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

STATE OF WASHINGTON,

Respondent,

v.

SHARYL MARIE SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00733-1

BRIEF OF RESPONDENT

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DATED April 23, 2018, Port Orchard, WA

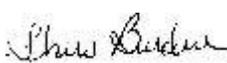

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred by excluding hearsay from defendant Smith's testimony?

2. Whether defense counsel was ineffective for failing to call a highly impeachable witness in an attempt to authenticate documents of questionable provenance?

3. Whether the second amended information provided Smith with adequate notice of the charges against her?

4. Whether defense counsel was ineffective, and the trial court in error, for failing to consider whether any of Smith's convictions were same criminal conduct for sentencing purposes?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Sharyl Marie Smith was charged by information filed in Kitsap County Superior Court with five counts of first degree theft; each count included special allegations of major economic offense and abuse of a position of trust. CP 1-5. Two days later, a first amended information was filed that omitted count five in the original information. CP 10-14. A second amended information later charged two counts of first degree identity theft as an accomplice each with special allegations of major

economic offense, abuse of a position of trust, and particularly vulnerable victim, two counts of first degree theft by aggregated amounts taken as an accomplice with special allegations of major economic offense, abuse of a position of trust, and Particularly vulnerable victim, and four counts of forgery with special allegations of abuse of a position of trust and particularly vulnerable victim. CP 56-64. The matter proceeded to trial under the second amended information.

Smith asked for a continuance on the morning of trial (before the presiding judge). RP, 7/17/17P, 3.¹ Smith's attorney represented to the court that he had just received some documents from Smith. Id. Counsel was unsure whether or not the documents would be admissible. Id. It was alleged that the documents would prove that Albert Smith, Smith's husband to whom much of the money taken from the company went, actually worked for the company. RP, 7/17/17P, 4. The defense admitted that its submission of documents to the state was at the eleventh hour and tardy. RP, 7/17/17P, 5. It was alleged that the documents were notes of work done by Mr. Smith for the company. Id.

It developed that the person who wrote the notes was Mr. Smith and the defense would need to talk to him. RP, 7/17/17P, 7. Further, the

¹ The VRP have sequential pagination from volume 1 forward; the volumes regarding the defense motion to continue, which are referred to as "RP, 7/17/17P." for the motion in presiding and "RP 7/17/17" for the motion before the trial judge.

defense would have liked to inquire of the company whether those records could be verified. *Id.* The state objected to the continuance expressing that since the company president was already a witness, the documents could be viewed by her with regard to authenticating them. RP, 7/17/17P, 7. The court did not find good cause to continue the trial.

The defense renewed the motion to continue before the trial judge. RP, 7/17/17, 42. Again, Smith argued that the late-found documents would establish that Albert Smith worked for the company. *Id.* The documents were described as Albert Smith's day-to-day notes. *Id.* The defense conceded that "it's not admissible evidence on its own." *Id.* The trial court agreed with that sentiment saying "I can't fathom how they would be admissible in the current form..." RP, 7/17/17, 48-49. The trial court ultimately reserved ruling on the motion to continue. RP, 7/17/17, 53.

Next day, it developed that the company president had reviewed the defense materials and doubted their veracity. RP 2. Asserting that the defense needed to speak with Albert Smith, the defense maintained its motion to continue. RP 3. The defense expressed some trepidation with regard to calling Albert Smith as a defense witness. RP 4. It was represented that the defense documents were not on any official forms from the company. RP 7. The trial court denied the continuance request.

RP 8, 13.

Apparently, the late defense documents included some time cards of defendant Smith regarding overtime that she had worked at home. RP 13. The state moved to exclude these as self-serving hearsay and because there was no authentication from a custodian of records. *Id.* The defense did not respond to this motion and the trial court ruled that the state's motion was granted. RP 14. The trial court ruled that someone other than Smith would need to authenticate those alleged timecards. *Id.*

Much discussion of the time card issue arose during Smith's trial testimony. That discussion and the trial court's ruling are included in argument section below.

Smith was found guilty as charged on all counts. CP 122-23. On special verdicts, the jury found on count I that Smith committed a major economic offense but her accomplice did not, that she used a position of trust to facilitate her crime but her accomplice did not, and that she knew or should have known that the victim was particularly vulnerable. CP 124-125. The same findings on special allegations were made on count II. CP 126-127. On count III, affirmative answers were given on the questions of major economic offense, including her accomplice, using a position of trust (but not her accomplice), and particular vulnerability. CP 128-129. On count IV, all affirmative answers were received except that

her accomplice did not use a position of trust. CP 130-131. On counts V, VI, VII, and VIII, the jury returned affirmative answers on the questions of use of a position of trust and particularly vulnerable victim. CP 132-135.

Smith was given an exceptional sentence on the identity theft counts (I and III) of 100 months and standard range sentences on the remaining counts. CP 192. All were ordered to run concurrently for a total of 100 months in custody. CP 193. She timely filed the present appeal.

B. FACTS

BPD Johnny Rivera responded to a call from Spaeth Transfer. RP 56. There he met the owner, Mr. Loidhamer, and an employee, Ms. Jenay Ingalls. *Id.* The two provided the officer with a stack of cancelled checks. RP 56-57. Officer Rivera described Mr. Loidhamer's demeanor at the time as "sad." RP 57. Officer Rivera described Ms. Ingalls as "a little angry." *Id.*

In reviewing the information provided, the officer developed a belief that Smith and her husband Albert Smith were suspects. RP 59. Several of the checks were made out to Sharyl Smith. RP 59. The majority of the checks were made out to Albert Smith. RP 66; 75.

Numbers on the checks, in an “identification box” (RP 73-74), matched Smith’s driver license number. RP 72. Some other checks had Albert Smith’s license number in the identification box. RP 75.

Most of the checks had been cashed at the Moneytree. RP 76-77. Officer Rivera went to the Moneytree and got a transaction summary of Albert Smith. RP 78. The information on the transaction summary correlated with the checks that had been provided by Mr. Loidhamer. RP 79.

Ms. Ingalls provided Officer Rivera with transaction statements from Spaeth’s bank. RP 83. Included were Spaeth credit card transactions. RP 91. The officer recounted the locations of the credit card transactions. RP 95-9100. They included a number of gas stations. Id. Some withdrawals happened at the Clearwater Casino. RP 99-100.

Jenay Ingalls is presently the owner of Spaeth. RP 103. She worked there for twenty years before ownership. Id; RP 106. She described Spaeth as a moving and storage company. RP 104. In 2014 and 15, Ms. Ingalls was in sales at Spaeth, involving providing customers with estimates of the cost of their moves. RP 105. She was also working in the office “a couple hours a day” helping the office manager catch up on paperwork. Id. Over time, Ms. Ingalls had done a number of tasks around the Spaeth office—payroll, figuring revenue, rating shipments. RP 107. Estimating jobs required her to know quite a bit about the conduct of the

business. Id. She would also temporarily do other jobs at the company—receptionist, paperwork person, bookkeeping—while others were on vacation. RP 108.

Ms. Ingalls bought the company in 2016. RP 110. She then began to review the company's financial documents. Id. Ms. Ingalls was aware that Smith had worked for Spaeth for three years as a bookkeeper. RP 111. The job entailed handling receivables and payables, paying bills, generating checks for Mr. Loidhamer to sign, and being responsible for the company credit cards. RP 113. Smith had been fired in October, 2013 for sleeping at her desk and not getting the work done. RP 111-112. Ms. Ingalls then took the role of bookkeeper. Id. She began by trying to figure out what Smith had been doing. RP 113. At times, Ms. Ingalls had assisted Smith with bookkeeping tasks. RP 114.

When she took over the company, Ms. Ingalls found that the company records were “messy.” RP 114. Files and paperwork were not in proper order, not properly put away; files were stacked on her desk halfway completed or untimely. RP115. One of the company's vendors, Comdata, required payment in three days. Id. Looking into a payment to Comdata, Ms. Ingalls discovered a number of on-line payments that she found unusual. RP 116. The company used written checks to pay bills. Id. The bookkeeper printed them and Mr. Loidhamer signed them. RP 117.

Ms. Ingalls found it unusual that there were “thousands and thousands and thousands of dollars going out in a month.” RP 117. The Comdata checks were used to pay the expenses of truck drivers; it is like an advance on their pay. Id. But Ms Ingalls found that there was more money going out than the drivers were making. Id. Drivers would call Spaeth when they needed an advance by Comdata check. RP 118. Sharyl Smith took their calls. Id.

The advances are used by Spaeth’s long-haul drivers. RP 120. In 2014 and 2015, Spaeth had two to three long-haul drivers. Id. These drivers did not always use Comdata. Id. In 2014, only one driver consistently used Comdata. Id. That driver always requests either \$1000 or \$2000 advances. RP 121. Comdata charges Spaeth a fee for the transactions. Id. The bookkeeper accounts for the advances, subtracting them from the driver’s paycheck. RP 121-122. Comdata advances are given by paper check to a present driver; they are given by code numbers if the driver calls in from out-of-town. RP 122.

But because the drivers are almost never present, Ms. Ingalls found it odd that Smith was keeping a box of paper Comdata checks in the office. RP 122. Given that most transactions are done by code, it would take the company years to use up the number of paper checks Smith had at her desk. Id. In Ms. Ingalls time at Spaeth, she never saw a driver get a paper Comdata check from the office. RP 123.

Yearly, Spaeth's average amount of Comdata advances was between \$80,000 and \$90,000. RP 124. In 2015 the bill was "over \$200,000, about 280." RP 124. Ms. Ingalls reported these findings to Mr. Loidhamer and Mr. Loidhamer called the police. Id. Mr. Loidhamer looked "stunned" when he was told. RP 126. It was found that a large number of Comdata checks were written to Sharyl and Albert Smith. RP 127. Albert Smith was not on the Spaeth Transfer payroll. RP 128-30. Ms. Ingalls never saw any paperwork regarding Albert Smith as an employee or as a contract driver. RP 132-33. Ms. Ingalls was not aware of any services that Albert Smith provided to the company. RP 133.

Smith testified that she never made an unauthorized Comdata check. RP 257. She testified that she never wrote a check to Albert Smith when she was not supposed to. Id. She testified that she had permission to write Comdata checks and the "Bob signed every single one of those." RP 258. She denied that she was stealing from the company. RP 259. She testified that she did overtime work for the company. RP 267. She said she was taking work home nearly every day. Id. She testified that she was paid for her overtime but not by payroll. RP 267-68.

Smith admitted using the company debit card to pay off her bills. RP 268-69. It was established that most of the debit card transactions occurred near Smith's home. RP 157-58.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY EXCLUDED HEARSAY AND SMITH WAS ABLE TO TESTIFY TO THE FACTS THAT SHE WANTED BEFORE THE JURY WITHOUT THE HEARSAY.

Smith argues that the trial court's hearsay rulings while Smith testified were erroneous and eviscerated her defense. This claim is without merit because Smith's testimony in fact included nearly all the evidence that she now claims was excluded. She simply was not accorded the ability to recount the statements of others during her testimony. Moreover, it is manifest that the trial court's proper rulings caused no improper prejudice to Smith's case.

Trial court rulings on the admissibility of evidence are reviewed for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). A trial court abuses its discretion when the decision was manifestly unreasonable or based upon untenable grounds or reasons. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014). A criminal defendant has a constitutional right to present a defense under the federal and state constitutions. *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996). The defendant does not, however, have a constitutional right to present evidence that is irrelevant or otherwise inadmissible. *State v.*

Jones, 168 Wn.2d 713, 230 P.3d 576 (2010).

Smith alleges that she was prohibited from testifying that she completed Comdata checks with permission; there is no citation to the record. Brief at 10. In fact, Smith was asked “Did you write Comdata checks in the same way that you used the debit card, without permission?” and she responded, without objection, “no, no. Bob signed every single one of those.” RP 258. She was not foreclosed from testifying that she had permission. But when Smith’s testimony included, with reference to Mr. Loidhamer, “he told me to write those checks” the trial court sustained the state’s hearsay objection and the answer was stricken. RP 258-59. Her position that she had permission was received without objection; her position that a particular person, Robert Loidhamer, said she had permission was excluded as hearsay.

Similarly, Smith tries to raise the impression that Smith was not allowed to tell the jury about her belief that Albert Smith worked for the company. Brief at 10-11. True, Smith was not allowed to recount a conversation or conversations that she had had with her husband. RP 254. But she did testify as to her belief that Albert worked there. Asked directly why she thought Albert worked there, she said “he came in all the time and spoke to Bob all the time.” RP 255. She added “and he wore the clothes.” *Id.* Further, she admitted that she made “monies payable” to

Albert but not when she was not supposed to. RP 257. The jury clearly heard Smith's position that she believed her husband worked there but not from out-of-court statements by her husband.

Thus, insofar as Smith's defense theory was that she had permission to make the checks and that her husband was paid because he worked at Spaeth, she was in fact allowed to say just those things. The trial court's hearsay rulings simply did not eviscerate her defense so that she was "completely unable to present her defense to the jury." Brief at 11.

But Smith claims here that the testimony that Mr. Loidhamer gave her permission is a verbal act and thus should not have been excluded as hearsay. Hearsay is "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(d). Smith properly notes that it is the purpose for which the evidence is asserted that matters. *See State v. Crowder*, 103 Wn. App. 20, 26, 11 P.3d 828 (2000). Thus, an out-of-court statement may not be hearsay if offered for a limited purpose and not for the truth of the matter. Smith claims her recitation of Mr. Loidhamer's grant of permission to cut checks was not for the purpose of the truth of the matter but for the purpose of demonstrating something else. What else is sought to be shown is unclear.

The state is askance of Smith's assertion. Clearly, testimony that someone did something, if true, is good evidence that the same was done. But it is at least difficult to ascertain why the mere fact of permission would aid in Smith's defense if she did not wish the jury to believe the truth of the grant of permission. Smith asserts that "Loidhamer's permission was crucial to the defense—indeed, it was the entire defense." Brief at 15. The next sentence is "*if believed*, the evidence would have created a reasonable doubt that did not otherwise exist." Brief at 15 (emphasis added). The fact is not "crucial" if it is not asserted for its truth. Why does a statement not asserted for its truth need be "believed?"

Smith needed Mr. Loidhamer's out-of-court statement to be considered to be true in order for it to establish her defense. For this purpose, the alleged statement by Mr. Loidhamer was and remains inadmissible hearsay.

Similarly, out-of-court statements by Albert Smith admitted to no hearsay exception. Smith advanced her personal knowledge that her husband worked for Spaeth. ER 602. She simply was not allowed to recite Albert Smith's statements as to that fact. The state fundamentally disagrees with the assertion that questions about what Albert Smith said about his employment status "did not seek to elicit a statement of any kind." Brief at 16. What else, then, was sought? If Smith really did not

wish to advance Albert Smith's out-of-court assertion as to where he worked, why is the exclusion of that hearsay damaging to her defense? Smith did in fact testify as to what her husband did for a living, just not by hearsay from him.

Finally, with regard to Smith's alleged timecards, again all the trial court did was exclude hearsay evidence. As noted above, the trial court granted the state's objection to that material on grounds of hearsay and lack of authentication. The defense had no argument on this ruling.

Then, during her testimony, Smith said that four Comdata checks to her were for overtime.² RP 258. Smith claimed that she was paid by Comdata check for the overtime, and not payroll, because her overtime pay was to be kept secret from Ms. Ingalls. *Id.* Smith then referred to recording and submitting her overtime and the state objected. *Id.* The state alluded to the prior ruling, maintained that the evidence is still hearsay, and that no proper custodian of records had authenticated the documents. RP 260. The trial court ultimately concluded that reference to the documents lacked foundation and sustained the state's objection. RP 263-64. The trial court noted that it was not precluding Smith from testifying that she did overtime and got paid for it, the trial court simply

² Part of this answer was, referring to Mr. Loidhamer, "he told me to write these checks." That was subject to sustained hearsay objection. The trial court ordered the "last answer" stricken but it remains unclear whether the overtime part was meant to be stricken and

did not want reference to inadmissible documents. RP 266.

Smith's testimony then continued with her saying "I did overtime." RP 267. She described taking work home every day. Id. She said she fell asleep at work because she was working so much. Id. She testified that she was appropriately paid for her overtime. RP 268.

Smith's argument here is slightly confusing in that she claims the trial court erred in "excluding exhibits on which she kept track of her overtime hours..." Brief at 20. However, the state can find nowhere in the record where the defense offered or sought to admit the documents. And, as noted, defense counsel had no argument or objection to the trial court's ruling that the documents are hearsay. The issue of admissibility of the timecards themselves was not preserved. RAP 2.5.

Further, Smith argues that here again she was seeking evidence that was not submitted for the truth of the matter and was therefore not hearsay. Brief at 19. Seems that it matters not that the evidence that Smith here claims is so very crucial to her defense was neither true nor false. Smith clearly would like the jury to have believed that it is true that she properly submitted overtime to the company and that some of the alleged payments to her were not theft but overtime payments.

defense counsel continued as though it had not been. RP, 7/20/17, 259.

Moreover, Smith in arguing the ease with which a document may be authenticated under ER 901, ignores the reasonable reason that the trial court found lack of foundation: that is, the trial court was concerned that the timecards may be perceived as an official document from the company. RP 262. The specter of an unreasonable inference is certainly something that a trial court can and should consider in ruling on admissibility. And, that reason to curtail mention of the hearsay documents is not unreasonable or untenable.

Since Smith got the evidence of overtime and pay for it before the jury, it is at least difficult to see how exclusion of hearsay documents of unknown provenance that would have established the same thing caused prejudice to her case. Similarly, with regard to Mr. Smith's employment, the proposition was established, just not by hearsay. And the same with regard to the permission issue: she said she had permission, she just could not recount an out-of-court statement by Mr. Loidhamer to that effect.

The trial court did not abuse its discretion in its proper hearsay and lack of foundation rulings. And those rulings had no improper effect on Smith's defense. This claim fails.

B. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE OR ADMIT QUESTIONABLE DOCUMENTS THAT COULD ONLY HAVE BEEN ADMITTED BY FOUNDATION LAIN BY A CONVICTED THEIR.

Smith next claims that defense counsel was ineffective for failing to investigate documents that allegedly serve to prove Albert Smith's work with Spaeth. This claim is without merit because the documents were not independently admissible and defense counsel made a strategic decision not to bring a very impeachable witness to court to authenticate them. Moreover, as argued above, Smith got the evidence of her belief that Albert Smith worked for the company before the jury.

“The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). From this overarching principle, the United States Supreme Court derived the two part test for ineffective assistance. The defendant must show that counsel's performance was deficient in that “counsel's errors were so serious that counsel was not functioning as the “counsel” guaranteed by the sixth Amendment.” 466 U.S. at 687. Second, the defendant must show that counsel's errors were “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*

In addressing the test, Smith must “overcome a strong presumption that counsel’s performance was reasonable.” *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011). Such claims are addressed as follows:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. “The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.”

In re Nichols, 151 Wn. App. 262, 272-73, 211 P.3d 462 (2009) (internal citation omitted).

The record reflects that the defense was on the horns of a dilemma. Defense counsel was aware that Albert Smith was a highly impeachable witness. The defense knew that he had been convicted as Ms. Smith’s accomplice in a separate trial and was in prison. RP, 7/17/17P, 7; RP 51-52. The defense knew that documents prepared by, and which could only be authenticated by, a convicted thief would be of low probative value. RP 42-43.³ Defense counsel even observed that the impeachable nature of

³ Defense counsel with regard to Mr. Smith “obviously, he’s a very impeachable character.” 1RP 4.

the evidence might be “very favorable to the state.” RP 4. Further, defense counsel was likely aware that assertions by Albert Smith that he was a truck driver for Spaeth were demolished by the state’s evidence that he, Albert Smith, did not even have a valid driver’s license at the time. RP 294.

Further, counsel’s late consideration of the material did not foreclose his ability to procure the attendance of Albert Smith—if counsel really wanted Albert Smith. The trial court noted that the defense would have the whole week to get Mr. Smith to court. RP 10. The witness was easy to find in prison. There’s no indication that the trial court would not have signed an order to produce Albert Smith. In fact, the trial court in considering the defense motion to recess or continue noted that there would be down-time before jury selection that would allow the parties to look more closely and held out the possibility that another recess may be in order later. RP 48. The state asserted that Ms. Ingalls for the company did not recognize the materials as official company forms. RP 7. Defense counsel made a reasonable call not to bring a nearly completely impeachable witness to court in order to attempt to authenticate sketchy documents. Smith’s best shot was her testimony of her own belief that Albert Smith worked there. Bringing Mr. Smith to court would likely have backfired by leading the jury to believe Smith was relying on

demonstrably false evidence.

Smith was convicted so hindsight allows the argument that these alleged work logs might have help the defense. But it is as easily seen that this line of inquiry could have hurt the defense. The answers to such close questions must be charged to trial counsel's sense of his case. Whether or not that sense informs counsel to seek or avoid particular evidence is the very heart of trial strategy. Such strategic choices are not deficient performance even if on review reasonable minds could disagree with the choice.

Moreover, since the record reflects that the unoffered evidence was of dubious merit, it is unlikely that seeking its admission would have in any probability changed the result of this trial. Relying on demonstrably false information would be as likely to undermine Smith's defense as assist it. Counsel's choice to not aggressively seek to admit that evidence caused no manifest prejudice. This issue fails.

C. SMITH DID NOT CHALLENGE THE CHARGING DOCUMENT BELOW AND LIBERAL CONSTRUCTION OF THE DOCUMENTS AND ALL THE CIRCUMSTANCES OF THE CASE SHOW THAT SMITH HAD SUFFICIENT NOTICE.

Smith next claims that the charging document with regard to theft

counts was constitutionally insufficient. This claim is without merit because, having failed to object to a deficient document below, Smith cannot overcome her burden to show that the omission from the information caused her actual prejudice and because there is no requirement that the identity of the theft victim be identified in the charging language.

Charging documents must contain all essential elements of a crime and thereby give the defendant notice and the ability to prepare a defense. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

This issue was not preserved below. At arraignment on the second amended information, Smith had no questions, waived reading, and entered pleas of not guilty. RP 4-5. Her attorney admitted in open court that the defense was not surprised by the filing. RP 7. The Washington Supreme Court has laid the rule

A different standard of review should be applied when no challenge to the charging document has been raised at or before trial because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refile of the charge. Applying a more liberal construction on appeal discourages what Professor LaFave has described as “sandbagging”. He explains this as a potential defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading.

We hereby adopt the federal standard of liberal construction in favor of the validity of charging documents where challenges to

the sufficiency of a charging document are initially raised after verdict or on appeal, but we further include in that standard both an essential elements prong and an inquiry into whether there was actual prejudice.

State v. Kjorsvik, 117 Wn.2d 93, 103-05, 812 P.2d 86 (1991) (internal footnotes omitted). Under this rule of liberal construction, “even if there is an apparently missing element, it may be able to be fairly implied from the language within the charging document” and the document upheld on appeal. *Id.* at 104. Thus “[t]he test is: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Kjorsvik*, 117 Wn.2d at 105–106.

In *State v. Tesenriter*, 101 Wn. App. 486, 4 P.3d 145 (2000), *review denied* 143 Wn.2d 1010 (2001), appellant claimed that the information charging possession of stolen property was insufficient. *Id.* at 494. There, the charge read “[i]n that the defendant, Michael Jay Tesenriter...did knowingly possess property of a value greater than \$250 knowing it was stolen.” *Id.* Tesenriter argued insufficiency because, *inter alia*, the charge failed to identify the stolen property. *Id.* at 495. The Court of Appeals responded that “none of these are elements of the crime of possession of stolen property.” 101 Wn App. at 495. Further, “[i]t has

long been the rule in Washington that the identity of the property's owner is not an element of crimes involving larceny or theft.” *State v. McReynolds*, 117 Wn. App. 309, 335, 71 P.3d 663 (2003).

In any event, the information in this case began by advising Smith that the property involved in the theft allegations was money. CP 1-5. This remained the case in the first amendment of that document. CP 10-14. Then, the second amendment did not include that the property taken was money. CP 56-64. But the previous permutations had already clearly advised Smith what the state alleged that she had stolen. On this record, it is impossible to say that Smith did not know what it is that she was alleged to have stolen. Further, Smith was clearly advised that the two counts of theft in the second amended constituted aggregation of amounts of money.

Finally, Smith makes no attempt to establish that she was actually prejudiced by the omission in the third information. As seen, she knew what she was defending. There is no point in the proceeding that Smith can point at that shows actual prejudice to her case. Smith was well advised as to the allegations she was defending. The charging document caused no actual prejudice. This issue fails.

A. NEITHER COUNSEL NOR THE COURT ERRED IN FAILING TO RAISE OR CONSIDER THE ISSUE OF SAME CRIMINAL CONDUCT AT SENTENCING BECAUSE THE PAIRS OF OFFENSE THAT SMITH ARGUES SHOULD HAVE BEEN CONSIDERED ARE NOT SAME CRIMINAL CONDUCT.

Smith next claims that several of Smith's crimes should have been considered same criminal conduct for sentencing purposes and that counsel was ineffective for failing to argue this issue. This claim is without merit because the two sets of offenses are not same criminal conduct and therefore counsel was not deficient in failing to claim that they were.

This ineffective claim is governed by the same rules as briefed above.

First, and most important, Smith advances no argument here explaining why the counts involved are same criminal conduct under RCW 9.94A.589. She cites the rule and attacks the trial court for not applying the rule but provides no analysis as to why counts I and II and counts III and IV are same criminal conduct.

Moreover, since Smith does not demonstrate that the offenses in question are in fact same criminal conduct, her claim of deficient performance by trial counsel has no weight. It is Smith's burden to show deficient performance and she has not shown how the same criminal

conduct issue should have been raised. Again, this issue is bald without any argument as to how the issue would have been properly raised below.

It would not have been properly raised below because the two sets of crimes do constitute the same criminal conduct. Count I is first degree identity theft charged with a date range of August 26, 2014 to October 20, 2014; Count II is first degree theft charged with the same date range. CP 56-57. Similarly, Count III is first degree identity theft charged with a date range of November 26, 2014 to November 1, 2015; Count IV is first degree theft charge with the same date range as Count III. CP 59-60.

RCW 9.94A.589 (1) (a) commands the sentencing court to count two or more crimes as one and sentence concurrently those crimes if it is found that the crimes constitute the same criminal conduct. Offenses are same criminal conduct if they have the same criminal intent, are committed at the same time and place, and involve the same victim. All these elements must be established or the offenses are not same criminal conduct. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). Since it is the defendant that benefits from a same criminal conduct finding, she has burden to establish it. *State v. Johnson*, 180 Wn. App. 92, 104, 320 P.3d 197 (2014). The issue is reviewed for abuse of discretion or misapplication of the law. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

Here, the two sets of crimes clearly involve the same victim so that part of the test is satisfied. The time and place are less certain: although charged with the same date ranges, it is clear that the various occasions of theft and identity theft were committed seriatim. *State v. Wright*, 183 Wn. App. 719, 334 P.3d 22 (2014) involved convictions for one count of first degree theft and 10 counts of Medicaid fraud. In brief summary, Wright had been forging hours worked on an in-home care contract for her mother. Discrepancies were discovered when the in-home care hours overlapped with hours Wright had worked at a full time job. The court rejected Wright's same criminal conduct claim, saying

As to the time when the crimes occurred, the charging decision to aggregate Ms. Wright's receipt of a series of payments as a common scheme or plan does not change the fact that her theft was not continuous but involved a series of transactions taking place on discrete dates—and those dates were consistently several days after she submitted the corresponding false telephonic invoice.

Id. at 734. Further, Wright's claim of same place failed because "Ms. Wright has not identified any evidence that the crimes were committed in the same place." *Id.*

Smith's crimes herein were similarly charged in the aggregate and within a date range, but occurred as a series of transactions done at different times and, likely, at different places. In any event, Smith provided the trial court with no evidence that the crimes of stealing the access number (identity theft) happened in the same place that the various

checks were cashed, which occasion constituted the receipt of the funds stolen. Smith's claim fails with regard to time and place.

It is also questionable whether the two crimes shared the same intent. The statutory intent elements of the crimes differ. Identity theft requires two mental states—knowingly with regard to obtaining or possessing another's identification or financial information and, second, that that obtaining or possessing be done with intent to commit any crime. RCW 9.35.020. Theft requires proof of intent to deprive the victim of the purloined property or services. RCW 9A.56.020. In *Wright, supra*, the court held that Wright's Medicaid fraud furthered her theft and that therefore it could not be said that her intent changed from crime to crime. 183 Wn. App. at 734. Wright thereby established the same intent element of the same criminal conduct test.

The state questions the vitality of the test regarding intent used in *Wright*. In *State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016), the Washington Supreme Court moved away from the test used in *Wright* on the question of same intent. In *Chenoweth*, there was no consideration given to the idea that when viewing a defendant's various crimes it matters that one crime seems to further another. Rather, "a straightforward analysis of the statutory criminal intent ..." was employed. 185 Wn.2d at 224-25. That this is a new and different approach is highlighted by the

dissenting judge's assertion that the majority departs from the old test considering whether or not the defendant's intent, objectively viewed, changed from crime to crime. *Id.* at 227-28.

Under *Chenoweth*, then, a straightforward review of the intent elements in the two statutes under which Smith was charged is required. As noted, they differ. Smith knowingly garnered the identification or access information with intent to commit another crime. It is essentially the intent to have the identity information for any nefarious purpose. One such purpose may well be theft. But theft still has a distinct mental state requirement: where the identity theft statute does not address the issue of permanent deprivation because the victim may well in fact retain the same information at the same time the identity thief has it, theft requires that the item be taken with intent to deprive the victim. The two statutes have different purposes and address different sorts of victimization. The intent elements are not the same.

It is established that Smith's crimes did not all occur at the same place and the same time. It is doubtful that the two crimes were done with the same intent. Counsel was not deficient for failing to raise a non-meritorious claim. Smith was properly sentenced.

IV. CONCLUSION

For the foregoing reasons, Smith's conviction and sentence should be affirmed.

DATED April 23, 2018.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

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