contact information, telling Ms. Williams that he would contact the

woman himself. Concerned that Ms. Meador might be being exploited by Mr. Miller, Ms. Williams filed a report that day with Adult Protective Services (APS).

On August 23, while at a visit at Prestige, Mr. Miller told Ms. Williams that his role as Ms. Meador's financial advisor prevented him from becoming her attorney-in-fact, but he would obtain and provide a copy of her existing power of attorney. He never did. Lacking an attorney-in-fact who could make decisions for Ms. Meador, personnel at Prestige initiated a guardianship proceeding.

In late August, Max Horn, an APS investigator, met with Ms. Meador. Ms. Meador struck Mr. Horn as confused and uncomfortable about answering Mr. Horn's questions about Mr. Miller, saying she "had to speak with Mark first." Report of Proceedings (RP) at 567. She did provide Mr. Horn with Mr. Miller's cell phone number at some point, however, and Mr. Horn phoned Mr. Miller on September 6. Mr. Horn's purpose for calling Mr. Miller was to find out where Ms. Meador banked, and Mr. Miller said he did not recall, other than that she had some funds at Chase. Mr. Miller agreed during the phone conversation to call Mr. Horn back with a phone number for the woman who held Ms. Meador's power of attorney, but he never did.

On the afternoon of September 8, Vancouver lawyer James David received a call from Mr. Miller. Mr. Miller was with Ms. Meador, who participated in the call. Mr. Miller explained that Ms. Meador was seeking legal representation to fight the guardianship proceeding commenced by Prestige. Mr. David traveled to meet with Ms.

Meador at Prestige the next day, and spoke with her without Mr. Miller present. She engaged him as counsel.

In Mr. David's second or third meeting with Ms. Meador, which took place at Brookdale following her September 12 discharge from Prestige, they opened her mail, which included two substantial checks from the Standard Insurance Company ("the Standard"), where she had held annuities. Previously, during Ms. Meador's stay at Prestige, Mr. Miller had been stopping at Brookdale to pick up her mail. Mr. David had Ms. Meador endorse the $240,000 in value of checks for deposit and arranged for them to be deposited into her bank account.

Mr. David attempted to meet with Mr. Miller twice, because he had questions about Ms. Meador's financial affairs, but Mr. Miller missed both appointments. Mr. Miller, who had visited Ms. Meador 18 times and called her room 36 times during the six weeks she was at Prestige, also stopped visiting Ms. Meador.

The investigation by APS led it to refer Ms. Meador's situation to the Vancouver Police Department. An investigation by Detective Michael Day led him to information that in August, Mr. Miller persuaded Ms. Meador to withdraw $50,000 in cash from her bank accounts with Chase and give it to Eddie Besaw, a former colleague of Mr. Miller's. Ms. Meador was led to understand that Mr. Miller was going to invest the $50,000 on her

behalf. Ms. Meador, who used a wheelchair, was able to travel by C-VAN[1] to a Fred Meyer store with an in-store Chase location suggested to her by Mr. Miller, but on arriving, she needed someone to push her to the bank and, following the withdrawal, take and deliver the $50,000 cash. Mr. Besaw told Detective Day that Mr. Miller engaged him to assist Ms. Meador at the bank and deliver the cash to Mr. Miller, who said he would invest it on her behalf. Mr. Besaw delivered $45,000 of the cash to Mr. Miller, reduced by $5,000 that Mr. Miller had allowed Mr. Besaw to keep for his trouble.

The detective also received information that the large checks from the Standard that Ms. Meador received in September at Brookdale were the result of a cash-out process that had been initiated by Mr. Miller. Mr. Miller had called the Standard and requested withdrawal documentation, holding himself out as Ms. Meador's nephew. His call had been recorded. The completed forms, signed by Ms. Meador but apparently completed by someone else, had been returned to Standard on September 6.

Detective Day also learned that Mr. Miller was unemployed, having resigned from Chase a couple of months earlier, and was in financial distress.

Mr. Miller was charged with first degree theft of the $50,000 withdrawn from Ms. Meador's bank accounts, criminal impersonation for the call to the Standard, and

[1] C-VAN is a paratransit service offered by Clark County's public transportation agency for disabled persons unable to travel on its fixed-route bus service. *See Who Is Eligible for Paratransit and Application* Process, C-TRAN, https://www.c-tran.com/c-tran-services/paratransit-service/paratransit-eligibility [https://perma.cc/35JV-9H2P].

attempted first degree theft for the steps taken to cash out the Standard annuities. The State alleged three aggravating circumstances for the theft and attempted theft counts: that the victim was particularly vulnerable or incapable of resistance, Mr. Miller used his position of trust, confidence, or fiduciary responsibility to commit the crimes, and the crimes were major economic offenses.

In August 2018, the case proceeded to a jury trial. In opening statements, the State described Mr. Miller as someone financially underwater, who charmed Ms. Meador into allowing him to assist with her finances after he left Chase. It characterized Mr. Besaw as "a fall guy" Mr. Miller engaged to help Ms. Meador make the $50,000 cash withdrawal and deliver the cash to him. RP at 256. The prosecutor suggested that after Mr. Miller succeeded in causing Ms. Meador to withdraw the $50,000, he took steps to obtain the even more substantial value of her annuities, falsely telling the Standard's customer service representative that he was Ms. Meador's nephew and that the funds were needed to pay her mounting medical expenses. "Fortunately," the prosecutor told jurors, "someone intercepts those disbursement checks before they get to Mark Miller." RP at 260.

Defense counsel responded, telling jurors in opening statement that it was Mr. Miller who was the fall guy for Mr. Besaw's theft of $50,000 cash from Ms. Meador. Defense counsel described Mr. Besaw as a person "who's kind of gone from career to career trying to make something of himself." RP at 266. He said that Mr. Miller had a

referral relationship with Mr. Besaw, who sold supplemental Medicare policies and annuities, but the relationship soured after clients referred by Mr. Miller were unhappy with Mr. Besaw's services. He told jurors that before the referral relationship ended, Mr. Miller had provided Mr. Besaw with Ms. Meador's name and phone number. He told jurors "there's no question that Eddie Besaw is the one who took $50,000 cash from Lillian Meador." RP at 270. As for the annuities, defense counsel told jurors that Mr. Miller simply helped Ms. Meador surrender her annuities because she wanted to make other investments, and there was no theft: "The money comes in, goes right into her bank, done deal." *Id*.

The jury was instructed on accomplice liability over Mr. Miller's objection. The State requested the instruction at the close of the evidence, and defense counsel argued that the State had not charged Mr. Miller as an accomplice and "[t]hat's a different kind of case." RP at 1269. He also argued:

> The State's theory, evidence they presented, everything presented is that Mr. Besaw was this unwitting guy who just went on a little errand to watch this woman do shopping for a little while and got $5,000 for it.
>
> The evidence is he knew nothing about what Mr. Miller's plan was. This is just a complete shock to him. He's—we're not talking about an accomplice. To have an accomplice, you have to have two parties to a crime. We don't have that here. We have one person acting innocently, he was just basically the instrument of Mr. Miller. That's the State's theory. He's not an accomplice. You've got to have two people to have accomplice liability here. We've got one actor, as the State has alleged, not an accomplice.

RP at 1270. The trial court overruled Mr. Miller's objection and gave the accomplice instruction.

The jury found Mr. Miller guilty as charged, including finding all of the aggravating circumstances charged by the State.

Mr. Miller had no criminal history. The trial court found his standard range sentence for the most serious crime, the first degree theft, was 2 to 6 months. It rejected a State request to impose an exceptional 120 month sentence, but did impose an exceptional sentence of 27 months.

Mr. Miller appeals. His appeal was administratively transferred from Division Two to Division Three.

ANALYSIS

Mr. Miller makes six assignments of error. One, to a scrivener's error, is conceded by the State.[2] We will direct the trial court to make the necessary correction.

In the published portion of this opinion, we address Mr. Miller's challenge to the accomplice liability instruction and the sufficiency of the evidence to support the "assumption of a false identity" element of the criminal impersonation charge.

[2] The judgment and sentence identifies Mr. Miller's sentence for criminal impersonation as "365 months." Clerk's Papers (CP) at 101. The trial court intended to impose 365 days, which was the high end of the standard range. *See* RP at 1468; CP at 99.

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON ACCOMPLICE LIABILITY

On the charge of first degree theft of the $50,000, the State wished to be able to argue that Mr. Miller could be liable as an accomplice if the jury was persuaded by the defense that Mr. Besaw was the principal. As defense counsel had told the jury in his opening statement, "There's no question that Eddie Besaw is the one who took $50,000 cash from Lillian Meador." RP at 270.

"Each party in a jury trial is entitled to have his theory or theories of the case presented to the jury by proper instructions where there is evidence to support them." *Kiemele v. Bryan*, 3 Wn. App. 449, 452, 476 P.2d 141 (1970). The trial court's choice of jury instructions is reviewed for an abuse of discretion. *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011).

The jury was instructed that to prove the charge of first degree theft, the State must show that the defendant, at the time charged and in or affecting persons in the State of Washington,

> (a) wrongfully obtained or exerted unauthorized control over property of another or the value thereof; or
>
> (b) by color or aid of deception, obtained control over property of another or the value thereof; and
>
> (2) That the property exceeded $5,000 in value;
>
> (3) That the defendant intended to deprive the other person of the property.

Clerk's Papers at 66. Adding an accomplice instruction enabled the State to argue that Mr. Besaw rather than Mr. Miller engaged in these acts, but that Mr. Miller acted as an accomplice. An accomplice is someone who, knowing that it will promote or facilitate the commission of a particular crime, solicits, commands, encourages, or requests another person to commit it, or aids or agrees to aid another person in planning or committing it. RCW 9A.08.020(3)(a)(i)-(ii).

Mr. Miller objected to the giving of an accomplice instruction, arguing, "The State's theory, evidence they presented, everything presented is that Mr. Besaw was this unwitting guy who just went on a little errand." RP at 1270. That was a fair characterization of Mr. Besaw's testimony, and Mr. Besaw was a key State witness. But a party is not bound by the testimony of its own witness. *State v. Winters*, 54 Wn.2d 707, 708, 344 P.2d 526 (1959). It may prove or point to evidence that the facts are otherwise. *See id.*; *accord State v. Green*, 71 Wn.2d 372, 378, 428 P.2d 540 (1967) (a party may impeach its own witness with evidence of a contradictory nature through other witnesses).

Throughout the trial, the State's theory was that Mr. Miller was the primarily culpable actor, but it was faced with defense evidence and argument that Mr. Besaw carried out the "actus reus"[3] of obtaining control of the cash. It also faced evidence and

[3] "Actus reus" is "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability; a

argument that Mr. Besaw's claim of innocent participation was not credible. Doubt was cast on whether Mr. Besaw could reasonably have believed that Mr. Miller needed *cash* to make investments on Ms. Meador's behalf, or that Mr. Besaw's serving as Ms. Meador's wheelchair attendant explained why he should be paid $5,000. The defense also described surveillance video of Mr. Besaw and Ms. Meador as they approached the in-store bank as revealing that Mr. Besaw was wearing sunglasses and was "hiding" and "hutching down." RP at 1377. After leaving the bank, Mr. Besaw could be seen on the surveillance video tucking the $50,000 cash under his waistband.

Well-settled principles control our review of Mr. Miller's challenge to the accomplice liability instruction. One is that an information that charges an accused as a principal adequately apprises him or her of potential accomplice liability even though the information does not expressly charge aiding or abetting or refer to other persons. *State v. Trujillo*, 112 Wn. App. 390, 401, 49 P.3d 935 (2002). Another is that "[w]hen determining if the evidence at trial was sufficient to support the giving of an instruction," this court views "the supporting evidence in the light most favorable to the party that requested the instruction." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

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forbidden act <the actus reus for theft is the taking of or unlawful control over property without the owner's consent>." BLACK'S LAW DICTIONARY 45-46 (11th ed. 2019).

Mr. Besaw could be viewed as the principal, given the undisputed evidence that he is the one who took the $50,000 from Ms. Meador and given the circumstantial evidence of his criminal intent. The fact that Mr. Besaw delivered $45,000 to Mr. Miller, the mastermind who made the theft possible, does not prevent Mr. Besaw from being the principal.[4] If the jury were to view Mr. Besaw as the principal, substantial evidence would support a finding by the jury that Mr. Miller knowingly solicited, commanded, encouraged, or requested commission of the crime, or aided or agreed to aid in its commission.

The trial court properly gave the accomplice instruction requested by the State.

II. SUFFICIENT EVIDENCE SUPPORTS THE "ASSUMPTION OF A FALSE IDENTITY" ELEMENT OF CRIMINAL IMPERSONATION

Mr. Miller next argues that the State failed to present sufficient evidence to support the "assumed a false identity" element of criminal impersonation.

"'The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact

[4] Dean Sanford Kadish has described this type of case, involving a "partly culpable principal" as one that presented problems for common law complicity doctrine—one in which "a secondary actor's liability surely should exceed that of the primary actor." Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 340 (1985). "The classic instance" he cites is "Iago coolly whipping Othello into murderous rage," leading him to kill Desdemona. *Id.* "Othello would be guilty of a culpable homicide, but perhaps only of manslaughter in view of the circumstances." *Id.* at 385. "[T]here is no reason why Iago should not be held accountable as Othello's accessory." *Id.* at 365.

could have found guilt beyond a reasonable doubt.'" *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A defendant's claim of insufficient evidence admits the truth of the State's evidence and "'all inferences that reasonably can be drawn [from it].'" *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015) (alteration in original) (quoting *Salinas*, 119 Wn.2d at 201). Circumstantial evidence is considered just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We 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), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009).

Mr. Miller was charged with criminal impersonation in the first degree under RCW 9A.60.040(1)(a). A person is guilty of the crime under that provision if the person "[a]ssumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose." Mr. Miller argues that in contacting the Standard, he provided his true name, and making a false representation that he was Ms. Meador's nephew does not constitute assuming a false identity within the meaning of the statute. This presents an issue of statutory construction. Our fundamental objective in construing a statute is to ascertain and carry out the legislature's intent, and if a statute's meaning is plain on its face, we give effect to that plain meaning as an

expression of legislative intent. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

The fact that Mr. Miller provided his true name does not take him outside the operation of the statute. This court has previously held that "the assumption of a false identity" is not the same as using a false name. *State v. Donald*, 68 Wn. App. 543, 550, 844 P.2d 447 (1993). It has further held that "assuming a false identity" does not require assuming the identity of an actual person, as is required for identity theft. *State v. Presba*, 131 Wn. App. 47, 55, 126 P.3d 1280 (2005).

The statutory terms "false identity" and "assumed character" are not defined, but dictionary definitions support their application to someone who misrepresents his relationship to another. In the absence of statutory definitions, courts may rely on the plain meaning of terms. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). RCW 9A.60.040(1)(a) speaks of a person who "act[s] in his or her assumed character," and one definition of "character" is

> **6 :** POSITION, RANK, CAPACITY, STATUS
>
> <in the *character* of a slave>
>
> <his *character* as a town official>
>
> <I have great pleasure in congratulating you on your first appearance in the *character* of a father, sir . . .—Charles Dickens, *Sketches by "Boz"*, 1836>.

MERRIAM-WEBSTER UNABRIDGED, https://perma.cc/3G5R-6UYP. For purposes of construing the statute's reference to "[a]ssum[ing] a false identity," among the definitions

of identity are "**[2]b :** the role an individual holds in a social group of society" and "**3 :** the condition of being the same with something described, claimed or asserted or of possessing a character claimed." MERRIAM-WEBSTER UNABRIDGED, https://perma.cc /B4XV-4MGF.

Not only does the plain language of the statute encompass falsely asserting a family relationship, but it is easy to foresee that falsely claiming to be someone's spouse, parent, child, or other family member could be used to facilitate a fraud or advance some other unlawful purpose. It is consistent with the legislature's purpose to apply the statute to Mr. Miller's misrepresentation of his relationship to Ms. Meador.

We remand with directions to the trial court to correct section 4.1, page 5 of Mr. Miller's judgment and sentence to reflect the 365 day sentence intended by the trial court. The convictions are affirmed.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

III. MR. MILLER'S REMAINING EVIDENCE SUFFICIENCY CHALLENGES ALSO FAIL

Before analyzing Mr. Miller's remaining evidence sufficiency challenges, we describe the trial evidence in more detail.

Witnesses Besaw and Miller testified at trial to their dramatically different stories of who orchestrated Ms. Meador's withdrawal of $50,000 and kept all or most of the cash. Bank records were presented that were consistent with Mr. Besaw's claim to have received only $5,000. But banking records for Mr. Miller did not provide evidence that he possessed $45,000 in late summer or early fall of 2016. The State presented evidence that Mr. Miller had a $282,607 judgment entered against him in 2012, had been keeping cash in his house for years, and was on notice that his judgment creditor had threatened collection action in late 2015 and garnished his bank account in the spring of 2016. Bank account statements were admitted showing the Mr. Miller kept little money in his bank accounts, and never for long.

Telephone records revealed a history of text messages and phone calls between Mr. Miller and Mr. Besaw in August 2016 that were consistent with Mr. Besaw's version of events. The State also presented cell tower evidence that placed Mr. Miller near the place, and at the time, when Mr. Besaw claimed to have delivered the $45,000 cash. The defense responded with an expert who testified that Mr. Miller's call could have been made from a location almost 22 miles away from the location suggested by the State's expert.

Mr. Miller's recorded call to the Standard was played for jurors. In it, Mr. Miller represented himself as being Ms. Meador's nephew. He also represented that the family was exploring the surrender of his aunt's annuities because she needed resources to pay

mounting medical expenses. The State presented evidence that Ms. Meador's expenses were largely covered by insurance and that she had ample assets to cover uninsured expenses. The recording of the call also revealed that Mr. Miller was on notice that a hasty cash out of the annuities would incur a penalty that could be avoided by going more slowly and requesting a penalty waiver.

The defense countered with evidence that on two occasions a week before Ms. Meador withdrew the $50,000, the visitor log at Prestige included a handwritten visitor entry for "Ed Besaw" and another for "Edwin Besaw." It also elicited testimony from Ms. Williams that when interviewed, she told defense counsel that she believed she had seen Mr. Besaw visit Ms. Meador once or twice. She testified that the man she recalled seeing was dressed professionally and had closed the door on entering Ms. Meador's room.

Mr. Besaw denied that the visitor log entries in his name were made by him or that he ever visited Ms. Meador. The State presented evidence that the man Ms. Williams saw enter Ms. Meador's room and close the door might have been Mr. David, who was wearing a suit when he visited Ms. Meador and closed the door upon entering her room. In closing argument, the State encouraged jurors to compare Mr. Besaw's supposed signature on the visitor log to signatures on his checks, which it characterized as "not at all similar." RP at 1344. It especially encouraged jurors to look at the entries for the two "Besaw" visits and focus on the visitor's handwritten name of the resident being visited.

It suggested that the name "Lillian Meador" as handwritten by "Ed" or "Edwin Besaw" was identical to how Mr. Miller wrote her name, arguing "This is Mark Miller signing in as Eddie Besaw. He's planning, even back as far as [August] 16th." RP at 1344.

A. Criminal impersonation – intent to defraud or unlawful purpose element

Mr. Miller next argues there is no evidence that his assumption of a false identity was done "with intent to defraud another or for any other unlawful purpose."

Criminal impersonation in the first degree, a class C felony, does not require that the act of assuming the false identity enabled the actor to *accomplish* fraud or *achieve* an unlawful purpose; all that is required is the intent. By statute, "[w]henever an intent to defraud shall be made an element of an offense, it shall be sufficient if an intent appears to defraud any person, association or body politic or corporate whatsoever." RCW 10.58.040. Intent to defraud may be inferred from surrounding "conduct that plainly indicates such intent as a matter of logical probability." *State v. Brooks*, 107 Wn. App. 925, 929, 29 P.3d 45 (2001) (internal quotation marks omitted) (quoting *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985)).

Mr. Miller testified at trial that he "told a fib" about being Ms. Meador's nephew in his call to the Standard "[j]ust to facilitate the call." RP at 1188. He claimed he knew he could get blank forms from the Standard without being a family member, but he testified that when you're a financial advisor, "they put up all kinds of roadblocks for you getting anything from them." *Id.*

By Mr. Miller's own admission, then, he believed that by lying he was avoiding "all kinds of roadblocks" the Standard would have put up had he been honest. But the recorded call could also support the inference that he believed deception was necessary to get what he needed. It reveals more than a passing misidentification of himself as a nephew; it reveals repeated lies:

> NORMA: Hi. This is Norma with the Standard. How can I help you?
>
> MR. MILLER: Yeah. Hi, Norma. My name is Mark Miller. I got the—well, my aunt, Lillian Meador, is in the hospital—or in assisted living. She has two annuities. And we're just trying to get assets to make sure we can pay for everything.
>
> NORMA: Okay.
>
> MR. MILLER: She has two annuities. I'm going to go over to her place and get that. But we are—we're probably going to need to surrender these—
>
> NORMA: Okay.
>
> MR. MILLER: —and doing that. So I'm just wondering where do we get the paperwork to surrender these?
>
> NORMA: You talk to us, and we send—mail it—mail it, fax it, or e-mail it to you.
>
> . . . .
>
> MR. MILLER: (inaudible). And, yeah, just—we're just trying to get things prepared because I know we've got—you know, there's only so much Medicare's going to do.
>
> NORMA: Yeah.
>
> MR. MILLER: And—and then we get to pay for the rest. . . .
>
> . . . .
>
> MR. MILLER: Yeah. It's just that we don't know how long this is going to go on, but we know the costs are going to go much higher—
>
> NORMA: Yeah.
>
> MR. MILLER: —then what we were planning for when she did these.
>
> NORMA: Yeah, you know, I understand that. . . .
>
> . . . .

MR. MILLER: Okay. Do these need—
NORMA: —(inaudible).
MR. MILLER: —to be notarized, gold sealed, any of those kind of things?
NORMA: As long as your aunt—it's your aunt, correct?
MR. MILLER: Yeah.
NORMA: As long as your aunt can sign it, we should be good.
MR. MILLER: She can sign it. She just—she can't walk right now—
NORMA: Yeah.
MR. MILLER: —so and doing that, so we're going to need some specialized care, nursing, hire private nurses, those kind of things. I know Medicare—we're just at the beginning of this, so we just want to make sure we have the paperwork we need.
And then at that point you'll sit there, and I'm assuming under 30 days. I mean, we've got money for probably the next few months but—
NORMA: All right.
. . . .
MR. MILLER: All right. I'm really concerned about loading up my credit card, which she has—she has more than enough to take care of this.
. . . .
MR. MILLER: Well, I appreciate your help. Hopefully we don't have to surrender these in any way—
NORMA: Uh-huh.
MR. MILLER: —and just keep them, but it's good to know that we have alternatives. Did you find out if that first one does have surrenders?
NORMA: Yeah, hold on. It probably is the exact same, but I'm going to double check that for you. That one's a (inaudible) 12. It's a seven year. Oh, hold on. Let me get into my—
MR. MILLER: Yeah, I had a conversation with her. I said something's got to give. Either we got to do the annuities, or we [have to] sell some of the property. Well, we're not selling the property.

RP at 660-67.

Mr. Miller argued at the close of the State's case that there was no evidence of an unlawful purpose and the trial court should dismiss the criminal impersonation count.

The trial court responded that it "disagree[d] 100 percent." RP at 1049. It observed that jurors could find that Mr. Miller was securing the forms "for the purpose of trying to cash in the annuity unlawfully and for an unlawful purpose." RP at 1049. We agree; the evidence was sufficient.

B. Attempted Theft

Mr. Miller challenges the sufficiency of the evidence to support his attempted first degree theft conviction on the ground that there was no evidence of intent to commit theft and, alternatively, that the evidence of his acts did not amount to the "substantial step" required to prove attempt.

His argument that there was no evidence of intent is frivolous. There was evidence that following on the heels of his theft from Ms. Meador of $50,000, Mr. Miller took steps to hastily cash out her annuities, subjecting her to early withdrawal penalties to obtain cash she did not need, lying as needed to facilitate the process, and stopping at Brookdale periodically to pick up her mail.

Alternatively, he argues that requesting blank annuity forms was not a substantial step. A person is guilty of an attempt to commit a crime only if, with intent to commit a specific crime, "he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020. "A substantial step is an act that is 'strongly corroborative' of the actor's criminal purpose." *State v. Johnson*, 173 Wn.2d 895, 899, 270 P.3d 591 (2012) (quoting *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)).

Mere preparation to commit a crime is not an attempt. *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). "The question of what constitutes a 'substantial step' under the particular facts of the case is clearly for the trier of fact." *Id.*

Mr. Miller's self-serving testimony at trial was that he merely obtained the surrender forms at Ms. Meador's request, gave them to her, saw her place them in a bureau drawer, and "that's the last I heard about it." RP at 1189.

While Mr. Miller denied completing the forms, the jury could reasonably infer that apart from Ms. Meador's signature, the handwritten completion of the forms was by him. He had the required account information and the completed forms were returned to the Standard within a week of Mr. Miller requesting that they be e-mailed to him. As the prosecutor pointed out in closing argument, the handwriting was "[r]emarkably similar to the way that [Mr. Miller] writes her name in the visitor logs." RP at 1346. And Ms. Meador testified that Mr. Miller tried to cash out her annuities, telling her he wanted the money to buy a cashier's check and gold coins.

Viewed in the light most favorable to the State, evidence amounting to a substantial step included telling Ms. Meador she should surrender the annuities, obtaining the necessary forms (lying as needed to facilitate the process), completing the forms, obtaining her signature, and returning them to the Standard. All that remained was to receive and misappropriate the check—and Mr. Miller periodically stopped at Brookdale to pick up Ms. Meador's mail. These acts are sufficient evidence of a substantial step.

IV. CONVICTING MR. MILLER OF ATTEMPTED FIRST DEGREE THEFT AND CRIMINAL IMPERSONATION DOES NOT CONSTITUTE DOUBLE JEOPARDY

Finally, Mr. Miller argues that his convictions for both criminal impersonation and attempted theft constituted double jeopardy because the criminal impersonation was the substantial step for the attempted theft.

The federal and state constitutions contain double jeopardy clauses protecting against multiple punishments for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. One aspect of protection against double jeopardy is that a person cannot "receive multiple punishments for the same offense." *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). A claim of double jeopardy can be raised for the first time on appeal and is reviewed de novo. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009); *State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998).

Where, as here, a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge "must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). If legislative intent is unclear, courts may use the "*Blockburger*"[5] analysis, which asks "whether the convictions were 'the same in law and in fact.'" *Villanueva-Gonzalez*, 180 Wn.2d at 980 (quoting *Adel*,

[5] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

136 Wn.2d at 632). "If each offense contains an element not contained in the other, the offenses are not the same; if each offense requires proof of a fact that the other does not, the court presumes the offenses are not the same." *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007).

Because proof of the "substantial step" element of an attempt crime has factual content only by considering the facts of a particular case, the *Blockburger* analysis requires further refinement when one of two convictions is for an attempt crime. *Id.* "[T]he 'abstract' term 'substantial step' must be given a factual definition to assess whether the attempted crime requires proof of a fact that is not required in proving the other crime." *Id.* (quoting *Orange*, 152 Wn.2d at 818).

Mr. Miller argues that the two convictions constitute double jeopardy because the evidence that he misrepresented himself to the Standard was the State's proof of the "substantial step" element of the attempted theft charge. (We note that this contradicts Mr. Miller's argument that merely obtaining the forms through a ruse could be preparation at most, not the required substantial step.)

Convicting Mr. Miller of both crimes did not constitute double jeopardy because to prove attempted theft, the State was not required to prove that Mr. Miller falsely identified himself to the Standard as Ms. Meador's nephew. *Cf. State v. Esparza*, 135 Wn. App. 54, 64, 143 P.3d 612 (2006) (to prove attempted first degree robbery, the State was not required to prove second degree assault). Since the charging document

filed in this case did not allege a particular substantial step, identifying the substantial step requires considering evidence of all the defendant's acts that could qualify. *See id.* at 63. As discussed in section II.B, the State presented evidence of a number of acts that amounted to a substantial step.

We remand with directions to the trial court to correct section 4.1, page 5 of Mr. Miller's judgment and sentence to reflect the 365 day sentence intended by the trial court. The convictions are affirmed.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, J.

Fearing, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 37351-7-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: October 1, 2020
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