

NO. 41701-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RODDY K. KARTCHNER,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's entry of judgements unsupported by substantial evidence denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

2. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when it failed to grant a motion for severance of counts and thereby allowed the state to present inadmissible, unfairly prejudicial evidence of similar bad acts.

3. The prosecutor committed misconduct and denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when he argued that the jury should convict even though the state had failed to prove the essential elements of knowledge and intent.

4. The trial court violated RCW 5.60.060 when it allowed the state to elicit evidence of private calls between the defendant and his wife.

5. The trial court erred when it failed to find that offenses having a unity of time, place, objective intent, and victim constituted the same criminal conduct for the purpose of calculating the defendant's offender score.

Issues Pertaining to Assignment of Error

1. Does a trial court's entry of judgements unsupported by substantial evidence deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

2. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it fails to grant a motion to sever counts when that denial allows the state to present inadmissible, unfairly prejudicial evidence?

3. Does a prosecutor commit misconduct and deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if that prosecutor argues that the jury should convict even though the state had failed to prove essential elements of knowledge and intent?

4. Are recorded jail conversations between spouses privileged under RCW 5.60.060?

5. Does a trial court err if it fails to find that offenses having a unity of time, place, objective intent, and victim constitute the same criminal conduct for the purpose of calculating a defendant's offender score?

STATEMENT OF THE CASE

Factual History

By seventh amended information filed November 16, 2010, the Clark County Prosecutor charged the defendant Roddy K. Kartchner, with 18 separate felonies and two misdemeanors involving a number of financial transactions in which the defendant had participated. CP 214-218. The following lists each count, along with the name of the alleged victim and the claimed date of occurrence. *Id.*

Count 1: First Degree Theft on 4/16/08 from Roseann Cioce;

Count 2: First Degree Theft on 5/6/08 from Joyce Helms;

Count 3: Second Degree Theft on 7/28/08 from Alan J. Moon;

Count 4: Second Degree Theft on 8/10/08 from Alan J. Moon;

Count 5: First Degree Theft on 9/22/08 from Renee Jenks;

Count 6: First Degree Theft on 9/29/08 from Don Rutherford;

Count 7: Second Degree Theft on 9/30/08 from Don Rutherford;

Count 8: First Degree Theft on 2/6/09 from Terry Williams and Stacy Dalgarno;

Count 9: Attempted First Degree Theft on 2/9/09 from Aaron LaBerge;

Count 10: First Degree Theft on 2/11/09 from Bank of America;

Count 11: First Degree Identity Theft on 2/11/09 from Aaron LaBerge;

Count 12: Forgery on 2/11/09 from Fanzter, Inc.;

Count 13: Money Laundering on 2/11/09;

Count 14: Money Laundering on 2/11/09;

Count 15: Attempted First Degree Theft on 2/11/09 from Dr. Alleyne;

Count 16: First Degree Identity Theft on 2/11/09 from Dr. Alleyne;

Count 17: Attempted First Degree Theft on 2/12/09 from Bank of America;

Count 18: Second Degree Identity Theft on 2/12/09 from Aaron LaBerge;

Count 19: Attempted Tampering with Physical Evidence on 2/20/09; and

Count 20: Attempted Tampering with Physical Evidence on 2/20/09.

CP 214-218.

For convenience sake, these charges can be placed into the following five groups:

(1) Charges Involving Friends and Acquaintances: Counts 2, 3, 4, 5, 6, 7 and 8;

(2) Charges Involving Strangers: Counts 1 and 2;

(3) Charges from the \$470,000.00 Franzter, Inc. Check: Counts 9, 10, 11, 12, 13, 14, 17 and 18;

(4) Charges Involving Dr. Alleyne: Counts 15 and 16; and

(5) The Tampering Charges: Counts 19 and 20.

The following gives the factual history behind the charges from the seventh amended information as they relate to the five identified groups.

(1) Charges Involving Friends and Acquaintances. In 2009, the defendant, Roddy Kartchner, was living in Hazel Dell with his wife of 27 years and their four children. RP 1049-1050. The family had lived in this home for many years. *Id.* At the time, the defendant was 51-years-old, had previously run a small construction company called Covenant Construction Consulting, Inc. (CCCI), and was then a “construction manager ” on a condominium project in Portland. RP 1050-1052, 1208-1209. By all accounts, he was a self-styled “entrepreneur,” and was constantly involved in trying to promote different projects, particularly with his long-time friend and fellow “entrepreneur” Tom Goodwin. RP 1024-1067, 1102-1108, 1119-1123, 1210-1224. Mr. Goodwin was a retired railroad engineer who lived in California, whom the defendant met many years previous at an entrepreneurial conference in California. RP 1169-1173.

While the defendant was involved in development projects with Mr. Goodwin, he was also involved with a number of his own projects. RP 1059-1062, 1083-1087, 1327-1335. One of these projects involved a person who identified herself by the name of Lynn Systel, who claimed she needed help securing a multimillion inheritance. RP 1054-1056. In an attempt to get money to further this and other projects, the defendant borrowed money from

a number of friends and acquaintances. RP 155-195, 551-569, 496-550, 673-685. One of these acquaintances was Alan Moon, who had owned a Cricket Wireless Store in Vancouver from 2007 to 2009. RP 455-495. In July of 2008, the defendant was in his store and borrowed \$500.00 cash upon his written promise to pay 300% interest in one month. RP 457-459. Mr. Moon later loaned the defendant \$200.00 more upon the defendant's promise to repay \$2,000.00 back within a short period of time. *Id.* The defendant did not repay the loans. RP 468. The state charged the defendant with two counts of second degree theft based upon these two transactions (Counts 3 and 4). CP 214-218.

The defendant also borrowed money from friends. RP 496, 551. For example, in September of 2008, the defendant borrowed \$1,800.00 from Ruth Jenks and her husband, giving a note payable in return. RP 551-561. The defendant was acquainted with the Jenks from a construction project where he had worked with Mr. Jenks. *Id.* When the defendant had been unable to repay the note as required, he gave them a pistol in partial payment. RP 560-561. He later offered to give them an expensive rifle as further collateral, but Ms Jenks husband said that was not necessary. RP 564-565. The state charged the defendant with one count of first degree theft based upon this transaction (Count 5). CP 214-218.

On two separate occasions in September of 2008, the defendant also

borrowed money from a friend from church by the name of Don Rutherford in order to pursue his attempts to get Ms Systel's inheritance. RP 497-503. The first loan was for \$1,850.00 and the second was for \$2,580.00, and in each instance Mr. Rutherford watched as the defendant purchased moneygrams with the money to send to third parties in the United Kingdom. RP 503-508. The defendant signed a note payable for each loan and had been unable to pay on the dates due. *Id.* In spite of that fact, Mr. Rutherford still considers the defendant his friend. RP 511-516. The state charged the defendant with two counts of second degree theft from these transactions (Counts 6 and 7). CP 214-218.

Finally, according to a person by the name of Stacy Dalgarno, in February of 2009, Ms Dalgarno's domestic partner by the name of Terry Williams loaned the defendant \$1,500.00 out of a joint checking account she maintained with Mr. Williams. RP 673-680. This loan apparently involved some type of business deal that Mr. Williams had with the defendant, although Ms Dalgarno was unsure of the exact nature of the business. *Id.* She also did not know whether or not the defendant had ever paid back the loan. *Id.* The state charged the defendant with one count of first degree theft out of this transaction (Count 8). CP 214-218.

(2) Charges Involving Strangers. Roseanne Cioce is a real estate broker who lives in Arden, North Carolina with her husband. RP 405-409.

In April of 2008, she learned that there was an unauthorized transfer from her account at Wells Fargo Bank in the amount of \$7,400.00. RP 405-410. This transfer was made as a payment on a credit card account the defendant and his wife maintained. RP 409-410. Similarly, in May of 2008, a person by the name of Joyce Helms, who lives in Nagshead, North Carolina, learned that there had been three unauthorized transfers out of an account she maintained at Wachovia Bank in the amounts of \$4,700.00, \$4,800.00, and \$2,500.00. RP 687-694. The first of these three unauthorized transfers was made as a payment on the same credit card account the defendant and his wife maintained. 676-678.

The defendant later stated that he only became aware of the transfers into his credit card account when his bank contacted his wife to state that the transfers had been reversed. RP 1059-1062, 1327-1335. He and his wife then informed their bank that the transfers had been fraudulent. *Id.* As a result, their bank closed the credit card account and issued the defendant and his wife new credit cards with a new account number. RP 594-560. The state charged the defendant with two counts of first degree theft out of these two transactions (Counts 1 and 2). CP 214-218.

(3) Charges from the \$470,000.00 Franzter, Inc. Check. One of the projects for which Mr. Goodwin and the defendant had been trying to find funding for many years involved “orbital engine” technology an engineer had

developed in the 1960's and 1970's. RP 1064-1071, 1102-1108, 1110-1116, 1226-1232. This was a form of a rotary engine, reputedly with numerous applications and very energy efficient. *Id.* Mr. Goodwin had previously purchased licenses to develop and market the technology, and he and the defendant had long been looking for financing with which to first develop a prototype and then get more funding with which to manufacture and market the engine. *Id.*

In late 2008 or early 2009, Mr. Goodwin contacted the defendant and told him that he had been successful in arranging funding for the "orbital engine" project through a source in London by the name of Mr. Azia after learning of him through a website called "RaiseCapital.com." RP 1035-1044, 1232-1250. Mr. Goodwin later told the defendant that the funding source had fallen through because they had first insisted in receiving \$200,000.00 in prepaid interest, which neither he nor the defendant could raise. RP 1119-1123. According to Mr. Goodwin, Mr. Azia did give him the name of a Mr. Mohr who might be able to provide him and the defendant with funding. RP 1126-1133. Shortly thereafter, Mr. Goodwin contacted the person identifying himself as a Mr. Mohr. *Id.*

After speaking with Mr. Mohr on the phone and through e-mail, Mr. Goodwin contacted the defendant and told him that Mr. Mohr, who was located in London, had agreed to provide them with an initial sum to start

processing documents, and that he would then send an additional \$17,000,000.00 as start up money for their “orbital engine” project. RP 1035-1037, 1237-1250. On Mr. Goodwin’s instructions, the defendant opened a business account at a local branch of the Bank of America in which Mr. Goodwin stated that Mr. Mohr would wire the funds. *Id.* All of the information the defendant used to open the account was truthful and accurate, correctly identifying himself, his business, his home address, and all other information the bank required to open up a legitimate business account. RP 336-340.

According to Mr. Goodwin, Mr. Mohr then contacted him and stated that he had decided to send a check to the defendant to start the business funding process instead of wiring the funds. RP 1141-1144. Mr. Goodwin then gave this information to the defendant, who began direct e-mail contact with the person identifying himself as Mr. Mohr. RP 1154-1155. On February 11, 2009, within a few days of his initial contacts with Mr. Mohr, the defendant received a check via Federal Express in the amount of \$470,000.00, drawn on a Bank of America account belonging to a Connecticut business by the name of Franzter, Inc. RP 1258-1267. Pursuant to the e-mail instructions from Mr. Mohr, the defendant took the check to his local branch of the Bank of America to deposit in the business account he had established. *Id.* Once at the bank, the defendant asked to speak with the

manager. *Id.* Although the manager was not in, the defendant did speak with the assistant manager, who used her computer to verify that the check was legitimate and that there were funds to cover it. RP 344-349, 1270-1271. This assistant manager then told the defendant that he could have instant access to the funds. *Id.* At this point, the defendant withdrew \$6,000.00 in cash for himself, \$6,000.00 in cash to deposit into Mr. Goodwin's personal account, along with a \$20,000.00 cashier's check to deposit into the defendant's business account, and a \$20,000.00 check to deposit into Mr. Goodwin's business account. The defendant then left the bank with a total of \$12,000.00 in cash and \$40,000.00 in two cashier's checks. RP 344-352, 1272-1292.

Once the defendant returned home from the bank, he received further instructions from Mr. Mohr via Mr. Goodwin, telling him to return to the bank and arrange for two wire transfers in the amount of \$200,000.00 each to be sent to a bank in China and a bank in Taiwan. RP 1275-1292. The defendant thought this instructions somewhat odd, but Mr. Goodwin told him that this person would soon be providing them with millions in investment money, so he should simply follow the instructions given. *Id.* As a result, the defendant returned to his local branch of the Bank of America, filled out the two wire requests, gave them to the bank employees, and left, stating that he would be back later to perform some further transactions. RP 353-359.

Sometime after the defendant left the bank after filling out the wire transfer requests, the manager at the defendant's branch of the Bank of America received a call from the manager of the Bank of America branch in Connecticut where Franzter, Inc. had its accounts. RP 359-360. The Connecticut branch manager informed the defendant's branch manager that (1) the check the defendant had deposited was fraudulent, and (2) the reason the bank's computers had shown sufficient funds to pay the check was that Franzter Inc. had a \$500,000.00 certificate of deposit that had just come to maturity and been placed in the business's operating accounts. *Id.* Upon receiving this information, the manager from the defendant's branch of the Bank of America immediately cancelled the two \$200,000.00 wire transfers and called the police, who came out to the bank, took an initial report, and told her to call them when the defendant returned. *Id.*

The defendant later returned to the bank in order to change the \$20,000.00 cashier's check he had previously had the bank make out to his business (Covenant Construction). RP 360-364. When he made his request, the bank manager asked him to wait in the lobby. *Id.* After the defendant left her office, she called the police. *Id.* Within 15 to 20 minutes, police officers arrived and found the defendant waiting in the lobby. *Id.* They then placed him under arrest and eventually took him to the police station, where he gave a lengthy statement to a detective from the Clark County Sheriff's

Office. RP 743-747. During this interview, the defendant attempted to explain about his many entrepreneurial endeavors, including the “orbital engine” project. *Id.* After this interview, the police obtained two search warrants for the defendant’s home office and executed them on succeeding days in order to retrieve his computer and other documents that the defendant told them outlined his transactions of that and previous days. RP 756-776. The state charged the defendant with the following crimes out of these transactions: attempted first degree theft and two counts of first degree identify theft from Aaron Labarge, the owner of Franzter, Inc. (Counts 9, 11 and 18); first degree theft and attempted first degree theft from Bank of America (Counts 10 and 17); Forgery of the Franzter, Inc. check (Count 12); and two counts of money laundering for the two wire transfers (Counts 13 and 14). CP 214-216.

(4) Charges Involving Dr. Alleyne. On February 11, 2009, a person by the name of Andrew Schneider went to a Bank of America Branch in Brooklyn, New York, and deposited a check for \$80,000.00 into a bank account the defendant had at Washington Mutual Bank. RP 22-661. The check was drawn on an account maintained by Dr. Neville Alleyne, an orthopedic surgeon in San Diego, California. RP 662. The check was a forgery and had not been authorized by Dr. Alleyne, who was not acquainted with either the defendant or a person by the name of Andrew Schneider. RP

715-721.

According to the defendant and his wife, the defendant had previously given his account information to a person identifying himself as Andrew Schneider, who was going to find investment funding. RP 1074-1079, 1347-1351, 1416-1419. However, the defendant did not feel good about Mr. Schneider as a source of funds, so he had dropped his correspondence with him, and was unaware that he had deposited any money into his account until after he got out of jail. *Id.* At no point did the defendant attempt to access this money. *Id.* The state charged the defendant with attempted first degree theft and first degree identity theft out of this transaction (Counts 15 and 16). CP 241-218.

(5) The Tampering Charges. On February 20, 2009, the defendant was still in the Clark County jail, not having yet made bail following his arrest. RP 783-790. On that day, he twice called his wife and had lengthy conversations with her, both of which were recorded by the jail. *Id.* At one point during the first of these calls, the defendant asked his wife the following question: “Did you find a home for my cases.” RP 791-792. This question was in reference to some brief cases that the defendant kept in his home office. *Id.* At one point during the second call, the defendant asked his wife to move some boxes out of his home office. RP 792-796. The state charged the defendant with two counts of attempted tampering with physical

evidence from these two telephone calls (Counts 19 and 20).

Procedural History

The state filed its original information against the defendant on February 18, 2009, and then filed seven consecutive amendments, eventually ending up with the 18 separate felony counts and the two misdemeanor charges as was noted previously. CP 1-2, 3-5, 16-19, 23-27, 28-32, 165-170, 193-198, 214-218. Prior to trial, the defense moved to sever the charges arising out of the defendant's negotiation of the \$470,000.00 Franzter check (Counts 9, 10, 11, 12, 13, 14, 18 and 19) from all other counts, which alleged crimes against unrelated individuals having primarily occurred many months previous. CP 109-124; RP 85-91. The trial court denied the motion. RP 98-99.

This case eventually came on for trial on November 29, 2010, and ran for five days with the state calling thirteen witnesses, the defense calling three, and the state recalling one witness in rebuttal. RP 335-988, 1047-1429, 1430-1436. The state's witnesses included the alleged "victims" from each count as noted in the previous list of charges, as well as the manager of the Bank of America where the defendant opened the account and deposited the Franzter check, an investigator from Washington Mutual Bank, an investigator from Bank of America, the detective who twice interviewed the

defendant, as well as a computer expert from the sheriff's office who searched the defendant's computer. RP 335, 570, 618, 731 and 940. Following the close of the defendant's case, the defense called three witnesses: the defendant's wife, Thomas Goodwin, and the defendant. RP 1047, 1097, 1207. All of these witnesses testified to the facts set out in the previous factual history. *See Factual History.*

Just prior to trial, and during the trial, the defense moved *in limine* to prevent the state from playing any recordings of any telephone conversations the defendant had with his wife while he was in the jail. RP 418-422, 432-440. Ultimately, the court denied the defendant's motion and allowed the state to play the recordings for the jury over further defense objection. RP 791-786.

Following the reception of evidence in this case, the court granted a state's motion to dismiss Count 4 (second charge of theft against Alan Moon), Count 5 (charge of theft against Renee Jenks), and Count 8 (Charge of theft against Terry Williams and Stacy Dalgarno). The court then instructed the jury with no objection or exception taken by either party. RP 1443-1444. At this point, the state presented its closing argument, which included the following statement to the jury:

The State's theory of the case is that willful, intentional ignorance surrounding multiple suspicious financial transactions is not a defense to a charge of financial fraud. A person who

intentionally does not inquire about the circumstances of multiple suspicious and probably criminal acts, can be inferred to be acting intentionally. And, you should make that inference.

RP 1490.

Following the defendant's closing argument, the state presented its rebuttal, which included the following statement to the jury:

The Defendant. His theory? I had no idea because I always relied on somebody else. Well, what is the reality? The reality is that society requires you to accept responsibility for your actions. When it appears that you are about to do something illegal, you have an obligation to determine if that act is illegal. If you fail to do so it can be inferred that you intentionally engaged in illegal conduct.

RP 1518.

At the beginning of the second day of deliberation (Monday, following a Friday evening adjournment), the court informed the parties that the jury foreperson had called in sick with the flu. 1568-1576. Over defense objection and a motion for mistrial, the court replaced the foreperson with the alternate, and instructed the newly constituted jury to pick a new foreperson and begin its deliberations anew. *Id.* In fact, the jury had been excused the previous Friday night not long after being sent out and the court was unsure whether or not it had done anything other than pick a foreperson before going home for the weekend. *Id.*

At about 2:00 pm that afternoon, the jury sent out three questions. CP 304-306. In the first question, the jury asked for the provenance of exhibit

81. CP 306. With the agreement of the parties, the court responded as follows: “You must rely upon your own memory and notes to address this issue.” CP 306; RP 1577. The second question asked whether or not the date of February 12, 2010, in the “to convict” instruction on Count 18 was a “typo.” CP 305. Again with the consent of the parties, the court responded that it was and gave the jury the correct date 2010. CP 305; *See also* Instruction 20 at CP 246. Finally, in the third question, the jury asked for a CD player to listen to the recorded conversations between the defendant and his wife. CP 304. The court, with the consent of the parties, responded by bringing the jury back into court room and playing the recording one time for them. RP 1578-1587.

Eventually, the jury returned verdicts of acquittal on Count 1 (theft from Roseanne Cioce), Count 2 (theft from Joyce Helms), Count 3 (theft from Alan Moon), and Counts 6 and 7 (thefts from Don Rutherford), which constituted the charges previously identified as being those relating to thefts from friends and acquaintances and theft from strangers. CP 307-311. The jury returned verdicts of “guilty” on the twelve remaining counts, which constituted the charges previously identified as relating to the defendant’s deposit of the Franzter check, Dr. Alleyne, and the tampering claims. CP 311-323.

At sentencing in this case, the defense argued, *inter alia*, that all of

the charges arising from the defendant's deposit of the Franzter check (Counts 9, 10, 11, 12, 13, 14, 17, and 18) constituted "same criminal conduct," as did the two charges involving Dr. Alleyne (Counts 15 and 16), thus yielding an offender score of two points. CP 334-339. The court disagreed, holding that only the two money laundering and the two counts naming Dr. Alleyne (attempted theft and identity theft) constituted the same criminal conduct. RP 1610-1619. Thus, the court found an offender score of seven concurrent points on ten felony convictions. *Id.* The court thereafter sentenced the defendant within the standard range for an offender score of seven points on each felony count. CP 341-353. The defendant thereafter filed timely notice of appeal. CP 363-386.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FOUND HIM GUILTY OF OFFENSES UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the defendant argues that substantial evidence does not support any of the defendant’s convictions. The following reviews the evidence presented at trial and how it fails to support the convictions based upon the defendant’s deposit of the Franzter check, the convictions involving check from Dr. Alleyne’s account, and the convictions for tampering with evidence.

(1) The Convictions Based upon the Defendant’s Negotiation of the Franzter, Inc. Check Are Not Supported by Substantial Evidence.

In the case at bar, the jury convicted the defendant of eight felonies related to his deposit of the Franzter check. They were as follows:

Count 9: Attempted First Degree Theft on 2/9/09 from Aaron LaBerge from the defendant’s deposit of the Franzter check;

Count 10: First Degree Theft on 2/11/09 from Bank of America from the deposit of the Franzter check, withdrawal of \$12,000.00 cash, and the creation of the two \$20,000.00 cashier's checks;

Count 11: First Degree Identity Theft on 2/11/09 from Aaron LaBerge from depositing the Franzter check with Mr. LaBerge's financial information on it;

Count 12: Forgery on 2/11/09 for depositing the Franzter check;

Count 13: Money Laundering on 2/11/09 for giving the bank the first wire transfer request;

Count 14: Money Laundering on 2/11/09 for giving the bank the second wire transfer request;

Count 17: Attempted First Degree Theft on 2/12/09 from Bank of America for attempting to exchange one of the two \$20,000.00 cashier's checks;

Count 18: Second Degree Identity Theft on 2/12/09 from Aaron LaBerge.

These eight counts encompass four separate types of offenses: (1) Theft under RCW 9A.56.020, (2) Identity Theft under RCW 9.35.020, (3) Forgery under RCW 9A.60.020, and (4) Money Laundering under RCW 9A.83.020. For theft, the *mens rea* element is the "intent to deprive". See RCW 9A.56.020. For identity theft, the *mens rea* element is the "intent to commit, or to aid or abet, any crime." See RCW 9.35.020. For forgery, the *mens rea* element is the "intent to injure or defraud." See RCW 9A.60.020. For money laundering, the *mens rea* element is "knowledge" that the property one is attempting to manipulate "is proceeds of . . . unlawful

activity.” *See* RCW 9A.60.0020.

Under the “intent” element from the first three classifications of offenses, or the “knowledge” element from the fourth type of offense, the state had the burden of proving that the defendant understood that he was committing illegal acts. In other words, the state had the burden of presenting evidence from which a reasonable jury could conclude that the defendant knew that the Franzter check was forged and, to put it succinctly, negotiated that check with the intent and desire to steal. This is where the evidence is insufficient to support the convictions because, taken as a whole, the evidence merely proves that the defendant acted as a gullible dupe of the real criminals who were manipulating him and Mr. Goodwin into believing that they had finally found their long sought-after financing for one of their projects. This evidence was that the defendant, a local resident of long-standing in the community set up an account in his own name, and using his own documentation. From this account, he had instant access to \$470,000.00, yet only took \$12,000.00 in cash, along with two \$20,000.00 cashiers checks made out to businesses easily traced back to him, and then did not try to negotiate those checks.

Nothing within the scenario of events supports a conclusion that the defendant acted with the intent to steal, injure or defraud, or that the defendant acted in any way other than as a victim himself of financial frauds

perpetrated by other individuals. Although this evidence does support the conclusion that the defendant acted with incredibly poor judgment, it does not support the conclusions that he acted with criminal intent. Thus, absent substantial evidence on intent, the court's entry of judgments against the defendant for these offenses violated his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

(2) The Convictions Based upon the Deposit of the Alleyne Check into the Defendant's Bank Account Are Not Supported by Substantial Evidence.

In this case, the jury convicted the defendant of two offenses involving Dr. Alleyne: Attempted First Degree Theft under RCW 9A.56.020 in Count 15, and First Degree Identity Theft under RCW 9.35.020 in Count 16. As was mentioned previously, in order to sustain convictions for these two offenses, there must be evidence in the record from which a reasonable juror can conclude that when a third person deposited the \$80,000.00 check forged on Dr. Alleyne's account into the defendant's bank account at Washington Mutual Bank, the defendant acted as an accomplice and with the intent to commit the crime of theft. Nothing within the record supports such a conclusion. Rather, the conclusion to be drawn is the same as in the other offenses: that the defendant initially believed that he had provided his bank account number in order to facilitate legitimate business financing, and that

he was unaware that the transfer had even been made. This last conclusion is supported by the fact that neither the defendant nor his wife ever attempted to access any of the funds deposited into their bank account. Thus, substantial evidence does not support the convictions in Counts 15 and 16.

(3) The Convictions for Attempted Tampering with Evidence Are Not Supported by Substantial Evidence.

Under RCW 9A.72.150(1), the offense of tampering with evidence is defined as follows:

(1) A person is guilty of tampering with physical evidence if, having reason to believe that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:

(a) Destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its appearance, character, or availability in such pending or prospective official proceeding; or

(b) Knowingly presents or offers any false physical evidence.

RCW 9A.72.150(1).

Under the plain language of this statute, the state is required to prove that the defendant, *inter alia*, acted “without legal right or authority.” In this case, the gravamen of the state’s claim with regard to the two tampering charges was that the defendant asked his wife to move briefcases he had in his home office. The briefcases and the contents were the defendant’s property and did not constitute any type of contraband. Thus, in asking his wife to move the briefcases, the defendant was acting well within his “legal

right or authority.” At a minimum, the record is devoid of any evidence to support the conclusion that the defendant acted without “legal right or authority” when asking his wife to move property that belonged to him and he was keeping in his own home. Thus, substantial evidence does not support the two tampering charges from Counts 19 and 20.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FAILED TO GRANT A MOTION FOR SEVERANCE OF COUNTS AND THEREBY ALLOWED THE STATE TO PRESENT INADMISSIBLE, UNFAIRLY PREJUDICIAL EVIDENCE OF SIMILAR BAD ACTS.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, a defendant charged with a crime is entitled to a severance of counts if the joinder of the counts is “so manifestly prejudicial as to outweigh the concern for judicial economy.” *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Under such circumstances in which the unfair prejudice outweighs the concern for judicial economy, the failure to grant a motion to sever requires reversal unless the state can prove that the error was harmless

beyond a reasonable doubt. *State v. Mitchell*, 117 Wn.2d 521, 817 P.2d 898 (1991) (failure to grant severance held harmless beyond a reasonable doubt).

In determining whether or not the trial court's refusal to grant a severance of counts denied the defendant the right to a fair trial, the court considers the following factors:

Factors that tend to mitigate any prejudice from a joinder of counts include: (1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime. *Watkins*, 53 Wn.App. at 269, 766 P.2d 484; *State v. Gatalski*, 40 Wn.App. 601, 606-07, 699 P.2d 804, review denied, 104 Wash.2d 1019 (1985). These same factors are applied by reviewing courts to determine if a trial court's denial of a severance motion was unduly prejudicial. *State v. Eastabrook*, 58 Wn.App. 805, 812, 795 P.2d 151, review denied, 115 Wash.2d 1031, 803 P.2d 325 (1990).

State v. Cotten, 75 Wn.App. 669, 687, 879 P.2d 971 (1994).

As the court instructs in *State v. Cotton*, the first factor to consider when evaluating the trial court's refusal to sever counts is "the strength of the state's evidence on each count." In this case, the state's evidence was relatively stronger on the counts related to the Franzter check than it was on either the counts involving friends and acquaintances, counts involving strangers, counts involving Dr. Alleyne, or the tampering counts. This conclusion is supported by the fact that the jury acquitted the defendant on all counts involving friends and acquaintances (Counts 3 through 8) and the

counts involving strangers (Counts 1 and 2). In addition, the jury's desire to listen again to the telephone conversations between the defendant and his wife evinces their ambiguity on these counts.

The second factor is the clarity of defense on each count. In this case, the defendant took the stand on his own behalf and unambiguously declared a similar defense to all the counts: that he did not act with the intent to injure and defraud. Thus, by failing to sever the counts in this case, the court made it near impossible for the jury to independently review the evidence from the different classes of offenses charged.

The third factor is "the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately." In this case the trial court gave the following instruction on this point:

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 227.

The deficiency in this instruction lies in its failure to instruct the jury that the evidence associated with one particular class of counts, such as those involving the Franzter check, was not evidence to be used in determining whether or not the state has met its burden on other unrelated counts. The

instruction fails to tell the jury which evidence was associated with a specific class of counts and what evidence was not associated with a specific count class of counts. Thus, the jury was free to use the evidence from those charges occurring many months before and involving friends and acquaintances as evidence of bad intent for the counts arising from the Franzter check or the counts involving Dr. Alleyne. Thus, Instruction No. 3 falls short in attempting to get the jury to parse out which evidence it could consider in the separate groups of offenses charged.

The fourth factor this court should consider in determining the issue of severance of counts is “the admissibility of the evidence of the other crime.” As concerns this fourth factor, it should be noted that none of the evidence concerning the offenses the defendant allegedly committed against individuals, (his friends and acquaintances, as well as Roseann Cioce, Joyce Helms, and Dr. Alleyne) would have been independently admissible in a trial on all of the counts arising from the Franzter check because it would have been evidence admitted solely for the purpose of proving the defendant’s propensity to commit crimes.

It is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. *See* 5 Karl B. Teglund, *Washington Practice, Evidence* § 114, at 383 (3d ed.

1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of a mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

. . . .

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

Similarly, Tegland goes on to note that “the courts are reluctant to allow the State to prove the commission of a crime by evidence that the defendant was associated with persons or organizations known for illegal activities.” 5 Karl B. Tegland, at 124.

For example, in *State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police

officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "It's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The

court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed the conviction and remanded the case for a new trial.

In addition, even if the state can prove some relevance in evidence that has the tendency to convince the jury that the defendant was guilty because of his propensity to commit crimes such as the one charged, the trial court must still weigh the prejudicial effect of that evidence under ER 403.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503

(2004), Acosta was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987) also explains why evidence of similarly crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, the defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: “This is not the problem. Alberto [the defendant] already has a record and had stabbed someone.” *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and

(3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, “[e]ach case must rest upon its own facts,” [*State v. Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State’s case and the logical relevance of the statement, leads to the conclusion that the court’s instruction could not cure the prejudicial effect of [the alleged victim’s] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona’s motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arose in the minds of the jury in the case at bar when the court denied the defendant’s motion to sever counts and allowed the state to present evidence from four separate groups of similar types of offenses that occurred at disparate times with disparate types of victims. Thus, under the four criteria set out in *Cotton*, particularly the fourth criteria, the trial court’s refusal to grant the motion to sever denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

III. THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN HE ARGUED THAT THE JURY SHOULD CONVICT EVEN THOUGH THE STATE HAD FAILED TO PROVE THE ESSENTIAL ELEMENTS OF KNOWLEDGE AND INTENT.

As was mentioned in Argument I, the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, guarantee a fair trial to every person charged with a crime. *State v. Swenson, supra; Bruton v. United States, supra*. This constitutional right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order in limine precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and (2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this argument by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the

death sentence. The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion in limine was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

State v. Gregory, 158 Wn.2d at 866-867.

In the case at bar, the only element of the crime that the defendant contested was his intent to steal, injure or defraud. As was mentioned in Argument I, each offense charged required the state to prove this *mens rea*. The prosecutor responded to the defendant's claims by twice inviting the jury to convict the defendant even if it only found that the defendant had been duped into performing the acts he did. The first such argument came in the state's initial closing, wherein the prosecutor argued as follows:

The State's theory of the case is that willful, intentional ignorance surrounding multiple suspicious financial transactions is not a defense to charge of financial fraud. A person who

intentionally does not inquire about the circumstances of multiple suspicious and probably criminal acts, can be inferred to be acting intentionally. And, you should make that inference.

RP 1490.

Following the defendant's closing argument, the state presented its rebuttal argument, which again included an argument that the jury should convict even if it failed to find that the defendant acted with the intent to steal, injure or defraud. During rebuttal, the prosecutor argued:

The Defendant. His theory? I had no idea because I always relied on somebody else. Well, what is the reality? The reality is that society requires you to accept responsibility for your actions. When it appears that you are about to do something illegal, you have an obligation to determine if that act is illegal. If you fail to do so it can be inferred that you intentionally engaged in illegal conduct.

RP 1518.

This latter statement that "society requires you to accept responsibility for your actions" and that "when it appears that you are about to do something illegal, you have an obligation to determine if that act is illegal" was a direct appeal to the jury to find the defendant guilty even if the jury found that he really didn't act with an actual intent to steal. It specifically invited the jury to convict because the defendant had been incredibly naive and gullible. By asking the jury to ignore one of the

elements of each offense, the prosecutor denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

IV. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO ELICIT EVIDENCE OF PRIVATE COMMUNICATIONS BETWEEN THE DEFENDANT AND HIS WIFE IN VIOLATION OF RCW 5.60.060.

Under RCW 5.60.060(1), of private communications between husband and wife are privileged from disclosure. This statute states:

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

RCW 5.60.060(1).

Under this statute, confidential communications between spouses

made during marriage are protected from disclosure. In *State v. Webb*, 64 Wn.App. 480, 824 P.2d 1257 (1992), the court explained this privilege as follows:

The marital communications privilege applies to confidential communications between spouses during marriage. To fall within the privilege, a communication must have been induced by the marriage relationship. The marital communications privilege is intended to encourage “that free interchange of confidences that is necessary for mutual understanding and trust.” The privilege is based on the premise that “the greatest benefits will flow from the relationship only if the spouse who confides in the other can do so without the fear that at some later time what has been said will rise up to haunt the speaker.”

State v. Webb, 64 Wn.App. at 486-487 (citations and footnote omitted).

In the case at bar, the court allowed the state to play two telephone calls between the defendant and his wife recorded while the defendant was in jail. The defense objected to the admission of this evidence on the basis that it violated RCW 5.60.060(1). However, the court overruled this objection on the basis that since the defendant and his wife knew that the conversations were being recorded, they were not protected communications between husband and wife. As a review of the court’s decision in *State v. Gibson*, 3 Wn.App. 596, 476 P.2d 727 (1970), indicates, this ruling was in error.

In *Gibson*, a police officer arrested a defendant and took him to a medical clinic for treatment of burns prior to booking him into jail. Pursuant

to police policy, the officer stayed with the defendant while he was treated by the physician. The defendant was later convicted of assault in a trial in which the court allowed the officer to testify to an incriminating statement that the defendant made in response to a question from the treating physician made in the furtherance of treatment. The defendant appealed, arguing that the admission of the statement violated the physician-patient privilege. The state responded that the trial court had not erred because the presence of the police officer defeated any claim that the defendant's statement to the doctor was privileged.

The Washington Supreme Court reversed the conviction, holding that the term "physician" used in RCW 5.60.060(4) should be construed to include agents of the physician who are present, and that the officer may be deemed to be an agent of the physician, present for the physician's protection as well as the detention of the prisoner. Thus, it was error to admit the officer's testimony concerning the medical information that the defendant gave to the attending physician. In making this decision, the court specifically noted that under the physician-patient privilege, the critical issue was whether or not the defendant believed there was a privilege. The court stated:

Actual treatment is not necessary; the only requirement for the relationship to arise by implication is that the patient believes the examination is being made for the purpose of treatment. If consulted

for treatment, it is immaterial by whom the doctor is employed.

State v. Gibson, 3 Wn.App. at 598 (citations omitted).

The facts from *Gibson* are analogous to the facts in the case at bar. In *Gibson*, the defendant's statements given to the treating physician for the purposes of treatment were privileged under RCW 5.60.060(4). The relevant fact was that the defendant believed the statement was privileged because he was making the statements to the physician for the purpose of treatment. In the case at bar, the defendant's confidential communications with his wife made during their marriage were privileged under RCW 5.60.060(1). The relevant fact was that the defendant and his wife believed that their statements were privileged because they were making them during a telephone call with no other person present. Thus, in the same way the court in *Gibson* erred by admitting evidence of the privileged statements, so in the case at bar the trial court erred by admitting evidence of the privileged statements.

In this case, the erroneous admission of the two recorded statements cause prejudice in two ways. First, absent the admission of the recorded conversations between the defendant and his wife, there would be no evidence to support the two tampering charges. Thus, these convictions should be vacated with instructions to dismiss. Second, the admission of this

evidence put the defendant's protestations of innocence in the other charges in an extremely unfavorable light. Indeed, given the fact that the jury acquitted the defendant on eight of the other charges, it appears likely that absent the admission of the two recordings of the defendant's telephone calls with his wife, the jury would have acquitted the defendant on all of the charges. Thus, the erroneous admission of this evidence caused prejudice and entitled the defendant to a new trial on all of the charges for which he was convicted.

V. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT OFFENSES HAVING A UNITY OF TIME, PLACE, OBJECTIVE INTENT, AND VICTIM CONSTITUTED THE SAME CRIMINAL CONDUCT FOR THE PURPOSE OF CALCULATING THE DEFENDANT'S OFFENDER SCORE.

Under RCW 9.94A.589(1)(a), at sentencing on two or more offenses, if "some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994). Under this statute, the term "same criminal intent" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). The term "same criminal intent" as used in this definition does not mean the same "specific intent." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Rather, it means the same "objective intent." *Id.*

For example, in *State v. Deharo*, 136 Wn.2d 856, 966 P.2d 1269 (1998), the trial court convicted the defendant of Delivery of Heroin, and Conspiracy to Deliver Heroin. At sentencing, the trial court found that these two offenses had the same victim and were committed at the same time and place. However, the court ruled that these two offenses did not constitute the “same criminal conduct” for the purpose of sentencing because they had different intent elements. The defendant appealed this ruling.

The Court of Appeals reversed the trial court on the sentencing issue, holding as follows:

[T]he present case, the “objective intent” underlying the two charges is the same - to deliver the heroin in one or both conspirators’ possession. Possessing that heroin was the “substantial step” used to prove the conspiracy. Since both crimes therefore involved the same heroin, it makes no sense to say one crime involved intent to deliver that heroin now and the other involved intent to deliver it in the future. Nor is there any factual basis for distinguishing the two crimes based on objective intent to deliver some now and some later. Under the reasoning in *Porter*, the two crimes should be treated as encompassing the same criminal conduct.

State v. Deharo, 136 Wn.2d at 858.

Similarly, in *State v. Saunders*, 120 Wn.App. 80, 86 P.3d 232 (2004), a defendant convicted of murder, robbery, kidnaping, and rape out of the same incident argued that his trial counsel had been ineffective when he failed to argue that the rape and the kidnaping constituted the “same criminal

conduct” for the purpose of determining his offender score. The court agreed, holding as follows:

Under the facts here, it appears that Williams’s primary motivation for raping Grissett by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Further, as the case law provides strong support to this argument, the failure was prejudicial. *See State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *Edwards*, 45 Wn.App. at 382, 725 P.2d 442; *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 526 (1998).

Thus, counsel’s decision not to argue same criminal conduct as to the rape and kidnaping charges constituted ineffective assistance of counsel and requires a remand for a new sentencing hearing where defense counsel can make this argument.

State v. Saunders, 120 Wn.App. at 825.

In the case at bar, the following lists the convictions arising out of the defendant’s deposit of the Franzter check at the Bank of America:

Count 9: Attempted First Degree Theft on 2/9/09 from Aaron LaBerge from the defendant’s deposit of the Franzter check;

Count 10: First Degree Theft on 2/11/09 from Bank of America from the deposit of the Franzter check, withdrawal of \$12,000.00 cash, and the creation of the two \$20,000.00 cashier’s checks;

Count 11: First Degree Identity Theft on 2/11/09 from Aaron LaBerge from depositing the Franzter check with Mr. LaBerge’s financial information on it;

Count 12: Forgery on 2/11/09 for depositing the Franzter check;

Count 13: Money Laundering on 2/11/09 for giving the bank the first wire transfer request;

Count 14: Money Laundering on 2/11/09 for giving the bank the second wire transfer request;

Count 17: Attempted First Degree Theft on 2/12/09 from Bank of America for attempting to exchange one of the two \$20,000.00 cashier's checks;

Count 18: Second Degree Identity Theft on 2/12/09 from Aaron LaBerge.

At sentencing, the court found that only the two money laundering charges arising out of Counts 13 and 14 constituted the same criminal conduct. As the following explains, this was an error. First, it should be noted that, under the state's theory of the case, there was only one objective intent: to steal money. Thus, there was a unity of intent. Second, all of the offenses occurred over a very short period of time and at the same place. Thus, there was a unity of time and place. Finally, as a review of the charges reveals, the victim in Counts 9, 11, 12 and 18 was Aaron LaBerge, whether denominated in his name or the name of his company. Thus, the trial court erred when it failed to find that these counts constituted the same criminal conduct. In addition, a careful review of the record also reveals that the

victim in Counts 10, 13, 14, 17 was Bank of America. Thus, the trial court erred when it failed to find that these counts constituted the same criminal conduct. Under the analysis, the defendant's offender score was actually two points instead of seven as the court calculated. As a result, this court should vacate the defendant's sentences and remand for resentencing using the correct offender score.

CONCLUSION

The defendant's convictions should be vacated and dismissed because they are not supported by substantial evidence. In the first alternative, all of the convictions should be reversed and the case remanded for a new trial based upon the trial court's error in failing to sever counts and based upon the prosecutor's improper statements during closing argument. In the second alternative, the defendant's sentences should be vacated and the case remanded for resentencing using the correct offender score.

DATED this 21st day of October, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION

ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,

FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 5.60.060

Who Are Disqualified – Privileged Communications

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

RCW 9.94A.589(1)

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims

occupied the same vehicle.

Dated this 21ST day of OCTOBER, 2011 at LONGVIEW, Washington.

/s/

CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

NO. 41701-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RODDY K. KARTCHNER,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's entry of judgements unsupported by substantial evidence denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

2. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when it failed to grant a motion for severance of counts and thereby allowed the state to present inadmissible, unfairly prejudicial evidence of similar bad acts.

3. The prosecutor committed misconduct and denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when he argued that the jury should convict even though the state had failed to prove the essential elements of knowledge and intent.

4. The trial court violated RCW 5.60.060 when it allowed the state to elicit evidence of private calls between the defendant and his wife.

5. The trial court erred when it failed to find that offenses having a unity of time, place, objective intent, and victim constituted the same criminal conduct for the purpose of calculating the defendant's offender score.

Issues Pertaining to Assignment of Error

1. Does a trial court's entry of judgements unsupported by substantial evidence deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

2. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it fails to grant a motion to sever counts when that denial allows the state to present inadmissible, unfairly prejudicial evidence?

3. Does a prosecutor commit misconduct and deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if that prosecutor argues that the jury should convict even though the state had failed to prove essential elements of knowledge and intent?

4. Are recorded jail conversations between spouses privileged under RCW 5.60.060?

5. Does a trial court err if it fails to find that offenses having a unity of time, place, objective intent, and victim constitute the same criminal conduct for the purpose of calculating a defendant's offender score?

STATEMENT OF THE CASE

Factual History

By seventh amended information filed November 16, 2010, the Clark County Prosecutor charged the defendant Roddy K. Kartchner, with 18 separate felonies and two misdemeanors involving a number of financial transactions in which the defendant had participated. CP 214-218. The following lists each count, along with the name of the alleged victim and the claimed date of occurrence. *Id.*

Count 1: First Degree Theft on 4/16/08 from Roseann Cioce;

Count 2: First Degree Theft on 5/6/08 from Joyce Helms;

Count 3: Second Degree Theft on 7/28/08 from Alan J. Moon;

Count 4: Second Degree Theft on 8/10/08 from Alan J. Moon;

Count 5: First Degree Theft on 9/22/08 from Renee Jenks;

Count 6: First Degree Theft on 9/29/08 from Don Rutherford;

Count 7: Second Degree Theft on 9/30/08 from Don Rutherford;

Count 8: First Degree Theft on 2/6/09 from Terry Williams and Stacy Dalgarno;

Count 9: Attempted First Degree Theft on 2/9/09 from Aaron LaBerge;

Count 10: First Degree Theft on 2/11/09 from Bank of America;

Count 11: First Degree Identity Theft on 2/11/09 from Aaron LaBerge;

Count 12: Forgery on 2/11/09 from Fanzter, Inc.;

Count 13: Money Laundering on 2/11/09;

Count 14: Money Laundering on 2/11/09;

Count 15: Attempted First Degree Theft on 2/11/09 from Dr. Alleyne;

Count 16: First Degree Identity Theft on 2/11/09 from Dr. Alleyne;

Count 17: Attempted First Degree Theft on 2/12/09 from Bank of America;

Count 18: Second Degree Identity Theft on 2/12/09 from Aaron LaBerge;

Count 19: Attempted Tampering with Physical Evidence on 2/20/09; and

Count 20: Attempted Tampering with Physical Evidence on 2/20/09.

CP 214-218.

For convenience sake, these charges can be placed into the following five groups:

(1) Charges Involving Friends and Acquaintances: Counts 2, 3, 4, 5, 6, 7 and 8;

(2) Charges Involving Strangers: Counts 1 and 2;

(3) Charges from the \$470,000.00 Franzter, Inc. Check: Counts 9, 10, 11, 12, 13, 14, 17 and 18;

(4) Charges Involving Dr. Alleyne: Counts 15 and 16; and

(5) The Tampering Charges: Counts 19 and 20.

The following gives the factual history behind the charges from the seventh amended information as they relate to the five identified groups.

(1) Charges Involving Friends and Acquaintances. In 2009, the defendant, Roddy Kartchner, was living in Hazel Dell with his wife of 27 years and their four children. RP 1049-1050. The family had lived in this home for many years. *Id.* At the time, the defendant was 51-years-old, had previously run a small construction company called Covenant Construction Consulting, Inc. (CCCI), and was then a “construction manager ” on a condominium project in Portland. RP 1050-1052, 1208-1209. By all accounts, he was a self-styled “entrepreneur,” and was constantly involved in trying to promote different projects, particularly with his long-time friend and fellow “entrepreneur” Tom Goodwin. RP 1024-1067, 1102-1108, 1119-1123, 1210-1224. Mr. Goodwin was a retired railroad engineer who lived in California, whom the defendant met many years previous at an entrepreneurial conference in California. RP 1169-1173.

While the defendant was involved in development projects with Mr. Goodwin, he was also involved with a number of his own projects. RP 1059-1062, 1083-1087, 1327-1335. One of these projects involved a person who identified herself by the name of Lynn Systel, who claimed she needed help securing a multimillion inheritance. RP 1054-1056. In an attempt to get money to further this and other projects, the defendant borrowed money from

a number of friends and acquaintances. RP 155-195, 551-569, 496-550, 673-685. One of these acquaintances was Alan Moon, who had owned a Cricket Wireless Store in Vancouver from 2007 to 2009. RP 455-495. In July of 2008, the defendant was in his store and borrowed \$500.00 cash upon his written promise to pay 300% interest in one month. RP 457-459. Mr. Moon later loaned the defendant \$200.00 more upon the defendant's promise to repay \$2,000.00 back within a short period of time. *Id.* The defendant did not repay the loans. RP 468. The state charged the defendant with two counts of second degree theft based upon these two transactions (Counts 3 and 4). CP 214-218.

The defendant also borrowed money from friends. RP 496, 551. For example, in September of 2008, the defendant borrowed \$1,800.00 from Ruth Jenks and her husband, giving a note payable in return. RP 551-561. The defendant was acquainted with the Jenks from a construction project where he had worked with Mr. Jenks. *Id.* When the defendant had been unable to repay the note as required, he gave them a pistol in partial payment. RP 560-561. He later offered to give them an expensive rifle as further collateral, but Ms Jenks husband said that was not necessary. RP 564-565. The state charged the defendant with one count of first degree theft based upon this transaction (Count 5). CP 214-218.

On two separate occasions in September of 2008, the defendant also

borrowed money from a friend from church by the name of Don Rutherford in order to pursue his attempts to get Ms Systel's inheritance. RP 497-503. The first loan was for \$1,850.00 and the second was for \$2,580.00, and in each instance Mr. Rutherford watched as the defendant purchased moneygrams with the money to send to third parties in the United Kingdom. RP 503-508. The defendant signed a note payable for each loan and had been unable to pay on the dates due. *Id.* In spite of that fact, Mr. Rutherford still considers the defendant his friend. RP 511-516. The state charged the defendant with two counts of second degree theft from these transactions (Counts 6 and 7). CP 214-218.

Finally, according to a person by the name of Stacy Dalgarno, in February of 2009, Ms Dalgarno's domestic partner by the name of Terry Williams loaned the defendant \$1,500.00 out of a joint checking account she maintained with Mr. Williams. RP 673-680. This loan apparently involved some type of business deal that Mr. Williams had with the defendant, although Ms Dalgarno was unsure of the exact nature of the business. *Id.* She also did not know whether or not the defendant had ever paid back the loan. *Id.* The state charged the defendant with one count of first degree theft out of this transaction (Count 8). CP 214-218.

(2) Charges Involving Strangers. Roseanne Cioce is a real estate broker who lives in Arden, North Carolina with her husband. RP 405-409.

In April of 2008, she learned that there was an unauthorized transfer from her account at Wells Fargo Bank in the amount of \$7,400.00. RP 405-410. This transfer was made as a payment on a credit card account the defendant and his wife maintained. RP 409-410. Similarly, in May of 2008, a person by the name of Joyce Helms, who lives in Nagshead, North Carolina, learned that there had been three unauthorized transfers out of an account she maintained at Wachovia Bank in the amounts of \$4,700.00, \$4,800.00, and \$2,500.00. RP 687-694. The first of these three unauthorized transfers was made as a payment on the same credit card account the defendant and his wife maintained. 676-678.

The defendant later stated that he only became aware of the transfers into his credit card account when his bank contacted his wife to state that the transfers had been reversed. RP 1059-1062, 1327-1335. He and his wife then informed their bank that the transfers had been fraudulent. *Id.* As a result, their bank closed the credit card account and issued the defendant and his wife new credit cards with a new account number. RP 594-560. The state charged the defendant with two counts of first degree theft out of these two transactions (Counts 1 and 2). CP 214-218.

(3) Charges from the \$470,000.00 Franzter, Inc. Check. One of the projects for which Mr. Goodwin and the defendant had been trying to find funding for many years involved “orbital engine” technology an engineer had

developed in the 1960's and 1970's. RP 1064-1071, 1102-1108, 1110-1116, 1226-1232. This was a form of a rotary engine, reputedly with numerous applications and very energy efficient. *Id.* Mr. Goodwin had previously purchased licenses to develop and market the technology, and he and the defendant had long been looking for financing with which to first develop a prototype and then get more funding with which to manufacture and market the engine. *Id.*

In late 2008 or early 2009, Mr. Goodwin contacted the defendant and told him that he had been successful in arranging funding for the "orbital engine" project through a source in London by the name of Mr. Azia after learning of him through a website called "RaiseCapital.com." RP 1035-1044, 1232-1250. Mr. Goodwin later told the defendant that the funding source had fallen through because they had first insisted in receiving \$200,000.00 in prepaid interest, which neither he nor the defendant could raise. RP 1119-1123. According to Mr. Goodwin, Mr. Azia did give him the name of a Mr. Mohr who might be able to provide him and the defendant with funding. RP 1126-1133. Shortly thereafter, Mr. Goodwin contacted the person identifying himself as a Mr. Mohr. *Id.*

After speaking with Mr. Mohr on the phone and through e-mail, Mr. Goodwin contacted the defendant and told him that Mr. Mohr, who was located in London, had agreed to provide them with an initial sum to start

processing documents, and that he would then send an additional \$17,000,000.00 as start up money for their “orbital engine” project. RP 1035-1037, 1237-1250. On Mr. Goodwin’s instructions, the defendant opened a business account at a local branch of the Bank of America in which Mr. Goodwin stated that Mr. Mohr would wire the funds. *Id.* All of the information the defendant used to open the account was truthful and accurate, correctly identifying himself, his business, his home address, and all other information the bank required to open up a legitimate business account. RP 336-340.

According to Mr. Goodwin, Mr. Mohr then contacted him and stated that he had decided to send a check to the defendant to start the business funding process instead of wiring the funds. RP 1141-1144. Mr. Goodwin then gave this information to the defendant, who began direct e-mail contact with the person identifying himself as Mr. Mohr. RP 1154-1155. On February 11, 2009, within a few days of his initial contacts with Mr. Mohr, the defendant received a check via Federal Express in the amount of \$470,000.00, drawn on a Bank of America account belonging to a Connecticut business by the name of Franzter, Inc. RP 1258-1267. Pursuant to the e-mail instructions from Mr. Mohr, the defendant took the check to his local branch of the Bank of America to deposit in the business account he had established. *Id.* Once at the bank, the defendant asked to speak with the

manager. *Id.* Although the manager was not in, the defendant did speak with the assistant manager, who used her computer to verify that the check was legitimate and that there were funds to cover it. RP 344-349, 1270-1271. This assistant manager then told the defendant that he could have instant access to the funds. *Id.* At this point, the defendant withdrew \$6,000.00 in cash for himself, \$6,000.00 in cash to deposit into Mr. Goodwin's personal account, along with a \$20,000.00 cashier's check to deposit into the defendant's business account, and a \$20,000.00 check to deposit into Mr. Goodwin's business account. The defendant then left the bank with a total of \$12,000.00 in cash and \$40,000.00 in two cashier's checks. RP 344-352, 1272-1292.

Once the defendant returned home from the bank, he received further instructions from Mr. Mohr via Mr. Goodwin, telling him to return to the bank and arrange for two wire transfers in the amount of \$200,000.00 each to be sent to a bank in China and a bank in Taiwan. RP 1275-1292. The defendant thought this instructions somewhat odd, but Mr. Goodwin told him that this person would soon be providing them with millions in investment money, so he should simply follow the instructions given. *Id.* As a result, the defendant returned to his local branch of the Bank of America, filled out the two wire requests, gave them to the bank employees, and left, stating that he would be back later to perform some further transactions. RP 353-359.

Sometime after the defendant left the bank after filling out the wire transfer requests, the manager at the defendant's branch of the Bank of America received a call from the manager of the Bank of America branch in Connecticut where Franzter, Inc. had its accounts. RP 359-360. The Connecticut branch manager informed the defendant's branch manager that (1) the check the defendant had deposited was fraudulent, and (2) the reason the bank's computers had shown sufficient funds to pay the check was that Franzter Inc. had a \$500,000.00 certificate of deposit that had just come to maturity and been placed in the business's operating accounts. *Id.* Upon receiving this information, the manager from the defendant's branch of the Bank of America immediately cancelled the two \$200,000.00 wire transfers and called the police, who came out to the bank, took an initial report, and told her to call them when the defendant returned. *Id.*

The defendant later returned to the bank in order to change the \$20,000.00 cashier's check he had previously had the bank make out to his business (Covenant Construction). RP 360-364. When he made his request, the bank manager asked him to wait in the lobby. *Id.* After the defendant left her office, she called the police. *Id.* Within 15 to 20 minutes, police officers arrived and found the defendant waiting in the lobby. *Id.* They then placed him under arrest and eventually took him to the police station, where he gave a lengthy statement to a detective from the Clark County Sheriff's

Office. RP 743-747. During this interview, the defendant attempted to explain about his many entrepreneurial endeavors, including the “orbital engine” project. *Id.* After this interview, the police obtained two search warrants for the defendant’s home office and executed them on succeeding days in order to retrieve his computer and other documents that the defendant told them outlined his transactions of that and previous days. RP 756-776. The state charged the defendant with the following crimes out of these transactions: attempted first degree theft and two counts of first degree identify theft from Aaron Labarge, the owner of Franzter, Inc. (Counts 9, 11 and 18); first degree theft and attempted first degree theft from Bank of America (Counts 10 and 17); Forgery of the Franzter, Inc. check (Count 12); and two counts of money laundering for the two wire transfers (Counts 13 and 14). CP 214-216.

(4) Charges Involving Dr. Alleyne. On February 11, 2009, a person by the name of Andrew Schneider went to a Bank of America Branch in Brooklyn, New York, and deposited a check for \$80,000.00 into a bank account the defendant had at Washington Mutual Bank. RP 22-661. The check was drawn on an account maintained by Dr. Neville Alleyne, an orthopedic surgeon in San Diego, California. RP 662. The check was a forgery and had not been authorized by Dr. Alleyne, who was not acquainted with either the defendant or a person by the name of Andrew Schneider. RP

715-721.

According to the defendant and his wife, the defendant had previously given his account information to a person identifying himself as Andrew Schneider, who was going to find investment funding. RP 1074-1079, 1347-1351, 1416-1419. However, the defendant did not feel good about Mr. Schneider as a source of funds, so he had dropped his correspondence with him, and was unaware that he had deposited any money into his account until after he got out of jail. *Id.* At no point did the defendant attempt to access this money. *Id.* The state charged the defendant with attempted first degree theft and first degree identity theft out of this transaction (Counts 15 and 16). CP 241-218.

(5) The Tampering Charges. On February 20, 2009, the defendant was still in the Clark County jail, not having yet made bail following his arrest. RP 783-790. On that day, he twice called his wife and had lengthy conversations with her, both of which were recorded by the jail. *Id.* At one point during the first of these calls, the defendant asked his wife the following question: “Did you find a home for my cases.” RP 791-792. This question was in reference to some brief cases that the defendant kept in his home office. *Id.* At one point during the second call, the defendant asked his wife to move some boxes out of his home office. RP 792-796. The state charged the defendant with two counts of attempted tampering with physical

evidence from these two telephone calls (Counts 19 and 20).

Procedural History

The state filed its original information against the defendant on February 18, 2009, and then filed seven consecutive amendments, eventually ending up with the 18 separate felony counts and the two misdemeanor charges as was noted previously. CP 1-2, 3-5, 16-19, 23-27, 28-32, 165-170, 193-198, 214-218. Prior to trial, the defense moved to sever the charges arising out of the defendant's negotiation of the \$470,000.00 Franzter check (Counts 9, 10, 11, 12, 13, 14, 18 and 19) from all other counts, which alleged crimes against unrelated individuals having primarily occurred many months previous. CP 109-124; RP 85-91. The trial court denied the motion. RP 98-99.

This case eventually came on for trial on November 29, 2010, and ran for five days with the state calling thirteen witnesses, the defense calling three, and the state recalling one witness in rebuttal. RP 335-988, 1047-1429, 1430-1436. The state's witnesses included the alleged "victims" from each count as noted in the previous list of charges, as well as the manager of the Bank of America where the defendant opened the account and deposited the Franzter check, an investigator from Washington Mutual Bank, an investigator from Bank of America, the detective who twice interviewed the

defendant, as well as a computer expert from the sheriff's office who searched the defendant's computer. RP 335, 570, 618, 731 and 940. Following the close of the defendant's case, the defense called three witnesses: the defendant's wife, Thomas Goodwin, and the defendant. RP 1047, 1097, 1207. All of these witnesses testified to the facts set out in the previous factual history. *See Factual History.*

Just prior to trial, and during the trial, the defense moved *in limine* to prevent the state from playing any recordings of any telephone conversations the defendant had with his wife while he was in the jail. RP 418-422, 432-440. Ultimately, the court denied the defendant's motion and allowed the state to play the recordings for the jury over further defense objection. RP 791-786.

Following the reception of evidence in this case, the court granted a state's motion to dismiss Count 4 (second charge of theft against Alan Moon), Count 5 (charge of theft against Renee Jenks), and Count 8 (Charge of theft against Terry Williams and Stacy Dalgarno). The court then instructed the jury with no objection or exception taken by either party. RP 1443-1444. At this point, the state presented its closing argument, which included the following statement to the jury:

The State's theory of the case is that willful, intentional ignorance surrounding multiple suspicious financial transactions is not a defense to a charge of financial fraud. A person who

intentionally does not inquire about the circumstances of multiple suspicious and probably criminal acts, can be inferred to be acting intentionally. And, you should make that inference.

RP 1490.

Following the defendant's closing argument, the state presented its rebuttal, which included the following statement to the jury:

The Defendant. His theory? I had no idea because I always relied on somebody else. Well, what is the reality? The reality is that society requires you to accept responsibility for your actions. When it appears that you are about to do something illegal, you have an obligation to determine if that act is illegal. If you fail to do so it can be inferred that you intentionally engaged in illegal conduct.

RP 1518.

At the beginning of the second day of deliberation (Monday, following a Friday evening adjournment), the court informed the parties that the jury foreperson had called in sick with the flu. 1568-1576. Over defense objection and a motion for mistrial, the court replaced the foreperson with the alternate, and instructed the newly constituted jury to pick a new foreperson and begin its deliberations anew. *Id.* In fact, the jury had been excused the previous Friday night not long after being sent out and the court was unsure whether or not it had done anything other than pick a foreperson before going home for the weekend. *Id.*

At about 2:00 pm that afternoon, the jury sent out three questions. CP 304-306. In the first question, the jury asked for the provenance of exhibit

81. CP 306. With the agreement of the parties, the court responded as follows: “You must rely upon your own memory and notes to address this issue.” CP 306; RP 1577. The second question asked whether or not the date of February 12, 2010, in the “to convict” instruction on Count 18 was a “typo.” CP 305. Again with the consent of the parties, the court responded that it was and gave the jury the correct date 2010. CP 305; *See also* Instruction 20 at CP 246. Finally, in the third question, the jury asked for a CD player to listen to the recorded conversations between the defendant and his wife. CP 304. The court, with the consent of the parties, responded by bringing the jury back into court room and playing the recording one time for them. RP 1578-1587.

Eventually, the jury returned verdicts of acquittal on Count 1 (theft from Roseanne Cioce), Count 2 (theft from Joyce Helms), Count 3 (theft from Alan Moon), and Counts 6 and 7 (thefts from Don Rutherford), which constituted the charges previously identified as being those relating to thefts from friends and acquaintances and theft from strangers. CP 307-311. The jury returned verdicts of “guilty” on the twelve remaining counts, which constituted the charges previously identified as relating to the defendant’s deposit of the Franzter check, Dr. Alleyne, and the tampering claims. CP 311-323.

At sentencing in this case, the defense argued, *inter alia*, that all of

the charges arising from the defendant's deposit of the Franzter check (Counts 9, 10, 11, 12, 13, 14, 17, and 18) constituted "same criminal conduct," as did the two charges involving Dr. Alleyne (Counts 15 and 16), thus yielding an offender score of two points. CP 334-339. The court disagreed, holding that only the two money laundering and the two counts naming Dr. Alleyne (attempted theft and identity theft) constituted the same criminal conduct. RP 1610-1619. Thus, the court found an offender score of seven concurrent points on ten felony convictions. *Id.* The court thereafter sentenced the defendant within the standard range for an offender score of seven points on each felony count. CP 341-353. The defendant thereafter filed timely notice of appeal. CP 363-386.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FOUND HIM GUILTY OF OFFENSES UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the defendant argues that substantial evidence does not support any of the defendant’s convictions. The following reviews the evidence presented at trial and how it fails to support the convictions based upon the defendant’s deposit of the Franzter check, the convictions involving check from Dr. Alleyne’s account, and the convictions for tampering with evidence.

(1) The Convictions Based upon the Defendant’s Negotiation of the Franzter, Inc. Check Are Not Supported by Substantial Evidence.

In the case at bar, the jury convicted the defendant of eight felonies related to his deposit of the Franzter check. They were as follows:

Count 9: Attempted First Degree Theft on 2/9/09 from Aaron LaBerge from the defendant’s deposit of the Franzter check;

Count 10: First Degree Theft on 2/11/09 from Bank of America from the deposit of the Franzter check, withdrawal of \$12,000.00 cash, and the creation of the two \$20,000.00 cashier's checks;

Count 11: First Degree Identity Theft on 2/11/09 from Aaron LaBerge from depositing the Franzter check with Mr. LaBerge's financial information on it;

Count 12: Forgery on 2/11/09 for depositing the Franzter check;

Count 13: Money Laundering on 2/11/09 for giving the bank the first wire transfer request;

Count 14: Money Laundering on 2/11/09 for giving the bank the second wire transfer request;

Count 17: Attempted First Degree Theft on 2/12/09 from Bank of America for attempting to exchange one of the two \$20,000.00 cashier's checks;

Count 18: Second Degree Identity Theft on 2/12/09 from Aaron LaBerge.

These eight counts encompass four separate types of offenses: (1) Theft under RCW 9A.56.020, (2) Identity Theft under RCW 9.35.020, (3) Forgery under RCW 9A.60.020, and (4) Money Laundering under RCW 9A.83.020. For theft, the *mens rea* element is the "intent to deprive". See RCW 9A.56.020. For identity theft, the *mens rea* element is the "intent to commit, or to aid or abet, any crime." See RCW 9.35.020. For forgery, the *mens rea* element is the "intent to injure or defraud." See RCW 9A.60.020. For money laundering, the *mens rea* element is "knowledge" that the property one is attempting to manipulate "is proceeds of . . . unlawful

activity.” *See* RCW 9A.60.0020.

Under the “intent” element from the first three classifications of offenses, or the “knowledge” element from the fourth type of offense, the state had the burden of proving that the defendant understood that he was committing illegal acts. In other words, the state had the burden of presenting evidence from which a reasonable jury could conclude that the defendant knew that the Franzter check was forged and, to put it succinctly, negotiated that check with the intent and desire to steal. This is where the evidence is insufficient to support the convictions because, taken as a whole, the evidence merely proves that the defendant acted as a gullible dupe of the real criminals who were manipulating him and Mr. Goodwin into believing that they had finally found their long sought-after financing for one of their projects. This evidence was that the defendant, a local resident of long-standing in the community set up an account in his own name, and using his own documentation. From this account, he had instant access to \$470,000.00, yet only took \$12,000.00 in cash, along with two \$20,000.00 cashiers checks made out to businesses easily traced back to him, and then did not try to negotiate those checks.

Nothing within the scenario of events supports a conclusion that the defendant acted with the intent to steal, injure or defraud, or that the defendant acted in any way other than as a victim himself of financial frauds

perpetrated by other individuals. Although this evidence does support the conclusion that the defendant acted with incredibly poor judgment, it does not support the conclusions that he acted with criminal intent. Thus, absent substantial evidence on intent, the court's entry of judgments against the defendant for these offenses violated his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

(2) The Convictions Based upon the Deposit of the Alleyne Check into the Defendant's Bank Account Are Not Supported by Substantial Evidence.

In this case, the jury convicted the defendant of two offenses involving Dr. Alleyne: Attempted First Degree Theft under RCW 9A.56.020 in Count 15, and First Degree Identity Theft under RCW 9.35.020 in Count 16. As was mentioned previously, in order to sustain convictions for these two offenses, there must be evidence in the record from which a reasonable juror can conclude that when a third person deposited the \$80,000.00 check forged on Dr. Alleyne's account into the defendant's bank account at Washington Mutual Bank, the defendant acted as an accomplice and with the intent to commit the crime of theft. Nothing within the record supports such a conclusion. Rather, the conclusion to be drawn is the same as in the other offenses: that the defendant initially believed that he had provided his bank account number in order to facilitate legitimate business financing, and that

he was unaware that the transfer had even been made. This last conclusion is supported by the fact that neither the defendant nor his wife ever attempted to access any of the funds deposited into their bank account. Thus, substantial evidence does not support the convictions in Counts 15 and 16.

(3) The Convictions for Attempted Tampering with Evidence Are Not Supported by Substantial Evidence.

Under RCW 9A.72.150(1), the offense of tampering with evidence is defined as follows:

(1) A person is guilty of tampering with physical evidence if, having reason to believe that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:

(a) Destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its appearance, character, or availability in such pending or prospective official proceeding; or

(b) Knowingly presents or offers any false physical evidence.

RCW 9A.72.150(1).

Under the plain language of this statute, the state is required to prove that the defendant, *inter alia*, acted “without legal right or authority.” In this case, the gravamen of the state’s claim with regard to the two tampering charges was that the defendant asked his wife to move briefcases he had in his home office. The briefcases and the contents were the defendant’s property and did not constitute any type of contraband. Thus, in asking his wife to move the briefcases, the defendant was acting well within his “legal

right or authority.” At a minimum, the record is devoid of any evidence to support the conclusion that the defendant acted without “legal right or authority” when asking his wife to move property that belonged to him and he was keeping in his own home. Thus, substantial evidence does not support the two tampering charges from Counts 19 and 20.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FAILED TO GRANT A MOTION FOR SEVERANCE OF COUNTS AND THEREBY ALLOWED THE STATE TO PRESENT INADMISSIBLE, UNFAIRLY PREJUDICIAL EVIDENCE OF SIMILAR BAD ACTS.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, a defendant charged with a crime is entitled to a severance of counts if the joinder of the counts is “so manifestly prejudicial as to outweigh the concern for judicial economy.” *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Under such circumstances in which the unfair prejudice outweighs the concern for judicial economy, the failure to grant a motion to sever requires reversal unless the state can prove that the error was harmless

beyond a reasonable doubt. *State v. Mitchell*, 117 Wn.2d 521, 817 P.2d 898 (1991) (failure to grant severance held harmless beyond a reasonable doubt).

In determining whether or not the trial court's refusal to grant a severance of counts denied the defendant the right to a fair trial, the court considers the following factors:

Factors that tend to mitigate any prejudice from a joinder of counts include: (1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime. *Watkins*, 53 Wn.App. at 269, 766 P.2d 484; *State v. Gatalski*, 40 Wn.App. 601, 606-07, 699 P.2d 804, review denied, 104 Wash.2d 1019 (1985). These same factors are applied by reviewing courts to determine if a trial court's denial of a severance motion was unduly prejudicial. *State v. Eastabrook*, 58 Wn.App. 805, 812, 795 P.2d 151, review denied, 115 Wash.2d 1031, 803 P.2d 325 (1990).

State v. Cotten, 75 Wn.App. 669, 687, 879 P.2d 971 (1994).

As the court instructs in *State v. Cotton*, the first factor to consider when evaluating the trial court's refusal to sever counts is "the strength of the state's evidence on each count." In this case, the state's evidence was relatively stronger on the counts related to the Franzter check than it was on either the counts involving friends and acquaintances, counts involving strangers, counts involving Dr. Alleyne, or the tampering counts. This conclusion is supported by the fact that the jury acquitted the defendant on all counts involving friends and acquaintances (Counts 3 through 8) and the

counts involving strangers (Counts 1 and 2). In addition, the jury's desire to listen again to the telephone conversations between the defendant and his wife evinces their ambiguity on these counts.

The second factor is the clarity of defense on each count. In this case, the defendant took the stand on his own behalf and unambiguously declared a similar defense to all the counts: that he did not act with the intent to injure and defraud. Thus, by failing to sever the counts in this case, the court made it near impossible for the jury to independently review the evidence from the different classes of offenses charged.

The third factor is "the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately." In this case the trial court gave the following instruction on this point:

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 227.

The deficiency in this instruction lies in its failure to instruct the jury that the evidence associated with one particular class of counts, such as those involving the Franzter check, was not evidence to be used in determining whether or not the state has met its burden on other unrelated counts. The

instruction fails to tell the jury which evidence was associated with a specific class of counts and what evidence was not associated with a specific count class of counts. Thus, the jury was free to use the evidence from those charges occurring many months before and involving friends and acquaintances as evidence of bad intent for the counts arising from the Franzter check or the counts involving Dr. Alleyne. Thus, Instruction No. 3 falls short in attempting to get the jury to parse out which evidence it could consider in the separate groups of offenses charged.

The fourth factor this court should consider in determining the issue of severance of counts is “the admissibility of the evidence of the other crime.” As concerns this fourth factor, it should be noted that none of the evidence concerning the offenses the defendant allegedly committed against individuals, (his friends and acquaintances, as well as Roseann Cioce, Joyce Helms, and Dr. Alleyne) would have been independently admissible in a trial on all of the counts arising from the Franzter check because it would have been evidence admitted solely for the purpose of proving the defendant’s propensity to commit crimes.

It is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Teglund, *Washington Practice, Evidence* § 114, at 383 (3d ed.

1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of a mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

. . . .

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

Similarly, Tegland goes on to note that “the courts are reluctant to allow the State to prove the commission of a crime by evidence that the defendant was associated with persons or organizations known for illegal activities.” 5 Karl B. Tegland, at 124.

For example, in *State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police

officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "It's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The

court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed the conviction and remanded the case for a new trial.

In addition, even if the state can prove some relevance in evidence that has the tendency to convince the jury that the defendant was guilty because of his propensity to commit crimes such as the one charged, the trial court must still weigh the prejudicial effect of that evidence under ER 403.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503

(2004), Acosta was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987) also explains why evidence of similarly crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, the defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: “This is not the problem. Alberto [the defendant] already has a record and had stabbed someone.” *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and

(3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, “[e]ach case must rest upon its own facts,” [*State v. Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State’s case and the logical relevance of the statement, leads to the conclusion that the court’s instruction could not cure the prejudicial effect of [the alleged victim’s] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona’s motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arose in the minds of the jury in the case at bar when the court denied the defendant’s motion to sever counts and allowed the state to present evidence from four separate groups of similar types of offenses that occurred at disparate times with disparate types of victims. Thus, under the four criteria set out in *Cotton*, particularly the fourth criteria, the trial court’s refusal to grant the motion to sever denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

III. THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN HE ARGUED THAT THE JURY SHOULD CONVICT EVEN THOUGH THE STATE HAD FAILED TO PROVE THE ESSENTIAL ELEMENTS OF KNOWLEDGE AND INTENT.

As was mentioned in Argument I, the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, guarantee a fair trial to every person charged with a crime. *State v. Swenson, supra; Bruton v. United States, supra*. This constitutional right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order in limine precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and (2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this argument by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the

death sentence. The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion in limine was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

State v. Gregory, 158 Wn.2d at 866-867.

In the case at bar, the only element of the crime that the defendant contested was his intent to steal, injure or defraud. As was mentioned in Argument I, each offense charged required the state to prove this *mens rea*. The prosecutor responded to the defendant's claims by twice inviting the jury to convict the defendant even if it only found that the defendant had been duped into performing the acts he did. The first such argument came in the state's initial closing, wherein the prosecutor argued as follows:

The State's theory of the case is that willful, intentional ignorance surrounding multiple suspicious financial transactions is not a defense to charge of financial fraud. A person who

intentionally does not inquire about the circumstances of multiple suspicious and probably criminal acts, can be inferred to be acting intentionally. And, you should make that inference.

RP 1490.

Following the defendant's closing argument, the state presented its rebuttal argument, which again included an argument that the jury should convict even if it failed to find that the defendant acted with the intent to steal, injure or defraud. During rebuttal, the prosecutor argued:

The Defendant. His theory? I had no idea because I always relied on somebody else. Well, what is the reality? The reality is that society requires you to accept responsibility for your actions. When it appears that you are about to do something illegal, you have an obligation to determine if that act is illegal. If you fail to do so it can be inferred that you intentionally engaged in illegal conduct.

RP 1518.

This latter statement that "society requires you to accept responsibility for your actions" and that "when it appears that you are about to do something illegal, you have an obligation to determine if that act is illegal" was a direct appeal to the jury to find the defendant guilty even if the jury found that he really didn't act with an actual intent to steal. It specifically invited the jury to convict because the defendant had been incredibly naive and gullible. By asking the jury to ignore one of the

elements of each offense, the prosecutor denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

IV. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO ELICIT EVIDENCE OF PRIVATE COMMUNICATIONS BETWEEN THE DEFENDANT AND HIS WIFE IN VIOLATION OF RCW 5.60.060.

Under RCW 5.60.060(1), of private communications between husband and wife are privileged from disclosure. This statute states:

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

RCW 5.60.060(1).

Under this statute, confidential communications between spouses

made during marriage are protected from disclosure. In *State v. Webb*, 64 Wn.App. 480, 824 P.2d 1257 (1992), the court explained this privilege as follows:

The marital communications privilege applies to confidential communications between spouses during marriage. To fall within the privilege, a communication must have been induced by the marriage relationship. The marital communications privilege is intended to encourage “that free interchange of confidences that is necessary for mutual understanding and trust.” The privilege is based on the premise that “the greatest benefits will flow from the relationship only if the spouse who confides in the other can do so without the fear that at some later time what has been said will rise up to haunt the speaker.”

State v. Webb, 64 Wn.App. at 486-487 (citations and footnote omitted).

In the case at bar, the court allowed the state to play two telephone calls between the defendant and his wife recorded while the defendant was in jail. The defense objected to the admission of this evidence on the basis that it violated RCW 5.60.060(1). However, the court overruled this objection on the basis that since the defendant and his wife knew that the conversations were being recorded, they were not protected communications between husband and wife. As a review of the court’s decision in *State v. Gibson*, 3 Wn.App. 596, 476 P.2d 727 (1970), indicates, this ruling was in error.

In *Gibson*, a police officer arrested a defendant and took him to a medical clinic for treatment of burns prior to booking him into jail. Pursuant

to police policy, the officer stayed with the defendant while he was treated by the physician. The defendant was later convicted of assault in a trial in which the court allowed the officer to testify to an incriminating statement that the defendant made in response to a question from the treating physician made in the furtherance of treatment. The defendant appealed, arguing that the admission of the statement violated the physician-patient privilege. The state responded that the trial court had not erred because the presence of the police officer defeated any claim that the defendant's statement to the doctor was privileged.

The Washington Supreme Court reversed the conviction, holding that the term "physician" used in RCW 5.60.060(4) should be construed to include agents of the physician who are present, and that the officer may be deemed to be an agent of the physician, present for the physician's protection as well as the detention of the prisoner. Thus, it was error to admit the officer's testimony concerning the medical information that the defendant gave to the attending physician. In making this decision, the court specifically noted that under the physician-patient privilege, the critical issue was whether or not the defendant believed there was a privilege. The court stated:

Actual treatment is not necessary; the only requirement for the relationship to arise by implication is that the patient believes the examination is being made for the purpose of treatment. If consulted

for treatment, it is immaterial by whom the doctor is employed.

State v. Gibson, 3 Wn.App. at 598 (citations omitted).

The facts from *Gibson* are analogous to the facts in the case at bar. In *Gibson*, the defendant's statements given to the treating physician for the purposes of treatment were privileged under RCW 5.60.060(4). The relevant fact was that the defendant believed the statement was privileged because he was making the statements to the physician for the purpose of treatment. In the case at bar, the defendant's confidential communications with his wife made during their marriage were privileged under RCW 5.60.060(1). The relevant fact was that the defendant and his wife believed that their statements were privileged because they were making them during a telephone call with no other person present. Thus, in the same way the court in *Gibson* erred by admitting evidence of the privileged statements, so in the case at bar the trial court erred by admitting evidence of the privileged statements.

In this case, the erroneous admission of the two recorded statements cause prejudice in two ways. First, absent the admission of the recorded conversations between the defendant and his wife, there would be no evidence to support the two tampering charges. Thus, these convictions should be vacated with instructions to dismiss. Second, the admission of this

evidence put the defendant's protestations of innocence in the other charges in an extremely unfavorable light. Indeed, given the fact that the jury acquitted the defendant on eight of the other charges, it appears likely that absent the admission of the two recordings of the defendant's telephone calls with his wife, the jury would have acquitted the defendant on all of the charges. Thus, the erroneous admission of this evidence caused prejudice and entitled the defendant to a new trial on all of the charges for which he was convicted.

V. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT OFFENSES HAVING A UNITY OF TIME, PLACE, OBJECTIVE INTENT, AND VICTIM CONSTITUTED THE SAME CRIMINAL CONDUCT FOR THE PURPOSE OF CALCULATING THE DEFENDANT'S OFFENDER SCORE.

Under RCW 9.94A.589(1)(a), at sentencing on two or more offenses, if "some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994). Under this statute, the term "same criminal intent" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). The term "same criminal intent" as used in this definition does not mean the same "specific intent." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Rather, it means the same "objective intent." *Id.*

For example, in *State v. Deharo*, 136 Wn.2d 856, 966 P.2d 1269 (1998), the trial court convicted the defendant of Delivery of Heroin, and Conspiracy to Deliver Heroin. At sentencing, the trial court found that these two offenses had the same victim and were committed at the same time and place. However, the court ruled that these two offenses did not constitute the “same criminal conduct” for the purpose of sentencing because they had different intent elements. The defendant appealed this ruling.

The Court of Appeals reversed the trial court on the sentencing issue, holding as follows:

[T]he present case, the “objective intent” underlying the two charges is the same - to deliver the heroin in one or both conspirators’ possession. Possessing that heroin was the “substantial step” used to prove the conspiracy. Since both crimes therefore involved the same heroin, it makes no sense to say one crime involved intent to deliver that heroin now and the other involved intent to deliver it in the future. Nor is there any factual basis for distinguishing the two crimes based on objective intent to deliver some now and some later. Under the reasoning in *Porter*, the two crimes should be treated as encompassing the same criminal conduct.

State v. Deharo, 136 Wn.2d at 858.

Similarly, in *State v. Saunders*, 120 Wn.App. 80, 86 P.3d 232 (2004), a defendant convicted of murder, robbery, kidnaping, and rape out of the same incident argued that his trial counsel had been ineffective when he failed to argue that the rape and the kidnaping constituted the “same criminal

conduct” for the purpose of determining his offender score. The court agreed, holding as follows:

Under the facts here, it appears that Williams’s primary motivation for raping Grissett by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Further, as the case law provides strong support to this argument, the failure was prejudicial. *See State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *Edwards*, 45 Wn.App. at 382, 725 P.2d 442; *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 526 (1998).

Thus, counsel’s decision not to argue same criminal conduct as to the rape and kidnaping charges constituted ineffective assistance of counsel and requires a remand for a new sentencing hearing where defense counsel can make this argument.

State v. Saunders, 120 Wn.App. at 825.

In the case at bar, the following lists the convictions arising out of the defendant’s deposit of the Franzter check at the Bank of America:

Count 9: Attempted First Degree Theft on 2/9/09 from Aaron LaBerge from the defendant’s deposit of the Franzter check;

Count 10: First Degree Theft on 2/11/09 from Bank of America from the deposit of the Franzter check, withdrawal of \$12,000.00 cash, and the creation of the two \$20,000.00 cashier’s checks;

Count 11: First Degree Identity Theft on 2/11/09 from Aaron LaBerge from depositing the Franzter check with Mr. LaBerge’s financial information on it;

Count 12: Forgery on 2/11/09 for depositing the Franzter check;

Count 13: Money Laundering on 2/11/09 for giving the bank the first wire transfer request;

Count 14: Money Laundering on 2/11/09 for giving the bank the second wire transfer request;

Count 17: Attempted First Degree Theft on 2/12/09 from Bank of America for attempting to exchange one of the two \$20,000.00 cashier's checks;

Count 18: Second Degree Identity Theft on 2/12/09 from Aaron LaBerge.

At sentencing, the court found that only the two money laundering charges arising out of Counts 13 and 14 constituted the same criminal conduct. As the following explains, this was an error. First, it should be noted that, under the state's theory of the case, there was only one objective intent: to steal money. Thus, there was a unity of intent. Second, all of the offenses occurred over a very short period of time and at the same place. Thus, there was a unity of time and place. Finally, as a review of the charges reveals, the victim in Counts 9, 11, 12 and 18 was Aaron LaBerge, whether denominated in his name or the name of his company. Thus, the trial court erred when it failed to find that these counts constituted the same criminal conduct. In addition, a careful review of the record also reveals that the

victim in Counts 10, 13, 14, 17 was Bank of America. Thus, the trial court erred when it failed to find that these counts constituted the same criminal conduct. Under the analysis, the defendant's offender score was actually two points instead of seven as the court calculated. As a result, this court should vacate the defendant's sentences and remand for resentencing using the correct offender score.

CONCLUSION

The defendant's convictions should be vacated and dismissed because they are not supported by substantial evidence. In the first alternative, all of the convictions should be reversed and the case remanded for a new trial based upon the trial court's error in failing to sever counts and based upon the prosecutor's improper statements during closing argument. In the second alternative, the defendant's sentences should be vacated and the case remanded for resentencing using the correct offender score.

DATED this 21st day of October, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION

ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,

FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 5.60.060

Who Are Disqualified – Privileged Communications

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

RCW 9.94A.589(1)

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims

occupied the same vehicle.

Dated this 21ST day of OCTOBER, 2011 at LONGVIEW, Washington.

/s/

CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

NO. 41701-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RODDY K. KARTCHNER,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's entry of judgements unsupported by substantial evidence denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

2. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when it failed to grant a motion for severance of counts and thereby allowed the state to present inadmissible, unfairly prejudicial evidence of similar bad acts.

3. The prosecutor committed misconduct and denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when he argued that the jury should convict even though the state had failed to prove the essential elements of knowledge and intent.

4. The trial court violated RCW 5.60.060 when it allowed the state to elicit evidence of private calls between the defendant and his wife.

5. The trial court erred when it failed to find that offenses having a unity of time, place, objective intent, and victim constituted the same criminal conduct for the purpose of calculating the defendant's offender score.

Issues Pertaining to Assignment of Error

1. Does a trial court's entry of judgements unsupported by substantial evidence deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

2. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it fails to grant a motion to sever counts when that denial allows the state to present inadmissible, unfairly prejudicial evidence?

3. Does a prosecutor commit misconduct and deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if that prosecutor argues that the jury should convict even though the state had failed to prove essential elements of knowledge and intent?

4. Are recorded jail conversations between spouses privileged under RCW 5.60.060?

5. Does a trial court err if it fails to find that offenses having a unity of time, place, objective intent, and victim constitute the same criminal conduct for the purpose of calculating a defendant's offender score?

STATEMENT OF THE CASE

Factual History

By seventh amended information filed November 16, 2010, the Clark County Prosecutor charged the defendant Roddy K. Kartchner, with 18 separate felonies and two misdemeanors involving a number of financial transactions in which the defendant had participated. CP 214-218. The following lists each count, along with the name of the alleged victim and the claimed date of occurrence. *Id.*

Count 1: First Degree Theft on 4/16/08 from Roseann Cioce;

Count 2: First Degree Theft on 5/6/08 from Joyce Helms;

Count 3: Second Degree Theft on 7/28/08 from Alan J. Moon;

Count 4: Second Degree Theft on 8/10/08 from Alan J. Moon;

Count 5: First Degree Theft on 9/22/08 from Renee Jenks;

Count 6: First Degree Theft on 9/29/08 from Don Rutherford;

Count 7: Second Degree Theft on 9/30/08 from Don Rutherford;

Count 8: First Degree Theft on 2/6/09 from Terry Williams and Stacy Dalgarno;

Count 9: Attempted First Degree Theft on 2/9/09 from Aaron LaBerge;

Count 10: First Degree Theft on 2/11/09 from Bank of America;

Count 11: First Degree Identity Theft on 2/11/09 from Aaron LaBerge;

Count 12: Forgery on 2/11/09 from Fanzter, Inc.;

Count 13: Money Laundering on 2/11/09;

Count 14: Money Laundering on 2/11/09;

Count 15: Attempted First Degree Theft on 2/11/09 from Dr. Alleyne;

Count 16: First Degree Identity Theft on 2/11/09 from Dr. Alleyne;

Count 17: Attempted First Degree Theft on 2/12/09 from Bank of America;

Count 18: Second Degree Identity Theft on 2/12/09 from Aaron LaBerge;

Count 19: Attempted Tampering with Physical Evidence on 2/20/09; and

Count 20: Attempted Tampering with Physical Evidence on 2/20/09.

CP 214-218.

For convenience sake, these charges can be placed into the following five groups:

(1) Charges Involving Friends and Acquaintances: Counts 2, 3, 4, 5, 6, 7 and 8;

(2) Charges Involving Strangers: Counts 1 and 2;

(3) Charges from the \$470,000.00 Franzter, Inc. Check: Counts 9, 10, 11, 12, 13, 14, 17 and 18;

(4) Charges Involving Dr. Alleyne: Counts 15 and 16; and

(5) The Tampering Charges: Counts 19 and 20.

The following gives the factual history behind the charges from the seventh amended information as they relate to the five identified groups.

(1) Charges Involving Friends and Acquaintances. In 2009, the defendant, Roddy Kartchner, was living in Hazel Dell with his wife of 27 years and their four children. RP 1049-1050. The family had lived in this home for many years. *Id.* At the time, the defendant was 51-years-old, had previously run a small construction company called Covenant Construction Consulting, Inc. (CCCI), and was then a “construction manager ” on a condominium project in Portland. RP 1050-1052, 1208-1209. By all accounts, he was a self-styled “entrepreneur,” and was constantly involved in trying to promote different projects, particularly with his long-time friend and fellow “entrepreneur” Tom Goodwin. RP 1024-1067, 1102-1108, 1119-1123, 1210-1224. Mr. Goodwin was a retired railroad engineer who lived in California, whom the defendant met many years previous at an entrepreneurial conference in California. RP 1169-1173.

While the defendant was involved in development projects with Mr. Goodwin, he was also involved with a number of his own projects. RP 1059-1062, 1083-1087, 1327-1335. One of these projects involved a person who identified herself by the name of Lynn Systel, who claimed she needed help securing a multimillion inheritance. RP 1054-1056. In an attempt to get money to further this and other projects, the defendant borrowed money from

a number of friends and acquaintances. RP 155-195, 551-569, 496-550, 673-685. One of these acquaintances was Alan Moon, who had owned a Cricket Wireless Store in Vancouver from 2007 to 2009. RP 455-495. In July of 2008, the defendant was in his store and borrowed \$500.00 cash upon his written promise to pay 300% interest in one month. RP 457-459. Mr. Moon later loaned the defendant \$200.00 more upon the defendant's promise to repay \$2,000.00 back within a short period of time. *Id.* The defendant did not repay the loans. RP 468. The state charged the defendant with two counts of second degree theft based upon these two transactions (Counts 3 and 4). CP 214-218.

The defendant also borrowed money from friends. RP 496, 551. For example, in September of 2008, the defendant borrowed \$1,800.00 from Ruth Jenks and her husband, giving a note payable in return. RP 551-561. The defendant was acquainted with the Jenks from a construction project where he had worked with Mr. Jenks. *Id.* When the defendant had been unable to repay the note as required, he gave them a pistol in partial payment. RP 560-561. He later offered to give them an expensive rifle as further collateral, but Ms Jenks husband said that was not necessary. RP 564-565. The state charged the defendant with one count of first degree theft based upon this transaction (Count 5). CP 214-218.

On two separate occasions in September of 2008, the defendant also

borrowed money from a friend from church by the name of Don Rutherford in order to pursue his attempts to get Ms Systel's inheritance. RP 497-503. The first loan was for \$1,850.00 and the second was for \$2,580.00, and in each instance Mr. Rutherford watched as the defendant purchased moneygrams with the money to send to third parties in the United Kingdom. RP 503-508. The defendant signed a note payable for each loan and had been unable to pay on the dates due. *Id.* In spite of that fact, Mr. Rutherford still considers the defendant his friend. RP 511-516. The state charged the defendant with two counts of second degree theft from these transactions (Counts 6 and 7). CP 214-218.

Finally, according to a person by the name of Stacy Dalgarno, in February of 2009, Ms Dalgarno's domestic partner by the name of Terry Williams loaned the defendant \$1,500.00 out of a joint checking account she maintained with Mr. Williams. RP 673-680. This loan apparently involved some type of business deal that Mr. Williams had with the defendant, although Ms Dalgarno was unsure of the exact nature of the business. *Id.* She also did not know whether or not the defendant had ever paid back the loan. *Id.* The state charged the defendant with one count of first degree theft out of this transaction (Count 8). CP 214-218.

(2) Charges Involving Strangers. Roseanne Cioce is a real estate broker who lives in Arden, North Carolina with her husband. RP 405-409.

In April of 2008, she learned that there was an unauthorized transfer from her account at Wells Fargo Bank in the amount of \$7,400.00. RP 405-410. This transfer was made as a payment on a credit card account the defendant and his wife maintained. RP 409-410. Similarly, in May of 2008, a person by the name of Joyce Helms, who lives in Nagshead, North Carolina, learned that there had been three unauthorized transfers out of an account she maintained at Wachovia Bank in the amounts of \$4,700.00, \$4,800.00, and \$2,500.00. RP 687-694. The first of these three unauthorized transfers was made as a payment on the same credit card account the defendant and his wife maintained. 676-678.

The defendant later stated that he only became aware of the transfers into his credit card account when his bank contacted his wife to state that the transfers had been reversed. RP 1059-1062, 1327-1335. He and his wife then informed their bank that the transfers had been fraudulent. *Id.* As a result, their bank closed the credit card account and issued the defendant and his wife new credit cards with a new account number. RP 594-560. The state charged the defendant with two counts of first degree theft out of these two transactions (Counts 1 and 2). CP 214-218.

(3) Charges from the \$470,000.00 Franzter, Inc. Check. One of the projects for which Mr. Goodwin and the defendant had been trying to find funding for many years involved “orbital engine” technology an engineer had

developed in the 1960's and 1970's. RP 1064-1071, 1102-1108, 1110-1116, 1226-1232. This was a form of a rotary engine, reputedly with numerous applications and very energy efficient. *Id.* Mr. Goodwin had previously purchased licenses to develop and market the technology, and he and the defendant had long been looking for financing with which to first develop a prototype and then get more funding with which to manufacture and market the engine. *Id.*

In late 2008 or early 2009, Mr. Goodwin contacted the defendant and told him that he had been successful in arranging funding for the "orbital engine" project through a source in London by the name of Mr. Azia after learning of him through a website called "RaiseCapital.com." RP 1035-1044, 1232-1250. Mr. Goodwin later told the defendant that the funding source had fallen through because they had first insisted in receiving \$200,000.00 in prepaid interest, which neither he nor the defendant could raise. RP 1119-1123. According to Mr. Goodwin, Mr. Azia did give him the name of a Mr. Mohr who might be able to provide him and the defendant with funding. RP 1126-1133. Shortly thereafter, Mr. Goodwin contacted the person identifying himself as a Mr. Mohr. *Id.*

After speaking with Mr. Mohr on the phone and through e-mail, Mr. Goodwin contacted the defendant and told him that Mr. Mohr, who was located in London, had agreed to provide them with an initial sum to start

processing documents, and that he would then send an additional \$17,000,000.00 as start up money for their “orbital engine” project. RP 1035-1037, 1237-1250. On Mr. Goodwin’s instructions, the defendant opened a business account at a local branch of the Bank of America in which Mr. Goodwin stated that Mr. Mohr would wire the funds. *Id.* All of the information the defendant used to open the account was truthful and accurate, correctly identifying himself, his business, his home address, and all other information the bank required to open up a legitimate business account. RP 336-340.

According to Mr. Goodwin, Mr. Mohr then contacted him and stated that he had decided to send a check to the defendant to start the business funding process instead of wiring the funds. RP 1141-1144. Mr. Goodwin then gave this information to the defendant, who began direct e-mail contact with the person identifying himself as Mr. Mohr. RP 1154-1155. On February 11, 2009, within a few days of his initial contacts with Mr. Mohr, the defendant received a check via Federal Express in the amount of \$470,000.00, drawn on a Bank of America account belonging to a Connecticut business by the name of Franzter, Inc. RP 1258-1267. Pursuant to the e-mail instructions from Mr. Mohr, the defendant took the check to his local branch of the Bank of America to deposit in the business account he had established. *Id.* Once at the bank, the defendant asked to speak with the

manager. *Id.* Although the manager was not in, the defendant did speak with the assistant manager, who used her computer to verify that the check was legitimate and that there were funds to cover it. RP 344-349, 1270-1271. This assistant manager then told the defendant that he could have instant access to the funds. *Id.* At this point, the defendant withdrew \$6,000.00 in cash for himself, \$6,000.00 in cash to deposit into Mr. Goodwin's personal account, along with a \$20,000.00 cashier's check to deposit into the defendant's business account, and a \$20,000.00 check to deposit into Mr. Goodwin's business account. The defendant then left the bank with a total of \$12,000.00 in cash and \$40,000.00 in two cashier's checks. RP 344-352, 1272-1292.

Once the defendant returned home from the bank, he received further instructions from Mr. Mohr via Mr. Goodwin, telling him to return to the bank and arrange for two wire transfers in the amount of \$200,000.00 each to be sent to a bank in China and a bank in Taiwan. RP 1275-1292. The defendant thought this instructions somewhat odd, but Mr. Goodwin told him that this person would soon be providing them with millions in investment money, so he should simply follow the instructions given. *Id.* As a result, the defendant returned to his local branch of the Bank of America, filled out the two wire requests, gave them to the bank employees, and left, stating that he would be back later to perform some further transactions. RP 353-359.

Sometime after the defendant left the bank after filling out the wire transfer requests, the manager at the defendant's branch of the Bank of America received a call from the manager of the Bank of America branch in Connecticut where Franzter, Inc. had its accounts. RP 359-360. The Connecticut branch manager informed the defendant's branch manager that (1) the check the defendant had deposited was fraudulent, and (2) the reason the bank's computers had shown sufficient funds to pay the check was that Franzter Inc. had a \$500,000.00 certificate of deposit that had just come to maturity and been placed in the business's operating accounts. *Id.* Upon receiving this information, the manager from the defendant's branch of the Bank of America immediately cancelled the two \$200,000.00 wire transfers and called the police, who came out to the bank, took an initial report, and told her to call them when the defendant returned. *Id.*

The defendant later returned to the bank in order to change the \$20,000.00 cashier's check he had previously had the bank make out to his business (Covenant Construction). RP 360-364. When he made his request, the bank manager asked him to wait in the lobby. *Id.* After the defendant left her office, she called the police. *Id.* Within 15 to 20 minutes, police officers arrived and found the defendant waiting in the lobby. *Id.* They then placed him under arrest and eventually took him to the police station, where he gave a lengthy statement to a detective from the Clark County Sheriff's

Office. RP 743-747. During this interview, the defendant attempted to explain about his many entrepreneurial endeavors, including the “orbital engine” project. *Id.* After this interview, the police obtained two search warrants for the defendant’s home office and executed them on succeeding days in order to retrieve his computer and other documents that the defendant told them outlined his transactions of that and previous days. RP 756-776. The state charged the defendant with the following crimes out of these transactions: attempted first degree theft and two counts of first degree identify theft from Aaron Labarge, the owner of Franzter, Inc. (Counts 9, 11 and 18); first degree theft and attempted first degree theft from Bank of America (Counts 10 and 17); Forgery of the Franzter, Inc. check (Count 12); and two counts of money laundering for the two wire transfers (Counts 13 and 14). CP 214-216.

(4) Charges Involving Dr. Alleyne. On February 11, 2009, a person by the name of Andrew Schneider went to a Bank of America Branch in Brooklyn, New York, and deposited a check for \$80,000.00 into a bank account the defendant had at Washington Mutual Bank. RP 22-661. The check was drawn on an account maintained by Dr. Neville Alleyne, an orthopedic surgeon in San Diego, California. RP 662. The check was a forgery and had not been authorized by Dr. Alleyne, who was not acquainted with either the defendant or a person by the name of Andrew Schneider. RP

715-721.

According to the defendant and his wife, the defendant had previously given his account information to a person identifying himself as Andrew Schneider, who was going to find investment funding. RP 1074-1079, 1347-1351, 1416-1419. However, the defendant did not feel good about Mr. Schneider as a source of funds, so he had dropped his correspondence with him, and was unaware that he had deposited any money into his account until after he got out of jail. *Id.* At no point did the defendant attempt to access this money. *Id.* The state charged the defendant with attempted first degree theft and first degree identity theft out of this transaction (Counts 15 and 16). CP 241-218.

(5) The Tampering Charges. On February 20, 2009, the defendant was still in the Clark County jail, not having yet made bail following his arrest. RP 783-790. On that day, he twice called his wife and had lengthy conversations with her, both of which were recorded by the jail. *Id.* At one point during the first of these calls, the defendant asked his wife the following question: “Did you find a home for my cases.” RP 791-792. This question was in reference to some brief cases that the defendant kept in his home office. *Id.* At one point during the second call, the defendant asked his wife to move some boxes out of his home office. RP 792-796. The state charged the defendant with two counts of attempted tampering with physical

evidence from these two telephone calls (Counts 19 and 20).

Procedural History

The state filed its original information against the defendant on February 18, 2009, and then filed seven consecutive amendments, eventually ending up with the 18 separate felony counts and the two misdemeanor charges as was noted previously. CP 1-2, 3-5, 16-19, 23-27, 28-32, 165-170, 193-198, 214-218. Prior to trial, the defense moved to sever the charges arising out of the defendant's negotiation of the \$470,000.00 Franzter check (Counts 9, 10, 11, 12, 13, 14, 18 and 19) from all other counts, which alleged crimes against unrelated individuals having primarily occurred many months previous. CP 109-124; RP 85-91. The trial court denied the motion. RP 98-99.

This case eventually came on for trial on November 29, 2010, and ran for five days with the state calling thirteen witnesses, the defense calling three, and the state recalling one witness in rebuttal. RP 335-988, 1047-1429, 1430-1436. The state's witnesses included the alleged "victims" from each count as noted in the previous list of charges, as well as the manager of the Bank of America where the defendant opened the account and deposited the Franzter check, an investigator from Washington Mutual Bank, an investigator from Bank of America, the detective who twice interviewed the

defendant, as well as a computer expert from the sheriff's office who searched the defendant's computer. RP 335, 570, 618, 731 and 940. Following the close of the defendant's case, the defense called three witnesses: the defendant's wife, Thomas Goodwin, and the defendant. RP 1047, 1097, 1207. All of these witnesses testified to the facts set out in the previous factual history. *See Factual History.*

Just prior to trial, and during the trial, the defense moved *in limine* to prevent the state from playing any recordings of any telephone conversations the defendant had with his wife while he was in the jail. RP 418-422, 432-440. Ultimately, the court denied the defendant's motion and allowed the state to play the recordings for the jury over further defense objection. RP 791-786.

Following the reception of evidence in this case, the court granted a state's motion to dismiss Count 4 (second charge of theft against Alan Moon), Count 5 (charge of theft against Renee Jenks), and Count 8 (Charge of theft against Terry Williams and Stacy Dalgarno). The court then instructed the jury with no objection or exception taken by either party. RP 1443-1444. At this point, the state presented its closing argument, which included the following statement to the jury:

The State's theory of the case is that willful, intentional ignorance surrounding multiple suspicious financial transactions is not a defense to a charge of financial fraud. A person who

intentionally does not inquire about the circumstances of multiple suspicious and probably criminal acts, can be inferred to be acting intentionally. And, you should make that inference.

RP 1490.

Following the defendant's closing argument, the state presented its rebuttal, which included the following statement to the jury:

The Defendant. His theory? I had no idea because I always relied on somebody else. Well, what is the reality? The reality is that society requires you to accept responsibility for your actions. When it appears that you are about to do something illegal, you have an obligation to determine if that act is illegal. If you fail to do so it can be inferred that you intentionally engaged in illegal conduct.

RP 1518.

At the beginning of the second day of deliberation (Monday, following a Friday evening adjournment), the court informed the parties that the jury foreperson had called in sick with the flu. 1568-1576. Over defense objection and a motion for mistrial, the court replaced the foreperson with the alternate, and instructed the newly constituted jury to pick a new foreperson and begin its deliberations anew. *Id.* In fact, the jury had been excused the previous Friday night not long after being sent out and the court was unsure whether or not it had done anything other than pick a foreperson before going home for the weekend. *Id.*

At about 2:00 pm that afternoon, the jury sent out three questions. CP 304-306. In the first question, the jury asked for the provenance of exhibit

81. CP 306. With the agreement of the parties, the court responded as follows: “You must rely upon your own memory and notes to address this issue.” CP 306; RP 1577. The second question asked whether or not the date of February 12, 2010, in the “to convict” instruction on Count 18 was a “typo.” CP 305. Again with the consent of the parties, the court responded that it was and gave the jury the correct date 2010. CP 305; *See also* Instruction 20 at CP 246. Finally, in the third question, the jury asked for a CD player to listen to the recorded conversations between the defendant and his wife. CP 304. The court, with the consent of the parties, responded by bringing the jury back into court room and playing the recording one time for them. RP 1578-1587.

Eventually, the jury returned verdicts of acquittal on Count 1 (theft from Roseanne Cioce), Count 2 (theft from Joyce Helms), Count 3 (theft from Alan Moon), and Counts 6 and 7 (thefts from Don Rutherford), which constituted the charges previously identified as being those relating to thefts from friends and acquaintances and theft from strangers. CP 307-311. The jury returned verdicts of “guilty” on the twelve remaining counts, which constituted the charges previously identified as relating to the defendant’s deposit of the Franzter check, Dr. Alleyne, and the tampering claims. CP 311-323.

At sentencing in this case, the defense argued, *inter alia*, that all of

the charges arising from the defendant's deposit of the Franzter check (Counts 9, 10, 11, 12, 13, 14, 17, and 18) constituted "same criminal conduct," as did the two charges involving Dr. Alleyne (Counts 15 and 16), thus yielding an offender score of two points. CP 334-339. The court disagreed, holding that only the two money laundering and the two counts naming Dr. Alleyne (attempted theft and identity theft) constituted the same criminal conduct. RP 1610-1619. Thus, the court found an offender score of seven concurrent points on ten felony convictions. *Id.* The court thereafter sentenced the defendant within the standard range for an offender score of seven points on each felony count. CP 341-353. The defendant thereafter filed timely notice of appeal. CP 363-386.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FOUND HIM GUILTY OF OFFENSES UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the defendant argues that substantial evidence does not support any of the defendant’s convictions. The following reviews the evidence presented at trial and how it fails to support the convictions based upon the defendant’s deposit of the Franzter check, the convictions involving check from Dr. Alleyne’s account, and the convictions for tampering with evidence.

(1) The Convictions Based upon the Defendant’s Negotiation of the Franzter, Inc. Check Are Not Supported by Substantial Evidence.

In the case at bar, the jury convicted the defendant of eight felonies related to his deposit of the Franzter check. They were as follows:

Count 9: Attempted First Degree Theft on 2/9/09 from Aaron LaBerge from the defendant’s deposit of the Franzter check;

Count 10: First Degree Theft on 2/11/09 from Bank of America from the deposit of the Franzter check, withdrawal of \$12,000.00 cash, and the creation of the two \$20,000.00 cashier's checks;

Count 11: First Degree Identity Theft on 2/11/09 from Aaron LaBerge from depositing the Franzter check with Mr. LaBerge's financial information on it;

Count 12: Forgery on 2/11/09 for depositing the Franzter check;

Count 13: Money Laundering on 2/11/09 for giving the bank the first wire transfer request;

Count 14: Money Laundering on 2/11/09 for giving the bank the second wire transfer request;

Count 17: Attempted First Degree Theft on 2/12/09 from Bank of America for attempting to exchange one of the two \$20,000.00 cashier's checks;

Count 18: Second Degree Identity Theft on 2/12/09 from Aaron LaBerge.

These eight counts encompass four separate types of offenses: (1) Theft under RCW 9A.56.020, (2) Identity Theft under RCW 9.35.020, (3) Forgery under RCW 9A.60.020, and (4) Money Laundering under RCW 9A.83.020. For theft, the *mens rea* element is the "intent to deprive". See RCW 9A.56.020. For identity theft, the *mens rea* element is the "intent to commit, or to aid or abet, any crime." See RCW 9.35.020. For forgery, the *mens rea* element is the "intent to injure or defraud." See RCW 9A.60.020. For money laundering, the *mens rea* element is "knowledge" that the property one is attempting to manipulate "is proceeds of . . . unlawful

activity.” *See* RCW 9A.60.0020.

Under the “intent” element from the first three classifications of offenses, or the “knowledge” element from the fourth type of offense, the state had the burden of proving that the defendant understood that he was committing illegal acts. In other words, the state had the burden of presenting evidence from which a reasonable jury could conclude that the defendant knew that the Franzter check was forged and, to put it succinctly, negotiated that check with the intent and desire to steal. This is where the evidence is insufficient to support the convictions because, taken as a whole, the evidence merely proves that the defendant acted as a gullible dupe of the real criminals who were manipulating him and Mr. Goodwin into believing that they had finally found their long sought-after financing for one of their projects. This evidence was that the defendant, a local resident of long-standing in the community set up an account in his own name, and using his own documentation. From this account, he had instant access to \$470,000.00, yet only took \$12,000.00 in cash, along with two \$20,000.00 cashiers checks made out to businesses easily traced back to him, and then did not try to negotiate those checks.

Nothing within the scenario of events supports a conclusion that the defendant acted with the intent to steal, injure or defraud, or that the defendant acted in any way other than as a victim himself of financial frauds

perpetrated by other individuals. Although this evidence does support the conclusion that the defendant acted with incredibly poor judgment, it does not support the conclusions that he acted with criminal intent. Thus, absent substantial evidence on intent, the court's entry of judgments against the defendant for these offenses violated his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

(2) The Convictions Based upon the Deposit of the Alleyne Check into the Defendant's Bank Account Are Not Supported by Substantial Evidence.

In this case, the jury convicted the defendant of two offenses involving Dr. Alleyne: Attempted First Degree Theft under RCW 9A.56.020 in Count 15, and First Degree Identity Theft under RCW 9.35.020 in Count 16. As was mentioned previously, in order to sustain convictions for these two offenses, there must be evidence in the record from which a reasonable juror can conclude that when a third person deposited the \$80,000.00 check forged on Dr. Alleyne's account into the defendant's bank account at Washington Mutual Bank, the defendant acted as an accomplice and with the intent to commit the crime of theft. Nothing within the record supports such a conclusion. Rather, the conclusion to be drawn is the same as in the other offenses: that the defendant initially believed that he had provided his bank account number in order to facilitate legitimate business financing, and that

he was unaware that the transfer had even been made. This last conclusion is supported by the fact that neither the defendant nor his wife ever attempted to access any of the funds deposited into their bank account. Thus, substantial evidence does not support the convictions in Counts 15 and 16.

(3) The Convictions for Attempted Tampering with Evidence Are Not Supported by Substantial Evidence.

Under RCW 9A.72.150(1), the offense of tampering with evidence is defined as follows:

(1) A person is guilty of tampering with physical evidence if, having reason to believe that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:

(a) Destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its appearance, character, or availability in such pending or prospective official proceeding; or

(b) Knowingly presents or offers any false physical evidence.

RCW 9A.72.150(1).

Under the plain language of this statute, the state is required to prove that the defendant, *inter alia*, acted “without legal right or authority.” In this case, the gravamen of the state’s claim with regard to the two tampering charges was that the defendant asked his wife to move briefcases he had in his home office. The briefcases and the contents were the defendant’s property and did not constitute any type of contraband. Thus, in asking his wife to move the briefcases, the defendant was acting well within his “legal

right or authority.” At a minimum, the record is devoid of any evidence to support the conclusion that the defendant acted without “legal right or authority” when asking his wife to move property that belonged to him and he was keeping in his own home. Thus, substantial evidence does not support the two tampering charges from Counts 19 and 20.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FAILED TO GRANT A MOTION FOR SEVERANCE OF COUNTS AND THEREBY ALLOWED THE STATE TO PRESENT INADMISSIBLE, UNFAIRLY PREJUDICIAL EVIDENCE OF SIMILAR BAD ACTS.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, a defendant charged with a crime is entitled to a severance of counts if the joinder of the counts is “so manifestly prejudicial as to outweigh the concern for judicial economy.” *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Under such circumstances in which the unfair prejudice outweighs the concern for judicial economy, the failure to grant a motion to sever requires reversal unless the state can prove that the error was harmless

beyond a reasonable doubt. *State v. Mitchell*, 117 Wn.2d 521, 817 P.2d 898 (1991) (failure to grant severance held harmless beyond a reasonable doubt).

In determining whether or not the trial court's refusal to grant a severance of counts denied the defendant the right to a fair trial, the court considers the following factors:

Factors that tend to mitigate any prejudice from a joinder of counts include: (1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime. *Watkins*, 53 Wn.App. at 269, 766 P.2d 484; *State v. Gatalski*, 40 Wn.App. 601, 606-07, 699 P.2d 804, review denied, 104 Wash.2d 1019 (1985). These same factors are applied by reviewing courts to determine if a trial court's denial of a severance motion was unduly prejudicial. *State v. Eastabrook*, 58 Wn.App. 805, 812, 795 P.2d 151, review denied, 115 Wash.2d 1031, 803 P.2d 325 (1990).

State v. Cotten, 75 Wn.App. 669, 687, 879 P.2d 971 (1994).

As the court instructs in *State v. Cotton*, the first factor to consider when evaluating the trial court's refusal to sever counts is "the strength of the state's evidence on each count." In this case, the state's evidence was relatively stronger on the counts related to the Franzter check than it was on either the counts involving friends and acquaintances, counts involving strangers, counts involving Dr. Alleyne, or the tampering counts. This conclusion is supported by the fact that the jury acquitted the defendant on all counts involving friends and acquaintances (Counts 3 through 8) and the

counts involving strangers (Counts 1 and 2). In addition, the jury's desire to listen again to the telephone conversations between the defendant and his wife evinces their ambiguity on these counts.

The second factor is the clarity of defense on each count. In this case, the defendant took the stand on his own behalf and unambiguously declared a similar defense to all the counts: that he did not act with the intent to injure and defraud. Thus, by failing to sever the counts in this case, the court made it near impossible for the jury to independently review the evidence from the different classes of offenses charged.

The third factor is "the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately." In this case the trial court gave the following instruction on this point:

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 227.

The deficiency in this instruction lies in its failure to instruct the jury that the evidence associated with one particular class of counts, such as those involving the Franzter check, was not evidence to be used in determining whether or not the state has met its burden on other unrelated counts. The

instruction fails to tell the jury which evidence was associated with a specific class of counts and what evidence was not associated with a specific count class of counts. Thus, the jury was free to use the evidence from those charges occurring many months before and involving friends and acquaintances as evidence of bad intent for the counts arising from the Franzter check or the counts involving Dr. Alleyne. Thus, Instruction No. 3 falls short in attempting to get the jury to parse out which evidence it could consider in the separate groups of offenses charged.

The fourth factor this court should consider in determining the issue of severance of counts is “the admissibility of the evidence of the other crime.” As concerns this fourth factor, it should be noted that none of the evidence concerning the offenses the defendant allegedly committed against individuals, (his friends and acquaintances, as well as Roseann Cioce, Joyce Helms, and Dr. Alleyne) would have been independently admissible in a trial on all of the counts arising from the Franzter check because it would have been evidence admitted solely for the purpose of proving the defendant’s propensity to commit crimes.

It is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Teglund, *Washington Practice, Evidence* § 114, at 383 (3d ed.

1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of a mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

. . . .

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

Similarly, Tegland goes on to note that “the courts are reluctant to allow the State to prove the commission of a crime by evidence that the defendant was associated with persons or organizations known for illegal activities.” 5 Karl B. Tegland, at 124.

For example, in *State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police

officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "It's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The

court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed the conviction and remanded the case for a new trial.

In addition, even if the state can prove some relevance in evidence that has the tendency to convince the jury that the defendant was guilty because of his propensity to commit crimes such as the one charged, the trial court must still weigh the prejudicial effect of that evidence under ER 403.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503

(2004), Acosta was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987) also explains why evidence of similarly crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, the defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: “This is not the problem. Alberto [the defendant] already has a record and had stabbed someone.” *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and

(3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, “[e]ach case must rest upon its own facts,” [*State v. Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State’s case and the logical relevance of the statement, leads to the conclusion that the court’s instruction could not cure the prejudicial effect of [the alleged victim’s] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona’s motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arose in the minds of the jury in the case at bar when the court denied the defendant’s motion to sever counts and allowed the state to present evidence from four separate groups of similar types of offenses that occurred at disparate times with disparate types of victims. Thus, under the four criteria set out in *Cotton*, particularly the fourth criteria, the trial court’s refusal to grant the motion to sever denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

III. THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN HE ARGUED THAT THE JURY SHOULD CONVICT EVEN THOUGH THE STATE HAD FAILED TO PROVE THE ESSENTIAL ELEMENTS OF KNOWLEDGE AND INTENT.

As was mentioned in Argument I, the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, guarantee a fair trial to every person charged with a crime. *State v. Swenson, supra; Bruton v. United States, supra*. This constitutional right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order in limine precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and (2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this argument by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the

death sentence. The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion in limine was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

State v. Gregory, 158 Wn.2d at 866-867.

In the case at bar, the only element of the crime that the defendant contested was his intent to steal, injure or defraud. As was mentioned in Argument I, each offense charged required the state to prove this *mens rea*. The prosecutor responded to the defendant's claims by twice inviting the jury to convict the defendant even if it only found that the defendant had been duped into performing the acts he did. The first such argument came in the state's initial closing, wherein the prosecutor argued as follows:

The State's theory of the case is that willful, intentional ignorance surrounding multiple suspicious financial transactions is not a defense to charge of financial fraud. A person who

intentionally does not inquire about the circumstances of multiple suspicious and probably criminal acts, can be inferred to be acting intentionally. And, you should make that inference.

RP 1490.

Following the defendant's closing argument, the state presented its rebuttal argument, which again included an argument that the jury should convict even if it failed to find that the defendant acted with the intent to steal, injure or defraud. During rebuttal, the prosecutor argued:

The Defendant. His theory? I had no idea because I always relied on somebody else. Well, what is the reality? The reality is that society requires you to accept responsibility for your actions. When it appears that you are about to do something illegal, you have an obligation to determine if that act is illegal. If you fail to do so it can be inferred that you intentionally engaged in illegal conduct.

RP 1518.

This latter statement that "society requires you to accept responsibility for your actions" and that "when it appears that you are about to do something illegal, you have an obligation to determine if that act is illegal" was a direct appeal to the jury to find the defendant guilty even if the jury found that he really didn't act with an actual intent to steal. It specifically invited the jury to convict because the defendant had been incredibly naive and gullible. By asking the jury to ignore one of the

elements of each offense, the prosecutor denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

IV. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO ELICIT EVIDENCE OF PRIVATE COMMUNICATIONS BETWEEN THE DEFENDANT AND HIS WIFE IN VIOLATION OF RCW 5.60.060.

Under RCW 5.60.060(1), of private communications between husband and wife are privileged from disclosure. This statute states:

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

RCW 5.60.060(1).

Under this statute, confidential communications between spouses

made during marriage are protected from disclosure. In *State v. Webb*, 64 Wn.App. 480, 824 P.2d 1257 (1992), the court explained this privilege as follows:

The marital communications privilege applies to confidential communications between spouses during marriage. To fall within the privilege, a communication must have been induced by the marriage relationship. The marital communications privilege is intended to encourage “that free interchange of confidences that is necessary for mutual understanding and trust.” The privilege is based on the premise that “the greatest benefits will flow from the relationship only if the spouse who confides in the other can do so without the fear that at some later time what has been said will rise up to haunt the speaker.”

State v. Webb, 64 Wn.App. at 486-487 (citations and footnote omitted).

In the case at bar, the court allowed the state to play two telephone calls between the defendant and his wife recorded while the defendant was in jail. The defense objected to the admission of this evidence on the basis that it violated RCW 5.60.060(1). However, the court overruled this objection on the basis that since the defendant and his wife knew that the conversations were being recorded, they were not protected communications between husband and wife. As a review of the court’s decision in *State v. Gibson*, 3 Wn.App. 596, 476 P.2d 727 (1970), indicates, this ruling was in error.

In *Gibson*, a police officer arrested a defendant and took him to a medical clinic for treatment of burns prior to booking him into jail. Pursuant

to police policy, the officer stayed with the defendant while he was treated by the physician. The defendant was later convicted of assault in a trial in which the court allowed the officer to testify to an incriminating statement that the defendant made in response to a question from the treating physician made in the furtherance of treatment. The defendant appealed, arguing that the admission of the statement violated the physician-patient privilege. The state responded that the trial court had not erred because the presence of the police officer defeated any claim that the defendant's statement to the doctor was privileged.

The Washington Supreme Court reversed the conviction, holding that the term "physician" used in RCW 5.60.060(4) should be construed to include agents of the physician who are present, and that the officer may be deemed to be an agent of the physician, present for the physician's protection as well as the detention of the prisoner. Thus, it was error to admit the officer's testimony concerning the medical information that the defendant gave to the attending physician. In making this decision, the court specifically noted that under the physician-patient privilege, the critical issue was whether or not the defendant believed there was a privilege. The court stated:

Actual treatment is not necessary; the only requirement for the relationship to arise by implication is that the patient believes the examination is being made for the purpose of treatment. If consulted

for treatment, it is immaterial by whom the doctor is employed.

State v. Gibson, 3 Wn.App. at 598 (citations omitted).

The facts from *Gibson* are analogous to the facts in the case at bar. In *Gibson*, the defendant's statements given to the treating physician for the purposes of treatment were privileged under RCW 5.60.060(4). The relevant fact was that the defendant believed the statement was privileged because he was making the statements to the physician for the purpose of treatment. In the case at bar, the defendant's confidential communications with his wife made during their marriage were privileged under RCW 5.60.060(1). The relevant fact was that the defendant and his wife believed that their statements were privileged because they were making them during a telephone call with no other person present. Thus, in the same way the court in *Gibson* erred by admitting evidence of the privileged statements, so in the case at bar the trial court erred by admitting evidence of the privileged statements.

In this case, the erroneous admission of the two recorded statements cause prejudice in two ways. First, absent the admission of the recorded conversations between the defendant and his wife, there would be no evidence to support the two tampering charges. Thus, these convictions should be vacated with instructions to dismiss. Second, the admission of this

evidence put the defendant's protestations of innocence in the other charges in an extremely unfavorable light. Indeed, given the fact that the jury acquitted the defendant on eight of the other charges, it appears likely that absent the admission of the two recordings of the defendant's telephone calls with his wife, the jury would have acquitted the defendant on all of the charges. Thus, the erroneous admission of this evidence caused prejudice and entitled the defendant to a new trial on all of the charges for which he was convicted.

V. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT OFFENSES HAVING A UNITY OF TIME, PLACE, OBJECTIVE INTENT, AND VICTIM CONSTITUTED THE SAME CRIMINAL CONDUCT FOR THE PURPOSE OF CALCULATING THE DEFENDANT'S OFFENDER SCORE.

Under RCW 9.94A.589(1)(a), at sentencing on two or more offenses, if "some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994). Under this statute, the term "same criminal intent" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). The term "same criminal intent" as used in this definition does not mean the same "specific intent." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Rather, it means the same "objective intent." *Id.*

For example, in *State v. Deharo*, 136 Wn.2d 856, 966 P.2d 1269 (1998), the trial court convicted the defendant of Delivery of Heroin, and Conspiracy to Deliver Heroin. At sentencing, the trial court found that these two offenses had the same victim and were committed at the same time and place. However, the court ruled that these two offenses did not constitute the “same criminal conduct” for the purpose of sentencing because they had different intent elements. The defendant appealed this ruling.

The Court of Appeals reversed the trial court on the sentencing issue, holding as follows:

[T]he present case, the “objective intent” underlying the two charges is the same - to deliver the heroin in one or both conspirators’ possession. Possessing that heroin was the “substantial step” used to prove the conspiracy. Since both crimes therefore involved the same heroin, it makes no sense to say one crime involved intent to deliver that heroin now and the other involved intent to deliver it in the future. Nor is there any factual basis for distinguishing the two crimes based on objective intent to deliver some now and some later. Under the reasoning in *Porter*, the two crimes should be treated as encompassing the same criminal conduct.

State v. Deharo, 136 Wn.2d at 858.

Similarly, in *State v. Saunders*, 120 Wn.App. 80, 86 P.3d 232 (2004), a defendant convicted of murder, robbery, kidnaping, and rape out of the same incident argued that his trial counsel had been ineffective when he failed to argue that the rape and the kidnaping constituted the “same criminal

conduct” for the purpose of determining his offender score. The court agreed, holding as follows:

Under the facts here, it appears that Williams’s primary motivation for raping Grissett by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Further, as the case law provides strong support to this argument, the failure was prejudicial. *See State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *Edwards*, 45 Wn.App. at 382, 725 P.2d 442; *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 526 (1998).

Thus, counsel’s decision not to argue same criminal conduct as to the rape and kidnaping charges constituted ineffective assistance of counsel and requires a remand for a new sentencing hearing where defense counsel can make this argument.

State v. Saunders, 120 Wn.App. at 825.

In the case at bar, the following lists the convictions arising out of the defendant’s deposit of the Franzter check at the Bank of America:

Count 9: Attempted First Degree Theft on 2/9/09 from Aaron LaBerge from the defendant’s deposit of the Franzter check;

Count 10: First Degree Theft on 2/11/09 from Bank of America from the deposit of the Franzter check, withdrawal of \$12,000.00 cash, and the creation of the two \$20,000.00 cashier’s checks;

Count 11: First Degree Identity Theft on 2/11/09 from Aaron LaBerge from depositing the Franzter check with Mr. LaBerge’s financial information on it;

Count 12: Forgery on 2/11/09 for depositing the Franzter check;

Count 13: Money Laundering on 2/11/09 for giving the bank the first wire transfer request;

Count 14: Money Laundering on 2/11/09 for giving the bank the second wire transfer request;

Count 17: Attempted First Degree Theft on 2/12/09 from Bank of America for attempting to exchange one of the two \$20,000.00 cashier's checks;

Count 18: Second Degree Identity Theft on 2/12/09 from Aaron LaBerge.

At sentencing, the court found that only the two money laundering charges arising out of Counts 13 and 14 constituted the same criminal conduct. As the following explains, this was an error. First, it should be noted that, under the state's theory of the case, there was only one objective intent: to steal money. Thus, there was a unity of intent. Second, all of the offenses occurred over a very short period of time and at the same place. Thus, there was a unity of time and place. Finally, as a review of the charges reveals, the victim in Counts 9, 11, 12 and 18 was Aaron LaBerge, whether denominated in his name or the name of his company. Thus, the trial court erred when it failed to find that these counts constituted the same criminal conduct. In addition, a careful review of the record also reveals that the

victim in Counts 10, 13, 14, 17 was Bank of America. Thus, the trial court erred when it failed to find that these counts constituted the same criminal conduct. Under the analysis, the defendant's offender score was actually two points instead of seven as the court calculated. As a result, this court should vacate the defendant's sentences and remand for resentencing using the correct offender score.

CONCLUSION

The defendant's convictions should be vacated and dismissed because they are not supported by substantial evidence. In the first alternative, all of the convictions should be reversed and the case remanded for a new trial based upon the trial court's error in failing to sever counts and based upon the prosecutor's improper statements during closing argument. In the second alternative, the defendant's sentences should be vacated and the case remanded for resentencing using the correct offender score.

DATED this 21st day of October, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION

ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,

FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 5.60.060

Who Are Disqualified – Privileged Communications

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

RCW 9.94A.589(1)

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims

occupied the same vehicle.

Dated this 21ST day of OCTOBER, 2011 at LONGVIEW, Washington.

/s/

CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

HAYS LAW OFFICE

October 21, 2011 - 4:35 PM

Transmittal Letter

Document Uploaded: 417014-Appellants' Brief.pdf

Case Name: State v. Kartchner

Court of Appeals Case Number: 41701-4

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellants'
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Cathy E Russell - Email: **jahayslaw@comcast.net**

A copy of this document has been emailed to the following addresses:
jennifer.casey@clark.wa.gov