



TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR .....2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 3

D. STATEMENT OF THE CASE .....5

E. ARGUMENT ..... 10

    1. A CONVICTION FOR “LEADING ORGANIZED CRIME”  
    MAY NOT REST ON ACCOMPLICE LIABILITY..... 10

        a. The general accomplice liability statute does not apply  
        to the specific offense of “leading organized crime.” .. 10

        b. A person may not be convicted of “leading organized  
        crime” by aiding the “leader.” ..... 12

        c. The State’s impermissible extension of the accomplice  
        liability doctrine requires reversal of his convictions ... 15

    2. THE FAILURE TO INSTRUCT THE JURY THAT AN  
    ACCOMPLICE’S TESTIMONY MUST BE TREATED WITH  
    CAUTION DENIED HAYES A FAIR TRIAL AND CANNOT  
    BE A REASONABLE STRATEGIC DECISION BY HIS  
    ATTORNEY ..... 18

        a. Unsubstantiated testimony of a participant in a crime  
        must be treated with caution..... 18

        b. There was no reasonable strategic purpose to ignore  
        this critical jury instruction.....20

        c. The absence of this critical jury instruction decidedly  
        and unquestionably prejudiced Hayes.....25

3. THE STATE'S INSISTENCE ON CHARGING MULTIPLE ALTERNATIVE MEANS THAT WERE NOT PROVEN UNDERMINED HAYES'S RIGHT TO A UNANIMOUS TRIAL BY JURY .....	26
a. There must be substantial evidence supporting each alternative means of committing a charged offense ...	26
b. The State did not prove every alternative means of committing "leading organized crime" listed in the "to convict" instructions .....	29
c. There was no evidence supporting the alternative means for possession of a stolen vehicle .....	32
d. The State did not prove the alternative means required for possession of stolen property.....	36
e. The remedy for a verdict based on unproven alternative means is reversal .....	37
4. THERE WAS NO EVIDENCE THAT HAYES POSSESSED PROPERTY BELONGING TO JEFFREY CALL AS CHARGED IN COUNTS 9 AND 10.....	37
a. The State must prove the essential elements of a criminal offense .....	37
b. There was no evidence relating to Jeffrey Call, thus requiring reversal of counts 9 and 10 .....	38
5. THE AGGRAVATING FACTOR OF "MAJOR ECONOMIC CRIME" WAS NEITHER SUPPORTED BY SUBSTANTIAL EVIDENCE NOR PROPERLY BASED ON ACTS BY HAYES ALONE.....	39
a. Accomplice liability does not apply to sentencing enhancements unless explicitly statutorily authorized	39
b. The major economic crime aggravating factor must be premised on a single "current offense." .....	41

6. THE COURT CORRECTLY MERGED THE UNDERLYING  
OFFENSES BUT IGNORED THE REQUIREMENT THAT  
MERGED OFFENSES MUST BE STRICKEN .....43

F. CONCLUSION .....45

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995) .....	26
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006) .....	23
<u>State v. Cantu</u> , 156 Wn.2d 819, 132 P.3d 725 (2006) .....	37
<u>State v. Carothers</u> , 84 Wn.2d 256, 525 P.2d 731 (1974) .....	18
<u>State v. Delgado</u> , 148 Wn.2d 723, 63 P.3d 792 (2004) .....	13
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005) .....	43
<u>State v. Harris</u> , 102 Wn.2d 148, 685 P.2d 584 (1984) .....	18, 20, 22
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996) .....	20
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998) .....	27
<u>State v. Jacobs</u> , 154 Wn.2d 596, 115 P.3d 281 (2005) .....	42
<u>State v. Johnson</u> , 124 Wn.2d 57, 873 P.2d 514 (1994) .....	12
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988) .....	27
<u>State v. Kyllo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009) .....	21
<u>State v. League</u> , 167 Wn.2d 671, 223 P.3d 493 (2009) .....	43
<u>State v. Lillard</u> , 122 Wn.App. 422, 93 P.3d 969 (2004), <u>rev. denied</u> , 152 Wn.2d 1002 (2005) .....	27, 28, 32, 33
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2000) .....	10, 19, 40
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005) .....	34, 35
<u>State v. Roswell</u> , 165 Wn.2d 186, 196 P.3d 705 (2008) .....	39

<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	38
<u>State v. Smith</u> , 159 Wn.2d 778, 155 P.3d 873 (2007).....	27, 28
<u>State v. Wappenstein</u> , 67 Wash. 502, 121 P.2d 989 (1912).....	10
<u>State v. Williams-Walker</u> , __ Wn.2d __, 2010 WL 118211 (2010)...	27
<u>State v. Williams-Walker</u> , 167 Wn.2d 887, 225 P.3d 913 (2010)..	27
<u>State v. Womac</u> , 160 Wn.2d 643,160 P.3d 40 (2007) .....	43, 44

**Washington Court of Appeals Decisions**

<u>In re Hubert</u> , 138 Wn.App. 924, 158 P.3d 1282 (2007).....	22, 25
<u>In re Pers. Restraint of Hubert</u> , 138 Wn.App. 924, 158 P.3d 1282 (2007) .....	25
<u>State v. Jackson</u> , 137 Wn.2d 712, 976 P.2d 1229 (1999).....	17
<u>State v. Kinchen</u> , 92 Wn.App. 442, 963 P.2d 928 (1998) .....	37
<u>State v. Montejano</u> , 147 Wn.App. 696, 196 P.3d 1083 (2008)	10, 11
<u>State v. Munson</u> , 120 Wn.App. 103, 83 P.3d 1057 (2004).....	29
<u>State v. Pineda-Pineda</u> , 154 Wn.App. 653, 226 P.3d 164 (2010)	40, 42
<u>State v. Rivas</u> , 97 Wn.App. 349, 984 P.2d 432 (1999).....	28, 33
<u>State v. Strohm</u> , 75 Wn.App. 301, 879 P.2d 962 (1994).....	29, 30

**United States Supreme Court Decisions**

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	37, 41
--	--------

<u>Burks v. United States</u> , 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) .....	39
<u>House v. Bell</u> , 547 U.S. 518, 126 S.Ct. 2064, 2086, 165 L.Ed.2d 1 (2006) .....	25
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	26, 37
<u>Lee v. Illinois</u> , 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) .....	19
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) .....	43
<u>Roe v. Flores-Ortega</u> , 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) .....	21
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	21, 25
<u>United States v. Cronin</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) .....	20
<u>Wiggins v. Smith</u> , 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) .....	21

### **United States Constitution**

Fifth Amendment .....	43
Fourteenth Amendent .....	26
Fourteenth Amendment .....	37
Sixth Amendment .....	20, 37

### **Washington Constitution**

Article I, section 3 .....	26, 37
Article I, section 9 .....	43
Article I, section 21 .....	26, 27
Article I, section 22 .....	20, 26, 27

**Statutes**

chapter 9A.82 RCW .....	13
RCW 9.94A.535 .....	41, 42
RCW 9A.08.020 .....	10, 39
RCW 9A.56.140 .....	28, 34, 36
RCW 9A.82.050 .....	13, 14
RCW 9A.82.060 .....	9, 12, 13, 14, 29
RCW 9A.82.080 .....	14
RCW 9A.84.010 .....	11

**Court Rules**

ER 804 .....	19
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**Other Authorities**

13A Washington Practice (2010) .....	10
<u>Webster's Third International Dictionary</u> , (1993) .....	34, 35
WPIC 6.05 .....	18, 23

A. SUMMARY OF ARGUMENT.

Relying largely on the claims of Benny Epstein, a man with an acknowledged history of committing fraud who testified under a grant of immunity and was hoping his testimony would lead to a more lenient sentence on his pending charges in federal court, the prosecution accused Larry Hayes of working with Epstein in committing the offense of leading organized crime and multiple related counts involving having credit card information belonging to other people. After numerous witnesses testified that it was Epstein, not Hayes, who led others in the commission of various offenses, the prosecution adopted a theory of accomplice liability.

The prosecution's accomplice liability theory created several fundamental flaws in the jury trial. First, the offense "leading organized crime," embraces the culpability of the leader, not an accomplice to the leader. Similarly, the aggravating factor of major economic crime may not be predicated on accomplice liability. Furthermore, for no conceivable strategic reason, Hayes's lawyer never asked for a mandatory instruction that would tell the jury that testimony given by a participant in a crime must be viewed with great caution, even though Epstein's sheer lack of credibility was the central theory of defense. Due to the undeniable taint of

evidence attacking Hayes's character and propensity based on the legally unavailable theory of accomplice liability, as well as the lack of evidence of certain charged offenses and the lack of evidence of multiple alternative means, Hayes is entitled to a new trial.

B. ASSIGNMENTS OF ERROR.

1. The offense of leading organized crime cannot be predicated on accomplice liability.

2. Defense's counsel's inexplicable failure to ask for a mandatory jury instruction on the great caution with which the jury should view the testimony of an admitted participant in the criminal acts denied him effective assistance of counsel.

3. The court instructed the jury on multiple alternative means for the charges of leading organized crime, possession of a stolen vehicle, and possession of stolen property that were not supported by the evidence and denied Hayes his right to trial by unanimous jury.

4. The State did not introduce any evidence supporting counts 9 and 10.

5. The aggravating factor necessary for enhanced punishment was neither legally nor factually supported by the evidence.

6. The imposition of multiple convictions for merged offenses violated the state and federal constitutional prohibition of double jeopardy.

7. The introduction of uncharged offenses under the theory of accomplice liability tainted the fairness of the trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The general statute governing accomplice liability is superceded when a specific offense dictates the liability of a group of actors who participate in an offense. Leading organized crime requires a group of actors who work together, but the offense punishes only the leader of the group. When the legislature defines an offense to preclude prosecution of those who simply aid the principal, did the prosecution impermissibly alter its theory to obtain a verdict based on an unavailable theory of complicity?

2. If requested, a trial court must instruct the jury that when a participant in a crime testifies for the prosecution, the jury should treat that testimony with great caution. The trial court's failure to give such an instruction is reversible error. Where there was no possible strategic benefit to forgoing this mandatory instruction and the State's case rested largely on the uncorroborated accusations of a participant in multiple offenses, did the defense

attorney's neglect of his duty to seek this necessary jury instruction deny Hayes his right to meaningful assistance of counsel?

3. When the court tells the jury that an offense may be committed by alternative means and some of the alternatives are not supported by substantial evidence, the defendant has been denied his rights to a unanimous jury verdict and due process of law. Here, the court told the jury that leading organized crime and possession of stolen property could be committed by alternative means but the evidence did not support each alternative. When there is insufficient evidence for each alternative means presented to the jury is a new trial required?

4. Sufficient evidence to prove a charged crime requires at least some evidence that the accused person committed the offense against the complaining witness. Where there was no evidence about an offense that Hayes committed involving Jeffrey Call, did the State fail to prove the allegations in counts 9 and 10?

5. An aggravating factor allows the State to seek additional punishment but it does not alter the definition of the underlying offense. The aggravating factor of "major economic crime" does not authorize an exceptional sentence based on accomplice liability. When the State predicates its exceptional sentence on a

theory of accomplice liability that is not allowed by statute, has the State failed to prove a viable basis for an exceptional sentence?

6. The state and federal constitutions prohibit placing a person twice in jeopardy for the same offense. Here, the court agreed that Hayes's convictions merged into the leading organized crime offense but the court neglected to vacate any of the convictions. Did the court fail to vacate the underlying convictions despite its finding that multiple punishments violate double jeopardy?

D. STATEMENT OF THE CASE.

In August of 2007, Idaho police caught Benny Epstein with flat screen televisions stolen from a hotel, and upon his arrest, found he had credit card receipts listing other peoples' credit card account numbers, along with four identifications in other peoples' names and tools to make fake identifications. 7RP 97, 102; 8RP 48.<sup>1</sup> The Idaho police also discovered that Epstein had rented two motorcycles in Idaho that had not been returned. 4RP 41.

Epstein told the police that stealing the televisions was his friend Tyreese Williams' idea and the motorcycle thefts, false

identifications, and credit card information came from Larry Hayes. 7RP 40. Epstein pled guilty in federal court to identity theft and credit card fraud. 7RP 27; 8RP 8.<sup>2</sup> In an effort to reduce the length of his federal sentence as well as escape prosecution in Washington, he testified against Larry Hayes under a grant of immunity. 7RP 28.

Epstein had no personal knowledge of Hayes giving other people false identifications or credit cards in exchange for buying items for Hayes. 7RP 50-51. Epstein named people who he thought served as “shoppers” for Hayes, but some of those people testified at trial and denied any involvement in such a scheme. 7RP 93; 9RP 53; 10RP 142-43; 11RP 116-18. The only purported “shopper” who testified for the prosecution was Hayes’ former girlfriend Dawn Flemming, who denied being any part of a scheme for Hayes. 9RP 53. Several other people Epstein implicated refuted Epstein’s claims and described Epstein as a violent thief who would never work for Hayes or anyone else, because he

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<sup>1</sup> The verbatim report of proceedings will be referred to by the volume designated on the cover page of the trial transcripts. Additional transcripts that do not have a volume designated on the cover page will be referred to by the date of the proceeding.

<sup>2</sup> The substance of Epstein’s federal charges was not discussed in court, but they seem to rest on allegations unrelated to Hayes. 8RP 75-76.

always controlled his criminal actions. 10RP 39, 110-12, 132;  
11RP 41, 95, 101, 116.

Pierce County police officers searched Hayes's home on September 12, 2007, including the computers found inside the house. 3RP 46; 4RP 100. They found evidence of false Washington licenses on his computer. 5RP 138; 6RP 60-67. They also seized a silver briefcase that contained over 800 credit card receipts from Great Clips, a hair salon. 3RP 72, 78. These receipts had been stolen from a storage unit. 3RP 90, 93.

Contradicting Epstein's claim that the briefcase belonged to Hayes, a number of witnesses testified that Epstein always carried a briefcase with him and the silver briefcase looked like one Epstein had. 10RP 108, 125, 142; 11RP 38, 92, 121. Several people also testified that when the police were preparing to search Hayes's home, Epstein created a "bomb" made of fireworks and said he wanted to bomb Hayes's home so the police would not get "his briefcase." 10RP 125, 147; 11RP 93-94.

The Great Clips credit card receipts had been taken from a storage unit located in the same facility, and next door, to a storage unit Epstein rented. 3RP 90; 10RP 97-100. While Epstein accused Hayes of being the person who burglarized the

neighboring storage unit, other people testified that Epstein had bragged of stealing from other storage units. 10RP 50, 130; 11 RP 39, 98. Also, Epstein was found in possession of several Great Clips receipts when he was arrested in Idaho. 10RP 27.

The prosecution charged Hayes with one count of leading organized crime, six counts of identity theft for having the financial information from credit cards issued to other people, and six counts of possession of stolen property for having the “access device” information, meaning credit card accounts, for the same people. CP 15-24. Only two people, Scott Mutter and Vanessa Cable, claimed their credit card information had been used without permission; other complainants had simply been notified that their information was in the possession of other people. See e.g., 3RP 15; 4RP 5; 5RP 19-20; 10RP 7. The prosecution also charged Hayes with two counts of possession of a stolen vehicle for two cars, a maroon Chevy Tahoe and a white Hummer that had been rented in Oregon with false credit card information and were seen parked in Hayes’s driveway. 3RP 21; CP 16; COA 39920-2-II, CP

1.<sup>3</sup> Several witnesses said they saw Epstein driving both cars.  
10RP 108, 128, 143.

At the close of the testimony, after hearing from a number of defense witnesses who implicated Epstein as the leader of others who committed various offenses, the prosecution modified its theory to claim Hayes was liable as an accomplice. 10RP 111, 132; 11RP 41, 114, 116; 12RP 8. Over defense objection, it added accomplice liability language to the jury instructions, including the leading organized crime allegation. 12RP 17. The State also submitted an aggravating factor of “major economic crime” to the jury. CP 101-02.

Hayes was convicted of all charged offenses, except for one count of possession of a controlled substance. The court merged the predicate offenses into leading organized crime at sentencing, finding that those offenses constituted the underlying criminal profiteering required to commit leading organized crime under RCW 9A.82.060(1)(a). 9/11/09RP 26-27. The court imposed an exceptional sentence of 180 months. Id. at 27. Hayes timely appeals. Pertinent facts are addressed in further detail below.

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<sup>3</sup> The charge underlying COA 39920-2-II involves one count of possession of a stolen vehicle. It was consolidated at trial with the charges underlying COA 39780-3-II.

E. ARGUMENT.

1. A CONVICTION FOR “LEADING ORGANIZED CRIME” MAY NOT REST ON ACCOMPLICE LIABILITY

a. The general accomplice liability statute does not apply to the specific offense of “leading organized crime.” Under RCW 9A.08.020, a person may be convicted as an accomplice to a crime by knowingly aiding or assisting another in the commission of that crime. State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000).

While the general law defining accomplice liability applies to many offenses, it does not govern the legal complicity required for all offenses. State v. Montejano, 147 Wn.App. 696, 196 P.3d 1083 (2008). It has long been the case that the complicity statute is “general in its terms and manifestly intended to meet cases not otherwise specifically provided for by statute.” State v. Wappenstein, 67 Wash. 502, 530, 121 P.2d 989 (1912); Montejano, 147 Wn.App. at 703; 13A Washington Practice, § 104, Complicity (2010) (“If, however, the statute defining a crime specifically addresses the culpability of an accomplice, the general accomplice statute cannot be applied to that crime.”).

In Montejano, this Court determined that a conviction for felony rioting may not be based on the general accomplice liability statute. 147 Wn.App. at 696. The rioting statute already takes into account that there will be more than one participant, because an essential element of rioting is that a person is “acting with three or more other persons.” Id., citing RCW 9A.84.010. Misdemeanor rioting becomes a felony when “the actor” is personally armed with a deadly weapon. Id. The State alleged that the defendant in Montejano committed felony rioting by participating in the group and being an accomplice to another person’s possession of a deadly weapon.

The Montejano Court rejected this application of the general accomplice liability statute to felony rioting because the statute itself directs the liability of group actors so the general accomplice liability statute does not control. Additionally, the statute requires that the “actor” who possesses the weapon must be the accused person, and not someone who was simply part of the underlying riot. Similar analysis applies to the offense of leading organized crime.

b. A person may not be convicted of “leading organized crime” by aiding the “leader.” Under RCW 9A.82.060(1)(a),<sup>4</sup> a person commits the offense of leading organized crime by leading at least three other people in a pattern of at least three criminal profiteering offenses. CP 23-24.

The purpose of this statute is to punish the leader of the criminal acts and its reach does not extend to the people participate in underlying offenses. State v. Johnson, 124 Wn.2d 57, 71, 873 P.2d 514 (1994). The Johnson Court held, “[i]t is clear that the statute [RCW 9A.82.060(1)(a)] is intended to apply to persons who ‘lead’ organized crime rather than to all persons in a group who commit crimes.” Id. at 71.

The court in Johnson relied on the legislature’s unambiguous “specification” that leading organized crime is intended for the leader and not the participants who are involved in this group offense. Id. “The requirements of [RCW 9A.82.060](1)(a) must apply to the accused person in order for that offense to be properly charged.” Id. In Johnson, the Supreme

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<sup>4</sup> RCW 9A.82.060 provides, in pertinent part:  
(1) A person commits the offense of leading organized crime by:  
(a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity.

Court rejected as “specious” the claim that the prosecution could have charged a defendant with leading organized crime where his offenses served the criminal goals of his gang, but he was a member of the gang and not the leader. Id. Simply put, the statute does not apply to members in a group organized for the purpose of criminal activity, unless they lead the group.

In addition to the unambiguous legislative specification that the statute applies to the conduct of the leader of the organization and not other participants in the underlying criminal acts, the legislature’s intent to punish the leader of the organization under RCW 9A.82.060(1)(a) is underscored by principles of statutory construction. When the legislature uses different words in the same statutory provisions, the court presumes the legislature intended those words to have different meanings. State v. Delgado, 148 Wn.2d 723, 728, 63 P.3d 792 (2004).

In chapter 9A.82 RCW, the Criminal Profiteering Act, the legislature expressly addressed liability of complicit actors in several statutes. For example, trafficking in stolen property in the first degree embraces both the leader and participant. RCW 9A.82.050(1). Trafficking in stolen property in the first degree

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extends liability to both (1) “[a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others,” and (2) a person “who knowingly traffics in stolen property.” Id. Accordingly, trafficking in stolen property specifically extends liability to a person who participates in the unlawful acts as well as the leader. Leading organized crime speaks to the culpability of the leader and not a person who knowingly participates. Compare RCW 9A.82.050(1) with RCW 9A.82.060(1)(a).

As another example in the same chapter of the criminal code, RCW 9A.82.080 defines the elements of “unlawful use of criminal profiteering.” This offense makes it unlawful for a person to “knowingly use profits from criminal profiteering to acquire or maintain any interest in real property” or another enterprise. RCW 9A.82.080(1), (2). The statute explicitly extends liability to a person who knowingly “conspire[s] or attempt to violate subsection (1) or (2) of this section.” RCW 9A.82.080(3). The statute expressly addresses the requirements of complicity under attempt and conspiracy rules for this offense. On the other hand, leading organized crime does not extend criminal liability to people who are not the leaders of the organization. RCW 9A.82.060(1)(a).

Hayes objected to the State's request to alter its theory of prosecution to include accomplice liability. 12RP 8-10, 13-14. He explained that accomplice liability did not extend to the leading organized crime charge. 12RP 13-14. The court was "troubled" by how an accomplice could manage an organization as required for the offense, but after considering the State's request, the court overruled the defense objection without explaining its reasoning. 12RP 12, 17. The court instructed the jury that it could convict Hayes of leading organized crime if he was an accomplice to the leader of the organization. CP 97 (Instruction 41).<sup>5</sup> In its closing argument, the State told the jury there were two "alternative theories" it could use to convict Hayes. If they did not believe Hayes planned the criminal offenses, "you still have the accomplice liability instruction in number 11." 6/23/09p.m.RP 52-53.

c. The State's impermissible extension of the accomplice liability doctrine requires reversal of his convictions.

The State did not initially allege Hayes was an accomplice in any of the charged offenses. 12RP 8. But after numerous witnesses testified that Benny Epstein would never work for anyone and it

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<sup>5</sup> The to-convict instruction for leading organized crime permitted the jury to convict Hayes if "the defendant, or an accomplice, intentionally organized, managed, directed, supervised or financed three or more persons in the

was Epstein who led others in committing criminal acts, the State shifted its theory of the case to embrace Hayes as an accomplice to Epstein. 12RP 10; 6/23/09a.m.RP 37-39, 52-53; 6/23/09p.m.RP 54-55.

In its closing argument, the State largely abandoned the possibility that Hayes was the principal actor while not outright conceding the point. The prosecution did not and could not point to any persuasive evidence that Hayes was the leader of at least three people who committed a pattern of identity thefts under Hayes's control. 6/23/09p.m.RP 54-55. There was simply no testimony, other than some vague and dubious allegations by Epstein, that Hayes managed, supervised, or directed other people to commit identity theft as their leader. In light of Epstein's significant credibility problems and his own criminal propensity, the State was left arguing that Hayes at least shared access to the briefcase containing receipts, Hayes made false identifications, and Hayes was a participant in a group of people who committed identity theft. Leading organized crime may not be based on accomplice liability and this accusation must be dismissed.

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commission of the crime of Identity Theft." CP 97.

The accomplice liability instruction relieved the State of their burden to prove Hayes was the principal, leading actor directing the organization in criminal profiteering. The prosecution urged the jury to convict Hayes as an accomplice. Accordingly, the error is presumptively prejudicial and reversal is required. State v. Jackson, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999).

Furthermore, the unavailable theory of accomplice liability tainted every charged offense. Despite repeated defense objections, the court admitted a host of evidence implicating Hayes in uncharged offenses, many of which occurred out-of-state, under the theory that it corroborated Epsteins' testimony or could be used to infer Hayes committed the leading organized crime offense. See e.g., 5RP 150-51; 7RP 9, 64; 9RP 10-11. Because the State used the leading organized crime charge as a platform for presenting a host of accusations of Hayes's involvement in uncharged offenses, and this information was admitted without any limitation on its use, the remaining convictions were undeniably tainted by the improperly presented theory of accomplice liability.

2. THE FAILURE TO INSTRUCT THE JURY THAT AN ACCOMPLICE'S TESTIMONY MUST BE TREATED WITH CAUTION DENIED HAYES A FAIR TRIAL AND CANNOT BE A REASONABLE STRATEGIC DECISION BY HIS ATTORNEY

a. Unsubstantiated testimony of a participant in a crime must be treated with caution. Whenever the prosecution introduces testimony of an accomplice, the court should expressly warn the jury against relying on the statements of a self-interested party that are not substantially corroborated. State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), overruled on other grounds, State v. Brown, 111 Wn.2d 124 (1988); see State v. Carothers, 84 Wn.2d 256, 269, 525 P.2d 731 (1974) ("Far from being superfluous or objectionable, a cautionary instruction is mandatory if the prosecution relies upon the testimony of an accomplice."). The cautionary instruction tells that jury:

The testimony of an accomplice, given on behalf of the [State], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

WPIC 6.05.

The court's failure to give this cautionary instruction, if requested, requires reversal when the prosecution relies on accomplice testimony that is not substantially corroborated by documentary or circumstantial evidence. Harris, 102 Wn.2d at 153-54. The extent to which the accomplice's testimony is otherwise corroborated dictates the prejudice that attaches to the court's failure to provide the jury with this explicit instruction. Id.

Criminal law has long-recognized the inherent unreliability of statements from a person also implicated in the underlying criminal acts. Under ER 804(b)(3), "self-serving" statements of an alleged accomplice "are assumed to be false and unreliable." Roberts, 142 Wn.2d at 496; see also Lee v. Illinois, 476 U.S. 530, 545, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) ("As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability"). The explicit instruction cautioning the jury against relying on the testimony of a person who implicates the defendant when he or she is also accused of the same crimes recognizes the suspect nature of this testimony, and it notifies the jury that the law treats such testimony as presumptively unreliable.

In Harris, the Court explained that the “failure to give this [cautionary] instruction is always reversible error when the prosecution relies *solely* on accomplice testimony.” 102 Wn.2d at 155 (emphasis in original). If the accomplice testimony is corroborated by independent evidence, whether reversal is required for failing to give the mandatory cautionary instruction “depends upon the extent of corroboration.” Id. It is only when the accomplice testimony “was substantially corroborated by testimonial, documentary or circumstantial evidence,” that the trial court does not commit reversible error by failing to give the instruction. Id.

b. There was no reasonable strategic purpose to ignore this critical jury instruction. Any person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6,<sup>6</sup> Wash. Const. art. 1, § 22.<sup>7</sup> To prevail in a claim of ineffective assistance of counsel, a defendant

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<sup>6</sup> The Sixth Amendment provides in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense.”

must show, “First, [that] counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). A decision is not tactical or strategic if it is not reasonable. Id.; see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,” quoting Strickland, 466 U.S. at 688).

An attorney’s performance necessarily falls below the standard of reasonable conduct when she has not carried out her duty to research the relevant law and propose accurate jury instructions. State v. Kyлло, 166 Wn.2d 856, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-91). In Kyлло, the defense attorney proposed a jury instruction that several published

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<sup>7</sup> Art. I, § 22 provides in part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . . [and] to have a speedy public trial by an impartial jury . . . .”

decisions had discredited as an erroneous statement of the law. Id. at 866-67. The Court held that the attorney's error could not be reasonable or professionally competent when counsel should have discovered relevant case law explaining that this instruction should not be used. Id. at 868.

Likewise, the failure to request an available jury instruction regarding a theory of defense may constitute unreasonable attorney performance. In re Hubert, 138 Wn.App. 924, 929, 158 P.3d 1282 (2007) ("Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel."). In Hubert, the defense attorney was not familiar with a pertinent statutory defense, even though the statutory defenses were clearly listed in the criminal code and referenced in the pattern jury instructions. Id. at 930. The Court held that this ignorance of the law was "plainly deficient performance." Id.

Similarly, it is well-established that the prosecution's case should not rest solely on the uncorroborated statement of an accomplice. The court must caution the jury against relying on such testimony when the defense requests an instruction. Harris, 102 Wn.2d at 155.

Apparently unaware of WPIC 6.05, Hayes's attorney did not request this instruction, even though he understood that the State's case hinged on the testimony of an unreliable participant in criminal activity. He phrased his objections to the State's reliance on statements of self-interested participants as "corpus issues," claiming there was insufficient evidence other than the testimony of purported accomplices to prove the crimes charged. 7RP 61-62, 66. Hayes's attorney misapprehended or confused the meaning of corpus delicti. The corpus delicti rule requires proof, independent of the defendant's own statements, that the charged crime was committed. State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006). Hayes had not given incriminating statements to the police that could have constituted the corpus of a charged offenses. Instead, the question was whether the purported "accomplices" Epstein and Flemming were credibly claiming Hayes was involved in the charged offenses.

Notwithstanding Hayes's attorney's ignorance of the rule regarding the unreliability of testimony given by a claimed accomplice, he argued to the jury that Epstein was "trying to save himself" after he was caught with stolen goods in Idaho. 6/23/09a.m.RP 73. Epstein received this "wonderful immunity" and

blamed Hayes for his troubles. Id. at 73-74. Epstein's testimony was critical to the prosecution, because he was the only witness who claimed that Hayes led the "three or more people" required to prove leading organized crime. 6/23/09p.m.RP 4.

Epstein gave this testimony for the prosecution because "Benny Epstein was in a pickle. He got caught in Idaho. He got caught in Oregon. He got caught in Washington." 6/23/09p.m.RP 5. And he committed many serious crimes. Id. Yet the information he supplied the authorities as part of his effort to reduce his criminal exposure falls apart upon closer scrutiny.

No one corroborated Epstein's story. The briefcase holding the receipts, upon which the prosecution rested its case, was repeatedly identified as Epstein's briefcase. See e.g., 10RP 108, 125; 11RP38, 92, 121. It was Epstein who many witnesses said always carried a briefcase, not Hayes, and Epstein who often drove nice new cars. 10RP 108; 11RP 10, 102. The rental unit from which the stolen credit card receipts were taken was next to Epstein's unit and Epstein had admitted to stealing from the rental units. 10RP 15-16, 27, 50.

Epstein's allegations against Hayes were not substantially corroborated, and this lack of corroboration was the theory of

defense. The defense attorney's ignorance of the cautionary instruction requirement and the court's obligation to have given it if requested constitutes deficient performance.

c. The absence of this critical jury instruction decidedly and unquestionably prejudiced Hayes. An attorney's deficient performance requires reversal when there is a reasonable probability that the outcome could have been different without the error. Strickland, 466 U.S. at 694; Hubert, 138 Wn.App. at 932 (reversing for ineffective assistance where court's instructions did not make available defense "inevitabl[y]" apparent). A defendant is not required to prove that he would not have been convicted but for the error. See e.g., House v. Bell, 547 U.S. 518, 552-53, 126 S.Ct. 2064, 2086, 165 L.Ed.2d 1 (2006) (reversing for ineffective assistance based on new evidence where, even though jury might disregard new evidence, it "would likely reinforce doubts" as to defendant's guilt).

The prosecution's case against Hayes rested upon Epstein and Flemming's testimony, for which both had been given unqualified immunity. 7RP 97; 9RP 18, 54. Both witnesses had convictions for fraudulent activity based on conduct unrelated to Hayes. 9RP 54. Their testimony, particularly Epstein's, was

contradicted by other witnesses. Even with his grant of immunity, Epstein invoked his Fifth Amendment right to avoid self-incrimination more than 25 times, demonstrating the extent of his own criminal liability and his fear of prosecution for many other incidents. 7RP 117-23, 130-47.

Epstein's testimony was the critical link in the case against Hayes, and Flemming's testimony cemented those allegations. Had the jury been properly instructed by the court that the law warns the jury against relying on such uncorroborated testimony, the outcome of the case would have been different.

3. THE STATE'S INSISTENCE ON CHARGING MULTIPLE ALTERNATIVE MEANS THAT WERE NOT PROVEN UNDERMINED HAYES'S RIGHT TO A UNANIMOUS TRIAL BY JURY.

a. There must be substantial evidence supporting each alternative means of committing a charged offense. Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amend. 14; Wash. Const. Art. I, sections 3, 21, 22. In Washington, the state constitutional right to a trial by jury "provides

greater protection for jury trials than the federal constitution.” State v. Williams-Walker, 167 Wn.2d 887, 695-96, 225 P.3d 913 (2010); Wash. Const. art. I, §§ 21, 22.

In a criminal case, the jury must unanimously find the prosecution proved every necessary element of the crime charged. Williams-Walker, 167 Wn.2d at 698; State v. Smith, 159 Wn.2d 778, 783, 155 P.3d 873 (2007). When one element may be established by alternative means, the requirement of unanimity is satisfied so long as substantial evidence supports each alternative means. Smith, 159 Wn.2d at 783; State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). An allegation included in the “to convict” instruction becomes the law of the case and must be proved by the State beyond a reasonable doubt like any other element. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998); State v. Lillard, 122 Wn.App. 422, 434-35, 93 P.3d 969 (2004), rev. denied, 152 Wn.2d 1002 (2005).

If one of the alternative means presented to the jury is not supported by substantial evidence, the verdict must be vacated unless the reviewing court finds that the verdict must have been based on one alternative that was supported by substantial evidence. State v. Rivas, 97 Wn.App. 349, 351-52, 984 P.2d 432

(1999), disapproved on other grounds, Smith, 159 Wn.2d at 787.

When there is only a general verdict, the reviewing court presumes the error requires reversal. Id. at 353.

In Lillard, the “to convict” instruction listed all statutory means of committing possession of stolen property. 122 Wn.App. at 434; RCW 9A.56.140(1).<sup>8</sup> Since the “to convict” instruction listed the alternative definitions of possession as alternative means by which the offense could be proven, the court ruled that there must be sufficient evidence to support each alternative, unless the verdict was undisputedly based “on only one alternative means” and substantial evidence supported that means. Id. at 435. The Lillard Court noted that while the pattern jury instruction for possession of stolen property lists the various alternatives of possession in brackets, it is “better practice to use only the alternative means actually at issue.” Id. at 435. Similarly to Lillard, the State charged Hayes with several offenses that may be committed by alternative means and the court instructed the jury that the verdicts could rest on numerous alternative means, yet the

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<sup>8</sup> RCW 9A.56.140(1) provides, “Possessing stolen property” means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

State did not prove each alternative means beyond a reasonable doubt.

b. The State did not prove every alternative means of committing “leading organized crime” listed in the “to convict” instructions. Leading organized crime contains alternative means by which the offense may be committed. State v. Munson, 120 Wn.App. 103, 107, 83 P.3d 1057 (2004); State v. Strohm, 75 Wn.App. 301, 305, 879 P.2d 962 (1994). Leading organized crime requires “[i]ntentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity.” RCW 9A.82.060(1)(a) (emphasis added). The to-convict instruction directed the jury to find that Hayes or an accomplice “intentionally organized, managed, directed, supervised, or financed” three or more persons in the commission of identity theft. CP 97 (Instruction 41).

In Strohm, the court parsed the meaning of each alternative to determine whether, in the absence of the special verdict stating the means underlying the conviction, there was substantial evidence supporting each alternative. 75 Wn.App. at 305-06. The court explained that to “supervise” requires directing and

overseeing with the power of direction. To “finance” requires the assurance of payment along with actual payment. Id. at 306. To “organize” means to arrange into coherent unity and unify into a functioning whole. Id.

The defendant in Strohm explicitly directed particular people to steal certain cars; told them where to steal the cars; how to steal them, what to do with them once stolen; monitored their performance; promised to and did pay for delivered stolen cars; and coordinated the participants in a unified whole. There was clear evidence that the defendant committed each alternative means of leading organized crime.

Unlike Strohm, the State did not establish that Hayes supervised particular individuals by directing and monitoring specific criminal acts. Epstein was the only witness who offered even vague testimony that Hayes would give people credit cards and tell them things he needed. Epstein’s testimony is suspect for many reasons, including the lack of corroborating evidence that Hayes received the array of stolen goods Epstein claimed and then

sold them as Epstein's testimony would require.<sup>9</sup> The single specific example Epstein gave, of a trip he took with Hayes to Idaho with the goal of renting motorcycles that Hayes would sell, was an event in which Hayes participated, and not one in which Hayes dictated and directed others in their commission of specific illegal acts.<sup>10</sup> Additionally, leading organized crime requires at least three incidents where Hayes supervised others in criminal profiteering, and at least one offense must have occurred in Washington, but there was no specific evidence of Hayes' supervision in three such instances.

There was no evidence Hayes "financed" the operation by paying anyone. Epstein contended that people were allowed to use the credit cards they received to buy what they wished as long as they also obtained what Hayes asked for, but no one was arrested or accused of possessing such items obtained at Hayes'

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<sup>9</sup> Some obvious reasons for questioning Epstein's account includes the fact that Epstein was arrested in Idaho while in possession of stolen goods and false credit card and identifications; Epstein had pled guilty in federal court and his pending federal sentencing would be impacted by how helpful he was in giving testimony against Hayes; and he admitted he was a long-term drug addict who acquaintances described as a bully and thug. 7RP 27, 29, 97, 102; 8RP 148; 10RP 48, 111, 137; 11RP 22, 40-41, 46, 95.

<sup>10</sup> Epstein claimed that "Justin" joined them in Idaho to help Hayes, but Justin Gilligan testified he never did any such thing. 7RP 76; 10RP 145. Epstein's close friend Tyreese Williams joined them in Idaho because Epstein insisted on bringing one of his "own" people. 7RP 76. Williams was arrested along with Epstein for stealing televisions in Idaho, an offense that Epstein conceded was not prompted by Hayes. 7RP 97; 8RP 39.

request. Epstein's allegations were not corroborated and were in fact contradicted by many witnesses. There was no evidence demonstrating that Hayes organized and coordinated a group of people into a functioning whole. There was no evidence that Hayes managed or directed people beyond Epstein's vague allegations.

The State did not prove beyond a reasonable doubt that Hayes committed each alternative means and the jury was not instructed to unanimously agree on any single alternative. Accordingly, the jury's verdict did not reflect the constitutionally required unanimity.

c. There was no evidence supporting the alternative means for possession of a stolen vehicle. Like the instructions at issue in Lillard, the court instructed the jury that to convict Hayes of possession of a stolen vehicle, the State must prove beyond a reasonable doubt that Hayes or an accomplice knowingly "received, retained, possessed, concealed, or disposed of" the two cars at issue. CP 76, 98. By virtue of this instruction, the prosecution was required to prove each alternative by substantial evidence or demonstrate the verdict rested only upon a single alternative. Lillard, 122 Wn.App. at 434-35.

No special verdict forms demonstrate the basis of the jury's verdict. See Nicholson, 119 Wn.App. at 860; Rivas, 97 Wn.App. at 301-02. Absent a special verdict form, the court must presume that the verdict could have rested on any of the alternatives. Nicholson, 119 Wn.App. at 860.

Moreover, the instructions repeatedly advised the jury of the various means of possessing stolen property, thus emphasizing all of the alternatives. CP 72, 76, 98. The charging document specifically included each alternative means of committing the offense. CP 16. The "to convict" instructions for the two counts of possession of stolen property listed the various statutory means of possessing such property. CP 72, 76, 98. Finally, the prosecution did not unambiguously elect and declare to the jury that its verdict must rest upon only a single specific alternative. Consequently, the convictions can only stand if each alternative is supported by substantial evidence. Lillard, 122 Wn.App. at 434.

Neither of the counts of possession of stolen vehicle rested upon evidence of each alternative means. There was evidence which could conceivably show his possession or retention of the cars, because the two cars were at least temporarily parked in Hayes's driveway and Hayes drove one of them, even though

witnesses saw Epstein driving the cars. 3RP 21 (cars parked in Hayes' driveway); 3RP 38-40 (Hayes arrested driving white Hummer); 10RP 143 (Epstein driving white Hummer). There was no evidence Hayes concealed or disposed of either car.

While the statute does not define what it means to "conceal or dispose" of property, it must mean something different from merely possessing or retaining, as the Legislature does not include superfluous words in statutes. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) ("statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." (internal citations omitted)); RCW 9A.56.140(1) (listing means of possession of stolen property as, "to receive, retain, possess, conceal, or dispose of stolen property").

If to "conceal" is given its dictionary definition, "conceal" means:

to prevent disclosure or recognition of: avoid revelation of:  
refrain from revealing: withhold knowledge of: draw attention  
from: treat so as to be unnoticed . . . to place out of sight:  
withdraw from being observed . . . .

Webster's Third International Dictionary, 469 (1993). There was no evidence Hayes took special steps to hide the identity of the cars

so they would not be recognized. It is possible a juror could have found Hayes “concealed” the cars by not returning them to their owners, or keeping them in his driveway, which is a place that the owners would not know to look for them. But a word is not included in the statute for purposes of being superfluous, and thus “conceal” must be construed as meaning more than having property in one’s possession in a place where a person commonly keeps items in one’s possession. Roggenkamp, 153 Wn.2d at 624. To give “conceal” independent meaning, it must involve efforts to avoid disclosure that were not present here.

Additionally, there was plainly no evidence Hayes disposed of either item. To “dispose” means,

to transfer into new hands or to the control of someone else (as by selling or bargaining away): relinquish, bestow . . . to get rid of, throw away, discard.

Webster’s Dictionary, at 654. There was no evidence Hayes took any such step with the cars. He did not conceal or dispose of either car and could not be found to have committed possession of stolen property under either alternative. Because the jury did not issue a special verdict and some jurors could have rested their decision based upon an alternative that was not supported by substantial

evidence in the record, Hayes was denied his right to a unanimous jury verdict.

d. The State did not prove the alternative means required for possession of stolen property. The State charged Hayes with six counts of possession of stolen property in the second degree, pertaining to having an access device, and each count was governed by the jury instruction setting forth all alternative means by which a person may possess stolen property: receive, retain, possess, conceal, or dispose of stolen property. RCW 9A.56.140(1); CP 79 (Instruction 79); CP 81, 83, 85, 87, 89, 90 (to-convict instructions for possession of stolen property). Even if the jury could have found Hayes received, retained, or possessed the credit cards or receipts by virtue of their presence in the briefcase in his home, there was no evidence that he concealed or disposed of them. The police found the items in a silver briefcase. Even if Hayes received or retained them at some point, he did not dispose of them or actively conceal them by means other than simple possession. The State did not prove each means of possession of stolen property despite encouraging the jury to rest their verdict upon any of these means.

e. The remedy for a verdict based on unproven alternative means is reversal. A verdict issued based on more than one alternative means cannot stand when any alternative means is not supported by substantial evidence. State v. Kinchen, 92 Wn.App. 442, 452, 963 P.2d 928 (1998). Accordingly, Hayes' convictions for leading organized crime, possession of a stolen vehicle, and possession of stolen property in the second degree must be reversed and the case remanded for a new trial. Id.

4. THERE WAS NO EVIDENCE THAT HAYES POSSESSED PROPERTY BELONGING TO JEFFREY CALL AS CHARGED IN COUNTS 9 AND 10

a. The State must prove the essential elements of a criminal offense. The prosecution bears the burden of proving each element of a criminal charge beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In Re Winship, 397 U.S. 359, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006); U.S. Const. amends. 6, 14; Const. art. I, § 3. When the sufficiency of the evidence is challenged on appeal, the Court examines all of the evidence and decides whether any rational trier of fact could have found guilt beyond a reasonable

doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The evidence must be viewed in the light most favorable to the State, with all reasonable inferences construed against the accused. Id.

To convict Hayes of identity theft and possession of stolen property for information related to Jeffrey Call, the prosecution needed to establish sufficient connection between Hayes and Call's access device and means of identification. CP 86, 87.

b. There was no evidence relating to Jeffrey Call, thus requiring reversal of counts 9 and 10. Unlike the complainants for other counts of identity theft and possession of a stolen access device, Jeffrey Call did not testify at Hayes's trial. No one alleged that Hayes unlawfully possessed Call's means of identification or used his access device. The prosecution forecast in its opening statement that it was unsure whether Call would be available to attend the trial. 5/20/09RP(opening) 13. He did not appear and there was no evidence presented connecting Hayes to any offenses committed against Call.

Where evidence is insufficient to support a conviction, double jeopardy bars retrial for that offense, and the matter must be dismissed. Burks v. United States, 437 U.S. 1, 11, 98 S.Ct.

2141, 57 L.Ed.2d 1 (1978). Without evidence connecting Hayes to Call's property or his means of identification, there was insufficient evidence relating to offenses against Jeffrey Call as charged in counts 9 and 10. The lack of evidence requires reversal of the convictions and dismissal of the charges in counts 9 and 10.

5. THE AGGRAVATING FACTOR OF "MAJOR ECONOMIC CRIME" WAS NEITHER SUPPORTED BY SUBSTANTIAL EVIDENCE NOR PROPERLY BASED ON ACTS BY HAYES ALONE

a. Accomplice liability does not apply to sentencing enhancements unless explicitly statutorily authorized. Although an aggravating factor permitting an enhanced penalty must be charged and proven beyond a reasonable doubt, "it is decidedly not an element needed to convict the defendant of the charged crime." State v. Roswell, 165 Wn.2d 186, 195, 196 P.3d 705 (2008); see Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); U.S. Const. amends. 6, 14; Wash. Const. art. I, § 22. Exceptional sentence criteria are separate factors from the question of whether a person may be convicted of the underlying crime. Roswell, 165 Wn.2d at 195.

The accomplice liability statute, RCW 9A.08.020, "cannot be the basis to impose a sentencing enhancement on an accomplice."

State v. Pineda-Pineda, 154 Wn.App. 653, 661, 226 P.3d 164 (2010). The accomplice liability statute, RCW 9A.08.020, “does not contain a triggering device for penalty enhancement.” Id. Accordingly, “the authority to impose a sentencing enhancement on the basis of accomplice liability must come from the specific enhancement statute.” Id.

The court in Pineda-Pineda recognized that the legislature has made a policy choice to hold accomplices liable for another person’s conduct in certain statutes, such as for possession of a firearm. The firearm enhancement statute provides that additional prison sentences “shall be added to the standard range sentence . . . if the offender or an accomplice was armed with a firearm.” 154 Wn.App. at 663 n.4 (citing RCW 9.94A.533(3)). Similarly, the legislature specifically contemplates the possibility accomplice liability in the context of the death penalty by expressly authorizing a conviction for aggravated first degree murder when a person solicits another to commit the crime. Id. (citing Roberts, 142 Wn.2d at 502).

The authority to impose a sentencing enhancement must be derived from specific authorizing language in the enhancement itself. Roberts, 142 Wn.2d at 501-02. Major participation by the

accused is necessary for an aggravating factor to apply in the context of aggravated first degree murder. Roberts, 142 Wn.2d at 505. In the absence of special interrogatories, the court does not speculate as to the basis of the jury's verdict and presumes it may have rested on accomplice liability. Id. at 509.

b. The major economic crime aggravating factor must be premised on a single "current offense." RCW 9.94A.535(3) contains an "exclusive list" of aggravating factors that may serve as the basis of an exceptional sentence above the standard range. Under the Sixth Amendment, a court may only use facts expressly found by the jury and proven beyond a reasonable doubt as a basis to increase an offender's punishment. Apprendi v. New Jersey, 530 U.S. 466, 468-69, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The court imposed an exceptional sentence on Hayes premised on the jury's finding that "the current offense" constituted a "major economic crime," based either on the number of victims, number of incidents, high degree of sophistication, or occurrence over a lengthy period of time. CP 25, 102. The jury was not asked to provide further specificity as to the basis of its finding in the special verdict form. Similarly, the trial court did not note any

factual basis for finding Hayes himself caused a major economic crime. 9/11/09RP 27.

The statute authorizing exceptional sentences does not explicitly trigger accomplice liability. RCW 9.94A.535(3). Because the statute is silent on the applicability of accomplice liability, it does not contain the necessary “triggering device” needed to incorporate accomplice liability. Pineda-Pineda, 154 Wn.App. at 661. Also, a criminal statute must be construed in the defendant’s favor when ambiguous, and therefore accomplice liability is not an available predicate for the enhanced punishment. See State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

The jury’s verdict for each “current offense” finding against Hayes was premised on the availability of accomplice liability, because each “current offense” allegation rested on accomplice liability. There was no jury finding that Hayes himself engaged in actions constituting a major economic crime. There was little evidence of Hayes’ own involvement in any scheme that caused actual loss to a significant number of people. Because this aggravating factor may not rest on accomplice liability, it must be stricken and Hayes resentenced to a standard range term.

6. THE COURT CORRECTLY MERGED THE UNDERLYING OFFENSES BUT IGNORED THE REQUIREMENT THAT MERGED OFFENSES MUST BE STRICKEN

As the Supreme Court recently reaffirmed, when two offenses merge because they are the same offense for purposes of double jeopardy, simply imposing a sentence on one offense is an inadequate remedy. The proper remedy is to vacate the lesser conviction. State v. League, 167 Wn.2d 671, 223 P.3d 493 (2009).

While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005); North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); U.S. Const. amend. 5; Const. art. 1, § 9. “Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently.” State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

The court agreed that Hayes’ convictions for identity theft, possession of stolen property, and possession of a stolen vehicle

merged into his conviction for leading organized crime, based on the legislature's intent to treat them as a single offense. 9/11/09RP 26-27. The prosecution essentially conceded this point at Hayes' sentencing, agreeing that "all identity theft and stolen property counts" were underlying parts of the leading organized crime conviction, although it maintained that one count of possession of a stolen vehicle that was separately charged and consolidated could count separately. 9/11/09RP 7-8. The court treated the offenses as having merged and labeled them as "one offense" when calculating Hayes' offender score, but entered convictions for all underlying offenses. 9/11/09RP 26-27; CP 113-15.

In Womac, the Supreme Court rejected the prosecution's contention that when the court imposes only a single sentence, there is no double jeopardy violation. 160 Wn.2d at 656-57. The court explained, "[t]hat Womac received only one sentence is of no matter as he still suffers the punitive consequences of his convictions." Likewise, the court erroneously listed the underlying convictions on Hayes' judgment and sentence. The underlying, merged convictions should be stricken from the judgment and sentence so they have no remaining punitive consequences as

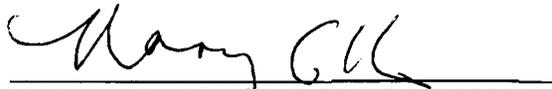
required by principles barring placing someone in double jeopardy for the same offense.

F. CONCLUSION.

For the reasons stated above, Larry Hayes respectfully asks this Court to reverse his convictions that are not supported by the evidence, are predicated on impermissible allegations of accomplice liability, are tainted by allegations of uncharged offenses, and deny him the right to a unanimous jury verdict. Alternatively, he asks this Court to reverse his sentence based on the insufficient evidence of the aggravating factor of major economic crime.

DATED this 30<sup>th</sup> day of June 2010.

Respectfully submitted,



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 39780-3-II
v.	)	
	)	
LARRY HAYES,	)	
	)	
APPELLANT.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR, DPA PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] LARRY HAYES 967228 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF JUNE, 2010.

X \_\_\_\_\_ 

FILED  
COURT OF APPEALS  
10 JUN -1 PM 12:13  
STATE PROSECUTOR  
BY \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
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