

NO. 46866-2-II

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

STATE OF WASHINGTON, RESPONDENT

v.

STEPHANE PERRY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Philip K. Sorenson

No. 13-1-03205-0

BRIEF OF RESPONDENT

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

1. Where the charging language of the Information is similar to that struck down in Satterthwaite because it does not contain the definition (to “withhold or appropriate”) of possessing stolen property, is the Information in this case constitutionally insufficient?
2. Where a witness is not an accomplice and her testimony is corroborated by other evidence is defense counsel ineffective for failing to request a cautionary instruction regarding accomplice testimony?
3. Is identity theft in the second degree an alternative means crime when it merely lists multiple facets of various means of committing the crime?
4. Whether defendant’s conviction for criminal trespass in the first degree should be affirmed where, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found both alternative means of committing the crime beyond a reasonable doubt.

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with identity theft in the second degree, unlawful possession of a stolen vehicle, possessing stolen property in the second degree, and unlawful use of drug paraphernalia on August 15, 2013. CP 5-7. The State filed an Amended Information adding burglary in the second degree and possession of stolen property in the third degree. CP 18-20. Prior to trial, the State filed a Second Amended Information reducing burglary in the second degree to criminal trespass in the first degree. CP 133-135.

The case was called for trial on September 15, 2014. 1 RP 4. The jury found defendant guilty of criminal trespass in the first degree, identity theft in the second degree, possession of a stolen vehicle, two counts of possession of stolen property in the third degree, and unlawful use of drug paraphernalia. 09-19-14 RP 3, CP 245-251. On October 3, 2014, the trial court sentenced defendant to 57 months. CP 256-70. Defendant timely appealed. CP 276.

2. Facts

On August 14, 2013, Shenelle Williams, the front desk manager of the Holiday Inn Express, called police about an unwanted guest in the hotel, 2 RP 245-246. She had asked the guest in Room 204, identified as the defendant, to leave, but he had refused. 2 RP 246.

Tacoma Police Officers Matthew Graham and Sargent Kieszling responded to the Holiday Inn Express. 2 RP 284-285. They contacted defendant in Room 204. 2 RP 287-288. Defendant identified himself as “Matthew Lane.” 2 RP 289. Defendant allowed them to enter the room. 2 RP 289.

Officer Graham observed that the room was in “disarray” and there were hypodermic needles all over the room. 2 RP 289. He also noted that there was someone in the bathroom; eventually, a female [later identified as Madison Morton] exited the bathroom. 2 RP 289-290. Defendant and the female were detained in handcuffs and read their *Miranda* rights. 2 RP 290.

Defendant he had no money to pay for the motel room. 2 RP 292. Defendant told the officers that a friend had booked the room for him. 2 RP 291. He had no way to contact this friend. 2 RP 291-292. When asked about the needles, defendant said that they belonged to the woman, but he later admitted that he had heroin used with her. 2 RP 293. One of the needles was loaded with a brown substance that appeared to be heroin. 2 RP 293. A spoon with brown residue was located in the room. 2 RP 309.

Officer Graham located a wallet in defendant’s pocket. 2 RP 293. In defendant’s wallet, Officer Graham located a Washington identification card with defendant’s real name on it. 2 RP 293. Officer Graham ran a record check on defendant’s true name and learned that defendant had an

outstanding warrant for his arrest. 2 RP 294. Also in the wallet, Officer Graham located a Social Security card belonging to Matthew Donald Lane. 2 RP 295. Defendant said he used the name “Matthew Lane” to check in because he had problems using his real name. 2 RP 295. Officer Graham also located a United States passport with the name Matthew Donald Lane. 2 RP 298. A record check showed that Matthew Donald Lane was a real person. 2 RP 297. When asked about being in possession of Lane’s documents, defendant said he was just holding onto these items for him and Lane was “just some guy.” 2 RP 302.

Officer Graham found keys to a Subaru Legacy under the bed and determined that the vehicle was associated with the room. 2 RP 304-305. Defendant thanked the officers for finding his keys. 3 RP 358. Defendant had driven the car to the motel. 3 RP 358. Officer Graham ran the license plate number and discovered that the plate on the vehicle did not belong to the car. 2 RP 306. Officer Graham ran the Subaru’s VIN number and discovered that the car belonged to Matthew Donald Lane. 2 RP 308.

Officer Kieszling impounded the Subaru. 3 RP 360. He contacted Matthew Lane and Lane confirmed the car was stolen. 3 RP 361. Matthew Lane also confirmed the safe in the room belonged to him and gave Officer Kieszling permission to open it. 3 RP 361. The safe had a number of Lane’s documents in it, including savings bonds for Lane’s children. 3 RP 362.

Lisa Rossi, a crime scene technician, was able to lift latent fingerprints from the Subaru. 2 RP 271-274. Fingerprints were lifted from inside the driver's door, on the driver's window and on the rearview mirror. 2 RP 272-274.

Toni Martin, a latent print examiner with the Tacoma Police Department, received the latent fingerprints from the crime scene. 3 RP 386. She compared them to defendant's known prints and concluded they were a match. 3 RP 387.

Matthew Lane was the victim of a burglary in August of 2013. 3 RP 339. Two cars and a fire safe containing personal documents were stolen among other property stolen during the burglary. 3 RP 339. He does not know defendant and never gave him permission to possess his property. 3 RP 340.

Thomas Thompson was the victim of a burglary in August 13, 2013. 2 RP 229. Property, including a briefcase, headphones and a phone were stolen from his garage. 2 RP 230-236. These items were found in defendant's hotel room. 2 RP 304. Thompson does not know defendant and never gave permission for defendant to possess his property. 2 RP 233.

Madison Morton said that defendant picked her up from work in the blue Subaru and drove her to the Holiday Inn Express. 3 RP 426-427. Defendant told her that his mother had passed away and left him some

money and he had purchased the Subaru. 3 RP 430. Defendant booked the hotel room online. 3 RP 428. He gave the front desk a different name because he had a warrant. 3 RP 428-429. Defendant owed her some money and he paid her back in drugs. 3 RP 434. They used drugs while they were in the hotel. 3 RP 434.

C. ARGUMENT.

1. THE STATE AGREES THAT DEFENDANT SHOULD ONLY BE SENTENCED ON ONE COUNT OF POSSESSION OF STOLEN PROPERTY IN THE THIRD DEGREE.

Defendant's second argument, that there was insufficient evidence to prove possession of stolen property in the second degree, is unnecessary as defendant was not convicted of this charge. The jury left verdict form D blank and convicted defendant of the lesser included charge of possession of stolen property in the third degree on verdict form D-1. CP 248, CP 249.

The State agrees that defendant should have only been charged with one count of possession of stolen property pursuant to *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003). This matter should be remanded to dismiss Count V, the second count of possession of stolen property in the third degree, from the judgment and suspended sentence. CP 271-275.

On remand, the State also agrees that the trial court should strike the phrase “forfeit any items seized by law enforcement” from the judgment and sentence pursuant to *State v. Roberts*, 185 Wn. App. 94, 339 P.3d 995 (2014), and that the trial court must determine defendant’s current and future ability to pay his legal financial obligations on the record pursuant to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

2. THE INFORMATION IN THIS CASE CONTAINS A STATUTORY CITATION THAT MAKES IT DISTINGUISHABLE FROM *SATTERTHWAITE*.

a. Possession of Stolen Property

Defendant argues that both his convictions for unlawful possession of a stolen vehicle and possession of stolen property in the third degree are based on a charging language that fails to contain all of the essential charging elements; however, defendant’s convictions for possession of stolen property in the third degree was originally based on being charged with possession of stolen property in the second degree:

That STEPHANE ALEXANDRE B PERRY, in the State of Washington, on or about the 14th day of August, 2013, did unlawfully, feloniously, and knowingly receive, retain, possess, conceal, or dispose of stolen property other than a firearm or a motor vehicle, belonging to another, of a value exceeding \$750, but that does not exceed \$5,000, and withheld or appropriated said property to the use of any person other than the true owner or person entitled thereto, contrary to RCW 9A.56.140(1) and 9A.56.160(1)(a), and against the peace and dignity of the State of Washington.

CP 18-20. This charging language contained all of the essential elements for the charge of possession of stolen property in the second degree, and by extension, the lesser included of third degree. The State has agreed that the other count of possession of stolen property in the third degree, which arguably left out the “withheld or appropriated” language should be dismissed, so the Court need not reach the issue with regard to this count.

b. Unlawful Possession of a Stolen Vehicle

The State acknowledges that the Court recently held as a matter of first impression that “withhold or appropriate” is an essential element of possession of a stolen motor vehicle. *State v. Satterthwaite*, 186 Wn. App. 359, 344 P.3d 738 (2014) (citing RCW 9A.56.068). However, the Information in the case at bar differs from *Satterthwaite* because it includes the phrase “knowing that it was stolen,” and also includes both a statutory citation to both RCW 9A.56.068 and also RCW 9A.56.140. CP 8-9.

An Information is constitutionally sufficient if it includes all essential elements of a crime. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). An “essential element” is an element whose specification is necessary to establish the very illegality of the act charged. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). Requiring all statutory and non-statutory elements in the charging document provides the accused of fair notice of the charges against him to afford him the opportunity to prepare a defense. *Vangerpen*, 125 Wn.2d at 787.

If the Information is challenged initially on appeal, it will be construed quite liberally. *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). “A Court should be guided by common sense and practicality in construing the language. Even missing elements may be implied if the language supports such a result.” *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1177 (1995)(quoting *State v. Hopper*, 118 Wn.2d 151, 822 P.2d 775 (1992)).

Although essential elements are required to make an Information constitutionally sufficient, the State need not include definitions of the elements. *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014). In *Johnson*, the Information alleged the defendant “did knowingly restrain [J.J.], a human being.” *Id.* at 301 (alteration in original). The defendant challenged the Information because it did not define “restrain,” as “to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his liberty,” which he argued was an essential element. The Court rejected this argument, reaffirming that definitions of elements do not need to be included in the Information to make it constitutionally sufficient. *Id.* at 302.

The present case presents an issue similar to that addressed in *Johnson*. The Information alleged that defendant “did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing it had been stolen.” CP 1. *Satterthwaite* requires that the Information define “possess” as requiring that a defendant “withhold or appropriate [possessed stolen

property] to the use of any person other than the true owner or person entitled thereto.” *Satterthwaite*, 186 Wn. App at 362 (*quoting* RCW 9A.56.140(1)) (alteration in original). Requiring the definition of an essential element is contrary to the Supreme Court’s holding in Johnson that no such definition is required.

In addition, the Information in this case contained a citation to RCW 9A.56.140. RCW 9A.56.140(1) includes the definition, “‘Possessing stolen property’ means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitle thereto.” In *Satterthwaite*, the Court noted that “[t]he charging document did not mention withholding or appropriating the stolen vehicle to the use of a person other than the owner, *and did not cite* RCW 9A.56.140.” *Satterthwaite*, 186 Wn. App at 365 (emphasis added). In the case at bar, the Information specifically includes RCW 9A.56.140. This makes the case distinguishable from *Satterthwaite*. The information is sufficient because the withhold or appropriate elements are included by fair construction and defendant’s conviction should be upheld.

The inclusion of the phrase “knowing it was stolen” in the Information further distinguishes this case from *Satterthwaite*. *Satterthwaite* is premised on the notion that the withholding or appropriation of the stolen item is what “ultimately makes the possession

illegal, thus differentiating between a person attempting to return known stolen property and a person choosing to keep, use or dispose of known stolen property.” *Satterthwaite*, 186 Wn. App at 364. The phrase “knowing it was stolen” makes it clear that defendant not only knowingly possessed the stolen car, but also that he possessed the car knowing it was stolen. The inclusion of this phrase makes it clear that defendant was not a person attempting to return known stolen property. The language arguably implies that the defendant withheld or appropriated the item from the true owner. *See, e.g., State v. Moavenzadeh*, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998)(“...the term “theft” is arguably adequate to convey an intentional, wrongful taking of the property of another.”)

3. DEFENSE COUNSEL WAS NOT INEFFECTIVE WHERE SHE DID NOT REQUEST THE WPIC FOR ACCOMPLICE TESTIMONY.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also, State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v.*

McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also*, *Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*,

120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489.

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

a. Counsel's performance was not deficient.

In order to find that defendant received ineffective assistance of counsel based on his trial counsel's failure to request a jury instruction, the Court must find that defendant was entitled to the instruction, that counsel's performance was deficient in failing to request the instruction, and that the failure to request the instruction prejudiced defendant. *In re*

Cross, 180 Wn.2d 664, 718, 327 P.3d 660, 691 (2014), *citing State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). With regard to the testimony of an accomplice:

(1) it is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.

State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584, 588 (1984) *overruled on other grounds by, State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989), and *State v. McKinsey*, 116 Wn.2d 911, 810 P.2d 907 (1991).

Corroborating evidence is sufficient if it fairly connects the defendant with the crime, and independent evidence is not needed to corroborate every part of the accomplice's testimony. *State v. Calhoun*, 13 Wn. App. 644, 648, 536 P.2d 668 (1975). A cautionary instruction is not required when an accomplice's testimony is corroborated by other evidence. *State v. Jennings*, 35 Wn. App. 216, 220, 666 P.2d 381 (1983).

The initial question is whether Madison Morton is an accomplice. An accomplice is one who could be indicted for the same crime as that for

which the principal is being tried. *State v. Boast*, 87 Wn.2d 447, 455, 553 P.2d 1322 (1976). Unless the person associates himself with the venture and participates in it as something he wishes to bring about, and by action to make it succeed, then that person is not an accomplice. *Id* at 456.

Defendant argues that Morton could have been charged with essentially all of the same crimes that defendant faced (brief of appellant, 24), but that is an overstatement in the context of the evidence in this case. The evidence shows that defendant rented the room using the stolen identity of Matthew Lane. Defendant was in sole possession of Lane's social security card, which was found in his wallet. 2 RP 295. The evidence also showed that defendant was in possession of Lane's stolen Subaru as he drove the car, thanked the officers for finding "his" car keys and his fingerprints were found in the car – specifically around the driver's seat. 3 RP 358; 2 RP 272-274. Morton testified that she drove the car to the motel, but only because defendant was not in a condition to drive it and that he told her it was his new car. 3 RP 428, 430. While Morton could have been charged with unlawful possession of a controlled substance or unlawful use of drug paraphernalia as she admitted to using drugs at the hotel with defendant, she was not an accomplice to defendant's other charges. As she was not an accomplice, defense counsel was not ineffective in requesting the jury instruction regarding an

accomplice's testimony.

Even if the Court were to conclude that Morton was an accomplice, her testimony was corroborated by other evidence. As discussed above, defendant checked into the hotel under the name Matthew Lane and was in possession of Lane's social security card. 2 RP 295. Defendant's fingerprints were found in the car around the driver's seat. 2 RP 272-274. In addition, one of defendant's jail phone calls was also recorded and he talks about being arrested at the Holiday Inn Express and how the police got the blue car and all of the stuff in the trunk. 09-16-14 RP 3-4. With this other evidence corroborating Morton's testimony that defendant rented the room and picked her up in the car, her testimony was corroborated by other evidence in the case. This is not an instance where the only evidence of defendant's guilt is predicated solely on accomplice's testimony.

- b. No prejudice can be presumed to result from the decision not to call the alleged alibi witness.

For a finding of ineffective assistance of counsel, the defendant must demonstrate prejudice. To demonstrate prejudice, the defendant must show that the outcome of the trial would probably have been different if counsel had offered the instruction. *State v. Brett*, 126 Wn.2d 136, 199, 892 P.2d 29 (1995).

Even without the instruction, defendant was able to argue Morton's

credibility. Defense counsel argued that:

Ms. Morton, who has self-interest, potential self-interest, she was, with the exception of the Social Security card, her possessory interest in the items in that room, in the room and everything that we're talking about, but for her statements, she's on equal footing, and she's not an objective observer, and so her explanation for things, her recollection should be questioned.

She talked about how one of the main connections between the two of these folks was their heroin use and heroin addiction, so that doesn't -- that's not a memory enhancer. So that's something else that should be taken into consideration when evaluating her testimony.

Also, you heard that she has an Identity Theft in the Second Degree conviction. That is relevant because you are the judges of her credibility, and a conviction like Identity Theft in the Second Degree is relevant in determining a person's credibility, and she was there in the room. And so her statements should be given very little credibility, and in some places she was very specific, oh, well, he told me his mom passed away, and she left him money and that's how he bought the car. That's pretty specific. It also makes Mr. Perry look pretty bad, which may be the goal of someone who's trying to take the attention away from themselves, and then it's really fuzzy in others.

3 RP 488-489.

A bit later in closing argument, defense says:

And so, with Ms. Morton, we know that she was in the room with a bunch of stolen property in it, that she was addicted to heroin and one of the reasons that she was there was to use drugs, and that the guy on the call is someone she also knows and has some sort of relationship with. And I think she said that she knows him through her daughter, his daughter, and the person at the beginning of the phone call calls Jordan dad, so that's likely the daughter.

She sounds like a pleasant person, but the way she talks in that call, if it's the same daughter, we don't know that, but we've got a couple of daughters here, could be the same one, she's not an innocent flower, she talks about how the Pierce County Jail call policy differs from the Snohomish County Jail. She -- amusement to the situation that Mr. Perry is in, and so if that's the circle that Ms. Morton runs in, she -- her testimony just really should be given minimal, if any, weight.

3 RP 489-490.

Even without the cautionary jury instruction, defense counsel made closing remarks attacking Morton's credibility. Counsel argued to the jury that there were numerous problems with her testimony and that the jury should not give it any weight. Because counsel was still able to make these arguments even without the jury instruction, defendant cannot demonstrate any prejudice due to his counsel not requesting the jury instruction. Defendant cannot show that the outcome of the trial could have been different but for defense counsel failing to require the jury instruction about accomplice testimony.

Therefore, appellant has failed to show ineffective assistance of counsel. His convictions should be affirmed.

4. DEFENDANT’S CONVICTIONS FOR IDENTITY THEFT IN THE SECOND DEGREE AND CRIMINAL TRESPASS IN THE FIRST DEGREE SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State’s case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). “In a claim of insufficient evidence, a reviewing court examines whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,’ ‘viewing the evidence in the light most favorable to the State.’” *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, “[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt.” *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable

inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, “[d]eterminations of credibility are for the fact finder and are not reviewable on appeal.” *Brockob*, 159 Wn.2d at 336; *State v. Locke*, 175 Wn. App. 779, 788-89, 307 P.3d 771, 776 (2013).

- a. Identity theft is not an alternative means crime where the statutes merely lists multiple facets of a means of committing the crime.

Where the offense at issue is an alternative means crime, the right to a unanimous jury verdict found in article I, section 21 of the Washington State Constitution requires that there be either “sufficient evidence to support each of the alternative means of committing the crime” or “a particularized expression of jury unanimity.” *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). “An alternative means crime is one ‘that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.’” *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (quoting *State v. Smith*, 159 Wn.2d 778, 784 P.3d 873 (2007)). “Because the legislature has not defined what constitutes an alternative means crime, whether a statute provides an alternate means for committing a particular crime is left to judicial determination.” *State v. Lindsey*, 177 Wn. App. 233, 240, 311 P.3d 61 (2013). Hence, decisional law “suggest[s] some guidelines for analyzing the alternative means

issue.” *Id.* Among these guidelines are the following: (1) “[m]erely stating methods of committing a crime in the disjunctive does not mean that there are alternative means of committing a crime”; (2) “[d]efinitional statutes do not create additional alternative means for a crime,” and (3) “a statute divided into subparts is more likely to be found to designate alternative means.” *Id.* at 240-41.

RCW 9.35.020 provides that “(1) No person may knowingly obtain, possess, use or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime¹.” Reviewing this statute as a whole indicates it does not set forth an alternative means crime for at least two reasons.

First, the placement of the word “knowingly” suggests that the legislature intended only one means of committing the crime because the word “knowingly” clearly relates to all the terms in the first part of the statute – “obtain, possess, use, or transfer” – as a group. If each of these words was interpreted as standing on its own, the “knowingly” requirement would apply only to “obtain.” As this Court noted in *Lindsey*, “[t]reating these terms as a group indicates that they represent multiple facets of a single means of committing the crime” rather than alternative means unto themselves. *Lindsey*, 177 Wn. App. at 241.

¹ The definitional jury instruction and “to convict” jury instruction mirrored this language. CP 217, 218.

Second, this group of terms, like the group of seven terms in RCW 9A.82.050(1), “relate to different aspects of a single category of criminal conduct”: here, “identity theft.” *Id.* at 241-42. They are too closely related to one another to define distinct acts in themselves. For example, one would have trouble “obtaining” without also “possessing” a means of identification.” *See Owens*, 180 Wn.2d at 99. “As a result, these terms appear to be definitional,” and, “[a]s noted above, definitional statutes do not create multiple alternative means for a crime.” *Id.* at 241-42. Thus, RCW 9.35.020 does not define an alternative means crime, and there need not be either sufficient evidence to support each of the terms listed there or “a particularized expression of jury unanimity.” *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

Defendant’s reliance on *State v. Lillard*, 122 Wn. App. 422, 93 P.3d 969 (2004), is misplaced as *Lillard* is based on *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998), which held that the State is required to prove additional elements to a crime if these elements are added to the “to-convict” instruction. However, in this case, the State did not add additional elements, merely the “multiple facets of a single means of committing the crime” as stated in *Lindsey. Lindsey*, 177 Wn. App. at 241.

There need only be sufficient evidence of the crime of identity theft, which includes that defendant “knowingly obtain, possess, use or transfer a means of identification or financial information of another

person, living or dead, to-wit: Matthew Lane, with the intent to commit, or to aid or abet, any crime.” CP 133-135. There was.

The jury had before it defendant’s statements and testimony that he checked into the motel under the name of Matthew Lane, he identified himself to police as Matthew Lane (2 RP 289), he was in possession of Matthew Lane’s Social Security card (2 RP 295), he was in possession of Matthew Lane’s passport (2 RP 298), he was in possession of Matthew Lane’s stolen safe containing Matthew Lane’s documents and property (3 RP 362). Defendant used the name Matthew Lane, he obtained and possessed Lane’s Social Security card and passport². Based on this evidence, there is sufficient evidence that defendant knowingly obtained, possessed, and used a means of identification with the intent to commit any crime.

Defendant does not appear to be challenging that Matthew Lane is a real person, especially as the real Matthew Lane testified at trial, or that the defendant had these items with the intent to commit a crime, as defendant was using Lane’s name to rent a motel room, evade arrest on a warrant by making a false statement to police, and use illegal drugs while being in possession of a stolen vehicle and other stolen property. As there is no real challenge to these elements, there was sufficient evidence from which a “rational trier of fact could have found the essential elements of

² Defendant need not also “transfer” a means of identification or financial information as that is part of the definition

the crime beyond a reasonable doubt, ‘viewing the evidence in the light most favorable to the State.’” *State v. Brockob*, 159 Wn.2d 311, 336, and Defendant’s convictions for identity theft in the second degree should be affirmed.

- b. There was sufficient evidence that defendant both unlawfully entered and remained in the hotel room.

A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). A person enters or remains unlawfully in or upon premises when he or she is not licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.52.010(5).

In this case, there was sufficient evidence that defendant unlawfully entered the motel room because he used a false name to rent the room. *See, e.g., Evans v. United States*, 417 A.2d 963, 965-66 (D.C. 1980)(As defendant gave a false identity and false addresses in order to procure the rental agreement, it was sufficient for a jury to conclude that Hertz did not knowingly consent to appellant's use of the vehicle at the time the agreement was signed.) Defendant registered for the room in the name of Matthew Lane. 2 RP 245, Exh. 29. Defendant admitted to police that he was using a false name to check into the motel because he had previously had problems renting a room when using his real name. 2 RP

295. There was sufficient evidence that by using a false name to rent the room, defendant unlawfully entered it.

There was also sufficient information that defendant unlawfully remained in the motel room. Shenelle Williams, the manager of the Holiday Inn Express, asked defendant to leave and he refused. 2 RP 246. Williams both called and went to the room before telling him that she would call police. 2 RP 264-265. When defendant failed to pay or vacate, Williams then called 911 to have police escort him off the property. 2 RP 246. Officers then arrived and removed defendant from the property. 2 RP 285. There was sufficient evidence that defendant unlawfully remained in the room.

As there was sufficient evidence adduced at trial to prove the crime beyond a reasonable doubt under either alternative means, defendant's conviction for criminal trespass in the first degree should be upheld.

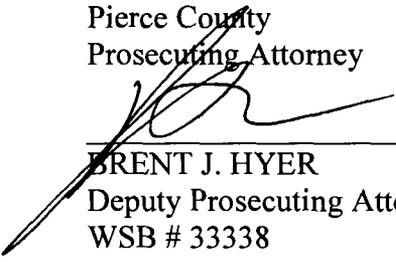
D. CONCLUSION.

While the State agrees that one of defendant's convictions for possession of stolen property in the third degree should be vacated, his remaining convictions for identity theft in the second degree, possession of a stolen vehicle, possession of stolen property in the third degree and criminal trespass in the first degree should be upheld. His trial counsel

was not ineffective for failing to request a jury instruction for accomplice testimony as Morton was not an accomplice and her testimony was corroborated in any event. The Court should remand this case back to the trial court to vacate count V, strike the language regarding the forfeiture of his property and inquire about his ability to pay his legal financial obligations.

DATED: October 19, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



BRENT J. HYER
Deputy Prosecuting Attorney
WSB # 33338

Certificate of Service:

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

10-19-15 Therese Kar
Date Signature

PIERCE COUNTY PROSECUTOR

October 19, 2015 - 10:23 AM

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