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Division II
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NO. 50582-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHN M. HODGES,

Appellant.

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

The Honorable Elizabeth Martin, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion for new trial based on pervasive ineffective assistance of counsel, accident or surprise, irregularity in the proceeding, and lack of "substantial justice."

2. Mr. Hodges was deprived of his Sixth and Fourteenth Amendment right to counsel.

3. Defense counsel provided ineffective assistance by failing to call three critical witnesses to testify at trial.

4. Defense counsel provided ineffective assistance by failing to propose a missing witness instruction.

5. Defense counsel provided ineffective assistance by stipulating to admission of a letter obtained by a private citizen in apparent violation of federal law.

6. Defense counsel provided ineffective assistance by failing to engage in investigation of three prior unauthorized uses of the debit card prior to it coming into the possession of Mr. Hodges.

7. Defense counsel provided ineffective assistance by failing to obtain exculpatory emails in the possession of a previous attorney.

8. Defense counsel provided ineffective assistance by failing to impeach a key state witness.

9. Defense counsel provided ineffective assistance by inviting the jury to convict Mr. Hodges.

10. Defense counsel provided ineffective assistance by failing to argue for same criminal conduct counsel provided ineffective assistance by failing to cite relevant case in support of a sentence below the standard range.

11. Defense counsel provided ineffective assistance of counsel by failing to provide case law to support an exceptional sentence downward.

12. Mr. Hodges was prejudiced by his attorney's deficient performance.

13. The State presented insufficient evidence to convict Mr. Hodges of second degree identity theft.

14. The State presented insufficient evidence to convict Mr. Hodges of possession of stolen property in the second degree.

15. Cumulative error deprived Mr. Hodges of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial judge err under CrR 7.5(a) when she denied a defense motion for new trial based on failure of prior defense counsel to perform an adequate investigation, failure to obtain exculpatory emails held by previous defense counsel, failure to provide three critical witnesses at trial, and failure to investigate three transactions involving the debit card not investigated by law enforcement? Assignment of Error 1.

2. Did the trial judge err under CrR 7.5(a) when she denied a defense motion for new trial where irregularity in the proceeding occurred and substantial justice was not achieved when a letter by Mr. Hodges was

introduced as evidence, where the letter was obtained in apparent violation of federal law prohibiting the unauthorized opening of mail by a person other than the addressee? Assignment of Error 1.

3. Did the trial judge err under CrR 7.5(a) when she denied a defense motion for new trial where “substantial justice” was not achieved due to the failure of law enforcement to interview a critical witness and failure to investigate three unauthorized uses of the card prior to it being in the possession of Mr. Hodges? Assignment of Error 1.

4. Did ineffective assistance of counsel and admission of inadmissible evidence deprive Mr. Hodges of a fair trial? Assignments of Error No. 3-12.

5. Was it ineffective assistance for Mr. Hodges’ counsel to fail to call witnesses whose testimony would have corroborated the testimony of Mr. Hodges and rebut the testimony of an officer regarding an important issue regarding the element of knowledge, where the dispositive issue at trial was the credibility of Mr. Hodges? Assignment of Error No. 3.

6. Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Here, Mr. Hodges’ attorney stipulated to the admission of a letter obtained by a non-governmental source through potentially illegal means. Was Mr. Hodges denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel? Assignment of Error 5.

7. Was it ineffective assistance for Mr. Hodges' counsel to fail to secure and offer exculpatory evidence known to be in the possession of prior counsel? Assignment of Error 7.

8. Was it ineffective assistance for Mr. Hodges' counsel to fail provide relevant case law in support of a motion for an exceptional sentence downward? Assignment of Error 11.

9. Was it ineffective assistance for Mr. Hodges' counsel to essentially invite the jury to convict during closing argument? Assignment of Error 9.

10. Where multiple crimes arise from the "same criminal conduct," they count as a single offense for purposes of calculating the individual's offender score. Offenses constitute the same criminal conduct at sentencing if the crimes were committed at the same time and place, involved the same victim, and involved the same criminal intent. Where the possession of a stolen access device, another's bank card, coincided with Mr. Hodges' possession or use of the bank card as an act of identity theft, did the offenses arise from the same criminal conduct? Assignment of Error 10.

11. There is insufficient evidence to support a conviction for identity theft in the second degree because the State failed to prove beyond a reasonable doubt that Mr. Hodges knowingly used Ms. Solomon's financial information. Assignment of Error 13.

12. There is insufficient evidence to support a conviction for

possession of stolen property in the second degree because the State failed to prove beyond a reasonable doubt that Mr. Hodges knew that the card Mr. Clark gave him was stolen. Assignment of Error 14.

13. Even where no single error standing alone may merit reversal, an appellate court may nonetheless find a defendant was denied a fair trial where cumulative errors created a reasonable probability that the jury's verdict would have been different had the errors not occurred. In light of the above errors, does the cumulative error doctrine require reversal of Mr. Hodges' convictions? Assignment of Error 15.

C. STATEMENT OF THE CASE

1. Procedural facts:

John Hodges was charged by information filed in Pierce County Superior Court on December 7, 2015 with identity theft in the second degree, contrary to RCW 9.35.020(3), and possession of stolen property in the second degree, contrary to RCW 9A.56.140(1). Clerk's Papers (CP) 3-4. The State alleged that Mr. Hodges used a Direct Express debit card belonging to Dean Solomon on December 5, 2015 to pay for putt-putt golf for himself, his daughter and his grandson at Tower Greens in Tacoma, Washington. CP 1-2; (Declaration for Determination of Probable Cause, filed 12/7/15).

a. Mr. Hodges' letter to Wally Clark

At trial the State sought to introduce a letter addressed to Wally Clark

and mailed from jail by Mr. Hodges. 2RP at 136.¹ Wally Clark previously rented a room from Dean Solomon, and lived in her house, but was asked to leave due to failure to pay rent. At trial, Ms. Solomon testified that after Mr. Clark was evicted, she received the letter via her home mail slot, which is located in the garage of her house. 2RP at 136, 177, 178. The letter carrier puts mail addressed to the house in a brass slot and the mail is deposited in her garage. 2RP at 177. She testified that the letter addressed to Mr. Clark was not in an envelope, but was deposited in her “garage mailbox.” 2RP at 178. Prior to trial defense counsel Charles Johnston stipulated to chain of custody of the letter and acknowledged that Mr. Hodges wrote the letter while he was in jail. 2RP at 1387. At trial, Mr. Hodges stated that he wrote the letter and mailed it from jail to Mr. Clark’s address at Ms. Solomon’s house, where he believed that Mr. Clark lived. 3RP at 281. The parties agreed to redaction to the original document to omit the sentence “I am now looking at 43 to 57 months in prison” and amending a sentence that stated “However, you can help prevent this from happening” to read “However, you can help by simply writing a statement to my attorney.” 2RP at 138. The letter was subsequently admitted as Exhibit 2. 2RP at 179.

¹The record of proceedings consists of seven volumes, which are designated as follows: RP (1/4/16) (bail hearing); 1RP February 13, 2017 (CrR 3.5 hearing); 2RP February 14, 2017, (*voir dire*); 3RP February 15, 2017, (jury trial); 4RP March 10, 2017 (sentencing, continued); 5RP April 7, 2017, (hearing); 6RP April 21, 2017, (motion to reinstate bail); and 7RP (misabeled as Volume 6) June 8, 2017, (CrR 7.5 motion for new trial, and sentencing).

b. Verdict, CrR 7.5 motion, and sentencing:

The matter came on for jury trial on February 13, 14, and 15, 2017, the Honorable Elizabeth Martin presiding. 1RP at 1-70, 2RP at 73-240, and 3RP at 243-356.

The jury found Mr. Hodges guilty of second degree identity theft and second degree possession of stolen property as charged. 3RP at 349; CP 91, 92.

The matter came on for sentencing on March 10, 2017. 4RP at 359. Defense counsel Johnston notified that court that Mr. Hodges blamed him for the conviction and that Mr. Hodges wished to proceed pro se. 4RP at 359-60. Mr. Hodges disagreed with that characterization and stated that it “was not [his] desire for [Mr. Johnston] to no longer be [his] attorney,” and that it was Mr. Johnston’s choice to withdraw. 4RP at 361, 362. Mr. Hodges stated that he wanted to represent himself at sentencing. 4RP at 362.

After inquiry by the court, Mr. Johnston was allowed to withdrawal and Mr. Hodges proceeded pro se. Mr. Hodges moved for mistrial and alternatively, a sentence below the standard range. 4RP at 367-68. He argued that his counsel provided ineffective representation and stated that he wrote the letter to Wally Clark and mailed it from the jail on January 9, 2016. 4RP at 368. He argued that Dean Solomon had testified that she retrieved the letter from her mailbox on January 9, 2016 and that she said it was already “opened without an envelope.” 4RP at 368. Mr. Hodges argued that the letter was illegally obtained and that he mailed the letter to Wally Clark and it was

processed and the left the jail facility on January 8, 2016. 4RP at 368. Following objection by the State, the court set the matter over to allow the prosecution to review Mr. Hodges' evidence regarding collateral attack of the convictions. 4RP at 371. The court also appointed counsel for Mr. Hodges. 4RP at 372.

c. CrR 7.5 motion for new trial

Following conviction, Mr. Hodges briefly represented himself, and then was appointed new counsel. 4RP at 373. Mr. Hodges then retained new counsel, Gavin Simkins, who appeared on April 7, 2017. 5RP at 377. Mr. Simkins filed a motion for new trial pursuant to Cr 7.5 on June 7, 2017, alleging multiple grounds in support of a new trial including "accident or surprise" under CrR 7.5(a)(4), insufficient investigation by law enforcement resulting in irregularly of the proceeding under CrR 7.5(a)(2) and (5), and failure of the court to do "substantial justice" under CrR 7.5(a)(8). CP 153-60.

Following a motion to set bail, the trial court heard Mr. Hodges' motion for new trial on June 8, 2017. 7RP at 402-419. Mr. Simkins argued that former defense counsel Mr. Johnston provided ineffective representation, that he "was asleep at the wheel," did not call critical witnesses including Mr. Hodges' daughter and the manager of Tower Greens, Brenda Zimmerman, both of whom were present at the time the debit card was used. Moreover, prior counsel did not call Wally Clark as a witness, despite that fact that Mr.

Clark was known to be incarcerated at the time therefore available for service. Mr. Simkins also argued that counsel did not object to entry of the letter by Mr. Hodges to Wally Clark, which was apparently opened by Ms. Solomon or persons unknown and provided to law enforcement, and also that prior counsel and did not file any pre-trial motions. 7RP at 413. Mr. Simkins also argued that “substantial justice has not been done” due to inadequate police investigation, particularly of three transactions involving Ms. Solomon’s Direct Express debit card that took place prior to Mr. Hodges receiving the card from Mr. Clark, failure to obtain exculpatory emails from Mr. Clark to counsel before Mr. Johnston’s representation, and overall failure to investigate and call Mr. Clark as witness at trial, who was the connection between Dean Solomon and Mr. Hodges. 7RP at 412. After hearing argument, the court denied the motion for new trial, stating that “a large portion of your argument is ineffective assistance of counsel,” and that it was more appropriate for appellate review. 7RP at 419, 420.

d. Sentencing

After denial of CrR 7.5 motion, the court proceeded to sentencing. Mr. Hodges had an offender score of “9+” and a standard range of 43 to 57 months for Count 1 and 22 to 29 months for Count 2. 7RP at 420. The State recommended a sentence of 57 months for Count 1 and 22 months for Count 2. 7RP at 420. Defense counsel requested an exceptional sentence below the standard range of 366 days. 7RP at 427. In ruling, the court noted that

the case involved a small amount of money and that it was for an outing with Mr. Hodges' grandson, and that "the reality is, he is not the one that stole the card[,] [w]e all know that's likely to have been Mr. Clark and not Mr. Hodges." 7RP at 429. Nevertheless, the court denied the request for an exceptional sentence and imposed a midrange sentence of 48 months for Count 1 and 26 months for Count 2, to be served concurrently, with 12 months of community custody. 7RP at 430; CP 180. The court imposed legal financial obligations including a \$500.00 crime victim penalty assessment, \$200.00 filing fee, and \$100.00 DNA collection fee. 7RP at 421.

Timely notice of appeal was filed on July 6, 2017. CP 205. This appeal follows.

2. Trial testimony:

Dean Solomon subleased a room in her house in Tacoma to Wally Clark 2RP at 159-60. Ms. Solomon did not previously know Mr. Clark, who responded to her Craigslist advertisement for a room for rent. 2RP at 160. Mr. Clark moved into Ms. Solomon's house in November, 2015. 2RP at 160. Ms. Solomon received social security disability payments into her account at Bank of America, which she was able to access by using a Direct Express debit card assigned to her. 2RP at 161. She was able to access the card using a Personal Identification Number or by using her signature for some transactions. 2RP at 162. She did not share her PIN with anyone else and kept her debit card in her wallet. 2RP at 162-63.

On December 5, 2015, while checking her Bank of America account online in order to pay bills, she discovered that there was \$3.00 in her account. 2RP at 163. She thought that her account contained approximately \$800.00. 2RP at 165. Her transaction history showed that her Direct Express debit card had been used recently to withdraw \$142.75 from an ATM, a purchase for \$177.46 from a Fred Meyer store, and a purchase for \$48.00 from a Goodwill store in Tacoma. 2RP at 165, 185. She stated that although she did not provide her PIN to anyone, the number was written on a piece of paper in her wallet. 2RP at 166. Ms. Solomon believed that her debit card was in her wallet, which she had left in her truck parked outside her house. 2RP at 170. She had not used her debit card in the week preceding her discovery of the transactions on December 5, 2015. While she was looking at the unauthorized transactions online, she noted that a transaction occurred at Tower Greens in Tacoma using her debit card about ten minutes before she checked her bank account. 2RP at 166.

Ms. Solomon called the Tower Greens bowling alley and told the manager that someone was using her card without authorization. 2RP at 166-67. She testified that the manager told her that the person who used that card was still there and that she would call the police. 2RP at 167. Ms. Solomon also called the police department. 2RP at 167.

After speaking with the police, she went to her truck and realized that it been broken into and that items were missing from her wallet, which was

stored in the truck. 2RP at 171. Items missing from her wallet include other debit cards in addition to the missing Direct Express card, her driver's license, checkbook, cell phone, and a bank bag containing cash from a fund raiser yard sale. 2RP at 172. A rent check from Wally Clark contained in the wallet was also gone. 2RP at 175. She had the check in her wallet because Mr. Clark had not signed the check and she was unable to cash it. 2RP at 176. She had locked the truck, but discovered that the lock on the driver's side door had been "punched in." 2RP at 172.

Mr. Clark lived in the house but had a separate bedroom and bathroom. 2RP at 163. Ms. Solomon asked Mr. Clark to leave approximately a week and a half after the incident because he had not paid his rent. 2RP at 176. Mr. Clark moved out and she had no further contact with him. 2RP at 177.

Trenton Christiansen works at Tower Lanes bowling alley and Tower Greens, which is a miniature golf course located in the same building. 2RP at 206-97. On December 5, 2015, he received a call from Ms. Solomon regarding the unauthorized use of her debit card at Tower Greens. 2RP at 208. He took her information and then contacted the manager and determined that the card was used ten to fifteen minutes before Ms. Solomon's call. 2RP at 208. Mr. Christensen said that the card was used to pay \$20.00 for golf for a party of two adults and a minor. 2RP at 209, 210. After determining that the party—identified as Ms. Hodges, his daughter and his grandson—were still playing golf, manager Brenda Zimmerman called police. 2RP at 212, 213.

Tacoma police officer Jesse Jahner and another officer arrived at Tower Greene at approximately 5:30 p.m. Officer Jahner testified that he contacted Mr. Christiansen, who pointed out the person who used the debit card. 2RP at 223. Police contacted Mr. Hodge, who was playing miniature golf with his daughter and his grandchild. 2RP at 224. After being questioned about the card, Officer Jahner testified that Mr. Hodges said he was going to call Wally Clark, who gave him the card to use because Mr. Clark owed him \$50 to \$60.00. 2RP at 225.

Officer Jahner testified that Mr. Christiansen “walked over and gave us a receipt” of the debit card transaction. 2RP at 226. Officer Jahner stated that after receiving the receipt, Mr. Hodges gave the officers a debit card with the name Dean M. Solomon on it.² 2RP at 226. Exhibit 1. Officer Jahner said that after showing him that card was issued to Dean Solomon, Mr. Hodges stated that he did not even look at the name on the card and just scribbled a name on the receipt. 2RP at 227. Officer Jahner stated that Mr. Hodges said that Wally Clark owed him \$50.00 to \$60.00 and that Mr. Clark gave him the card and thought that he could spend the money that Mr. Clark owed and then could return it later. 2RP at 228.

Law enforcement did not contact Ms. Solomon regarding the unauthorized purchases at Fred Meyer and Goodwill, or the ATM withdrawal

²Mr. Hodges’ testimony is contrary to the officer’s testimony regarding the sequence of events. 3RP at 277.

that she described, and did not conduct any further investigation of the losses. 2RP at 190.

Approximately two weeks after the incident and after Mr. Clark had moved out, Ms. Solomon stated that she received a letter in her mail box. 2RP at 177, 178. She testified that the letter, which was addressed to Wally Clark and dated January 7, 2016, was not in an envelope. 2RP at 178, 181. She stated that she turned the letter over to Tacoma Police. 2RP at 179. She identified the letter entered as Exhibit 2 as the same one that was in her mail box and the redacted version of the letter was admitted without objection. 2RP at 179, 3RP at 280.

The letter was read to the jury:

To Wally:

Hey, what's happening? Remember me? Ed (Dean Solomon) and I had picked you up from Motel 6 that Friday night, December 4th, then we went to Les (Doc's) house on East 64th and Portland Avenue til morning. Then I started walking to 72nd Street transit where you and Ed (Dean Solomon) had picked me up. Ed (Dean Solomon) gave us (you and me) a ride home to my motor home downtown at the car lot where my Explorer was. Do you remember when Ed (Dean Solomon) gave me his Direct Express card and told me to go ahead and use it and to sign the name Dean Solomon on any receipt and to get the card back to him later that day? Well, he tried to contact me a few hours later and couldn't reach me. So he got scared he wasn't going to get the card back and decided to call it in stolen and never even attempted to call or text me to inform me he had called it in stolen. So when I used it to pay for putt putt golf at Tower Lanes that Saturday evening with my five-year-old grandson, the card was stolen and I got arrested in front of my grandson.

However, you can help by simply writing a statement to my attorney stating you witnessed Ed (Dean Solomon) give me his card when he dropped me off. You following me on this, buddy?

2RP at 181-82.

Page two of the letter continued:

Of course you are. I please need you to have my back on this Wally. This means the world to me, and my grandson's little heart is broken wondering where his papa is at. So if you could contact my attorney and state, 'I, wally Clark, did witness Dean Solomon give a Direct Express card to John Hodges and did hear Dean Solomon authorize John Hodges to use it and sign the name Dean Solomon,' with Wally Clark's name below that.

That's it man. Nothing else needs to be said. This can be done privately in my attorney's office between you and my attorney. Nothing will happen except the charges against me will be dismissed in court. No, you won't have to come to my court hearings or trial. Just need a signed statement from you. Please, please, please. I will give my attorney your phone number on Monday. Thanks, man. Hope to see you soon. Your friend, John Hodges.

2RP at 181-83.

Mr. Hodges testified that on December 4, 2015 he worked until 8:00 p.m. and was later invited to a party by a friend named Les. 3RP at 261. He agreed to go if he could get a ride and then texted a friend known as "North End Ed" to see if he could get a ride to the party. 3RP at 261. Ed picked up Mr. Hodges and then they stopped at a restaurant parking lot and picked up a man named Wally Clark, whom Mr. Hodges did not know. 3RP at 262. They

then drove to Les' house where Mr. Hodges stayed until 7:00 a.m. 3RP at 262.

Mr. Hodges stated that he talked with Mr. Clark at the party, and that he had brought two unopened half gallons of alcohol to the party, which he provided to Mr. Clark. 3RP at 271-72. As a result, Mr. Clark owed money to Mr. Hodges, and Mr. Clark gave a debit card to Mr. Hodges to use to repay the amount that he owed to Mr. Hodges. 3RP at 272. Mr. Hodges put the debit card he received from Mr. Clark in his pocket without looking at the name on it, assuming that it was Mr. Clark's card. 3RP at 272. After that Mr. Hodges left the party and went to his job at a car lot and worked until 4:30 or 5:00 p.m. 3RP at 272-73. After work, Mr. Hodges, his daughter, and Mr. Hodges' grandson, went to play miniature golf at Tower Greens. 3RP at 273. At Tower Greens Mr. Hodges used the card at the counter to purchase a round of golf for two adults and a child. 3RP at 273. Mr. Hodges testified that he used the card to pay the total of \$19.00 and a one dollar tip and handed the card to the employee. 3RP at 274. The clerk handed Mr. Hodges a receipt, and he stated that he "just scribbled in a name like I do when I used Dan Kuchan's card all the time to go to Home Depot or Lowes." 3RP at 275. He stated that he worked at a car lot for Dan Kuchan and used Mr. Kuchan's card several times a week as part of his job. 3RP at 275. Mr. Hodges, his daughter and grandson were halfway through their round of golf when the supervisor approached him regarding the receipt and the use of the debit card. 3RP at 276. Mr. Hodges testified that he gave her the debit card, and disputed the testimony

by Officer Jahner that he gave the card directly police. 3RP at 277.

After being informed that the card could not be used by a Tower Greens employee, Mr. Hodges' daughter paid cash for the game and the supervisor told them that were welcome to stay and finish their game. 3RP at 277. After the supervisor walked away, Mr. Hodges called Wally Clark asked him what was up with this card, at which time Mr. Clark hung up on Mr. Hodges. 3RP at 278.

They continued to play golf and fifteen to twenty minutes, at which time police arrived. 3RP at 278. Mr. Hodges told police that Wally Clark had loaned him money and had given him the card earlier that day and that he was supposed to return it to Mr. Clark that evening. 3RP at 279. He called Mr. Clark a second time while in the presence of the police. 3RP at 279. He told him that the police were there, but Mr. Clark would not respond, and Mr. Hodges then handed his phone to the police, who then handed it back after receiving no response. 3RP at 279-80.

Mr. Hodges was arrested and while in the jail, wrote a letter to Mr. Clark. 3RP at 281-82. Mr. Hodges testified that that he believed that Dean Solomon was a male and that he was in fact "North Tacoma" Ed, who he only knew by his nickname. 3RP at 281. He thought that after his arrest, that Mr. Clark may have stolen the card from Ed. 3RP at 282. Mr. Hodges stated that he wrote the letter to make Mr. Clark believe that he was not going to get into trouble then he would write a statement that would secure his release from jail.

3RP at 285. He stated that he did not want to alarm Mr. Clark by writing him a letter accusing him of giving Mr. Hodges a stolen access card because Mr. Clark would flee or otherwise not be cooperative. 3RP at 285. Mr. Hodges stated that the statement contained in the letter that “Dean Solomon gave me his Direct Express card and told me to go ahead and use it to sign his name “Dean Solomon” on the receipt and to get the card back to him later that day” did not occur, but that he wrote that in order to make Mr. Clark think that was what he thought had occurred. 3RP at 285. Mr. Hodges stated that he wrote the letter to Mr. Clark to make him think that he is “basically giving me a way out” and that he is not going to “tell on me[,] [b]ut yet, I can still help him get out of jail.” 3RP at 286.

Mr. Hodges testified that when he used the card at Tower Greens, he did the same thing that he had done in the past when he was allowed to use his boss Dan Kuchan’s card to purchase materials at building supply stores; he signed the name “Dan Kuchan” when using the debit card during the past year with his boss’s permission. 3RP at 289-90, 291. He stated that just as when he had used his boss’s card, he believed that the use of the card was authorized by its owner, so he signed a name—in his case a scribbled name—as he had done when using Mr. Kuchan’s card. 3RP at 292.

Defense counsel elicited from Mr. Hodges that he had been convicted of third degree theft in 2011, third degree theft in 2014, third degree theft in 2011, and third degree possession of stolen property, and third degree theft in

Chelan Municipal Court. 3RP at 259-60.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED MR. HODGES' MOTION FOR NEW TRIAL

Following trial, Mr. Hodges moved for a new trial under CrR 7.5. 7RP 41-19; CP 153-160.

CrR 7.5 provides in relevant part:

(a) Grounds for new trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

...

(2) Misconduct of the prosecution or jury;

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

(4) Accident or surprise;

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

...

(8) That substantial justice has not been done.

CrR 7.5(a)(1), (5), (8).

A trial court's decision on a motion for new trial is reviewed for abuse of discretion. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). An abuse of discretion will be found "only 'when no reasonable judge would have

reached the same conclusion." *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)).

Here, Mr. Hodges' new counsel raised several grounds for granting a new trial, primarily based on ineffective assistance of previous counsel. These claims are discussed at length in section 2, below.

a. Trial counsel failed to investigate or interview potential witnesses, failed to investigate prior use of the debit card, and failed to obtain exculpatory emails by Wally Clark, prejudicing Mr. Hodges.

To prevail on a claim of ineffective assistance of counsel, Mr. Hodges must show (1) that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). As argued in section 2 below, failure to investigate or interview witnesses "is a recognized basis upon which a claim of ineffective assistance of counsel may rest." *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991) (citing *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989)), review

denied, 123 Wn.2d 1022 (1994). The trial court erred by failing to grant a new trial based on ineffective assistance of counsel. Here, the court engaged in virtually no analysis of Mr. Simkins' argument on behalf of his client, and merely stated that a claim of ineffective assistance should be heard by this Court. 7RP at 419. Mr. Hodges submits that the trial court had sufficient basis to grant a new trial based on Mr. Hodges' presentation at trial.

b. CrR 7.5(a)(8) provides that a new trial may be granted if substantial justice has not been done.

Mr. Hodges also argues that the police investigation was cursory and slipshod, and that substantial justice was not achieved in this case. CrR 7.5(a)(8). The prosecution presented evidence of three transactions involving the debit card prior to the receipt of the card by Mr. Hodges from Mr. Clark. These unauthorized uses of the card were not investigated by law enforcement. Detective Elizabeth Schiefdecker testified that she is the only detective assigned to financial crimes such as identity theft, credit card fraud, and elder abuse for the entire city of Tacoma. 3RP at 251-52. The detective acknowledged that she did not investigate the use of the card at an ATM, Goodwill or Fred Meyer prior to the card coming into Mr. Hodges' possession. 3RP at 257. This was evidence that law enforcement did not conduct even a basic investigation and should have resulted in a new trial.

Evidence of the use of the card prior to its receipt by Mr. Hodges was material to the defense. The person who used the card could have provided information regarding the link between Ms. Solomon and Mr. Hodges. That link, logically, is Wally Clark. Despite this reasonable inference, law enforcement made no attempt to obtain video of the transactions using the card or to interview Mr. Clark. Evidence of sloppy police work may be relevant to impeaching the thoroughness of a police investigation, albeit such evidence is often relevant in limited circumstances such as mishandled or inadequately collected evidence. See, e.g., *State v. Rafay*, 168 Wn.App. 734, 803, 295 P.3d 83 (2012). However, poor police investigation may also be relevant to show that investigators failed to pursue leads that the alleged crime was committed by someone other than the defendant. See *United States v. Crosby*, 75 F.3d 1343, 1347 (9th Cir.1996). Here, an investigation of the use of card, particularly in the instance of its use at an ATM in which Ms. Solomon's PIN was required, would have shed considerable light on the manner in which Mr. Clark acquired the card before he gave it to Mr. Hodges.

The information would have constituted substantive evidence supporting the defense theory at trial that Mr. Hodges was unaware that the card was stolen and unaware that its use was not authorized by Ms. Solomon. See *State v. Jones*, 25 Wn.App. 746, 751, 610 P.2d 934 (1980).

In addition to the inadequate police investigation, CrR 7.5(a)(8) is also present in the significant irregularities that occurred at trial. In addition to the pervasive specter of ineffective assistance of counsel present in almost every aspect of this case, the letter by Mr. Hodges and introduced as Exhibit 2 was obtained through murky and potentially illegal method in violation of federal law, as discussed below. The letter, which Mr. Hodges testified was sent from jail through the regular mail to Mr. Clark at his former address at Ms. Solomon's house, was introduced as a two page letter with no recognition that it was apparently opened in violation of 18 U.S.C.A, § 1702. The mysterious, potentially illegal method the letter was obtained should have been sufficient to compel the trial court to grant a new trial under CrR 7.5.

The jury's verdict rested on Mr. Hodges' credibility. An investigation into the use of the card would have resulted in (1) rebutting the implied accusation that Mr. Hodges was responsible for using the card at the Fred Meyer, Goodwill, and ATM, and (2) presented evidence that Mr. Hodges was unaware that the card had been stolen. Evidence consistent with the defense theory and in direct conflict with the State's theory surely would have impacted the outcome.

The court erred in denying the motion for new trial.

**2. DEFENSE COUNSEL FAILED MR. HODGES
IN A VARIETY OF WAYS**

A defendant has the constitutional right to the effective assistance of counsel under Wash. Const. art. 1, § 22; U.S. Const. amend. VI. To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The standard for evaluating effectiveness of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The court must decide (1) whether counsel's conduct constituted deficient performance and (2) whether the conduct resulted in prejudice. To prevail, appellant must show (1) that his lawyer's representation was deficient and (2) that the deficient conduct affected the outcome of the trial. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2D 512 (1999); *Strickland*, 466 U.S. at 693-94. Performance is deficient if it falls "below an objective standard of Reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The defendant need show only a reasonable probability the outcome would have differed in order to undermine confidence in the outcome and demonstrate prejudice. *Strickland*, 466 U.S. at 693-94. Representation that falls sufficiently below an objective reasonableness standard overcomes the strong presumption of reasonableness. *Thomas*, 109 Wn.2d at 226.

As Mr. Hodges argues above, a new trial should be granted because, *inter alia*, he received ineffective assistance of counsel, and because substantial

justice was not done. But if this Court concludes to the contrary, then a new trial should be granted on the basis that Mr. Hodges' attorney provided ineffective assistance for the reasons presented below.

a. Mr. Hodges' right to effective counsel was violated when his attorney failed to call Wally Clark as a witness and failed to investigate exculpatory emails by Mr. Clark sent to previous counsel

A failure to investigate or interview witnesses is a recognized basis for an ineffective assistance of counsel claim. *State v. Jones*, 183 Wn.2d 327, 339-40, 352 P.3d 776 (2015). Courts will not give deference to an uninformed or unreasonable failure to interview witnesses. *Id.* at 34. A failure to interview witnesses who may provide corroborating testimony may constitute deficient performance. *State v. Weber*, 137 Wn.App. 852, 858, 155 P.3d 947 (2007), rev. denied, 163 Wn.2d 1001 (2008).

A lawyer has a duty to investigate what information a potential witness possesses. *Sanders v. Ratelle*, 21 F.3d 1446, 1456-57 (9th Cir. 1994). A failure to interview key witnesses constitutes inadequate investigation. *Thomas*, 109 Wn.2d at 231 (defendant received ineffective assistance of counsel where attorney failed to ascertain his expert witnesses credentials and failed to call a different expert witness to testify). "Moreover, the failure to conduct a reasonable investigation is considered especially egregious when the evidence that would have been uncovered is exculpatory." *Weber*, 137 Wn. App. at 858. Finally, a failure to subpoena a necessary witness is deficient performance. *State*

v. *Jury*, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978), rev. denied, 90 Wn.2d 1006.

Wally Clark was clearly a necessary witness because his presence permeates almost every aspect of the case; he is the connection between Ms. Solomon and Mr. Hodges. As the trial court judge noted at sentencing, it is very likely that Mr. Clark committed the theft of the card in question. Therefore, it is reasonable to believe that Mr. Clark could testify that Mr. Hodges had nothing to do with the offenses, and in fact, he sent emails and texts to previous counsel stating that he received the card from Ms. Solomon and corroborating that he provided the card to Mr. Hodges and that he is innocent. CP 154.

Despite his unmistakable pivotal role in the case, and despite his apparent ability to cooperate with defense counsel, defense counsel did not call Mr. Clark as a witness. Counsel was reduced to a strawman argument, putting the blame on Mr. Clark during closing argument:

[Y]ou've got Wally Clark being the roommate. You've got Wally Clark having access. You've got Wally Clark's social security check that's taken out of the purse. You've got Wally Clark with money problems. You've got the thing being—the card being used multiple times before Mr. Hodges ever gets it. You've got somebody that knows the pin number, which would be more likely than not Wally Clark, the roommate. To the reasonable inference and all the evidence is Wally Clark stole the card.

3RP at 334.

Counsel's deficient representation is made even more egregious by the

fact that Mr. Clark was apparently willing to accept responsibility and admit to not only taking the card, but to telling Mr. Hodges that he could use it without revealing that the card was illegally obtained. CP 154. As stated in the motion for new trial, Mr. Clark contacted Mr. Hodges' first attorney by email and later by text, stating that he received the card from Ms. Solomon for methamphetamine and also gave him the PIN, and that he gave the card to Mr. Hodges. CP 154; (Motion for New Trial at 2). Mr. Hodges told Mr. Johnston about the email and texts sent to his previous attorney, but Mr. Johnston made no attempt to secure the email from the previous attorney. CP 154.

As to prejudice, it is reasonably probable that the outcome would have been different but for the deficient performance. Accordingly, Mr. Hodges' convictions should be reversed and his case remanded for a new trial. *Thomas*, supra. The failure to call Wally Clark to the stand to exculpate Mr. Hodges—just as he indicated that he would in his email and texts to previous counsel—constituted ineffective assistance of counsel for which a new trial should be granted.

b. Defense counsel was ineffective by failing to propose a missing witness instruction.

Having failed to procure Mr. Clark as a witness, defense counsel was obligated, at the least, to propose a missing witness instruction. Counsel argued at length about what Mr. Clark's absence in closing argument. These remarks demonstrate that defense counsel correctly understood what was at stake and

that there can be no tactical reason for defense counsel to omit a missing witness instruction.

c. Mr. Hodges' right to effective counsel was violated when his attorney did not call Brenda Zimmerman and his daughter as witnesses at trial.

As argued *supra*, failure to interview and subpoena witnesses constituted ineffective assistance of counsel. *State v. Jury*, 19 Wn. App. 256, 264-65, 576 P.2d 1302 (1978).

Mr. Hodges' daughter, if called to stand, could have provided testimony to show the correct sequence of events at Tower Greens. Mr. Hodges' daughter's testimony and the testimony of Ms. Zimmerman would support his testimony that he gave the debit card to Ms. Zimmerman before police arrived, that he had knowledge that the card was being questioned, but nevertheless remained to play golf because he had no knowledge that it was stolen. It would also rebut the testimony of Officer Jahner that Mr. Hodges gave the card to police when they arrived, which Mr. Hodges strongly disputes. See, Motion for New Trial at 4-5. CP 156-57. Similarly, Ms. Zimmerman was also a logical witness who would have provided testimony to rebut the officer's testimony that Mr. Hodges had the card in his possession when police arrived.

This testimony is relevant because it supports the core defense argument that Mr. Hodges was unaware that the card was stolen and that even after giving the card to the supervisor, he and his daughter and grandson remained in the building and continued to play golf for the twenty to thirty minutes before

police arrived. Mr. Hodges argued that he if believed that he had done something wrong, he would have had ample time to leave. His daughter's testimony and testimony of Ms. Zimmerman would have rebutted the officer's testimony that he obtained the card from Mr. Hodges, and that Mr. Hodges therefore was unaware that police had been called or that the card was being questioned.

The cumulative effect of counsel's errors was highly prejudicial to Mr. Hodges. By failing to call both Ms. Zimmerman and his daughter to testify, counsel effectively deprived Mr. Hodges of his right, under the Sixth Amendment of the United States constitution and article I, § 22 of the Washington constitution, to confront his accusers. The failure to call these witnesses, combined with the failure to propose a missing witness instruction, also violated his right to present a defense. Without the evidence, the defense theory could not be fully presented and the officer's testimony, which Mr. Hodges strongly contests, could not be rebutted. The convictions should therefore be reversed.

d. Mr. Hodges' right to effective counsel was violated when his attorney failed to investigate and present exculpatory evidence

Failure to investigate or interview witnesses is a recognized basis upon which a claim of ineffective assistance of counsel may rest. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). Here, trial counsel failed to call three vital witnesses, as argued supra, who would have contradicted the officer's

testimony that he received the card from Mr. Hodges. In addition, Mr. Hodges repeatedly asked trial counsel Mr. Johnston to obtain exculpatory emails and texts from Mr. Clark to his previous attorney. Trial counsel also failed to obtain and present this evidence. CP 154.

Last, counsel failed to investigate the previous use of the card at an ATM, Goodwill, and Fred Meyer, described by Ms. Solomon. The transaction history showed that her Direct Express debit card had been used to withdraw \$142.75 from an ATM, and also used to make a purchase of \$177.46 from a Fred Meyer, and a purchase for \$48.00 from a Goodwill store in Tacoma. 2RP at 165, 185. The police made it abundantly clear that they were not going to obtain video of the use of the card at Fred Meyer, or otherwise conduct an investigation of the thefts, despite the probability that video of the transaction existed for at least the Fred Meyer purchase. Without evidence of who perpetrated those offenses, the implication that it was Mr. Hodges who used the card prior to receiving it at the party from Mr. Clark remained unresolved. Without an investigation of the use of the card and without limiting instruction, the jury was free to speculate that Mr. Hodges not only used the card at Tower Greens, but had also used it the day before. Counsel was ineffective by permitting this implication to remain addressed.

By obtaining evidence that someone other than Mr. Hodges used the card at Fred Meyer, as well as Goodwill and the ATM, the defense would be able to strengthen its argument that he received the card from Mr. Clark at the party.

In order to be admissible, the evidence connecting another person with the crime charged must establish a nexus between the other suspect and the crime. *State v. Condon*, 72 Wn.App. 638, 647, 865 p.2d 521 (1993). Trial counsel failed to investigate those other crimes and failed to investigate the strong possibility that Mr. Clark or some other person used the card prior to Mr. Hodges receiving it. Trial counsel's failure to investigate and present this evidence of an alternative suspect constitutes ineffective assistance of counsel.

e. Mr. Hodges received ineffective assistance when trial counsel failed to impeach a key state witness regarding acquisition of the letter to Wally Clark

Dean Solomon was the prosecution's principal witness regarding the theft of the card. Ms. Solomon also testified regarding a letter addressed to Wally Clark that she received in her "garage" mailbox. Mr. Hodges testified that he mailed the letter to Mr. Clark from jail where he was being held after his arrest. Despite Ms. Solomon's pivotal role as a prosecution witness, defense counsel not only stipulated to the letter's admission, but failed to impeach her regarding acquisition of a letter addressed to someone else. Ms. Solomon's testimony regarding the letter was damaging. Mr. Hodges was compelled to explain the letter and the reason he wrote it and was exposed to strenuous cross-examination to explain why he employed a ruse in the letter in his attempt to secure Mr. Clark's cooperation. He explained that the purpose of the letter was to elicit Mr. Clark to come forward and acknowledge that he gave the card to Mr. Hodges at the party. Mr. Hodges explained that he believed the best way to

have Mr. Clark admit his role was engage in a ruse against Mr. Clark. The State capitalized on this during closing by arguing that:

The defendant admitted on the stand that every single thing in this letter was a complete and utter fabrication. He testified—he admitted on the stand that he was willing to take someone lie to the Court in order to get him out from under these charges. He admitted he was willing to perpetrate a fraud on the Court in order to get out from under these charges.

3RP at 312.

Introduction of the letter was highly damaging to Mr. Hodges' credibility. The manner by which Ms. Solomon came into the letter is mysterious and her credibility needed to be attacked. There is no reasonable explanation reason for defense counsel failing to impeach the credibility of a critical State witness regarding her acquisition of the letter. Reversal on both counts is required because counsel performed deficiently in declining to challenge the admission of the letter and failing to impeach the witness, which undermines confidence in the outcome.

Defense counsel had an opportunity to ask Ms. Solomon about the letter on cross-examination, but inexplicably did not do so. Information elicited regarding the letter would have been useful evidence to help the jury in assessing the truth of her testimony, which was a significant component of the State's case.

Ms. Solomon testified that she obtained the letter to Wally Clark in her mail, which is put through a letter slot in her garage, but that it was not in an

envelope. Mr. Hodges, on the other hand, testified that that he mailed the letter from the jail and that it was in an envelope addressed to Wally Clark and sent to his former address at the house he sublet from Ms. Solomon. Federal law protects mailed matter until it is delivered to the person to whom it is directed or to his authorized agent. 18 U.S.C.A. § 1702 provides:

Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined under this title or imprisoned not more than five years, or both.

The statute protects mail not yet delivered to the addressee or his or her authorized agent, even though the post office has relinquished possession of the mail matter. See, e. g., *United States v. Ashford*, 530 F.2d 792 (8th Cir. 1976) (defendant violated section 1702 by appropriating letter delivered "c/o" defendant, where addressee had not authorized defendant to receive his mail).

Counsel was ineffective by not questioning Ms. Solomon how she acquired the letter addressed and mailed to Wally Clark, and whether she violated federal laws if she opened a letter not addressed to her. Defense counsel needed this opportunity to undermine her credibility and call into question her damaging testimony, but inexplicably failed to do so. There is a reasonable probability that but for defense counsel's failure to impeach Ms. Solomon, the

result of Mr. Hodges' trial would have been different.

Similarly, counsel was deficient for failing to move to exclude the letter. Counsel did not move in limine to exclude the letter and in fact stipulated to its admission, nor did Counsel object when Ms. Solomon later testified in front of the jury regarding the contents of the letter.

Although it was not strictly speaking a governmental intrusion, the government reaped the benefits of the alleged mail theft. Absent statutory authorization, private citizens are not and should not be permitted to take property from other private citizens.

Not only should the admissibility of the letter have been challenged, but the testimony of Ms. Solomon regarding the letter's content should also have been excluded, because the information about which she testified was obtained in violation of federal law and constituted mail theft.

f. Counsel's failure to impeach this crucial witness prejudiced the outcome of the case.

Counsel's failure to engage in reasonable measures to impeach the prosecution's key witness could not have been tactical or strategic. There was simply no reason to not undercut Ms. Solomon's credibility by uncovering and introducing the readily available information casting doubt on Ms. Solomon's veracity.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. *Thomas*, 109 Wn.2d at 226. Ms.

Solomon was an important witness. Juror belief in the credibility was crucial to the State's case. Ms. Solomon was the only person who could testify as to the origin of the letter. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Mr. Hodges "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693.

g. Mr. Hodges received deficient representation when counsel invited the jury to convict Mr. Hodges during closing argument

Counsel's performance fell below objective standards of reasonableness when he essentially invited the jury to convict during closing arguments. Mr. Hodges testified that he just scribbled a name on the signature line of the receipt, which is a practice he utilized when using his Dan Kahen's card to make purchases at home improvement stores. Although the receipt showed an incomprehensible scribble, counsel essentially conceded that it could be a name, and argued to the jury:

He testified in court that it turned out to be –he scribbles his boss' name because he scribbles his boss' name on the credit card at work. And you'll get this, you know, if you -, if you look at this and you say that says "Dean Solomon," *I guess you're going to convict him.* But if you look at this and say that's a scribble, it looks like a "d" and a scribble, then you know he is telling the truth.

3RP at 330 (*emphasis added*).

Mr. Hodges suffered prejudice because counsel's argument effectively

relieved the State of its burden to prove the essential fact of the signature and by conceding it was possible that the name was Dean Solomon instead of “D” followed by a scribble.

Based on this unnecessary and unwarranted concession, Mr. Hodges was denied his constitutional right to effective assistance of counsel, and his convictions should be reversed.

h. Counsel was ineffective by failing to argue that the convictions for possession of a stolen access device and identity theft were the same criminal conduct. Constituted the same criminal conduct

i. Mr. Hodges’ convictions should have been counted as the same criminal conduct at sentencing

An offender score may be reduced if the court finds two or more of the current offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). In order for separate offenses to “encompass the same criminal conduct” under the statute, three elements must therefore be present: (1) same criminal intent, (2) same time and place, and (3) same victim. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589(1)(a). The absence of any one of these prongs prevents a finding of same criminal conduct. *Vike*, 125 Wn.2d at 410.

ii. The intent for both counts coincided where Mr. Hodges used the debit card

In determining whether the criminal intent element of the same criminal

conduct analysis is satisfied, the question is whether the defendant's criminal intent, objectively viewed, changed from one crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). To constitute separate conduct, there must be a substantial change in the nature of the criminal objective. *State v. Calloway*, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985).

As used in this analysis, intent "is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Each crime is not viewed solely on the basis of the statute but in the objective context of the facts of the case. The proper examination focuses on to "what extent did the criminal intent, when viewed objectively, change from one crime to the next." *Tili*, 139 Wn.2d at 123. For example, "the unlawful possession of property taken in a theft is a mere continuation of the thief's act of depriving the true owner of his or her right to possess their property." *State v. Haddock*, 141 Wn.2d 103, 112, 3 P.3d 733 (2000). Here, according to the State's theory, Mr. Hodges' objective intent in possessing the stolen access device and in appropriating Ms. Solomon's identity coincided. Both acts furthered the goal of using the card at the golf course.

The overall objective underlying the acts was to obtain items without having to provide one's own money. Possessing the stolen access device was necessary to and furthered the identity theft. See *State v. Anderson*, 72 Wn. App. 453, 464, 864 P.2d 1001 (1994) (same criminal conduct where defendant would have been unable to commit one crime without the other).

Ms. Solomon, the owner of the card, was the single victim of both offenses. Ms. Solomon's debit card was the object underlying both the possession of stolen property and the identity theft counts. See *Haddock*, 141 Wn.2d at 111 (owner of the property is victim of possession of stolen property).

iii. The possession and identity theft also occurred at the same time and place.

The evidence underlying both counts was that Mr. Hodges used Ms. Solomon's card for putt putt golf. The evidence of possession thus occurred when Mr. Hodges tried to make a purchase with the card at Tower Greens, and the evidence of identity theft also occurred there and then. The time and place, therefore, was precisely the same for each count.

iv. Defense counsel was ineffective for failing to argue same Criminal conduct.

Whether current offenses encompass the same criminal conduct is a question within the sentencing court's discretion. *State v. Tili*, 139 Wn.2d 107,

122, 985 P.2d 365 (1999). But defense counsel must request the court exercise its discretion. See *State v. Jackson*, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (failing to raise same criminal conduct before sentencing court waives argument that sentencing court erred when calculating offender score), rev. denied, 167 Wn.2d 1007 (2009). Here, defense counsel failed to argue same criminal conduct at sentencing and affirmatively adopted the State's calculated standard range.

As a result, counsel waived Mr. Hodges' same criminal conduct argument. Because there was no strategic reason for waiving this argument, defense counsel's performance was defective. No legitimate tactical decision justified counsel's stipulation to an offender score that when there was a possibility the court would have determined a lesser offender score had such a request been made. Even though Mr. Hodges' score is "9+," a finding of same criminal conduct would have at least been supportive of counsel's argument for an exceptional sentence downward. Mr. Hodges need not show counsel's deficient performance more likely than not altered the outcome. *Strickland*, 466 U.S. at 693. He need only show lack of confidence in the outcome. *Thomas*, 109 Wn.2d at 226.

Here, the trial court did not address the same criminal conduct issue at sentencing because Mr. Hodges's attorney failed to ask the trial court to

exercise its discretion in finding same criminal conduct. This Court cannot be confident the trial court would not have concluded the two offenses constituted the same criminal conduct had it been asked to do so. Remand for resentencing is required.

i. Counsel was ineffective in failing to cite relevant case law when requesting a sentence below the standard range.

Mr. Hodges' counsel requested a mitigated sentence, arguing that the amount spent at the Tower Greens was very small, that Mr. Hodges' actions after being approached by Ms. Zimmerman about the card usage and the fact that he remained to play golf do not show that he had knowledge that the card was stolen or that he was not authorized to use it. 7RP at 426. Defense counsel filed a motion for sentence below the standard range on June 7, 2017. The three page motion, however merely cites basic statutory law and gave no concrete basis for an exceptional sentence. CP 161-63. At sentencing, counsel argued that his client's prior criminal history was due to a period of drug addiction, and that he had been crime free for a long period of time. 7RP at 426. Counsel also argued for mitigation based on Mr. Hodges' medical issues. 7RP at 426. The sentencing court rejected this argument and imposed a mid-range sentence: 48 months for count 1 and 26 months for count 2. 7RP at 430.

Defense counsel was unreasonably deficient in failing to recognize and

cite relevant case law regarding mitigation. Counsel had a number of non-statutory mitigation factors he could have used, in particular Mr. Hodges' significant medical issues and his ownership of a gutter business.

As discussed above, counsel is ineffective when his deficient performance prejudices the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. Failure to recognize and cite appropriate case law constitutes deficient performance. *Adamy*, 151 Wn. App. at 588; see also *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law).

The record shows that the court was generally sympathetic to Mr. Hodges' argument and noted that the amount in question was small, that he was with his grandson and used the card to pay for an outing with him, and that Mr. Hodges was not the person who stole the card, that it was more than likely Mr. Clark who committed the theft. 7RP at 430. On this record, it appeared likely that the court could have been persuaded by a more developed argument for a downward sentence. Based on this deficiency performance by trial counsel at sentencing, this Court should reverse and remand for resentencing because Mr. Hodges' counsel was ineffective in failing to argue relevant case law at sentencing regarding an exceptional sentence downward.

j. Trial counsel's deficient performance was

prejudicial to Mr. Hodges

In the case at bar, each among the litany of trial counsel's errors individually prejudiced Mr. Hodges. Viewed as a whole, counsel's cumulative errors are overwhelming. Mr. Johnston's mistakes began shortly after he was retained to represent Mr. Hodges and continued through the trial. Due to counsel's failure to conduct an investigation, Mr. Hodges was denied his right to present three critical witnesses. The same failure to investigate resulted in denying Mr. Hodges his right to adequately present his theory of the case – that he received the card without knowledge that it was stolen. It is sufficiently probable that counsel's errors affected not only the trial outcome. The nature of most of the errors affected substantial rights of Mr. Hodges. These errors are harmless only if the State can show that the mistakes in no way affected the final outcome of the case. The State cannot meet that burden here.

3. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR IDENTITY THEFT IN THE SECOND DEGREE BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT Mr. HODGES KNOWINGLY USED MS. SOLOMON'S FINANCIAL INFORMATION

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119

Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928.

The identity theft statute prohibits the possession or use of a means of identification of another person with the intent to commit a crime. RCW 9.35.020(1). Second degree identity theft involves credit, money, goods, services, or anything else of value less than \$1,500. RCW 9.35.020(2). A “[m]eans of identification” for purposes of the identity theft statute means information or an item that is not describing finances or credit, but is personal to or identifiable with an individual or other person, including a person's name. RCW 9.35.005(3).

The jury was instructed in this case that:

A person commits the crime of identity theft in the second degree when, with intent to commit any crime, he or she knowingly obtains, possesses, or uses, a means of

identification or financial information of another person.

CP 68-88; (Jury instruction 7).

An essential element, then is that Mr. Hodges knew he was using a stolen debit card. Mr. Hodges testified that he obtained the card from Mr. Clark in exchange for alcohol he had left remaining at the party the previous night and told that he could use the card in payment for the alcohol and then return the card. The prosecution argued that Mr. Hodges' messy signature on the receipt somehow proved he was trying to conceal his identity. 3RP at 341-42. Yet, this is weak evidence indeed since no comparative signature was ever introduced into evidence other than from the letter. Moreover, Mr. Hodges testified that that was the same method he used when using his boss Dan Kahen's debit card to make routine purchases for work. The first letter on the receipt could be construed as a "D," just as he signed using his boss's card. The rest is a scribble and does not show indications that the signature was intended to mimic the name on the card. There is no evidence that Mr. Hodges signed Ms. Solomon's name rather than simply a scribble; instead the evidence supports the defense argument that he signed messily without intending to mimic any name. This is insufficient evidence of his knowledge.

Moreover, Mr. Hodges' actions after he was approached by Ms. Zimmerman are entirely consistent with lack of knowledge that the card was

stolen. He testified that after being informed that there was a problem with card, he gave it to Ms. Zimmerman, and instead of rapidly leaving with his daughter and grandson, as would be expected, they leisurely continued to play golf until the police arrived and he called Mr. Clark to find out “what was up” with the card he had been provided to pay for the alcohol.

The State failed to present evidence sufficient to convince a fair-minded fact finder that Mr. Hodges knowingly used a stolen card. Therefore, his conviction for identity theft must be reversed.

4. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. HODGES KNEW THAT THE CARD MR. CLARK GAVE HIM WAS STOLEN

There is also insufficient evidence to support the possession of stolen property conviction. A person is guilty of possessing stolen property in the second degree if he or she possesses a stolen access device.

RCW 9A.56.160(1)(c).

Possessing stolen property means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate

the same to the use of any person other than the true owner or person entitled thereto.

CP 68-88; Jury Instruction No. 13).

As with the identity theft conviction, to support a conviction of second degree possession of stolen property here, the jury had to find beyond a reasonable doubt that Mr. Hodges knew the card Mr. Clark gave him was stolen. As argued above, the State failed to prove beyond a reasonable doubt that Mr. Hodges had that knowledge and therefore, his conviction for second degree possession of stolen property must also be reversed.

5 CUMULATIVE ERROR DEPRIVED MR. HODGES OF A FAIR TRIAL.

Pursuant to the cumulative error doctrine, even where no single error standing alone merits reversal, a reviewing court may nonetheless find the combined errors denied a defendant a fair trial. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine requires reversal where the cumulative effect of otherwise nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 150 (1992).

Under Article 1, section 3 and the Fifth and Fourteenth Amendments, a criminal defendant has the due process right to a fair trial. *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); *State v. Braun*, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). This Court may reverse a conviction when the combined effect of trial errors

effectively denies the defendant his right to a fair trial, even if each error standing alone may not itself warrant a new trial. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). Once the appellant establishes actual error, a reviewing court may then measure the errors' cumulative effect. *State v. Clark*, 143 Wn.2d 731, 771-72, 24 P.3d 1006 (2001).

In this case, each among the litany of errors individually requires reversal of Mr. Hodges' convictions. Should this Court determine, however, that these issues do not individually require reversal, in combination they do.

Taken together, counsel's unreasonable acts and failures to act denied Mr. Hodges a fair trial. See *Blackburn v. Foltz* 828 F.2d 1177 (6th Cir. 1987) (reasonable probability that absent multiple instances of ineffective assistance, jury would have a reasonable doubt as to guilt).

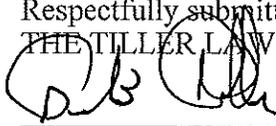
Here, Mr. Hodges contends that each error set forth above, viewed alone, engendered sufficient prejudice to merit reversal. Alternatively, however, he argues the errors, taken together, created a cumulative and enduring prejudice that was likely to materially affect the jury's verdict and the integrity of the verdict cannot be assured. This Court must reverse his convictions and order a new trial.

E. CONCLUSION

For the foregoing reasons, Mr. Hodges respectfully requests this Court reverse his convictions and dismiss, or, in the alternative, reverse and remand for a new trial.

DATED: February 16, 2018.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

ptiller@tillerlaw.com

Of Attorneys for John Hodges

CERTIFICATE OF SERVICE

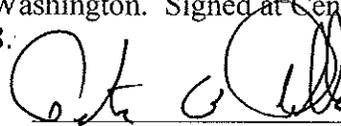
The undersigned certifies that on February 16, 201, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Michelle Hyer, Pierce County Prosecutor and copies were mailed by U.S. mail, postage prepaid, to the following:

Michelle Hyer
Pierce County Prosecutor
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102
PCpatcecf@co.pierce.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. John M. Hodges
DOC #975958
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 16, 2018.



PETER B. TILLER

THE TILLER LAW FIRM

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