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No. 50814-1-II

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

State of Washington,

Respondent,

v.

Mary Sandoval,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Police officers searched Mary Sandoval's purse and found items that did not belong to her. According to Ms. Sandoval, she did not know she possessed the items, and she was shocked to learn her purse contained a bag with a Target credit card that belonged to someone else and a pipe with methamphetamine.

When the State charges someone with possession of a stolen access device (in this case, a credit card), it must present evidence that the access device could be used to obtain something of value at the time the defendant possessed it. Here, the State failed to meet its burden because it failed to prove that Ms. Sandoval could use the access device in question to obtain something of value at the time she possessed it.

In addition to the State failing to meet its burden in regards to this charge, the court also commented on the evidence and issued incorrect jury instructions that required the jury to find that Ms. Sandoval possessed a stolen access device.

Moreover, Ms. Sandoval's counsel performed deficiently when he stripped her of her only available defense to the charge of unwitting possession.

For these reasons and the other reasons stated in this brief, Ms. Sandoval asks this Court to reverse her convictions.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to find Ms. Sandoval guilty of possession of stolen property in the second degree. U.S. Const. amend. XIV; Const. art. I, § 3.

2. Jury instruction 20 was legally deficient because it allowed the jury to find Ms. Sandoval guilty of possession of stolen property in the second degree based on an incorrect statement of the law.

3. Jury instruction 20 impermissibly relieved the State of its burden to prove that Ms. Sandoval was guilty of possession of stolen property beyond a reasonable doubt.

4. Jury instruction 20 contains an impermissible comment on the evidence. Const. art. IV, § 16.

5. Ms. Sandoval was deprived of her Sixth Amendment right to the effective assistance of counsel when her trial counsel failed to request a jury instruction for unwitting possession. U.S. Const. amend. VI; Const. art. I, § 22.

6. The trial court erred when it imposed discretionary Legal Financial Obligations without conducting an individualized inquiry into Ms. Sandoval's present and future ability to pay.

C. ISSUES

1. The constitution commands the State to provide sufficient evidence to prove each element of a charged offense beyond a reasonable doubt. If the State misinterprets an element of the defendant's charged offense and only produces evidence that supports its mistaken interpretation of the element, then the State has failed to meet its burden. Possession of a stolen access device requires the State to prove that the device "can be used" to obtain something of value at the time the defendant possessed it. However, the State misinterpreted the statute and believed it only needed to prove that the device could be used to obtain something of value when it was last in possession of its rightful owner.

Relying on this erroneous interpretation, the State presented no evidence that Ms. Sandoval could use the access device to obtain anything of value at the time she possessed it. Without this critical evidence, should this Court reverse and dismiss Ms. Sandoval's conviction for possession of a stolen access device?

2. A jury instruction is legally deficient if it permits the jury to find the defendant guilty on an incorrect legal basis. Jury Instruction 20 permitted the jury to find Ms. Sandoval guilty of possession of a stolen access device if the access device could be used to obtain something of

value when it was last in possession of its lawful owner. Was Jury Instruction 20 legally deficient?

3. The Washington Constitution prohibits judges from instructing the jury that the State has established a fact in issue. Jury Instruction 20 required the jury to find that Ms. Sandoval possessed a stolen access device based on the evidence the State presented regarding the access device's ability to obtain something of value at the time its true owner possessed it. Does Jury Instruction 20 constitute an impermissible comment on the evidence that relieved the State of its burden of proving every element of possession of a stolen access device beyond a reasonable doubt?

4. An attorney performs deficiently if he fails to identify and present the only available defense the evidence supports. When this occurs, the defendant has been denied a fair trial. The State also charged Ms. Sandoval with possession of a controlled substance. Ms. Sandoval presented abundant evidence at trial that she unwittingly possessed this substance, but her trial counsel did not request a jury instruction on unwitting possessing. Without this instruction, the jury was left with no choice but to convict Ms. Sandoval of possession of a controlled substance. Did counsel's deficient performance prejudice Ms. Sandoval, requiring reversal?

5. Sentencing courts may only require a defendant to pay discretionary legal financial obligations (LFOs) if the defendant possesses the present or future ability to pay. Therefore, the record must reflect that the trial court made an individualized inquiry into the defendant's ability to pay. This individualized inquiry requires the court to consider a number of non-exclusive factors, including the defendant's incarceration and other debts. The court did not conduct an individualized inquiry into Ms. Sandoval's ability to pay but required her to pay \$250 in discretionary LFOs. Should this Court reverse and require the sentencing court to conduct an individualized inquiry into Ms. Sandoval's present and future ability to pay?

D. STATEMENT OF THE CASE

Mary Sandoval entered into a demonstration agreement with a Toyota dealership. RP 125-26. The demonstration agreement allowed Ms. Sandoval to use a new Toyota for up to three days to see if she liked the car enough to purchase it. RP 126, 129. When Ms. Sandoval did not return the car and fell out of contact with the Toyota dealership, the dealership reported the car stolen. RP 131-32.

Roughly a month later, the police found Ms. Sandoval and her husband in the car. RP 155-56. Ms. Sandoval explained that she did not physically return the car to the Toyota dealership after she learned it was

reported stolen because she was afraid that the police would pull her over en route to the dealership and arrest her. RP 224. She instead hoped that the dealership would pick up the car from the address she listed in the demonstration agreement, as the demonstration agreement contained a clause that allowed the dealership to recover the car on its own. RP 228-29. Additionally, Ms. Sandoval and her husband were undergoing hard times and did not have a home, so they used the car as their shelter. RP 228, 249.

The police searched Ms. Sandoval incident to arrest. RP 159-60. Inside Ms. Sandoval's purse, the police found methamphetamine pipes and a Target credit card that belonged to another person. RP 160. Ms. Sandoval was surprised to learn that the police discovered this in her purse and denied knowingly possessing those items. RP 238. Ms. Sandoval explained that a couple of days prior, hotel staff in Portland gave her a bag with numerous items that she simply shoved in her purse. RP 162. She did not inspect the items in the bag. RP 231. Unfortunately, that bag contained the pipes and the Target credit card. RP 249.

The State charged Ms. Sandoval with 1) possession of a stolen vehicle; 2) possession of stolen property in the second degree (access

device); and 3) possession of a controlled substance (methamphetamine).¹

The jury convicted her of these charges.

At sentencing, the court stated it would only impose the “mandatory minimum” in legal financial obligations, but Ms. Sandoval’s judgment and sentence requires her to pay \$250 is discretionary jury fees. CP 59.

Ms. Sandoval appeals.

E. ARGUMENT

1. Insufficient evidence supports Ms. Sandoval’s conviction for possession of stolen property in the second degree.

- a. The State bears the heavy burden of proving every element of a crime beyond a reasonable doubt.

The State bears the heavy burden of providing sufficient evidence to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). When a defendant challenges the sufficiency of the evidence, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012)

¹ The State also charged Ms. Sandoval with identity theft in the second degree because she also possessed her sister’s birth certificate at the time of the arrest. CP 15. However, the jury was hung on this charge and the State later dismissed it. RP 322-23, 331.

(citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

However, if no rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt, the court must dismiss the conviction with prejudice. *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

- b. The State fails to prove every element of a crime when the evidence it presents fails to meet the statutory criteria of the defendant's charged crime.

If the State 1) relies on an erroneous interpretation of an essential element of the crime; and 2) produces evidence regarding an essential element of a crime that only supports its erroneous interpretation of one of the essential elements, then it has failed to meet its burden. This failure requires reversal. *See, e.g., State v. Smith*, 155 Wn.2d 496, 120 P.3d 559 (2005) (reversing the defendant's conviction for driving with a suspended license because the lower court relied on an erroneous interpretation of one of the necessary elements of the driving with a suspended license statute); *State v. Marohl*, 170 Wn.2d 691, 246 P.3d 177 (2010) (reversing the defendant's conviction for assault in the third degree because the jury relied on an erroneous interpretation of one of the necessary elements of assault in the third degree when it convicted the defendant); *State v. Rodgers*, 146 Wn.2d 55, 43 P.3d 1 (2002) (reversing the defendant's

conviction for drive-by shooting because the court erroneously interpreted one of the necessary elements of the drive-by shooting statute when it convicted the defendant).

- c. Here, the State failed to prove every essential element of possession of stolen property in the second degree (stolen access device) because the State relied on an erroneous interpretation of the term “access device” to prove that Ms. Sandoval was guilty of this crime.

Here, the State failed to prove every essential element of possession of stolen property in the second degree—specifically, possession of a stolen access device—because the State relied on an erroneous interpretation of the term “access device” to prove that Ms. Sandoval was guilty of this crime.

The essential elements of possession of a stolen access device require the State to prove the defendant 1) possessed;² 2) a stolen; 3) access device. RCW 9A.56.160. In turn, an “access device” is 1) any card, plate, code, account number, or other means of account access; 2) *that can be used*; 3) to obtain; 4) things of value; 5) or *can be used*; 6) to initiate a transfer of funds. RCW 9A.56.010(1).

² Here, “possession” means to Knowingly [...] 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.
RCW 9A.56.140(1).

At Ms. Sandoval's trial, Ginger Philips testified that someone stole her wallet at a hotel in Portland, Oregon in February of 2017. RP 204. Ms. Philips' wallet contained several credit cards, including a Target credit card. RP 204. After Ms. Philips discovered that someone stole her wallet, she promptly cancelled all of the credit cards that were in the stolen wallet. RP 208. About six weeks later, a police officer discovered the stolen Target credit card belonging to Ginger Philips in a bag inside Ms. Sandoval's purse. CP 6; RP 160-62, 203-05. Although the Target credit card was inactive by the time the police recovered the card from Ms. Sandoval, the State charged Ms. Sandoval with possession of stolen property in the second degree (stolen access device). CP 6. The State presented no evidence to suggest that the Target credit card "[could] be used" to "obtain... [something] of value" at the time the police recovered the card from Ms. Sandoval's purse. RCW 9A.56.010(1).

During its closing argument, the State acknowledged that Ms. Philips cancelled the Target credit card by the time the police discovered the card in a bag inside Ms. Sandoval's purse. RP 289. However, the State argued to the jury that the card's cancellation was irrelevant to its decision to convict Ms. Sandoval of possession of stolen property in the second degree, claiming what mattered was whether the Target card was an access device at the time Ms. Phillips possessed it. RP 289. In other words, the

State argued that because it presented evidence that Ms. Philips’s Target card “[could] be used” to “obtain...[something] of value” at the time it was stolen, the State met its burden in proving that Ms. Sandoval possessed a stolen “access device.” RCW 9A.56.010; RP 289. Ultimately, the court issued a jury instruction³ that reflected the State’s erroneous interpretation of the statute. CP 42.

The plain meaning of the access device statute and our Supreme Court’s ruling in *Rose* support the conclusion that the State misinterpreted the statute, requiring reversal.

- i. The State must prove that the access device could be used to obtain something of value at the time the defendant possessed it.*

A plain reading of the “access device” statute compels a reading that requires the State to prove that the device could be used to obtain something of value at the time the defendant possessed the access device. This court reviews questions of statutory construction *de novo*. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005).

Interpretation of a statute begins with a reading of the statute’s text. *Roggenkamp*, 153 Wn.2d at 621. If the language is unambiguous, this Court relies solely on the statutory language; however, if the language

³ The impropriety of this jury instruction is fully discussed in part two of the Argument section of this brief.

is susceptible to more than one reasonable interpretation, the statute is ambiguous. *Id.* A statute is not ambiguous simply because two different interpretations are feasible. *Id.* To determine a statute's plain language, this Court examines the statute where the provision is found, provisions related to the statute in question, and the larger statutory scheme as a whole. *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015).

The "access device" statute reads as follows:

"Access device" means any card, plate, code, account number, or other means of account access that *can be used* alone or in conjunction with another access device to *obtain* money, goods, services, or anything else *of value*, or that *can be used* to initiate a transfer of funds, other than a transfer originated solely by paper instrument

RCW 9A.56.010(1)(emphases added).

The word "can" means "to be able to do, make, or accomplish," and denotes the present tense. *Can*, Merriam Webster.⁴ Therefore, to convict someone of possession of a stolen access device, the State must prove beyond a reasonable doubt that on the date indicated in the information, the person 1) possessed; 2) a stolen; 3) access device, 4) *that can be used*; 5) to obtain; 6) things of value; 7) or *can be used*; 8) to initiate a transfer of funds. RCW 9A.56.010(1). It therefore follows that an access device that cannot be used to obtain anything of value on the date

⁴ <https://www.merriam-webster.com/dictionary/can> (last visited Mar. 5, 2018).

listed in the information fails to support a conviction for possession of stolen property in the second degree (access device).

ii. *Our Supreme Court’s decision in Rose confirms the plain reading of the “access device” statute.*

Our Supreme Court’s decision in *Rose* confirms the State must prove the defendant possessed a stolen “access device” that could be used to obtain something of value at the time the defendant possessed the access device. In *Rose*, the police searched the defendant incident to arrest and discovered what appeared to be a credit card in the name of Ruth Georges. 175 Wn.2d at 12. At the defendant’s bench trial, Ms. Georges testified that she threw away a credit card offer she received in the mail the day the police searched the defendant. *Id.* The credit card offer included a plastic credit card with an account number and Ms. Georges’ name on the front. *Id.* However, the credit card offer required Ms. Georges to pay \$30 to activate the account. *Id.* Because she did not have the necessary \$30 to activate the account, Ms. Georges threw the card in the trash. *Id.* Mr. Rose retrieved this card and was convicted of second degree possession of a stolen access device. *Id.*

On appeal, Mr. Rose argued that the State failed to prove the card was an “access device” within the meaning of RCW 9A.56.160(1). *Id.* at 13. This was because the card was not linked to an existing, active

account, and also because the State failed to prove the card could “be used” to obtain something of value. *Id.* at 14.

The Washington Supreme Court agreed. First, the court reasoned it was unclear from the record whether the card the defendant took could be used to obtain anything of value, as the card was never activated. *Id.* at 17. However, relying on federal cases that serve as the federal analog to RCW 9A.56.010(1), the court concluded that the State must either prove an existing, active account or prove that the access device can be used to obtain something of value. *Id.* (referencing *United States v. Bailey*, 41 F.3d 413, 417-418 (9th Cir. 1994); *United States v. Taylor*, 95 F.2d 1050, 1051 (8th Cir. 1991)). Because it was unclear from the record that the card could be used to obtain anything of value, the court concluded the State failed to meet its burden. *Id.* at 18.

Ultimately, the court held that because “the card in question was not tied to an existing, active account...affirmative evidence that it could be used to obtain something of value was necessary under the State’s burden of proof.” *Id.*, n.1; *see also United States v. Onyesoh*, 674 F.3d 1157 (9th Cir. 2012) (holding that the federal analog to Washington’s possession of a stolen access device statute requires the State to prove that expired and inactive credit card numbers the defendant possessed could

nevertheless be used to obtain “something of value” based on the unambiguous language of the statute).

Similarly, here, the State failed to prove that Ms. Philips’ card was linked to an active account. Instead, the evidence demonstrated that Ms. Philips deactivated the Target credit card shortly after she discovered that someone stole her card. RP 208. Under *Rose*, the State bore the burden of proving that Ms. Sandoval could nevertheless use the inactive Target card to obtain something of value. 175 Wn.2d at 18, n.1. But here, the State failed to prove that Ms. Sandoval could use the card in any manner to obtain anything of value at the time the police discovered the card in the bag.

- d. Because the State failed to meet its burden, reversal and dismissal with prejudice is required.

The State simply failed to meet its burden in proving that Ms. Sandoval possessed stolen property in the second degree (access device). Therefore, this Court should dismiss Ms. Sandoval’s conviction for possession of stolen property in the second degree with prejudice. *Burks*, 437 U.S. at 11.

2. Jury instruction 20 misstated the law and contains an impermissible comment on the evidence.

- a. Jury instruction 20 was legally deficient because it allowed the jury to find Ms. Sandoval guilty of possession of stolen property in the second degree based on an incorrect statement of the law.

This Court assesses whether a jury instruction is legally correct *de novo*. *State v. Chenoweth*, 188 Wn. App. 521, 535, 354 P.3d 13 (2015). Trial courts must produce jury instructions that “accurately state the law, permit the defendant to argue his theory of the case, and that the evidence supports.” *State v. Staley*, 123 Wn.2d 794, 803, 872 P.3d 502 (1994). “A jury instruction is legally deficient if it permits the jury to find the defendant guilty on an incorrect legal basis.” *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000).

An erroneous jury instruction that misstates an element of the charged crime is subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). This standard of review necessitates reversal if a court cannot hold beyond a reasonable doubt that the jury instruction did not contribute to the verdict. *Id.*

Jury Instruction 20 is legally deficient because it allowed the jury to find Ms. Sandoval guilty of possession of stolen property in the second degree (stolen access device) based on an erroneous definition of the term “access device.” CP 47. As previously explained, the term “access

device” under RCW 9A.56.010(1) requires the State to prove that the “access device” in question could be used to obtain goods on the date listed in the information; however, Jury Instruction 20 incorrectly states,

The phrase “can be used” refers to the status of the access device when it was last in possession of its lawful owner, regardless of its status at a later time.

CP 47.

For the reasons stated fully in part one of the Argument section of this brief, this definition is incorrect. Because this definition erroneously allowed the jury to find Ms. Sandoval guilty of possession of stolen property in the second degree (access device) based on an incorrect interpretation of RCW 9A.56.010(1), Jury Instruction 20 was legally deficient.

The State cannot meet its burden in proving that this erroneous definition was harmless beyond a reasonable doubt. The State failed to produce any evidence that the deactivated Target credit card could be used to obtain anything of value at the time the police recovered the card from Ms. Sandoval. Therefore, alternatively, this Court should reverse and remand for a new trial.

b. Jury instruction 20 contains an impermissible comment on the evidence.

Additionally, jury instruction 20 contains an impermissible comment on the evidence. This court evaluates whether a jury instruction amounts to a comment on the evidence *de novo*. *In re L.T.S.*, 197 Wn. App. 230, 234, 389 P.3d 660 (2016).

The Washington Constitution forbids judges from “charg[ing] juries with respect to matters of fact, nor comment thereon.” Const. art. IV, § 16. Instead, judges “shall declare the law.” *Id.* Therefore, judges cannot convey their personal opinion about the merits of a case or instruct the jury that the State has established a fact at issue. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Our constitution prohibits judicial comments on the evidence “to prevent the trial judge’s opinion from influencing the jury.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Const. art IV, § 16.

A jury instruction fashioned out of another court’s findings and rulings regarding legal sufficiency amount to a comment on the evidence. *State v. Brush*, 183 Wn.2d 550, 558, 353 P.3d 213 (2015); *see also State v. Sinrud*, 200 Wn. App. 643, 403 P.3d 96 (2017) (reversing the defendant’s conviction for possession with intent to deliver because the trial court commented on the evidence when it instructed the jury that, as a matter of

law, a factual issue found legally sufficient to support a possession with intent to deliver conviction in another case supported a conviction in the defendant's case).

Courts presume that judicial comments are prejudicial, and the State bears the burden of proving no prejudice resulted from the judicial comment. *Levy*, 156 Wn.2d at 723.

Jury Instruction 20 constitutes an impermissible comment on the evidence because it resolved a factual issue in favor of the State and relieved the State of its burden of proving every element of possession of stolen property (access device) in the second degree. For example, in *Brush*, a jury convicted the defendant of first degree murder for killing his ex-fiancée. 183 Wn.2d at 552. During the penalty phase of the trial, the court instructed the jury to determine whether the crime was an aggravated domestic violence offense. *Id.* at 555. To assess this, the jury had to determine whether 1) the victim and the defendant were family or household members; and 2) the offense was part of an ongoing pattern of abuse of the victim “manifested by multiple incidents over a *prolonged period of time*” per RCW 9.94A.535(3)(h)(i) (emphasis added). *Id.* The evidence produced at trial tended to show that the defendant perpetrated other acts of abuse two months before the murder. *Id.* The court instructed the jury that a “prolonged period of time” meant “more than a few weeks.”

Id. Based on this jury instruction, the jury found the aggravator applied, and the defendant received an exceptional sentence. *Id.* at 555.

This jury instruction was premised on a Court of Appeals decision that reversed a defendant’s domestic violence aggravator for insufficient evidence because it found that two weeks was not a “prolonged period of time” under the applicable statute. *Id.* at 557 (referencing *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001)). The Washington Practice: Washington Pattern Jury Instructions: Criminal (WPIC) later adopted a jury instruction regarding the term “prolonged period of time” based on the court’s ruling in *Barnett*. *Id.* Thus, the trial court in *Brush* instructed the jury regarding the term “prolonged period of time” based on *Barnett* and the WPIC. *Id.*

Our Supreme Court ruled the instruction was an impermissible comment on the evidence. *Id.* at 559-60. First, the court reasoned that the WPIC constituted an inaccurate representation of the holding in *Barnett* because *Barnett* merely held that two weeks was legally insufficient to constitute a “prolonged period of time” under the relevant statute. *Id.* at 558. The court in *Barnett* did not provide a legal definition of the term “prolonged period of time.” *Id.* Additionally, our Supreme Court “questioned the propriety of instructing the jury based on case law that did not take into account the jury’s role in determining facts that increase the

penalty for a crime,” as *Barnett* was decided before *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).⁵ *Id.* at 558. Because this incorrect interpretation of the law relieved the State of its burden to show the pattern of abuse occurred over a “prolonged period of time” and resolved a factual issue in favor of the State, the instruction constituted an impermissible comment on the evidence. Moreover, the State could not meet its burden in proving no prejudice resulted because the instruction likely “lead [the] jury to conclude that the abuse in this case met the given definition of a ‘prolonged period of time.’” *Id.* at 559.

Similarly, here, Jury Instruction 20 constitutes an impermissible comment on the evidence because it is based on a Court of Appeals ruling in a legal sufficiency case that pre-dates *Rose*; moreover, the instruction lead the jury to conclude that the State met its burden in proving all of the elements of possession of stolen property in the second degree (access device). Jury instruction 20 was based on 11 Wash. Prac.: Wash. Pattern Jury Instructions: Criminal 79.07 (4th Ed. 2016). This WPIC contains, in brackets, the following language:

The phrase “can be used” refers to the status of the access device when it was last in possession of its [lawful owner] [an authorized user] regardless of its status at a later time.

⁵ In *Blakely*, the United States Supreme Court held “that a defendant has the right for a jury to determine facts that increase the penalty for a crime.” *Brush*, 183 Wn.2d at 558 (referencing *Blakely*, 542 U.S. at 301, 313-14).

Id.

The same language appears in Jury Instruction 20. CP 47. It appears this language derives from Division One’s ruling in *State v. Schloredt*, 97 Wn. App. 789, 987 P.2d 647 (1999). In *Schloredt*, the defendant challenged the sufficiency of the evidence supporting his possession of stolen property in the second degree (access device) convictions, arguing the State failed to prove the access devices in question were operational on the date he possessed them. *Id.* at 793. The court overtly spurned the plain meaning of the access device statute and concluded the evidence was sufficient to convict the defendant of the crime. *Id.* at 793-95. The court justified its decision to refuse to read the statute plainly by concluding it would not “give a hypertechnical reading of [the] statute so as to yield an absurd result.” *Id.* at 794. Instead, the court concluded the phrase “can be used” in the access device statute “is a reference to the status of the access device when last in possession of its lawful owner.” *Id.* Again, this language appears in Jury Instruction 20. CP 47.

Interestingly, the WPIC in question contains a comment that notes,

The phrase “can be used” is open to interpretation,⁶ as the statute does not specify whether usability is measured as of the time when

⁶ For the reasons stated in part one of the Argument section of this brief, the statute is actually plain and unambiguous. And even if the statute were ambiguous, the rule of lenity requires this Court to interpret the statute in the

a device was taken from the lawful owner, or when the device is found in the defendant's possession, or at some other point.

Wash. Prac.: Wash. Pattern Jury Instructions: Criminal, supra, 79.07.

Importantly, *Schloredt* pre-dates our Supreme Court's decision in *Rose*, which holds that if the access device in question is not tied to an existing, active account, the State bears the burden of showing some affirmative evidence that the access device can nevertheless be used to obtain something of value. 175 Wn.2d at 18, n.1.

Just like the jury instruction at issue in *Brush*, Jury Instruction 20 relieved the State of its burden and, essentially, instructed the jury to find Ms. Sandoval guilty of possession of a stolen access device in the second degree. The instruction critically relieved the State of its burden of proving that the Target credit card could be used to obtain something of value at the time Ms. Sandoval possessed the card. Additionally, the instruction left the jury with no choice but to convict Ms. Sandoval of this crime, as the State presented evidence that the Target credit card could be used to obtain something of value at the time Ms. Phillips last possessed the card. RP 205.

defendant's favor. *See State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015).

c. Reversal is required.

Jury Instruction 20 improperly stated the law and relieved the State of its burden to prove every element of assault in the second degree beyond a reasonable doubt. Jury instruction 20 also contained an impermissible comment on the evidence because it instructed the jury that the State established a fact at issue.

In light of the absence of any evidence that demonstrated the Target credit card could be used to obtain anything of value at the time Ms. Sandoval possessed it, the State cannot meet its heavy burden in proving that Jury Instruction 20 did not prejudice Ms. Sandoval beyond a reasonable doubt.

This court should reverse.

3. Ms. Sandoval’s counsel performed deficiently when he neglected to request a jury instruction regarding the affirmative defense of unwitting possession.

To prove ineffective assistance of counsel, the defendant must first establish that her attorney’s performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance means performance falling “below an objective standard of reasonableness based on a consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d

1251 (1995). This Court “must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690.

Next, the defendant must establish that her trial counsel’s deficient performance prejudiced her. *Id.* at 687. Prejudice occurs when, but for counsel’s deficient performance, a reasonable probability exists that the outcome of the trial would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A reasonable probability is a probability sufficient to undermine the confidence in the outcome of the defendant’s trial. *State v. Hubert*, 138 Wn. App. 924, 930, 158 P.3d 1282 (2007).

- a. Counsel’s failure to request an instruction on Ms. Sandoval’s sole affirmative defense to possession of methamphetamine constitutes deficient performance.

Counsel’s failure to request an instruction on Ms. Sandoval’s sole affirmative defense to possession of methamphetamine—unwitting possession—constitutes deficient performance. For defense counsel’s failure to request an affirmative defense instruction to amount to deficient performance, the defendant must show that the trial court would have granted the instruction if counsel had requested it. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). Possession of a controlled substance is a strict liability crime, and unwitting possession is the only

available defense for this crime. *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994); *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

i. Ms. Sandoval was entitled to an unwitting possession instruction.

A defendant is entitled to an affirmative defense instruction (such as unwitting possession) if evidence exists that supports her theory, regardless of the source of the evidence. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016). This means that the defendant may also point to the State’s evidence to demonstrate that she merits the instruction. *Id.*

In evaluating the evidence, the trial court must view the evidence in the light most favorable to the defendant. *Id.* (referencing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)). While the defendant may not point to the State’s absence of evidence to demonstrate that she warrants an affirmative defense jury instruction, “the trial court is justified in denying a request for an affirmative defense jury instruction only where *no credible evidence* appears in the record to support it.” *Id.* at 849-51 (quoting *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064) (emphasis added). In sum, the defendant must produce *only some* evidence, and once the defendant produces this evidence, the defendant bears the burden of persuading the jury by a preponderance of

the evidence that the affirmative defense requires her acquittal. *Id.* at 849, 852.

Ms. Sandoval was plainly entitled to an unwitting possession instruction. At trial, Ms. Sandoval explained how she came to unwittingly possess the methamphetamine: Ms. Sandoval was staying at a hotel in Portland, Oregon with her husband. RP 229-30. While in Portland, Ms. Sandoval went out to lunch with her mother. RP 229-30. When she arrived back at the hotel, she saw her husband sitting in the back of a police car. RP 251. The police approached Ms. Sandoval and explained they were detaining her husband because he did not pay a portion of the hotel bill and also because someone reported there were drugs in their hotel room. RP 250-51.

Ms. Sandoval spoke to hotel management to inquire about the alleged drugs that were found in the hotel room. RP 229. One of the hotel maids handed Ms. Sandoval a bag of items that were allegedly found in Ms. Sandoval's hotel room. RP 231. The maid pulled out a small bag of coconut oil within the bag that belonged to Ms. Sandoval and mistakenly claimed the coconut oil was drugs. RP 232, 245. The maid did not pull out anything else from the bag and claim it was drugs. RP 245-46. After Ms. Sandoval explained that the "drugs" were just coconut oil, the maid handed Ms. Sandoval the bag. RP 247. Based on the maid's

misidentification of the coconut oil, Ms. Sandoval believed the “drugs” at issue in the hotel room was just the coconut oil. RP 245-46. Ms. Sandoval later put the bag in her purse without inspecting the contents of the bag. RP 231. Sometime that same day, Ms. Sandoval pleaded with the hotel management to drop the charges against her husband, and the hotel management agreed. RP 251-52.

Ms. Sandoval testified that she only saw the methamphetamine pipes that were inside the bag on the day of her arrest. RP 246, 254. Ms. Sandoval explained to the officer that someone else handed her the bag with the pipes. RP 162, 254. At trial, Ms. Sandoval testified that she was “shocked” to learn that she actually had methamphetamine in her possession. RP 238.

Because Ms. Sandoval more than met the required “some evidence” standard, she was entitled to a jury instruction on unwitting possession.

- ii. *Counsel’s failure to request an unwitting possession instruction stripped Ms. Sandoval of her only available defense to the charge of drug possession.*

Counsel’s failure to request an unwitting possession instruction stripped Ms. Sandoval of her only available defense to the charge of drug

possession; thus, counsel performed deficiently when he failed to request this instruction.

Powell is instructive. In *Powell*, the defendant was charged with second degree rape by engaging in sexual intercourse with another person who was incapable of consent after he engaged in a sexual encounter with an intoxicated woman. *Id.* at 144, 153. At trial, the complainant testified that she drank alcohol and smoked marijuana the day of the sexual encounter. *Id.* at 142. She claimed to have blacked out and awoke to the defendant engaging in sexual activity with her. *Id.* at 143.

The defendant also testified during his trial. At trial, he conveyed that he believed 1) the sexual activity was consensual; and 2) the complainant did not appear too intoxicated to participate in sexual activity willingly. *Id.* at 149. Other witnesses testified that they saw the complainant on the date of the incident with the defendant, and the complainant did not appear to be drunk. *Id.* at 145.

The court later issued jury instructions that instructed the jury to convict the defendant of rape in the second degree if the complainant was “incapable of consent by reason of being physically helpless or mentally incapacitated.” *Id.* at 150. The court issued another jury instruction that defined “mental incapacity” as

A condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by...the influence of a substance or some other cause.

Id.

Our legislature provided a statutory “reasonable belief” affirmative defense to the charge of rape in the second degree if the defendant proves, by a preponderance of the evidence, that he reasonably believed the victim was not mentally incapacitated or physically helpless. *Id.* at 153; *see also* RCW 9A.44.030(1). However, defense counsel did not request a jury instruction reflecting this affirmative defense. *Id.* at 155.

Despite not requesting this critical jury instruction, defense counsel mainly argued that the evidence demonstrated that, from the defendant’s perspective, the complainant did not appear to be unable to consent to sexual activity. *Id.* at 155.

On appeal, the defendant argued his counsel performed ineffectively for failing to request this jury instruction, and this Court agreed. *Id.* This Court first determined that the evidence plainly demonstrated that the defendant was entitled to a jury instruction reflective of the “reasonable belief” affirmative defense to rape in the second degree. *Id.* at 154. This Court also reasoned that it appeared that the defendant’s counsel was aware of this defense based on his closing argument and the

testimony he elicited from the witnesses; however, defense counsel simply failed to request the instruction that reflected his theory of the defense. *Id.* This Court could not identify any objectively reasonable tactical basis for failing to request this affirmative defense instruction. *Id.*

Similarly, here, no objectively reasonable tactical basis exists for Ms. Sandoval's trial counsel to neglect to request a jury instruction consistent with his theory of her defense. Like the defendant in *Powell*, Ms. Sandoval produced more than enough evidence to warrant an unwitting defense instruction. And like the defense counsel in *Powell*, Ms. Sandoval's counsel elicited testimony that demonstrated that Ms. Sandoval was completely unaware of her possession of the methamphetamine. RP 229, 231, 238. No objectively reasonable tactical reason existed to deprive Ms. Sandoval of her only defense to possession of methamphetamine.

- b. Counsel's deficient performance prejudiced Ms. Sandoval because the lack of a jury instruction on the affirmative defense of unwitting possession left the jury with no choice but to convict Ms. Sandoval of possession of methamphetamine.

Counsel's deficient performance prejudiced Ms. Sandoval because, like in *Powell*, without a jury instruction on the only available affirmative defense, the jury was left with no choice but to convict Ms. Sandoval of

possession of methamphetamine. “Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.” *In re Hubert*, 138 Wn. App. 924, 932, 158 P.3d 1282 (2007); *accord Powell*, 150 Wn. App. at 156.

Here, the to-convict instruction for possession of methamphetamine simply required the jury to convict Ms. Sandoval of possession of methamphetamine if she possessed methamphetamine on the day of her arrest and her possession of methamphetamine occurred in the State of Washington. CP 40. The court further defined “possession” as “having a substance in one’s custody or control.” CP 41. It was clear that Ms. Sandoval possessed the methamphetamine on the date in question because it was discovered in her purse, and it was clear that this act occurred in Washington. What was unclear, however, was whether she wittingly possessed the methamphetamine. Without the affirmative defense instruction, the jury could give no weight to Ms. Sandoval’s testimony concerning how she inadvertently possessed the methamphetamine. In other words, the jury possessed no means to acquit Ms. Sandoval.

Like in *Powell*, this Court should find that counsel’s deficient performance in failing to seek an affirmative defense instruction deprived

Ms. Sandoval of a fair trial and “essentially nullified [her] defense.” 150 Wn. App. at 157-58. Accordingly, this Court should reverse.

4. This Court should reverse the trial court’s imposition of discretionary legal financial obligations because the court did not conduct the required individualized inquiry into Ms. Sandoval’s present and future ability to pay.

Upon a defendant’s conviction, a sentencing court may order the defendant to pay costs (legal financial obligations, or LFOs). RCW 10.01.160(1). However, sentencing courts cannot require a defendant to pay discretionary costs unless the defendant possesses the present or future ability to pay. RCW 10.01.160(3).

Recognizing that the imposition of LFOs creates numerous obstacles for indigent offenders, our Supreme Court exercised its RAP 2.5 discretion and reached the merits of an unpreserved challenge to LFOs in *State v. Blazina*, 182 Wn.2d 827, 834-36, 344 P.3d 680 (2015). Because the inability to pay LFOs enables a court to retain jurisdiction over indigent offenders long after they are released from prison, “the court’s long term involvement in defendant’s lives inhibits reentry.” *Id.* at 837. This is because the active record results in serious negative consequences in employment, housing, and finances. *Id.*⁷

⁷ Referencing *Am. Civ. Liberties Union, In for a Penny: The Rise of America’s New Debtors’ Prisons* 68-69, https://www.aclu.org/files/assets/InForAPenny_web.pdf.

With these concerns in mind, our Supreme Court held, “the record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” *Blazina*, 182 Wn.2d at 838. This inquiry *must* consider non-exhaustive factors such as the defendant’s incarceration and other debts. *Id.* Furthermore, our Supreme Court instructed sentencing courts to look to GR 34 for guidance to determine a defendant’s ability to pay. *Id.*

Here, the sentencing court did not engage in the required inquiry into Ms. Sandoval’s ability to pay. Nothing in the record indicates that the court looked to GR 34 for guidance to determine Ms. Sandoval’s ability to pay. Though the court stated it was only going to impose the “mandatory minimum” in LFOs, the judgment and sentence contains a discretionary fine of \$250 (jury demand fee). CP 59; RP 337.

This court should reverse with instructions for the court to engage in the inquiry mandated in *Blazina*. *See State v. Ralston*, 185 Wn.2d 1025, 377 P.3d 724 (2016) (granting petition for review on the issue of imposition of discretionary LFOs and remanding the case to the superior court because it did not conduct an individualized inquiry into the appellant’s current and future ability to pay in light of the non-exhaustive factors noted in *Blazina* and the factors for determining indigency as

described in GR 34); *accord State v. Christopher*, 135 Wn.2d 1001, 369 P.3d 149 (2016); *State v. Como*, 185 Wn.2d 1025, 377 P.3d 730 (2016).

F. CONCLUSION

Based on the foregoing, Ms. Sandoval asks this Court to dismiss with prejudice her conviction for possession of stolen property in the second degree (access device); alternatively, Ms. Sandoval asks this Court to reverse her conviction for possession of stolen property in the second degree and remand for a new trial.

Additionally, Ms. Sandoval asks this Court to reverse her conviction for possession of a controlled substance and remand for a new trial.

DATED this 14th day of March, 2018.

Respectfully submitted,

/s Sara S. Taboada
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Attorney for Appellant

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

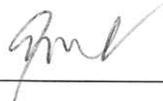
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 50814-1-II
v.)	
)	
MARY SANDOVAL,)	
)	
Appellant.)	

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