

COURT OF APPEALS
DIVISION II

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No. 39780-3-II

STATE OF WASHINGTON
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THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

LARRY HAYES,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE STATE'S CLAIM THAT HAYES WAS CONVICTED AS A "CO-LEADER" OF A CRIMINAL ENTERPRISE UNDER THE GENERAL ACCOMPLICE LIABILITY STATUTE IS ARGUMENT IS ILLOGICAL AND SPURIOUS

- a. Hayes clearly objected to the State's use of accomplice liability to convict him of leading organized crime. The prosecution spends several pages claiming Hayes did not object to the State's requested accomplice liability instruction. Response Brief, 16-18. Inexplicably, despite lengthy quotes from the in-court discussion of accomplice liability for leading organized crime, the prosecution's brief omits the portion of the record where Hayes raised his objection.

The trial judge said to Hayes's attorney, "Mr. Longacre, any objections to the instructions?" 12RP 7-8. Mr. Longacre replied, "I do, Your Honor. I do object to the use of accomplice liability." 12RP 8. Then, the judge adjourned to research accomplice liability. 12RP 16-17.

When the judge returned to the courtroom, he ruled, "As to the objection to the plaintiff's proposed supplemental instructions regarding accomplice liability, I'm going to overrule the defense's

objections and give to the instructions proposed by the State.”
12RP 17.¹ Before delivering the instructions, the court asked
Hayes’s attorney, “do you wish to make your formal objections to
the jury instructions?” 12RP 69. Defense counsel responded by
explaining, “I still have objection to No. 11,” the accomplice liability
instruction. 12RP 69. He said, it applied to the other charges but
does not apply to the “RICO charge,” which is shorthand the
attorney had used for leading organized crime throughout the trial.
12RP 69.

By adding accomplice liability, the prosecution was making a
person who participated in an underlying offense as guilty as the
leader of a large crime syndicate. 12RP 69-70. Longacre
explained that the State’s theory for leading organized crime had
been that Hayes “was the leader of organized crime.” 12RP 8.
The State was now positing a new theory of accomplice liability in a
last minute addition to its instructions. Id.

¹ The prosecutor’s initial set of proposed instructions did not mention
accomplice liability for any charged offense. A supplemental packet of
instructions inserted accomplice liability into each charged offense, other than the
controlled substance allegation, and added a definition of accomplice liability.
See CP 67. Copies of both sets of proposed instructions will be presented for
supplemental designation with this brief.

The judge questioned the prosecutor about how it could proceed on an accomplice liability theory for leading organized crime. 12RP 11. The judge said it the accomplice instruction “troubles me” for the leading organized crime charge. 12RP 12. The prosecution claimed that the jury could find “an organization that was being run by Benny” Epstein, and Hayes aided him. 12RP 13.

Hayes objected to the application of the general accomplice liability rules to the particular offense of leading organized crime. The court overruled, and plainly understood, Hayes’s objection to the State’s use of accomplice liability to obtain a conviction for leading organized crime. The prosecution’s claim on appeal that the trial court was never apprised of Hayes’s objection is frivolous and disingenuously distracts this Court from the legal issue presented.

b. The prosecution’s claim that it was only seeking to cover multiple co-leaders by using accomplice liability is belied by the instruction and argument presented to the jury. The prosecution agrees with the general proposition that some offenses are not intended to be subject to the broad complicity rules of the general accomplice liability statute. Response Brief, at 15. But it

claims that Hayes could have been a co-leader, along with another leader of the criminal scheme, which would allow for accomplice liability. Even if this theory of co-participant liability is correct, it is inapposite. It does not reflect how the prosecution or jury instructions defined accomplice liability to the jury.

The State did not ask the jury to find that an accomplice must be one of the “leaders.” Instead, it used the general accomplice liability instruction, expanding criminal liability to any knowing participant, no matter how minor that person’s role. CP 67(accomplice definition). The prosecution explained to the jury that it had “two alternative universes” available. RP 38. Either Hayes “was the individual who was in fact leading this enterprise,” or Epstein was “the leader.” RP 38. Because they had accomplice liability available, they did not need to “accept one or the other in order to convict.” RP 38. Further, the prosecution argued,

if Larry Hayes aided, abetted, or assisted Benjamin Epstein as an accomplice then you can return a verdict of guilty on any charge where you find that he has acted as an accomplice. And that includes the principal charge of leading organized crime.

RP 38.

The State did not tell the jury to find that Hayes was one of the leaders of the enterprise. It used accomplice liability to argue

that Hayes was guilty if he helped the criminal profiteering enterprise, led by someone else, in any minor role. CP 97. The jury did not need to find Hayes participated in the underlying acts or played any role beyond some encouragement. Id. The accomplice liability instruction presented by the court did not limit liability to the leader or leaders.

c. The leading organized crime statute precludes accomplice liability. The prosecution does not offer any statutory construction or source of legal authority regarding the intended scope of the leading organized crime statute. It only claims that Hayes has not presented authority showing that the statute “precludes” multiple leaders. Response Brief, at 20. Yet a “multiple leaders” scenario was not presented to the jury. The prosecution’s focus on the availability of co-leader liability, as opposed to the theory of accomplice liability it argued to the jury, appears to be an implicit concession that leading organized crime is an offense like felony riot, or premeditated murder, that are not covered by the general, default provisions on accomplice liability statute.

Although the Supreme Court addressed the essential elements of leading organized crime in a different context in State

v. Johnson, 124 Wn.2d 57, 71, 873 P.2d 514 (1994), its analysis applies to the present circumstances. The 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 71.²

If Johnson fundamentally misconstrued the essential elements of the statute, the legislature has, by its silence the past 16 years, not revisited that issue and thus is deemed to have acquiesced. Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Com'n, 148 Wn.2d 887, 905 n.14, 64 P.3d 606 (2003).

In addition to the plain language of RCW 9A.82.060, which is focused on the leader who organizes and manages multiple people, tools of statutory construction may be used to determine the intended scope of the statute, none of which the prosecution explores. Other sections of this same chapter use express language to define the scope of co-participant culpability. See RCW 9A.82.050(1) (trafficking in stolen property includes person

² The prosecution correctly points out that the last full sentence on page 12 of Appellant's Opening Brief uses quotation marks that would indicate the sentence quotes Johnson and those quotation marks should not have been used. Counsel apologizes for any confusion. The sentence rephrases language drawn

who plans and directs, as well as person involved in trafficking); RCW 9A.82.080 (unlawful use of criminal profiteering extends liability to conspirators). Leading organized crime speaks to the culpability of the manager or organizer, not the people aiding in the underlying acts. RCW 9A.82.060.

If the scope of statutory liability is ambiguous, the rule of lenity requires the court to interpret the language in the light most favorable to the accused. City of Aberdeen v. Regan, __ Wn.2d __ , 239 P.3d 1102, 1108 (2010). The language of the statute does not extend the same liability as the organizer and manager to any group participant. Johnson, 124 Wn.2d at 71.

Leading organized crime is an offense that is intended and crafted to apply to the leader. Even the State seems to concede this purpose. The State's claim that Hayes could and should be convicted for any help he gave to another person who was the leader is contrary to the purpose and scope of the statute. See State v. Montejano, 147 Wn.App. 696, 703, 196 P.3d 1083 (2008); 13A Washington Practice, § 104, Complicity (2010) ("If, however, the statute defining a crime specifically addresses the culpability of

from Johnson, 124 Wn.2d at 71.

an accomplice, the general accomplice statute cannot be applied to that crime.”). In Montejano, the court ruled that the felony rioting statute explicitly excluded accomplice liability because it punished group action, and more seriously punished the leader of the group. Likewise, leading organized crime requires group action, and more seriously punishes the leader of the individual actors, and it does not rest on general principles of accomplice liability. Hayes’s conviction for leading organized crime should be reversed because it was based on an unavailable theory of accomplice liability.

2. THE PROSECUTION AGREES THE COURT WOULD HAVE CAUTIONED THE JURY ABOUT RELYING ON ACCOMPLICE TESTIMONY IF DEFENSE COUNSEL HAD ASKED, BECAUSE THE STATE RELIED ON UNCORROBORATED ACCUSATIONS BY OTHER ADMITTED CRIMINAL WRONGDOERS

The prosecution agrees that if Hayes’s attorney had asked, the court would have instructed the jury that an accomplice’s testimony must be treated with great caution. Response Brief, at 36. Had the court refused Hayes’s request to give this instruction, it would have been reversible error. 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). But the State claims that

defense counsel's performance was not deficient because he could still argue to the jury that Epstein and Dawn Flemming, both purported accomplices testifying under grants of immunity, should not be believed. Response Brief, at 36-37.

The State's claim that the jury could get the law from the closing argument of the defense attorney is not well taken. The court's instructions directed the jury to disregard any argument of counsel that is not supported by the law as instructed by the court. CP 56 ("The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.").

As the Washington Supreme Court has recognized, "lawyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is." In re Detention of Pouncy, 168 Wn.2d 382, 392, 229 P.3d 678 (2010). Therefore, "[a] jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995).

Moreover, the United States Supreme Court has recognized the importance of cautioning the jury against relying on the testimony of those implicated in the same criminal acts. Banks v.

Dretke, 540 U.S. 668, 701-02, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (in cases involving informants, “[we] have counseled submission of the credibility issue to the jury ‘with careful instructions.’”); see also On Lee v. United States, 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed.2d 1270 (1952) (defendant “entitled” to have informant credibility issues “submitted to the jury with careful instructions”).

Washington has also long required a cautionary instruction when a case rests largely on uncorroborated accomplice testimony. See State v. Badda, 63 Wn.2d 176, 181, 385 P.2d 859 (1963) (“long established” rule that jury must receive cautionary instruction when case rests on uncorroborated testimony of accomplice; jury must be told they “should not convict upon such testimony alone unless, after a careful examination of it, they are satisfied beyond all reasonable doubt of its truth”); see also Harris, 102 Wn.2d at 153 (noting “this court's often repeated concern over accomplice testimony and the need to caution jurors regarding its questionable reliability”).

The court's general remarks telling the jurors to decide the weight or value of each witness are not an adequate substitute for

the lack of cautionary accomplice instruction. The pattern instruction regarding accomplice testimony, WPIC 6.05, provides:

The testimony of an accomplice, given on behalf of the plaintiff, **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.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal § 6.05 (3rd ed. 2008) (emphasis added). This clear, strong, mandatory language is far different from permitting the jury to consider the witness's ability to observe or bias the witness may have shown. CP 56.

The court must caution the jury against relying on such testimony when the defense requests an instruction. Harris, 102 Wn.2d at 155. Even when a witness has a plain motive to lie, juries often find this testimony compelling, thus underscoring the importance of cautionary instructions as a way to guard against wrongful convictions. See e.g., Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice, 77 (2009) ("often juries believe lying criminal informants, even when juries know that the informant is being compensated and has the

incentive to lie”; in study of 51 wrongful capital convictions, “each one involve[ed] perjured informant testimony accepted by jurors as true.”).

Here, the prosecution does not even argue that Hayes was convicted based on corroborated, independently established proof. The State concedes Epstein’s testimony “was central to the charge of leading organized crime.” Response Brief, at 37.

Thus, the State implicitly concedes that the failure to instruct the jury that testimony from Epstein and Flemming must be treated with great caution affected the outcome of the case.

The crux of the prosecution’s argument is that Hayes’s lawyer did other things to assist Hayes, and thus this lapse should be excused. But Hayes’s convictions relied on Epstein’s and Flemming’s allegations, including whether Epstein stole the credit card receipts and owned the briefcase that contained the receipts which formed the basis of every identity theft and possession of stolen property count charged. Hayes was not charged with actually using this credit card or identity information. Rather, each charge was based on credit card information found in the briefcase taken by police from Hayes’s home. Its ownership by Hayes, though, was dubious. Several witnesses testified this briefcase

belonged to Epstein; Epstein was very upset that the police took it; and Epstein owned the storage unit from which the receipts were stolen. 10RP 108, 125, 142; 11RP 38, 92, 121. It was Epstein who was connected to all of the charged counts, and Flemming's testimony that Hayes gave her a fake credit card to use only corroborated the accusations, it was not part of a charged crime. Hayes's theory of defense was that Epstein and Flemming were lying, and some witnesses corroborated that claim. Accordingly, the lack of cautionary instruction from the court underscoring the legally recognized caution with which their testimony should be taken affected the outcome of each count of the case, and should cause the reversal of all convictions due to the reasonable probability of prejudice from defense counsel's deficient performance.

3. THE STATE DID NOT PROVE MULTIPLE ALTERNATIVE MEANS PRESENTED FOR NUMEROUS CHARGED OFFENSES.

The State's analysis of the unanimity argument rests on a misrepresentation of critical facts, which are addressed herein.

a. Leading organized crime. There are several alternative means of leading organized crime: organizing, managing, directing, supervising, or financing three or more

persons with the intent to engage in a pattern of criminal profiteering,³ and each one must be supported by substantial evidence. 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); RCW 9A.82.060(1)(a).

The baffling nature of what were the predicate acts of identity theft is demonstrated by the prosecution's closing argument, which never delineated what offenses or acts the jury should rely on. The same flaw occurs in response brief, where prosecution again fails to articulate the identity thefts perpetrated, by which four actors, thus signifying the lack of evidence against Hayes for the essential elements and alternative means of leading organized crime.

As charged, the State needed to prove at least three acts of identity theft, committed for financial gain, that were part of the same enterprise and involved at least three other people. CP 95-96 (Instructions 39, 40). At least one of the acts had to occur in Washington. CP 97 (Instruction 41). And some evidence must

³ The court instructed the jury that criminal profiteering means "any act of Identity Theft committed for financial gain." CP 96 (Instruction 40). It defined a pattern of criminal profiteering as "at least three acts of criminal profiteering" that are not isolated events, occurring during the charging period. CP 95.

support each alternative means, such as Hayes's supervision, management, organization, and financing.

The prosecution offers Epstein's claim of a trip to Idaho, for the purported purpose of renting motorcycles and then selling them, using false credit cards for the rental. Response Brief, at 24-26. It also claims Flemming's trip to Spokane, in which she presented a fake identification and credit card, qualifies as a predicate act.

But the offense of identity theft requires the appropriation of an actual person's identity, not that of a fraudulent or concocted person. State v. Presba, 131 Wn.App. 47, 54, 126 P.3d 1280 (2005), rev. denied, 158 Wn.2d 1008 (2006) ("the identifying information of a real person . . . is required for identity theft."). Using a false name does not violate the identity theft statute when there is no person with that name. Id.; see also State v. Berry, 129 Wn.App. 59, 68, 117 P.3d 1162 (2005) (reversing identity theft conviction when no allegation that name used was of "actual, real person, even if name was common in community). The State does not explain how the use of fraudulent credit cards establishes that Hayes managed, supervised, financed and organized acts of identity theft required to commit this charged crime, when there

was no evidence that the fraud involved the use of real people's identities.

The same flaw applies to the other allegations that Hayes told Epstein to buy things with a fake credit card in Oregon, and Epstein's claim that Hayes directed others to go "shopping" was stricken as hearsay. 7RP 50-51. Acts that do not amount to identity theft, did not occur in Washington, and were uncorroborated cannot form the sole basis of proving Hayes's direct involvement in overseeing and organizing a scheme of identity theft.

The prosecution's failure to articulate a valid basis for the jury to convict Hayes under each alternative means for leading organized crime undermines the unanimity of the jury's verdict and fairness of the trial.

b. Possession of stolen vehicle. The prosecution concedes it needed some evidence that Hayes concealed or disposed of the stolen cars in order to have sufficient proof for each alternative means of possessing stolen property. Response Brief, at 27. The prosecution's explanation is unconvincing. It claims that one car, the red Chevy Tahoe, was "concealed," because it was parked on public streets, first directly outside Hayes's home

and later outside the home of a friend who lived in Puyallup. Response Brief, at 28. The other car, the Hummer, was driven on at least one occasion by Epstein, although he returned it to Hayes and Hayes was arrested while driving it from his home. Id. This lending of the Hummer constitutes “disposal,” the State claims.

Neither scenario meets the requisite legal standard. There is no plausible definition of conceal that involves parking a large red vehicle on a public street in a residential neighborhood, in front of your own home and a friend’s house. And no legitimate definition of dispose is satisfied by temporarily lending a vehicle to another person and then driving it yourself, especially when that other person is considered an accomplice in the same set of offenses. As explained in Appellant’s Opening Brief, the State presented alternative means of possessing stolen property that it did not prove. Opening Brief, at 32-35.

c. Possession of stolen access device. The “to convict” instruction for the stolen access device allegations defined possession of stolen property as “knowingly possessed,” without further explanation of the alternative means the constituted possessing. See CP 81. But the instruction defining this offense expressly included each alternative means, and therefore, like

possession of the stolen vehicles, the State was required to present sufficient evidence of each alternative. CP 79 (Instruction 23).

Instruction 23 explained the requirements of possession of stolen property in the second degree, based on possessing a stolen access device. It stated,

Possessing stolen property means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing 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.

CP 79. Accordingly, as explained in Appellant's Opening Brief, that State was required to prove each of the alternative means that the court presented to the jury in its instructions. Credit card receipts stored in own one's bedroom do not meet the definition of conceal or dispose, as required by the instructions. CP 79; see State v. Lillard, 122 Wn.App. 422, 434-35, 93 P.3d 969 (2004), rev. denied, 152 Wn.2d 1002 (2005).

4. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT HAYES OF TAKING PROPERTY OR IDENTIFYING INFORMATION FROM JEFFREY CALL

Jeffrey Call did not testify at trial and he was never mentioned to the jury other than a lone reference: one exhibit contains his name on a credit card receipt. 3RP 79. This single shred of evidence does not prove the two felony offenses related to Call.

Without presenting any evidence that Call was an actual person, the State could not prove that the possession of a credit card receipt in Call's name constituted identity theft. Presba, 131 Wn.App. at 54. The count charging identity theft from Call should be reversed. Id.

Possession of a stolen access device required the possession of Call's credit card information without authorization; that Hayes withheld it from him for his own use; and that the access device "was an access device belonging to Jeffrey Call." CP 87 (Instruction 31). Without Call's testimony, the State did not prove the essential elements of this offense. Call could have been a friend or acquaintance who authorized the use of his credit card information. He may not have existed as a person, and his account

information was fraudulent. The reason the prosecution presented witnesses for the other charged counts was because such testimony was necessary to prove the essential elements of the crime. By failing to present any evidence from or about Call, the prosecution did not prove the essential elements of possession of a stolen access device.

5. AN EXCEPTIONAL SENTENCE MUST REST
ON THE CONDUCT OF THE ACCUSED, NOT
ON COMPLICITY WITH ANOTHER

The prosecution agrees that exceptional sentences greater than the standard range may not be based on accomplice liability for all offenses. Response Brief, at 44. Yet it creates a simplistic test for when a mere accomplice may be given an exceptional sentence based on the offense broadly, without explicit findings of the accused person's individual culpability. *Id.* at 46.

The State correctly cites to State v. McKim, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982), which examined a former deadly weapon sentencing enhancement to determine whether an accomplice could be punished for another person's possession of a weapon. The McKim Court acknowledged that the sentencing enhancement at issue is not a substantive crime. The definition of accomplice liability in RCW 9A.08.020(1), speaks to when a person

is guilty of “a crime,” and therefore does not automatically extend to added elements derived from sentencing enhancements. 98 Wn.2d at 115-16.

The McKim Court found the necessary “triggering device” for accomplice liability in the “operative language” of the penalty enhancement statute. Id. at 116. This Court used similar analysis in State v. Pineda-Pineda, 154 Wn.App. 653, 663-64, 226 P.3d 164 (2010). In Pineda-Pineda, the court ruled, “We hold that, where there is no explicit statutory authorization for imposition of a sentence enhancement on an accomplice, the defendants' own acts must form the basis for the enhancement.” Id. at 664.

The operative language of RCW 9.94A.535 and RCW 9.94A.537 does not dictate enhanced sentencing based on general accomplice liability. The State concocts a test for aggravating factors: positing that if the aggravating factor includes the language, “the defendant,” then an exceptional sentence must be based on the jury’s verdict of the defendant’s personal involvement and responsibility; but if the aggravating factor reads “the offense,” then the defendant may be sentenced based on conduct of others for whom he aided or abetted. The State’s theory is concocted, it

concedes, because it is not based on any citation to legal authority. Response Brief, at 46-47.

The jury was not asked to find whether Hayes was a minor, or major, participant in the “major economic offense,” alleged as an aggravating factor. The jury was not asked to pass judgment on Hayes’s personal complicity. The court only asked the jury whether “the crime” involved multiple incidents or victims, or a high degree of planning or sophistication. CP 102. Each “crime” had rested on accomplice liability. The aggravating factor contains no buried operative language triggering accomplice liability, and such an extension of liability should not be concocted without clear statutory footing. Hayes’s exceptional sentence should be reversed.

6. WHEN THE LEGISLATURE INTENDS A SINGLE PUNISHMENT BASED ON ELEVATING PREDICATE OFFENSES TO A GREATER CRIME, THE COURT SHOULD IMPOSE A SINGLE PUNISHMENT

When the legislature intends to impose a single punishment for different offenses, the double jeopardy clauses of the state and federal constitutions requires the court to impose one punishment. 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. I, § 9. Multiple offenses constitute a single crime for double jeopardy purposes when they are the same in law and fact, as charged and proven, not as generically defined. Blockberger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); In re Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004).

The State contends that the offenses underlying the “criminal profiteering,” which formed the predicate for leading organized crime, are properly treated as the same criminal conduct, under RCW 9.94A.589, but do not constitute the same offense for double jeopardy purposes. The State claims that even though the trial court explained the offenses “merge” and should be treated as one offense, it did not intend this as a double jeopardy finding. 9/11/09RP 26-27; CP 113-15.

A double jeopardy violation occurs when, absent clear legislative intent to the contrary, the evidence required to support a conviction for one would have been sufficient to warrant a conviction for the other. Orange, 152 Wn.2d at 816. Under the merger doctrine, when a particular degree of crime requires proof of another crime, the court presumes the legislature intended to

punish both offenses singly. See Freeman, 153 Wn.2d at 772-73; State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). A separate conviction for the included crime will not stand unless it involved an injury to the victim that is separate and distinct from the greater crime. Johnson, 92 Wn.2d at 680.

Leading organized crime contained the mandatory element of identity theft for the purpose of financial gain, as charged. CP 97. The identity theft and possession of stolen access devices were proven by the same facts, as both were based on possessing the credit card information of others, which results in the underlying “criminal profiteering” scheme subsuming these two predicate offenses, as the trial court recognized.

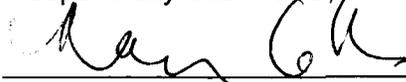
In State v. Turner, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010), the Supreme Court ruled, “to assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction.” Here, the court found that the predicate offenses of identity theft and possession of stolen access devices were the same in fact and law as the greater offense of leading organized crime, but declined to strike the underlying offenses. The judgment and sentence should be corrected.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Hayes respectfully requests this Court remand his case for further proceedings.

DATED this 21st day of December 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,)
) v.)
) LARRY HAYES,)
) APPELLANT.)

NO. 39780-3-II

COURT OF APPEALS
DIVISION TWO
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **REPLY 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:

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