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COA No. 52721-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK MILLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

The Honorable Gregory Gonzalez

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMMARY OF APPEAL 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

D. STATEMENT OF THE CASE 4

 1. Charging and trial. 4

 (a). Opening statements and Mr. Miller’s defense - that the \$50,000 theft was committed by Ed Besaw. 5

 (i). *State’s opening statement - prosecution argues that Meador’s withdrawal of \$50,000 from her bank was arranged by Mr. Miller tricking Ed Besaw into being the “fall guy.”* 5

 (ii). *Defense opening - None of this happened, Ed Besaw was the malfeasor, and he conned Ms. Meador into withdrawing \$50,000 from the bank.* 6

 (iii). *Criminal impersonation and attempted theft.* 7

 (b). Trial. 7

 (i). *Mr. Miller’s work as a financial advisor at JPMorgan.* . . . 7

 (ii). *Ed Besaw obtains Ms. Meador’s client information.* 9

 (iii). *Mr. Miller’s family illnesses and his efforts to informally assist Ms. Meador with her own illness-related financial affairs at the same time.* 10

 (iv). *Lillian Meador testimony.* 11

 (v). *Mark Miller’s denials of any wrongdoing.* 12

 (vi). *Ed Besaw testimony.* 15

 (vii). *Stephanie Williams.* 15

2. <u>Verdicts and sentencing.</u>	15
E. ARGUMENT	16
1. THE TRIAL COURT ERRED IN GIVING AN UNTIMELY ACCOMPLICE LIABILITY INSTRUCTION, WHICH ALSO VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS, REQUIRING REVERSAL BECAUSE THE STATE CANNOT PROVE THE INSTRUCTIONAL ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.	16
(a). <u>A trial court may only give a jury instruction warranted by the evidence, and no evidence supported accomplice liability.</u>	16
(b). <u>Furthermore, where the defense has defended the case against the State’s claims since inception of the charge that the prosecution’s star witness was in fact the perpetrator, allowing the State an accomplice instruction is not harmless beyond a reasonable doubt.</u>	18
2. THERE WAS INSUFFICIENT EVIDENCE TO AFFIRM THE JURY’S VERDICTS FOR CRIMINAL IMPERSONATION AND ATTEMPTED THEFT, THUS DUE PROCESS REQUIRES REVERSAL AND DISMISSAL OF COUNTS TWO AND THREE WITH PREJUDICE.	25
(a). <u>Due Process required the Clark County prosecutor to produce evidence sufficient to allow Mr. Miller’s jury to find every element of the crimes charged beyond a reasonable doubt.</u>	25
(i). <i>Charges and required proof.</i>	25
Criminal impersonation.	25
Attempted first degree theft.	25
(ii). <i>Basic facts.</i>	26
(iii). <i>No evidence of criminal impersonation, or for any unlawful purpose.</i>	29
[A]. Mr. Miller did not assume a false identity.	29

[B]. There was no act done in a false identity with intent to defraud or for any other unlawful purpose.	33
(iv). <i>There was also no evidence of the required substantial step strongly corroborative of the essential element of intent, both of which are necessary for conviction for attempted theft.</i>	34
[A]. The completed crime, and attempt - versus solicitation and conspiracy.	34
[B]. No intent, and even if, <i>arguendo</i> , there was evil intent, there was no substantial step.	38
(b). <u>Remedy.</u>	43
3. IF THE EVIDENCE WAS SUFFICIENT, DOUBLE JEOPARDY WAS VIOLATED BY ENTRY OF JUDGMENT FOR CRIMINAL IMPERSONATION WHERE ANY IMPERSONATION WAS THE “SUBSTANTIAL” STEP FOR THEFT.	43
(a). <u>Double Jeopardy protects against duplicative punishment for the same offense, and the challenge may be raised on appeal.</u> 43	
(b). <u>Double Jeopardy was violated.</u>	44
F. CONCLUSION.	50

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Allen</u> , 182 Wn.2d 364, 341 P.3d 268 (2015)	17
<u>State v. Berube</u> , 150 Wn.2d 498, 79 P.3d 1144 (2003).	20,23
<u>State v. Bencivenga</u> , 137 Wn.2d 703, 974 P.2d 832 (1999)	40
<u>Bowen v. Odland</u> , 200 Wash. 257, 93 P.2d 366 (1939).	18
<u>In re Pers. Restraint of Borrero</u> , 161 Wn.2d 532, 167 P.3d 1106 (2007).	46,47,48
<u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995).	49
<u>State v. Cronin</u> , 142 Wn.2d 568, 14 P.3d 752 (2000).	17
<u>State v. Davis</u> , 174 Wn. App. 623, 300 P.3d 465 (2013)	35
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).	33
<u>State v. Dent</u> , 123 Wn.2d 467, 869 P.2d 392, 397 (1994).	41
<u>State v. Ervin</u> , 169 Wn.2d 815, 239 P.3d 354 (2010).	31
<u>State v. Esparza</u> , 135 Wn. App. 54, 143 P.3d 612 (2006)	45
<u>State v. Fair</u> , 5 Wn. App. 2d 1034 (COA No. 77180-9-I) (October 8, 2018).	19
<u>In re PRP of Francis</u> , 170 Wn. 2d 517, 242 P.3d 866 (2010)	44,46,48
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005)	45,46,49
<u>State v. Frohs</u> , 83 Wn. App. 803, 924 P.2d 384 (1996).	49
<u>State v. Gay</u> , 4 Wn. App. 834, 486 P.2d 341, <u>review denied</u> , 79 Wn.2d 1006 (1971)	36
<u>State v. Goddard</u> , 74 Wn. 2d 848, 447 P.2d 180 (1968)	41
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).	26
<u>State v. Grundy</u> , 76 Wn. App. 335, 886 P.2d 208 (1994)	38
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).	43
<u>State v. Houser</u> , 178 Wn. App. 1008 (2013) (COA No. 43154–8–II. December 3, 2013)	39
<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986).	23
<u>State v. Jackson</u> , No. 77022-5-I, 2018 WL 6503321 (Wash. Ct. App. Dec. 10, 2018)	30
<u>State v. Lewis</u> , 69 Wn.2d 120, 417 P.2d 618 (1966)	40
<u>State v. Longshore</u> , 197 Wn. App. 1019, 2016 WL 7403795 (2016), <u>amended on denial of reconsideration</u> , Mar. 14, 2017, <u>review denied</u> , 189 Wn.2d 1003 (2017).	20
<u>State v. Mockovak</u> , 174 Wash. App. 1076 (2013) (No. 66924–9–I, May 20, 2013)	36
<u>State v. Moles</u> , 130 Wn. App. 461, 123 P.3d 132 (2005).	33
<u>State v. Munden</u> , 81 Wn. App. 192, 913 P.2d 421 (1996).	16
<u>State v. Murphy</u> , 7 Wn. App. 505, 500 P.2d 1276 (1972)	35,36

<u>State v. Nicholson</u> , 77 Wn. 2d 415, 463 P.2d 633 (1969).	41
<u>In re Pers. Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004)	45
<u>State v. Ortuno-Perez</u> , 196 Wn. App. 771, 385 P.3d 218 (2016). . .	23
<u>State v. Presba</u> , 131 Wn. App. 47, 126 P.3d 1280 (2005).	29,31
<u>State v. Ray</u> , 768 S.W.2d 119 (Mo.Ct.App.1988)	37
<u>State v. Rice</u> , 102 Wn.2d 120, 683 P.2d 199 (1984).	20
<u>State v. Rich</u> , 184 Wn.2d 897, 365 P.3d 746 (2016)	34
<u>State v. Rodriguez</u> , 48 Wn. App. 815, 740 P.2d 904 (1987)	16
<u>City of Seattle v. Schurr</u> , 76 Wn. App. 82, 881 P.2d 1063 (1994) .	30
<u>State v. Simmons</u> , 113 Wn. App. 29, 51 P.3d 828 (2002)	29
<u>State v. Stein</u> , 94 Wn. App. 616, 972 P.2d 505 (1999), <u>affirmed on other grounds</u> , 144 Wn.2d 236, 27 P.3d 184 (2001)	24
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).	24
<u>State v. Teal</u> , 152 Wn.2d 333, 96 P.3d 974 (2004).	18
<u>State v. Theroff</u> , 95 Wn.2d 385, 622 P.2d 1240 (1980)	16
<u>State v. Vasquez</u> , 178 Wn.2d 1, 309 P.3d 318 (2013).	34
<u>State v. Weaver</u> , 60 Wn.2d 87, 89, 371 P.2d 1006 (1962).	40
<u>State v. Wheeler</u> , 22 Wn. App. 792, 593 P.2d 550 (1979).	16
<u>State v. Workman</u> , 90 Wn.2d at 451, 584 P.2d 382 (1978).	35

STATUTES, ORDINANCES, AND COURT RULES

RCW 9A.28.020(1)	35
RCW 9A.08.020(3)	17
RCW 9A.28.020(3)(c)	5
RCW 9A.56.020(1)(b)	34
RCW 9A.56.030(1)(a).	4,34
RCW 9A.60.040(1)(a)	5,29
RCW 9.94A.589(1)(a)	44
Colo.Rev.Stat. 18-5-113(1)(e), (2).	30
former SMC 12A.08.050(B)	30
RAP 2.5(a)(3).	45

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V	44
U.S. Const. amend. VI	23,24
U.S. Const. amend. XIV.	24,26

UNITED STATES SUPREME COURT CASES

<u>Blockburger v. United States</u> , 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932).	44
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<u>California v. Trombetta</u> , 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)	23
<u>Crane v. Kentucky</u> , 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)	23
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1980)	26,34
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	26,34

UNITED STATES COURT OF APPEALS CASES

<u>United States v. Goetzke</u> , 494 F.3d 1231 (9th Cir.2007)	35
<u>United States v. Nelson</u> , 66 F.3d 1036 (9th Cir.1995)	35
<u>United States v. Lewis</u> , 676 F.2d 508 (11th Cir.), <u>cert. denied</u> , 459 U.S. 976, 103 S.Ct. 313, 74 L.Ed.2d 291 (1982)	37

CASES FROM OTHER STATE JURISDICTIONS

<u>Alvarado v. People</u> , 132 P.3d 1205 (Colo.2006)	30
<u>Commonwealth v. Boone</u> , 286 Pa.Super. 384, 428 A.2d 1382 (1981).	43
<u>People v. Hagan</u> , 199 Ill. App. 3d 267, 556 N.E.2d 1224 (1990), <u>aff'd</u> , 145 Ill. 2d 287, 583 N.E.2d 494 (1991)..	41
<u>People v. Orndorff</u> , 261 Cal. App. 2d 212, 67 Cal. Rptr. 824, 826 (Ct. App. 1968).	39

PRACTICE GUIDES

Black's Law Dictionary 434 (7th ed.1999)	29
R. Perkins, <u>Criminal Law</u> 618 (2d. ed. 1969)	43
Washington Pattern Jury Instructions: Criminal 100.05 (2d ed. 1994)	35
WPIC 110 .03, at 183 (2d ed.2005 supp.)	37
Wayne R. LaFave, 2 <u>Subst. Crim. L.</u> (2d ed.2003)	38

A. SUMMARY OF APPEAL

Recently retired JPMorgan financial advisor Mark Miller was accused of tricking a past colleague into escorting one of Miller's former clients to her Chase bank in Vancouver, where she withdrew \$50,000 in a cashier's check, and escorting her again the next day when she converted the withdrawal to cash. The colleague, Ed Besaw, claimed that Mr. Miller asked him to do this, and paid him \$5,000 because the client, an elderly woman named Lillian Meador, needed assistance and security when making the withdrawal. Besaw alleged that he then gave \$45,000 to Mr. Miller at the Safari Club in Portland, Oregon, keeping his \$5,000 payment.

Mr. Miller was charged with first degree theft; at trial, he denied that he had any knowledge of Besaw's conduct, much less cleverly arranged the theft by using Besaw. He argued at trial that Ed Besaw approached and then swindled Lillian Meador on his own, after Mr. Miller gave him Meador's contact information in a routine business referral. Mr. Miller attacked and impeached Besaw's claims, and demonstrated his motive to steal, showing that he had a history of incompetent financial services work, that he had unsuccessfully tried to get Mr. Miller to loan him large sums of money, and that he had falsely represented to other people that he

worked at Mr. Miller's newly established independent financial services firm. Mr. Miller also pointed to Mr. Besaw's surreptitious behavior at the Chase bank as seen on surveillance video on the days the withdrawals were made.

However, after the defense had spent the entire evidence phase of trial portraying Besaw as a con artist who committed the theft, the trial court granted the State's motion to instruct the jury that it could find that Miller acted together with Besaw to commit the crime. The court abused its discretion and rendered Mr. Miller's trial unfair by instructing the jury on accomplice liability, over Mr. Miller's repeated objections, violating his right to due process under the Fourteenth Amendment.

The State also charged Mr. Miller with criminal impersonation and attempted theft, alleging that Miller secured blank annuity surrender forms for Ms. Meador by calling Meador's insurance company to have the forms sent to his email address, having referred to himself as her "nephew" during the call. The evidence was insufficient on both counts and the twin convictions violated double jeopardy.

B. ASSIGNMENTS OF ERROR

1. The trial court improperly gave an accomplice liability

instruction.

2. The court violated Mr. Miller's Sixth Amendment right to defend against the charge and his Fourteenth Amendment due process right to a fair trial by giving the accomplice liability instruction.

3. The evidence that Mr. Miller committed criminal impersonation was insufficient.

4. The evidence that Mr. Miller committed attempted first degree theft was insufficient.

5. Count 2 and count 3 violated Double Jeopardy, requiring vacation of count 2.

6. A scrivener's error lists 365 "months" as the sentence for count 3, where it should be 365 days. CP 99, 101.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court improperly give the jury an accomplice liability instruction over defense objection, where there was no evidence that Mr. Miller, and Mr. Besaw – the State's witness who Mr. Miller alleged was the actual perpetrator - were complicit?

2. Did the court violate Mr. Miller's Sixth and Fourteenth Amendment rights by giving the accomplice liability instruction, after the defense focused at trial on showing that Ed Besaw was the

person who committed the theft, rendering Mr. Miller's trial unfair and requiring reversal of all the counts?

3. Was the evidence that Mr. Miller secured blank annuity surrender forms for Ms. Meador by calling Meador's insurance company to have the forms sent to his email address, having referred to himself as her "nephew" during the call, insufficient to prove criminal impersonation by use of a false identity with intent to defraud?

4. Was the evidence that Mr. Miller secured blank annuity surrender forms for Ms. Meador by calling Meador's insurance company to have the forms sent to his email address, having referred to himself as her "nephew" during the call, insufficient to prove the "substantial step" or the intent required for attempted first degree theft?

5. Did entry of judgment on count 2 (criminal impersonation) violate Double Jeopardy, where that crime was the "substantial step" for the attempted theft (count 3)?

6. Should the scrivener's error be corrected?

D. STATEMENT OF THE CASE

1. Charging and trial.

Mr. Miller was charged with first degree theft pursuant to RCW

9A.56.030(1)(a). CP 8 (count 1), CP 51-52. In addition, he was charged with count 2, criminal impersonation per RCW 9A.60.040(1)(a), and count 3, attempted first degree theft. CP 8-9, CP 51-52 (RCW 9A.56.030(1)(a) and RCW 9A.28.020(3)(c)). The charges were brought at the urging of persons including a social services coordinator at a care facility, and an Adult Protective Services investigator, believing they were protecting Ms. Lillian Meador, but wrongly believing that Mr. Miller had engaged in malfeasance. CP 7. Lillian was an 88-year old woman who lived primarily at Brookdale Retirement Community, a nursing home in Vancouver, Washington. CP 7.

(a). Opening statements and Mr. Miller's defense - that the \$50,000 theft was committed by Ed Besaw.

(i). State's opening statement - prosecution argues that Meador's withdrawal of \$50,000 from her bank was arranged by Mr. Miller tricking Ed Besaw into being the "fall guy."

The State's attorney told the jury in opening statement that when Mark Miller met Lillian Meador as a financial advisor at JPMorgan, this was at a time when he had a large civil judgment against him arising out of prior bankruptcy proceedings.¹ RP 254.

¹ This was supported by evidence indicating that Mr. Miller had a default judgment entered against him as the result of a ruling in a bankruptcy court in January of 2012 for \$282,000, and that as a result writs of garnishment were issued. RP 756-61 (witness Erin Olson).

The prosecutor urged that Mr. Miller had charmed Lillian and ingratiated himself with her at her nursing care facilities, and continued to advise her after he left JPMorgan, but with wrongful intent. He then allegedly used his past business colleague Ed Besaw as a “fall guy,” persuading Besaw to accept \$5,000 for escorting Lillian to her Chase bank branch, where she would ultimately withdraw \$50,000 cash. RP 256-58. According to the State, Miller had told Meador he was going to use the money to invest in gold for her. RP 257. Besaw, the State claimed, innocently deposited \$5,000 into his bank account after delivering \$45,000 to Miller at a club in Portland, which Miller allegedly kept. RP 258-6.

(ii). Defense opening - None of this happened, Ed Besaw was the malfeasor, and he conned Ms. Meador into withdrawing \$50,000 from the bank.

In the defense opening, counsel focused on attacking the prosecution theory - the same theory the State had been advancing since the affidavit of probable cause filed 14 months earlier - that Miller used Besaw as an innocent fall guy and persuaded him to escort Lillian to the bank to withdraw the \$50,000. See CP 8-9, 51-52.

The defense argued that Besaw, who had gone from failed career to failed career, and tried to get Mark Miller to help him in

business and loan him money, secured Lillian Meador's contact information from Miller, and then visited her at Prestige Care with no apparent relationship that justified it. RP 268. Besaw later could be seen on surveillance video surreptitiously bringing Meador to the bank for the \$50,000 withdrawal and then taking all the money from her. RP 266-69.

(iii). Criminal impersonation and attempted theft.

Regarding the other charges (counts 2 and 3), the State told the jury in opening that Mr. Miller called Standard Insurance, referred to himself as Ms. Meador's nephew, and said that she needed to cash out her annuities to pay for her care at the nursing home and other facilities. RP 259-60. Mr. Miller denied that this was wrongful representation or any attempt at theft. RP 270.

(b). Trial.

(i). Mr. Miller's work as a financial advisor at JPMorgan.

In 2016, Ms. Meador was a client of Mr. Miller's at JPMorgan, where he worked as a financial advisor. CP 7. Miller had been a financial advisor and an insurance agent since 2000, when he first began working for Pacific Benefits Group, and then American Express Financial Advisors. His work at JPMorgan was a position that involved meeting clients at numerous company branches in

southern Washington, and at their homes. RP 1129-33, 1141-42.

At JPMorgan, Ms. Meador had been an endearing but high-maintenance client who set meetings with Mr. Miller on almost a weekly basis, to chat with him, often bringing gifts of food. RP 352, 1142. Mr. Miller could tell that Ms. Meador was lonely - for the first six months of meetings, she did not make any new investments or initiate any business. RP 1141-42. JPMorgan supervisor Al Tu told Miller to keep meeting with Ms. Meador. RP 1141-42. When Mr. Miller indicated to Meador that he could not continue to come to the Orchards branch of JPMorgan weekly to see her, Ms. Meador stated that she had \$100,000 in a savings account that she would like to invest. RP 1142-43.

Mr. Miller set Ms. Meador up to begin the process of having JPMorgan determine what investments might be appropriate, including assessing what Ms. Miller's goals and risk tolerances were. RP 1143. Ms. Meador's wealth was well known to Miller and the staff at JPMorgan, including the fact that she had a net worth of approximately 1.5 million dollars, consisting mostly of land. RP 1145. During this process Mr. Miller occasionally met with Ms. Meador at her nursing home, Brookdale, sometimes bringing employee Rilee King with him, and frequently bringing Ms. Meador's

JPMorgan file with him to the meetings, per standard practice. RP 1143-47.

(ii). Ed Besaw obtains Ms. Meador's client information.

Mr. Miller had met Ed Besaw years earlier, when they both worked at Pacific Benefits Group, a firm that assisted people with selecting medical insurance. RP 1129. Some years later, Besaw began telephoning Miller at JPMorgan asking him to refer clients for Besaw's new business venture, involving Medicaid and insurance coverage, and apparently annuities. RP 1130-33. Mr. Miller would occasionally include Mr. Besaw's name on a list of insurance agents that he would provide to JPMorgan clients, for purposes including annuities, but he emphasized to the clients that they should do their own due diligence before selecting any agent. RP 1132-34.

In July of 2016, Mr. Besaw asked Mr. Miller if he would lend him \$30,000; Mr. Miller declined. RP 1139. Mr. Miller also learned that Mr. Besaw had been using business cards with his name on it, but falsely representing that he worked for Mr. Miller's new company, Timberline Wealth Strategies. RP 1230. Mr. Miller told Besaw that he would take legal action against Besaw if he continued to do this. RP 1230-31.

However, Mr. Miller at some point had given Ed Besaw's

business telephone number to Lillian Meador. RP 113-34.

According to the supervisor at Ms. Meador's care facility, Mr. Besaw visited Ms. Meador there at least once, if not more times. RP 315-20. But Miller had not known that Besaw and Meador had met, and he did not know that Besaw had cultivated a relationship with Ms. Meador, until many months later, when Mr. Miller was charged with theft. RP 1134-35, 1202-03. This entire incident started, for Miller at least, when Ms. Meador telephoned him and said he had stole from her, which Mr. Miller told her was ridiculous, although he offered to speak with her again when she stopped saying this. RP 1232-33.

(iii). Mr. Miller's family illnesses and his efforts to informally assist Ms. Meador with her own illness-related financial affairs at the same time.

In the Fall of 2016, Mr. Miller left JPMorgan to deal with the illness and death of close relatives, including his father. RP 1148-55. During that time, Mr. Miller worked to establish his own financial services firm. At the same time, he informally assisted Ms. Meador with her financial affairs. RP 1127-33, 1141. During the Fall, Ms. Meador was hospitalized, and then temporarily spent multiple weeks at the Prestige Care facility in Vancouver, after suffering a UTI infection. See RP 574-76 (testimony of Adult Protective Services investigator Max Harvey).

Mr. Miller, as he testified, informally advised Ms. Meador during this time, trying to help her with financial concerns regarding payment for these expensive services she needed at three different facilities - her nursing home, the hospital, and the intensive Prestige Care facility. RP 1183-84. He visited Ms. Meador numerous times at her facilities, including Prestige Care. RP 1146, 1169-72, see RP 294, 296, 299, 301-03 (testimony of Prestige Care supervisor Stephanie Williams).

Mr. Miller became concerned, however, when he learned that the Prestige Care facility was having Lillian sign multiple blank checks, which he confronted supervisor Stephanie Williams about, and which she admitted at trial. RP 1190, see RP 314. Mr. Miller was worried that Ms. Meador was being “railroaded,” and his primary goal was to see that Ms. Meador gained the assistance of others such as a lawyer so that he would be able to step away from the burden of helping her with her financial affairs. RP 1195-96, 1200.

(iv). Lillian Meador testimony.

Lillian Meador’s testimony was brief. Meador, age 90 at trial, said that she visited Mr. Miller at JPMorgan about every week when he worked there. RP 352. After he left JPMorgan, Ms. Meador said, Mr. Miller wanted her to obtain money from the Chase bank at Fred

Meyer in order to invest in gold coins. RP 353-54. Meador also stated that she had two annuities at Standard Insurance, and that Mark Miller “wanted the money so that he could buy some - a cashier’s check and buy gold coins.” RP 357-58. Meador stated of the annuities, that “we didn’t cash them out.” RP 357.

When cross-examined, Meador recalled that a gold investment was something she had asked Mr. Miller about. RP 360. She stated that the trip to the bank was arranged by Mr. Miller. RP 355, 361-62. But it turned out that this was what Ed Besaw had told her. RP 360-61. Meador testified that Mr. Besaw gave Mr. Miller the withdrawn money. RP 354-55.

(v). Mark Miller’s denials of any wrongdoing.

Regarding the annuities, Mr. Miller testified that Ms. Meador said that she wished to make some investments in gold, and although Mr. Miller advised her that this was not a good idea, and unnecessary, he helped her begin the process of surrendering her annuities. RP 1180-81. It appeared that Lillian wanted to purchase gold because she believed it would be a means of gifting some of her wealth to her grandchildren, and not her children. RP 1181-82. Mr. Miller explained that sending gold to her grandchildren at their family’s homes would not achieve this goal. RP 1181. He hoped

and assumed that Ms. Meador had taken his advice to not buy gold, because she said that this made sense, and did not raise the matter again. RP 1181-82.

Lillian did have concerns about her finances and her ability to pay for her ongoing care. RP 1182-83. Ms. Meador had significant wealth, and long-term care insurance, but that insurance did not pay for the Prestige Care facility, only the Brookdale nursing home. RP 1182-83. She appeared to be aware of the requirement of the Medicare “spend down,” and wanted to spend the capital from her annuities, but Mr. Miller advised that this should not be done until absolutely necessary, especially because it would incur a penalty. RP 1185-86.

However, Ms. Meador stated that she wanted to surrender the policies, so Mr. Miller called Standard Insurance. RP 1182-83. He referred to himself as Ms. Meador’s nephew on the telephone call simply to facilitate the call. RP 1187-88. He received the forms by email, printed them out, and gave them to Lillian, who stated that she would think about them. RP 1189. He did not know until much later that she had sent them in to Standard. RP 1189.

Some weeks later, when Ms. Meador returned to Brookdale nursing home, she telephoned Mr. Miller, and when Mr. Miller said

that he would come and see her when he had time, she accused him of stealing money from her. RP 1201-02. Mr. Miller soon found himself accused, and in a case deposition, told that he had committed theft. RP 1202-03.²

Regarding the bank withdrawal, Mr. Miller did not make any request of Ed Besaw to escort Ms. Meador to her bank, or hire him, or do any other act of asking him or paying him to obtain any cashier's check or \$50,000 in cash from Meador's bank. RP 1210. He never had Mr. Besaw meet him at the Safari Club in Portland, a place Mr. Miller had never even been to, and he never received money from Besaw there. RP 1209. On August 26, the night the police had focused on and obtained records for, Mr. Miller did receive a cell phone call from Ed Besaw; this was a few weeks after Miller had returned from his father's funeral. RP 1207. Besaw telephoned after Mr. Miller had left his Vancouver home and was on his way to The Lamp restaurant in Portland, and during the call he fended off the usual financial and business entreaties from Besaw. RP 1207-08. Miller may have accidentally pocket-dialed Besaw's

² Adult Protective Services investigator Max Harvey learned that Meador had accused numerous other persons of theft, including the taking of some checks from her. RP 596; see also RP 1036-37.

number a short time later that evening. RP 1208.

(vi). Ed Besaw testimony.³

At trial, Mr. Besaw claimed that he was asked to escort Ms. Meador to the Chase bank by Mark Miller, and said that he gave \$45,000 to Miller at the Safari Club in Portland, Oregon. RP 377-86. Ed Besaw denied ever visiting Lillian Meador at any facility, and said that the first time he met her was when they went to Chase bank together. RP 378-79. He denied that he had ever visited Ms. Meador at Prestige Care, and claimed that his signatures logging in as a visitor were not his. RP 399.

(vii). Stephanie Williams. Stephanie Williams, a supervisor at Prestige Care, testified that she did not recall Ed Besaw visiting Lillian -- but admitted that she told defense counsel that he had, and then ultimately testified that this was true. RP 315-20.

2. Verdicts and sentencing.

The jury convicted Mr. Miller on all three counts, and on aggravating factors that Ms. Meador was particularly vulnerable, that the crimes were major economic offenses, and that Mr. Miller used a position of trust to commit the crimes. CP 89-96. The trial court

³ Mr. Besaw's testimony on direct and cross-examination is explored in greater depth at Part E.1, infra.

imposed an exceptional sentence of 27 months. CP 101.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN GIVING AN UNTIMELY ACCOMPLICE LIABILITY INSTRUCTION, WHICH ALSO VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS, REQUIRING REVERSAL BECAUSE THE STATE CANNOT PROVE THE INSTRUCTIONAL ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

(a). A trial court may only give a jury instruction warranted by the evidence, and no evidence supported accomplice liability.

“It is error to submit to the jury a theory for which there is insufficient evidence.” State v. Munden, 81 Wn. App. 192, 195, 913 P.2d 421 (1996). And mere speculation about potential criminal culpability is not a basis for a jury instruction. Rather, “some evidence must be presented affirmatively to establish” the theory for which a jury instruction is sought. State v. Rodriguez, 48 Wn. App. 815, 820, 740 P.2d 904 (1987) (quoting State v. Wheeler, 22 Wn. App. 792, 797, 593 P.2d 550 (1979)).

Thus a party is entitled to an instruction on its theory of the case only “if there is evidence to support that theory.” State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980) (jury instructions can encompass only those theories of liability which are supported by substantial evidence).

Here, there was no evidence to support the giving of an

accomplice liability instruction, as the State successfully requested, as to the charge of first degree theft. See CP 70 (Instr. 15).

The defense objected vigorously. During discussion of jury instructions, the State contended – for the first time - that guilt to first degree theft (count 1) could be predicated on accomplice liability under a theory that Miller and Besaw acted together to commit the offense, and that therefore as to Besaw, “[i]t may be that he has criminal culpability.” RP 1271-72, see RP 1236-37, 1248, 1268.

The court ruled that the jury would be instructed on accomplice liability because of the general rule that all accomplices need not be charged. RP 1273. Mr. Miller’s more specific objections and subsequent exception were both noted. RP 1273, see also RP 1298.

But accomplice liability requires knowing participation in the commission of the crime with another. RCW 9A.08.020(3); State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). Thus Mr. Besaw and Mr. Miller cannot be deemed to have committed the first degree theft under an accomplice liability theory upon mere speculation that they knowingly acted together. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (accomplice liability may not rest on speculation about knowledge).

Accordingly the trial court abused its discretion, and prejudiced Mr. Miller, when it overruled the defense objections that an accomplice instruction was not warranted by the evidence. RP 1273. The court simply may not instruct the jury on a legal principle that is factually “outside of the issues in the case,” because it “introduces a rule of law inapplicable to the facts.” Bowen v. Odland, 200 Wash. 257, 263, 93 P.2d 366 (1939).

(b). Furthermore, where the defense has defended the case against the State’s claims since inception of the charge that the prosecution’s star witness was in fact the perpetrator, allowing the State an accomplice instruction is not harmless beyond a reasonable doubt.

When a trial court sets forth the definition of accomplice liability in the jury instructions, jurors may convict the accused person as an accomplice – this is the initial category of prejudice Mr. Miller suffered here. See State v. Teal, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004).

But more importantly, as Mr. Miller argued repeatedly in objecting to accomplice liability instructions: “We’ve not been fighting an accomplice case this whole time. It’s a general denial, and to now bring up accomplice at the last second seems – it’s unfair.” RP 1269. Mr. Miller argued that the State’s theory and “everything they presented” was that Mr. Besaw was the fall guy, and everything the

defense did at trial was to show that Besaw in fact was a lying wrongdoer. RP 1269-70.

Thus, giving the jury instruction caused Mr. Miller to have unwittingly *helped the State's case* at trial. Where the defense spent the trial showing how likely it was that Mr. Besaw was a dishonest, criminal schemer, for the State to now announce that Mr. Miller could be guilty by working together with that wrongdoer, was extraordinarily prejudicial when it culminated in the instructional error.

For example, in State v. Fair, the trial court *refused* to give an accomplice instruction. State v. Fair, 5 Wn. App. 2d 1034 (COA No. 77180-9-1) (October 8, 2018, at p. 2) (unpublished, cited pursuant to GR 14.1). As the Court of Appeals recognized, in affirming the trial court's refusal to give the instruction, where there was no evidence that the defendant and the other suspect the defendant pointed to at trial were complicit, an accomplice instruction is unwarranted, and the defense's proper argument that the crime was committed by another does not create an exception to the rule requiring evidence of complicity in the record. State v. Fair, at p. 4.

The Washington Courts have recognized that harmlessness beyond a reasonable doubt must be shown by the State where

instructional error allows the jury to convict the defendant on an unsupported theory of criminal liability. See, e.g., State v. Longshore, 197 Wn. App. 1019, 2016 WL 7403795 (2016), amended on denial of reconsideration, Mar. 14, 2017 (reversing a murder conviction because the court gave an accomplice instruction when the evidence did not support accomplice liability), review denied, 189 Wn.2d 1003 (2017) (unpublished, cited pursuant to GR 14.1). The case involved an instruction which allowed the jury to convict despite a lack of evidence that the defendant and the other person acted together to commit the specific crime charged, and most importantly, the Court reiterated the standard of prejudice:

An erroneous instruction given on behalf of a party in whose favor a verdict is returned is presumed prejudicial unless it affirmatively appears the error was harmless. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). An error is harmless only if it appears beyond a reasonable doubt that the error did not contribute to the ultimate verdict. State v. Berube, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003).

Longshore, at p. 6.

Reversal is required here under that standard. The defense was thoroughly prejudiced by the erroneously given accomplice instruction. In the defense opening statement, counsel focused on the prosecution theory - the same one and the only one, that the prosecutor had been making since the affidavit of probable cause

filed 14 months earlier - that Miller, the malfeasant, used his past colleague Besaw as an innocent and persuaded him to escort Lillian to withdraw \$50,000. See CP 8. The defense attacked Ed Besaw as the real perpetrator, having the need, the motive and the means to escort Ms. Meador to the bank, and commit the theft of the \$50,000. As defense counsel argued,

[t]he evidence will show -- and there's no question that Eddie Besaw is the one who took \$50,000 cash from Lillian Meador. No question about that.

RP 270.

Then, during trial, the State examined its star witness, Besaw, eliciting testimony to portray to the jury that he was the fall guy for Mr. Miller. First, Besaw justified his belief in the merit of being paid the money he alleged he was, saying that he had been working with Mr. Miller on annuities for several months, and, he said, "I typically make more than that on that." RP 382. The State also elicited that Mr. Besaw believed he was due a larger amount of money from Mr. Miller based on past business dealings. RP 32-84.

Then on cross-examination, defending against the State's theory of the case that Ed Besaw was an innocent who Miller had tricked, the defense elicited that Besaw was seen wearing sunglasses in the video surveillance photos of him and Ms. Meador

at the Chase bank. RP 408. Under cross-examination, the defense got Besaw to admit that he took the money that Ms. Meador had withdrawn, and placed it under his shirt and in his back waistband. RP 412. And the defense noted that Mr. Besaw also had changed his name from Edwin Pearl to Edwin Besaw. RP 416.

In re-direct examination, the State continued to examine Besaw by eliciting testimony that would show him to have been tricked by Mr. Miller, eliciting reasons why his testimony about speaking on the phone with Mr. Miller, and giving Miller \$45,000 in Portland, might have some understandable inconsistencies. RP 416-17.

And, in final cross-examination, the defense continued to attempt to show Besaw's guilty character, asking whether he had boasted to past co-workers that he was able to write the same words on a whiteboard with two markers in his hand. RP 422.

In closing argument, however – having secured an accomplice instruction - the State now asserted that Mr. Miller committed theft either by paying Ed Besaw to escort Ms. Meador to her bank and make the withdrawal, or under a theory that Miller “orchestrated” the plan, together with Besaw. See RP 1320 (State's closing argument).

This requires reversal. “[I]t is prejudicial error to submit an issue to the jury where there is not substantial evidence concerning it.” State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). And an instructional error is harmless only if it appears beyond a reasonable doubt that the error did not contribute to the ultimate verdict. (Emphasis added.) Berube, 150 Wn.2d at 505. This standard of harmless error is particularly appropriate here. Mr. Miller has a constitutional right to argue that the prosecution has not proven its case, and may point to evidence logically connecting another person to the crime. See State v. Ortuno-Perez, 196 Wn. App. 771, 790, 385 P.3d 218 (2016); U.S. Const. amend. VI. And if the jury concludes another is the culpable party, jurors have a reasonable doubt, requiring acquittal under Fourteenth Amendment Due Process. Mr. Miller had a right to present his defense theory, which was violated when his trial efforts to do so were negated by an instruction allowing the jury to find criminal liability regardless. Whether rooted directly in the fair trial guarantee of Due Process or the Sixth Amendment right to defend, the Constitution guarantees criminal defendants a *meaningful* opportunity to present a complete defense. See Crane v. Kentucky, 476 U.S. 683, 689–690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); California v. Trombetta, 467 U.S. 479,

485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); U.S. Const. amends. VI, XIV.

Here, it cannot be shown that the jury did not predicate guilt on a theory that Mr. Besaw and Mr. Miller acted together, particularly where the defense spent the bulk of trial as to Ed Besaw showing his need for money, motive and opportunity to commit the crime, as an other suspect – in other words, doing everything it could to implicate the person that the State would later announce at the last second was actually part of a complicit team with the accused. State v. Stein, 94 Wn. App. 616, 625, 972 P.2d 505, 510 (1999), affirmed on other grounds, 144 Wn.2d 236, 27 P.3d 184 (2001) (“We presume that an instructional error is prejudicial unless the State satisfies its burden of affirmatively showing harmless error.”) (citing State v. Smith, 131 Wn.2d 258, 263–64, 930 P.2d 917 (1997)). Reversal is required. Importantly, the need to reverse extends to all three counts – a conviction for theft secured by the jury believing that Miller actually acted together with Besaw (who the defense had spent all of trial showing to be a thief) would have directly informed the jury’s consideration of whether Miller was guilty of the other charges. The court’s admonition to consider each count separately, CP 63, does not prohibit the jury from considering the trial evidence in its totality,

as the jury in this case would have done as to counts 2 and 3 when deliberating on the *mens reas* associated with those offenses.

2. THERE WAS INSUFFICIENT EVIDENCE TO AFFIRM THE JURY'S VERDICTS FOR CRIMINAL IMPERSONATION AND ATTEMPTED THEFT, THUS DUE PROCESS REQUIRES REVERSAL AND DISMISSAL OF COUNTS TWO AND THREE WITH PREJUDICE.

(a). Due Process required the Clark County prosecutor to produce evidence sufficient to allow Mr. Miller's jury to find every element of the crimes charged beyond a reasonable doubt.

(i). Charges and required proof.

Criminal impersonation. In addition to the alleged first degree theft (count 1), the State charged count 2, criminal impersonation, alleging that on September 1, 2016, Mr. Miller "did assume a false identity, to wit: the identity of Lillian Meador's nephew, and did an act in such assumed character with the intent to defraud another," when he "telephoned The Standard Insurance" company to request annuity surrender forms, and referred to himself as Meador's "nephew." CP 8, 51-52.

Attempted first degree theft. The State also charged count 3, alleging that Mr. Miller on September 1, 2016 committed attempted first degree theft, "[by] telephoning the [Standard Insurance] company," an act of conduct that "was a substantial step toward the commission of [first degree theft]." CP 9, 51-52.

The jury convicted Mr. Miller on these additional counts, and on the several aggravating factors. CP 88-96. However, entry of a judgment of conviction for a crime violates the Fourteenth Amendment's Due Process clause unless the evidence is such that any rational trier of fact, viewing the evidence in the light most favorable to the State, could find each of the elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1980); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV.

(ii). Basic facts.

Although the challenge on appeal is the failure of the State's case, Mr. Miller readily conceded in his trial testimony that as part of his effort to help with Ms. Meador's finances paying for multiple care facilities, he telephoned Standard Insurance in Portland, Oregon at Ms. Meador's request. RP 1182-86. Although he had advised Lillian that surrender of her annuities was something that should not be done until absolutely necessary, Ms. Meador insisted. RP 1185-86.

Miller telephoned Standard, identified himself as Mark Miller, and had blank annuity surrender forms sent to his email address. If filled out and signed by her, these would allow Ms. Meador to

surrender the annuities - i.e., obtain checks for her capital funds from two policies that she held with the company. RP 1188-89. Mr. Miller told the Standard operator that he was Ms. Meador's nephew to facilitate the call - if the company believed him to be a competing financial advisor - which he was not, nor in any official capacity to Ms. Meador - there might be greater proprietary roadblocks. RP 1188. Mr. Miller subsequently printed the forms out and gave them to Lillian. She put them in a drawer and said she would handle them later. RP 1189-90. Miller's securing of the forms to be sent by email was confirmed by the State's primary evidence, including witnesses, and the recording of the call made to Standard. RP 625-48, 660-68 (recording played for jury); Supp. CP ____, Sub # 153 (Exhibit list, Exhibit 2). Mr. Miller knew the telephone call was being recorded. RP 1188; see RP 614.⁴

First, the Standard call recording showed that the operator asked, "How can I help you?," at which point Mr. Miller stated,

Yeah. Hi Norma. My name is Mark Miller. I got the -- well, my Aunt, Lillian Meador, is in the hospital -- or in assisted living. She has two annuities. And we're just trying to get assets to make sure we can pay for everything.

⁴ The trial court, after litigation on multiple issues, had issued an *in limine* ruling deeming the recorded call admissible under Washington's Privacy Act. RP 605-22.

RP 660-68; Exhibit 2. The operator asked if Miller was Meador's aunt because she wished to refer to her -- during the phone call - as the appropriate relation, when telling Mr. Miller that "[a]s long as your aunt can sign" the forms, they would be valid. RP 665; Exhibit 2.

The operator was plainly not requiring attestation from Mr. Miller that he had any specific blood relationship to the annuity holder, as the State would later imply in closing argument. See RP 1340. Indeed, the State's own witness Robert Hershinow, from Standard Insurance, confirmed that any caller who called and requested a blank form no. 12411 for annuity surrender, could provide any random name or identifier, and the company would send the blank form as requested. RP 645-46. The caller would not have to provide an annuity holder's official personal information, such as a social security number, because the forms were generic. RP 646.

And even if a person telephoned and said that he or she was a relative of the annuity holder, Standard would give no greater amount of information about the annuity holder than it would reveal to a random caller as just described, but would of course still send a blank form -- as it would to anybody. RP 637-39. Notably, Hershinow confirmed, anyone could obtain the precisely identical forms from the Standard Insurance website, that Mr. Miller happened

to receive by calling personally. RP 646-48.

Mr. Hershinow also confirmed that Standard emailed the annuity surrender forms that Miller requested to his email address of “MBBC111yahoo.com [sic],” RP 642; the forms were later received back by Standard Insurance and processed by check to Ms. Meador’s bank account. RP 642-44; State’s Exhibits 69-71.

(iii). No evidence of criminal impersonation, or for any unlawful purpose.

[A]. Mr. Miller did not assume a false identity.

There was no evidence on which to convict Mark Miller of criminal impersonation, a crime which requires proof that a person “assume[d] a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose.” RCW 9A.60.040(1)(a); see State v. Presba, 131 Wn. App. 47, 55, 126 P.3d 1280 (2005).

The elements of criminal impersonation in the first degree which the State must prove beyond a reasonable doubt are: (1) the defendant “[a]ssumes a false identity”; (2) “does an act in his or her assumed character” (3) “with intent to defraud another or for any other unlawful purpose.” RCW 9A.60.040(1)(a). “Defraud” means “[t]o cause injury or loss to . . . by deceit.” State v. Simmons, 113 Wn. App. 29, 32, 51 P.3d 828 (2002) (quoting Black’s Law Dictionary

434 (7th ed.1999)); see also City of Seattle v. Schurr, 76 Wn. App. 82, 84, 881 P.2d 1063 (1994) (discussing former SMC 12A.08.050(B)); CP 75, 76 (Instrs. 20, 21). For example, in State v. Jackson, the defendant Henry Jackson was being questioned by police, and he identified himself as his brother, William Jackson. He also gave the officers his brother's residence address, in order to avoid police detection of a no-contact order. State v. Jackson, No. 77022-5-I, 2018 WL 6503321, at *1, 4 (Wash. Ct. App. Dec. 10, 2018) (unpublished, cited for informational purposes only pursuant to GR 14.1). Jackson plainly assumed an identity that was not his. For further example, under a nearly identical statute, Colorado has held that evidence that the defendant gave a false name to a police officer in order to avoid arrest is sufficient to prove that the defendant assumed a false identity for an unlawful purpose. See Alvarado v. People, 132 P.3d 1205, 1206-07 (Colo.2006) (holding that the defendant was guilty when he used another's identity to unlawfully avoid arrest during a traffic stop, by writing the false name and date of birth and providing more specific information when questioned by the police officer).⁵

⁵ In Colorado, it is a felony to commit criminal impersonation under Colo.Rev.Stat. § 18-5-113(1)(e), (2) (2004); the elements of the crime are effectively identical to Washington's.

Legislative intent is derived solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Here, Mr. Miller did not assume a false identity. He truthfully stated his name as Mark Miller and gave an email address that belonged to him, Mark Miller, he being Miller, and the email address being his.

This is not assuming the identity of another, real or non-existent. In an equal protection case, the Court of Appeals has stated that the crime of impersonation does not require “use of a false name nor a false identity . . . assuming the identity of an actual person, which is necessary to commit identity theft.” (Emphasis added.) State v. Presba, 131 Wn. App. at 55 (addressing appellant’s argument regarding equal protection and specific/concurrent statutes in charging). Mr. Miller gave neither a false, fictitious identity nor a true identity that was the name of another.

Simply put, Mr. Miller did not claim to be a person other than Mark Miller. He provided his actual identity. Describing oneself, while giving one’s true name *and* identifying information, as having a relationship to another person such as “nephew” or “partner” -

neither of which carries any legal authority as to the affairs of the other - does not fall within the language of the criminal impersonation statute. This stands in contrast to giving the false name of an actual person with authority such as the name of a parent as to a minor child, or giving a fictional name that represents oneself as having the power to speak for another or to secure benefits for another.

Assuming a false identity, by its plain language, means assuming the identity, even if fictional, of another person than oneself, but it does not mean describing oneself by a formal or informal affinity or relationship that may exist between individuals. Unlike every other Washington case cited, the descriptor of “nephew” did not, as it did in the foregoing authorities, assume the an identity – Mr. Miller said he was Mr. Miller.

It would of course be improper for Mr. Miller to represent himself as Ms. Meador’s investment counselor or fiduciary of any sort, because she was no longer a client of his at JPMorgan where he previously worked, and she had not become his client simply because he was starting a new financial business while advising Meador informally. RP 1127-33, 1141; RP 738, 751 (testimony of Riley King); see RP 1368-69 (closing argument). The fact that in amongst Mr. Miller’s statements to the operator he said that Ms.

Meador was facing financial pressures while paying for three facilities virtually simultaneously, which was true, RP 1182-86, leaves only the fact that Mr. Miller admittedly told a “fib” that he believed would genially smooth over the process compared to stating he was a financial industry professional, but this does not constitute the charged crime. See RP 1187-88, 1213-14.

[B]. There was no act done in a false identity with intent to defraud or for any other unlawful purpose.

Further, there was no proof of an unlawful purpose. Certainly, “[c]ircumstantial evidence and direct evidence are equally reliable.” State v. Moles, 130 Wn. App. 461, 465, 123 P.3d 132 (2005) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). But the evidence as a whole showed no purpose to defraud. Mr. Miller’s request for the blank forms, which he provided to Ms. Meador, at the same time as Mr. Miller himself worked to ensure that Lillian had legal representation and handed over her financial information to Attorney Jim David, does not show any intent to defraud. Attorney David confirmed that he was retained to protect the interests of Ms. Meador in September of 2016, upon the recommendation of Mr. Miller, who specifically explained that he had been helping Ms. Meador with her finances, as a friend. RP 1103-04, 1107-09. Mr. David was also present when checks for the annuity funds from

Standard insurance arrived at Ms. Meador's care facility, pursuant to her submission of the forms that Miller had obtained. RP 1114-15.

This does not show an intent to defraud. Speculative inferences from circumstantial evidence are insufficient. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (citing Jackson, supra, 443 U.S. at 319); State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). The defendant's conviction for criminal impersonation must be reversed because the evidence put before the jury was inadequate to stand as proof "beyond a reasonable doubt." Jackson, at 319; In re Winship, at 364.

(iv). There was also no evidence of the required substantial step strongly corroborative of the essential element of intent, both of which are necessary for conviction for attempted theft.

[A]. The completed crime, and attempt - versus solicitation and conspiracy.

First degree theft is theft of an amount of value exceeding \$5,000. CP 64 (Instr. 9); see RCW 9A.56.020(1)(b), RCW 9A.56.030(1)(a). Theft requires, *inter alia*, that the taking be done with the intent to deprive. CP 65, 66 (Instrs. 10, 11).

An attempt offense, however, is the criminalization of an effort to commit a crime that is uncompleted, because frustrated or discontinued after a "substantial step" has been taken toward

actually committing the offense. Washington Pattern Jury Instructions: Criminal 100.05, at 222 (2d ed. 1994); RCW 9A.28.020(1); see also CP 74 (Instr. 19) (requiring, to convict, that the act be a substantial step toward first degree theft); see, e.g., United States v. Goetzke, 494 F.3d 1231, 1237 (9th Cir.2007) (a suspect crosses the line separating preparation from attempt when his actions unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances) (citing United States v. Nelson, 66 F.3d 1036, 1042 (9th Cir.1995)); see, e.g., State v. Davis, 174 Wn. App. 623, 632-34, 300 P.3d 465 (2013) (proof of retrieving the weapon and moving toward victim was sufficient to establish an act constituting a substantial step toward murder).

With regard to attempted crimes, first, when an attempt conviction is challenged on appeal for lack of adequate proof, conduct is not a substantial step “unless it is strongly corroborative of the actor’s criminal purpose.” State v. Workman, 90 Wn.2d at 451, 584 P.2d 382 (1978).

Second, to constitute a substantial step, the conduct must be an overt act that reaches “far enough toward the accomplishment of the target crime to amount to the commencement of the consummation.” State v. Murphy, 7 Wn. App. 505, 512, 500 P.2d

1276 (1972) (citing State v. Gay, 4 Wn. App. 834, 839-40, 486 P.2d 341, review denied, 79 Wn.2d 1006 (1971)). The act must be an unequivocal showing that the actual crime has so far moved towards its commencement that there is little going back, except by intervention or change of heart. Gay, 4 Wn. App. at 839. Thus in a battery case, the act of attempt must cross the line between violence menaced and violence actually begun. Murphy, 7 Wn. App. at 512.

“Mere preparation” toward committing a crime is not a substantial step. For example, intent is also an aspect of solicitation to commit a crime, but securing some aspect necessary to commit the crime is not conduct adequate to be deemed a “substantial step” for purposes of an attempt. State v. Gay, 4 Wn. App. at 839-40 (soliciting a hit man to kill one’s spouse held to be mere preparation, not a substantial step toward murder, and therefore not an attempt); cf. State v. Mockovak, 174 Wash. App. 1076, at pp. 3-5, 12 (2013) (No. 66924–9–I, May 20, 2013) (unpublished, cited for informational purposes only pursuant to GR 14.1) (attempted theft which requires proof of more than the mere preparation adequate for a conspiracy was satisfied where defendant paid money to an undercover officer to kill his business partner while partner was in Australia, gave officer a photo of intended victim so that he could be located, and received

call from the officer from Australia saying the victim had been located, and told him to proceed).

The high requirement for attempt also contrasts with the conduct necessary to constitute conspiracy, which *can* be an act of mere preparation. See State v. Ray, 768 S.W.2d 119, 121 (Mo.Ct.App.1988) (telephone conversation can be overt act for purposes of conspiracy charge); United States v. Lewis, 676 F.2d 508, 511 (11th Cir.) (holding that a telephone call to arrange a meeting was a sufficient overt act for conspiracy), cert. denied, 459 U.S. 976, 103 S.Ct. 313, 74 L.Ed.2d 291 (1982)); see WPIC 110 .03, at 183 (2d ed.2005 supp.) (for conspiracy, “[a] substantial step is conduct of the defendant which strongly indicates a criminal purpose”). Among inchoate crimes, therefore, a substantial step is the highest level of overt act required in the criminal law.

In this case, accordingly, the jury instructions in Mr. Miller’s case informed the jury that a person commits attempted first degree theft if, “with intent to commit theft in the first degree, he does any act that is a substantial step toward the commission of theft in the first degree.” CP 72 (Instr. 17). The instructions provided that “[a] substantial step is conduct that strongly indicates a criminal purpose

and that is more than mere preparation.” (Emphasis added.) CP 73
(Instr. 19).

**[B]. No intent, and even if, *arguendo*, there was
evil intent, there was no substantial step.**

Mr. Miller had no intent to commit theft when he secured the annuity forms for Ms. Meador to complete. Mr. Miller provided attorney Jim David with Ms. Meador’s financial records pertaining to the efforts he had been making on her behalf. RP 1107-08. Mr. David had Ms. Meador sign the checks from Standard, and they were deposited into her bank account - just as Hershinow, the witness from Standard Insurance, testified. RP 1116-17; see RP 642-44.

Even if the jury could conclude that Mr. Miller’s requesting of blank annuity surrender forms was an act done with intent to take anything of value from Ms. Meador - all of which Miller sharply denies - there was no substantial step. Even obvious intent does not itself make an act of conduct a substantial step. “[I]t is not enough that the defendant have intended to commit a crime. There must also be an act, and not any act will suffice.” Wayne R. LaFave, 2 Subst. Crim. L. § 11.4 (2d ed.2003); see, e.g., State v. Grundy, 76 Wn. App. 335, 336-37, 886 P.2d 208 (1994) (defendant who said he wanted cocaine and asked to see drugs offered to him for sale by

undercover officer was merely negotiating and did not commit “substantial step”).

For further example, this case is unlike State v. Houser, 178 Wn. App. 1008 (2013) (COA No. 43154–8–II. December 3, 2013) (unpublished, cited pursuant to GR 14.1) (evidence that defendant possessed in his home the chemicals and equipment necessary to manufacture methamphetamine and that others, using defendant’s truck, delivered additional manufacturing materials to house with the declared purpose of arriving to make methamphetamine with defendant that night, was guilty of “substantial step”).

More similar to this case is a California case which involved a set-up where the actors hoped to swindle a stranger by showing there was money enough in a bank account that would show the trustworthiness to briefly take possession of the swindler’s cash – there, there was no “attempt” where the scheme was stopped many steps before its consummation. People v. Orndorff, 261 Cal. App. 2d 212, 216, 67 Cal. Rptr. 824, 826 (Ct. App. 1968).

Similarly, here, the charge was little more than speculation based upon an inference that Mr. Miller needed money, would do what was necessary to secure it, and that his obtaining of the forms would inevitably be followed by multiple, successful other steps

necessary to securing of the funds. This is inadequate. Put another way, in cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rational trier of fact to find guilt beyond a reasonable doubt. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (citing State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

In this case, too many additional steps remained before the annuity surrender forms could be part of an actual attempt - Mr. Miller would have had to ensure submission of the documents to some location and in some form to which he would have the ability to gain access, secure a means by which the money, once the surrender forms were completed and signed by Meador, would be available to him, and devise some manner of persuading Standard Insurance to send the checks to such address. Or, he would have to have access to Ms. Meador's bank account, and go through the steps necessary to employ that access – if it remained to secure the assistance of another to obtain the funds, and that scheme commenced, *that* might have been a substantial step. Compare State v. Lewis, 69 Wn.2d 120, 124, 417 P.2d 618 (1966) (defendants

guilty of attempt where they displayed counterfeit money to victim, persuaded victim to go to her bank and withdraw money pursuant to a ruse, arranged to meet the next day to take her money, and did arrive at location only to be pursued and caught by police) (stating that defendants “had done every act in the execution of their contrived scheme except to receive the property of their intended victim.”).

This case is more like People v. Hagan, where a defendant’s lengthy negotiations with a potential lessor for a lease with an initial rent-free period (customarily granted to well-funded commercial lessees), predicated on defendant’s actual, completed submission of false financial statements and false tax returns misrepresenting his company’s assets, was nonetheless mere preparation, and not “substantial step” toward theft, where actual lease document was never completed or signed by the defendant. People v. Hagan, 199 Ill. App. 3d 267, 285, 556 N.E.2d 1224, 1237 (1990), aff’d, 145 Ill. 2d 287, 583 N.E.2d 494 (1991).

Importantly, a substantial step is required in the attempt context to prevent the imposition of punishment based on intent

alone. State v. Dent, 123 Wn.2d 467, 475, 869 P.2d 392, 397 (1994).⁶

Thus, even supposing the most larcenious evil of mind in obtaining these annuity forms nevertheless leaves nothing more than a preparation of the groundwork for an attempt, and a crime whose commencement was never begun. Calling an Insurance company and securing blank annuity surrender forms for Ms. Meador falls far short of a substantial step. Even if Mr. Miller was disbelieved by the

⁶ It is true that there are cases that state that “where intent is clearly shown, slight acts in furtherance of a scheme will establish the necessary element of overtness.” State v. Goddard, 74 Wn. 2d 848, 851, 447 P.2d 180 (1968). These cases typically involve acts of physical proximity that make eminently clear that the crime was imminent, and only frustrated by resistance or capture. Thus in Goddard, Goddard, charged with attempted performance of an illegal abortion, had arrived at the home of the undercover individual, prepared the bed with clean bedclothes, arranged various medical implements, and cleaned the person’s body as preparation for the procedure, at which point police burst into the room and arrested Goddard. Goddard, 74 Wn. App. at 849-50. Plainly, intent was clear and the medical procedure was adequately imminent.

And in State v. Nicholson, which cited Goddard for the proposition, the appellant accosted teenage girls, said he was going to rape them, and lay on top of them, but was unable to secure an erection. State v. Nicholson, 77 Wn. 2d 415, 420-21, 463 P.2d 633, 637 (1969). He was deemed guilty because, “[t]he intent being made manifest and his acts directed toward its consummation being ‘overt’ according to the definition given in State v. Goddard, *supra*, the evidence was clearly sufficient to support the verdict on these counts of attempted rape.”).

These cases that use the “slight acts in furtherance” language involved thoroughly unambiguous conduct toward commission of the completed crime that unmistakably showed its commission was impending, and would have occurred immediately, but for the arisal of external, frustrating circumstances such as intervention by law enforcement. The cases do not compare to the facts here.

jurors, and did intend theft, the conduct put forth by the State can only be classed as mere preparation, and intent is not punished where combined with mere preparation. See R. Perkins, Criminal Law 618 (2d. ed. 1969); Commonwealth v. Boone, 286 Pa.Super. 384, 395 n. 4, 428 A.2d 1382 (1981).

(b). Remedy.

Reversal is required. The criminal law simply does not punish conduct as inchoate as that allegedly committed here, and the proof fails to meet the statute. The conviction for attempted theft must be reversed. Jackson, at 319; In re Winship, at 364. A reviewing court must reverse and dismiss when no rational fact-finder could find every element of the offense beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Counts 2 and 3 must be dismissed.

3. IF THE EVIDENCE WAS SUFFICIENT, DOUBLE JEOPARDY WAS VIOLATED BY ENTRY OF JUDGMENT FOR CRIMINAL IMPERSONATION WHERE ANY IMPERSONATION WAS THE “SUBSTANTIAL” STEP FOR THEFT.

(a). Double Jeopardy protects against duplicative punishment for the same offense, and the challenge may be raised on appeal.

The trial court entered judgment on the charge of attempted theft, and criminal impersonation. CP 97. Mr. Miller denies

committing both offenses. However, by entry of judgment on criminal impersonation, his right to be free from double jeopardy was violated. U.S. Const. amend. V. It was clear at trial that the State employed the allegation, that Mr. Miller committed criminal impersonation by referring to himself as Ms. Meador's "nephew" to call Standard Insurance and secure annuity forms for Ms. Meador, as the proof of the substantial step for attempt.⁷

Entry of judgment in violation of Double Jeopardy violates a defendant's 5th Amendment rights. See generally, Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed. 306 (1932); U.S. Const. amend. V. Mr. Miller may raise the issue for the first time on appeal. See, e.g., In re PRP of Francis, 170 Wn. 2d 517, 522, 242 P.3d 866, 869 (2010) (challenge to the court's ability to enter convictions and sentence a defendant for duplicative charges may be raised at any time); RAP 2.5(a)(3).

(b). Double Jeopardy was violated. Although the State may bring multiple charges arising from the same factual conduct, "[w]here a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must

⁷ The court deemed impersonation and attempted theft to be the same criminal conduct per RCW 9.94A.589(1)(a). RP 1463-69; CP 99.

determine whether, in light of legislative intent, the charged crimes constitute the same offense.’ ” State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005) (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). The issue is one of legislative intent. “If the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended.” Freeman, 153 Wn.2d at 771.

Except in the rare instance where Legislative intent is clear, reviewing courts turn to the “same evidence” test set forth in Blockburger v. United States, 284 U.S. at 304, to assess whether the two offenses are the same in both fact and law. Freeman, 153 Wn.2d at 771-72. If each crime contains an element that the other does not, the courts presume that the crimes are not the same offense for double jeopardy purposes. State v. Esparza, 135 Wn. App. 54, 60, 143 P.3d 612 (2006) (quoting Freeman, at 772).

Importantly, in assessing double jeopardy, courts view the offenses as they were charged and proved. Freeman, 153 Wn.2d at 772; accord, Orange, 152 Wn.2d at 817. Courts do not consider the statutory elements of the offenses in the abstract; that is, they do not consider all the ways in which the State could have charged an

element of an offense, but rather how the State actually secured the convictions. Freeman, at 772.

Consistent with this principle, “[w]here one of the two crimes is an attempt crime, the test requires further refinement.” In re Pers. Restraint of Borrero, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007). This is because, as our Supreme Court has explained, one of the elements of an attempt crime is that the defendant “ ‘does any act which is a substantial step toward the commission of that crime.’ “ Borrero, 161 Wn.2d at 537 (quoting former RCW 9A.28.020(1) (1975)).

The “substantial step” element is merely a placeholder until the facts of the particular case give it independent meaning. Borrero, 161 Wn.2d at 537. Only by examining the actual facts constituting the substantial step can the determination be made that the defendant’s double jeopardy rights have been violated. Borrero, 161 Wn.2d at 537.

Thus where one crime was also the substantial step element of an attempted greater offense, double jeopardy is generally violated. See, e.g., In re PRP of Francis, 170 Wn. 2d at 524 (second degree assault was the substantial step towards attempted robbery). Of course, the reviewing court should not presume “that the trier of

fact relied on only the facts tending to prove both crimes.” Borrero, 161 Wn.2d at 538. Instead, the court looks to the facts and the prosecutor’s closing argument to determine how the convictions were procured. Borrero, at 538–39.

In this case, the State proved that Mr. Miller secured annuity surrender forms for Ms. Meador by telephone, and that same evidence was also the substantial step for the attempted first degree theft. Consistent with the affidavit of probable cause, the State made clear in closing argument that the charge of attempted first degree theft “has to do with the cashing out of the annuities”⁸ allegedly attempted by Mr. Miller, which was proved by the substantial step of “the phone call pretending to be her nephew[.]” RP 1321-22. The State argued:

So elements on or about September 1st of 2016, that was **the date he made the call, the defendant did an act that was a substantial step** toward the commission of Theft in the First Degree. We’ve already talked about what the elements are of Theft in the First Degree. That the act was done with the intent to commit Theft in the First Degree and that the act occurred in the state of Washington or essentially affected a person within the state of Washington. So then we get into, well, **what is a substantial step? Is the phone call enough?** A

⁸ It is clear that this statement in closing argument is not, in context, an argument that Miller cashed out the annuities. Attorney Jim David testified that checks for the annuity funds were written by Standard to Ms. Meador and deposited in her bank account. RP 1114-15.

substantial step is defined for you. This is Instruction Number 18. It's pretty brief. A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation. So he doesn't have to complete the crime. He doesn't really have to necessarily get close to completing the crime. There just has to be a substantial step done with the intent to commit the crime. **And I would submit to you that the phone call pretending to be her nephew, asking how they're going to cash these out, having them e-mail him the forms that are later within a week turned around and sent back for disbursement, that is, in fact, a substantial step.**

All right. Final count, Count III, Instruction 21, this is **Criminal Impersonation in the First Degree. Again, relating to the call to Standard Insurance. This is where he pretends to be her nephew.** That's what the allegation is here. To convict the defendant of the crime of Criminal Impersonation in the First Degree, each of these elements must be met: First, on or about September 1, 2016, the defendant assumed a false identity. It doesn't have to be a real person, it just a false identity. In this case, it was the identity of Lillian Meador's nephew that the defendant did an act in the assumed character with the intent to defraud another or for any other unlawful purpose and that the act occurred in the state of Washington or affected a person within the state of Washington.

(Emphasis added.) RP 1322-23. As the State noted in closing, the annuity surrender forms were signed and sent in by Ms. Meador. RP 1340 (State's closing argument); RP 1114-15 (testimony of attorney David); Exhibits 69, 70. The twin offenses violated double jeopardy. In re PRP of Francis, at 524; Borrero, at 538–39.

Further support for finding a double jeopardy violation exists here, where these two crimes did not involve separate injury. Another Freeman consideration is whether the offenses committed had an independent purpose or effect. State v. Freeman, 153 Wn.2d at 778. “[O]ffenses may in fact be separate when there is a separate injury to the ‘the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.’ “ Freeman, at 778–79 (quoting State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996)). Here, the criminal impersonation and securing of annuity forms sent by Standard Insurance as Ms. Meador’s nephew caused no separate or distinct injury than the attempted theft.

Mr. Miller’s constitutional guarantee against double jeopardy protects him from receiving multiple punishments for the same offense. Blockburger, *supra*; State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The double jeopardy violation requires that Mr. Miller’s conviction for criminal impersonation must be vacated.

F. CONCLUSION

Mr. Miller asks that the Court of Appeals reverse his judgment and sentence. The scrivener's error at CP 101 of 365 months conflicts with the court's sentence of 365 "days" and should be corrected if the judgment is not reversed. CP 99.

DATED this 21ST day of May, 2019.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 52721-9-II
)	
MARK MILLER,)	
)	
Appellant.)	

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