

**NO. 69649-1-I**

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**FELIPE ZEFERINO-LOPEZ,**  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

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**RESPONDENT’S BRIEF**

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## **I. SUMMARY OF ARGUMENT**

Felipe Zeferino-Lopez was convicted of Identity Theft in the Second Degree for his use of a social security number of another to open a bank account. Zeferino-Lopez claimed he purchased the social security card as a child and was unaware it belonged to another. He contends the prosecutor improperly argued the State was not required to prove he knew the number belonged to another individual which amounted to misconduct.

The identity theft statute prohibits use of identity of another with the intent to commit a crime. The element of knowledge applies to the verbs obtain, possess or use, and not knowledge the card belongs to another. Thus, the argument was not error and did not amount to misconduct. In addition, defense counsel's decision not to object to the argument failed to preserve the error, defense counsel was not ineffective for not making any objection to the argument and any error was harmless beyond a reasonable doubt where the State was required to prove the intent to commit a crime.

## **II. ISSUES**

1. Where the identity theft statute requires proof of possession with intent to commit a crime, does the element of knowledge apply to possession or use, or that the identity belonged to another?

2. Did the prosecutor's argument constitute an incorrect statement of the law constituting misconduct that permits reversal of the conviction?
3. Did the defense fail to preserve any claim of error by choosing not to object to the prosecutor's argument?
4. Did defense counsel commit ineffective assistance in deciding not to object to the prosecutor's closing argument?
5. Where the defense theory was there was no intent to commit a crime since the defendant believed that the social security number was his and the parties argued whether he had the intent to commit a crime, was any error harmless beyond a reasonable doubt?

### **III. STATEMENT OF THE CASE**

#### **1. Statement of Procedural History**

On August 3, 2012, Felipe Zeferino-Lopez was charged with Identity Theft in the Second Degree alleged to have occurred on or about March 9, 2010. CP 1. Zeferino-Lopez was alleged to have opened a bank account using a social security number assigned to another individual. CP 3. Zeferino-Lopez admitted that he was in the country illegally and had purchased the social security number used to open the account. CP 3.

On November 5, 2012, the case proceeded to jury trial. 11/5/12 RP 1.<sup>1</sup>

On November 6, 2012, the jury returned a verdict of guilty. CP 25.

On November 8, 2012, the trial court sentenced Zeferino-Lopez to 55 days of confinement from a zero to ninety day standard range. CP 27, 29, 11/8/12 RP 120, 122.

On December 7, 2012, Zeferino-Lopez timely filed a notice of appeal. CP 38.

## **2. Summary of Trial Proceedings**

### **i. Testimony**

Vicki Gall was an investigator for Key Bank who investigated an account opened by Felipe Z. Lopez on March 9, 2010. 11/5/12 RP 15-6, 19. Gall had been contacted by an individual in California who had gone to open an account at another bank, found out about an account opened at Key Bank and complained they had not opened an account with Key Bank. 11/5/12 RP 19-20, 32-3. The information came to light after Check Systems reported negative information about a social security number. 11/5/12 RP 19-20. Check Systems is a company that checks for problematic accounts for banks

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number.

11/5/12 RP	Jury Trial Day 1 – Testimony
11/6/12 RP	Jury Trial Day 2 – Testimony, Jury Instructions, Closing
11/8/12 RP	Sentencing.

including Key Bank. 11/5/12 RP 20. Gall looked up the account in question by searching by the social security number. 11/5/12 RP 21. The social security card at issue was on a signature card used when the account was opened. 11/5/12 RP 21-2. Other information was obtained from the person opening the account and a copy of the application showing the information was admitted. 11/5/12 RP 23, CP\_\_ (Exhibit 2 at trial, Supplemental Designation of Clerk's Paper's Pending). The date of birth was provided as November 1, 1985. 11/5/12 RP 26.

In addition, as part of the application process, the person who opened the account swore under penalty of perjury that the person was a citizen of the United States. 11/5/12 RP 25. Being a United States citizen was required in order to open the account. 11/5/12 RP 25. Key Bank does not have a program that allows an illegal immigrant to obtain a bank account. 11/5/12 RP 31

At the time the account was opened, Check Systems did not show any negative information with the social security number. 11/5/12 RP 26.

Gall located transactions of the account holder in which images were generated from the video system. 11/5/12 RP 27. The images showing transactions showing the person accessing the account were admitted. CP\_\_ (Exhibit 3 at trial, Supplemental Designation of Clerk's Paper's Pending), 11/5/12 RP 28-9.

Deborah Wolfsachs was an employee of the social security administration who was a district manager. 11/5/12 RP 34. Wolfsachs testified that social security numbers are primarily used to maintain a person's earnings record, but are also used by banks to open accounts and by employers. 11/5/12 RP 35.

Social security numbers can issued to American citizens and a legal resident who is eligible for work. 11/5/12 RP 35. Those not in the United States legally are not eligible for a Social Security number. 11/5/12 RP 35-6.

Social security numbers are assigned randomly. 11/5/12 RP 36. In the past, the first part of the number was assigned based upon the area where the person was applying. 11/5/12 RP 36. That change had only recently been made. 11/5/12 RP 36.

The social security card assigned to the number used by Zeferino Lopez in opening a bank account was not assigned to Zeferino Lopez. 11/5/12 RP 37. The card was assigned to a person who was not a male and whose birth date was not November 1, 1985. 11/5/12 RP 38.

Sergeant Bob Wischhusen was the detective assigned to follow up the investigation related to the complaint out of California of the use of a Social Security number. 11/5/12 RP 39-40. Wischhusen took the report April 20, 2012. 11/5/12 RP 40. Wischhusen spoke to the person in California who told Wischhusen to speak to Vicki Gall. 11/5/12 RP 40.

Wischhusen received driver's license information from Ms. Gall associated with the account information. 11/5/12 RP 40. Wischhusen received documents from Ms. Gall, and then tried to get information about Zeferino-Lopez and determine where he lived and worked. 11/5/12 RP 41.

Wischhusen obtained a phone number for Zeferino-Lopez and called him to arrange a meeting in person. 11/5/12 RP 41-2. On June 2, 2012, Wischhusen met Zeferino-Lopez in person. 11/5/12 RP 42. Zeferino-Lopez matched the person on the driver's license. 11/5/12 RP 42. Zeferino-Lopez spoke in broken but plain English with Wischhusen. 11/5/12 RP 42. Wischhusen never believed an interpreter was needed. 11/5/12 RP 42.

Zeferino-Lopez told Wischhusen that he had purchased the Social Security number for \$100 but he could not recall where or when. 11/5/12 RP 43. He said if he remembered right, he needed it for employment. 11/5/12 RP 43. Zeferino-Lopez said he had been using the social security number for several years. 11/5/12 RP 43. Zeferino-Lopez appeared to be working at Arby's at the time. 11/5/12 RP 47. Zeferino-Lopez admitted he was illegally in the United States. 11/5/12 RP 43. Zeferino-Lopez came back in to the station later, and provided a copy of the Social Security card. 11/5/12 RP 44. A copy of the card was admitted. CP\_\_ (Exhibit 1 at trial, Supplemental Designation of Clerk's Paper's Pending), 11/5/12 RP 44. Wischhusen identified Zeferino-Lopez in court. 11/5/12 RP 44.

Felipe Zeferino-Lopez testified. 11/6/12 RP 51. Zeferino-Lopez was born November 11, 1985. 11/6/12 RP 51. He testified he was born in Mexico and came to the United States in 1995 with friends, when he was nine or ten years old. 11/6/12 RP 51-2. He claimed he had not gone to school before he came to the United States but he did know how to read. 11/6/12 RP 52. He testified he did learn English after he arrived. 11/6/12 RP 52. Zeferino-Lopez claimed he was sixteen when he started going to school in Mount Vernon where he learned English. 11/6/12 RP 55-6.

Zeferino-Lopez claimed he had obtained the Social Security card within a month after he arrived. 11/6/12 RP 53. He said he got the card from a friend at a Conway farm because he needed it to work. 11/6/12 RP 53. He claimed he purchased the card for \$100 which he borrowed from a friend. 11/6/12 RP 54, 67. He claimed he needed the card to get a job picking strawberries when he was nine or ten years old. 11/6/12 RP 45. He admitted he did not show anyone the card to get that job. 11/6/12 RP 54. He then testified the first time he used the card to get a job was when he began working at a restaurant when he was eighteen years old. 11/6/12 RP 54-5. He used the card to get a job at restaurants Lorenzo's, La Hacienda, Calico and La Casita. 11/6/12 RP 56-7. He then used the card to get work at a Chevrolet dealership detailing cars and trucks. 11/6/12 RP 57-8. His final job using the card was at an RV dealership. 11/6/12 RP 58. He left the job at

the RV dealership after the detective contacted him about the social security card. 11/6/12 RP 59.

Zeferino-Lopez testified that after he took the Social Security card to the Burlington Police Department and they made a copy, they returned the card to him which he ripped up. 11/6/12 RP 64. He claimed that the only jobs he got after doing so was for washing cars and landscaping where he was paid cash. 11/6/12 RP 64-5.

Zeferino-Lopez claimed that the first time he found out the card belonged to someone else was when Detective Wischhusen told him. 11/6/12 RP 65.

On cross-examination, Zeferino-Lopez admitted he spelled his name differently from time to time. 11/6/12 RP 66. Zeferino-Lopez admitted he was deported in 2003 when he was sixteen years of age. 11/6/12 RP 67-8. He admitted he came back the same day he was deported. 11/6/12 RP 67, 77. Zeferino-Lopez claimed he left the Social Security card in the United States when he was deported. 11/6/12 RP 68, 77.

On cross-examination, Zeferino-Lopez also admitted he had a permanent resident card which said he was a legal resident of the United States since August 23, 2004. 11/6/12 RP 69. Zeferino-Lopez admitted he had never been a permanent resident in the United States and that the card showing that was fraudulent. CP\_\_ (Exhibit 6 at trial, Supplemental

Designation of Clerk's Paper's Pending), 11/6/12 RP 70. Zeferino-Lopez admitted he got the permanent resident card at the same time as the Social Security card from the same friend. 11/6/12 RP 70-1. He admitted he deleted certain information and put new information on the Permanent Resident card. 11/6/12 RP 71.

Zeferino-Lopez also admitted he used the Social Security card in order to obtain a credit card in addition to the bank account. 11/6/12 RP 72. The bank closed the account on Zeferino-Lopez. 11/6/12 RP 74.

Zeferino-Lopez admitted to being the person in the photographs from the bank transactions. 11/6/12 RP 74. He said he stopped using the Social Security card because he had been caught. 11/6/12 RP 75.

Zeferino-Lopez also called the operator of the RV dealership that employed him. 11/6/12 RP 80. Zeferino-Lopez quit working for the dealership June 23, 2012, after the problem with Zefernio-Lopez's Social Security card was found to be invalid. 11/6/12 RP 81-2.

**ii. Jury Instructions**

The jury instruction on Identity Theft in the Second Degree read in pertinent part as follows:

To convict the defendant of identity theft in the second degree, the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 9, 2010, the defendant knowingly possessed or used a means of identification of another person, living or dead;
- (2) That the defendant acted with intent to commit any crime;
- (3) That any of these acts occurred in the State of Washington.

CP 17. The jury was also instructed on the terms knowingly and intentionally.

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 18.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 20.

The State also sought and the trial court approved using two instructions pertaining to federal crimes.

It is a crime for anyone to knowingly execute or attempt to execute, a scheme or artifice to defraud a financial institution.

CP 21 (Instruction No. 9), 18 U.S.C.A. §1344, CP \_\_, (State's Proposed Instructions to the Jury, Sub No. 24, filed November 5, 2012).

It is a crime to falsely and willfully represent himself to be a citizen of the United States.

CP 22 (Instruction No. 10), 18 U.S.C.A. §911, CP \_\_, (State's Proposed Instructions to the Jury, Sub No. 24, filed November 5, 2012).

Defense objected to use of instruction number nine, but did not object to instruction number ten. 8/6/12 RP 85-6.

**iii. Closing argument**

The prosecutor attacked the credibility of the defendant's claim that at the age of nine he purchased a social security card and a permanent residence from a friend but he could not recall whom. 8/6/12 RP 93. The prosecutor noted the defendant's claim that the photograph of him on the permanent resident card was him at age nine was not credible given the way the photograph looked and the date on the card. 8/6/12 RP 93-4.

The prosecutor also focused on the criminal intent required to be proven noting that criminal intent is in a person's mind and thus can only truly be drawn from inferences from circumstantial evidence. 8/6/12 RP 97.

The prosecutor then directly stated the knowledge element.

The State needs to prove that on this date the defendant knowingly possessed or used a means of identification of another person living or dead. So that also needs to be broken down. I need to prove that the defendant knowingly

possessed a means of identification of another person. And those terms are further defined in the instruction.

8/6/12 RP 98. After noting that a social security number is a means of identification, the prosecutor turned to the issue of whether the card belonged to another.

The next question becomes whether or not the Social Security number belonged to somebody else. That element requires that that Social Security number belonged to another person living or dead, not the defendant. We heard testimony from the Social Security Administration division manager who indicated that that Social Security number is assigned to an actual person, actual specific person. It's not just a random number. And that person is not the defendant. It's not his date of birth. It's not his gender. So we have established that the means of identification of the Social Security number belonged to another person.

And then we have to establish that the defendant knowingly possessed the Social Security number. Instruction Number 6 defines knowingly for you. It's actually rather a lengthy instruction for such a small word. But basically knowingly means that you are aware of a fact that exists. So when we ask ourselves did the defendant know that he was possessing the Social Security number, of course he did. He knew he possessed it. He bought it. He used it. He possessed it. He knew he possessed it. And so we can kind of check that off. So we, through these means, we've established the defendant knowingly possessed a means of identification that belonged to another person.

8/6/12 RP 98-9.

The prosecutor then turned to argue the applicable criminal intent.

Element two is that the defendant acted with the intent to commit any crime. So it's not enough just that the defendant possessed a Social Security number. It's not enough that he just used the Social Security number. He needed to have

intent to commit another crime by doing that. Not that he actually committed another crime but that he intended to.

8/6/12 RP 99. The prosecutor noted the intent to commit a crime had occurred based upon the two federal statutes which Zeferino-Lopez had violated by opening the account. 8/6/12 RP 100-1.

The defense closing argument relied on Zeferino-Lopez's claim that he had purchased the card when he was a child and that he did not have it with him at the time of his deportation. 8/6/12 RP 103. Defense counsel also focused on the element of knowledge and claimed he did not knowingly possess cards of another and there was no intent to commit a crime against the bank. 8/6/12 RP 109.

I submit that he did not really get it. He did not understand what he was doing when he presented these cards. He did not understand this card that belonged to somebody else; that he did not have any bad intentions there. Now, clearly he knew he wasn't a US citizen. He knew he wasn't here legally.

8/6/12 RP 109. He also argued there was no evidence he intended to wrongfully represent that he was a citizen or to defraud the bank. 8/6/12 RP 109-11, 111-2.

On rebuttal, the prosecutor argued that Zeferino-Lopez's actions defrauded the bank by misrepresenting who he was and also that he used the card to hold himself out as a citizen. 8/6/12 RP 114-5.

The prosecutor questioned the credibility of Zeferino-Lopez's contentions that he did not know the number was not really his. 8/6/12 RP 115-6. To support the argument, the prosecutor noted that Zeferino-Lopez had a fraudulent permanent resident card which he admitted to altering. 8/6/12 RP 116. Finally, the prosecutor focused on the element of knowledge, of which Zeferino-Lopez complains on appeal. At first the prosecutor noted the State was not required to prove Zeferino-Lopez knew the card belonged to a particular individual.

The final thing I want to address is counsel's argument that the State needs to prove beyond a reasonable doubt that the defendant knew that the number belonged to someone else. What I would submit to you is that this is an inaccurate reading of the instruction. First of all, it's just common sense. We would never be able to prove a case like this if we had to prove that the defendant knew the number belonged to someone else. Simply because of the very example Ms. Riquelme gave, we'd have to prove he broke into someone's house and stole their Social Security card. We're not going to have that case. Does it make sense that the law would require that? And it doesn't.

8/6/12 RP 116-7. Then the prosecutor explained how the knowledge element applied.

So my next argument focuses on grammar, if there's any English majors in here you'll understand what I'm talking about. The requirement is that the defendant knowingly possessed identification of another person. Knowingly is an adverb. It applies to the verb that follows, which is possession or use. Knowing applies and refers to possession or use. The phrase that comes after it is an object. And knowingly does not apply to that grammatically speaking. If

you read the instruction, as it's meant to be read, there's common sense fashion and grammatically correct fashion. What the State needs to prove to the defendant is he knowingly possessed or used. That's what he had to know. That's what the mental state of knowing applies to. The rest of it describes the thing that he possessed. He didn't have to know that that number was specifically assigned to another individual. He didn't. He had to know that he was in possession of it and the number. He had to know he was using the number and clearly he did. The mental state we need to prove is that he intended by using that number to commit a crime. I would submit to you those two crimes are defrauding the bank, holding himself out to be a US citizen. I would ask you to find the defendant guilty. Thank you.

8/6/12 RP 117.

There was no objection by the defense to the State's closing argument.

#### **IV. ARGUMENT**

**1. The State properly argued it was not required to show the defendant knew the social security number was assigned to another.<sup>2</sup>**

##### **i. Elements of Identity Theft**

No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

RCW 9.35.020(1), *see also* State v. Presba, 131 Wn. App. 47, 55-56, 126

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<sup>2</sup> The State chooses not to address Zeferino's claims of prosecutorial misconduct and ineffective assistance as those arguments are controlled by the issue of whether the prosecutor's argument was a misstatement of the law.

P.3d 1280 (2005) (sufficient evidence of identity theft where a defendant stopped for speeding, and had a suspended license, offered another's name, social security number, former address and date of birth to thwart the officer's attempt to ascertain her correct identity).

By the plain language of the statute, the knowledge applies directly to the defendant's obtaining, possession, use or transfer. It does not modify the term "means of identification or financial information of another person, living or dead." Had the legislature intended to do so, it could have added the term which the person knows belongs to another. The use of the term knowingly in the statute prevents the prosecution of a person who inadvertently obtains or has control over items which are a means of identification of another.

Washington rules of statutory construction support that position. The word "knowingly" is an adverb, and, as a grammatical matter, an adverb generally modifies the verb or verb phrase with which it is associated. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001) (interpreting the harassment statute to provide that knowing applies to the making of the threat, and not that the threat be communicated to the victim threatened). "Knowingly" modifies the verb phrase of "obtain, possess, use, or transfer." But "knowingly" does not modify the phrase "of another person." The

phrase “of another person” is an object and is not modified by the adverb knowingly.

Furthermore, to commit the offense, the person must have the means of identification of another “with intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1). This provides the additional criminal mens rea for the offense. This portion of the statute allows an individual to contend that the person does not have the intent to commit a crime. It allowed Zeferino-Lopez to contend that because he had believed he properly had obtained the means of identification he had no intent to commit a crime.

Zeferino-Lopez relies upon the case of Flores–Figueroa v. U.S., 566 U.S. 646, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009) to support his contention about statutory interpretation. In that case, the Supreme Court was interpreting a mandatory prison term to be imposed for convictions on certain crimes if the offender “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” 18 U.S.C. § 1028A(a)(1). The Court stated that “[a]s a matter of ordinary English grammar, it seems natural to read the statute's word ‘knowingly’ as applying to all the subsequently listed elements of the crime.” Flores–Figueroa, 129 S.Ct. at 1890. The Court further stated that “[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive

verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.” Flores–Figueroa, 129 S.Ct. at 1890. This rule, however, is limited to the interpretation of federal criminal statutes, and does not control interpretation of a Washington State statute. *See Flores–Figueroa*, 129 S.Ct. at 1895 (Alito, J., concurring) (“I suspect that the Court's opinion will be cited for the proposition that the *mens rea* of a federal criminal statute nearly always applies to every element of the offense.”). In addition, the majority noted that its construction of how the word “knowingly” modifies the subsequently listed elements was not binding in all situations. Flores–Figueroa, 129 S.Ct. at 1891 (“As Justice Alito notes, the inquiry into a sentence's meaning is a contextual one.”). The Washington identity theft statute also differs from the federal enhancement by requiring the additional element that the possession or use of the card be with the intent to commit a crime.

Given the Washington rules of statutory interpretation, Flores–Figueroa is inapplicable. *See Von Herberg v. City of Seattle*, 157 Wn. 141, 160, 288 P. 646 (1930) (“[O]ur interpretation of our statutes is binding upon the Federal courts, not theirs on us.”).

Zeferino-Lopez also cites the interpretation of the trafficking statute in State v. Killingsworth, 166 Wn. App. 283, 269 P.3d 1064 (2012), *rev. denied*, 174 Wn. 2d 1007, 278 P.3d 1112 (2012) to support his contention.

Appellant's Opening Brief at page 11-2. However, the trafficking statute does not have another mens rea as exists in the identity theft statute. Furthermore the verb phrase "trafficks in stolen property" is different from the verb phrase to which Zeferino-Lopez claims applies here: "obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead."

In reply, Zeferino-Lopez may argue that the recently issued case of State v. Vasquez, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ 87282-1, 2013 WL 3864265 (Wash. July 25, 2013) should be considered in evaluating his claims. In Vasquez, the defendant was contacted by a security officer regarding a shoplifting incident. The security officer found that the defendant had a forged social security card and permanent resident card. The State charged the defendant for forgery for his possession of the cards. The Supreme Court held that the evidence did not support the inference of an intent to defraud based upon the mere possession of the cards.

That analysis is inapplicable here since Vasquez involved the charge of forgery and prosecution was based upon inference about the intent to use the card. Here the statute under which Zeferino-Lopez was prosecuted contains different elements and he had actually used the social security card in order to open a bank account.

**2. The failure to object to the prosecutor's closing argument precludes review.**

It is undisputed that the defendant failed to object to the prosecutor's closing argument. The question that this presents is whether the defendant has preserved the claimed error.

Three steps are involved in analyzing whether an issue raised for the first time on appeal can benefit from RAP 2.5(a)'s manifest constitutional error exception. The defendant has the initial burden of showing that (1) the error was "truly of constitutional dimension" and (2) the error was "manifest." State v. O'Hara, 167 Wn.2d at 98, 217 P.3d 756. A defendant cannot simply assert that an error occurred at trial and label the error "constitutional"; instead, he must identify an error of constitutional magnitude and show how the alleged error actually affected his rights at trial. Gordon, 172 Wn.2d at 676, 260 P.3d 884. If he successfully shows that a claim raises a manifest constitutional error, then the burden shifts to the State to prove that the error was harmless beyond a reasonable doubt under the Chapman standard. Gordon, 172 Wn.2d at 676 n. 2, 260 P.3d 884.

State v. Grimes, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011) *rev. denied*, 175 Wn. 2d 1010, 287 P.3d 594 (2012) (footnote references omitted).

The State contends that the claimed improper argument was not of constitutional magnitude. Zeferino-Lopez has made no effort to establish it was such instead claiming the argument amounted to misconduct since it was a claimed misstatement of the law to the jury. Brief of Appellant at page 8. To support that claim, Zeferino-Lopez cites to State v. Warren, 165

Wn.2d 17, 195 P.3d 940 (2008), a case in which the prosecutor had misstated the burden of proof to the jury. As argued above, there was no misstatement of the law. Furthermore, the Zeferino-Lopez's failure to raise the claim below precludes reversal unless the argument was flagrant and ill-intentioned.

While the prosecutor's comments were improper because they commented on defense counsel's role, Warren did not object at the time to these comments, and they are not so flagrant and ill-intentioned that no instruction could have cured them. See Stenson, 132 Wn.2d at 719, 940 P.2d 1239; State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002) (misconduct to directly contrast prosecutor's role with defense attorney's role). As in Yates, Warren has failed to show prejudice. See Yates, 161 Wn.2d at 776, 168 P.3d 359 (even if prosecutor's argument improperly commented on defense counsel's role, there was no substantial likelihood the comment affected the jury's decision).

State v. Warren, 165 Wn.2d 17, 19-30, 195 P.3d 940 (2008) (holding that the defendant's failure to object to improper closing argument which commented on the defense counsel's role precluded review), *see also* State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003) (reversal not required where there was no objection to prosecutor's closing argument, which allegedly used religious and cultural stereotyping).

In addition, the error must be manifest; have identifiable prejudice.

“ ‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” Kirkman, 159 Wn.2d at 935, 155 P.3d 125 (citing State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); McFarland, 127 Wn.2d at 333-34, 899 P.2d 1251). To

demonstrate actual prejudice, there must be a “ ‘plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.’ ” Kirkman, 159 Wn.2d at 935, 155 P.3d 125 (internal quotation marks omitted) (*quoting* WWJ Corp., 138 Wn.2d at 603, 980 P.2d 1257).

State v. O'Hara, 167 Wn. 2d 91, 99, 217 P.3d 756 (2009).

As explained above, the argument was appropriate and as such no identifiable prejudice can be established.

Furthermore, even if Zeferino-Lopez's interpretation of the statute were applied, he cannot show prejudice, since the State was required to prove that Zeferino-Lopez acted with intent to commit a crime. Only if he indeed had knowledge that his card was fraudulent, could he have had that intent. If the jury had found that he truly believed he had received the social security card properly, it would have found that he had no intent to commit a crime by the use of the card. Because the instructions enabled the defense to argue their theory of the case, Zeferino-Lopez cannot establish prejudice.

For the same reason, the claimed misstatement of the law is also harmless beyond a reasonable doubt. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (constitutional errors which are not fundamental are subject to a harmless error analysis).

**V. CONCLUSION**

For the foregoing reasons, the defendant's conviction for Identity Theft in the Second Degree must be affirmed.

DATED this 27<sup>th</sup> day of August, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by;  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jennifer L. Dobson and Dana M. Nelson, addressed as Nielsen Broman Koch PLLC, 1908 E Madison Street, Seattle, WA 98122-2840 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 27<sup>th</sup> day of August, 2013.

  
KAREN R. WALLACE, DECLARANT