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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

YELENA ALEXANDER SHUBOCHKINA, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Karena Kirkendoll

No. 16-1-03414-6

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**Brief of Respondent**

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

1. Did the trial court properly seat an alternate juror under CrR 6.5 when it gave both parties opportunity to provide input and made a record showing that the reconstituted jury was instructed to begin deliberations anew?
2. Has defendant failed to establish ineffective assistance of counsel when defendant has shown neither that counsel's performance was deficient nor that such performance was prejudicial to the defense?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On June 21, 2017, the State charged Yelena Alexander Shubochkina, hereinafter "defendant," by amended information with one count of identity theft in the first degree and one count of violation of a protection order. CP 87-88. On June 26, 2017, the State moved to dismiss the violation of a protection order count. RP 124. Defendant had no objection to the dismissal. RP 125. That day, the State filed its second

amended information charging defendant with one count of identity theft in the first degree. CP 34. Jury trial commenced before the Honorable Karena Kirkendoll. RP 119.

The jury deliberated for about an hour and a half when one of the jurors learned that her father passed away. RP 340-42. The juror informed the court that she would not be returning for further deliberations, and the court contacted the alternate juror. RP 340. The State requested that the court advise the jury that it must begin deliberations anew with the alternate. RP 341. The court gave defendant the opportunity for input as well, but defendant did not comment on the State's request to reinstruct the jury. *Id.* The court stated that "Ms. Bartelson will again remind them that they must start anew with Juror No. 5 because they did have about an hour and a half of deliberations yesterday." RP 340-41. The trial court again gave both parties the opportunity to supplement the record, and both parties stated they did not have anything further to add. RP 342.

On June 28, 2017, the jury acquitted defendant of identity theft in the first degree but convicted her of identity theft in the second degree as a lesser included offense, finding that defendant did not spend an amount of money in excess of \$1,500 required for first degree identity theft. CP 43, 54-55; RP 345; RCW 9.35.020(2), (3). Defendant was sentenced to 30

days confinement. CP 56-68. Defendant filed a timely notice of appeal. CP 79.

## 2. FACTS

In the summer of 2009, defendant met Dr. Ronald Brockman, a retired orthopedic surgeon, through the dating website, Match.com. RP 202, 243. At the time, defendant was living in King County and Dr. Brockman was living in Pierce County. RP 187. The two visited occasionally. *Id.* A few years later, Dr. Brockman suffered from a fungal infection and went to California for treatment. RP 187-88. Defendant contacted Dr. Brockman while he was in rehabilitation in California. RP 175. She said that she had lost her job and was being evicted from her apartment, so she needed a place to stay. *Id.* Dr. Brockman offered her to stay at his place since he was not there. *Id.*

When Dr. Brockman moved back to Washington, he and defendant lived together. RP 175-76. Dr. Brockman allowed defendant to use his credit card while she was looking for work. RP 176. Defendant also did some household chores, driving, and other caretaking activities for Dr. Brockman while Dr. Brockman was recovering. RP 189-90. Approximately one year prior to trial, around June 2016, Dr. Brockman suffered cardiac arrest during a doctor's appointment. RP 177. Dr.

Brockman spent about a week in the hospital. *Id.* Meanwhile, defendant continued to use Dr. Brockman's credit card without permission. RP 181-83. Realizing defendant was overspending, Dr. Brockman told defendant, "Hey, you can't do this. I can't afford this." RP 176, 183. Dr. Brockman testified that he took the credit card away from defendant on July 6, 2016. *Id.* Between July 6, 2016 and August 9, 2016, defendant spent approximately \$2,167 on Dr. Brockman's credit card. Exh. 1.

On August 9, 2016, Dr. Brockman's ex-wife, Susan Brockman, obtained a Vulnerable Adult Protection Order (VAPO) protecting Dr. Brockman from defendant. RP 184-85. Defendant continued to use Dr. Brockman's credit card despite the fact that the VAPO specifically prohibited defendant from financial exploitation. RP 161. Between August 9, 2016, when defendant signed the VAPO, and August 11, 2016, defendant made eight unauthorized charges to Dr. Brockman's credit card. Exh. 1. According to Dr. Brockman's Bank of America Fraud Statement, defendant spent a total of \$128.22 at Whole Foods, Albertsons, and 76-Speed E Mart between those dates. *Id.*

On August 23, 2016, police contacted defendant at her apartment. RP 152-53. Defendant confirmed that she made the purchases

shown on Dr. Brockman's fraud statement. RP 154. When asked where the card was, defendant stated she had "thrown it in the garbage when she realized that it wasn't her card." *Id.* When asked how she obtained Dr. Brockman's card, defendant explained that she got it when she went to visit Dr. Brockman at the hospital. RP 155. Defendant activated the card herself and used it for multiple weeks. *Id.* Officers searched the dumpster where defendant said she threw away the card, but it was not there. RP 156-58.

Officers came back to defendant's apartment the following day and arrested defendant for violating the VAPO. RP 159-61. When defendant was being transported, she made a statement inconsistent with her claim the day prior that she did not realize it "wasn't her card;" defendant stated that "she only used the card because Dr. Brockman told her she could." RP 154, 162-63.

At trial, Dr. Brockman testified that defendant used his business card to make the unauthorized purchases. RP 186. Dr. Brockman testified that he believed defendant claimed to be a new employee in order to gain access to the credit card. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY SEATED AN ALTERNATE JUROR UNDER CrR 6.5 WHEN IT GAVE BOTH PARTIES OPPORTUNITY TO PROVIDE INPUT AND MADE A RECORD SHOWING THAT THE RECONSTITUTED JURY WAS INSTRUCTED TO BEGIN DELIBERATIONS ANEW.

CrR 6.5 governs the use of alternative jurors. While CrR 6.5 does not specify that a hearing is required before a deliberating juror can be replaced with an alternate juror, it does contemplate a formal proceeding which includes opportunity for input from the parties and which may, in the court's discretion, include a brief voir dire of the alternate juror. *State v. Ashcraft*, 71 Wn. App. 444, 462-63, 859 P.2d 60 (1993). "Moreover, the rule requires that a jury which has commenced deliberations before an initial juror is replaced by an alternate juror 'shall be instructed to disregard all previous deliberations and begin deliberations anew.'" *Id.*

"An appellate court must be able to determine *from the record* that jury unanimity has been preserved." *Id.* at 465 (emphasis in original). Thus, no error occurs if a reviewing court can ascertain from the record that the reconstituted jury was instructed to begin deliberations anew. *See Id.*

The record here shows that the reconstituted jury was instructed to begin deliberations anew, and jury unanimity was therefore preserved. The jury deliberated for about an hour and a half before one of the jurors learned that her father passed away. RP 340-42. The juror informed the court that she would not be returning to continue deliberations. RP 340. The court contacted the alternate juror, and the alternate was able to come in the following morning. *Id.*

The court stated it would have to “make a clear and concise record of what’s occurring.” RP 341. The State added, “I would just request that the jury be advised that now that they have a new member of the jury that they must restart all deliberations.” *Id.* Defendant was given the opportunity to provide input but did not comment on the State’s request to reinstruct the jury. *Id.* The court confirmed it would reinstruct the jury as the State requested: “Ms. Battleson will again remind them that they must start anew with Juror No. 5 because they did have about an hour and a half of deliberations yesterday.” RP 341-42.

When a trial court seats an alternate juror after deliberations have already begun, it must (1) give both parties the opportunity for input, and (2) make a record indicating that the reconstituted jury was instructed to begin deliberations anew. *Ashcraft*, 71 Wn. App. at 460, 467. In *Ashcraft*, the trial court proceeded *ex parte* in its decision to replace a deliberating

juror with an alternate when the deliberating juror became unavailable. *Id.* at 466. Neither party was given the opportunity to provide input on the court's decision to replace the deliberating juror, nor was counsel given the opportunity to ensure for the record that the jury would be instructed to begin deliberations anew. *Id.* at 466-67. The court rejected the State's argument that "because the record [did] not affirmatively reflect that the jury was *not* so instructed, appellant ... failed to demonstrate a reasonable possibility of prejudice." *Id.* at 464. The court "must be able to determine *from the record* that jury unanimity has been preserved." *Id.* at 465.

Unlike in *Ashcraft*, the record here affirmatively establishes that both sides were given the opportunity to provide input and that the reconstituted jury was instructed to begin deliberations anew. After explaining the situation regarding the alternate juror, the trial court asked, "Is there anything from the State?" RP 341. After the State's response, the trial court asked defense counsel, "And, Ms. Jean, anything from you?" *Id.* After listening to input from both sides, the trial court assured the parties that "Ms. Battleson will again remind [the jury] that they must start anew with Juror No. 5 because they did have about an hour and a half of deliberations yesterday." RP 341-42.

The record reflects that jury unanimity was preserved. The court gave both parties opportunity for input prior to seating the alternate juror.

RP 341. Further, the court made a record ensuring that the reconstituted jury would be instructed to begin deliberations anew. RP 341-42. The court fully complied with the requirements of both CrR 6.5 and *Ashcraft*. Because no error occurred, defendant's conviction should be affirmed.

2. DEFENDANT HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENDANT HAS SHOWN NEITHER THAT COUNSEL'S PERFORMANCE WAS DEFICIENT NOR THAT SUCH PERFORMANCE WAS PREJUDICIAL TO THE DEFENSE.

Criminal defendants have a constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Const art. I, §22; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

The defendant bears the burden of showing that counsel's assistance was "so defective as to require reversal of conviction." *Strickland*, 466 U.S. at 687. To succeed on an ineffective assistance of counsel claim, a defendant must first show that counsel's performance was deficient. *Id.* "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* Second, a defendant must show that the deficient performance was prejudicial to the defense. *Id.* "This requires showing that counsel's errors

were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*

The threshold for deficient performance is high. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Defense counsel is afforded significant deference in decisions regarding the course of representation. *Id.* Thus, there is a strong presumption that counsel’s performance was effective. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In order to rebut the presumption that counsel’s performance was effective, defendant must establish the absence of any “conceivable legitimate tactic explaining counsel’s performance[.]” *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). If defense counsel’s conduct can be considered to be a legitimate trial strategy or tactic, then counsel’s performance is not deficient. *Id.* The court must judge the reasonableness of counsel’s actions on the facts of the particular case, viewed as of the time of counsel’s conduct. *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

If the defendant proves that counsel’s performance was deficient, he must also show that deficient performance prejudiced the defense. *Mierz*, 127 Wn.2d at 471 (citing *Strickland*, 466 U.S. at 687). Prejudice occurs when, but for the deficient performance, there is a reasonable

probability that the outcome would have been different. *Strickland*, 466 U.S. at 694.

Ineffective assistance of counsel claims are reviewed de novo. *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). The burden is on the defendant to show from the record a sufficient basis to rebut the strong presumption counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). Defendant here fails to satisfy either prong of *Strickland*.

- a. Without a showing that the objection would have been sustained, failure to make an objection at trial is not to deficient performance.

“Counsel’s decisions regarding whether and when to object fall squarely within the category of strategic or tactical decisions.” *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). To show that counsel was ineffective for failing to object, defendant must show that the objection would have been sustained. *See Johnston*, 143 Wn. App. at 19; *see In re Davis*, 152 Wn.2d 647, 748, 101 P.3d 1 (2004). “Only in egregious circumstances, on testimony central to the State’s case, will failure to object constitute incompetence of counsel justifying reversal.” *Johnston*, 143 Wn. App. at 19 (*quoting State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989)). Failure to make a losing objection will not amount to deficient performance. *See Johnston*, 143 Wn. App. at 19.

Here, defendant has not shown that had defense counsel objected to the admission of the Vulnerable Adult Protection Order (VAPO), the objection would have been sustained.

Defendant argues that the admission of the VAPO and evidence of defendant's arrest for violating it should have been excluded from trial. Brief of Appellant at 14-15. However, even if defendant objected to the admission at trial, any objection under ER 401 or 403 would have been overruled.

Under ER 401, evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. Here, the VAPO was relevant because it made it more probable that defendant was guilty of identity theft for every charge defendant made after entry of the VAPO. The State explained why:

[O]n Page 2 of 3 of the order, you'll see in Subsection (2) that is X'd as a provision it indicates that one of the things the respondent is restrained from – it lists a number of things, and it also says “Financial exploitations against the vulnerable adult.” I believe that is very relevant to Count I since not all but some of the transactions are alleged to have occurred after August 9<sup>th</sup> through the August 11<sup>th</sup> time frame.

RP 126-27.

To convict defendant of identity theft, the jury had to find that defendant *knowingly* obtained, possessed, used, or transferred a means of

identification or financial information of another with intent to commit a crime. CP 36-53. “Knowingly” was defined for the jury as when “a person has information that would lead a reasonable person in the same situation to believe that a fact exists.” *Id.* In order to find that defendant had the requisite knowledge to commit the crime, the jury had to find that a reasonable person in defendant’s position would know that defendant was not authorized to use Dr. Brockman’s credit card.

At trial, the State alleged that between July 6, 2016, and August 11, 2016, defendant charged over \$1,500 on Dr. Brockman’s credit card without authorization. RP 139. Defendant maintained, however, that Dr. Brockman gave her permission to use his credit card. RP 260, 274-76. The VAPO order and defendant’s subsequent arrest were relevant because they showed that at least between August 9, 2016, when the VAPO was signed, and August 11, 2016, defendant did not have permission to use Dr. Brockman’s credit card, but she used it anyway. Any use of Dr. Brockman’s credit card during that time was unlawful and in violation of the VAPO. Defendant had explicit notice that she was restrained from exploiting Dr. Brockman’s finances. Exh. 3. The VAPO, therefore, conclusively proved that defendant had the requisite knowledge to commit identity theft, at least between August 9, and August 11, 2016.

Even if defendant objected to the admission of the VAPO under ER 403, any objection would have been overruled. Under ER 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury ...” A trial judge has broad discretion in balancing the probative value of evidence against its potential prejudicial impact. *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). The trial judge is “in a superior position to evaluate the impact of the evidence, since he sees the witnesses, defendant, jurors, and counsel, and their mannerisms and reactions.” *Id.*

Defendant claims that the danger of unfair prejudice lies in the “bottom of page 1 of the VAPO.” Brief of Appellant at 16. That language reads: “Respondent committed acts of abandonment, abuse, personal exploitation, improper use of restraints, neglect and/or financial exploitation of the vulnerable adult.” Exh. 3. While that language is prejudicial, it had probative value of its own. It showed the gravity of the harm to Dr. Brockman as well as the seriousness of the order against defendant.

Defendant does not assert ineffective assistance of counsel for counsel’s failure to request that that portion of the VAPO be redacted. Defendant claims that counsel was ineffective for failing to object to the

admission of the order as a whole. Brief of Appellant at 17. Had counsel objected to the admission of the order in its entirety, the objection would certainly have been overruled.

The language defendant claims as having a “prejudicial impact” actually served as the basis for the VAPO. The finding language is standard stock language for VAPOs. A court must make such a finding in order to issue a VAPO. In relation to the high probative value of the VAPO as a whole, the potential for unfair prejudice by way of a single sentence serving as the basis for the order is minimal. Any objection under ER 403 would therefore have been overruled. Counsel’s decision not to make a losing objection does not amount to deficient performance.

- b. The jury verdict showed that admission of the VAPO was not prejudicial.

The portion of the VAPO defendant claims was “unfairly prejudicial” proved to not have any unfairly prejudicial effect upon the jury. Defendant claims that the court’s finding at the bottom of page 1 of the VAPO, which states: “Respondent committed acts of abandonment, abuse, personal exploitation, improper use of restraints, neglect and/or financial exploitation of the vulnerable adult[,]” was unfairly prejudicial because it showed defendant “had engaged in some form of abuse, including financial exploitation.” Exh. 3; Brief of Appellant at 16-17. But the finding language refers to defendant’s conduct *prior* to the issuance of

the VAPO. Exh. 3. As defendant points out, the jury appeared to find defendant guilty for conduct only *after* the VAPO issued. Brief of Appellant at 19-21; Exh. 1.

Defendant was charged with identity theft in the first degree. CP 34. The only distinguishing element between first degree identity theft and second degree identity theft is the amount of money taken. RCW 9.35.020(2), (3). Identity theft in the first degree requires the jury to find that defendant obtained more than \$1,500. CP 43; RCW 9.35.020(2). Identity theft in the second degree occurs when the defendant takes any amount less than \$1,500. RCW 9.35.020(3). The sum total of all the charges that the State alleged defendant unlawfully made between July 6, 2016 and August 11, 2016, was \$2,295. RP 163-64. But the jury in this case rejected identity theft in the first degree. CP 54. That means that the jury found that defendant took less money than the amount the State claimed at trial. Necessarily, the jury found defendant guilty of identity theft in the second degree, which means it found that defendant unlawfully obtained an amount less than \$1,500. CP 50-51, 55; RCW 9.35.020(3).

The evidence admitted at trial admits only one way to segregate the unauthorized charges defendant made on Dr. Brockman's credit card: the pre-VAPO charges and the post-VAPO charges. The only fact presented at trial which distinguishes defendant's pre-VAPO charges from

her post-VAPO charges was the August 9, 2016, issuance of the VAPO. No other distinguishing factor was introduced at trial. Admission of the VAPO was arguably prejudicial with respect to the pre-VAPO charges only, but the jury acquitted defendant of all the pre-VAPO charges. Thus, the jury rejected all potentially tainted evidence of the credit card charges.

The jury convicted defendant of identity theft in the second degree, finding that defendant unlawfully charged less than \$1,500 to Dr. Brockman's credit card. CP 50-51, 55. The post-VAPO charges totaled \$128.22. Exh. 1. Since the VAPO is the only thing that distinguishes the charges in Dr. Brockman's fraud statement, the verdict shows that the jury only convicted defendant for the post-VAPO charges, totaling \$128.22. Exh. 1.

As defendant suggests, it follows that the jury convicted defendant for charges made only after she signed the VAPO on August 9, 2016. Brief of Appellant 19-21; Exh. 3. Even though the language in the VAPO states that defendant had "committed acts of ... financial exploitation" against Dr. Brockman, the jury rejected any argument that defendant's pre-VAPO use of Dr. Brockman's credit card was unlawful. Exh. 3. Defendant's argument that the finding language unfairly prejudiced the defense is therefore without merit.

D. CONCLUSION.

The record shows that the reconstituted jury was instructed to begin deliberations anew. Admission of the VAPO was highly probative to establishing defendant's guilt, and the potential for unfair prejudice did not substantially outweigh the high probative value. Any objection under ER 403 would have been overruled. Defendant has therefore failed to establish ineffective assistance of counsel. Defendant's conviction should be affirmed.

DATED: February 21, 2018.

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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.

2-21-18 [Signature]  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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