

COURT OF APPEALS
DIVISION II

NO. 39479-5

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CULLEN L. WICK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner

No. 07-1-03618-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is defendant precluded from challenging the lawfulness of his arrest on direct appeal where he failed to raise this issue below?
2. Did the State present sufficient evidence for a reasonable fact finder to conclude that defendant was guilty of identity theft in the second degree and unlawful possession of fictitious identification?

B. STATEMENT OF THE CASE.

1. Procedure

On July 11, 2007, the State charged CULLEN L. WICK, hereinafter “defendant,” with one count of forgery, one count of unlawful possession of a controlled substance (methamphetamine), two counts of possessing stolen property in the second degree, two counts of possession of another’s identification, and one count of possession of fictitious identification. CP 1-3. On September 24, 2007, the State filed an amended information adding three counts of identity theft in the second degree. CP 6-10.

On November 27, 2007, defendant failed to appear for trial and a bench warrant was issued for his arrest. CP 275, 276, 277. On January 9, 2008, the State filed a second amended information, adding one count of bail jumping. CP 11-15.

On May 28, 2008, the case was called for jury trial before the Honorable D. Gary Steiner. RP 3. The State filed a third amended information, charging defendant with one count of forgery (Count I), one count of unlawful possession of a controlled substance (Count II), two counts of possessing stolen property in the second degree (Counts III and IV), one count of unlawful possession of fictitious identification (Count VII), three counts of identity theft (Counts VIII, IX, and X), and one count of bail jumping (Count XI). CP 187-90, RP 3-4.

Defendant was represented by an appointed attorney for trial, but retained private counsel for pretrial motions. RP 14, 16. His pretrial attorney raised several pretrial motions, including a motion to suppress defendant's statements, a request to sever the bail jumping charge from the other charges as he intended to call the prosecuting attorney as a witness, a motion to dismiss based on pre-accusatorial delay, and a motion to suppress evidence discovered per a search warrant as he believed there was a *Franks*¹ issue with regard to the warrant. RP 24, 36-37.

On June 2, 2008, the parties held the CrR 3.5 hearing. RP 47. The court ruled that defendant's initial statements to the officers were admissible as defendant was not in custody. RP 104. The court also ruled

¹ *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

that defendant's post-arrest statements were admissible, as he was properly advised of his *Miranda*² warnings. RP 104.

Following the 3.5 hearing, the court heard defendant's motion to sever Count XI, the bail jump charge. RP 106. The court denied the motion and released the prosecutor from the subpoena. CP 170; RP 121.

On June 4, 2008, the court heard argument for defendant's motion to dismiss for pre-accusatorial delay. RP 132. During the argument, defendant raised the question of the validity of the warrant again, and the court noted that the 3.6 hearing had been stricken by defendant. RP 133-34. Defendant acknowledged that he had stuck the 3.6 hearing because he could not carry the burden of a *Franks* hearing. RP 134. The court ultimately denied defendant's motion to dismiss. CP 38-56; RP 149.

At no time during these pretrial proceedings did defendant challenge the validity of his arrest or the admissibility of any evidence based on the timing of his arrest. *See* RP 1-195.

On June 5, 2008, the court heard motions in limine. RP 155. The State agreed not to mention defendant's two misdemeanor warrants unless defendant took the stand or, if there was "some sort of challenge to the reason for the arrest." RP 155. Defendant moved to exclude all evidence and testimony relating to an altered identification card and Brian Eickhoff's credit card, which did not directly relate to charged offenses,

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

but were on defendant's person or in his car. RP 168-69. The State argued that possession of those items were necessary to prove defendant's intent. RP 156, 166, 170-71, 177. The State did agree not to elicit testimony regarding several items of clothing belonging to the fire department which were found in the car. RP 157. The court ruled that the identifications and credit cards found in defendant's car that were not the basis for the charged crimes were inadmissible, with the exception of any with defendant's name or that of Linda Schock, who was with him at the time of arrest. RP 185-91. The court reserved ruling on the Eickhoff credit card. RP 193.

On June 9, 2008, the court reiterated its ruling on the record:

The other receipt or receipts which were in plain sight on the dash of a like nature to those presented to Safeway, I think those are admissible. They would rebut his explanation at the scene that I either didn't know anything about this or it must be my sister's, I'm just here for my sister with this one receipt. The presence of other receipts would be admissible for that purpose. The stuff in the sack, or satchel or wherever it was, that are charged crimes are in. Evidence of a charged crime. The stuff in the sack that is not charged would not be admissible under *State v. Trickler*³, except for the ID in the sack, which was the same as the one he had on his person, either Wiok or Wick, to rebut the statement he made at the scene that something happened with respect to this one ID. It is a jury question as to why he would have two, why there were similarly altered, what that all means hearing his explanation. I think the thing that I have not decided is that there is an ID under

³ 106 Wn. App. 727, 25 P.3d 445 (2001).

the name of Wick, Christopher Wick, which is his brother.
I guess that's undecided.

RP 198-99. The court also ruled that the Eickhoff credit card was admissible, as well as all of the items in the car that were not located inside the tote. RP 206. Finally, the court admitted all of the receipts found within the car, agreeing with the State that the receipts were "the State's proof that the defendant intended to commit a crime using these people's identification and to prove his knowledge of the forgery." RP 208.

Testimony began after the court issued its pretrial rulings. RP 209. Defendant chose not to testify, but did present testimony from his girlfriend, Linda Schock and from the law enforcement officer responsible for executing the warrant to search his car. RP 638, 739. The State called Mr. Eickhoff in rebuttal. RP 758.

The jury received the case on June 23, 2008, and returned guilty verdicts on all counts the following morning. RP 847-49.

On October 24, 2008, the court sentenced defendant to the high end of the standard range for each count, all to run concurrent, for a total confinement of 60⁴ months. CP 249-261; RP 863.

Defendant filed this timely notice of appeal. CP 263.

⁴ Based on defendant's offender score of 9+, his standard range sentences were: Count I 22-29, Count II 12+-24, Counts III and IV 22-29, Count VII 0-12, Counts VIII, IX, and X 43-57, Count XI 51-60.

2. Facts

On November 5, 2005, Tacoma Police Officers Mettler, Robison,⁵ and Williams responded to the Safeway located in the Proctor district of Tacoma. RP 214, 385-86, 625. Store employees had called 9-1-1 when defendant and his girlfriend, Ms. Schock, attempted to return a bottle of black truffle oil with a fraudulent receipt. RP 387.

Upon Officer Mettler's arrival, just a few minutes after the dispatch, he observed defendant and Ms. Schock leaving the store. RP 389. Defendant and Ms. Schock matched the description of the suspects that were given by the store employees. RP 389. Officer Mettler approached the couple, gave them *Miranda* warnings, and told them why he was contacting them. RP 389, 391.

Defendant told Officer Mettler that he was at the store to return the bottle of oil for his mother. RP 390. Defendant showed the officer a receipt for the item and said he did not understand why there was a problem. RP 390. Officer Mettler then questioned the store employees about the receipt because:

I wanted to make darn sure that if we were going to arrest [defendant], that, like I said before, I didn't want to end up on the front page of the paper the next day, you know, for -
- because it looked close.

⁵ Officer Robison was in his first month of field training and was teamed with Officer Mettler. RP 213.

RP 383. The employees described the differences between a legitimate receipt and the one defendant presented to them. RP 394.

While Officer Mettler was speaking to the employees, Officer Williams asked defendant if he had any identification. RP 629. Defendant claimed he had nothing on him, but verbally identified himself to the officer. RP 629.

After contacting the employees, Officer Mettler returned to defendant, handcuffed him, put him in the back of his patrol car, and advised defendant he was under arrest. RP 394. He also advised defendant of his *Miranda* warnings a second time. RP 394-95. Defendant again claimed he was returning the oil for his mother and had no idea how the receipt could be fake. RP 395. Defendant stated that whatever the case was, "I don't want [Ms. Schock] arrested for this. It is my own doing." RP 395.

Officer Mettler spoke to Ms. Schock, who pointed out defendant's car. RP 396. Officer Mettler observed several receipts for Safeway and Albertson's on the dashboard and passenger seat of defendant's car. RP 396. He called the store employees to get their opinion of the receipts. RP 397. The store employees looked through the windows of the car and determined that the receipts looked fraudulent. RP 344.

Officer Mettler returned to defendant and asked for his permission to search the car. RP 397. Defendant refused and Officer Mettler had the car impounded so detectives could get a search warrant. RP 397.

Officer Williams took defendant from Officer Mettler's patrol car and searched him before placing him in his own patrol car. RP 629-30. During the search, he found defendant's wallet which contained a valid identification card for defendant. He also found what looked like a legitimate identification card with defendant's name, but someone had enclosed the "C" in "Wick" to make it an "O." RP 630. Defendant's wallet also contained a credit card that had a picture on the card that looked like defendant, but the name on the card was "Brian Eickhoff." RP 632.

Defendant told Officer Williams that some kids had stolen his wallet and altered his identification. RP 630. When asked about the credit card, defendant said he did not know how it had gotten into his wallet. RP 632. Officer Williams transported defendant to the jail, while Officer Mettler accompanied Ms. Schock to the hospital in an ambulance.⁶ RP 398.

Five days later, Tacoma Police Detective Nist executed a search warrant on defendant's car. RP 420-23. She found receipts from several different stores on the dashboard and on the passenger seat of the car. RP 440. She found receipts from several stores and an envelope labeled "card, Cash & Carry from Lowes," in a blue notebook that was located on the front passenger floor. RP 432. Inside the envelope there were more

⁶ After Ms. Schock was arrested, she began to complain about medical issues. RP 409.

receipts; one was an Albertson's receipt that had been glued to a blank piece of paper. RP 433. Also on the front passenger floor, she found a box containing office supplies, such as a cutter, notebook paper, pens, correction fluid, rules, tape, and thermal paper. RP 434. The box also contained several more receipts, most had the tops cut off. RP 437. Under the box were photocopied receipts and merchandise tags. RP 435.

In the driver's visor, there was mail addressed to defendant and Cathie Hillman, along with another Albertson's receipt. RP 436. In the passenger visor was an identification card in the name of Cathie Hillman-Wick, a plastic baggie she suspected contained narcotics, and glass smoking pipes. RP 294, 440. She found a combination printer/scanner/copier machine in the back seat. RP 445. There was also a length of rubber tubing in the center console. RP 299-300.

In a plastic tote in the back seat, she found two rolls of thermal paper, the registration for defendant's vehicle in the name of Joanne Wick, and a large freezer bag full of receipts, a driver's license, miscellaneous items, pens, batteries, scissors, and a small metal box. RP 438, 439, 441. The box contained a Washington driver's license for Jean Dougherty, a Washington driver's license for Hilary Leonard, a King County library card for Linda Schock, a Washington Quest card for Linda Schock, and a Washington driver's license for Cullen Wiok. RP 441-42. The miscellaneous items in the bag consisted of a US Bank Visa debit card for Jean Dougherty, another fake identification card for Cullen Wiok, an

Alaska Airlines visa card for Lori Kelly, and a visa card for Hilary Leonard. RP 443.

Finally, Detective Nist discovered an inverter box wired into the car's electrical system. RP 304. The inverter allows a person to plug a regular power cord into the car's cigarette lighter. RP 304. The suspected narcotics later tested positive for methamphetamine. RP 495-96.

According to Detective Quillio, who assisted Detective Nist with the warrant, a piece of plastic tubing can be used to allow a person to inhale methamphetamine vapors remotely from someone else who is holding the pipe. RP 300-01.

Hilary Leonard, Jean Dougherty, and Lori Kelly all testified that they did not know defendant, Ms. Schock, or Lori Silves. RP 477-78, 484, 548. They all testified that their identification was stolen in a vehicle prowl occurring in 2004 or 2005. RP 475-76, 481-83, 545-46.

Ms. Schock testified that all of the items found in defendant's car belonged to a woman named Lori Silves. RP 148-49. According to Ms. Schock, Silves was being kicked out of a Mr. Melendy's house on November 5th and Melendy called her and told her to get Silves' belongings out of his house. RP 646. She and defendant loaded Silves' property into defendant's car. RP 646. The tote belonged to Silves, as did the cardboard box with all the receipts. RP 648-49. Ms. Schock claimed that Melendy gave her a bag belonging to Silves and said she might be interested in its contents. RP 649. The bag contained defendant's driver's

license that had been altered to “Wiok.” RP 649. According to Ms. Schock, the driver’s license had been taken by Silves from Ms. Schock’s house. RP 649. She gave the card to defendant who put it in his wallet. RP 650. They picked Silves up and took her to a couple of places so she could get them money for gas. RP 651-53. According to Ms. Schock, Silves suggested they take the truffle oil back and they could keep the refund money. RP 654. Evidently, Silves was in defendant’s car when he was arrested, but fled before the officers noticed her. RP 699-700, 730.

Ms. Schock also testified that she knew Brian Eickhoff as a friend of a friend. RP 686. She testified that Mr. Eickhoff and his girlfriend, Carrie Todd, had come to a Halloween party at the house she shared with defendant and left his credit card. RP 687. She claimed defendant had the credit card in his wallet because they planned on meeting with Mr. Eickhoff to return it. RP 688.

In rebuttal, the State called Brian Eickhoff. RP 758. Mr. Eickhoff testified that he did not know defendant, Ms. Schock, or Carrie Todd. RP 759. Mr. Eickhoff also testified that his identification had been stolen along with his car in 2005. RP 759-62.

C. ARGUMENT.

1. AS DEFENDANT FAILED TO MOVE TO SUPPRESS EVIDENCE BASED ON THE LAWFULNESS OF HIS ARREST BELOW, HE HAS WAIVED REVIEW OF THAT ISSUE.

Arguments not raised in the trial court are generally not considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). RAP 2.5(a) permits a party to raise for the first time on appeal a “manifest error affecting a constitutional right.” This exception to the general rule does not automatically mandate review whenever a criminal defendant identifies some constitutional issue not raised below. *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). An appellant must show actual prejudice in order to establish that the error is “manifest.” *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992); *State v. Contreras*, 92 Wn. App. 307, 311, 966 P.2d 915 (1998). “It is not enough that the defendant allege prejudice actual prejudice must appear in the record.” *McFarland*, 127 Wn.2d at 333. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *Id.* A failure to move to suppress evidence, however, constitutes a waiver of the right to have it excluded, and the trial court does not err in considering evidence that the defendant has not moved to suppress. *State v. Mierz*, 72 Wn. App. 783, 789, 866 P.2d 65 (1994).

Here, defendant did not challenge the lawfulness of his arrest below. Because of defendant's failure to argue for suppression, the record is insufficient for defendant to show manifest error.⁷

While defendant claims that he was unlawfully arrested upon contact with the officers, there is evidence to suggest that defendant was not under arrest until after Officer Mettler discussed the fraudulent receipt with the store employees. Officer Mettler testified at the CrR 3.5 hearing that he handcuffed defendant and placed him in the patrol car because he did not want him "going anywhere." RP 58. At both the CrR 3.5 hearing and at trial, Officer Mettler specifically stated that he did not feel comfortable arresting defendant upon first contact because he thought the receipt looked legitimate. RP 54-55, 411-12. Officer Robison testified that, when Officer Mettler handcuffed defendant, Officer Mettler specifically told defendant that he was not under arrest at that point. RP 219, 254.

Officer Williams testified that he was speaking to defendant while Officer Mettler went into the store to speak to employees. RP 629. After talking to the employees, Officer Mettler came out, informed Officer Williams they had probable cause to arrest and arrested defendant. RP

⁷ While defendant did not properly preserve the issue, the State does stand ready to brief the merits of defendant's claim if so directed by this court.

629. Officer Williams searched defendant just before he transported defendant to the jail. RP 630.

The officers' testimony indicates that defendant was not under arrest until after Officer Mettler discussed the situation with the store employees. Since defendant did raise this issue below, the State did not introduce any evidence of defendant's warrants.

As defendant did not challenge his detainment and arrest below, the court was not asked to assess the point at which defendant was arrested nor to enter into any credibility determinations. The trial court was not even asked to consider whether the officers' initial detention exceeded the proper scope of a *Terry*⁸ stop. Without the appropriately preserved record, defendant fails to show that there was an error and that it was "manifest."

In addition, even if defendant's initial detainment was an unlawful arrest, none of the evidence seized flowed from that arrest. Defendant was not searched until just before he was transported to the jail. RP 629-30. There was a reference in the record that defendant had outstanding warrants, which the State agreed not to introduce unless there was a question raised as to the legality of defendant's arrest. RP 155.

Also, the officers had an independent basis for the warrant to search defendant's car. The warrant was based on items seen in open view of a person standing outside the car, looking in the windows. RP 60-61,

⁸ *Terry v. Ohio*, 392 U.S. 1 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

69. All evidence seized from the car was taken per the warrant. Even if defendant's arrest was unlawful, the evidence in the car did not flow from the arrest.

Without a properly preserved objection below, the trial court was not put on notice that a record needed to be made for appellate review. The record in this case is insufficient for this court to make a suppression determination on direct appeal. Because defendant did not raise the 3.6 challenge below, he cannot show that his claimed error is "manifest." He is precluded from raising the suppression issue for the first time on appeal.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR A REASONABLE FACT FINDER TO FIND DEFENDANT GUILTY OF IDENTITY THEFT AND UNLAWFUL POSSESSION OF FICTITIOUS IDENTIFICATION.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the

evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). When there is substantial evidence, and when the evidence is of such a character that reasonable minds may differ, it is the function and the province of the jury to weigh the evidence, determine the credibility of the witnesses, and decide disputed questions of fact. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d 114 (2006). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Evidence that supports the determination of a fact must be substantial. It must attain such character as would convince an

unprejudiced mind of the truth of the fact to which the evidence is directed. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The existence of a fact cannot rest on mere guess, speculation, or conjecture. *Id.* “[A] verdict does not rest on speculation or conjecture when founded upon reasonable inferences drawn from circumstantial facts.” *Douglas v. Freeman*, 117 Wn.2d 242, 254-55, 814 P.2d 1160 (1991).

- a. The State presented sufficient evidence to prove defendant was guilty of three counts of identity theft.

To convict defendant of the crime of identity theft in the second degree, the State had to prove each of the following elements beyond a reasonable doubt:

- 1) That on or about the 5th day of November, 2005, the defendant knowingly obtained possessed, used, or transferred a means of identification or financial information of another person (to wit: [victim’s name]), whether that person is living or dead; and
- 2) That the defendant did so with the intent to commit, or to aid or abet any crime; and
- 3) That the acts occurred in Pierce County, Washington.

CP 191-32 (Jury instruction no. 30, 33, 34); *see also* RCW 9.35.020(1).

The language of the identity theft statute is similar to that of the burglary statute. *See* RCW 9A.52.025(1). To prove burglary, the specific crime intended is not an element of burglary; rather, the State need prove only “the intent to commit any crime against a person or property inside the burglarized premises.” *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000

(1985) (emphasis added). The required intent of the identity theft statute is the intent to commit, aid, or abet any crime, and, therefore, proof of a specific crime is not an element of identity theft. The plain language of the identity theft statute does not require the State to prove what crime the defendant intended to commit, aid, or abet. Specific criminal intent may be inferred from the defendant's conduct where it is "plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, defendant was charged with three counts of identity theft for his possession of a driver's license and credit card belonging to Jean Dougherty, a credit card belonging to Lori Kelly, and a driver's license belonging to Hilary Leonard. CP 4-5, 187-90. As defendant had not actually used the items in a crime, circumstantial evidence was provided by the State to show defendant's intent to commit, aid, or abet any crime. The record contains sufficient facts for a reasonable fact finder to infer that defendant possessed of all four pieces of identification or financial information with the intent to commit a crime.

First, all of the items were found in a tote bag within defendant's car, together with a large number of items used for the forging of receipts and fictitious identification cards. RP 439, 441-43. Officers found additional items used to forge receipts in defendant's car and additional fictitious identification on defendant's person. RP 432, 434, 436, 440, 445. Defendant's entire car was essentially a "mobile receipt forging"

unit. *See* Appellant's brief at 31. Officers also found the Eickhoff credit card in defendant's wallet. RP 632. The photo on Mr. Eickhoff's credit card looked resembled defendant. RP 632. In addition, the receipt that defendant presented to Safeway showed a sophisticated operation, in that the receipt looked legitimate to someone unfamiliar with Safeway's business operations. *See* RP 383. The jury could reasonably infer that defendant's attempted fraud showed his intent to commit additional fraud with the stolen identifications and credit cards.

Second, Schock's testimony on behalf of defendant support a reasonable inference that defendant's intention was criminal. Schock testified that she and defendant purchased the truffle oil together for their friend Silves. RP 654. Yet defendant had told the officers he was returning it for his mother. RP 390, 395. Schock testified that defendant's altered identification was in Silves' belongings, and that she had given it back to defendant. RP 649-50. Defendant told the officers that his wallet had been stolen by some kids and he had only recently reacquired it. RP 630. Schock also testified that she and defendant knew Eickhoff through mutual friends and they were trying to return his credit card to him after a party. RP 687. Defendant told the officers that he did not know how Mr. Eickhoff's credit card got into his wallet. RP 632. Also, on rebuttal, Mr. Eickhoff appeared and testified that he did not know defendant, Schock, or Carrie Todd. RP 759. He stated that his credit card had been stolen from his vehicle. RP 763.

As credibility determinations are for the trier of fact, the jury was free to disbelieve Schock's testimony and consider that Schock was attempting to cover up defendant's criminal activities. Given Ms. Schock's patently false statements on the stand, it was not unreasonable for the jury to infer that defendant's intention with regard to the identifications and credit cards was unlawful.

Under the totality of these circumstances, and when the evidence is viewed in the light most favorable to the State, there was sufficient evidence to permit a rational trier of fact to find that defendant possessed identification and credit cards belonging to three other persons with the intent to commit some crime. Given the items found in defendant's car and on his person, the only possible inference is that defendant possessed the identification and credit cards with the intent to commit a crime. There was certainly evidence to infer that defendant intended to use the items in committing additional acts of fraud, or that defendant intended to trade the items for money or drugs.

With all reasonable inferences drawn in favor of the State, there was sufficient evidence presented at trial for the jury to reasonably infer that defendant possessed Hilary Leonard, Jean Dougherty, and Lori Kelly's identification and financial information with the intent to commit a crime.

- b. The State presented sufficient evidence to prove that defendant was guilty of unlawful possession of fictitious identification.

To convict defendant of the crime of unlawful possession of fictitious identification, the State had to prove each of the following elements:

- 1) That on or about the 5th day of November, 2005, the defendant possessed a personal identification card with a fictitious person's identification; and
- 2) That the defendant intended to use such identification to commit theft, forgery, or identity theft; and
- 3) That the acts occurred in the State of Washington.

CP 191-232 (Jury instruction no. 28); *see also* RCW 9A.56.320(4). The trier of fact may infer the intent to commit a crime "from all the facts and circumstances." *State v. White*, ___ Wn.2d ___, 207 P.3d 1278, 1281 (2009) (*quoting State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)).

Again, sufficient evidence was presented to the jury to support its finding that defendant was guilty of unlawful possession of fictitious identification. Defendant possessed not one, but three identifications that had been altered to the name of Cullen Wiok. One was on his person; two were with the stolen identifications and credit cards that were the basis of the identity theft charges. RP 441-42, 443, 630.

Defendant's own statements indicate a consciousness of guilt. He initially told Officer Williams he had no identification on him. RP 629. It was not until he was searched incident to arrest that Officer Williams

found, not only his valid identification, but also the altered identification. RP 630. Also, defendant suggested to the officer that “some kids” had made the alteration to the identification in his wallet. RP 630. This statement was completely undermined by the fact that he had two more that were similarly altered in his car.

Finally, as suggested in his brief, defendant possessed a “mobile receipt forging operation in his vehicle.” Appellant’s brief at 31. That defendant carried altered identification with the purpose of furthering his receipt forging operation was a completely reasonable inference based on the totality of the circumstances.

With all reasonable inferences drawn in favor of the State, there was sufficient evidence presented at trial for the jury to reasonably infer that defendant possessed three pieces of altered identification with the intent to commit theft or forgery.

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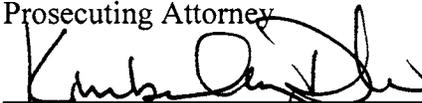
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DEPUTY

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions.

DATED: JULY 15, 2009

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Pierce County
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/15/09 
Date Signature