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NO. 50910-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHARYL SMITH,
Appellant.

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

Kitsap County Cause No. 16-1-00733-1

The Honorable Jeffrey P. Bassett, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court's limits on Ms. Smith's testimony violated her Sixth and Fourteenth Amendment right to present a defense.
2. The trial court's limits on Ms. Smith's testimony violated her Wash. Const. art. I, §§ 3 and 22 right to present a defense.
3. The state cannot establish that the violations of Ms. Smith's right to present a defense were harmless beyond a reasonable doubt.
4. The trial court erred by excluding Ms. Smith's testimony that Loidhamer had given her permission to complete the Comdata checks made out to herself and her husband.

ISSUE 1: Evidence of an out-of-court statement which is relevant not for its truth value but for the mere fact that the statement was made is not hearsay under the "verbal acts doctrine." Did the trial court violate Ms. Smith's constitutional right to present a defense by precluding her from testifying that her boss had given her permission to complete the checks that she was accused to have stolen and/or forged?

5. The trial court erred by prohibiting Ms. Smith from testifying that she knew what her husband did for a living based on her conversations with him.

ISSUE 2: Evidence that is within a testifying witness's personal knowledge and does not contain any out-of-court statement is not hearsay. Did the trial court violate Ms. Smith's constitutional right to present a defense by prohibiting her from testifying that she knew what her husband did for a living – a fact which was critical to her defense – based on her conversations with him?

6. The trial court erred by excluding the documents Ms. Smith had created keeping track of her overtime hours.
7. The trial court erred by precluding Ms. Smith from testifying that she had kept track of her overtime hours.

ISSUE 3: A trial court violates an accused person's right to present a defense by excluding relevant, admissible evidence necessary to that defense. Did the trial court violate Ms.

Smith's right to present a defense by erroneously excluding evidence that she had kept track of her overtime hours when her defense rested on her claims that the money she was alleged to have stolen was actually payment for overtime work?

8. Ms. Smith was deprived of her Sixth and Fourteenth Amendment right to the effective assistance of counsel.
9. Ms. Smith's defense attorney provided ineffective assistance of counsel by failing to conduct reasonable investigation necessary to the defense.

ISSUE 4: The right to the effective assistance of counsel includes the right to an attorney who conducts reasonable investigation. Did Ms. Smith's attorney provide ineffective assistance by failing to conduct any investigation into documents that may have been pivotal to her defense because he simply overlooked them in his case file?

10. Ms. Smith's convictions for theft were entered in violation of her Sixth and Fourteenth Amendment right to an adequate charging document.
11. Ms. Smith's conviction for theft violated her state constitutional right to an adequate charging document under art. I, §§ 3 and 22.
12. The charging document failed to set forth the critical facts related to Ms. Smith's theft charges.
13. The charging document failed to charge Ms. Smith with theft of "specifically described property."

ISSUE 5: An Information charging a theft offense must "clearly" charge the accused with a crime relating to "specifically described property." Was the language charging Ms. Smith with theft constitutionally deficient when it did not include any language describing "property or services" that she was alleged to have stolen?

14. Counts I and II should have been scored as the same criminal conduct for sentencing purposes.
15. Counts III and IV should have been scored as the same criminal conduct for sentencing purposes.

16. The sentencing court abused its discretion by failing to consider whether any of Ms. Smith's offenses qualified as same criminal conduct.

ISSUE 6: A court abuses its discretion by failing to decide whether to exercise available discretion. Did the trial court abuse its discretion by failing to consider same criminal conduct at Ms. Smith's sentencing hearing even though at least two pairs of her charges occurred at the same time and place against the same victim with the same intent?

17. Defense counsel provided ineffective assistance of counsel by failing to argue same criminal conduct at sentencing.

ISSUE 7: Defense counsel provides ineffective assistance by waiving arguments regarding same criminal conduct at sentencing. Did Ms. Smith's defense attorney provide ineffective assistance of counsel by failing to raise same criminal conduct when at least two pairs of her charges occurred at the same time and place against the same victim with the same intent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sharyl Smith worked for the moving company Spaeth Transfer as a bookkeeper for three years. RP (7/20/17) 110. She was hired, in part, for her ability to computerize the company's outdated pen-and-paper system. RP (7/20/17) 241.

When the bookkeeper for one of Spaeth's sister companies left, Ms. Smith took on significant additional duties. RP (7/20/17) 243. She also ended up picking up the receptionist's work when she left. RP (7/20/17) 244.

Bob Loidhamer, the company's owner, was battling cancer and going through surgery so Ms. Smith did not push him to hire additional help even though she was falling behind on her work. RP (7/20/17) 244. But she did end up working significant overtime hours on evenings and weekends to keep up. RP (7/20/17) 258.

Ms. Smith's husband worked for the company as a truck driver. RP (7/20/17) 252. He came into the office almost every day to talk to Loidhamer. RP (7/20/17) 253.

Comdata is a money transfer system typically used to pay truck drivers while they are on the road. RP (7/20/17) 117-20. Ms. Smith's husband cashed \$264,500 worth of Comdata checks, which Ms. Smith had

made out to him at Loidhamer's request. RP (7/20/17) 216, 252. Other truckers who contracted with the company made \$300,000 or more in the same period of time. RP (7/20/17) 249-50.

Ms. Smith was also paid \$6,200 for her overtime work. Ex. 6. She was paid with Comdata checks instead of through regular payroll because Loidhamer did not want the other employees to know that she was getting overtime hours. RP (7/20/17) 259. Ms. Smith deposited the Comdata checks into her bank account. Ex. 6; RP (7/20/17) 194-205.

Ms. Smith was eventually fired from her job for falling asleep at her desk. RP (7/20/17) 111.

After Ms. Smith left, Jenay Ingalls from the sales department took over as bookkeeper. RP (7/20/17) 112. She saw that Ms. Smith had been making payments to Comdata online. RP (7/20/17) 116. She thought this was unusual because she was accustomed to Loidhamer paying bills with checks. RP (7/20/17) 116. She also thought it was unusual that Ms. Smith had been using physical Comdata checks when Comdata payments were usually made using only an electronic code. RP (7/20/17) 121-23. Ingalls became suspicious when she saw that the amount of money being paid out to Comdata was more than double what went out in an average year. RP (7/20/17) 124.

Ingalls also thought it was suspicious that Ms. Smith had used the company debit card to make cash withdrawals at ATM machines. RP (7/20/17) 144-47.

Ingalls and Loidhamer called the police. RP (7/20/17) 56, 124.

The state charged Ms. Smith with two counts of first degree theft, two counts of first degree identity theft, and four counts of forgery. CP 56-65. The state also alleged that Ms. Smith had abused a position of trust, had committed a major economic offense, and that the victim of the offenses had been particularly vulnerable. CP 56-65.

The charging language for the theft offenses read as follows:

On or between [relevant dates]... the above-named Defendant did wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive said person of such property or services, such property or services being in excess of five thousand dollars (\$5,000.00) in value, in the aggregate from a series of transactions with are part of a criminal episode or a common scheme or plan...
CP 58, 60.

A short time later, Loidhamer died of cancer. RP (7/20/17) 163.

He sold the company to Ingalls shortly before his death. RP (7/20/17) 109-10.

On the first day of trial, Ms. Smith's attorney asked the court for a brief continuance to conduct further investigation for the defense. RP (7/17/17) 42. He had failed to notice documents in his file (which Ms.

Smith had given to her previous attorney) keeping track of Ms. Smith's husband's work for the company.¹ RP (7/17/17) 44-45. Counsel told the court that he needed more time to investigate the documents and verify their authenticity and determine whether they could be used in Ms. Smith's defense. RP (7/17/17) 43-46. He said it was an issue of whether Ms. Smith would receive a fair trial. RP (7/17/17) 45.

The trial court denied defense counsel's motion to continue. RP (7/18/17) 8, 12.

The court granted the states motion *in limine* to exclude the documents Ms. Smith had used to keep track of her overtime hours. RP (7/18/17) 14. The court ruled that those documents were only admissible if someone else could verify their authenticity. RP (7/18/17) 14.

At trial, Ingalls testified that no one at the company ever worked overtime. RP (7/20/17) 138-39. She also said that no bills were ever paid online. RP (7/20/17) 116-17. But she also admitted on that she had only worked in the sales department before Ms. Smith left and was only in the office for one or two hours each day. RP (7/20/17) 165.

¹ Earlier in the day, defense counsel had told the court that Ms. Smith had only recently found the documents in a shed at her home. RP (7/17/17) 42. He later admitted, however, that the oversight had been his fault and that the documents had been in his file all along. RP (7/17/17) 44-45.

Ingalls also testified that Ms. Smith's husband never worked for the company. RP (7/20/17) 128. She said that she knew all of the employees and he was not one of them. RP (7/20/17) 128. But she also admitted that many of the truckers were private contractors, not company employees. RP (7/20/17) 130. She said she was "generally" familiar with who the truckers were. RP (7/20/17) 130.

Ingalls also testified that there was no reason to pay a trucker contractor through Comdata. RP (7/20/17) 134.

Ms. Smith testified at trial. She tried to tell the jury that Loidhamer had authorized the Comdata checks she deposited as payment for her overtime work but the court sustained the state's hearsay objection. RP (7/20/17) 258-59. The court also sustained a hearsay objection when she tried to say that she had permission to write the checks. RP (7/20/17) 259.

The court also prohibited Ms. Smith from testifying that she kept track of the overtime hours that she worked. RP (7/20/17) 260-66. The trial court ruled that she could not even allude to keeping any kind of document because the documents themselves were inadmissible. RP (7/20/17) 263.

The court also would not allow Ms. Smith to testify that her husband had worked at the company as a trucker. RP (7/20/17) 254. The

court ruled that it would be hearsay for her to tell the jury that she knew that her husband worked for Loidhamer because of conversations that she had with him. RP (7/20/17) 254.

Ms. Smith admitted at trial to using the company's debit card without permission to take out about \$9,000 cash because she was behind on her bills. RP (7/20/17) 256.

The jury found Ms. Smith guilty of all eight counts and answered yes to each of the special interrogatories for the sentencing aggravators. CP 122-35. The court calculated Ms. Smith's offender score as seven even though she did not have any criminal history that added to her score. CP 191. The court sentenced Ms. Smith to an exceptional sentence of 100 months. RP (9/15/17) 33.

This timely appeal follows. CP 203.

ARGUMENT

I. THE TRIAL COURT VIOLATED MS. SMITH'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY PROHIBITING HER FROM TESTIFYING THAT THE CHECKS SHE CASHED WERE AUTHORIZED BY THE COMPANY TO PAY FOR HER OVERTIME WORK AND FOR HER HUSBAND'S WORK AS A TRUCK DRIVER.

The entire basis of Ms. Smith's defense was that the funds she and her husband received via Comdata checks were not stolen but were payment for work they had done for Loidhamer – either for Ms. Smith's

overtime hours or for her husband's contract work as a trucker. RP (7/24/17) 362-74.

Ms. Smith testified at trial and admitted to the jury that she had used the company debit card without permission, essentially confessing to counts I and II. RP (7/20/17) 256. But she also sought to inform the jury through her testimony that she had completed the Comdata checks with permission from Loidhamer as payment for work by herself and her husband, making her not guilty of counts III through VIII. RP (7/20/17) 258-59.

But the court did not permit Ms. Smith to tell the jury that she completed and deposited the Comdata checks with permission. Instead, the trial court held that any reference to having been given permission to make the Comdata checks out to herself and her husband were inadmissible hearsay. RP (7/20/17) 258-59. The trial court ruled that the documents she had created keeping track of her overtime hours were inadmissible because they could not be authenticated by someone else. RP (7/18/17) 14. The court also prohibited Ms. Smith from telling the jury even that she kept track of her overtime hours because that would be a reference to an inadmissible exhibit. RP (7/20/17) 260-66. Finally, the court prohibited Ms. Smith from testifying that she knew that her husband

worked for the company as a trucker because she had spoken to him about it. RP (7/20/17) 254.

The result of these rulings was that Ms. Smith was completely unable to present her defense to the jury. The court's rulings violated Ms. Smith's constitutional rights.

An accused person has a constitutional right to present his/her defense to the jury. U.S. Const. Amends. VI, XIV; art. I, §§ 3, 22; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (Jones I); *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Holmes v. S. Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)).²

The right to present a defense includes the right to introduce relevant³ and admissible evidence. *Jones I*, 168 Wn.2d at 720.

² A claim that the trial court violated an accused person's right to present a defense is reviewed *de novo*. *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017), *as amended on denial of reconsideration* (Oct. 31, 2017).

Ms. Smith forcefully argued for the admission of the evidence discussed below. RP (7/18/17) 14; RP (7/20/17) 237-71. Her attorney argued that she needed the evidence in order to explain to the jury why she was not guilty. RP (7/20/17) 265. Insofar as she did not raise these exact constitutional arguments in the trial court, they present manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

³ Evidence is relevant if it has any tendency to prove a material fact. ER 401. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

Once the accused has established that proffered evidence is relevant and admissible, it can only be excluded if the state proves that the evidence is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Id.* No state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

If there are questions of the strength or accuracy of evidence that is critical to the defense, those weaknesses must be established by cross-examination, not by exclusion:

[T]he trial court should admit probative evidence [offered by the defense], even if it is suspect. In this manner, the jury will retain its role as the trier of fact, and *it* will determine whether the evidence is weak or false.

Duarte Vela, 200 Wn. App. at 321 (emphasis in original).

The exclusion of evidence offered by the defense violates the Sixth Amendment right to present a defense when “the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist.” *Id.* at 326 (citing *United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006)).

Evidentiary rulings concerning evidence offered by the defense are reviewed for an abuse of discretion. *Id.* at 317. But “the more the exclusion of that evidence prejudices an articulated defense theory, the

more likely [an appellate court] will find that the trial court abused its discretion. *Id.* (citing *Jones I*, 168 Wn.2d at 720).

Violation of the right to present a defense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382.

- A. The evidence that Loidhamer gave Ms. Smith permission to complete the Comdata checks for herself and her husband was not hearsay under the verbal acts doctrine.

The trial court precluded Ms. Smith from testifying that she completed the Comdata checks with permission from Loidhamer, ruling that the testimony constituted inadmissible hearsay. RP (7/20/17) 252, 258-59.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Accordingly, whether an out-of-court statement qualifies as hearsay depends on the purpose for which it is offered. *Duarte Vela*, 200 Wn. App. At 319.

A “verbal act” is not hearsay because it is not offered for the truth of the matter assert:

Such verbal acts are not in the first instance assertive statements and not offered to prove the truth of the matter asserted. Likewise, out-of-court declarations that are more in the nature of an order or a request” and that, to a large degree, [are] not even capable of being true or false are also not hearsay.

United States v. Rivera, 780 F.3d 1084, 1092 (11th Cir. 2015)⁴ (internal citation omitted); *See also. State v. Rangel-Reyes*, 119 Wn. App. 494, 498, 81 P.3d 157 (2003) (A “verbal act” is not hearsay because it has no truth value, rather its significance lies solely in the fact that the statement was made).

A hearsay statement is one that “narrate[s], describe[s], or otherwise convey[s] information and so [is] judged by [its] truth value.” *United States v. Montana*, 199 F.3d 947, 950 (7th Cir.1999). A verbal act, on the other hand, such as “a promise, offer, or demand,” serves to “commit the speaker to a course of action.” *Id.*

Accordingly, a statement that is offered only as evidence of “legally operative verbal conduct” affecting the legal rights of the parties is a verbal act, not hearsay.” *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004); *Robertson v. U.S. Bank, N.A.*, 831 F.3d 757, 764 (6th Cir. 2016). A quintessential example of a verbal act is a statement granting or withholding permission to do something. *See United States v. Moreno*, 233 F.3d 937, 940 (7th Cir. 2000) (collecting examples).

⁴ Several of the cases cited herein address the federal rules of evidence concerning hearsay. But the federal hearsay rules are identical to the Washington state rules and federal cases are regularly cited by Washington courts in construing the bounds of the state rules. *See e.g. State v. Smith*, 97 Wn.2d 856, 859, 651 P.2d 207 (1982) (The Washington hearsay rules are taken verbatim from the federal rules, so it is proper to look to the federal rule’s construction when construing the Washington rule.

In Ms. Smith's case, the evidence that Loidhamer gave Ms. Smith permission to complete the Comdata checks was a verbal act, not hearsay. The significance of the evidence lay in the fact that the action was taken, not in the truth value of any statement itself. *Rivera*, 780 F.3d at 1092; *Rangel-Reyes*, 119 Wn. App. At 498. The trial court erred by excluding the evidence as hearsay. *Id.*

The trial court's evidentiary error violated Ms. Smith's Sixth Amendment right to present a defense because the evidence that Ms. Smith had completed the checks with Loidhamer's permission was critical to the defense – indeed, it was the entire defense. *Jones I*, 168 Wn.2d at 720. If believed, the evidence would have created a reasonable doubt that did not otherwise exist. *Duarte Vela*, 200 Wn. App. at 326. The state cannot show that this error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382.

The trial court abused its discretion and violated Ms. Smith's constitutional right to present a defense by prohibiting her from testifying that she had completed and deposited the Comdata checks with Loidhamer's permission. *Jones I*, 168 Wn.2d at 720; *Duarte Vela*, 200 Wn. App. at 326; *Rivera*, 780 F.3d at 1092; *Rangel-Reyes*, 119 Wn. App. at 498. Ms. Smith's convictions must be reversed. *Id.*

- B. The evidence that Ms. Smith's husband worked as a trucker for Loidhamer was not hearsay because it was based on Ms. Smith's personal knowledge and did not include any out-of-court statements.

When Ms. Smith attempted to testify that she knew what her husband did for a living based on conversations that she had had with him, the trial court sustained the state's hearsay objection. RP (7/20/17) 254. This was the case even though Ms. Smith did not attempt to testify to any out-of-court statement that her husband had made.

As a result, the only evidence Ms. Smith was permitted to present to the jury to establish that her husband had done contract work for Loidhamer was her testimony that she came into the office frequently and wore a company shirt. RP (7/20/17) 253-55.

Ms. Smith did not attempt to testify to any out-of-court statement made by her husband. RP (7/20/17) 254. Rather, the trial court sustained the state's hearsay objection after her attorney asked her a simple yes-or-no question: whether she had ever talked to her husband about what he did for a living. RP (7/20/17) 254. Because that question did not seek to elicit a statement of any kind, the answer would not have been hearsay. ER 801(c).

Additionally, testimony that is based on a testifying witness's personal knowledge is not hearsay. *State v. Benefiel*, 131 Wn. App. 651,

656, 128 P.3d 1251 (2006) (testimony from Community Corrections Office that the accused had not contacted him or any other officer, as required, was not hearsay because it was based on the witness's personal knowledge).

Ms. Smith should have been permitted to testify regarding what her husband did for a living because the information was within her personal knowledge. *Id.* The trial court abused its discretion by prohibiting Ms. Smith providing that testimony.

The trial court's improper evidentiary ruling violated Ms. Smith's constitutional right to present a defense because the evidence that her husband was working as a contractor for Loidhamer was critical to the defense and would have created a reasonable doubt if believed by the jury. *Jones I*, 168 Wn.2d at 720; *Duarte Vela*, 200 Wn. App. at 326. The state cannot establish harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382.

The trial court abused its discretion and violated Ms. Smith's Sixth Amendment right to present a defense by precluding her from testifying regarding what her husband did for a living based on an erroneous evidentiary ruling. *Jones I*, 168 Wn.2d at 720; *Duarte Vela*, 200 Wn. App. at 326. Ms. Smith's convictions must be reversed. *Id.*

- C. The evidence that Ms. Smith had kept track of her overtime hours and provided that information to Loidhamer was admissible because the documentation could be authenticated by Ms. Smith and was not hearsay.

The trial court prohibited the admission of the documents Ms. Smith created to keep track of her overtime hours, ruling that they were inadmissible unless someone other than Ms. Smith could “verify their authenticity.” RP (7/18/17) 13-14.

Then, during Ms. Smith’s testimony, the court ruled that Ms. Smith could not even tell the jury that she had kept track of her overtime hours at all because that testimony would *allude* to the existence of a document that had been excluded by the court. RP (7/20/17) 259, 263.

In order to authenticate a piece of evidence under ER 901, the proponent must merely provide evidence “sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). One way to authenticate a document is for a witness with knowledge to testify that it “is what it is claimed to be.” ER 901(b)(1). There is no requirement that such testimony be provided by someone other than the person who created the document. *See* ER 901.

In the context of evidence that is critical to the defense, questions of authenticity should be left to the jury in order to permit the jury to “retain its role as the trier of fact.” *Duarte Vela*, 200 Wn. App. at 321 ([in

the context of the Sixth Amendment right to present a defense], “the trial court should admit evidence, even if suspect, and allow it to be tested by cross-examination.”)

Here, Ms. Smith’s testimony that she created the documents in order to keep track of her overtime hours was sufficient to authenticate them under ER 901. ER 901(b)(1). The court’s ruling that the exhibits were inadmissible unless they could also be authenticated by a third party was an abuse of discretion.

The documents keeping track of Ms. Smith’s overtime hours were also not hearsay. They were not offered in order to establish their truth or falsity in terms of how many hours she worked on any given day. Rather, the documents were offered only to show that she kept track of her overtime hours.

Indeed, even if the documents themselves had been inadmissible for some reason, Ms. Smith still should have been permitted to testify that she kept track of her overtime hours. There is no rule of evidence prohibiting testimony which alludes to the existence of an inadmissible exhibit, but the trial court excluded her testimony on that very basis. RP (7/18/17) 14. The trial court abused its discretion.

Again, the trial court’s improper evidentiary ruling violated Ms. Smith’s constitutional right to present a defense because the evidence that

she had kept track of her overtime hours and submitted that information to Loidhamer was a critical link in the defense theory that the Comdata checks had actually been payment for her overtime work. *Jones I*, 168 Wn.2d at 720; *Duarte Vela*, 200 Wn. App. at 326. The state cannot prove that this error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382.

The trial court violated Ms. Smith's Sixth Amendment right to present a defense by excluding exhibits on which she kept track of her overtime hours and by prohibiting her from testifying that she had kept track of those hours even once the documents had been excluded. *Jones I*, 168 Wn.2d at 720; *Duarte Vela*, 200 Wn. App. at 326. Ms. Smith's convictions must be reversed. *Id.*

II. MS. SMITH'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CONDUCT INVESTIGATION NECESSARY TO THE DEFENSE.

Ms. Smith gave her attorney papers documenting the work that her husband had done for Loidhamer some time before trial. RP (7/17/17) 43-46. But counsel never bothered to investigate the authenticity of those documents or determine whether he could admit them through some witness at trial. RP (7/17/17) 44-45. Instead, defense counsel appears to

have simply overlooked the documents until the day before the trial began. RP (7/17/17) 44-45.⁵

On the day that Ms. Smith's trial began, defense counsel requested additional time in order to investigate the documents and determine whether he could seek their admission at trial. RP (7/17/17) 43-46. But the trial court denied the motion, ruling that it had come too late. RP (7/18/17) 8, 12. Ms. Smith's defense attorney provided ineffective assistance of counsel by failing to conduct reasonable investigation at a time when it could have helped the defense.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (*Jones II*).⁶

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.*

⁵ Before the presiding judge, defense counsel alleged that Ms. Smith had only discovered the papers in a shed a few days previously. RP (7/17/17) 42. Apparently realizing his mistake, however, counsel admitted to the trial judge later that day that he had actually received at least some of the documents when he received the case file from previous counsel. RP (7/17/17) 44-45. He told the judge that he had simply failed to recognize the significance of the documents and, accordingly, had not conducted any investigation related to them. RP (7/17/17) 44-45.

⁶ Ineffective assistance of counsel claims are reviewed *de novo*. *Jones II*, 183 Wn.2d at 338.

The accused is prejudiced by counsel’s deficient performance if there is a reasonable probability⁷ that counsel’s mistakes affected the outcome of the proceedings. *Id.*

The presumption that a defense attorney has acted reasonably is rebutted if “no conceivable legitimate tactic explains counsel’s performance.” *State v. Fedoruk*, 184 Wn. App. 866, 880, 339 P.3d 233 (2014) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

A “reasonable probability” under the prejudice standard for ineffective assistance requires less than the preponderance of the evidence standard. *Estes*, 188 Wn.2d at 458. Rather, “it is a probability sufficient to undermine confidence in the outcome.” *Id.*; see also *Jones II*, 183 Wn.2d at 339.

The right to the effective assistance of counsel includes the right to reasonable investigation by counsel. *State v. Lopez*, 94418-1, 2018 WL 894443, at *5, --- Wn.2d ---, --- P.3d --- (Wash. Feb. 15, 2018) (citing *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); *Strickland v.*

⁷ A “reasonable probability” under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, “it is a probability sufficient to undermine confidence in the outcome.” *Id.*; see also *Jones II*, 183 Wn.2d at 339.

Washington, 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);
Jones II, 183 Wn.2d at 339–40.)

In Ms. Smith’s case, defense counsel provided deficient performance by completely failing to investigate the documents provided to him by his client that appear to have corroborated her testimony that her husband worked for Loidhamer as a contract driver. *Id.* There is no conceivable tactic served by this failure. Indeed, counsel admitted that he simply neglected to recognize the significance of the papers, which were in the case file when he received it from prior counsel. RP (7/17/17) 44-45. Counsel’s performance fell below an objective standard of reasonableness. *Jones II*, 183 Wn.2d at 339.⁸

There is a reasonable probability that counsel’s failure to investigate affected the outcome of Ms. Smith’s trial. *Id.* at 344. In *Jones II*, the Supreme Court found that the defense was prejudiced by counsel’s failure to interview identified witnesses because – even though the witnesses testifying in support of the defense theory would still have been outnumbered by those supporting the prosecution – the case was a credibility contest in which each piece of evidence supporting the defense

⁸ Defense counsel moved for a continuance or brief recess in order to give him time to investigate the documents. RP (7/17/17) 43-46. But the trial court properly denied that motion because defense counsel could not demonstrate due diligence. *See e.g. United States v. Jeri*, 869 F.3d 1247, 1258 (11th Cir. 2017), *cert. denied*, 138 S.Ct. 529, 199 L.Ed.2d 405 (2017).

could have tipped the balance in the minds of the jury. *Id.* Similarly, in Ms. Smith's case, investigation leading to the successful admission of the documents demonstrating that Ms. Smith's husband worked for Loidhamer as a contractor could have tipped the balance in the jury's minds in concluding that Ms. Smith was telling the truth. Ms. Smith was prejudiced by her attorney's unreasonable failure to conduct necessary investigation into her defense. *Id.*

Ms. Smith received ineffective assistance of counsel in violation of her rights under the Sixth Amendment. *Id.* Ms. Smith's convictions must be reversed. *Id.*

III. THE LANGUAGE CHARGING MS. SMITH WITH THEFT WHOLLY UNDEFINED "PROPERTY OR SERVICES OF ANOTHER" WAS DEFICIENT, IN VIOLATION OF HER CONSTITUTIONAL RIGHT TO ADEQUATE NOTICE OF THE ALLEGATIONS AGAINST HER.

The Information in Ms. Smith's case charged him with theft of undefined "property or services of another," allegedly belonging to some un-named person. CP 58, 60.

Because it did not allege *what* Ms. Smith was alleged to have stolen or whom she was alleged to have stolen it from, the Information did not provide her adequate notice of the charges against her. The charging language was constitutionally deficient.

The Sixth Amendment right “to be informed of the nature and cause of the accusation” and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI, XIV.⁹ A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).¹⁰ The charge must include more than “the elements of the offense intended to be charged.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).¹¹

Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to

⁹ Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

¹⁰ The Fifth Amendment, applicable through the Fourteenth, protects an accused person against double jeopardy. U.S. Const. Amends. V, XIV.

¹¹ Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

allow the defendant to plead the former acquittal or conviction “in case any other proceedings are taken against him for a similar offense.” *Id.*

Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).

In theft cases, the Information must “clearly” charge the accused person with a crime relating to “specifically described property.” *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes “not a single word to indicate the nature, character, or value of the property,” the charge is “too vague and indefinite upon which to deprive one of his [or her] liberty.” *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

In this case, the Information passes only the first of these three requirements: it charges in the language of the statute, and thus “contains the elements of the offense intended to be charged.” *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it omits critical facts. In the absence of critical facts, the Information does not provide adequate notice of the charges, nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

Here, the Information does not provide any allegations regarding the nature or character of the “property or services” Ms. Smith was alleged

to have stolen or whom she is alleged to have stolen them from. CP 58, 60. Because of this, the allegations are “too vague and indefinite upon which to deprive [Ms. Smith] of [her] liberty.” *Id.* The Information provides neither notice nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631. The critical facts for Ms. Smith’s theft charges cannot be found by any fair construction of the charging document. *Rivas*, 168 Wn. App. at 887.

The Information is constitutionally deficient. Ms. Smith’s theft convictions must be reversed and the charges dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

IV. COUNTS I AND II, AS WELL AS COUNTS III AND IV SHOULD HAVE BEEN SCORED AS THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES.

As outlined by the prosecutor in closing argument, Counts I and II against Ms. Smith (alleging theft and identity theft) both related to her alleged unauthorized use of the company debit card. RP (7/24/17) 343. Likewise, Counts III and IV (for theft and identity theft) related to the checks cashed by Ms. Smith’s husband. RP (7/24/17) 345.

Because those two sets of charges occurred at the same time and place and involved the same victim and intent, they should have been scored as the same criminal conduct at Ms. Smith’s sentencing.

- A. The sentencing court abused its discretion by failing to consider whether Counts I and II, as well as Counts III and IV qualified as the same criminal conduct.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. The sentencing judge must determine how multiple current offenses are to be scored. Offenses that comprise the "same criminal conduct" are "counted as one crime. RCW 9.94A.589(1)(a). "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

A court's failure to exercise discretion is itself an abuse of discretion. *Brunson v. Pierce County*, 149 Wn. App. 855, 861, 205 P.3d 963 (2009). Here, the court did not consider whether Ms. Smith's convictions for Counts I and I as well as III and IV comprised the same criminal conduct. RP (9/15/17) 11-44. This failure to exercise discretion constitutes an abuse of discretion. *Id.*¹²

¹² Ms. Smith received an exceptional sentence, which was not strictly based upon her offender score. RP (9/15/17) 33-35. Nonetheless, this error requires remand for resentencing because the sentencing court must first determine the correct standard-range sentence before it can depart therefrom. *State v. Parker*, 132 Wn.2d 182, 187-88, 937 P.2d 575 (1997) ("If the sentencing judge were to set an exceptional sentence without first properly calculating the legislatively designated standard sentence she would redesignate the punishment for the crime without reference to the legislative standard to which the court must defer absent exceptional circumstances"). Accordingly, an improperly-calculated offender score requires remand even in cases involving exceptional sentences unless the record clearly indicates that the sentencing court would have imposed the same sentence regardless. *Id.* at 189. The record does not so indicate in Ms. Smith's case.

B. Ms. Smith's attorney provided ineffective assistance by failing to argue that count I and II as well as counts III and IV comprised the same criminal conduct for sentencing purposes.

An accused person has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Defense counsel provides ineffective assistance by failing to argue same criminal conduct when warranted. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013).

As outlined above, two pairs of Ms. Smith's convictions should have been counted as the same criminal conduct for sentencing purposes. *State v. Vike*, 125 Wn.2d 407, 412-413, 885 P.2d 824 (1994). But defense counsel failed to make that argument at Ms. Smith's sentencing hearing. RP (9/15/17) 11-44. Counsel provided ineffective assistance by failing to protect his client from an improperly-calculated offender score. *Phuong*, 174 Wn. App. at 548. Ms. Smith's case must be remanded for a new sentencing hearing. *Id.*

CONCLUSION

The trial court violated Ms. Smith's Sixth Amendment right to present a defense by excluding extensive evidence that was critical to the defense, based on erroneous evidentiary rulings. Ms. Smith's defense attorney provided ineffective assistance of counsel by failing to conduct a

reasonable investigation. The language charging Ms. Smith with theft was constitutionally deficient. Ms. Smith's convictions must be reversed.

In the alternative, the trial court abused its discretion by failing to score Counts I and II, as well as Counts III and IV as the same criminal conduct. Ms. Smith's attorney also provided ineffective assistance of counsel by failing to argue same criminal conduct at sentencing. Ms. Smith's case must be remanded for a new sentencing hearing.

Respectfully submitted on February 27, 2018,



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on February 27, 2018.



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