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

STATE OF WASHINGTON, RESPONDENT

v.

Bruce Brooks, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 16-1-01679-2

Brief of Respondent

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

1. Whether appellant properly preserved an ER 1002 objection at trial.
2. Excepting one instance, whether appellant properly preserved an ER 701 improper opinion testimony objection at trial.
3. Whether the trial court abused its discretion when it overruled appellant's ER 701 objection.
4. Whether any error in presenting testimony pertaining to the content of a digital photograph on a cell phone was harmless.
5. Whether the State presented sufficient evidence to demonstrate that appellant's possession of identity theft documents was knowing.
6. Whether the State presented sufficient evidence to demonstrate that appellant intended to use identity theft documents to commit a crime.

7. Whether the State introduced at trial opinion testimony of appellant's criminality.
8. Whether appellant should have received ten months community placement instead of the twelve months of community placement imposed by the trial court.
9. Whether appellant can challenge the sufficiency of the trial court's LFO inquiry for the first time on appeal.

B. STATEMENT OF THE CASE.

1. PROCEDURE

Appellant Bruce Brooks (hereinafter defendant) timely appeals a judgment and sentence entered on December 2, 2016. CP 59-73; CP 76.

2. FACTS

- ca. noon Mr. Coe calls the police to report a burglary of his neighbors. 11-03-16 RP 249.
- 5:09 p.m. Tacoma Police Officer Thiry testifies that on April 25, 2016 he responded to a residence located at 7201 South Bell St., Tacoma, Pierce County Washington. 11-3-16 RP 187-88.
- 6:04 p.m. Officer Tiffany responds to assist in the investigation. 11-7-16 RP 359.
- 7:00 p.m. Officer Thiry was enroute to the residence on 47th Avenue East where Officer Tiffany was. 11-03-16 RP 204. There he saw the same Nissan Pathfinder that was depicted in the cell phone photograph taken by Mr. Coe. 11-03-16 RP

204-05. This was later corroborated by Officer Tiffany, who linked Exhibit 260 (Mr. Coe's photograph) to the Nissan Pathfinder at 6810 47th Ave. East. 11-7-16 RP 358.

Officer Tiffany testifies that he arrived at the scene to help Officer Thiry. 11-07-16 RP 354. He testified that Officer Thiry Showed him a picture of the suspect vehicle (Exhibit 260) and you could see the license plate on the vehicle. 11-7-16 RP 355. He expanded the photo on Officer Thiry's cell phone to get the license plate number. 11-7-16 RP 366.

7:37 p.m. Officer Thiry arrives at the 47th Street Address. 11-03-16 RP 208. Michelle Killgore is there, wearing the necklace described in exhibits 77-80. 11-03-16 RP 208-10. Ms. Killgore is wearing a gray hooded sweatshirt, like the blonde female entering the Pathfinder. 11-03-16 RP 213. Officer Thiry sees two of Jennifer Shanburn's tote bags in the Nissan Pathfinder parked in the driveway. 11-03-16 RP 212.

10:05 p.m. Officer Waddell and Koskovich dispatched to assist other officers investigating a burglary. 11-03-16 RP 239. They assisted in the traffic stop of a red Jeep Cherokee vehicle license plate AYX 1314. 11-03-16 RP 240.

a. Officer Thiry's Testimony

As Officer Thiry approached, he was flagged over to a neighboring residence, directly across from 7201 South Bell St., by Steven Coe, a neighbor. 11-03-16 RP 189. Mr. Coe told Officer Thiry that "he was in his yard when he looked across the street and saw a vehicle that he did not recognize as being associated with that residence. And the -- and subjects were removing items from the victim house and placing it into a vehicle he did not recognize." 11-03-16 RP 191.

Mr. Coe told Officer Thiry that he then took pictures of the car with his cell phone. 11-03-16 RP 191. Mr. Coe then emailed those pictures to Officer Thiry. 11-03-16 RP 191-92. Officer Thiry then opened the photographs with the laptop computer in his patrol car. 11-03-16 RP 192. Mr. Coe was standing right with Officer Thiry when Officer Thiry received the emailed photographs. 11-03-16 RP 193.

Officer Thiry then testified, without objection, about what he saw when he looked at the photographs: the vehicle in the photographs was a red Nissan Pathfinder (11-03-16 RP 192), the Pathfinder's license plate number was 463ZZW (11-03-16 RP 193), there was a red dealer plate in the Pathfinder's rear window, and there was a white female with long blonde hair and a gray hooded sweatshirt was getting into the passenger rear seat of the vehicle (11-03-16 RP 193).¹

The Red Pathfinder was registered to a person named Jamal Block (11-03-16 RP 206-07) with an address on 47th Street. 11-03-16 RP 207. Officer Thiry went to that address at 7:37 p.m. 11-03-16 RP 208. Officer Thiry observed Mr. Block and Ms. Killgore at the address, along with the homeowner and a teenaged male. 11-03-16 RP 208. Ms. Killgore wore a

¹ The testimony regarding "getting into the passenger rear seat," might have been objected-to, or it might have been asked and answered before the objection was made. 11-03-16 RP 194. No motion to strike that testimony was made. The description of the female was not objected to. 11-03-16 RP 193.

distinctive necklace. 11-03-16 RP 208-09. That necklace—Ms.

Shanburn’s necklace—was depicted in exhibits 77-80. 11-03-16 RP 209-10; Exhibit 251(admitted at 11-03-16 RP 289); 11-03-16 RP 214.²

Officer Thiry observed the Red Pathfinder parked in the driveway of the 47th Street address in front of the garage. 11-03-16 RP 211.

Officer Thiry looked in the Pathfinder and saw two tote bags belonging to Jennifer Shanburn. 11-03-16 RP 212.

Officer Thiry saw appellant and Mr. Coats when they arrived at the police station. 11-03-16 RP 214-15. Officer Thiry testified that appellant was at that time wearing the same type of coat that the driver of the Pathfinder in Mr. Coe’s picture was wearing. 11-03-16 RP 215-16. Utility gloves were found in appellant’s back pocket. 11-03-16 RP 219 (Exhibit 255). Mr. Brooks was searched by Officer Thiry. 11-03-16 RP 227. He “had one 100-dollar bill, two 50-dollar bills, and one 20-dollar bill.” *Id.*

Officer Thiry testified that Mr. Coats was wearing a Marshawn Lynch football jersey and high-end Nike tennis shoes. 11-03-16 RP 223 (Exhibits 231³ and 236⁴). Officer Thiry, with some experience (11-03-16

² The necklace exhibit was mis-reported or mis-stated as “51” at 11-03-16 RP 213, but correctly referenced *Id.* at 214.

³ Admitted at 11-3-16 VRP 226. Identified by Mr. Jones as his jersey at 322.

⁴ Identified by Mr. Jones as his shoes at 324.

RP 233-34), testified that the Nike shoes were very distinct and he had not seen them before (11-03-16 RP 233), and that they were shoes that could be customized (11-03-16 RP 234).

Mr. Coats was searched by Officer Thiry. He was carrying one 20-dollar bill. 11-03-16 RP 228.

b. Mr. Coe's Testimony

Mr. Coe testified. 11-03-16 RP 248-276. Mr. Coe lived at 113 South 72nd Street in Tacoma. On April 25, 2016, around noon, he was outside his home, in the front yard, getting ready to wash his car. 11-03-16 RP 249. Dusty and Jennifer lived across the street from him, at a distance of about "twenty yards or so." 11-03-16 RP 250.

When he was washing the car, Mr. Coe saw a blonde gal walking up through Dusty and Jennifer's carport. 11-03-16 RP 250. Dusty and Jennifer's cars were not there, because they were at work. *Id.* the woman walked into their gate, up to their back door and then inside. 11-03-16 RP 251. "And then a few minutes later the blonde gal came out because a black and red Blazer pulled up into the driveway. She came out and talked to the gentleman in the Blazer. she went back in the house. then a few minutes later, her and another gentleman walked out carrying things and started loading it into the Blazer." *Id.* The female came out of the house carrying an armload of stuff. 11-03-16 RP 253. The male came out

carrying a big flat screen TV. *Id.* Mr. Coe said that the items were unloaded into the back seat area of the Blazer, not the hatchback area, but the side back door. 11-03-16 RP 255.

Mr. Coe described the man carrying the TV out of the house as “either a white male with an – a good tan or Hispanic. And he had longer hair with a baseball cap turned around backward on his head. 11-03-16 RP 254. He was between 5’10” and 6’ tall, and skinny. *Id.* He was wearing short pants. 11-03-16 RP 257.

Mr. Coe did not get a good look at the driver. 11-03-16 RP 257. he described him as dark skinned (a little darker than the man carrying the TV). 11-03-16 RP 258. He appeared to be medium build. 11-03-16 RP 258-59. He had short hair, like a buzz cut (“like he just buzzed it all off”). 11-03-16 RP 258, 270.

Mr. Coe took pictures of the activity. 11-03-16 RP 256; Exhibits 258-262 (admitted at 11-03-16 RP 272). Then he called the police. 11-03-16 RP 256. He called the non-emergency number. 11-03-16 RP 259. A “couple of hours, I think” later, the police arrived. *Id.*

c. Jennifer Shanburn’s Testimony

Jennifer Shanburn, lived at 7201 South Bell St. with her roommate “Dusty”, Ricky Jones. 11-03-16 RP 276. Ms. Killgore testified that she had never met appellant, Michelle Killgore, or Michael Coates and none

of them had any reason or permission to be in her residence on April 25, 2016.

d. Ricky Lynn “Dusty” Jones’ Testimony.

Mr. Jones was at work when he got a telephone call informing him that “someone came and took all of our things.” 11-03-16 RP 312. Before he left the house was “pretty” tidy. *Id.* The back door was locked and there was no damage to the back door when he left for the day. 11-03-16 RP 312-13. When he got home he walked in the back door and saw that the casing to the doorframe was all over the floor. 11-03-16 RP 313. “It looked like a tornado ran through the house.” 11-03-16 RP 313.

Mr. Jones testified that he did not know Michelle Killgore, Bruce Brooks, and Michael Coats. 11-03-16 RP 330. He testified that none of them had a reason to be in his residence on April 25, 2016, or to possess his bank statements or ID card. 11-03-16 RP 330-31.

e. Officer Waddell’s Testimony.

Officer Waddell testified that he and Officer Koskovich were dispatched to assist other officers at 10:05 p.m. 11-03-16 RP 239. They assisted in the traffic stop of a red Jeep Cherokee vehicle license plate AYY 1314. 11-03-16 RP 240. Officer Waddell testified that Mr. Brooks was already out of the vehicle, standing on the left side (passenger side) when they arrived. 11-03-16 RP 243, 246. Officer Waddell testified that

appellant was searched during their contact with Mr. Brooks and \$200.72 was found on him. 11-03-16 RP 242.

f. Officer Tiffany's Testimony

Officer Tiffany responded to help Officer Thiry at the scene of the burglary (11-7-16 RP 354) at about 6:04 p.m. (11-7-16 RP 359). He got the license plate of the Nissan Pathfinder getaway vehicle from photographs shown him by Officer Thiry. Exhibit 260; 11-7-16 RP 355-56. The license number of that vehicle, from those photographs was 463ZZW. 11-7-16 RP 358. He found the address of the registered owner of that vehicle: 6810 47th Ave. East. 11-7-16 RP 358. He then went to that address and set up surveillance. 11-7-16 RP 360. After waiting about an hour, the Pathfinder came back to the residence." 11-7-16 RP 361.

Officer Tiffany contacted people at the 47th Ave. E. house. 11-7-16 RP 362. Present were the uncle of the registered owner, and some of his younger nephews, the registered owner (Mr. Block), and a female named Killgore. 11-7-16 RP 362-63.

Ms. Killgore was wearing some sort of rain jacket and a fairly distinct necklace. 11-7-16 RP 364. Ms. Killgore and her attire are depicted in Exhibits 77-79. *Id.*

After interacting with Ms. Killgore, Officer Tiffany went to 920 South 72nd St. 11-7-16 RP 265-66. There he met Robin Brooks. 11-7-16

RP 369. A search warrant was served on that residence. 11-7-16 RP 369-70. Exhibits 180 and 181, pertaining to Bruce Brooks' name and address were also found at that address. 11-8-16 VRP 559-60.

C. ARGUMENT.

1. DEFENDANT DID NOT PRESENT A REASONABLY SPECIFIC ER 1002 / BEST EVIDENCE OBJECTION TO THE TRIAL COURT.

a. Officer Thiry's Testimony

Defense counsel made an objection when no question was before the witness, Officer Thiry: "Your Honor, I think I am going to object to testimony about photos that are not admitted into evidence." 11-03-16 RP 194. This is only a statement of fact, not a reasonably specific objection.

That objection was overruled. It is well established that

[i]f a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.

State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (quoting 5 K. Tegland, Wash. Prac., Evidence § 10, at 25 (2d ed. 1982)).

Officer Thiry then testified about the driver of the Pathfinder, as shown in the photograph he observed. 11-03-16 RP 194. Defense counsel again objected: "Your Honor, I'm going to object on foundation grounds

for testimony about photos that have not been admitted or adequate foundation being laid.” A “foundation” exception is insufficient to present an ER 1002 objection. *State v. Christian*, 44 Wn. App. 764, 766, 723 P.2d 508, 509 (1986). *United States v. Wagoner*, 713 F.2d 1371, 1377 (8th Cir. 1983); *State v. Holland*, 781 S.W.2d 808, 811 (Mo. Ct. App. 1989)⁵. Even if an objection is made at trial, a party may assign error in the appellate court only on the specific ground made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976).

After Officer Thiry testified that appellant, when he saw him at the police station, was wearing the same type of coat as the person driving the Pathfinder in Mr. Coe’s photograph, appellant’s trial counsel objected and moved to strike:

Your Honor, I will object to this. 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.

⁵ *State v. Lopez*, 146 N.M. 98, 102, 206 P.3d 1003 (2009) is a very close case where “the objection was not as specific as it might have been.” *Id.* However the opponent “did point out that the testimony concerned what was on the documents and that the documents were not disclosed or produced, and he did request foundation.” *Id.* This case is not even as specific as *Lopez*. In *State v. Smith*, 228 Or. 340, 344, 364 P.2d 786, 788 (1961), the inapplicability of the best evidence rule to an automobile was relatively obvious, but the Oregon Supreme Court held: “The phrase ‘no proper foundation [was] laid’ in the context of this claim of error is a mere ritualistic formula. *State v. Smith*, 228 Or. at 344–45.

11-03-16 RP 216. This objection recites facts, preserves an ER 701 (opinion testimony by lay witness) objection, and reiterates the same foundation objection that appellant's trial counsel presented earlier. It is clear, at this point, that the trial court did not comprehend that defendant's counsel was making an ER 1002 / Best Evidence Rule objection:

[Prosecutor]: Your Honor, they're based on his observations of both the photographs and Mr. Brooks personally when he was brought in. He can certainly testify from his own personal observations.

Court: I will allow you to testify from your personal observations. On cross-examination –

11-3-16 VRP 216. After this exchange, the co-defendant's counsel presented a confusing argument:

MR. JOHNSON: If he's -- if he's testifying about the content of photographs, is that not hearsay? It's a form -- it's kind of a visual testimony being sought -- being used to prove the truth of the matter assert.

Id. Very shortly afterward, the Court asked the Prosecutor: "Are you intending on bringing those in at another time?" 11-3-16 VRP 217. The prosecutor responded: "I certainly can." *Id.*

It is plain that an ER 1002 objection was available. However, no ER 1002 / Best Evidence Rule objection was made. Furthermore, the record does not reveal that the trial court ever understood that an ER 1002 objection was made.

One characteristic about an ER 1002 objection is that it is very often a very easy objection to remedy: The proponent of the digital photograph can (a) admit the original;⁶ (b) admit a duplicate (which the prosecutor stated it could do);⁷ (c) explain why the original or duplicate is lost, destroyed, or obtainable.⁸ A specific objection would have brought all these potential avenues into play. Defendant's failure to make a reasonably specific objection should preclude relief.

b. Officer Tiffany's Testimony.

Officer Tiffany was asked about the relative detail of the exhibits compared to the detail that he could see in Officer Thiry's telephone. 11-7-16 RP 384. The only objection to that question was relevance. *Id.* The best evidence objection was not preserved. Alternatively, the best evidence rule objection is not well taken because this testimony was not admitted to prove the content of the photograph on Officer Thiry's phone.

Officer Tiffany was then asked whether he was able to see the distinguishing features of the driver. 11-7-16 RP 384. The best evidence rule is not implicated in this exchange because the witness in that specific question was not asked to testify about the content of the photograph on

⁶ ER 1002.

⁷ ER 1003.

⁸ ER 1004.

Officer Thiry's telephone. Furthermore, defense counsel's objection was only an insufficient foundation objection. 11-7-16 RP 385.

Officer Tiffany was then asked to testify about whether the photographs on Officer Thiry's telephone resembled anyone else in the courtroom. 11-7-16 RP 386. When asked to identify that person, Officer Tiffany apparently identified appellant's co-defendant, Mr. Coats. *Id.* Only the insufficient word "Objection" was interposed in response. *Id.*

After Mr. Coats' counsel's elicited testimony from Officer Tiffany that a person (apparently the driver) on Officer Thiry's cell phone photographs closely resembled Mr. Block (11-7-16 RP 388), the State elicited testimony that the cell phone photographs also closely resembled appellant. 11-7-16 RP 389. No objection was interposed to that testimony.

No reasonably specific objections were interposed to Officer Thiry's testimony. Defendant's ER 1002 objection is not preserved for review.

2. DEFENDANT FAILED TO PRESENT A REASONABLY SPECIFIC ER 701 OPINION EVIDENCE OBJECTION IN ALL BUT ONE INSTANCE. IN THAT INSTANCE, DEFENDANT'S OBJECTION WAS PROPERLY OVERRULED.

After Officer Thiry testified that appellant, when he saw him at the police station, was wearing the same type of coat as the person driving the

Pathfinder in Mr. Coe's photograph, appellant's trial counsel objected and moved to strike. 11-03-16 RP 216.

This objection was properly overruled. Officer Thiry did not testify about the content of the picture he saw on the cell phone. Rather he compared the coat of the driver in the digital image with the coat that the defendant was wearing on the night after the burglary, when he was arrested. 11-03-16 RP 216. The jury did not have the opportunity to make that comparison. The comparison was (a) rationally based on his two perceptions, (b) helpful to a clear understanding of a fact and issue; and (c) was not based on scientific, technical, or other specialized knowledge. ER 701. This comparison was not something that the jury could make, because the jury was not situated to make that comparison.

Defendant interposed no ER 701 opinion objection to any of the other cell phone photograph testimony.⁹ His failure to present a reasonably specific objection as to that testimony precludes review. *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (quoting 5 K. Tegland, Wash. Prac., Evidence § 10, at 25 (2d ed. 1982)).

Defendant's futility argument is not well taken because, as noted above, the trial court properly overruled defendant's ER 701 objection at

⁹ The substance of the objections interposed is presented in the previous section.

11-03-16 RP 216. Defendant has not demonstrated that a proper objection would have been futile.

3. ANY ERROR RELATING TO CELL PHONE PHOTO EVIDENCE ADMITTED OVER OBJECTION WAS HARMLESS.

Evidentiary error is grounds for reversal only if it results in prejudice. An error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole.

(citations and internal quotation omitted) *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255, 1261 (2001), as amended (July 19, 2002). In this case, the evidence against Mr. Brooks for residential burglary and identity theft was quite substantial, even without Officer Thiry's and Officer Tiffany's very general descriptions of the getaway driver via the blown up cell phone picture.

The burglary in this case happened at about noon.¹⁰ It was a three person job.¹¹ A man and a woman carried items from the house to a Nissan Pathfinder getaway vehicle¹². Another man drove the getaway vehicle.¹³

¹⁰ 11-03-16 RP 249.

¹¹ Mr. Coe testified that a man and a woman carried items out of the house to a vehicle and a third man drove the three of them away. 11-03-16 RP 250-259.

¹² Officer Thiry, without objection, identified the Pathfinder from Mr. Coe's cell phone photograph. 11-03-16 RP 193.

¹³ *Id.*

Less than half a day after that burglary, appellant's house¹⁴ contained a pair of Mr. Jones' Nike shoes,¹⁵ another pair of Mr. Jones' Nike shoes,¹⁶ Ms. Shanburn's floral bag,¹⁷ Ms. Shanburn's Gucci sunglasses,¹⁸ a backpack belonging to Mr. Jones,¹⁹ Mr. Jones' smaller 32 inch television,²⁰ Mr. Jones' RCA surround sound system,²¹ headphones

¹⁴ 920 South 72nd St. was appellant's house. 11-8-16 RP 525, 555. Exhibit 181 was a photograph of an IRS form for Bruce Brooks. The document photograph was found at Brooks' residence. 11-8-16 RP 560; admitted at 11-8-16 RP 569. "Robin Brooks" also lived at the residence. 11-8-16 RP 525.

¹⁵ Mr. Jones testified that Exhibit 237 were his brand new, never worn Nike shoes that were also normally kept in the top shelf of his bedroom closet, next to Exhibit 256. 11-03-16 RP 323. Mr. Jones testified that he couldn't see any wear or dirt on Exhibit 237. 11-03-16 RP 324.

¹⁶ Mr. Jones testified that Exhibit 236 were another pair of Nike shoes that he ordinarily kept on the top shelf of his bedroom closet. 11-03-16 RP 324.

¹⁷ Ms. Shanburn identified Exhibit 245 as her floral bag. 11-03-16 RP 286-87. Along with Exhibit 245 (another floral bag), it was kept in her bedroom closet. 11-03-16 RP 287. Detective Williams identified Exhibit 245 as a bag retrieved from 920 S. 72nd St. 11-8-16 RP 591; Exhibit 21.

¹⁸ Ms. Shanburn identified Exhibit 238 as her Gucci sunglasses and they were admitted into evidence. 11-03-16 RP 289-90. The record reveals no other sunglasses admitted into evidence. Detective Williams testified that "Exhibit 138" were sunglasses recovered from 920 South 72nd St. 11-8-16 RP 592. It appears clear that Detective Williams and Ms. Shanburn were talking about the same item. Compare Exhibit 187 (the photograph of the sunglasses), with the sunglasses themselves (Exhibit 238).

¹⁹ Mr. Jones testified that Exhibit 247 was his backpack, most likely kept in his bedroom closet. 11-03-16 RP 320. Detective Williams testified that Exhibit 247 was found at 920 South 72nd St. 11-8-16 RP 589.

²⁰ Mr. Jones testified that a 32 inch television was taken from the home. 11-03-16 RP 314. He identified Exhibit 249 as that television. *Id.* That television was normally kept in the living room. 11-03-16 RP 315. Detective Williams testified that Exhibit 249 came from 920 South 72nd St. 11-8-16 RP 558, 612. Detective Williams apparently misstated the address as 920 S. L. St. (11-8-16 RP 558), but that was corrected later. *Id.* at 612.

²¹ Mr. Jones testified that Exhibit 242, an RCA surround system also belonged in the living room. 11-03-16 RP 315. Detective Williams testified that this item came from 920 S. 72nd St. 11-8-16 RP 588.

taken from the the burglarized home,²² a large “50 or 51” TV set from the living room,²³ banking mail belonging to Mr. Jones (which contained his social security number),²⁴ mail belonging to Ms. Shanburn (“containing medical information, student loan information, insurance information, our tax documents, paystubs”),²⁵ Mr. Jones’ Washington State ID card,²⁶ Ms. Shanburn’s Playstation 3,²⁷ Ms. Shanburn’s paystubs and mail from the Internal Revenue Service,²⁸

²² Mr. Jones identified Exhibits 232, 233, and 234 as headphones that Mr. Jones used. 11-03-16 RP 317. Mr. Jones said that one pair was in his bedroom and the other two pair were in the living room. 11-03-16 RP 319. Detective Williams testified that Exhibit 234, the Beats headphones, came from 920 S. 72nd St. 11-8-16 RP 593.

²³ Ms. Shanburn identified the television as hers. 11-03-16 RP 282-283; (Exhibit 250). It was in the living room of her home. 11-03-16 RP 281. That 50 inch television (Exhibit 250) was collected from defendant’s residence. 11-8-16 RP 558. Detective Williams apparently misstated the address as 920 S. L. St. (11-8-16 RP 558), but that was corrected later. *Id.* at 612.

²⁴ 11-8-16 RP 593. Exhibit 243B was identified by Mr. Jones as “One would be my my primary bank account and other one is Wells Fargo, which has either my HSA account in it for health savings or my 401(k) statements.” 11-8-16 RP 328. Detective Williams testified that the material was mail recovered from 920 South 72nd St., and that it contained Social Security numbers and personal financial information. 11-8-16 RP 593. Mr. Jones testified that those items were normally kept in his room, or they could have been in the kitchen along with the other mail. 11-03-16 RP 329.

²⁵ 11-03-16 RP 308. Exhibit 243A was identified by Ms. Shanburn. Detective Williams testified that the material was mail recovered from 920 South 72nd St., and that it contained Social Security numbers and personal financial information. 11-8-16 RP 593.

²⁶ Mr. Jones testified that Exhibit 239 was his Washington State ID that was in his top dresser drawer when he last saw it. 11-03-16 RP 327. He since renewed that ID. *Id.* The record shows that the prosecutor erroneously referenced Exhibit 239 as Exhibit 139. 11-8-16 RP 592. Exhibit 139 was a photograph of a dresser. Exhibit 2, Supp. CP 2 (Trial Exhibit List). Detective Williams referred to “Exhibit 139” as a Driver’s License. 11-8-16 RP 592. No Driver’s license was admitted into evidence. Viewing everything together, it appears plain that Detective Williams’ “Exhibit 139” was actually “Exhibit 239.”

²⁷ Ms. Shanburn identified the Playstation missing from her home as hers. 11-03-16 RP 283-84; (Exhibit 235). Detective Williams testified that Exhibit 235 came from 920 S. 72nd St.

²⁸ Exhibits 192-195 are photographs of Ms. Shanburn’s paystub and tax documents collected at 920 S. 72nd St. 11-8-16 RP 560; admitted at 11-8-16 RP 586.

Detective Viehmann asked appellant to detail his entire day for him, starting at 8:00 a.m. until he was stopped by the police. 11-8-16 RP 510. Appellant said that he met an acquaintance at about 9:30 or 10:00 a.m., then dropped the acquaintance at the store about an hour later. He said that he was home until he went to Jamal Block's house at about 4:30 p.m. *Id.* (Mr. Block was the registered owner of the burglary getaway vehicle.²⁹) Detective Viehmann said that he pointed out to appellant the gap in time from about 11:00 to 4:30 p.m., and that he "ultimately said that he was" with Ms. Killgore during that timeframe. 11-8-16 RP 511. Appellant's activities that day put him at his home when the stolen property arrived there. 11-8-16 RP 510-511, 11-8-16 RP 524-525.

Ms. Killgore, appellant's admitted companion during the time period the burglary was committed, was a white female with long blond hair—a description consistent with one of the burglars photographed by Mr. Coe.³⁰ Inside the Pathfinder was a gray hooded sweatshirt that "was the sweatshirt that the blonde female that was entering the Pathfinder was wearing" in the photographs taken by Mr. Coe. 11-03-16 RP 212, 213.

²⁹ Jamal Block was the registered owner of the vehicle. 11-03-16 RP 207. He lived nearby, at 6810 47th Ave. E. 11-03-16 RP 199.

³⁰ Officer Thiry's description of the female burglar, drawn from Mr. Coe's cell phone picture, was admitted into evidence without objection. 11-03-16 RP 193. Exhibits 77 and 78 depict Ms. Killgore as she appeared to Detective Viehmann later that day. 11-8-16 RP 505. Ms. Killgore is depicted in Exhibit 77.

Seven hours³¹ after the burglary and about three miles away from the site of the burglary,³² Ms. Killgore was wearing Jennifer Shanburn's necklace³³ and Mr. Jones' North Face jacket.³⁴ The burglary getaway vehicle was just outside the residence that Ms. Killgore was inside. 11-7-16 RP 361; Exhibit 63.³⁵ Inside that Red Pathfinder vehicle were gloves

³¹ Mr. Coe testified that the burglary happened around noon. 11-03-16 RP 249. Officer Tiffany arrived at the burglary scene to help at 6:05 p.m. He then surveilled the 47th St. East residence for about an hour before contacting the people inside the residence. 11-7-16 RP 361.

³² 6810 47th Ave. E. is about three miles away from the victim's South Bell St. Address. 11-03-16 RP 199.

³³ The necklace and Ms. Killgore were photographed by Renae Campbell. (Exhibits 77-80; 11-7-16 RP 394. The necklace (Exhibit 251) was identified by Ms. Shanburn. 11-03-16 RP 288. Detective Williams identified it as Ms. Shanburn's necklace. 11-8-16 RP 543.

³⁴ Mr. Jones testified that Exhibit 257 was his North Face jacket which should have been hanging in his closet. 11-03-16 RP 328. Detective Williams testified to exhibits 77 and 79 which depicted Ms. Killgore in Ms. Shanburn's necklace and Mr. Jones' jacket. 11-8-16 RP 543. The jacket Ms. Killgore was wearing was a "male" jacket. 11-8-16 RP 508.

³⁵ The house Officer Thiry went to was 6810 47th Ave. E. 11-03-16 RP 199. That was the registered owner's address. *Id.* Officer Thiry saw the Nissan Pathfinder at that residence. 11-03-16 RP 204-05. Mr. Block was present at that residence. 11-03-16 RP 207. Mr. Block was the registered owner of the Pathfinder. 11-03-16 RP 207. The gray sweatshirt was referenced at 11-03-16 RP 212, 213. Exhibit 63, 69, and 70 are photographs of the Nissan Pathfinder taken outside the 47th St. address by Renae Campbell. 11-7-16 RP 406-07. Ms. Campbell also sealed the Pathfinder with evidence tape. 11-7-16 RP 407-08. The vehicle and its contents are depicted at the TPD Fleet Operations area in Exhibits 2-8, 10-14, 18-21, and 24-36. 11-7-16 RP 413-14.

(11-7-16 RP 427),³⁶ Mr. Jones jacket from work with the name “Dusty” on it,³⁷ and another of Ms. Shanburn’s floral bags.³⁸

Sometime before 10:05 p.m. on April 25, 2016³⁹ appellant and Mr. Coats were stopped inside a Red Jeep Cherokee vehicle. 11-03-16 RP 240-41.⁴⁰ Appellant was the driver.⁴¹ Appellant had gardening gloves in his back pocket. 11-03-16 RP 242. Appellant had Mr. Jones’ REI hiking backpack⁴² in the cargo area of the Cherokee he was driving.

Appellant’s companion in the Jeep Cherokee, Mr. Coats, was wearing Mr. Jones’ Marshawn Lynch jersey⁴³ and Mr. Jones’ Nike

³⁶ Forensic Technician Donovan Veliz testified that gloves are items that can be used to prevent the deposit of fingerprints. 11-7-16 RP 429.

³⁷ Mr. Jones testified that Exhibit 229 was a jacket that was given to him from his work company which had his name embroidered on it and the company name and logo embroidered in the back. 11-03-16 RP 325. Detective Williams found that jacket in the Jeep Cherokee when he searched it. 11-8-16 RP 615.

³⁸ Ms. Shanburn identified Exhibits 244 as her floral bag. 11-03-16 RP 286-87. They were kept in her bedroom closet. 11-03-16 RP 287. Detective Williams identified Exhibit 244 as a bag retrieved from the Nissan Pathfinder. 11-8-16 RP 614; Exhibit 21 (11-7-16 RP 414).

³⁹ Date: 11-03-16 RP 238; Time: 11-03-16 RP 239.

⁴⁰ Officer Waddell, along with Officer Koskovich, responded to the stop. 11-03-16 RP 240. They did not initiate it. *Id.*

⁴¹ Officer Waddell’s testimony on this point was not objected to. 11-03-16 RP 241. It was clarified on cross-examination that when he arrived Officer Waddell saw Mr. Brooks standing by the driver’s side of the vehicle and Mr. Coats was seated in the passenger seat. 11-03-16 RP 243-44.

⁴² Mr. Jones identified Exhibit 248 as his REI hiking backpack kept in his bedroom (11-03-16 RP 320). That backpack was photographed in the cargo area of the Jeep Cherokee. Exhibit 54. 11-7-16 RP 440. Detective Williams, who served the search warrant on the Jeep Cherokee, identified Exhibit 248 as a backpack he found in the Cherokee.

⁴³ Mr. Jones testified that Exhibit 231 was his Marshawn Lynch jersey. 11-03-16 RP 322. Detective Viehmann testified that Mr. Coats was wearing Exhibit 231 when he contacted Mr. Coats on April 25th. 11-8-16 RP 506.

shoes.⁴⁴ Mr. Coats hair was long in two braids down the back. 11-8-16 RP 507. Mr. Coats' description was consistent with Mr. Coe's description of one of the burglars: "he was either a white male with an -- a good tan or Hispanic. And he had longer hair . . ." 11-03-16 RP 254.

Mr. Coe testified that he was not able to get a clear look at the driver of the getaway vehicle. 11-03-16 RP 257. He testified that he was "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." 11-03-16 RP 258. He testified that the driver had a buzz cut and was medium build. 11-03-16 RP 258, 259.

Appellant's other admitted companion that day was Jamal Block; appellant stated that he was at Jamal Block's house at around 4:30 that day. 11-8-16 RP 510. Mr. Block was the registered owner of the burglary getaway vehicle and Mr. Block's home was the place where the getaway vehicle was found by police.

Appellant's companion when arrested ten hours after the burglary was Mr. Coats, a white male with long hair who was wearing Mr. Jones'

⁴⁴ Mr. Jones testified that Exhibit 256 were his Nike shoes that were normally kept in Mr. Jones' closet. 11-03-16 RP 323. Mr. Jones testified that these shoes "went with" his Seahawks stuff. *Id.* Detective Viehmann identified Exhibit 256 as the shoes he placed into evidence after speaking with Mr. Coats. 11-8-16 RP 506-07.

Seahawks jersey and Mr. Jones' shoes. Mr. Coats, consistent with Mr. Coe's description of one of the burglars, was a white male with long hair.

Even without the identification testimony related from Mr. Coe's cell phone, these connections, to the other burglars, to the getaway vehicle, and to the very recently burgled property provide solid evidence that appellant was an accomplice to the burglary. This case is a web of connections and appellant is the accomplice located right in the center of that web.

Within reasonable probabilities, the outcome of a trial without the objected-to testimony about digital picture would have been the same as the trial appealed from.

4. THE STATE INTRODUCED AMPLE EVIDENCE OF DEFENDANT'S KNOWING POSSESSION OF THE STOLEN FINANCIAL DOCUMENTS AND DEFENDANT'S INTENT TO USE THAT MATERIAL TO COMMIT A CRIME.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt, viewing the trial evidence in the light most favorable to the State. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficiency claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192,

201, 829 P.2d 1068 (1992); *see also State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Direct and circumstantial evidence are equally reliable. *State v. Thomas*, 150 Wn. 2d 821, 874, 83 P. 3d 970 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *Thomas*, at 874-875; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The presence of contrary or countervailing evidence is irrelevant to a sufficiency-of-the-evidence challenge because the evidence is viewed in the light most favorable to the State. *State v. Ibarra–Cisneros*, 172 Wn.2d 880, 896, 263 P.3d 591 (2011).

The standard under *Jackson v. Virginia*, 443 U.S. 307, 317–18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) “is designed to ensure that the defendant's due process right in the trial court was properly observed.” *State v. Rattana Keo Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013). The appellate court takes the State's evidence as true, and review is de novo. *State v. Berg*, 181 Wn.2d 857, 337 P. 3d 310 (2013).

At trial, Ms. Shanburn identified Exhibit 243 as a bag belonging to Mr. Jones. 11-3-16 VRP 293. Mr. Jones’ bag contained Ms. Shanburn’s mail, her pay stub, and her daughter’s telephone case. 11-3-16 VRP 293-94. The mail inside of that bag, Exhibits 243A and 243B, was recovered from 920 South 72nd St., defendant’s residence. 11-8-16 VRP 593.

A rational jury could readily infer that Ms. Shanburn's and Mr. Jones' financial documents were purposely taken from their home from the fact that they had to be selected, gathered, placed in a bag, and carried away. First, the stolen documents all relate to financial matters. Second, Mr. Jones testified that his financial documents were normally kept in his room or in the kitchen with the other mail, and his ID card was kept in his dresser drawer. 11-3-16 VRP 327, 328-29.

A rational jury could readily infer that defendant possessed these documents because they were obviously part of the haul from the burglary he participated in earlier that day and helped establish that defendant was one of the burglars.

A rational jury could readily infer knowing possession of the stolen financial documents from the fact that, as related above, there were at least three burglars and that the loot had already been divided up amongst the burglars. Much of the stolen property was found at defendant's residence,⁴⁵ but Mr. Coats was wearing the stolen shoes and the stolen Seahawks jersey, and Ms. Killgore was wearing Ms. Shanburn's stolen necklace and Mr. Jones stolen rain jacket. The division of the stolen property necessarily implies a prior determination of what was taken.

⁴⁵ The prosecuting attorney summed up defendant's share of the take at 11-9-16 RP 650-51.

Sufficient evidence supports the inference that defendant knowingly possessed “a means of identification or financial information of another person.” RCW 9.35.020(1).

The “intent to use someone else’s identity or personal information to commit a crime” could easily be inferred by a rational jury from the facts of this case. Nothing but the intent to commit a crime would motivate appellant and his burglar-accomplices to select and asportate the highly incriminatory financial documents of Jennifer Shanburn and Dusty Jones from the burglary situs. The paper itself has no intrinsic value. The information on that paper is a different story. The jury had an ample basis to infer intent to commit a crime from the circumstances presented in this case.

5. NO OPINION TESTIMONY AS TO DEFENDANT’S
“CRIMINALITY” WAS ELICITED AT TRIAL.

Defendant claims that the following statement constitutes the rendering of an opinion of the defendant’s guilt by Detective Williams:

Prosecutor: And in your experience in investigating those approximately thousand property crimes, have you investigated calls that have involved bank statements being taken from a residence or mailbox?

...

Det. Williams: Yes, I have. It's common practice that we come across documents that are stolen during the course of a burglary, especially financial documents, credit cards, ID

cards, passports, mail, anything with somebody's name on there that's used to facilitate future crimes.

11-8-16 VRP 602-03. Defendant objected on the basis that Det. Williams answer was an improper opinion as to "criminality." 11-8-16 VRP 603.

That objection was implicitly overruled by the trial court.

Okay. Just I'm going to -- I'm going to sustain your objection in terms of the additional questioning that is going on with this witness as to that, Exhibit 243B, the one that contains two pieces.

11-8-16 VRP 609.

The trial court properly overruled defendant's objection. The testimony at issue did not constitute an opinion as to the defendant's guilt. It was merely a statement of a plain fact: Burglars often steal financial documents because financial documents have value.

6. THIS CASE PRESENTS NO CUMULATIVE ERROR.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type

of error will affect the court's weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

In this case, for the reasons set forth in the preceding sections, defendant has failed to establish any error at trial, much less accumulation of error. No cumulative error occurred. The court should reject defendant's request for a new trial.

7. APPELLANT SHOULD HAVE RECEIVED TEN MONTHS COMMUNITY PLACEMENT INSTEAD OF TWELVE MONTHS.

The State concedes that appellant's argument is well taken. Appellant received a 50 month sentence on Count II (a Class C felony with a five year statutory maximum). CP 66. Appellant accordingly could receive no more than ten months community custody. RCW 9.94A.701(9). Appellant received twelve months. CP 66. Remand for resentencing is appropriate. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

8. APPELLANT WAIVED HIS OBJECTION TO THE MANNER IN WHICH THE TRIAL COURT EVALUATED APPELLANT'S ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS.

The trial court in this case complied with *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) because it conducted an individualized inquiry into appellant's current and future ability to pay. *Id.*, 182 Wn.2d

at 839; 12-02-16 RP 21-22. The court inquired about appellant's prior work (12-02-16 RP 21), and his ability to work after he got out. (12-02-16 RP 22). The inquiry was brief and cursory—but it was trial court initiated and it was both an invitation and an opportunity for appellant to present relevant information relating his financial ability. The invitation was plain:

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?

12-02-16 RP 22. Appellant had a lawyer at that sentencing hearing (12-02-16 RP Cover Page) and that lawyer made no attempt to provide the trial court with any further information. 12-02-16 RP 21-22. Appellant further complains for the first time on appeal that the trial court erred because it did not *sua sponte* resentence appellant because he did not receive the DOSA sentence the parties anticipated he would receive in his other case. Appellant's Brief at 44. The trial court had no duty to *sua sponte* "reassess" appellant's sentence once it was imposed. Appellant had a duty to raise that issue to the trial court. The record presented on appeal is insufficient to demonstrate that there really was material financial information that the trial court needed to hear, but did not.

Unpreserved LFO errors do not command review as a matter of right. *State v. Blazina*, 182 Wn.2d at 833; RAP 2.5(a). This Court should decline to review this issue presented for the first time on appeal. *Id.*

At any event, this matter is going back to the trial court for resentencing on the community custody issue (and the reduction in community custody could conceivably have some impact on appellant's ability to pay his legal financial obligations). The State acknowledges that respondent should be able to present evidence about his present and future ability to pay his legal financial obligations at that sentencing hearing.

D. CONCLUSION.

Had defendant made a reasonably specific ER 1002 best evidence rule objection, the issue would have been fleshed out in the trial court, the digital picture itself would likely have gotten into evidence anyway, and this matter would have been a non-issue. Failure to make a reasonably specific objection should preclude appellate review.

The opinion testimony relating to the digital photograph that was specifically objected to pursuant to ER 701 was properly overruled because the witness did not render an opinion of the content of the photograph—the witness compared what was on the photograph with what he saw on the night of defendant's arrest. Such testimony was helpful to

the jury and the trial court did not abuse its broad evidentiary discretion when it permitted that testimony.

Even if the testimony relating to Mr. Coe's digital photographs was improperly admitted, any such error was harmless.

Sufficient evidence was admitted to prove identity theft. The burglars selected financial documents and carried them away from Ms. Shanburn's and Mr. Jones' home. When they divided up their stolen haul, the stolen financial documents remained with defendant. The evidence was sufficient to establish that defendant knew he had the stolen documents and that he intended to use them to commit a crime.

No opinion testimony was presented as to defendant's guilt.

Defendant's trial was fair and its outcome should be affirmed.

Defendant correctly points out that his community correction duration was two months too long. Defendant's *Blazina* objection is moot because defendant may present financial information to the trial court at his resentencing.

DATED: December 18, 2017.

MARK LINDQUIST
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

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.

12.15.17 Therese Ka
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

December 15, 2017 - 4:57 PM

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