

COA NO. 49810-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BRUCE BROOKS,

Appellant.

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

The Honorable Gretchen Leanderson, Judge

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BRIEF OF APPELLANT

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CASEY GRANNIS  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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**A. ASSIGNMENTS OF ERROR**

1. The court erroneously admitted police officer testimony on the content of photographs under ER 1002, the best evidence rule.

2. The court erroneously admitted police officer testimony identifying appellant as the person in the photographs, which constituted improper opinion testimony under ER 701.

3. The evidence is insufficient to convict appellant of identity theft.

4. The court erroneously admitted police officer testimony that constituted an opinion on guilt and profiling.

5. Defense counsel's failure to ensure the jury could not consider the improper testimony on guilt and profiling violated appellant's right to the effective assistance of counsel.

6. Cumulative error deprived appellant of his due process right to a fair trial.

7. The court erred in imposing a sentence for the identity theft conviction that exceeds the statutory maximum. CP 64.

8. The court erred in imposing discretionary legal financial obligations in the absence of a proper inquiry into ability to pay. CP 62.

### Issues Pertaining to Assignments of Error

1. Where the State did not produce the digital version of photographs police officers used to identify appellant and an alleged accomplice as participants in the burglary, whether police testimony on the content of the photos violated the best evidence rule under ER 1002?

2. Whether police officer testimony identifying the person in the photo as appellant constituted an improper opinion under ER 701 because it invaded the province of the jury as trier of fact?

3. Whether the evidence is insufficient to convict appellant of identity theft because the State failed to prove he (a) knowingly possessed a means of identification or personal information of another; or (b) intended to commit a crime with those things?

4. Whether the court erroneously admitted police officer testimony about the intent of others to commit crimes with financial documents because such testimony constituted an opinion on guilt and allowed the jury to use the testimony as evidence that appellant fit the profile of those who commit identity theft? In the alternative, if the record shows the trial court sustained the defense objection to this testimony outside the presence of the jury, whether defense counsel was ineffective in failing to have the trial court sustain the objection in front of the jury and strike the testimony so that the jury could not consider it?

5. Whether some combination of errors specified above (assignments of error 1, 2, 4, 5) violated appellant's due process right to a fair trial under the cumulative error doctrine?

6. Whether the combination of confinement and community custody for the identity theft conviction under count 2 exceeds the five-year statutory maximum?

7. Whether the court wrongly imposed a discretionary \$1500 fee for appointed counsel because it failed to make a sufficient individualized inquiry into appellant's ability to pay?

**B. STATEMENT OF THE CASE**

The State charged Bruce Brooks with residential burglary and second degree identity theft. CP 1-2. His case was tried together with co-defendant Michael Coats, who was charged with residential burglary. 1RP<sup>1</sup> 1; CP 33. The following evidence was produced at trial.

Around noon on April 25, 2016, Steven Coe was in his front yard when he saw a blonde female walk through his neighbor's yard across the street and into the back door of the residence. 1RP 249-52, 263. His neighbors were not home. 1RP 251. A Blazer pulled into the neighbor's

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<sup>1</sup> This brief cites to the verbatim report of proceedings as follows: 1RP - five consecutively paginated volumes consisting of 10/25/16, 10/31/16, 11/1/16, 11/3/16, 11/7/16, 11/8/16, 11/9/16, 11/14/16, 11/15/16; 2RP - 10/31/16 (voir dire); 3RP - 11/1/16 (voir dire); 4RP -12/2/16.

driveway. 1RP 251. Coe could not see the driver very well. 1RP 253. The female came out and talked to the driver, then went back into the house. 1RP 251. A few minutes later, she and another man came out and loaded things into the car. 1RP 251. That man had a big screen TV.<sup>2</sup> 1RP 253. The woman had a white basket full of stuff. 1RP 253, 266. They got in the car and left. 1RP 255. The driver never left the car. 1RP 253.

When the car backed out of the driveway, Coe "tried to get a look at the driver, but he had turned his head down like this and had his arm up so I wasn't able to get a clear look at his face."<sup>3</sup> 1RP 257. The driver ducked down. 1RP 258. When the prosecutor asked if Coe recalled the man's race, Coe answered "Honestly, I really couldn't tell you. Dark-skinned. I thought he was Samoan or a darker-skinned maybe oriental or something. I really could not tell because all I saw was, like, the side of his face and the back of his head." 1RP 258. The driver had "short hair, like a buzz cut." 1RP 258. He was not bald. 1RP 267. Coe took digital photos on his cell phone as the event unfolded, including photos of the driver. 1RP 256, 272, 274; Ex. 258-262. He called the police. 1RP 256.

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<sup>2</sup> Coe described this man as either a white male with a good tan or Hispanic, skinny, between 5'10' and 6', longer hair, wearing a baseball cap and short pants. 1RP 254, 257. At trial, Coats had two long braids of hair. 1RP 507.

<sup>3</sup> There was no description of what Coe meant by "like this."

Jennifer Shanburn and Ricky "Dusty" Jones lived in the residence at issue. 1RP 276-77. Shanburn returned home that afternoon after receiving phone messages from Coe. 1RP 279. The back door was broken, the house ransacked. 1RP 279-80. As Shanburn put it, "I came home to an empty house besides furniture, basically." 1RP 280. Items taken from the house included: two televisions, two Samsung tablets, two PlayStations, a surround sound system, five \$100 bills, a bag of loose change, purses, tote bags, a jewelry box (including a "tree of life" necklace), sunglasses, clothing (including a Seahawks jersey), shoes (including a pair of Nikes in Seahawks colors), a smart phone, Beats studio headphones, and backpacks. 1RP 281-90, 313-26.

Also taken: a state identification card, mail, tax documents, bank statements, pay stubs, and various documents containing medical information, student loan information, credit card information and insurance information. 1RP 290-94, 308-09, 329, 592-94. These items were contained in a bag, identified as Exhibit 243.<sup>4</sup> 1RP 293-94, 592-94.

More stuff was piled up near the back door. 1RP 280.

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<sup>4</sup> At trial, the contents of the bag were divided between those belonging to Shanburn and those belonging to Jones. 1RP 300-03. Shanburn's items were placed into a Ziplock and admitted as Exhibit 243A. 1RP 294, 296-303, 307. Jones's items — his state ID and unopened mail from the bank — were placed into a separate Ziplock bag and admitted as Exhibit 243B. 1RP 300-03, 307, 327-29.

Officer Thiry responded to the 911 call. 1RP 187. Coe showed him the digital photos he took on his cell phone. 1RP 191, 268-69. The screen size on Coe's cell phone was about four inches. 1RP 270. The phone had a feature that could zoom in and expand the photo. 1RP 274. There were things that could be seen in the photographs that were not clearly visible in the paper photos admitted as Exhibits 258-262. 1RP 274-75. Thiry had Coe email the photos to his City of Tacoma email address so that he could enlarge them on the laptop in his patrol car. 1RP 191-92. After enlarging the photos, Thiry identified the vehicle as a red Nissan Pathfinder and noted its license plate number. 1RP 192-93. Over defense objection, Thiry testified one photo showed a female with long blonde hair and a gray hooded sweatshirt getting into the rear passenger seat of the vehicle. 1RP 193-94. Over further defense objection, Thiry testified another photo showed the driver of the vehicle was a "bald black male." 1RP 194-95.

At the scene, Thiry showed the photos to Officer Tiffany, who had arrived to assist. 1RP 354-56. Thiry ran a record check on the vehicle and determined its registered owner, Jamal Block, lived nearby. 1RP 199, 207. On cross examination, Brooks's counsel elicited Tiffany's testimony that the person in one of the photos was a black male that closely resembled Block, and that the vehicle in the photo belonged to Block. 1RP 374.

Over defense objection, Tiffany testified on redirect that Brooks closely resembled the driver in the photo. 1RP 384-89.

Officers surveilled the address where the vehicle was registered. 1RP 203-04, 362-63. The Pathfinder arrived. 1RP 204-06, 362-63. Officers contacted Block and Michelle Killgore at the residence. 1RP 208, 363. Killgore wore a necklace with a pendant of twisted wire in the form of a tree. 1RP 208-09. Shanburn had described this necklace as an item of jewelry that was missing from her residence. 1RP 209. They saw a gray hooded sweatshirt in the Pathfinder, which matched the sweatshirt that the blonde female wore in the photo obtained from Coe. 1RP 212-13. Items taken from the Shanburn/Jones residence were found in Block's Pathfinder. 1RP 212, 394-95, 405-07, 440-41, 532-33, 613-15.

At some point during the investigation that day, police stopped a Jeep Cherokee containing Brooks and Coats. 1RP 240-41. Officer Waddell was not present when the stop was initiated, but inferred Brooks was the driver because Brooks was standing on driver's side of vehicle and Coats was on the other side when Waddell arrived on scene. 1RP 243-44. Waddell testified that \$200.72 was found on Brooks. 1RP 242. Stolen property from the Shanburn/Jones residence was found in the Jeep Cherokee. 1RP 433-34, 438-41, 533-34, 613.

Coats and Brooks were transported to police headquarters. 1RP 214, 242-43. Thiry was there when they arrived. 1RP 214-15. Thiry had "minimal contact to basically check on them while they awaited to be interviewed." 1RP 215. Coats wore a number 24 Seahawks jersey and Nike shoes (black and lime green color), which matched the description of what Jones reported missing. 1RP 222-26. Thiry searched Brooks. 1RP 226-27. Brooks had one 100-dollar bill, two 50-dollar bills and one 20-dollar bill. 1RP 227. Coats had two 20-dollar bills. 1RP 228. Over defense objection, Thiry testified that Brooks wore what appeared to be the coat that the driver of the Pathfinder wore in the photo taken by Coe. 1RP 215-17.

Detective Viehmann interrogated Brooks. 1RP 508. Brooks said he picked up a male acquaintance at 10 a.m. and dropped him off an hour later at a store. 1RP 510. Brooks went home and then later went to Block's house at 4:30 p.m. 1RP 510. Brooks said he was with Killgore that day, with the detective inferring sometime between 11 a.m. and 4:30 p.m. 1RP 511, 534-36.

After the interrogation, police searched Brooks's residence and found items taken from the Shanburn/Jones residence. 1RP 525-26, 531-32, 557-59, 588-93. Documents containing personal information, including Jones's ID, were found in a bag. 1RP 592-94.

The jury found Brooks guilty on both counts. CP 45-46. Coats was acquitted. 1RP 714. The court imposed a total sentence of 72 months in confinement on Brooks. CP 64. Brooks appeals. CP 76.

C. **ARGUMENT**

1. **IMPROPER POLICE TESTIMONY ABOUT THE CONTENT OF THE PHOTOGRAPHS REQUIRES REVERSAL OF THE CONVICTIONS.**

The crucial issue at trial was identity: who was the driver of the vehicle outside the burgled house? Police testimony describing and identifying the driver as depicted in the photos taken by Coe violated the best evidence rule. The "zoomed in" digital photos relied on by the officers were at no time admitted into evidence, yet the State sought to prove the content of those photos by eliciting testimony that the driver depicted in them resembled Brooks. Further, an officer testified based on his observation of the photos that the female participant in the burglary wore an item of clothing that was later associated with the female that Brooks contacted on the day of the burglary. Again, those digital photos were not admitted into evidence, in violation of the best evidence rule. Furthermore, police testimony on the identity of the person depicted in the photos constituted improper opinion that invaded the province of the jury on a key fact at issue. Reversal is required because there is a reasonable

probability that these errors, considered independently or in combination, tainted the verdicts on both counts.

**a. Over defense objection, the court admitted police officer testimony about who and what was depicted in photographs.**

Officer Thiry testified before Coe. On direct examination, Thiry testified that, in one of the photos taken by Coe, he saw a female with long blonde hair and a gray hooded sweatshirt getting into the rear passenger seat of the vehicle. 1RP 193-94. Brooks's counsel objected to testimony about photos that were not admitted into evidence. 1RP 194. The prosecutor said the testimony was based on the officer's personal observations of the photos. 1RP 194. The court told Thiry to proceed, as it was his personal observation. 1RP 194.

Thiry testified "And then in another photo that he showed me and then later sent, after the Pathfinder had backed out of the victim residence driveway, I could note the driver of the Pathfinder appeared to be a --" 1RP 194. At this point, Brooks's counsel again objected "on foundation grounds for testimony about photos that have not been admitted or adequate foundation being laid." 1RP 194. The prosecutor said the foundation was laid for how he came into possession of the photos and viewed them on his laptop. 1RP 195. The court allowed the testimony.

1RP 195. Thiry finished his answer: "the driver of the Pathfinder was a bald black male from what I noted from the photo." 1RP 195.

Thiry later testified that Brooks wore what appeared to be the coat that the driver of the Pathfinder wore in the photo taken by Coe. 1RP 215-16. Brooks's counsel objected: "We don't have these photos. He's testifying about photos and what appears to be his opinion as to what the photos depict. I'm going to object and move to strike that testimony. I think the photos ought to be - come in upon proper foundation, and it should be a jury question." 1RP 216. The prosecutor said Thiry's testimony was based on his personal observations of the photos and of Brooks when he was brought into police headquarters. 1RP 216. The judge ruled that the witness could testify from personal observations. 1RP 216. When asked by the court, the prosecutor said she could bring the photos in later. 1RP 217.

Coe subsequently testified. During cross-examination, Coe identified exhibits 258-262 as the photos he took on his phone and they were admitted into evidence. 1RP 256, 272. These are in the form of paper printouts. Ex. 258-262.

Officer Tiffany testified later in the trial. When Tiffany arrived on the scene, Thiry showed him Coe's photos on Thiry's cell phone. 1RP 354-56. He expanded the photos to get a clear view of license plate. 1RP

356. On cross examination, Brooks's counsel, referring to Tiffany's police report, elicited Tiffany's testimony that the driver in one of the photos was a black male that closely resembled Block, and that the vehicle in the photo belonged to Block. 1RP 374.

Outside the presence of the jury, the prosecutor argued counsel, by insinuating Block was driving the vehicle, opened the door to testimony that Block told Tiffany that Brooks had borrowed the vehicle. 1RP 376. Brooks's counsel disagreed the door was opened because the point was already obvious and had been made when Thiry gave his opinion of what the photo showed. 1RP 376. Tiffany's description matched Thiry's description and there was previous testimony that the vehicle was registered to Block. 1RP 376. Coats's counsel joined in the objection, arguing that what Brooks told Tiffany was inadmissible hearsay. 1RP 377-78. The prosecutor contended the State did not open the door; rather the defense was aware that the vehicle was in possession of someone else, and the hearsay would rebut the inference raised by the defense. 1RP 378. The court ruled it was not allow the State to elicit the hearsay, but there could be some other questions that could be asked on redirect. 1RP 380.

On redirect, the prosecutor elicited Tiffany's testimony that the photos taken by Coe, as reflected in Exhibits 259 and 260, were taken from a distance and it was difficult to distinguish individual details of the

driver. 1RP 384. The prosecutor asked how he was able to see the distinguishing features. 1RP 384. Brooks's counsel objected, "there isn't a foundation. It's not admitted. We do have photographs that have been admitted. I don't think this testimony is proper because --" 1RP 384-85. The prosecutor cut Brooks's counsel off before he could finish his sentence, saying Tiffany's testimony was based on his personal observations. 1RP 385. The court overruled the objection. 1RP 385.

The prosecutor repeated her question about how Tiffany was able to see the distinguishing features. 1RP 386. Tiffany responded, "It was zoomed in." 1RP 386. The prosecutor asked if the photos observed on Thiry's phone resembled anyone in the courtroom, and Tiffany answered yes. 1RP 386. Brooks's counsel objected when the prosecutor asked Tiffany to point the person out. 1RP 386. The prosecutor said it was based on personal observation and he was asked about what he saw on the phone by defense counsel. 1RP 386-87. The court overruled the objection. 1RP 387. Tiffany identified "the defendant with the black jacket and flannel shirt on." 1RP 387. On re-cross, Tiffany confirmed he wrote in his report that the black male seen in the photo closely resembled Block. 1RP 388. On further redirect, Tiffany identified Brooks as closely resembling the person in the photo. 1RP 389. Tiffany acknowledged he had not seen Brooks before testifying in court that day. 1RP 390.

The defense theorized the State could not prove Brooks was the driver of the vehicle and so the jury could not find beyond a reasonable doubt that he was an accomplice to the burglary. 1RP 681-83. In closing argument, the State emphasized the importance of Thiry zooming in on the photo and describing the driver as a bald, black male. 1RP 644-45, 653, 696. The prosecutor also highlighted that Tiffany zoomed in and identified Brooks as resembling the driver. 1RP 645, 653.

**b. Testimony provided by officers Thiry and Tiffany describing the content of the digital photographs violated the best evidence rule.**

ER 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute." This is known as the best evidence rule. The best evidence rule "generally requires that 'the best possible evidence be produced.'" State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (quoting Larson v. A.W. Larson Constr. Co., 36 Wn.2d 271, 279, 217 P.2d 789 (1950)). The rule requires an original be produced unless the proponent can show that it is unavailable for a reason other than the fault of the proponent.<sup>5</sup> Id. at 397.

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<sup>5</sup> Under ER 1003, a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the

In Fricks, for example, the Supreme Court considered whether a gas station's tally sheet could be admitted in a robbery case when the "only foundation laid for admission of this hearsay evidence was the manager's testimony that such a tally sheet was kept." Id. The Court held "the State failed to produce the document or to make any showing of its unavailability. Under these circumstances the testimony of the manager as to its contents was not an acceptable method of proof." Id.

By its terms, the best evidence rule encompasses photographs as well as writings and recordings. ER 1002. The rule applies "when a witness seeks to testify about the contents of a . . . photograph without producing the physical item itself - particularly when the witness was not privy to the events those contents describe." United States v. Bennett, 363 F.3d 947, 953 (9th Cir. 2004).<sup>6</sup>

Officer Thiry testified that the man in the zoomed-in digital photo was a bald black man and that Brooks wore the same clothes as the man in that photo. Officer Tiffany testified the man in the zoomed-in digital photo resembled Brooks. Thiry also testified that, in one of the photos taken by Coe, he saw a female with long blonde hair and a gray hooded

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original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

<sup>6</sup> The Washington rule is based on the federal counterpart. See 5C Wash. Prac., Evidence Law and Practice § 1002.1 (6th ed.)

sweatshirt getting into the vehicle. The digital photos upon which these officers relied as the basis for their testimony were never admitted into evidence. Paper photos were later admitted, but they were not the zoomed-in digital version upon which Thiry and Tiffany relied to describe their contents. Neither officer had first-hand knowledge of who was present at the scene of the burglary. Neither officer was present when the burglary occurred and so they were not privy to the events described in the photographs. The State sought to prove the contents of the digital photos — that it depicted Brooks and Killgore — through officer testimony about what the photos depicted. The best evidence rule precludes a witness from simply recounting what he previously saw in a photo.

Under ER 1004, the original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if the original is lost or destroyed, not obtainable, in possession of the opponent, or pertains to collateral matters. The best evidence rule thus does not apply when the original is lost or destroyed in the absence of bad faith. State v. Kinard, 109 Wn. App. 428, 435, 36 P.3d 573 (2001) (citing State v. Detrick, 55 Wn. App. 501, 502-04, 778 P.2d 529 (1989)). But here, the State made no showing that the original digital photos were unavailable. Coe testified he still had the photos. 1RP 264.

Defense counsel's repeated objections were therefore appropriate. Counsel did not cite ER 1002 or use the phrase "best evidence," but the nature of the objection is apparent from the context. Counsel objected based on insufficient foundation and that the photos were not in evidence, which captures the best evidence rule. "The propriety of an evidence ruling will be examined on appeal if the specific basis for the objection is 'apparent from the context.'" State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (quoting State v. Pittman, 54 Wn. App. 58, 66, 772 P.2d 516 (1989)).

Interpretation of an evidentiary rule is a question of law reviewed de novo. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). So long as the trial court interpreted the rule correctly, its decision to admit evidence is reviewed for abuse of discretion. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). The trial court in Brooks's case did not interpret the best evidence rule correctly and its decision therefore receives no deference. The court mistakenly believed the officer could testify about the contents of the photos so long as the officer relied on personal observation of the photos. Description of the content of the photos based on personal observation does not satisfy the best evidence rule. The State sought to prove the content of the photos. The best evidence rule requires the photos to be admitted as evidence. And not just

any photo. The police described the content of the digital photos based on their zoom capacity but those digital photos were never admitted into evidence. Even if the trial court could be said to correctly interpret the best evidence rule, it failed to adhere to its requirements, which itself constitutes an abuse of discretion. See Foxhoven, 161 Wn.2d at 174 ("Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.").

**c. Police testimony describing and identifying the driver of the vehicle in the photographs constituted improper opinion testimony.**

The right to have factual questions decided by the jury is crucial to the constitutional right to a jury trial. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). Opinion testimony is carefully controlled because it can usurp the jury's role. Id. at 590-91. A lay witness may give opinion testimony only if it is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony or the fact in issue. ER 701. But the identity of a person portrayed in a photograph or video is generally a factual question for the jury. State v. George, 150 Wn. App. 110, 118, 206 P.3d 697 (2009). Opinion testimony identifying the defendant in a photo runs "the risk of invading the province of the jury and unfairly prejudicing [the defendant]." Id. (quoting United States v. La Pierre, 998 F.2d 1460, 1465 (9th Cir. 1993)). Lay opinion as

to the identity of a person is therefore inadmissible unless "there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." George, 150 Wn. App. at 118 (quoting State v. Hardy, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994)). Opinion testimony may be appropriate when the witness has had sufficient contacts with the person or when the person's appearance before the jury differs from his or her appearance in the photograph. Id. (citing La Pierre, 998 F.2d at 1465). The requirement that the witness be more likely than the jury to correctly identify the defendant ensures that the witness's testimony does not improperly invade the province of the jury. Id.

In Hardy, police officers testified to the defendants' identities in videos of drug transactions. Hardy, 76 Wn. App. at 189. The officers had known the individuals for several years, so they were more likely than the jury to correctly identify the men and the manner in which they moved from a video. Id. at 190-91. For this reason, officer testimony on the issue of identity was admissible. Id. at 190-92.

George stands in contrast. In George, a police officer testified he could identify the defendants in a surveillance video based on their build, their movements, and their clothing. George, 150 Wn. App. at 115-16. Although he could not make out facial features, he testified they looked very similar at trial to the way they looked the day of the crime. Id. The

Court of Appeals held it was an abuse of discretion to admit the officer's identification because he had only seen the defendants on the day of the crime. Id. at 119. The officer observed one defendant as he exited the van and ran away and at the hospital that evening. Id. He observed the other defendant when the latter exited the van and was handcuffed and later at the police station in an interview room. Id. These were not the type of extensive contacts that would give the officer a better basis than the jury for comparing the defendants' appearance at trial to the figures on the surveillance video. Id.

Brooks's case compares favorably to George. Officer Tiffany admitted he had not seen Brooks in person before seeing him in the courtroom on the day of Tiffany's testimony. 1RP 390. Tiffany had no prior contact with Brooks whatsoever. For this reason, Tiffany was no more likely to correctly identify Brooks in the video than the jury. In fact, he is less likely because the jury had the advantage of personally observing Brooks during several days of trial, whereas Tiffany saw Brooks only while testifying. An officer's identification testimony is typically unhelpful to the jury if the officer has never seen the defendant in person. LaPierre, 998 F.2d at 1465.

Officer Thiry had previous contact with Brooks, but not sufficient ~~contact to place him in a better position than the jury.~~ Thiry only saw

Brooks at the police station, when he was brought in and searched. 1RP 214-15, 226-27. Thiry described the contact as "minimal." 1RP 215. There is no more contact here than there was in George, and certainly a far cry from the extensive contact in Hardy. Thiry was in no better position than the jury to identify Brooks.

The trial court abused its discretion in failing to adhere to the evidentiary requirements for opinion testimony of this nature. Defense counsel did not object to Thiry's initial testimony identifying a bald black man in the photo on the basis that such testimony constituted improper opinion. 1RP 194-95. But counsel did object to Thiry's subsequent testimony on whether the jacket worn by the person in the photo matched Brook's clothing on the basis of improper opinion: "We don't have these photos. He's testifying about photos and what appears to be his opinion as to what the photos depict. I'm going to object and move to strike that testimony. I think the photos ought to be - come in upon proper foundation, and it should be a jury question." 1RP 216.

Counsel was correct that what is depicted in the photos was a question for the jury, not the police officer. But the trial court overruled the objection on the basis that the officer could testify to his personal observation. This shows an objection to Thiry's earlier testimony on the basis of improper opinion would have been denied, as it too was allowed

on the basis of personal observation. 1RP 194-95. Error in the admission of Thiry's initial testimony on the basis of improper opinion is therefore preserved for appeal. The record shows an objection to Thiry's initial testimony would have been futile. See State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (failure to properly object may be excused where it would have been a useless endeavor); State v. McCreven, 170 Wn. App. 444, 473, 284 P.3d 793 (2012) ("although the codefendants did not object to the 'trickery' comment, our review of the record suggests that such an objection was unlikely to succeed given the trial court's blanket overruling of all objections during closing argument.") (citing State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996) (where no corrective purpose would be served by raising a proper objection at trial, the lack of objection should not preclude appellate review)).

Defense counsel objected to Officer Tiffany's later testimony about what who was depicted in the photo: "there isn't a foundation. It's not admitted. We do have photographs that have been admitted. I don't think this testimony is proper because --" 1RP 384-85. The prosecutor interrupted Brooks's counsel before he could finish his sentence, saying Tiffany's testimony was based on his personal observations. 1RP 385. The court overruled the objection. 1RP 385. Given the earlier objection to Thiry's testimony, the nature of the objection to Tiffany's testimony is

apparent from the context, despite the prosecutor's interruption as counsel explained the basis for the objection. Moreover, objection on the basis of improper opinion was futile because the trial court had made clear that it would allow testimony of this nature because the officers personally observed the photos. Error related to admission of Tiffany's opinion testimony is therefore preserved for review.

**d. Reversal of both convictions is required because there is a reasonable probability that the error affected the outcome.**

Evidentiary error requires reversal if there is a reasonable probability that the error affected the outcome. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "When evidence is improperly admitted, the trial court's error is harmless if it is minor in reference to the overall, overwhelming evidence as a whole." George, 150 Wn. App. at 119. In determining whether improper admission of evidence requires reversal, the inquiry is not whether there is sufficient evidence to convict without the inadmissible evidence. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). Rather, the question is whether there is a reasonable probability the outcome of the trial would have been different without the inadmissible evidence. Id. Admissible evidence of guilt is measured against the prejudice caused by the inadmissible testimony. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Identity was the disputed element on the burglary charge. In closing argument, the State emphasized the importance of Thiry zooming in on the photo and describing the driver as a bald, black male, which fit Brooks. 1RP 644-45, 653, 696. The prosecutor also highlighted that Tiffany zoomed in and identify Brooks as resembling the driver. 1RP 645, 653. The improperly admitted testimony formed a crucial part of the State's case against Brooks. Not only did the objectionable testimony go to the primary issue of fact on this charge, but "police officers' testimony carries an 'aura of reliability.'" Montgomery, 163 Wn.2d at 595 (quoting State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). Coe, the only eyewitness to the burglary, did not identify Brooks as the driver of the vehicle outside the house. Cf. George, 150 Wn. App. at 119-20 (evidentiary error harmless as to one defendant where robbery victim also identified defendant, victim's description of defendant was consistent with booking information, and other evidence linked defendant to robbery). Coe testified the driver had short hair; he was not bald. 1RP 258, 267. The objectionable police testimony to the contrary was a key ingredient in the State's case.

Absent improper testimony regarding the photos, the evidence on the burglary charge was thin. Stolen property was later found in Brooks's residence and the vehicle he was in when stopped by police, but

possession of stolen property is insufficient to prove burglary as a matter of law. State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). The jury learned from the interrogation that Brooks spent time with Killgore on the day of the burglary, but nothing about the nature of that interaction. The improperly admitted testimony about the description of the woman in the photo forged a culpable link between the two. The jury, meanwhile, acquitted Coats even though he was found in possession of stolen property. The main difference between Coats and Brooks is that police identified Brooks as resembling the man in the photos, whereas no such testimony was given for Coats. The identity theft conviction is tainted as well because jurors may have been influenced by officer testimony that Brooks was the driver of the vehicle as depicted in the digital photos. The jury may have concluded Brooks was more likely to have committed identity theft based on evidence that he participated in the burglary as the getaway driver. Under the circumstances, there is a reasonable probability that the improper testimony prejudiced the outcome on both charges.

**2. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE IDENTITY THEFT CONVICTION BECAUSE THE STATE FAILED TO PROVE THE MENTAL ELEMENTS OF THE OFFENSE.**

The State failed to prove the "knowledge" element of the identity theft charge. The evidence does not show Brooks knew he was in

possession of a means of identification or financial information. Alternatively, the State failed to prove the "intent" element of the identity theft charge. The evidence does not establish Brooks obtained someone else's identity or information with the intent to effectuate any crime. Possession alone is insufficient to establish the requisite intent. The conviction must be reversed due to the failure of proof.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The sufficiency of the evidence is a question of law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).<sup>7</sup>

The identity theft statute provides: "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

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<sup>7</sup> The trial court denied Brooks's motion to dismiss the charge based on insufficient evidence after the State rested its case. 1RP 633-35.

to aid or abet, any crime." RCW 9.35.020(1). A person is guilty of second degree identity theft when he or she violates RCW 9.35.020(1) under circumstances not amounting to identity theft in the first degree as set forth in RCW 9.35.020(2). RCW 9.35.020(3).<sup>8</sup> The "to convict" instruction reflects the statutory definition of the crime. CP 39.

First, the State did not prove Brooks "knowingly" obtained, possessed, used, or transferred a means of identification or financial information of another person.<sup>9</sup> The documents containing personal information and Jones's ID were found in a bag in Brooks's residence. 1RP 592-94. Another person took that bag from the Shanburn/Jones residence. The State produced no evidence that Brooks ever looked in the bag to see what was inside. The State did not produce evidence that the identification card and documents containing personal information could be seen without emptying the bag. There was no indication the bag had

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<sup>8</sup> RCW 9.35.020(2) provides: "Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value, or when the accused knowingly targets a senior or vulnerable individual in carrying out a violation of subsection (1) of this section, shall constitute identity theft in the first degree."

<sup>9</sup> Unlike the "to convict" instruction for the burglary count, the "to convict" instruction for the identity theft count did not include the accomplice option. CP 32, 39. The State argued Brooks was guilty as an accomplice to burglary (1RP 651-55), but did not argue a theory of accomplice liability in relation to the identity theft count. 1RP 655-59.

been emptied and its contents examined after being taken from the Shanburn/Jones residence.

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Knowledge, like intent, may be inferred when the defendant's conduct indicates the requisite knowledge as a matter of logical probability. State v. Warfield, 119 Wn. App. 871, 884, 80 P.3d 625 (2003). It follows that knowledge, like intent, cannot be based on evidence that is "patently equivocal." See State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013) (addressing intent). Here, the evidence relied on by the State to show Brooks knowingly possessed the means of identification or personal information rests on speculation. To prove the knowledge element, there must be unequivocal evidence from which it can be reasonably inferred that Brooks was subjectively aware that the bag found in his residence contained the means of identification or personal information. Such evidence is lacking here.

Alternatively, the State failed to prove Brooks possessed the items with "the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). "When intent is an element of the crime, 'intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and ~~circumstances plainly indicate such an intent as a matter of logical~~

probability.'" Vasquez, 178 Wn.2d at 8 (quoting State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)). While intent is typically proved through circumstantial evidence, intent cannot be inferred from evidence that is "patently equivocal." Id. (quoting Woods, 63 Wn. App. at 592).

Vasquez noted the legislature has defined inferences that may arise from some crimes. Id. at 8, n.1. But, for those crimes where possession and intent are both elements and there are no defined inferences, an inference cannot be based on mere possession. Id. at 8. Such an inference would relieve the State of its burden to prove all elements beyond a reasonable doubt. Id. Possession together with "slight corroborating evidence" might be sufficient to show intent. Id. (addressing intent to injury or defraud in forgery case) (quoting State v. Esquivel, 71 Wn. App. 868, 870, 863 P.2d 113 (1993)). Still, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Rich, 184 Wn.2d at 903 (quoting Vasquez, 178 Wn.2d at 16). "A 'modicum' of evidence does not meet this standard." Id. (quoting Jackson v. Virginia, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

The State did not prove Brooks acted with the requisite intent to use someone else's identity or personal information to commit a crime. Under the identity theft statute, possession and intent are both elements, and the legislature has not defined inferences that may arise from the

crime. Brooks may have had not a discernable legitimate reason for possessing the means of identification and personal information, but mere possession is insufficient to infer an intent to use the identification or information to commit a crime in the future. See Vasquez, 178 Wn.2d at 12 (rejecting Court of Appeals analysis that the only value to Vasquez of the forged social security and resident cards was to permit him to falsely represent his right to legally be in the United States, finding that such a presumption impermissibly relieves the State from its burden to prove intent beyond a reasonable doubt). Brooks possessed items commonly associated with the charged crime. But the circumstances did not "plainly indicate" his intent to use them to commit a crime.

The State presented evidence that identification documentation was stolen from the burgled residence. Possession of the documents after someone else took them from the house does not support a finding that Brooks intended to use the documents to commit a crime. The identification and financial information was not taken alone. Many things were taken from the Shanburn/Jones residence. There is no evidence that Brooks took the identification and documents containing personal information out of the bag for examination. Speculation that Brooks might commit an unspecified crime with the identification at issue is ~~insufficient to support a conviction for identity theft under RCW~~

9.35.020(1). Equivocal evidence of intent is not enough. Vasquez, 178 Wn.2d at 14. Even viewing the evidence in a light most favorable to the State, a rational juror could not have found that Brooks, by merely possessing the identification documents, intended to use them to commit a crime.

"[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Hundley, 126 Wn.2d at 421-22 (quoting Winship, 397 U.S. at 364). No reasonable trier of fact could reach subjective certitude on the fact at issue here. The identity theft conviction should be reversed, either because the State failed to prove the "knowledge" element or because it failed to prove the "intent" element. Where insufficient evidence supports conviction, the charge must be dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

**3. IMPROPER POLICE TESTIMONY ON GUILT AND PROFILING TAINTED THE OUTCOME ON THE IDENTITY THEFT CHARGE.**

The court erred in admitting a detective's testimony on guilt and the profile of those who commit identity theft. In the alternative, defense counsel was ineffective in allowing the jury to consider this improper testimony. Assuming the record shows the court sustained the objection to this testimony outside the presence of the jury, counsel did not request that

the court inform the jury of the ruling, nor did counsel request the court to strike the testimony. Counsel's deficiency permitted the jury to consider the improper testimony. Reversal of the identity theft conviction is appropriate because there is a reasonable probability that the improper testimony affected the outcome.

On direct examination, the prosecutor elicited Detective Williams's testimony that Exhibit 243B consisted of two bank statements addressed to Jones. 1RP 593-94. When the prosecutor requested Williams to open the envelope containing the bank statements to see if account numbers were present, the defense objected. 1RP 594-95. The jury exited the courtroom and the parties argued about the matter. 1RP 595-600. The court decided to not allow the witness to open the envelopes. 1RP 601. The court said it would place its ruling on the record. 1RP 601. When the jury returned to the courtroom, the court announced the objection was sustained. 1RP 601-02.

The prosecutor then elicited Detective Williams's testimony that he had investigated close to a thousand property crimes over the course of his 16-year career. 1RP 602. The prosecutor asked if he had investigated calls involving bank statements taken from a mailbox or residence. 1RP 603. Brooks's attorney objected on relevance grounds, but the objection was overruled. 1RP 603.

Williams answered: "Yes, I have. It's common practice that we come across documents that are stolen during the course of a burglary, especially financial documents, credits cards, ID cards, passports, mail, anything with somebody's name on there that's used to facilitate future crimes." 1RP 603. Coats's counsel objected to this testimony as a violation of motion in limine number 9, which covered "opinions on criminality." 1RP 603. The in limine order prohibited the State from asking a witness an opinion on the guilt of the defendant. CP 7-8; 1RP 126-27.

The court directed the prosecutor to ask another question. 1RP 603-04. The prosecutor protested, and the court ordered the jury to leave the courtroom so that the matter could be hashed out. 1RP 604. Outside the presence of the jury, the prosecutor argued there was no violation of the pre-trial order because the question and answer did not give an opinion of the defendant. 1RP 604-05. Coats's counsel disagreed, contending the testimony was an impermissible opinion on criminality. 1RP 605. He argued it is inappropriate to give an opinion on why a person would commit a crime, how crimes are committed, or "what they're typically like." 1RP 605-06. The detective was a fact witness and could not offer an expert opinion. 1RP 606. It was inappropriate to "get into criminal

profiles, criminality, opinions of criminality" or "a person's intent." 1RP 606.

The prosecutor said none of that had been asked. 1RP 606. Coats's counsel said that was the road they were heading down. 1RP 606. The prosecutor said her next question was going to be how common it was for items such as the Union Bank letter to contain an account number. 1RP 606. Brooks's counsel argued it was a comment on guilt "because he's saying, based on his experience, you find mail in the context of identity theft cases."<sup>10</sup> 1RP 607. Expert testimony was not needed on the issue. 1RP 607. The prosecutor said it was no different than asking a narcotics detective if it was common for a buyer or seller to bring a scale or baggies to a transaction based on training and experience. 1RP 607-08.

The court indicated the prosecutor could ask the detective how common it was for bank account statements to contain account numbers, "But I don't want the additional -- I understand what counsel are saying, and that's -- so it needs to actually be as simple as that." 1RP 608. When the prosecutor asked for clarification, the court said, "I'm going to sustain your objection in terms of the additional questioning that is going on with

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<sup>10</sup> Even if Brooks's counsel had not objected, Brooks could rely on the objection lodged by Coats's counsel for purposes of appellate review. See RAP 2.5(a) ("A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.").

this witness as to that, Exhibit 243B, the one that contains the two pieces." 1RP 609. The prosecutor could ask if the detective knew that would be a bank statement containing account numbers, "with no additional insinuation." 1RP 608-09.

In front of the jury, the court described the objection that had been made as going to the opening of the envelope. 1RP 611. Counsel clarified the objection was based on motion in limine number 9. 1RP 611. The prosecutor offered to rephrase the question. 1RP 611. The court responded "Let's go ahead, and I will have you rephrase." 1RP 611. The prosecutor asked if the document appeared to be a bank statement, and the detective answered in the affirmative. 1RP 611. The court at no time notified the jury of its ruling on the objection. The answer that was objected to was not stricken, and no request was made to strike it.

Brooks's appellate counsel is uncertain as to how the Court of Appeals will view the trial court's ruling on the objection. If the record is interpreted to show the trial court did not sustain the objection based on improper opinion on guilt and profile evidence, then the court abused its discretion in failing to do so.

This is the detective's objectionable testimony: "It's common practice that we come across documents that are stolen during the course of a burglary, especially financial documents, credits cards, ID cards,

passports, mail, anything with somebody's name on there that's used to facilitate future crimes." 1RP 603. The pre-trial order prohibited the State from eliciting opinions on guilt. CP 7-8; 1RP 126-27. "Opinions on guilt are improper whether made directly or by inference." State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). The inference to be drawn from the detective's testimony is that Brooks was guilty of identity theft because his actions dovetailed with those who had committed that crime. More specifically, the testimony constituted impermissible profile evidence. Testimony implying guilt based on the characteristics of known offenders is inadmissible because it invites the jury to conclude that, because a defendant shares some of the characteristics, he is more likely to have committed the crime. Braham, 67 Wn. App. at 936. The detective, in testifying it was common to come across documents stolen during burglaries that are used to facilitate future crimes, had the effect of lumping Brooks in with that group of criminals because his alleged actions mirror the profile of those who commit identity theft in this manner.

If the Court of Appeals determines the trial court sustained the objection, the error is in how the objection was subsequently handled. The jury was not informed of the ruling on the objection and the jury was not instructed to disregard the testimony. That is counsel's failing. Having won the objection, it was counsel's duty to ensure the jury was prevented

from using the improper evidence by taking appropriate steps. The failure to do so constitutes ineffective assistance of counsel.

The accused in a criminal case is guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009).

The deficiency here begins with defense counsel's failure to ensure the jury knew the objection was sustained. The court sustained the objection outside the presence of the jury. When the jury returned to the courtroom, the court did not tell the jury that the objection had been sustained. Instead, the court merely referenced that an objection had been made. Without the jury being informed that the objection to the witness's answer had been sustained, the jury was given no signal that it should not consider the testimony at issue in its deliberations. To prevent the jury from considering the objectionable evidence, defense counsel should have

requested that the ruling sustaining the objection be stated in front of the jury. Counsel objected to the testimony because he did not want the jury to consider it, but the failure to ensure the jury was informed that the objection was sustained meant the jury was free to use the testimony against his client.

The more fundamental deficiency is the failure to move to strike the objectionable testimony. "When an objection is sustained with no further motion to strike the testimony and no further instruction for the jury to disregard the testimony, the testimony remains in the record for the jury's consideration." State v. Stackhouse, 90 Wn. App. 344, 361, 957 P.2d 218 (1998) (citing State v. Swan, 114 Wn.2d 613, 659, 790 P.2d 610 (1990)). Defense counsel's failure to move to strike the testimony allowed the jury to consider the improper testimony and use it against Brooks in deliberating on his fate. There is no conceivable, legitimate tactic for failing to do so. Had the request been made, it would have been granted because the court had already sustained the objection outside the presence of the jury. Counsel objected to the testimony because he did not want the jury to consider it, but the failure to ensure the testimony was stricken allowed the jury to do just that. That is not strategy. That is negligence.

Brooks demonstrates prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been

different. Thomas, 109 Wn.2d at 226. Alternatively, if the court erred in failing to sustain the objection, the standard for prejudice is a reasonable probability that the error affected the outcome. Neal, 144 Wn.2d at 611. Even if this Court finds the evidence sufficient to sustain the identity theft conviction, the evidence supporting that count is still weak at best. There is no evidence that Brooks used or attempted to use the documents to commit a crime. The documents were stuffed into a bag. There is no evidence that Brooks extracted them for examination. The improper guilt and profile testimony may have tipped the balance toward conviction because Brooks fit the profile of those who commit identity theft. "A law enforcement officer's opinion testimony may be especially prejudicial because the 'officer's testimony often carries a special aura of reliability.'" State v. King, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)). The identity theft conviction should therefore be reversed.

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**4. CUMULATIVE ERROR DEPRIVED BROOKS OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.**

Every defendant has the due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably

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probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). As discussed above, an accumulation of errors affected the outcome and produced an unfair trial in Brooks's case. These errors include (1) violation of ER 1002, the best evidence rule; (2) improper opinion testimony under ER 701; (3) improper testimony on guilty and profiling, or ineffective assistance in failing to ensure the jury disregarded the improper testimony.

**5. THE COMBINED TERM OF CONFINEMENT AND COMMUNITY CUSTODY FOR THE IDENTITY THEFT CONVICTION EXCEEDS THE FIVE YEAR STATUTORY MAXIMUM.**

Second degree identity theft is a class C felony with a statutory maximum sentence of 60 months. RCW 9A.20.020(3); RCW 9A.20.021(l)(c). For the second identity theft conviction under count 2, the court imposed 50 months confinement in addition to 12 months of community custody for a combined total of 62 months. CP 64. The combined term of confinement and community custody exceeds the 60-month statutory maximum.

Defense counsel did not object to the excessive sentence, but erroneous sentences may be challenged for the first time on appeal. State v.

Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). RCW 9.94A.701(9) provides: "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." Under this provision, the trial court, not the Department of Corrections, has the obligation to reduce the term of community custody to avoid a sentence in excess of the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). A notation on the judgment and sentence that the combined term cannot exceed the statutory maximum is insufficient. Id. at 472; see CP 65 ("Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum"). The case must therefore be remanded to enable the trial court to reduce the community custody term on count so that the total sentence for that count does not exceed the statutory maximum of 60 months.

**6. THE COURT FAILED TO ADEQUATELY INQUIRE INTO BROOKS'S ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.**

The trial court erred when it imposed discretionary legal financial obligations (LFOs) without making an individualized determination of his ability to pay. The \$1500 fee for court appointed counsel should be

vacated and the case remanded for a sufficient inquiry into Brooks's ability to pay.

Brooks was sentenced on drug convictions in another case at the same hearing on which he was sentenced for burglary and identity theft. 4RP 1-5, 19-24, 27-28. In addition to mandatory LFOs and restitution, the prosecutor sought a discretionary \$1500 "DAC" fee for appointed counsel in the burglary case. 4RP 5. The judge initially decided to impose a Drug Offender Sentencing Alternative (DOSA) instead of a standard range sentence in the burglary case. 4RP 19-20. With good time, Brooks could be released in 24 months under a DOSA. 4RP 17-18. The court imposed standard mandatory fees in both cases. 4RP 20-21.

The following exchange occurred:

The Court: In terms of -- did you have a job, sir, prior to --

The Defendant: Yes. I worked remodeling homes.

The Court: Okay. And were you doing that at the time?

The Defendant: At the time, I was -- wasn't working when it happened; but, yes, I was working.

The Court: Well, the fact that you're going to be on a DOSA and you will be out a little bit sooner than if you were not on a DOSA, I am going to impose the 1500 DAC recoupment. You will need to pay that, and that's for your attorney's time. I am not hearing that you would not be able to be

gainfully employed back in that line of work. When you are out, is there anything else that I would need to know that would indicate that you would not be available to obtain any type of employment when you got out, sir?

The Defendant: Well, hopefully I will be able to get employment. Definitely will be seeking employment.

The Court: Okay. Well, I think that you need to be paying that as part of your paying the \$1500 so I will require that.

4RP 21-22.

After a discussion off the record, the State notified the court that Brooks had a prior conviction for an offense that made him ineligible for a DOSA. 4RP 25-26. The court agreed and imposed a standard range sentence of 72 months on Brooks. 4RP 26-28; CP 64. The court did not, however, reassess whether the discretionary fee for appointed counsel was warranted now that the DOSA was off the table. The judgment and sentence contains a boilerplate finding on ability to pay LFOs. CP 61.

A decision to impose discretionary LFOs is reviewed for an abuse of discretion. State v. Clark, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). A decision is an abuse of discretion when it is exercised on untenable grounds or for untenable reasons. Id. A decision is made for untenable reasons if it is based on an incorrect legal standard. State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). The court did not apply the correct legal standard in imposing the discretionary LFO on Brooks. Its inquiry was insufficient.

Before imposing discretionary LFOs, the trial court must make an individualized inquiry into the defendant's present and future ability to pay. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). "In

determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3). The trial court must consider factors such as whether the defendant meets the GR 34 standard for indigency, incarceration, and the defendant's other debts, including restitution. Blazina, 182 Wn.2d at 838-39. Including boilerplate language in the judgment and sentence stating that the defendant has an ability to pay does not satisfy this requirement. Id. at 838.

Here, the record does not reflect that the trial court made a sufficient inquiry into Brooks's ability to pay discretionary LFOs. The trial court's inquiry was limited to questions about Brooks's ability to work once out of custody. The trial court did not consider other factors set forth in Blazina, such as Brooks's financial resources, other debts, incarceration, and whether the defendant meets the GR 34 standard for indigency. As for incarceration, it is noteworthy that the court originally imposed the discretionary fee based on its intent to sentence Brooks to a DOSA, which would reduce Brooks's time in prison. But when the court later determined Brooks was ineligible for the DOSA, it did not reassess whether the discretionary fee was still appropriate in light of the increased prison time.

While Brooks is physically capable of working, the court's inquiry did not consider Brooks's broader financial status, consideration of which would allow the trial court to truly determine if Brooks would be able to pay LFOs even if he was able to work when out of custody following release from a standard range sentence. An inquiry limited to an ability to work in the future is not enough. State v. Bostick, noted at 199 Wn. App. 10192017, 2017 WL 2451498, at \*3 (slip op. filed June 6, 2017) (unpublished).<sup>11</sup> The record does not reflect the requisite sufficient inquiry for the trial court's decision. Accordingly, this Court should vacate the imposition of the discretionary LFO and remand to the trial court for a sufficient inquiry into Brooks's present and future ability to pay.

Brooks did not object to the imposition of LFOs at sentencing. However, the imposition of discretionary LFOs without the requisite inquiry into ability to pay is a systemic problem. Blazina, 182 Wn.2d at 834-35. Appellate courts have the discretion to consider the challenge despite lack of objection below. State v. Lee, 188 Wn.2d 473, 501, 396 P.3d 316 (2017). Following Blazina, the Supreme Court has exercised its discretion to reach the merits of unpreserved LFO challenges in a number of cases. Lee, 188 Wn.2d at 501-02; State v. Marks, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016); State v. Duncan, 185 Wn.2d 430, 437-38, 374

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<sup>11</sup> Brooks cites Bostick for its persuasive value. GR 14.1(a).

P.3d 83 (2016). This Court has exercised its discretion as well. State v. Tedder, 194 Wn. App. 753, 756, 378 P.3d 246 (2016); State v. Valdez, 2017 WL 2774682, at \*17 (slip op. filed June 27, 2017) (unpublished); Bostick, 2017 WL 2451498, at \*2 n.4 (unpublished). In light of the systemic problem identified by Blazina and the decision to review unpreserved challenges to LFOs in a number of cases, Brooks requests that this Court exercise its discretion under RAP 2.5(a), reverse the imposition of discretionary LFOs, and remand for an individualized inquiry into Brooks ability to pay.

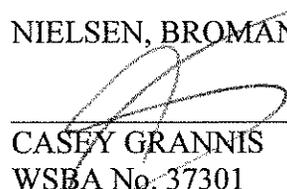
**D. CONCLUSION**

For the reasons stated, Brooks requests reversal of his convictions, reversal of the discretionary LFO, and correction of his sentence.

DATED this 22nd day of August 2017

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
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CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

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