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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The evidence is insufficient to prove the essential elements of identity theft.
2. Appellant received ineffective assistance of counsel in violation of Const. art 1, § 22 and the Sixth Amendment.
3. The evidence supports an instruction for the misdemeanor offense of simple theft as an alternative to identity theft.
4. The prosecutor committed misconduct during closing argument and shifted the burden to Appellant to disprove an essential element of identity theft.
5. The jury instructions do not inform the jury of the applicable law, contradict the to-convict instruction for identity theft, and are so confusing as to undermine confidence in the verdict.
6. The court erred in finding that the current offenses were not the same criminal conduct. Sentencing Finding of Fact 1, CP 78.
7. The sentencing court violated the SRA by failing to run Appellant's sentences concurrently as same criminal conduct.
8. The sentencing court erroneously denied Appellant credit for time served.

B. Issues Pertaining to Assignments of Error

1. Where the State failed to prove that Appellant possessed personal identifying information with intent to commit a crime, is the evidence sufficient to support a conviction for identity theft?
2. Was defense counsel ineffective in failing to request an instruction for the misdemeanor offense of simple theft as an alternative to the class C felony of identity theft, where the evidence supports the lesser instruction?
3. Is a new trial required where the jury instructions fail to inform the jury that only a natural person can be the victim of identity theft and where the instructions as a whole contradict and undermine the to-convict instruction?
4. Where the prosecutor argued in closing that the defense had presented no evidence to refute the allegation that the alleged means of identification actually was in Appellant's possession, did this unlawfully shift the burden to the defendant, in violation of the presumption of innocence?
5. Where Appellant was in possession of three credit cards and used one of them, was the possession and use the same criminal conduct for sentencing purposes?
6. Did the sentencing court violate the SRA and unlawfully deny Appellant credit for time served?

III. STATEMENT OF THE CASE

A number of credit cards were stolen from the School District during a burglary during the night of July-14-15, 2010. RP 34-35.¹ The missing cards included a Home Depot card and a Sears card on which it was not disputed that the School District was the sole named card holder. RP 50, 96. A third card was a Visa bank card on which the State alleged the name of the School District Superintendent, Stanley Pinnick, also was embossed. RP 48, 96.

Possession: The police searched the home of Appellant William C. Sells on July 18th, 2010. They found the two store cards in his truck, along with a receipt from one of several transactions on July 15, 2010 involving the Visa card. RP 112. The two store cards in the truck were the basis for Count 2 which charged Sells with second degree possession stolen property, an access device, RCW 9A.56.160. CP 5-6. At trial, the defense did not dispute the possession charge. RP 173.

Identity Theft: In Count 1, the State charged Sells with using the Visa card to make small purchases at three businesses in Aberdeen,

¹ The verbatim report of proceedings is contained in a single consecutively paginated volume designated RP. The RP includes the trial on September 16 and 17, 2010, and sentencing on October 21, 2010. An aborted sentencing hearing on October 11, 2010, is in a separate volume designated 10/11 RP. (A scrivener's error at RP 5 gives the first trial date as September 6, 2010. It was September 16, 2010.)

Washington on the morning of July 15th. CP 5. The Visa card was not in evidence, but a school district employee gave hearsay testimony that in addition to the School District, Pinnick's name was on that card. RP 48. The State characterized Pinnick's name on the Visa card as a means of identification. RP 136-37, 162. Accordingly, Sells was charged in Count 1 with second degree identity theft, RCW 9.35.020(3). CP 5; RP 161.²

The evidence at the jury trial included images from a store security video showing Sells and an accomplice engaging in transactions with the Visa card at an AM/PM mini-mart on the morning of July 15, 2010. RP 68-69. Witnesses also testified that Sells used the Visa at a Valerio gas station and an America's Diner restaurant. RP 79; 89. The State did allege — and presented no evidence — that either Sells or the accomplice claimed at any time or in any manner to be Stanley Pinnick. Rather, in using the Visa card, Sells first said the accomplice was a School District employee of whom no identification was either requested or offered. RP 71, 73. Sells returned to the AM/PM later by himself. RP 70. He used the Visa card and signed the receipts in the name, not of Pinnick, but of a person called Bryce Bitar. RP 80, 91.

When interviewed by the police at the time, Mr. Singh, the owner of the AM/PM, said the sole name of the cardholder on the Visa card was

² Sells was not accused of the burglary or of stealing any card. CP 5-6.

that of the School District. RP 76. At trial, with a little help from the prosecutor, he again testified that only the School District's name was on the card. RP 72. The defense challenged the sufficiency of the evidence that Pinnick's name was on the card. RP 174-77.

Outside the presence of the jury, the defense also argued that the evidence was insufficient to prove the essential elements of identity theft, even if Pinnick's name was on the Visa card. RP 136. Sells moved to dismiss Count 1 for lack of evidence, but the court denied the motion. RP 137.

During closing argument, the prosecutor commented on the lack of evidence to disprove the State's allegation that Pinnick's name was on the Visa card:

Is there some evidence here that [Pinnick's] name wasn't on the card? I wish we had the card, but the card was thrown away, lost, going who knows where in those three days. But the answer is, is there a reasonable doubt that his name was on the card? And the answer is no.

9/16 RP 183. Defense counsel did not object at the time, but subsequently moved for a new trial on Count 1, citing prosecutorial misconduct. 10/11 RP 1-2. The court denied the motion. 10/11 RP 3.

The defense did not object to the proposed jury instructions. RP 158. The jury convicted Sells on both counts. CP 28, 29.

Sentencing: At sentencing, the court calculated Sells's offender score as 11. RP 198; CP 67. Sells did not stipulate to this offender score. RP 183. The standard ranges on a score of 9+ were 43-57 months on Count 1 and 22-29 on Count 2. RP 192. The court imposed top-of-the range sentences of 57 months on Count 1 and 29 months on Count 2. The court then ordered the sentences to run consecutively under the "free crime" doctrine of RCW 9.94A.535. CP 68; RP 202-03. The court summarily rejected Sells's request for credit for time served. CP 68; RP 206-07.

The court was offended by a letter it received from Sells blaming others for his predicament. RP 201. The court was clearly angry with Sells, and threatened him with contempt when he tried to speak during an extended tirade by the court against the inadequate severity of the Sentencing Reform Act. RP 201. The court continued in this vein for several pages, saying it would like to sentence Sells to life in prison as a habitual offender as provided in the law of Nevada where Sells had incurred some priors. RP 201-02. Finally, the court imposed top-of-the-range sentences on both counts and ran them consecutively. RP 202-03. That was a total of 86 months — 57 months for Count 1 and 29 months for Count 2. RP 203.

The court was under the impression that Washington has some sort of “50% rule” whereby offenders serve only half their sentence. Defense counsel thought that this statute was no longer in effect but was not sure about that. RP 203. The court opined that, even if the 50%-rule had sunsetted, the state’s budget woes would still result in Sells serving less than 86 months. RP 203.

Accordingly, when the prosecutor suggested — without supporting evidence — that Sells should not receive credit for time served because parole violation proceedings were pending in Nevada, the court adopted the bare allegation despite the lack of any evidence. RP 206. The prosecutor appears to have been referring to a Nevada hold Sells thought would take effect after he had served his time in Washington. RP 200. The prosecutor argued that Nevada, not Washington, would credit Sells for time served prior to sentencing in these proceedings. RP 206. The court (without a citation) noted that it had been reversed on appeal for granting credit for time served under similar circumstances in an earlier case. Accordingly, the court accepted the State’s hand-waving argument that Sells had been held on the Nevada hold, not the Washington offenses and summarily denied credit for time served. RP 206-07. Defense counsel argued that credit for time served was owed because the court had

granted bail on this offense. RP 207. On Junly 19, 2009, the court had conditionally released Sells if he could raise \$10,000 bail, which he could not. Order Setting Conditions of Release, Supp. CP. The court rejected that idea without explanation. RP 207.

Mr. Sells filed timely notice of appeal. CP 80.

IV. **ARGUMENT**

1. THE EVIDENCE IS INSUFFICIENT TO PROVE IDENTITY THEFT.

The evidence is insufficient as a matter of law to prove that Sells intentionally acquired possession of Stanley Pinnick's name for the purpose of using Pinnick's identity to commit a crime.

The Due Process Clause of the Fourteenth Amendment mandates that the State must prove every essential component of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, a rational trier of fact could find that the essential elements were proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A challenge to the sufficiency of the evidence admits the truth of the State's evidence, and the reviewing court defers to jury's resolution of conflicting testimony,

credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992).

Every crime has two essential components, the actus reus and the mens rea. The actus reus is the culpable act itself; the mens rea is the criminal intent with which the criminal act must be performed to constitute a punishable offense. *State v. Utter*, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). The nexus between the criminal act and the criminal intent is essential to the offense. They are not independent of each other; the intent must be directed toward the act, and vice versa. *Id.*

The actus reus and mens rea of identity theft are using or possessing a means of identification with the intent to commit an unlawful act. *State v. Baldwin*, 150 Wn.2d 448, 455, 78 P.3d 1005 (2003). The State must prove that the defendant possessed the item of identification information with the intent to commit a crime. RCW 9.35.020(1).

Here, the State alleged that Sells possessed “a means of identification of Mr. Stanley Pinnick” ... “with the intent to commit the crime of theft.” Instr. 4, CP 22. But the offense is not proved by affixing possession and the intent to commit a crime to a suspect like post-it notes. The conjunction “with” between possession and intent in this statute does not mean it is sufficient that the possession and the criminal intent exist contemporaneously. Possession must be acquired for the purpose of

committing a crime; the intent to commit a crime must be the reason for acquiring the possession. The required nexus is causative, not merely temporal.

Sells came into possession of three credit cards that had been stolen from the School District's offices. The named card-holder on all the cards was the North Bend School District. The State alleged one card, a Visa, also had district superintendent Stanley Pinnick's name on it. But Sells's acquisition of Pinnick's name was purely incidental to his obtaining the School District's Visa card along with the store cards. There is no evidence he intended to obtain Pinnick's name, let alone to use Pinnick's name in the commission of a crime. And he did not in fact use Pinnick's name. When Sells and his accomplice used the Visa card, they did not assume Pinnick's identity. They said that one of them worked for the school district. Later, when asked for identification, Sells did not claim to be Pinnick, but signed the slip "Bryson Bitar."

The State simply failed to prove that Sells possessed Pinnick's name with the intent to commit a crime. As with the other two cards in Sells's possession, Pinnick's name was entirely superfluous to Sells's alleged criminal purpose. The Visa in the School District's name was a means of accessing the School District's bank account, not Pinnick's, and

this could be — and was — achieved without reference to Pinnick. The superintendent's name on the card was entirely superfluous.

It is widely recognized that the nexus between taking a victim's identity and the intent to use the information to commit a crime is the *sine qua non* of the crime of identity theft. Identity thieves use their victims' personal information to transact business in a victim's name, take funds from his bank accounts, run up debts, and commit crimes. *See, e.g.*, Holly K. Towle, IDENTITY THEFT: MYTHS, METHODS AND NEW LAW, 30 Rutgers Computer & Tech. L.J. 237, 241 (2004).

Here, the State neither alleged nor proved any nexus whatsoever between Pinnick's name on the card and Sells's intent to commit an offense with that card. The State offered no evidence that Sells had any interest whatever in Pinnick's name. The card-holder of interest was the School District. In using the card, Sells and his accomplice claimed to be a School District employee called Bryce Bitar, not Stanley Pinnick.

By the State's reasoning, a person is guilty of identity theft if she steals someone's book with an *ex libris* inscription while simultaneously intending to drive home while intoxicated. As the State applied the statute here, one could even be convicted of identity theft merely for acquiring a name inscribed in a book with the intention of misappropriating the book.

That is the best analogy of what happened to Sells. Sells possessed Pinnick's name on a card with no intent beyond possessing the card.

It is simply not sufficient to establish that the defendant was in possession of an item with a person's name on it and that the defendant intended to commit some crime. Rather, the essence of the crime of identity theft is intentionally obtaining a person's identifying information for the purpose of using that information to commit a crime.

Moreover, accepting the truth of the State's evidence, it is not even clear that Pinnick's name on the School District credit card constituted a means of identification in the context of the identity theft statute.

"Financial information" is information identifiable to an individual that "concerns ...credit, including... information held for the purpose of account access or transaction initiation." RCW 9.35.005(1) (emphasis added). Pinnick's name on the Visa card is information for the purpose of account access or transaction initiation. A "means of identification," by contrast, is information or an item that is not describing finances or credit. Laws of 1999, ch. 368, § 1; *State v. Berry*, 129 Wn. App. 59, 67, 117 P.3d 1162 (2005). RCW 9.35.005(3); Instr. 6, CP 23. Thus, a person's name may constitute a means of identification. RCW 9.35.005(3). But, by these definitions, a single manifestation of a single name on a single item cannot be both a means of identification and financial information.

The facts of Sells's case are like those of *Berry*. *Berry* did not commit identity theft against the owner of an account simply by using the account number where *Berry* did not use the account owner's name or other examples of identity. *Berry*, 129 Wn. App. at 67.

Likewise Sells used a credit card. It was the account number on the card that gained access to the funds in the account. The fact that the card-holder, or one of the card-holders, was the School District relieved the offender from any necessity of claiming to be Pinnick. Simply claiming to be an anonymous district employee was sufficient.

Dismissal is Required: Accordingly, there is absolutely no evidence that Sells used Pinnick's name or any other form of Pinnick identification or ever intended to do so. Therefore, the State failed to prove the essential intent element of identity theft. "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Therefore, the Court should reverse the conviction on Count 1 and dismiss the prosecution.

2. IT WAS INEFFECTIVE ASSISTANCE NOT TO SEEK AN INSTRUCTION FOR SIMPLE THEFT AS AN ALTERNATIVE TO IDENTITY THEFT AS CHARGED IN COUNT 1.

Wash. Const. art 1, § 22 and the Sixth Amendment guarantee people accused of crime the right to the effective assistance of counsel. Specifically, a defendant is entitled to have his jury receive a correct statement of the law, and counsel is ineffective for failing to provide it. *State v. Thomas*, 109 Wn.2d 222, 228, 743 P.2d 816 (1987). Failure by defense counsel to discover the applicable law falls below an objective standard of reasonableness and is deficient per se. *State v. Kylo*, 166 Wn.2d 856, 865-69, 215 P.3d 177 (2009). “[D]efense counsel has a duty to investigate all reasonable lines of defense,” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 744, 101 P.3d 1 (2004), citing *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

This Court reviews an ineffective assistance claim de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail, an appellant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The decision not to request a jury instruction that could have mitigated the jury’s verdict constitutes deficient performance unless it can

be characterized as part of a legitimate trial strategy. Both deficient performance and prejudice are established by showing that an attorney of reasonable competence would not have failed to offer an instruction that was necessary to further the defense theory of the case provided the evidence supports an inference that the lesser crime was committed. *Thomas*, 109 Wn.2d at 227-28. “A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases.” *Thomas*, 109 Wn.2d at 229.

An effectiveness challenge to counsel’s failure to request a necessary instruction poses three questions. First, the Court must determine whether the defendant was entitled to the omitted instruction. Second, whether counsel was ineffective for not requesting the instruction. And finally, whether counsel’s deficient performance prejudiced the defense under the *Strickland* standard. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); *State v. Powell*, 150 Wn. App. 139, 154-58, 206 P.3d 703 (2009).

All three prongs are satisfied here.

Sells Was Entitled to A Simple Theft Instruction: The court would have given a simple theft instruction had it been asked to do so.

The right to due process of law requires that the jury be fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). A defendant is entitled to a jury instruction supporting his theory of the case unless there is no substantial evidence in the record supporting the theory. *Powell*, 150 Wn. App. at 154. When determining whether the evidence is sufficient to support an instruction, this Court views the evidence in the light most favorable to the party that would benefit from the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Here, that is the defense.

It is theft in the third degree to commit theft of property valued less than \$750. RCW 9A.56.050(1).³ The statutory definition of “theft,” includes to wrongfully “exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). Third degree theft is a gross misdemeanor. RCW 9A.56.050(2).

Sells essentially conceded that he exerted control over what was obviously a School District Visa card to buy gas and food with the School

³ The definition of “theft,” includes to “wrongfully exert unauthorized control over the property or services of another...with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). Also to “appropriate lost or misdelivered property ... with intent to deprive [the owner]of such property or services.” RCW 9A.56.020(1)(c).

District's funds. It is inconceivable that, if defense counsel had requested a third degree theft instruction, the court would not have given it.

Failure to Request the Instruction Was Not Reasonable: No plausible explanation can be conceived not to request a simple theft instruction, because, without a lesser offense instruction that punished Sells's admitted conduct, none but a highly sophisticated jury would acquit rather than accept the State's assurances that the greater charge was proved. Counsel's failure to request a simple theft instruction was per se unreasonable.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Performance of counsel is accorded a high degree of deference, and a reviewing court starts with a presumption that counsel acted reasonably. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *Strickland*, 466 U.S. at 689. Failing to investigate the relevant law cannot be characterized as a legitimate tactic; it is per se deficient performance. *Powell*, 150 Wn. App. at 155.

When an ineffectiveness claim rests on counsel's failure to request an instruction that would allow the jury to convict on a lesser offense, the Washington Supreme Court has recently emphasized that the appellant must persuade the Court that no legitimate strategy can be conceived for

omitting the instruction. *State v. Grier*, ___ Wn.2d ___, ___ P.3d ___, Slip Op. 83452-1 at page 19 (2011 WL 873427), quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

It is still the law, however, that the question of whether counsel's performance was ineffective is not amenable to per se rules, but requires a case by case basis analysis. This Court evaluates whether the presumption of reasonable performance is rebutted by the absence of any conceivable legitimate tactic explaining counsel's performance based on the particular facts of this case, not on "mechanical rules." Whether counsel's choices were strategic is not the question. Rather, the Court must ask whether counsel's choice was reasonable on these facts." *Grier*, Slip Op. at 19; *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); *Cienfuegos*, 144 Wn.2d at 229; *Strickland*, 466 U.S. at 696.

All-Or-Nothing Strategy Is Indefensible On These Facts: The State may argue that Sells's counsel made a strategic decision to pursue an "all-or-nothing" strategy instead of seeking a lesser offense instruction and that such a strategy is presumed legitimate where doing so is at least conceivably a legitimate strategy to secure an acquittal. *Grier* 2011 WL 459466, at 15. But *Grier* does not alter the fact that representation is deficient if counsel fails to pursue a viable defense where no strategic

reason suggests itself for not doing so. *State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001); *State v. Klinger*, 96 Wn. App. 619, 622-23, 980 P.2d 282 (1999). That is the case here.

No legitimate strategy justified withholding from Sells's jury the option of convicting him of simple third degree theft — a gross misdemeanor — rather than identity theft, a Class C, seriousness level II felony offense. The evidence that Sells committed an offense by means of using the card to obtain goods or services with the School Districts funds was overwhelming. It is theft in the third degree to commit theft of property valued less than \$750. RCW 9A.56.050(1).

Third degree theft is a gross misdemeanor. RCW 9A.56.050(2). Second degree identity theft, by contrast is a class C felony. RCW 9A.56.020(3). As discussed in Issue 1, the evidence for identity theft was weak to the point of insufficiency, but the same evidence was overwhelming that Sells had committed a crime.⁴

Significantly, Count 2, possession of a stolen access device, also constitutes a Class C felony. RCW 9A.56.160(2). Sells was certain to be convicted of Count 2, for possessing the other two access devices. He essentially admitted guilt on Count 2. Therefore, giving the jury the

⁴ Remember, the jury would not know that simple theft is a less serious crime. Only that it was a better fit on these facts.

option on Count 1 of convicting Sels of third degree theft instead of identity theft was a no-risk proposition. Consider:

If the jury was not persuaded that the elements of identity theft were proved, without the simple theft option, they would acquit on Count 1. Count 2 would then be the sole offense with a standard range maximum of 29 months. But, if the jury opted for simple theft on Count 1, at worst, the court would have tagged on a 90 days maximum misdemeanor sentence for a total of 32 months.

If Count 1 had been the only charge, then conceivably it could be argued that counsel acted reasonably in risking an all-or-nothing roll of the dice. Even then, though, on these facts, Sells would argue that the vanishingly small likelihood of an acquittal rendered the strategy unreasonable. Given Count 2, without the lesser offense option, the 'all' if convicted on Count 1 was 86 months and 'nothing' was 29 months. But with the theft option, 'nothing' was still 29 months, but the 'all' was only 32 months, not 86. Accordingly, it is simply not conceivable that reasonable counsel would substitute a possible sentence of 86 versus 29 months for one of 32 versus 29 months. It did not benefit Sells in the slightest to withhold from the jury the ability to convict on the lesser charge.

Moreover, the likelihood the jury would acquit on Count 1 was vanishingly small. Defense counsel's sole defense was a challenge to the sufficiency of the evidence that Pinnick's name was on the card. But the State presented evidence from a bank representative and the School District employee who managed the cards that Pinnick's name was on the Visa card as the district superintendent. RP 48, 96. As discussed in Issue 1, defense counsel missed the real weakness in the State's case. The essential element of identity theft was not whether Pinnick's name was on the card, but whether Sells intentionally acquired Pinnick's name acquired for the purpose of committing a crime or used Pinnick's name to commit any crime.

Effective counsel would have requested an instruction for simple theft to account for the allegations constituting Count 1.

Lack of a Simple Theft Instruction Prejudiced Sells: To establish prejudice, an appellant must show that it is reasonably probable the outcome of the trial would have been different if counsel had done what he was supposed to do. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Cienfuegos*, 144 Wn.2d at 229, citing *Strickland*, 466 U.S. at 694.

Here, failure to instruct the jury on simple third degree theft was highly prejudicial to Sells. It is highly likely that a properly instructed jury would have convicted Sells of simple third degree theft which carried a maximum penalty of 90 days rather than 57 months.

The Court should reverse the conviction for Count 1.

3. THE JURY INSTRUCTIONS FOR COUNT 1
ARE BOTH INSUFFICIENT AND DEFECTIVE.

Jury instructions that relieve the State of its burden of proof constitute a manifest constitutional error which this Court will review even if trial counsel did not object. *State v. Goble*, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005). As in *Goble*, the instructions here were so confusing as to relieve the State of its burden because the jury could have convicted based on a misunderstanding of the law. Instructions that jeopardize the requirement of jury unanimity also may be challenged for the first time on appeal. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). That is the case here. Moreover, the instructional errors in this case are so serious that failure to challenge them was per se ineffective assistance of counsel. Accordingly, the court will review them. *Kyllo*, 166 Wn.2d at 862. And the invited error doctrine does not preclude review if instructional error results from ineffective assistance of counsel. *Kyllo*, 166 Wn.2d at 861.

The Court reviews instructional errors de novo. *Brett*, 126 Wn.2d at 171. An instruction that is potentially confusing is erroneous unless the instructions, read as a whole, accurately inform the jury of the law. *State v. Peterson*, 35 Wn. App. 481, 486, 66 P.2d 645 (1983). The jury is presumed to follow the court's instructions and to have read the instructions as a whole. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994); *State v. Alford*, 25 Wn. App. 661, 670, 611 P.2d 1268 (1980), *aff'd*, *State v. Claborn*, 95 Wn.2d 629, 628 P.2d 467 (1981). That being so, Sells's jury could not possibly have rendered a sustainable verdict for the following reasons:

(a) ***The Instructions Do Not Inform the Jury of the Law.*** The State's erroneous interpretation of the law regarding the elements of identity theft was communicated to the jury in the instructions.

In support of Count 1, the State argued that a school district is a "person" for purposes of the identity theft statute because it is a corporation. CP 13. This is wrong. The State cited instances where a courts have accepted a school district as the victim of a crime other than identity theft. CP 14. But no case has found that a school district is a potential victim of identity theft. And the the plain language of the governing statute, RCW 9.35.020, unambiguously says otherwise by limiting potential victims to human beings.

The general definition of “person” in the criminal code includes “any natural person and, where relevant, a corporation, [etc.]...”. RCW 9A.04.110(17) (emphasis added.) But in the context of identity theft, the only relevant definition is for a “natural person.” The plain language of the identity theft statute limits potential victims to “another person living or dead.” RCW 9.35.020. This can only refer to a natural person, because a corporation is neither living nor dead. Never has been and never will be. Thus, while the name of a corporation may be subject to copyright violation, it is not susceptible to identity theft.

The instructions given to Sells’s jury fail to address this distinction, and are thus insufficient. Moreover, the instructions are also defective because they misinform the jury with an incorrect statement of the law.

The to-convict instruction defines identity theft as charged in Count 1 as possessing a means of identification of “a person.” Instr. 2, CP 21. But the jury was not instructed that the operative definition of “person” is restricted to natural persons. Therefore, one or more jurors may erroneously have concluded that it was immaterial whether or not Pinnick’s name appeared on the School District’s Visa card. But the identity of the actual victim is an essential element of the crime of identity theft. *Berry*, 129 Wn. App. at 68.

(b) ***The Instructions Contradict the To-Convict:*** The to-convict instruction for Count 1 limits the universe of possible victims solely to Stanley Pinnick. Instr. 4, CP 22. But the unanimity instruction for Count 1 contradicts the to-convict and tells the jury they can convict on based on the use of an “access device” in the name either of Pinnick or of North Beach School District. Instr.11, CP 24.

(c) ***The Instructions are Hopelessly Confusing:*** Besides conflicting with the elements of Count 1 set forth in the to-convict, Instruction 11 also conflates the elements of Counts 1 with those of Count 2 by substituting the term “access device for “means of identification.” The definitional instruction for identity theft defines the offense in terms of a means of identification. Instr. 2, CP21. The term “access device” is used to describe the essential elements in the to-convict instruction for Count 2. Instr. 5, CP 23.

But the unanimity instruction says the jury can convict on Count 1 if they unanimously find Sells used an “access device.” Instruction 11, CP 24.

These instructions deprived Sells of his right to a properly instructed jury and left the jurors to try to figure out for themselves what constituted which crime and which if any crime the State had proved.

Reversal is Required: Erroneous instructions given on behalf of the prevailing party in a jury trial are presumed prejudicial unless it affirmatively appears that the error was harmless. *State v. Bray*, 52 Wn. App. 30, 34-35, 756 P.2d 1332 (1988). These errors cannot be harmless.

The remedy is to reverse the conviction on Count 1.

4. THE STATE SHIFTED THE BURDEN TO SELLS TO PROVE PINNICK'S NAME WAS NOT ON THE VISA CARD.

During closing argument, the prosecutor called the jury's attention to the fact that Sells had failed to prove that Pinnick's name was not on the card. RP 183.

Defense counsel made a tactical decision not to request a curative instruction when the error occurred to avoid drawing the jury's attention to the lack of defense evidence proving that Pinnick's name was not on the card. But upon reflection, counsel moved for a mistrial on this ground. CP 50; 10/11 RP 1. The court summarily denied the motion. 10/11 RP 3. This was error.

In its memorandum in response to Sells's motion, the State cited *State v. Ashby*, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969), for the proposition that commenting on the lack of evidence refuting the the State's evidence is not objectionable unless the prosecutor comments that

the defendant himself failed to refute it, and that any prejudice is cured by instructing the jury not to infer guilt from the defendant's decision not to testify. CP 52. The State also cited *Brett*, 126 Wn.2d 136, and *State v. Morris*, 150 Wn. App. 927, 932, 210 P.3d 1025 (2009), both of which reiterate the holding of *Ashby*. CP 52.

Ashby, *Brett*, and *Morris* are distinguishable, however. The sole issue in all these cases was whether the prosecutor's comment necessarily drew attention to the defendant's failure to take the stand and testify in his own defense. *Id.* The Court took the view that it did not, because witnesses other than the defendant could conceivably have been called to testify on the particular point at issue. *Ashby*, *Brett*, and *Morris* hark back to *State v. Litzenberger*, 140 Wash. 308, 311, 248 P. 799 (1926), where the Court asked rhetorically:

Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it, and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his.

Ashby at 38, citing *Litzenberger*, 140 Wash. at 311. This Court in *Morris* rejected the claim that these cases were no longer viable after *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), held it was reversible error to comment on a defendant's exercise of his right not to

testify in his own defense. *Morris*, 150 Wn. App. at 931.

Sells, by contrast, contends that the prosecutor's comment violated his right to the presumption of innocence by drawing the jury's attention to his exercise of his right not to present any evidence. We contend that *Ashby*, *Brett*, and *Morris* are no longer viable after *Winship* held that it is reversible error to comment on a defendant's exercise of his right to present no evidence whatsoever. 97 U.S. 358, 361-62.

This is not about Sells's right not to personally take the stand. A criminal defendant has no duty to present any evidence or any witnesses, and it is reversible misconduct for the State to comment on the lack of defense evidence. *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990). A defendant "has no duty to present any evidence. The State bears the entire burden of proving each element of its case beyond a reasonable doubt." *State v. Traweck*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986), citing *Winship*, 397 U.S. 358. The prosecutor may not imply guilt from the defendant's failure to call witnesses to prove his innocence. *Traweck*, 43 Sn. App. at 107. It is misconduct to invite the jury to infer that the defendant had a duty to present favorable evidence if it existed. *Cleveland*, 58 Wn. App. at 648 (discussing *Traweck*).

By way of an exception to this rule, reversal is not required if the 'missing witness' doctrine applies. *State v. Blair*, 117 Wn.2d 479, 488,

816 P.2d 718 (1991). If the State identifies a particular witness whose testimony could illuminate a factual dispute, the prosecutor may suggest a negative inference based on the failure of the defense to call that specific witness. But this exception does not apply unless, “as a matter of reasonable probability, [the defense] would not knowingly fail to call the witness in question unless the witness’s testimony would be damaging.” In other words, “the inference is based, not on the bare fact that a particular witness is not produced to testify, but on the non-production *when it would be natural for him to produce the witness if the facts known by him had been favorable.*” *Blair*, 117 Wn.2d at 488-90.

Here, the State did not argue that a particular witness existed whom Sells could have called to refute the State’s claim that, the missing Visa card, if the State had been able to produce it, would bear Pinnick’s name. Rather, the State’s comment simply drew attention to the fact that Sells did not present any evidence disproving the State’s allegations.

Counsel’s Failure to Object Was Deficient Performance: When the defense does not object to misconduct at trial, the issue is waived unless the misconduct was “so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Edvalds*, 157 Wn. App. 517, 522, 237 P.3d 368 (2010). Here, the misconduct most likely could have been

cured by a timely objection and a curative instruction reminding the jury of the *Winship* doctrine. Therefore, the Court should reverse on the grounds of ineffective assistance of counsel.

Counsel's performance fell below an objective standard of reasonableness. The prosecutor's comment was clearly improper. An objection and instruction could have corrected any misunderstanding in the jury box and avoided any resulting prejudice. Counsel had no tactical reason for not objecting. The deficiency prong of the ineffective assistance test is met.

The prejudice prong is also satisfied because confidence in the verdict is compromised. We cannot know what factors led the jury to its verdict or what the impact of any particular constitutional violation might have had on deliberations.

The remedy is to reverse the conviction.

4. COUNTS 1 AND 2 WERE SAME CRIMINAL CONDUCT.

At sentencing, the court engaged in what a neutral observer might describe as a rant for four pages. RP 200-04. In the course of this speech, the court decreed that the current offenses were not same criminal conduct because they were committed in different places and at different times. RP 203. The court entered a finding to that effect. CP 78. This was error.

Same criminal conduct means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). All three elements must be present for multiple offenses to encompass the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

But offenses need not occur simultaneously in order to constitute the same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). The “same time” and “same intent” elements may be established if the individual acts were part of a continuing, uninterrupted sequence of conduct. *Porter*, 133 Wn.2d at 186. In determining whether two crimes share the same criminal intent, the court considers (1) whether the defendant’s intent, viewed objectively, changed from one crime to the next, and (2) whether commission of one crime furthered the other. *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

RCW 9.94A.589(1)(a) is construed narrowly, and most multiple crimes do not constitute the same criminal conduct. *State v. Stockmyer*, 136 Wn. App. 212, 218, 148 P.3d 1077 (2006). This Court defers to the trial court’s determination of same criminal conduct unless the court clearly abused its discretion or misapplied the law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990). Here, the sentencing court did both.

The State argued that three days elapsed between the use of the Visa card and the search that turned up the other two cards in Sells's possession. RP 192. But the focus of a same criminal conduct inquiry is the timing of the unlawful acts, not the discovery of the evidence. The fact that two additional cards were discovered in a different place three days after the use of the Visa card does alter the fact that the offenses involving the three cards were part of a single, ongoing course of criminal conduct. The three cards went missing at the same time, during the night or early morning of July 15, 2009. By 8:30 that morning, Sells had somehow acquired at least one of the cards. The State did not allege and presented no evidence to suggest that Sells did not come into possession of the other two cards at the same time or that his possession of the Home Depot and Sears card somehow were part of a separate unlawful course of conduct from the one by which Sells acquired the Visa card.

It is well-settled in the context of a double jeopardy analysis that the unit of prosecution for credit card offenses is not the number of transactions, but the number of victims. *See, e.g., State v. Fisher*, 139 Wn. App. 578, 582, 161 P.3d 1054 (2007) (possession, with the requisite intent, of a victim's means of identification or financial information.) Here, the State manipulated semantics to characterize a single criminal episode involving three School District's credit cards as violating two

distinct statutes. Fine. But it stretches traditional concepts of fairness and the spirit of the SRA to further insist that the offenses of possessing three cards and using one of them does not constitute a single course of conduct for sentencing purposes.

Sells clearly acquired, retained and used these three cards as part of a single course of action. The single victim was the School District. Therefore Counts 1 and 2 are the same criminal conduct for sentencing purposes. At best, the sentencing judge appears to have blamed Sells for what he perceived as shortcomings of the SRA. At worst, the court seems to have harbored ill-will toward him. This led the court to ignore the same criminal conduct provisions and to reject the idea out of hand without a meaningful analysis.

This Court should remand so that a different judge can determine whether Sells was guilty of a single course of criminal conduct.

5. SELLS IS ENTITLED TO CREDIT FOR TIME SERVED.

The Sentencing Reform Act, RCW 9.94A (SRA), requires: “The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.” RCW

9.94A.505(6) (emphasis added.) Use of the word “shall” means this is not subject to the sentencing court’s discretion.

The court summarily refused to give Sells credit for time served on the grounds that he was not held solely on the offense for which he was sentenced but was instead (or also) detained on a hold from the state of Nevada. RP 206-07. The record contains absolutely no evidence that such a hold exists. CP 63 (Sentencing Exhibit List.) All we have are vague references by Sells and the prosecutor. RP 200, 206. Moreover, if Nevada did issue a hold request, there is nothing to show what the effective date of that hold would be or whether the hold would take effect before the date Sells was eventually released in Washington.

Moreover, even if a Nevada hold existed and was in effect, the Washington court did not honor it. Instead, the court issued an order granting conditions of release regarding the offenses for which Sells was sentenced on October 21, 2010. Order Setting Conditions of Release, Supp. CP. Accordingly, Sells was not confined on an out-of-state hold. He was in custody solely on the Washington charges. Therefore, the sentencing court did not have discretion under the SRA to withhold credit for the time Sells served while confined during these proceedings.

The remedy is to remand for resentencing according to law. Because of the court's apparent hostility to Sells, this Court should remand for resentencing before a different judge.

VI. **CONCLUSION**

The Court should reverse the conviction for Count 1 and remand with instructions to dismiss the prosecution with prejudice. Alternatively, the Court should remand for a new trial with a properly instructed jury. At minimum, the Court should remand for resentencing before a different judge.

Respectfully submitted this March 25, 2011.

A handwritten signature in black ink, appearing to read "Jordan B. McCabe", written over a horizontal line.

Jordan B. McCabe, WSBA No. 27211
Counsel for William C. Sells

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STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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