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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN M. HODGES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 15-1-04862-9

Brief of Respondent

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

1. Was the knowledge element of defendant's identity theft and possession of stolen property convictions amply proved through evidence he misappropriated the victim's debit card for financial gain and engaged in an elaborate scheme to conceal his guilt?
2. Is the unfair attack on the defense investigation and trial performance improperly based on speculation about efforts and reasoning outside the record as well as predicated on baseless theories of deficiency?
3. Did the trial court properly exercise its discretion in denying defendant's CrR 7.5 motion for a new trial as it advanced the same unsupported theories of error reasserted on appeal?

B. STATEMENT OF THE CASE.

1. Procedure

On December 8, 2015, defendant was charged with identity theft and possession of stolen property in the second degree for using a victim's debit card to make an illegal purchase at a miniature golf course. CP 1-4. He was not charged with stealing the card. *Id.* Michael Maltby was appointed as his

counsel. CP 9. Defendant says Maltby did not investigate. But in January 2015, his investigation into witnesses and evidence was planned. CP 8-9, 27. The record is silent regarding its still confidential results. The State's witness list named Walter Clark—a man defendant claims should have been the subject of a missing witness instruction. CP 215. Clark was the victim's roommate when the charged crimes occurred as well as someone defendant sometimes blames for them. 2RP 175; 3RP 272, 284; Ex.2A. Clark was reportedly unavailable for trial. 2RP 175-76, 197.

A continuance of the trial was granted January 27, 2016, in part to enable Maltby to finish investigating. CP 10. Discovery included a letter defendant sent to the victim's address to induce Clark to testify falsely on defendant's behalf. CP 220; Ex.2A. The victim, Ms. Dean Solomon, found it among her mail after Clark moved out, then gave it to police. 2RP 176-79, 179. Police did not direct that conduct. *Id.* A redacted copy of the letter was admitted without objection. 2RP 178-79; Ex.2-2A.

A March 10, 2016, court order noted the defense investigation was progressing. CP11. Charles Johnson replaced Maltby as defense counsel. Defendant says Johnson's investigative and trial efforts were deficient. A continuance was granted to give Johnson time to prepare and find witnesses. CP 13. Three defense witnesses were named. CP 218. Clark was not among them. Counsel's reasoning is not part of this record; however, defendant

said he tried to induce Clark's assistance through a ruse as Clark would otherwise avoid an incriminating appearance. 3RP 284-85.

A pretrial order declared discovery complete February 7, 2017. CP 230. Although the State mailed Clark a subpoena for a trial date after serving him in Jail for a July 2016, trial date, it does not appear a State's subpoena mailed to him for February 14, 2017, when trial began. CP 222, 225. No explanation is provided. At trial, the State said he was unavailable; Johnston said he was "long gone." 3RP 265. Defendant contends he was incarcerated at the time without citation to the record.

Defendant's guilt was proved through testimony as well as physical evidence that established he knowingly used the victim's stolen debit card to buy a round of miniature golf and signed her name to the receipt without her permission.¹ Defendant fired Johnston after the verdicts, then retained Simkins to file a CrR 7.5 motion for a new trial. It was based on defendant's unsigned affidavit, letters defendant filed pro se and inferences drawn from his documents. CP 153. Those materials advanced yet another account for how he received the debit card. *Id.* A 48 month prison sentence for the identity theft conviction was imposed with a concurrent 22 month sentence for possessing stolen property. *Id.* It was based on an offender score of 11

¹ *E.g.*, 2RP 164-73, 206-14, 225-33; 3RP 284-85, 292-95; Ex.1; 2A.

for convictions including theft. CP 164. At the time of the crimes on review, he was a 54-year old who had been committing acts of criminal dishonesty since at least 1996. *Id.*

2. Facts

On December 5, 2015, Ms. Dean Solomon was preparing to pay bills when she discovered only \$3.00 remained of the roughly \$800.00 supposed to be in an account funded by Social Security for her disability. 2RP 159-64. She had been saving for Christmas. 2RP 164. Her account was accessed with a debit card she believed to be in her truck. 2RP 165-66, 170-72. A review of her account revealed fraudulent transactions at an ATM, the Good Will and a Fred Meyer. 2RP 185. A \$20.00 purchase at a miniature golf course in Tacoma had just cleared. 2RP 166-67, 206, 221; Ex. 1. Solomon called the course to report that theft; and on being told the man who used the card was there, she called 911. RP 165-67.

Defendant used her card to buy a round of miniature golf for himself, his daughter, and grandson.² The cashier who processed the sale recalled a man, later identified as defendant, pulled the card from a pocket different from the one in which his wallet was carried. 2RP 212. Defendant was still

² 2RP 212, 214, 223, 226-227, 273-75.

on the course as police arrived. 2RP 223-25. Officer Jahner told him he was being contacted about a stolen credit card. 2RP 225. Defendant responded:

[H]e was going to call a Wally Clark who lived at 3412 North 31st Street, who gave [defendant] the card because [Clark] owed [defendant] \$50 to \$60.

2RP 225. No mention was made of defendant receiving the card from “Ed,” which defendant urged Clark to falsely claim in a letter intended to induce perjury. Ex.2A; 3RP 285. Nor did defendant mention he allegedly received the card from Clark in trade for alcohol, yet that was defendant’s testimony at trial. 2RP 225; 3RP 272.

When Jahner asked why defendant signed the receipt with a cursive “D” seemingly signing “Dean,” defendant said he scribbled a name without looking at the card. 2RP 228-229, 233; Ex.1. Yet in a letter defendant urged Clark to falsely say “Ed” gave defendant the card with directions “to sign Dean Solomon on any receipt.” Ex.2A; 3RP 290-91. At trial, defendant shifted to saying his scribble approximated the signature of his alleged boss Dan Kuchan, despite the absence of a link between Kuchan and Solomon’s card. 3RP 289-93. Kuchan was absent from the version defendant gave Jahner. 2RP 225. A version in defendant’s CrR 7.5 motion asserts Solomon gave Clark her card with pin for methamphetamine. CP 154.

Solomon tried to discover how her account had been compromised since she was under the misbelief the card was in the truck parked three feet

from her bedroom window. 2RP 170. Solomon had yet to shed less security-minded habits acquired from life in an area less affected by crime. 2RP 188. She found her truck's door lock had been punched. 2RP 172. Her driver's license, debit card with pin, and check book were gone. 2RP 171-72. Cash for a nonprofit was missing. 2RP 175. As was an unendorsed social security check her then roommate Walter Clark used for rent. 2RP 173-75, 198-99.

Clark moved into Solomon's spare room a month before the crimes. 2RP 159-60. He was vetted through a social worker and landlord. 2RP 184. He was evicted for failing to pay rent roughly two weeks after the crimes. 2RP 175-76. At trial, Solomon said she had not seen Clark since he moved out, she had no contact with him and did not know where he was. 2RP 175-77, 179, 197. A few weeks following his departure Solomon found a folded envelopeless letter addressed to Clark had been dropped into her garage-letter slot with her mail. 2RP 177-79, 197; Ex.2A. As Solomon had no way of contacting Clark, she turned the letter over to police. *Id.*

A copy of the letter with prejudicial text redacted by agreement was admitted. 3RP 179-83. At trial, defendant admitted it was written to commit a fraud on the court by inducing Clark to blame "Ed" for giving defendant Solomon's card. 3RP 280, 285, 294-95. Defendant said, "Ed" would not have minded lying for defendant in court. 3RP 295. The letter was addressed to "Wally," dated "January 7, 2016, and states:

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 till 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? ... 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," ...

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 182-83 (emphasis added).

At trial, defendant said he first met Clark when “Ed” picked Clark up at a motel en route to a party. 3RP 262. Yet defendant told Officer Jahner Clark’s address, which was where the letter suborning Clark’s perjury was sent. 2RP 177-79, 197, 225. Materials defendant sent to support his CrR 7.5 motion reassert he met Clark once when he was picked up at a motel. Ex.2A; CP 105-06. According to defendant, Clark let defendant use Solomon’s card up to the value of alcohol Clark bought from defendant. 3RP 272. Added to those odd-inconsistent accounts and defendant’s admitted effort to commit fraud upon the court, his credibility was impeached by his recent crimes of dishonesty—theft and possession of stolen property. 3RP 258-59.

C. ARGUMENT.

1. THE RECORD READILY PROVES DEFENDANT KNOWINGLY COMMITTED IDENTITY THEFT AND POSSESSION OF A STOLEN ACCESS DEVICE AS IT ESTABLISHES HE PURPOSELY SIGNED THE VICTIM’S NAME TO A RECEIPT FOR AN ILLEGAL DEBIT CARD PURCHASE HE ATTEMPTED TO LEGITIMIZE THROUGH GUILTY CONSCIENCE BETRAYING PERJURY.

If a defendant creates false favorable evidence, proof of it supports an inference of guilt. *State v. Constantine*, 48 Wash. 218, 221-22, 93 P. 317

(1908); *State v. Sanders*, 66 Wn.App.878, 884, 833 P.2d 452 (1992). Direct and circumstantial evidence are equally reliable. See *State v. Moran*, 181 Wn.App. 316, 321, 324 P.3d 808 (2014); *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127 (1954). The prosecution need not rule out every hypothesis except guilt. *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1992). Courts presume juries resolved conflicting inferences in favor of the State, so its evidence with all reasonable inferences from it are accepted as true. *State v. White*, 150 Wn.App. 337, 342, 207 P.3d 1278 (2009).

Defendant challenges the knowledge element of his convictions. His arguments should fail. A person acts with knowledge of a fact when he is aware of it or has information that would lead a reasonable person in the situation to believe that fact exists. RCW 9A.08.010(b); CP 78.

a. Defendant knew he stole his victim's identity for personal gain.

To convict defendant of identity theft in the second degree the State proved he knowingly used a means of identification or financial information of another person with intent to commit a crime. RCW 9.35.020(1); CP77. Defendant (John Hodges) used a debit card bearing Dean Solomon's name to make a purchase knowing the card did not belong to him. The evidence viewed most favorably to the State is he scribbled "Dean" on a receipt, falsely asserting, or at least implying, he was the "Dean" named on the card.

When confronted by an officer, defendant said he did not look at the card before signing a name *coincidentally* matching the name it bore. Defendant apparently knew better than to sign “Wally Clark,” even though Clark is the man who allegedly traded the card. Jurors were free to interpret defendant’s impromptu excuse as a lie that betrayed his consciousness of guilt.

That perception was no doubt reinforced by defendant’s later effort to enlist Clark in an elaborate act of perjury to explain why defendant signed “Dean” to the receipt, *i.e.*, a man named “Ed” (who defendant named Dean Solomon) told defendant to do so. Ex.2A. When the gambit failed, he shifted to testifying he did not sign “Dean” but an approximation of “Dan,” because an alleged “boss” named “Dan” let defendant sign a variant of Dan’s name to make purchases for Dan’s business with Dan’s credit card.

A guilty conscience is inferable from defendant’s inconsistencies and elaborate effort to suborn perjury. While possession of the card is alone insufficient to prove guilty knowledge, it can be proved through possession plus slight corroborating evidence like improbable or false explanations. *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 815 P.2d 1362 (1991); *State v. Ladely*, 82 Wn.2d 172, 175, 509 P.2d 658 (1973).

Defendant’s challenge to his identity theft conviction depends on an irrelevant disagreement with the jury’s rejection of his testimony; efforts to fabricate evidence stacked upon a history of criminal dishonesty can have

that effect. The jury was free to disbelieve him. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). His well-supported verdicts should be affirmed. *E.g.*, *State v. Fedorov*, 181 Wn.App. 187, 195, 324 P.3d 784 (2014); *State v. Sells*, 166 Wn.App. 918, 925, 271 P.3d 952 (2012).

b. Defendant knew he unlawfully possessed the victim's debit card.

To convict defendant of possession of stolen property in the second degree the State adduced evidence defendant knowingly received, retained or possessed a stolen access device knowing it was stolen and withheld or appropriate it to the use of a person other than the one entitled thereto. RCW 9A.56.160(b)(c); CP 83. A person can be presumed to know a fact if he has information that would lead a reasonable person to believe it exists. CP 78.

The version of events defendant ventured at trial was Clark, a man defendant just met at a motel, loaned him Dean Solomon's debit card for use up to the value of alcohol defendant gave Clark. No reasonable person would believe it lawful to possess or use a debit card belonging to a person other than a stranger who offered it in trade for alcohol. That defendant did not sign Clark's name to the receipt betrays defendant did not assume the card belonged to Clark. Reasonable people do not use a third party's debit card without that party's permission, if at all. They would not accept as valid

permission an invitation to use extended by a bartering stranger to the card who offered use of it in trade. See *Ladely*, 82 Wn.2d at 175.

Excuses so improbable from defendant—a 54-year old with theft convictions and experience using debit cards, combined with the recency of the debit card's theft, were proof enough to convict him absent the added proof of lies he tried to defeat his charges. See *State v. Rockett*, 6 Wn.App. 399, 402-03, 493 P.2d 321 (1972); *State v. Beck*, 4 Wn.App. 306, 310, 480 P.2d 803 (1971) (improbable alibi); *State v. Claassen*, 131 Wash. 596, 601, 230 P. 825 (1924). He again improperly attacks the verdict with inferences from his own absurd—already rejected—theories of innocence.

2. THE UNFAIR ATTACK UPON THE DEFENSE INVESTIGATION AND TRIAL PERFORMANCE IS IMPROPERLY BASED ON SPECULATION ABOUT EFFORTS AND REASONING BEYOND THE RECORD AS WELL AS PREDICATED ON BASELESS THEORIES OF DEFICIENCY.

Courts engage in a strong presumption counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Ineffective assistance of counsel must be proved by more than a petitioner's self-serving allegations. See *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 451, 28 P.3d 729 (2001); *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). Defendants are burdened to prove ineffective assistance from the record. *McFarland*, 127 Wn.2d at 335. Courts reviewing the claim

in an appeal will not consider matters outside the record. *Id.* An inadequate record precludes review. *State v. Vazquez*, 66 Wn.App. 573, 583, 832 P.2d 883 (1992); *State v. Locati*, 111 Wn.App. 222, 226, 43 P.3d 1288 (2002).

To prevail on an ineffective assistance of counsel claim, a defendant must prove counsel's performance was deficient and the proven deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994)(citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Counsel is only constitutionally deficient if her presumptively reasonable representation is demonstrated to fall below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 335; *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

To rebut the presumption, defendants must establish the absence of any conceivable legitimate explanation for counsel's conduct. *See Id.* at 42. Prejudice only exists if there is a reasonable probability the result of the trial would have been different but for counsel's deficient performance. *See State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986); *State v. Neff*, 163 Wn.2d 453, 466, 181 P.3d 819 (2008).

- a. Defendant's attack on pretrial investigation conducted by counsel is based on supposition not a record of the investigation completed or strategic choices counsel made.

Our Supreme Court never held competent counsel must conduct an investigation. *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010). Counsel must undertake reasonable investigation or reasonably decide particular investigations are unnecessary. *Strickland*, 466 U.S. at 691. Scrutiny of the choice is deferential. *Id.* The investigation required depends on each case. *A.N.J.*, 168 Wn.2d at 111. Counsel need not scour the globe on the off chance something will turn up. *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S. Ct. 2456 (2005); *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527 (2007). She must evaluate the evidence and likelihood of conviction. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985); *A.N.J.*, 168 Wn.2d at 111.

Reasonably diligent counsel may draw a line when there is reason to think further investigation would be wasteful. *Beard*, 545 U.S. 374, 383. That useful evidence might have come from pressing on is not enough to prove deficient performance for perfection is not the standard. *State v. Adams*, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978); *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974). The significance of alleged omissions cannot be assumed. *McFarland*, 127 Wn.2d at 335; *State v. Jury*, 19 Wn.App. 256, 265, 576 P.2d 1302 (1978). An inadequate record precludes review. *Vazquez*, 66 Wn.App. at 583; *Locati*, 111 Wn.App. at 226.

The claim of deficient investigation is predicated on unwarranted inferences from alleged omissions. Several filings mention counsel's plans for investigation, which included examining physical evidence, searching for witnesses and interviews. *Id.* Keeping with defendant's CrR 4.7(b) and (f)(1) protections, attorney-client privilege and maybe the right against self-incrimination, the results of those efforts were not divulged. There is no way to assess the investigation's extent or reason for any omissions. On appeal, defendant identifies unpursued lines of defense, then assumes without proof the investigation missed evidence favorable to his defense.

Defendant must prove the investigation deficient. Yet he did not call upon trial counsel to account for his conduct at the CrR 7.5 hearing. Instead, defendant cites to his unsigned CrR 7.5 affidavit. He apparently relies on handwritten letters he filed without regard for his earlier effort to fabricate evidence. Ineffective assistance must be proved by more than self-serving accusations. See *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 451, 28 P.3d 729 (2001). *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). Defendant cannot fill evidentiary voids by repeatedly quoting himself. *Id.*; *In re Pers. Restraint of Reise*, 146 Wn.App. 772, 789, 192 P.3d 949 (2008). Corroborating testimony from his harshly disparaged counsel is required for defendant's claims against counsel to prevail.

Defendant says counsel failed to track down proof of who stole the debit card and withdrew funds from the account before defendant took his turn. Yet defendant was not charged with those crimes. CP 1; 3RP 337. Proof they were committed by Clark or another would not alter the proof of defendant's parasitic misuse of the card when it came into his possession. Nothing in the record proves counsel neglected to discover who committed the uncharged crimes. The answer could have derailed the defense.

Citing his unsworn affidavit, defendant alleges there are emails that Clark sent to defendant's first lawyer; wherein, Clark declared willingness to exculpate defendant. That is precisely what defendant asked him to do through the letter defendant used to induce perjury. Ex.2A. Their existence remains unknown, for they were not made part of the record. Defendant's self-serving assertions about them or what counsel failed to do with them is not proof of deficiency. *State v. Cervantes*, 169 Wn.App. 428, 282 P.3d 98 (2012). Credible corroboration is required. *Id.*

If trial counsel knew about them, there would be a strategic reason not to secure them in light of defendant's discovered effort to induce Clark to perjure himself through letters directed to defendant's first lawyer as well as to keep Clark off the defense witness list. For once trial counsel had them in his possession and endorsed Clark as a witness, counsel's CrR 4.7(b) duty to disclose them to the State would activate. Disclosing to the State more

potential proof of defendant's witness tampering would have followed. As the emails were hearsay, they were not admissible as substantive evidence. ER 801-802. Use of them would be limited to impeach Clark if he accused defendant from the witness stand. ER 613. Because defendant neglected to produce Counsel's CrR 7.5 testimony or affidavit, his strategy, if any, regarding these issues remains unknown. He may have known the omitted evidence was harmful to the defense, or could not be obtained or presented. For the same reasons outcome determinative prejudice has not been shown.

- b. Defendant's attack on counsel's decision not to call three witnesses wrongly assumes they could have been called and would have given useful testimony without committing perjury.

Omission of a witness typically is not ineffective assistance. *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987). Counsel's decision to avoid a witness is considered a legitimate tactic absent *proof* of inadequate investigation. *State v. Byrd*, 30 Wn.App. 794, 799, 638 P.2d 601 (1981). If counsel is stultified by post-trial scrutiny of the myriad choices she must make in a trial: "whether to put some witnesses on the stand and leave others off" she will lose the freedom essential to skillful representation. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 735, 16 P.3d 1 (2001).

Counsel is not obliged to pursue doubtful strategies. *State v. Brown*, 159 Wn.App. 366, 371-72, 245 P.3d 776 (2011). It is reasonable for counsel

to hold the State to its burden instead of reaching to prove innocence. *See State v. Cantu*, 156 Wn.2d 819, 328, 132 P.3d 725 (2006); *State v. Israel*, 113 Wn.App. 243, 271, 54 P.3d 243 (2002). The choice often turns on nuanced predictions about the demeanor of an available witness, *e.g.*,

[T]he expressions of h[er] countenance, how [s]he sits or stands, whether [s]he is inordinately nervous, h[er] coloration during critical examination, the modulation or pace of h[er] speech and other non-verbal communication.

In re Detention of Stout, 159 Wn.2d 357, 383, 150 P.3d 86 (2007). Experienced trial lawyers know testimony may appear favorable on paper only to appear harmfully fabricated or suborned from the stand. *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). Counsel cannot knowingly call witnesses intending to commit perjury. APR 5; RPC 3.1; *Matter of Kerr*, 86 Wn.2d 655, 663, 548 P.2d 297 (1976). A defendant must prove an uncalled witness would have been outcome determinative based on more than conjecture or inadmissible hearsay. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886-87, 828 P.2d 1086 (1992).

Defendant contends that counsel was deficient in not calling Clark, defendant's daughter, and miniature golf course manager, Zimmerman, to testify. The record refutes that contention. Beginning with Clark, the stated reason for his absence was unavailability.³ At trial, defendant explained the

³ 2RP 175-76, 179, 197; 3RP 264-65.

perjury he hoped to adduce from Clark by assuring Clark he could lie about his own culpability. 3RP 284-85. Counsel could not have aided defendant in that deception. If Clark was called, an invocation of his right against self-incrimination was not in counsel's power to overcome. *State v. Carlisle*, 73 Wn.App. 678, 679, 871 P.2d 174 (1994). It is conceivable Clark would have responded by corroborating the case against defendant. A safer strategy was for defendant to attribute defense-corroborating hearsay, or its equivalent, to Clark, which is what counsel was mostly able to do. 3RP 264-72.

Like uncertainty prevents defendant from proving a deficiency in counsel's midtrial decision against calling defendant's daughter. Without citation to the record, defendant says she would have rebutted the police. The record only shows she grew upset, then left the miniature golf course with her son. 2RP 214. It is unclear if she was upset to discover her recidivist father took them out with a stolen card or thought he had been mistreated. Defendant neglected to adduce her statement at the CrR 7.5 hearing.

Because defendant also failed to adduce one from trial counsel, the reason for the absence of defendant's daughter is unknown. Her placement on the defense witness list in the context of counsel's remarks about the defense evince a strategic omission decided amid a privileged conversation

with defendant. CP 221; 2RP235-37.⁴ Perhaps counsel had reason to believe she would not be helpful. Favorable testimony from her was impeachable as biased while negative testimony might have been heavily weighted.

Defendant asserts miniature-golf manager Zimmerman would have refuted Officer Jahner's account of seizing the debit card from defendant by testifying she took the card. On appeal, the only cited record of that version is defendant's own unsigned CrR 7.5 affidavit.⁵ That motion refers to: "Exhibit 3, Declaration of ... Zimmerman," which was not attached nor has such an exhibit been cited in the opening brief, so it does not appear to exist. Moreover, how the card was seized is immaterial to defendant's guilt. For it would not change his signing "Dean," to the receipt for a card bearing the name "Dean Solomon," or his effort to excuse that act through perjury.

⁴ 2RP 235-36 ([Court]: "So your witnesses are lined up for tomorrow?" [Johnson] "Morning, yes."); 237 ([Court] "So you've got one or more witnesses. Who do you have, Mr. Johnson." [Johnson] "Your Honor, we are – **based upon the testimony, I am going to talk to my client**, and we are going to have his daughter that was there – and I don't think we need her now based upon the testimony, **but I have got to talk to him about that**. We were also going to have a lady perhaps testify that was at the party that night, but again, based upon the testimony, I am not sure we need her either, **but I have to talk to my client about that**. And my client may or may not testify....") (emphasis added).

⁵ Def. Br. pg. 28 (citing CrR 7.5 motion at 4-5; CP 156-57).

- c. Defendant's attack on counsel's decision not to request a missing witness instruction to profit from Clark's absence is based on facts outside the record and otherwise meritless.

An ineffective assistance claim predicated on counsel not seeking a missing witness instruction depends on proof defendant was entitled to it, the omission was deficient and prejudiced the defense. *State v. Johnston*, 143 Wn.App. 1, 21, 177 P.3d 1127 (2007). The instruction “should be used sparingly.” *State v. Houser*, 196 Wn.App. 486, 493, 386 P.3d 1113 (2016).⁶ It permits juries to infer a missing witness would have testified against the case of a party who could have called her and naturally would have called her for favorable testimony. *Id.* at 491. Here, issuance turns on five factors:

(1) the absent witness is particularly within the [state's] ability to produce, (2) the missing testimony is not merely cumulative, (3) the witness's absence is not satisfactorily explained, (4) the witness is not incompetent or his testimony privileged, and (5) the testimony does not infringe on the defendant's constitutional rights.

State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Even if these factors are achieved, the instruction should be withheld if the witness's testimony would be self-incriminating. *Houser*, 196 Wn.App. at 492, n.11⁷

⁶ Quoting 1 Washington Practice: Washington Pattern Jury Instructions: Criminal 5.20 note on use at 177 (3d ed. 2008).

⁷ Citing *State v. Blair*, 117 Wn.2d 479, 489–90, 816 P.2d 718 (1991); *State v. Gregory*, 158 Wn.2d 759, 846, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

Defendant cannot prove entitlement to a missing witness instruction. The record appears silent as to whether Clark was particularly within the State's control. Without citation to the record, defendant claims Clark was known to be incarcerated, therefore available for service. But when Clark's absence was raised at trial the prosecutor said he "is not available to testify." 3RP 264. Counsel concurred, stating he was "long gone." 3RP 265. The victim said as much. *Id.*; 2RP 175-76, 179, 197. Irrespective of Clark's availability, defendant's claim to a missing witness instruction predicated on Clark's absence is defeated by defendant's representation that Clark would have to incriminate himself to testify truthfully:

[Counsel] Had you reached the conclusion that Wally Clark had stolen this credit card from Ed ...?

[Defendant] Yes.

[Counsel] Okay. So why don't you write a letter to Wally saying, "You bad guy. You got me in trouble by giving me this credit card that you stole from Dean Solomon who you thought was Ed"?

[Defendant] That -- in my mind, that wasn't going to do any good but spook him. He is not going to come say, "I stole the card," and tell and admit that he gave it to me, whatever and release me. ...

3RP 284-85. On appeal, defendant cites to his unsworn claim Clark was willing to admit his guilt and failure to disclose the card's theft to defendant. Def.Br. 27 (citing CP 154). Of course, this claim could be yet another one of defendant's uncorroborated lies.

Witnesses should be advised of their right against self-incrimination if there is reason to know their testimony may subject them to prosecution. *Carlisie*, 73 Wn.App. at 679. If Clark invoked, defendant was unable to overcome it with a grant of CrR 6.14 immunity. *Id.* Independent evidence of defendant's illegal use of the card joined with the absence of charges for its theft or prior misuse of it to remove any reason for the State to enable immunity for Clark's testimony. An ineffective assistance claim cannot be based on an instruction defendant was ineligible to receive.

- d. The attack on counsel's inquiry of the victim about discovering defendant's effort suborn perjury and absence of a motion to exclude his fraud assumes more could be done.

Competent counsel need not raise every point however frivolous, damaging or inconsequential that a defendant deems important. *Stenson*, 142 Wn.2d at 734. Choice of trial tactics, actions to be taken or avoided and methodology to be used rest in counsel's judgment. *Id.* Failure to raise all possible nonfrivolous issues likewise is not ineffective assistance. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004). Deciding which issues may lead to success is counsel's role. *Id.*

Defendant's challenge to the scope of counsel's cross-examination of the victim (Solomon) relies on speculation that Solomon testified falsely about the envelopeless condition of the letter defendant sent Clark to induce

his perjury. “Decisions on how to conduct cross-examination are strategic.” *State v. Stockman*, 70 Wn.2d 941, 945, 425 P.2d 898 (1967); *In re Pers. Restraint of Morris*, 189 Wn.App. 484, 501, 355 P.3d 355 (2015). The extent of cross must be quickly decided in the heat of conflict. *Id.*

Defendant argues Solomon’s credibility needed to be attacked as to whether she truly found the letter defendant wrote to suborn perjury mixed among her mail without an envelope on her garage floor. No suggestion of how to effectively pursue that line of impeachment is made. The omission is understandable, for despite the CrR 7.5 hearing defendant is still without evidence showing Solomon lied. Defendant is faulting his trial counsel for not developing impeachment defendant has yet to marshal.

He relies instead on jail policies regarding how mail is sent from that facility. His letter from the jail shows it did not maintain records of outgoing mail. CP 111. It remains possible defendant mailed the letter to a third party directed to drop it into Solomon’s mailbox without the jail envelope in an effort to create plausible deniability for defendant. Such a tactic would be analogous to inmates using three-way calls to conceal calls to accomplices or protected parties. *United States v. Williams*, 590 F.3d 616 (8th Cir. 2010).

Without proof to refute Solomon’s testimony, additional cross-examination would have devolved into a futile quarrel she could have ended by denying the accusations defendant makes. Most trial lawyers know better

than to challenge irrefutable testimony or argue with witnesses, especially sympathetic ones like victims with whom jurors would relate.⁸ As Solomon, unlike defendant, was not a prolific perpetrator of dishonest crimes it was sound for counsel to pursue a strategy that did not entail attacking her with unprovable accusations of misconduct.

Defendant says it was deficient for counsel not to press for exclusion of the letter aimed at suborning perjury. Without proof, defendant asserts Solomon's handling of the letter violated federal law. Counsel must refrain from frivolously accusing people of crimes or attacking with argumentative innuendo. *See* RPC 3.1; CR 11; ER 611; *State v. Miles*, 139 Wn.App. 879, 886, 167 P.3d 879 (2007). There is no legal basis for exclusion as Solomon was a civilian who handled the letter without direction from the State. *City of Pasco v. Shaw*, 161 Wn.2d 450, 459, 116 P.3d 1157 (2007). Defendant fatally failed to present authority in support of his novel theory of exclusion. *City of Bellevue v. Raum*, 171 Wn.App. 124, 149, 286 P.3d 695 (2012).

⁸ *E.g.*, Stephen D. Easton, Irving Younger's Ten Commandments of Cross-Examination: A Refresher Course, with Additional Suggestions, 26 Am. J. Trial Advoc. 277, 296 (2002). You should not ask any question unless you have some way to establish the correct answer. *Id.* at 300. "Although competitiveness is a necessary component of the trial attorney's personality, you must control it. When a witness is testifying in a manner that you are certain is untruthful, there will be part of you that wants to beat her (rhetorically of course, not physically). Resist that temptation. If you get into arguments with the witness, the jury will almost certainly side with the witness." *Id.* at 318.

- e. Counsel's effort in closing to persuade jurors to acquit based on a favorable interpretation of the evidence did not invite conviction.

Conceding the probable verdict to attend an adverse determination of a material fact can be sound strategy. See *State v. Silva*, 106 Wn.App. 586, 596, 24 P.3d 477 (2001). For it may win the jury's confidence by portraying the defense as fearlessly confronting a difficulty in the case. *Id.* at 596 n. 37. Strategic concessions are not deficient. *State v. Hermann*, 138 Wn.App. 596, 605, 158 P.3d 96 (2007). For it is in structure and emphasis and rhetoric that advocates complete their mission of persuasion. *Com v. Hudson*, 455 Pa. 117, 124, 314 A.2d 231 (1974). Comments made in summation are reviewed in the argument's entire context. *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003).

Defendant's jury was rightly instructed on its duty to return a verdict by applying the court's instructions to the evidence and that the remarks made by counsel are not evidence. CP 69-70. Counsel's argument advanced a theory of innocence based on defendant's alleged ignorance the card was stolen and what counsel cast as defendant conduct inconsistent with guilt. 3RP 322-36. Counsel concluded: "You cannot find him guilty" 3RP 336. The remark dubbed deficient was a false choice aimed at acquittal:

When the officer showed him the receipt and said, "Well, that looks like a D to me," and again, spontaneous. [Defendant] said, "I didn't know the name that was on that card. I scribbled a name on it." [Defendant] testified in court

that it turned out to be -- he scribbles his boss's name because he scribbles his boss's name on the credit card at work. And you'll get this [Ex.1]. 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, looks like a D and a scribble, then you know [defendant] is telling you the truth. You know [defendant] is telling you the truth. You'll have that [Ex.1] back there, and you all can study that as long as you can. That does not say Dean Solomon.

3RP 329-30 (emphasis added); *State v. Miles*, 139 Wn.App. 879, 890, 162 P.3d 1169 (2007) (false choice adverse verdict could only be reached if a singled-out portion of the evidence was believed).

The choice is false as it was never asserted defendant signed the full legal name "Dean Solomon" to the receipt, yet counsel frames conviction as dependent on finding he did. Acquittal was the likely result of accepting the choice, for it raised an artificial threshold for conviction beyond the elements that he was confident the evidence did not meet. The jury was free to find defendant's guilt from any other persuasive fact or combination of facts that satisfied the charged crimes' elements. There is no way the false choice was outcome determinative if construed against the defense it was tailored to serve. *State v. Bonisisio*, 92 Wn.App. 783, 797-98, 964 P.2d 1222 (1998) (counsel's inadvertent request for the jury to convict not prejudicial).

- f. Defendant failed to establish counsel was ineffective in not arguing that the convictions be scored as same criminal conduct.

Same criminal conduct” is applied narrowly to disallow most same conduct claims, which defendants are burdened to prove. *State v. Valencia*, 2 Wn.App.2d 121, 125, 416 P.3d 1275 (2019). Crimes are deemed same conduct if they involve the same criminal intent and committed against the same victim at the same time and place. If any elements is not met, the court cannot count two or more crimes as one to compute criminal history. *Id.*

Same criminal intent requires a continuing, uninterrupted sequence of conduct. *State v. Munoz-Rivera*, 190 Wn.App. 870, 889, 361 P.3d 182 (2015). The element is defeated by proof an offender had time to pause, reflect, and either cease or proceed to commit a further crime. For it proves the formation of new intent to commit a second act. *Id.*

Evidence in this case shows defendant took possession of the card the night before he used it to steal Solomon’s identity and money to play miniature golf. Any time before converting her funds he could have turned her card over to authorities or her bank. *E.g., State v. Young*, 97 Wn.App. 235, 244, 984 P.2d 1050 (1999). His theft entailed intent to commit a crime by means of the card’s possession or use; whereas, the possessory offense differently turned on him withholding it from the victim knowing it was stolen. *State v. Tresenriter*, 101 Wn.App. 486, 497, 4 P.3d 145 (2000).

The same time element is met if crimes occur amid a continuous transaction or in a single, uninterrupted episode over a short period of time. *Young*, 97 Wn.App. at 240. The record showed Solomon's card was stolen from her a day before defendant misused it for personal gain. According to him, he received it for alcohol the night before. So the same time element fails. The same place element fails as he took possession of the card at a place different from the course where he used it to steal Solomon's identity. It is defendant's burden to prove the same victim element, but the record is silent as to whether the course lost revenue from the fraud. Counsel would not be deficient in avoiding inquiries that might trigger a restitution debt.

The claim of deficiency is defeated by defendant's inability to prove it would have been an abuse of discretion to score his crimes separately over a motion for them to be treated as one. He is also too prolific a recidivist to prove prejudice. Tallying both his crimes as one point would have reduced his offender score from 11 to the still maxed-out score of 9+.

- g. Defendant failed to prove counsel ineffective in not presenting authority defendant himself failed to identify in support of the request for a downward sentencing departure based on facts defendant perceives to be mitigating.

Generally, defendants are not entitled to challenge an imposition of sentence within the standard range. *McFarland*, 189 Wn.2d at 56. To secure review through an ineffective assistance claim a defendant must prove both

that counsel failed to cite controlling authority and its absence probably affected the result. *State v. Hernandez-Hernandez*, 104 Wn.App. 263, 265, 15 P.3d 719 (2001). Presentation of authority sufficient to apprise a court of the law binding or guiding its decision is proficient performance. *See Id.*

Defendant vaguely contends counsel was deficient for not citing *relevant* mitigation cases to argue the motion counsel filed in support of an exceptional sentence. Yet defendant's failure to find those cases ought to preclude review. *Raum*, 171 Wn.App. at 149. Counsel need not cite every relevant case on the books, or even most of them. Relevance is a minimal logical connection tending to make propositions more or less true. *See ER 401*. Effectiveness requires citation to *controlling* authority. *Hernandez*, 104 Wn.App. at 265. Authority is controlling if courts are bound to follow it or it dictates a result. *State v. Pedro*, 148 Wn.App. 932, 950, 201 P.3d 398 (2009). Imposition of exceptional sentences is controlled by RCW 9.94A.535 and interpretations given to it by Washington's appellate courts.

Defendant indirectly concedes the motion filed by counsel cited the controlling statute. The motion framed the utility of a downward departure according to the RCW 9.94A.010(1)'s call for sentences proportionate to crime and RCW 9.94A.010's call for frugal use of public resources. CP 94. It was supplemented by oral argument at the hearing. 3RP 259; 7RP 425. The trial court responded by sentencing defendant to the low end despite

the State's high-end recommendation. 7RP 429-30. Among the reasons the court declined to impose the exceptional sentence were defendant's ongoing misdemeanors. *Id.* Also, rightly, relevant to the court was his willingness to commit fraud against it to avoid accountability. 7RP 429. And that his guilty knowledge for the crimes was "apparent" to the court from the signature he signed to the receipt. *Id.* Nothing in illustrative cases regarding how other courts sentenced other offenders based on mitigating factors applicable in those cases would change the reasons defendant's sentence. This ineffective assistance claim is consequently as meritless as the rest, leaving defendant's claim of cumulative error without support.

3. THE TRIAL COURT RIGHTLY EXERCISED ITS DISCRETION BY DENYING THE FRIVOLOUS CrR 7.5 MOTION DEFENDANT FILED DUE TO THE UNWARRANTED INFERENCES IT DREW FROM HIS OWN SELF-SERVING HEARSAY AND MATTERS BEYOND THE RECORD TIED TOGETHER BY UNSOUND LEGAL THEORIES, IN OTHER WORDS; IT WAS AN ABRIDGED VERSION OF HIS MERITLESS APPEAL.

The granting of a new trial involves the relationship and function of the trial judge, jury and appellate courts. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). A fine balance must be struck so any one does not unduly usurp the functions of the others while giving each latitude to fulfill its own function. *Id.* Trial courts should not interfere with the jury's weighing of evidence or credibility. *State v. Skinner*, 111 Wash. 435, 438,

191 P. 148 (1920). Denial of a new trial will be affirmed absent an abuse of discretion. *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996).

A new trial should not be granted if none of CrR 7.5's enumerated grounds are proved. *State v. Williams*, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). The same is true of CrR 7.5 motions based on matters beyond the record. *State v. Bandura*, 85 Wn.App. 87, 93, 931 P.2d 174 (1997). A defendant's hearsay about what witnesses would say is not enough. Their affidavits or comparable evidence must prove substantial prejudice. *State v. Reynoldson*, 168 Wn.App. 543, 547, 277 P.3d 700 (2012).

The trial court rightly denied defendant's CrR 7.5 motion. 7RP 419-29. It was built upon the same defendant hearsay underlying his appeal. CP 153-56. It referenced nonexistent exhibits and invoked CrR 7.5(a)(4)—accident or surprise, to claim testimony from an officer and clerk to whom defendant passed the stolen card “convoluted the true sequence of events” apparently in its deviation from defendant's convoluted web of conflicting averments and admitted lies about events. CP 158. He also cites to Clark's absence assuming without proof he could have been found and would have done more than invoke his right to silence, corroborate defendant's guilt or prove defendant's effectiveness in suborning perjury.

Elsewhere defendant attacked the police investigation, arguing it did not secure proof of who stole the debit card and misused it before him. *Id.*

Yet he was not charged for either (making the other-suspect theory he adds on appeal irrelevant) and the investigation's adequacy was for his jury to decide. His theory of prejudice is without legal support, for police are not obliged to investigate. *State v. Judge*, 100 Wn.2d 706, 717, 675 P.2d 219 (1984). The motion, like the appeal, both without proof, allege the letter that was sent to induce Clark's perjury was illegally revealed by a civilian who acted alone. Both wrongly rely on cases only applicable to state actors.

D. CONCLUSION.

Defendant's guilty knowledge for his theft of the victim's identity and unlawful possession of her stolen debit card were amply proved. His purposeful act of scribbling a name passable for hers joined with his effort to explain it away through perjury to at least provide the slight corroborative evidence his convictions required. The manifold attacks on counsel are as unfortunate as they are unfounded. Nearly all are based on bare accusations with unwarranted inferences and matters outside the record. Remaining are theories lacking legal support. His CrR 7.5 motion was rightly denied as it

was replete with the same flaws. Defendant's decision to expand on them in a 48-page brief is lamentable, but so it goes. His well-proved convictions should be affirmed with his sentence.

RESPECTFULLY SUBMITTED: Tuesday, June 26, 2018.

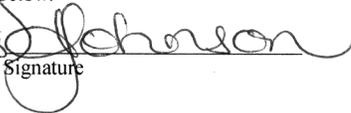
MARK LINDQUIST
Pierce County Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

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.



6/26/18
Date Signature 

PIERCE COUNTY PROSECUTING ATTORNEY

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