

FILED
Court of Appeals
Division II
State of Washington
7/2/2018 11:31 AM
NO. 50814-1-II

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

STATE OF WASHINGTON, Respondent

v.

MARY ELIZABETH SANDOVAL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00733-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The State presented sufficient evidence to sustain Sandoval's conviction for Possession of Stolen Property in the Second Degree.**
- II. Jury instruction 20 properly stated the law.**
- III. Jury instruction 20 did not relieve the State of its burden to prove Sandoval guilty beyond a reasonable doubt.**
- IV. Jury Instruction 20 does not contain an impermissible comment on the evidence.**
- V. Sandoval received the effective assistance of counsel.**
- VI. The State agrees that the imposition of the discretionary, jury demand fee of \$250 should be stricken.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mary Elizabeth Sandoval was charged by second amended information with Possession of a Stolen Motor Vehicle, Possession of a Controlled Substance – Methamphetamine, Identity Theft in the Second Degree, and Possession of Stolen Property in the Second Degree for being discovered in possession of these items on or about April 2, 2017. CP 15-16. The parties proceeded to a jury trial in front of the Honorable Robert Lewis beginning on August 15, 2017 and concluding with the jury's verdicts the next day. RP 5-326. The jury found Sandoval guilty of Possession of a Stolen Motor Vehicle, Possession of a Controlled

Substance, and Possession of Stolen Property in the Second Degree, and hung on the Identity Theft charge. RP 322-26; CP 51-54. The trial court sentenced Sandoval to a standard range sentence of 3 months confinement. RP 337; CP 57-58. Sandoval filed a timely notice of appeal. CP 66.

B. STATEMENT OF FACTS

On March 6, 2017, Sandoval entered into a demonstration agreement with a Toyota dealership in Kelso, Washington. RP 124-28, 145. A demonstration agreement allows a potential customer to “drive the vehicle for 24 hours, take it home, see if they like it, [and] see if they want to move forward with purchasing it.” RP 126. Sandoval’s signed demonstration agreement required her to bring the Toyota RAV4 vehicle back to the dealership by noon of March 7, 2017 and limited her driving of the vehicle to 70 miles. RP 127-28. The agreement, however, did allow for some flexibility for returning the RAV4 later provided that it was returned within 72 hours. RP 129, 134, 146.

Once the maximum time had expired, the dealership made attempts to get the vehicle back by trying to call and text Sandoval, and by driving to the address Sandoval listed in the agreement as her own to see if the RAV4 was there. RP 130-35, 140, 145-48. Sandoval, after initially remaining in contact, did not return these calls and text messages, and the

dealership was unable to find the vehicle at Sandoval's listed address. RP 130-33, 135, 140, 145-48. As a result, the dealership called the police and reported the RAV4 as stolen. RP 132, 139.

On April 2, 2017, the police found Sandoval in the RAV4 at her listed address. RP 152-55. The police arrested Sandoval for possessing the stolen vehicle and searched her incident to that arrest. RP 159-160. When searching Sandoval's purse, the police found a stolen Target credit card in the name of Ginger Phillips,¹ Sandoval's sister's birth certificate, "some small glycine or clear Ziploc baggies with a powdery residue and two pipes that . . . are commonly used to ingest methamphetamine." RP 160-62, 203-06. Residue from inside one of the pipes tested positive for methamphetamine. RP 197. Sandoval told the police that she had been staying at a hotel and that an employee at the hotel approached her and provided her with the stolen credit card as well as the clear plastic baggies. RP 162. The employee said that these items had been found in Sandoval's room. RP 162. Sandoval told the police that she didn't know what to do with the items so she put them in her purse. RP 162.

¹ The card had been stolen from Ms. Phillips in February of 2017. RP 203-04. Ms. Phillips cancelled the card shortly thereafter. RP 207-08.

Sandoval testified at trial. RP 221-256. In her testimony, Sandoval attempted to explain why she did not return the RAV4 and how she came to possess a stolen credit card and the methamphetamine. RP 221-256.

After dispossessing Sandoval of the RAV4, it was returned to the dealership. The RAV4's mileage was listed at 237 miles at the time it left the dealership and was returned with well over 1,000 miles on the odometer. RP 129-30, 133. The RAV4 was also in rough shape as it had been smoked in, contained a significant amount of garbage, and appeared to have been involved in a small collision. RP 133.

ARGUMENT

I. The State presented sufficient evidence to sustain Sandoval's conviction for Possession of Stolen Property in the Second Degree.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Accordingly, in order to determine whether the necessary quantum of proof exists, the reviewing court "need not be convinced of the defendant's guilt beyond a reasonable doubt but only that substantial evidence supports the State's

case.” *State v. Gallagher*, 112 Wn.App. 601, 51 P.3d 100 (2002)
(citations omitted).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. This means that “these inferences ‘must be drawn in favor of the State and interpreted most strongly against the defendant.’” *State v. Homan*, 181 Wn.2d 102, 330 P.3d 182 (2014) (quoting *Salinas*, 119 Wn.2d at 201). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 824 P.2d 533 (1992). In other words, an appellate court does not “reweigh the evidence and substitute [its] judgment for that of” the fact finder. *State v. McCreven*, 170 Wn.App. 444, 284 P.3d 793 (2012) (citation omitted). Furthermore, “specifics regarding date, time, place, and circumstance are factors regarding credibility . . .” and, thus, matters a fact finder best resolves. *State v. Hayes*, 81 Wn.App. 425, 914 P.2d 788 (1996) *rev. denied* 130 Wn.2d 1013 (1996).

Sandoval argues that the State failed to prove that she possessed a stolen access device because at the time she was arrested the stolen Target credit card that she possessed had been deactivated and thereby ceased to be an “access device.” Brief of Appellant at 9-15. Sandoval’s argument rests on an incorrect, and already rejected, interpretation of the “access device” statute² and an unwarranted extension of our Supreme Court’s decision in *State v. Rose*. 175 Wn.2d 10, 282 P.3d 1087 (2012).

- a. Statutory interpretation of the “access device” statute and prior court decisions support the conclusion that Sandoval possessed a stolen access device at the time she was arrested.

This court reviews questions of statutory interpretation de novo. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). Statutory interpretation, the aim of which is to determine the legislature’s intent, begins with the statute’s plain meaning. *State v. James-Buhl*, --- Wn.2d ---, 415 P.3d 234, 237, (2018) (citation omitted). “Plain meaning is ‘discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’” *Id.* (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). If the plain language is unambiguous, courts

² Sandoval uses “‘access device’ statute” as a shorthand for RCW 9A.56.010(1). Br. of App. at 11-12. The State will do the same.

must give it effect. *Id.* (citing *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)).

Furthermore, when courts construe or interpret a statute “we presume that the legislature is aware of the holdings . . . and that the legislature’s failure to amend [the statute] after these cases were decided indicates legislative acquiescence.” *Mortensen v. Moravec*, 1 Wn.App.2d 608, 625, 406 P.3d 1178 (2017) (citing *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009)). In other words, “[l]egislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence in that construction.” *Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993).

To the extent that the language of a statute remains ambiguous, reviewing courts “presume the legislature does not intend absurd results and, where possible, interpret ambiguous language to avoid such absurdity.” *State v. Ervin* 169 Wn.2d 815, 823-24, 239 P.3d 354 (2010) (citing *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983)).

Moreover, if the relevant statute is susceptible to more than one reasonable interpretation reviewing courts “may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Id.* at 820 (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)).

RCW 9A.56.160(1)(c) states that a person “is guilty of possessing stolen property in the second degree if: [h]e or she possesses a stolen access device.” In turn, RCW 9A.56.010(1) defines “access device,” in relevant part, as: “any card, . . . account number, or other means of account access that can be used . . . to obtain money, goods, services, or anything else of value. . . .” Sandoval focuses her argument on the phrase “can be used” in the “access device” statute and claims that because “can” means “to be able to do, make or accomplish” and “denotes the present tense” that, essentially, a stolen credit card must be working at the time a thief is found in possession of it or the credit card is not an “access device” as defined by statute. Br. of App. at 12-13.³ Sandoval, however, fails explain how her premise—the definition of “can” and the fact that the term is in the present tense—necessitates her conclusion. Notably, *State v. Schloredt* has already rejected this argument. 97 Wn.App. 789, 793-94, 987 P.2d 647 (1999).

The defendant in *Schloredt* argued that “the language ‘can be used’ in the definition of access device requires the State to prove the stolen [credit] cards remained active at the time of their discovery in his pocket.” *Id.* The court responded:

³ Sandoval uses the definitions of “can” listed as “archaic” rather the other more modern definitions that highlight the versatility of the verb. <https://www.merriam-webster.com/dictionary/can>

A reviewing court will not give a hypertechnical reading of a statute so as to yield an absurd result. It begs reason to assume the legislature intended that a defendant could not be charged with possessing a stolen credit card or other access device solely because the victim discovered the theft and cancelled the account on the stolen card before the defendant was apprehended. . . . This is gymnastics, not statutory construction, and we decline [the defendant's] invitation to assume the legislature intended to engage in such contortions in writing a simple definition. *The clear legislative intent of the language "can be used" in [(former)] RCW 9A.56.010(3) is a reference to the status of the access device when last in possession of its lawful owner.* It does not reference the status of the device when later located in unauthorized hands.

Id. (emphasis added and internal footnotes omitted) In short, *Schloredt* interpreted the "access device" statute and concluded that "[w]hether the victims cancelled their accounts prior to [the defendant's] arrest is irrelevant." *Id.*

In the 19 years since *Schloredt* was decided, RCW 9A.56.010 has been amended 4 times and not once has the definition of "access device" been changed, substantively or otherwise. 2017 c 266 § 7; 2011 c 164 § 2; 2006 c 277 § 4; 2002 c 97 § 1. This legislative silence on the portion of the statute that *Schloredt* construed "creates a presumption of acquiescence in that construction." *Leonard*, 120 Wn.2d at 545; *Koenig*, 167 Wn.2d at 348 (finding legislative acquiescence where "the legislature ha[d] declined to modify the PRA's definitions of agency and public records in the 23 years since the [relevant court] decision" construing the definitions). Moreover,

Schloredt's conclusion that a contrary construction would lead to absurd results is persuasive as it strains credulity that the legislature intended to make the existence of a crime wholly dependent on the diligence of the crime victim following a theft—woe be to the criminal whose victim is not alacritous in calling his or her credit card company.

State v. Clay is also instructive. 144 Wn.App. 894, 184 P.3d 674 (2008). In *Clay*, the defendant was arrested and found with a Mervyns credit card in his pocket that had the victim's name on the front and her name signed to the back. *Id.* at 896. The victim had a credit card account at Mervyns, but her account number had changed and she had never received a new card. *Id.* Thus, the victim had neither seen nor signed the card in the defendant's possession. The defendant argued that the credit card found in his possession was not an access device because it had never been activated and was never in the possession of its intended user. *Id.* *Clay* rejected this argument.

After reviewing *Schloredt*, *Clay* concluded:

The [access device] statute does not require that the access device be activated. RCW 9.56.010 focuses exclusively upon the capacity of the device to be used in the manner described and *does not include within its definition of access device any reference to the status of that device with its issuer*. While whether a card has been activated by its intended user may be relevant, this fact is not dispositive in determining whether it "can be used."

Id. at 898-99 (emphasis added). Thus, sufficient evidence existed that the unactivated credit card was an “access device” where the victim “had a single active Mervyns account that had been assigned a new account number, but had not received a card corresponding to that new number,” someone else had signed the signature box on the card, and no evidence existed to show that additional steps needed to be taken to activate the card. *Id.* at 899.

Here, Phillips testified that her Target credit card was stolen. RP 204-05. She explained that it worked like a credit card, could be used to obtain goods or services, and contained account information on it, to include the account number, expiration date, and her name. RP 205. Phillips also testified that the card was stolen with her wallet and at the time it was stolen that she could have used the card in a Target store. RP 205. Additionally, after it was stolen, someone used or attempted to use the card and Phillips called Target to cancel the card. RP 207-08. Based on these facts, the State presented sufficient evidence that Phillips’ Target credit card was an access device.

- b. *State v. Rose*⁴ does not overrule *Schloredt* or *Clay* nor does it support Sandoval’s argument that the term “can be used” refers to at the time that the criminal is apprehended in possession of the credit card.

⁴ 175 Wn.2d 10, 282 P.3d 1087 (2012).

Sandoval claims that our Supreme Court’s decision in *Rose* confirms that her interpretation of the “access device” is correct. But the decision does not address that issue nor does it purport to overrule *Schloredt* or *Clay*. In *Rose*, the victim received a credit card offer in the mail. 175 Wn.2d at 13. The offer included a plastic credit card with an account number and the victim’s name on it, but required a \$30 payment in order to be activated. *Id.* Thus, when the card arrived in the mail it was “an unactivated credit card not linked to an existing account.” *Id.*

The victim did not have the money needed to activate the account so she threw the card in the trash. *Id.* That same day, the defendant was arrested for another crime and the above referenced card was found in his possession after a search incident to his arrest. *Id.* at 12-13.

On that evidence, *Rose* held that “[t]he State bore the burden to prove that the card ‘can be used’ to obtain something of value” and that the State failed to “meet its burden.” 175 Wn.2d at 18. But because the card in question was *never* able to be used to obtain something of value, the question of *when* “can be used” refers was not relevant. In fact, *Rose* briefly discusses *Schloredt* and *Clay* and summarizes the holding of each, but does not suggest either was wrongly decided. *Id.* at 15-16. Instead, *Rose* chose to factually distinguish the cases—rather than conducting an alternative statutory interpretation—noting that “[u]nlike the devices at

issue in *Clay*, *Schlorede*, and *Chang*, this card was not linked to an existing, active account, nor was the account holder’s name signed on the back.” *Id.* at 17. *Rose* even cites to federal cases for the proposition that “an existing, active account is not necessary if the device can nevertheless be used to obtain something of value.” *Id.* (citing cases). The court concluded, however, that “it stretches the inference beyond the evidence to conclude that *this card* could be used to obtain something of value” *Id.* (emphasis added).

Subsequent decisions of this Court, albeit unpublished,⁵ support the State’s assessment of *Rose*.⁶ In *State v. Van Fields*, the victim’s EBT card was stolen from her purse. 2 Wn.App.2d 1036, 2018 WL 834350, 1 (2018). The victim explained that an “EBT card could be used ‘like any other debit card at the store’ *as long as one entered a code.*” *Id.* (emphasis added). The defendant, who was later found in possession of the victim’s EBT card, argued that the State failed to show that the EBT card could be used to access something of value and, like *Sandoval*, relied upon *Rose*. *Id.* at 3.

⁵ GR 14.1 states that unpublished opinions “may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

⁶ In addition to *State v. Van Fields*, *infra*, this Court’s decision in *State v. Vickers* found sufficient evidence that stolen credit cards constituted “access devices” by distinguishing *Rose* and looking to the evidence of the status of the cards when last in the possession of the lawful owner. 179 Wn.App. 1029, 2014 WL 548147 (2014) (noting that any “rational juror upon hearing that the credit cards belonged to [the victim] and that he carried them with him in his wallet or backpack, could reasonably infer that they were access devices”).

This Court approvingly cited *Schloredt* for the proposition that the “State must prove the access device’s status—that it could be used—when the device was last in possession of its lawful owner.” *Id.* And immediately afterwards cited *Rose* for the proposition that the “State b[ears] the burden to prove that the card ‘can be used’ to obtain something of value.” *Id.* Thus, this Court was able to harmonize the holding of each case and recognize that holding of *Rose* did not overrule or abrogate *Schloredt*.

Van Fields then looked to the relevant facts—the status of the device when last in the victim’s possession—and noted that the victim “was carrying her EBT card in her wallet when it was stolen, and it is also a reasonable inference that she did so because she used her card and thus that it was active.” Thus, at that point, the evidence was sufficient to show that the card could be used to obtain something of value—the “reasonable inference from [the victim’s] testimony was that she could use *her* EBT card in the manner she described.” *Id.* (emphasis in original). Accordingly, this Court concluded that the case was “factually distinct from *Rose*,” that the defendant’s “reliance on *Rose* [wa]s misplaced,” and that the State

provided sufficient evidence that the EBT card met the statutory definition of “access device.” *Id.* at 3-4.⁷

Van Fields persuasively discusses *Rose*, confirms that *Schloredt*’s relevant holding remains good law, and by applying the facts to the law shows that the holding of each is not in tension. Furthermore, as noted above, *Rose* cites to federal cases for the proposition that “an existing, active account is not necessary if the device can nevertheless *be used to obtain something of value.*” 175 Wn.2d at 17 (emphasis added). Notably, federal cases have also concluded that a credit card “need not be usable in its primary ‘access’ sense[,] . . . credit cards—whether expired, fake, or un-activated—can be used to create and corroborate false identities.” *Vysniauskas*, 593 Fed.Appx. at 528-29; *Moon*, 808 P.3d at 1092; *Popovski*, 872 F.3d at 553. Thus, the phrase “used to obtain something of value” is not limited to “fraudulent purchases.” *Moon*, 808 P.3d at 1092; *Vysniauskas*, 593 Fed.Appx. at 528-29; *Popovski*, 872 F.3d at 553.

Here, the current state of law, *Rose* included, requires a straightforward application of *Schloredt* to the facts of this case. The

⁷ This Court also rejected the defendant’s argument relying on *United States v. Onyesoh*, 674 F.3d 1157, 1159 (9th Cir. 2012) (defining “access device” in 18 U.S.C. § 1029 and applying federal sentencing guidelines) as a federal case interpreting federal statute. *Id.* at 4. Sandoval likewise cites *Onyesoh* approvingly. Br. of App. at 14. Worth noting, however, is that multiple courts have explicitly disagreed with the reasoning in *Onyesoh*, though an additional statute without a Washington analog plays a part in those courts disagreement. See *U.S. v. Vysniauskus*, 593 Fed.Appx. 518, 528-29 (6th Cir. 2015); *U.S. v. Moon*, 808 F.3d 1085 (6th Cir. 2015); *United States v. Popovski*, 872 F.3d 552, 553 (7th Cir. 2017).

evidence that the Target credit card, at the time Phillips last possessed the card, could be used to obtain something of value is undeniable. And even if *Rose* somehow alters or narrows the holding of *Schloredt*, *Rose* is still so factually distinguishable as to be almost totally inapplicable to these facts. In *Rose*, the credit card in question was a mailed “offer” that was (1) never linked to “an existing account;” (2) never activated; (3) never signed; and required a \$30 activation fee. 175 Wn.2d at 12-18.

Realistically, the card in *Rose* was more a piece of plastic than it was as an actual credit card. On the other hand, the credit card that Sandoval possessed was linked to an existing account with Target, was carried by Phillips in her purse, and was active and used to make purchases at Target by Phillips before it was stolen.⁸ *See Clay*, 144 Wn.App. at 896-99 (holding that a stolen Mervyns credit card, where the victim had a credit account, was an “access device” even though the card was not activated nor ever in the victim’s possession.)

Because of these differences, Phillips’ card was an access device and *Rose* does not compel otherwise. Moreover, because Phillips’ card, even if cancelled while in the possession of Sandoval, was linked to an existing Target credit account and contained account and identification

⁸ No evidence suggests that the cancelling of a particular card also cancels the active account with the relevant store or credit card company and it defies common sense that it would. RP 208.

information, the card “*could* be used” by Sandoval “to obtain something of value,” e.g., “to create [or] corroborate false identities.” *Rose*, 175 Wn.2d at 18 (emphasis added); *Vysniauskas*, 593 Fed.Appx. at 528-29. Sufficient evidence supported Sandoval’s conviction.

II. Jury instruction 20 properly stated the law and does not contain a comment on the evidence.

Sargent argues that Jury instruction 20, the instruction defining “access device” was “legally deficient because it . . . [was] based on an erroneous definition of the term ‘access device’” and because it “contain[ed] an impermissible comment on the evidence.” Br. of App. at 16-23. The jury was properly instructed because instruction 20 gave the correct legal definition of the phrase “can be used” as explained above in section I. Additionally, because the legal definition provided in instruction 20 did no more than accurately state the law pertaining to an issue, it did not constitute an improper comment on the evidence.

- a. Jury instruction 20 properly defined the phrase “can be used.”

Sandoval provides the correct legal standard for assessing whether a jury instruction accurately states the law. Br. of App. at 16. 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.*

Here, the court provided the jury with instruction 20, which stated:

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.

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. Sandoval only complains about the second paragraph of the instruction. Br. of App. at 17. But as discussed in section I, the phrase “can be used” as defined in instruction 20 is a correct statement of law. Consequently, the instruction was not legally deficient and did not allow

the jury to convict Sandoval on an incorrect legal basis. Moreover, any error in the definition of the phrase “can be used” is harmless because, as also argued above, Phillips’ Target credit card was an “access device,” from the time Phillips’ last possessed it to the time Sandoval was dispossessed of it by the police, because at all times it could be used to obtain something of value. This Court should affirm Sandoval’s conviction.

- b. Instruction 20 does not contain an impermissible comment on the evidence.

The Washington State Constitution “does not allow judges to ‘charge juries with respect to matters of fact, nor comment thereon.’” *State v. Brush*, 183 Wn.2d 550, 556-67, 353 P.3d 213 (2015) (quoting CONST. art. IV, § 16). Instead, judges “shall declare the law.” *Id.* at 557. Accordingly, a jury instruction “that does no more than accurately state the law pertaining to an issue . . . does not constitute an impermissible comment on the evidence by the trial judge.” *Id.* (citing *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001)). In other words, if an instruction reflects an accurate “legal conclusion” then it is not a comment on the evidence. *In re Taylor-Rose*, 199 Wn.App. 866, 874, 401 P.3d 357 (2017).

On the other hand, a trial court “makes an improper comment on the evidence if it gives an instruction that (1) conveys to the jury his or her personal attitude on the merits of the case or (2) instructs the jury that matters of fact have been established as a matter of law.” *Id.* (citing *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006)). Courts review jury instructions “de novo to determine if the trial court has improperly commented on the evidence.” *Id.* (citation omitted).

Sandoval argues that 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.” Br. of App. at 23. But instruction 20 did no such thing. The instruction defined the phrase “can be used,” it did not instruct the jury that the State had proven the element, i.e., the State still had to prove the Target credit card was an “access device” at the time Phillips last possessed it. This instruction is no different than various other instructions given in Sandoval’s trial. For instance, instruction 15 states that “[m]ethamphetamine is a controlled substance.” CP 42. This instruction accurately stated the law, but still required that the State prove that the substance that Sandoval possessed was a controlled substance.

Sandoval also argues that *Brush*’s admonition “that legal definitions *should not be* fashioned out of courts’ findings regarding legal sufficiency” means that “a jury instruction fashioned out of another court’s

findings and rulings regarding legal sufficiency amount to a comment on the evidence.” 183 Wn.2d at 558 (emphasis added); Br. of App. at 18. Sandoval then argues that instruction 20 constitutes a comment on the evidence because it is fashioned from *Schloredt*, which Sandoval characterizes as a “Court of Appeals ruling in a legal sufficiency case. . . .” Br. of App. at 21-22.

But this mischaracterizes *Schloredt*, since quite plainly *Schloredt* reaches its holding regarding the meaning of “can be used” by engaging statutory interpretation—the court looked to the plain language, legislative history, and whether certain interpretations of the statute would lead to absurd results. 97 Wn.App. at 793-94. Sandoval acknowledges this fact later when arguing that *Rose* in some way cabins *Schloredt*’s holding. Br. of App. at 22-23. Moreover, as argued at length in section I, *supra*, *Schloredt* was correctly decided and still accurately states the law. Consequently, instruction 20 does not either “(1) convey[] to the jury [the court’s] personal attitude on the merits of the case or (2) instruct[] the jury that matters of fact have been established as a matter of law.” *Taylor-Rose*, 199 Wn.App. at 874. Instead, the instruction “does no more than accurately state the law” and “does not constitute an impermissible comment on the evidence by the trial judge.” *Brush*, 183 Wn.2d at 558; *Taylor-Rose*, 199 Wn.App. at 874.

Furthermore, even if instruction 20 constituted a comment on the evidence the error was harmless because, as also argued above, Phillips' Target credit card was an "access device," from the time Phillips' last possessed it to the time Sandoval was dispossessed of it by the police, because at all times it could be used to obtain something of value. This Court should affirm Sandoval's conviction.

III. Sandoval received the effective assistance of counsel.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

The analysis of whether a defendant’s counsel’s performance was deficient starts from the “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 211 P.3d 441 (2009) (stating that “[j]udicial scrutiny of counsel’s performance must be highly deferential”) (quotation and citation omitted). When counsel’s actions or decisions can be characterized as “legitimate trial strategy or tactics, performance is not deficient.” *Grier*, 171 Wn.2d at 33 (citing *Kylo*, 166 Wn.2d at 863). Thus, “given the deference afforded to decisions of defense counsel in the course of representation” the “threshold for the deficient performance prong is high.” *Id.* In order to prove that deficient performance prejudiced the defense, “the defendant must establish that ‘there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.’” *Id.* at 34 (quoting *Kylo*, 166 Wn.2d at 862).

Here, Sandoval claims that her trial counsel’s “failure to request an instruction on Ms. Sandoval’s sole affirmative defense to possession of methamphetamine—unwitting possession—constitutes deficient performance.” Br. of App. 25.⁹ Because Sandoval’s counsel’s choice not

⁹ Sandoval argues that she would have been entitled to the affirmative defense of unwitting possession had she asked for it. Br. of App. at 26-28. The State agrees.

to undertake the burden of an affirmative defense was a reasonable strategic or tactical choice, Sandoval's ineffective assistance claim fails.

A defendant may “elect[] to forgo an affirmative defense as a matter of strategy” and argue as his or her “sole defense [] that the State failed to prove its case.” *State v. Coristine*, 177 Wn.2d 370, 378-79, 300 P.3d 400 (2013). A defendant may elect to proceed without a colorable affirmative defense because he or she does “not want the burden of proof.” *State v. Lynch*, 178 Wn.2d 487, 493, 309 P.3d 482 (2013); *State v. Whittaker*, --- Wn.App.2d ----, 2018 WL 2041507, 6 (2018) (recognizing “that it is a reasonable trial strategy for a defendant not to assume the burden of proof for this affirmative defense and instead argue that the State failed to carry its burden of proof” and declining to find deficient performance where “defense counsel *may have* adopted that strategy”).¹⁰ On the other hand, a defense counsel's “failure to recognize and raise an affirmative defense can fall below the constitutional minimum for effective representation.” *Coristine*, 177 Wn.2d at 379 (citing *In re Hubert*, 138 Wn.App. 924, 928-29, 158 P.3d 1282 (2007) (where defense counsel submitted a declaration stating he failed to argue the “reasonable belief” defense because he failed to investigate properly and did not know

¹⁰ This Court's decision in *Whittaker* is unpublished. GR 14.1 states that unpublished opinions “may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

the defense existed until Hubert's appellate counsel brought it to his attention).

Sandoval relies on *State v. Powell* to support her argument that “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.” Br. of App. at 29-31; 150 Wn.App. 139, 206 P.3d 703 (2009). *Powell* is distinguishable and, because it predates *Coristine* and *Lynch*, *Powell* does not discuss our Supreme Court’s conclusion that it is a reasonable trial strategy for a defendant to not assume the burden of proof for an affirmative defense.

In *Powell*, the defendant was charged with second degree rape for engaging in sexual intercourse with another person who was incapable of consent after he engaged in a sexual encounter with an intoxicated woman. 150 Wn.App. at 144, 153. The legislature has provided a statutory defense to such a rape, which the defendant must prove by a preponderance of the evidence, where “at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.” RCW 9A.44.030(1). *Powell*’s trial counsel, however, did not request a “reasonable belief” instruction despite the fact that (1) the defendant’s testimony, portions of the victim’s testimony, and the testimony of other witnesses supported a “reasonable belief” theory; (2)

“defense counsel, in effect, argued the statutory defense; and (3) the statutory defense was entirely consistent with defendant’s theory of the case.” *Powell*, 150 Wn.App. at 154-55. *Powell* concluded that based on those facts there was “no objectively reasonable basis for failing to request a ‘reasonable belief’ instruction.” *Id.* at 155.

Here, the police discovered pipes in Sandoval’s purse. RP 160, 165. The purse had been in the car she was driving and on her person. RP 160, 165. One of the pipes contained a residue that tested positive for methamphetamine. RP 160, 165, 197. Sandoval testified about the events that led to her placing the pipes in her purse. RP 229-238, 244-49, 254-55. While Sandoval’s story provided sufficient evidence to warrant the unwitting possession instruction, had she desired to undertake the burden of the affirmative defense, it plainly lacked credibility.

Sandoval testified that on or about April 1, she went to the hotel at which she, at times, and her husband had been staying when she was informed by the police and hotel staff that drugs had been found in their room. RP 229-231, 244-45, 247, 254-55. She was then given a bag—the type that lines an ice bucket—by the hotel staff that the hotel staff said

contained drugs amongst other left over items from the room. RP 162,¹¹ 229-231, 245, 247, 254-55. Sandoval then placed the bag that contained the drugs in her purse. RP 162, 229-231. She was arrested approximately 24 hours later and testified that she was shocked that pipes and the stolen credit card¹² were found in her purse. RP 235, 238, 254.

Notably, no other witness or evidence supported the “unwitting possession” theory. More importantly, however, is that unlike the trial counsel in *Powell*, Sandoval’s trial counsel did not “in effect, argue[] the statutory defense” during his closing argument. 150 Wn.App. at 154-55.¹³ Instead, Sandoval’s trial counsel discussed the drug charge as follows:

Okay. She told us she goes back to the Radisson. Portland Police are there because of her husband. Apparently she -- apparently the staff as a result of this incident with her husband had gone into the room to collect the personal items that were in there. Threw it in this plastic bag. One of the personal items was the controlled substances. Another personal item was the credit card and the (inaudible). And then they give it to her.

Well, the Portland Police, who were there investigating her husband -- okay. So they knew about the stuff that was seized. They were told by hotel staff, well, we think we

¹¹ Sandoval told the police that *she* had been staying at a hotel and that an employee at the hotel approached her and provided her with the stolen credit card as well as clear plastic baggies. RP 162. The employee said that these items had been found in Sandoval’s room. RP 162. Sandoval told the police that she didn’t know what to do with the items so she put them in her purse. RP 162.

¹² Sandoval also testified that the maid at the hotel found the stolen credit card in a drawer in the hotel room and placed it with the other items into the plastic bag that was given to Sandoval. RP 233-34.

¹³ Sandoval does not argue on appeal that her trial counsel argued the statutory defense in closing. Br. of App. at 30-32.

have dope. Okay. But then they didn't do anything with it. Okay. Just like they didn't do anything with the stolen vehicle because it was not to them a big deal. So instead of giving it to the police, this bag of stuff, giving it to Officer Dannel with the Portland Police bureau, they give it to her.

And she's questioning, well, what do you mean there's dope? And they pull out some bottle -- coconut oil or something. If this was -- if she went into some alley, and she was purchasing meth from somebody, and she had it in her pocket, and then she's running away, okay, different story. But in this case she received it legitimately from hotel staff after Portland Police bureau had been notified, after they were there and knew about it.

Okay. *The State has the obligation of proving each and every element of the charges.* Okay. Your job is to put together all the evidence or lack thereof and decide whether or not these crimes were committed. Okay. *But their obligation is to prove every element beyond a reasonable doubt.*

RP 299-300 (emphasis added). As noted in *Coristine*, a defendant may “elect[] to forgo an affirmative defense as a matter of strategy” and argue as his or her “sole defense [] that the State failed to prove its case.” 177 Wn.2d at 378-79; *Whittaker*, 2018 WL 2041507 at 6. This is, in part, exactly what Sandoval's trial counsel did.

But Sandoval's trial counsel had an additional strategy that necessitated Sandoval not assume the burden of proof; by emphasizing

that Sandoval received¹⁴ the methamphetamine “legitimately from hotel staff after Portland Police bureau had been notified,” that “it was not to them [(the Portland Police)] a big deal,” and that the drugs were likely the property of her husband, trial counsel sought to convince the jury that this residue drug charge was trivial and not one for which Sandoval should be convicted. *See State v. Nicholas*, 185 Wn.App. 298, 300-01, 341 P.3d 1013 (2014) (explaining that jury nullification “may occur when members of the jury disagree with the law the defendant has been charged with breaking, or believe that the law should not be applied in that particular case” and may be based on the juror’s “sense of justice, morality, or fairness”) (citations omitted). A seasoned defense attorney knows that, in general, juries are not impressed with drug residue cases.

Consequently, Sandoval’s trial counsel’s decision to forgo the affirmative defense of unwitting possession was a legitimate and reasonable tactical decision. And “a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim.” *State v. Yarbrough*, 151 Wn.App. 66, 91, 210 P.3d 1029 (2009) (citing *State v. McNeal*, 145 Wn.2d 352, 37 P.3d 280 (2002)). Accordingly,

¹⁴ Assuming arguendo that Sandoval’s whole story with the hotel has some actual connection to how she came to possess the pipes. The State believes a more likely scenario is that Sandoval kept the pipes that she used to smoke methamphetamine in her purse.

Sandoval has failed to show that her trial counsel's performance was deficient.

Moreover, even assuming deficient performance, Sandoval cannot show prejudice. Sandoval cites *Powell* for the proposition that prejudice is established where "defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense." Br. of App. at 32; 150 Wn.App. at 156. But this standard for determining prejudice has never been adopted by our Supreme Court nor does it survive the reasoning of *Coristine*. If a defendant can elect "to forgo an affirmative defense as a matter of strategy" and choose as his or her "sole defense [] that the State failed to prove its case" then *Powell*'s prejudice standard is inoperative because challenging the State's proof is always available as a defense. *Coristine*, 177 Wn.2d at 378-79.

Instead, for Sandoval to show prejudice she must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Grier*, 171 Wn.2d. at 34 (quoting *Kyllo*, 166 Wn.2d at 862). Here, the evidence proved beyond a reasonable doubt that Sandoval *wittingly* possessed the methamphetamine—she was handed a plastic bag that she was told contained drugs, she put the bag in her purse, and later the police found a pipe in her purse that contained methamphetamine. Even had the

unwitting possession instruction been provided to the jury there is not a reasonable probability that they jury would have found that Sandoval met her burden of proof and, therefore, acquitted her of the drug charge. Accordingly, Sandoval's ineffective assistance of counsel claim fails.

IV. The State agrees that the imposition of the discretionary, jury demand fee of \$250 should be stricken.

Here, the record supports the notion that trial court intended to only impose the mandatory legal financial obligations as it indicated it was going to impose the "mandatory minimum" legal financial obligations. RP 337. If the trial court felt differently it likely would have engaged in the mandatory, ability to pay inquiry. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015); RCW 10.01.160(3). Nonetheless, the trial court imposed the discretionary, jury demand fee of \$250. The State agrees that this fee should be stricken.

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CONCLUSION

For the reasons argued above, this Court should affirm Sandoval's convictions.

DATED this 2nd day of July, 2018.

Respectfully submitted:

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July 02, 2018 - 11:31 AM

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Appellate Court Case Title: State of Washington, Respondent v. Mary E. Sandoval, Appellant
Superior Court Case Number: 17-1-00733-1

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