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

STATE OF WASHINGTON, Respondent

v.

MARK ALLAN MILLER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01217-3

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly instructed the jury on the definition of an accomplice.**
- II. Sufficient evidence supported Miller's conviction for criminal impersonation where he assumed the false identity of Meador's nephew.**
- III. Sufficient evidence supported Miller's conviction for attempted theft in first degree where his substantial step involved assuming a false identity to receive financial forms, helping to fill out the forms, and providing those forms to Meador, and where these actions resulted in checks in excess of \$230,000 being sent to Meador.**
- IV. Double Jeopardy was not violated in entering judgment on the criminal impersonation count and the attempted theft count because the two crimes were not the same in law and in fact.**
- V. The judgment and sentence contains a scrivener's error that should be corrected on remand.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mark Allan Miller was charged by second amended information with (1) Theft in the First Degree for his actions on, about, or between August 22, 2016 and August 26, 2016, in which he deprived Lillian Meador of over \$5,000 of United States currency; (2) Attempted Theft in the First Degree for his actions on or about September 1, 2016, where he took a substantial step towards depriving Lillian Meador of over \$5,000 of

United States currency; and (3) Criminal Impersonation in the First Degree for assuming the false identity of Lillian Meador's nephew on or about September 1, 2016 . CP 51-52. Counts 1 and 2, the theft counts, also alleged the particularly vulnerable victim aggravating circumstance, the abuse of trust aggravating circumstance, and the major economic offense aggravating circumstance. CP 51-52; RCW 9.94A.535(3)(b),(d),(n).

On August 20, 2018, the case proceeded to a jury trial before the Honorable Gregory Gonzales. RP 89; CP 137-140. On August 28, 2018, the jury returned its verdicts finding Miller guilty as charged to include each aggravating circumstance. RP 1422-1440; CP 88-96. The trial court sentenced Miller to an exceptional sentence of 27 months in prison. RP 1465; CP 100-01. Miller's timely notice of appeal followed. CP 112.

B. FACTUAL HISTORY¹

By the summer of 2016, Mark Miller was in financial peril. He did not have much money in the bank, there was a civil judgment against him

¹ RAP 10.3(a)(5) asks practitioners for a "fair statement of the facts . . . relevant to the issues presented." Miller's recitation of the facts relies almost exclusively on his own lengthy trial testimony in which he denied the allegations against him. Brief of Appellant 7-15. The jury and the trial court were not as credulous. In fact, the trial court commented to Miller at his sentencing hearing that "[y]ou got in the witness stand and you came up with some farfetched story. . . . I didn't believe you. The jury didn't believe you." RP 1464-65. The trial court later continued: "I looked at your demeanor during trial. I looked at the facts. I looked at all the witnesses. And, again, I've reached one conclusion. You should be so ashamed of what you've done to this woman, how you befriended her, how you took advantage of her and how you took her money. *There's no doubt in my mind you took her money. There's no doubt in my mind that you planned it, that you schemed accordingly, that you brought in a third party to do this.*" RP 1465 (emphasis added). A statement of facts based on Miller's testimony is more charitable than warranted.

in the amount of \$282,607, garnishment proceedings were approved by the Clark County Superior Court, which resulted in a garnishment of his wages and his bank account, and on June 1, 2016, he left his job as a financial advisor at Chase Bank. RP 433-440, 757-760, 1074-75, 1152. Lillian Meador, on the other hand, had a net worth of 2.5 to 3.0 million dollars in 2016 that included annuities, CDs, insurance policies, a pension from the State of Oregon, and three beach properties on the Oregon coast. RP 280-81, 1003-06, 1182-83. But at that time, Meador was also in her late 80s and in poor health. RP 274-75. Meador had a catheter in place, which often resulted in urinary tract infections (UTI), suffered from kidney disease and poor eyesight, and was wheelchair bound. RP 275-77, 575. In addition, Meador's cognitive ability depreciated substantially when she had a UTI. RP 278, 575.

Miller and Meador were acquainted. Shortly after being hired by Chase Bank on June 1, 2015, Miller became Meador's financial advisor. RP 352, 733-34, 749, 1140-41. Meador came in to Chase almost weekly to see Miller though she chatted much more than she discussed financial services. RP 352, 735, 737, 1142-43. The frequency of these meetings sometimes frustrated Miller. RP 736, 1142. Nonetheless, he provided Meador with his personal phone number and occasionally visited her at her home and at the hospital. RP 737-38. One time Miller remarked to

another employee that if he ever left Chase he “would take Lillian [Meador] with him.” RP 744-45.

After June 1, 2016, when Miller did in fact leave Chase, Meador showed up at the bank for several weeks and did not appear to know that Miller no longer worked there. RP 755. Sometime thereafter, in July or early August of 2016, Meador got sick and left her place at Brookdale Orchards for the hospital and, on August 9, 2016, left the hospital for Prestige Care and Rehabilitation. RP 287-88, 575, 653. Meador stayed at Prestige until September 12 and then returned to her place at Brookdale. RP 288.

For a reason unexplained, Miller was listed as Meador’s emergency contact. RP 288. So while at Prestige, Stephanie Williams, Meador’s social worker, contacted Miller to help with Meador’s assessment. RP 288-89. Miller introduced himself to Williams as Meador’s friend and financial advisor. RP 290. Williams attempted on multiple occasions to get power of attorney information from Miller—he indicated he had such information and would provide it—but he never did. RP 293-295. Williams wanted this information because, based on some cognitive testing of Meador that had taken place showing deficits or impairment, she wanted to find someone to assist Meador with discharge

planning, financial matters, personal affairs, and returning home safely.

RP 295, 305.

On August 17, upon learning that cognitive testing of Meador had taken place, Miller became “very upset and agitated” and informed Williams that “he thought he made it clear from the beginning that if there were cognitive testing to take place that he needed to be present because he was so well versed and that he needed to make sure the questions were being asked appropriately.” RP 296, 303. Miller also told Williams that he had 20 years of experience with the elderly and that he had “determined that Lillian did not have cognitive deficits.” RP 296. Following this conversation, and due to her concerns for Meador, Williams filed a report with Adult Protective Services (APS), which resulted in the initiation of guardianship proceedings to determine if Meador was capable of making her own decisions. RP 304-05.

Miller was also confrontational with Williams during an August 23 meeting in her office where she informed him that she had “concerns” about him. RP 298, 303. Miller responded by explaining his failure to provide Williams the requested information as the result of being “overwhelmed” due to his brother being mauled by a bear and his father

passing away. RP 299. He once again promised to provide the power of attorney documents to Williams, but he never came through. RP 299.

During this same time period (late August), and after Williams filed her report, APS investigator Max Harvey went to Prestige to meet with Meador. RP 565. Harvey observed that Meador was confused, repetitive, “bouncing from one topic to another,” and difficult to keep on track. RP 565-66, 575-76. On September 6, Harvey was able to make contact with Miller over the phone. RP 570. Miller told Harvey that “I don’t handle her finances in any way, shape or form, but I told Lil that once she’s better and back home, we can talk about doing that.” RP 571. Other than that, Miller was vague with Harvey about Meador’s assets, attorneys, and, after promising, once again failed to provide POA contact information or recontact Harvey as Harvey had requested. RP 573-74, 576-78.

Meanwhile, Miller was calling and visiting Meador at Prestige on a very regular basis. RP 525-26.² In fact, between August 10 and September 15, Miller called Meador 36 times and between August 9 and September 10 he signed in as visiting her 18 times. RP 306-07, 525-26; Ex. 23.

During these visits Miller would tell Meador that he wanted to invest her

² Meador testified that it was Miller’s idea that she go to Prestige after her hospital stay, as opposed to other short-term rehabilitation centers, because it was closest to his home. RP 352-53.

money in gold coins. RP 353, 371-72. He eventually asked her to go to a Chase bank in Fred Meyer to withdraw money for the alleged investment. RP 353-55, 360-61, 371-72.

And so on August 22, Meador took a C-TRAN bus to Fred Meyer to withdraw money. RP 354-55; 390-96, 407-412. The man waiting to push her wheelchair into the bank was not Miller, however, it was Eddie Besaw. RP 354-56; 379-380. Besaw was an old business associate of Miller's. RP 374-76, 402-03, 1129-30.³ There had been no communication between the two men from at least July 15 until August 21 when Miller placed a call to Besaw. RP 520-23. Miller asked Besaw to assist Meador by going to the bank with her and "basically kind of chaperoning her." RP 377-78. In speaking with Miller, Besaw understood

³ Much was made as to whether this was the first time Meador met Besaw and whether this meeting and their next meeting at Fred Meyer on August 24 was the sum total of their interactions. Besaw said it was. RP 398-400, 405, 411. Meador said those were the only times they met, but that she called Besaw at least once. RP 357, 360. Williams, from Prestige, told the police that she had never seen Besaw, told defense that she had, and seemed unsure at trial. RP 315-320, 322-23, 326-27, 535-36.

And then there was the matter of Prestige's visitor log. Entries on August 16 and 17 had a signature bearing Besaw's name and listed Meador as the person visited. Ex. 23. But the signatures did not match the signatures Besaw affixed to a number of different checks, Besaw disclaimed the signatures as his, and the writing of Meador's name very closely resembled how Miller wrote Meador's name when he visited her. Ex. 13, 23; RP 398-400, 405; *see* RP 1343-46 (State's closing argument). Moreover, Williams remembered meeting with Miller at Prestige on August 17, but there is no corresponding sign in with his name on the visitor log. Ex. 23; RP 294, 296, 299. The reasonable inference is that Miller signed Besaw's name. *See* RP 1418 (rebuttal argument).

that the purpose of the withdrawal was to allow Miller to make some investments for Meador. RP 378.

Back to the 22nd; the following chronology of the day's events was established by Fred Meyer's store surveillance, Prestige's visitor logs, and Miller's call records: (1) at 5:53 AM Miller calls Meador; (2) at 7:54 AM Miller sends a text message to Besaw; (3) at 8:00 AM Besaw sends a text message to Miller; (4) at 11:47 AM Meador arrives at Fred Meyer; (5) Meador gets a cashier's check in the amount of \$50,000; (6) at 1:20 PM the C-TRAN bus picks Meador up from Fred Meyer; (7) at 1:23 PM Besaw calls Miller and leaves a voice message; (8) at 1:28 PM Miller calls Besaw; (9) at 1:55 PM Miller visits Meador at Prestige; and finally (10) at 9:40 PM Miller visits Meador at Prestige again. RP 390-96, 407-412, 466-67, 478-481, 511-12, 520-525; Ex. 23, 26, 29.

After Meador's arrival at Fred Meyer on August 22, Besaw approached and introduced himself. RP 379. Besaw then pushed the wheelchair bound Meador into Fred Meyer where she first selected some cinnamon rolls before heading to the bank. RP 355-56, 379-380. Meador attempted to get \$50,000 cash, but Chase was unable to provide her that much cash money. RP 355-56, 510-12. This upset Meador who ended up settling for the aforementioned \$50,000 cashier's check. RP 427-28, 510-

12. Upon exiting the store, Meador handed Besaw the cashier's check, which was in a manila folder. RP 380.

Besaw, as instructed, then called Miller and the two arranged to meet at the nearby Big Al's. RP 380, 410. Miller was not pleased when he opened up the folder and discovered it did not contain cash. RP 380-81. Miller indicated that he would talk with Meador and get it fixed. RP 381. Besaw left, and left the folder with Miller. RP 381.

On August 23, Miller again visited Meador, and he and Besaw exchanged phone calls and text messages. Ex. 23, 26, 29. Miller asked Besaw to meet Meador at Fred Meyer again. RP 381. And on August 24 Meador returned to Fred Meyer. RP 356. This time Meador left the Chase bank within Fred Meyer with \$50,000 in cash. RP 381-82. She handed the cash off to Besaw, got on the C-TRAN bus, and went back to Prestige. RP 412. Besaw called Miller and was told to take \$5,000 out of the total as a fee for helping Miller out. RP 382-86, 406-07, 414, 428-29. He did and deposited \$4,500 of the \$5,000 into his business bank account. RP 382-86, 406-07, 414, 428-29; Ex. 15. Besaw also voluntarily provided that account's records to the police. RP 428-29.

The two men were in contact again on August 26 to arrange a meeting in which Besaw could provide Miller the remaining \$45,000. RP

386-87, 488-89, 520-25; Ex. 26, 29. They agreed to meet at the Safari Show Club in Portland, Oregon. RP 386-87, 413-18. Miller told Besaw that he would call him when he got to the club and for Besaw to bring out the money and throw it into the trunk of his (Miller's) car. RP 386-87, 413-15, 417-18, 544. Everything went according to plan—Besaw waited in the club, received a call from Miller, and then left the club to transfer the money by placing it in Miller's car. RP 386-88, 413-15, 417-18, 544, 902-06 (historical cell site analysis), 923, 992-94, 1044. Miller drove off and Meador never saw the money again. RP 354-55, 386-87.

Miller had additional plans for extracting money from Meador. This time, on September 1, he called The Standard insurance company where Meador had two annuities worth a total of \$240,000 and sought to cash them out. RP 628-630, 634-36, 660-68, 1002-06. On this phone call, which was recorded⁴, Miller identified himself as Mark Miller, Meador's nephew—he is not—and inquired “where do we get the paperwork to surrender these?”. RP 660-61, 665, 1187-88. In explaining why the “surrender” was necessary Miller falsely portrayed Meador as being in some level of financial hardship when it came to her medical care. RP 280, 661-68, 1003-06. Miller also asked the representative from The

⁴ The entire call played in front of the jury and, therefore, it is transcribed in the report of proceedings. RP 660-68; Ex. 2.

Standard insurance whether she “happen[ed] to know of a very good real estate agent that sells coastal properties?”. RP 663. By the end of the call Miller had forms necessary to withdraw the money from the annuities emailed to his personal email account. RP 640-41, 644-45, 664-68.

And it turns out, that just 5 days later on September 6, The Standard received the completed forms, which requested a full cash out. RP 632-33, 642; Ex. 69, 70. Meador’s signature adorned the forms, but the handwriting suggests she had some help filling out some of the information. Ex. 69, 70. The Standard had the checks, worth \$177,693.20 and \$61,350.32 respectively, made out to Lillian Meador and dated September 9. RP 632-33.

In the interim, however, Miller became concerned because of the initiation of guardianship proceedings, i.e., when the court appoints a person to look out for interests of, generally, an elderly person by making or assisting in making medical and/or financial decisions that benefit them, related to Meador. RP 272-73, 304-05, 1192, 1195. So on September 8, Miller called an attorney named Jim David and asked him to help fight against a guardian being appointed for Meador. RP 1104-05, 1110. David was hired by Meador to fulfill that role. RP 1105-06.

But Miller did not know that David too would seek to assess Meador's finances and question him about them. RP 1107-08, 1195. And when David sought to question Miller about Meador's finances, he (Miller) left a meeting despite David asking him to stay, and then discontinued seeing Meador and rebuffed an additional attempt by David to discuss Meador's finances by failing to show up to an interview scheduled for September 26. RP 1107-108, 1112-13, 1202-03. In fact, David was present when the checks from The Standard arrived and he immediately had her sign them and arranged to have them deposited into one of her accounts. RP 1114-17. Meador was eventually appointed a guardian. RP 273-74.

Miller testified in his defense at trial. He denied the allegations against him in total.

ARGUMENT

I. The trial court properly instructed the jury on the definition of an accomplice.

Miller argues that the trial court erred when it instructed the jury on accomplice liability because "there was no evidence to support the giving of an accomplice liability instruction" and that he was prejudiced by the giving of the instruction because "it cannot be shown that the jury did not predicate guilt on the 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. . . .” Br. of App. 22-23. These inconsistent⁵ theories fail since sufficient evidence supported the instruction and the State’s theory of guilt was always predicated on Miller’s actions.

a. Standard of Review

A trial court’s decision to give a particular instruction is reviewed for an abuse of discretion. *State v. Hathaway*, 161 Wn.App. 634, 647, 251 P.3d 253 (2011). Moreover, when determining if the evidence at trial was sufficient to support the giving of an instruction, appellate courts view the supporting evidence in the light most favorable to the party that requested it. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). A court properly gives a jury instruction “if it is a correct statement of the law and evidence exists to support giving the instruction.” *State v. Alires*, 92 Wn.App. 931, 936, 966 P.2d 935 (1998) (citing *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993)).

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⁵ Miller does not attempt to argue that there is insufficient evidence that he planned and arranged Meador’s trip to the bank where she met with Besaw and withdrew money under false pretenses—and how could he given the jury needed only to believe Meador or Besaw. That was not a tall task given the phone records, Prestige visitor logs, and Miller’s financial situation and contemporaneous behavior.

b. Accomplice Liability

A person is an accomplice to a crime if “with knowledge that it will promote or facilitate the commission of the crime, he or she: [s]olicits, commands, encourages, or requests such other person to commit it or [a]ids or agrees to aid another in planning or committing” the crime. RCW 9A.08.020(3)(a)(i)-(ii). Thus, a person can be an accomplice even if not present at the scene of the crime. *State v. Hoffman*, 116 Wn.2d 51, 103, 804 P.2d 577 (1991).

The “complicity rule in Washington,” which includes accomplice liability, “is that any person who participates in the commission of the crime is guilty of the crime and is charged as a principal.” *State v. Trujillo*, 112 Wn.App. 390, 401, 49 P.3d 935 (2002) (citation omitted). “Thus, an information which charges an accused as a principal adequately apprises him or her of potential accomplice liability even though the information does not expressly charge aiding or abetting or refer to other persons.” *Id.* (citing cases); *State v. McDonald*, 138 Wn.2d 680, 686-87, 981 P.2d 443 (1999) (noting that “principal and accomplice liability are not alternative means of committing a single offense”).

In other words, “the elements of the offense remain the same whether the defendant is alleged to have acted as a principal or an accomplice.” *Id.*; *State v. Carothers*, 84 Wn.2d 256, 262-64, 525 P.2d 731

(1974); *State v. Teal*, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004).

Accordingly, “a verdict may be sustained upon evidence that the defendant participated . . . as an aider or abettor, even though he was not expressly accused of aiding and abetting and even though he was the only person charged in the information.” *McDonald*, 138 Wn.2d at 688 (omissions in original) (internal quotation omitted); *Carothers*, 84 Wn.2d at 263 (holding that the State need not “elect between charging a defendant as a principal or as an accessory before the fact”).

Here, the trial court did not abuse its discretion when it chose to instruct the jury on accomplice liability because sufficient evidence supported giving the instruction especially when viewing the evidence in the light most favorable to the State. Miller’s argument that insufficient evidence supported the instruction is based on (1) a conclusory statement that “there was no evidence to support giving of an accomplice liability instruction;” (2) the fact that “defense objected vigorously” to the giving of the instruction; and (3) a statement that “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.” Br. of App. at 16-17.

This argument is without merit and fails to grapple with the facts of the case. The evidence presented established that Besaw and Miller

knowingly acted together to deprive Meador of \$50,000. And the evidence was overwhelming that Miller did so with criminal intent. *See supra*, n. 5. Accordingly, he was guilty of the crime regardless of whether Besaw was his dupe or accomplice. And the jury could have easily come to the conclusion that Besaw acted with criminal intent since he accepted \$5,000 to escort a very elderly, wheelchair bound woman into a bank on multiple occasions to withdraw \$50,000 at the of direction Miller and then provided \$45,000 in cash to Miller at an evening meeting at a strip club wherein he exited the club only long enough to toss the cash into Miller's trunk. *See* Br. of App. at 21-22 (arguing that Besaw was "the real perpetrator, having the need, the motive and the means to" commit the crime). Common sense could lead one to the conclusion that Besaw, despite his cooperation with the police and story that was consistent with the documentary evidence, shared Miller's criminal intent. Thus, the trial court did not abuse its discretion when it instructed the jury on accomplice liability.

Miller makes an alternative argument that giving the accomplice liability instruction was error because he had "not been fighting an accomplice case this whole time . . . and to now bring up accomplice . . . seems . . . unfair." Br. of App. at 18 (quoting RP 1269). But this argument too is without merit when it was plain as day that the State's theory of the case, and the way the crime was charged, was that Miller was guilty for

his actions in orchestrating the plan to separate Meador from \$50,000 in cash irrespective of Besaw's state of mind. CP 7-9, 51. The addition of an accomplice liability instruction does nothing to change that—Miller is the principle. Moreover, the addition of the instruction did nothing to change Miller's theory of the case—that he did not know anything about what Besaw was up to with Meador and that he did not have anything to do with Meador's withdrawal of \$50,000. Consequently, Miller could not have been prejudiced by the giving of the accomplice liability instruction and any error in giving the instruction was harmless.

Furthermore, the law is well-settled that Miller cannot complain of surprise because “an information which charges an accused as a principal adequately apprises him or her of potential accomplice liability even though the information does not expressly charge aiding or abetting or refer to other persons.” *Trujillo*, 112 Wn.App. at 401 (citing cases). Thus, Miller's conviction for Theft in the First Degree “may be sustained upon evidence that the defendant participated . . . as an aider or abettor, even though he was not expressly accused of aiding and abetting. . . .” *McDonald*, 138 Wn.2d at 688 (omissions in original) (internal quotation omitted); *Carothers*, 84 Wn.2d at 263.

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II. Sufficient evidence supported Miller’s conviction for criminal impersonation where he assumed the false identity of Meador’s nephew.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Furthermore, “specifics regarding date, time, place, and circumstance are factors regarding credibility . . .” and, thus, matters a jury best resolves. *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788 (1996).

A person commits the crime of Criminal Impersonation in the First Degree “if the person: [a]ssumes 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). A defendant need not use “a false name” in order to assume “a false identity” as the two do not mean

the same thing. *State v. Donald*, 68 Wn.App. 543, 550, 844 P.2d 447 (1993); *State v. Presba*, 131 Wn.App. 47, 55, 126 P.3d 1280 (2005). And “neither use of a false name nor a false identity requires assuming the identity of an actual person.” *Presba*, 131 Wn.App. at 55. Moreover, an “intent to defraud” may be inferred “from surrounding facts and circumstances if they plainly indicate such intent as a matter of logical probability.” *State v. Brooks*, 107 Wn.App. 925, 929, 29 P.3d 45 (2001) (citation and internal quotation omitted).

The criminal impersonation statute does not define “identity” or “defraud.” RCW 9A.60.040. In the absence of statutory definitions courts may turn to dictionaries to determine the plain meaning of terms. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). Black’s Law Dictionary relevantly defines “identity” as “[t]he authenticity of a person or thing” and “defraud” to mean “[t]o cause injury or loss to (a person) by deceit.” BLACK’S LAW DICTIONARY 434, 748 (7th ed. 1999); *State v. Simmons*, 113 Wn.App. 29, 32, 51 P.3d 828 (2002). Webster’s Third New International Dictionary relevantly defines “identity” to mean “*the condition of being the same with something described, claimed, or asserted* or of possessing a character claimed.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1123 (2002) (emphasis added).

Here, the evidence taken in the light most favorable to the State is sufficient to establish that Miller assumed “a false identity” and acted with an intent to defraud. Miller may have used his actual name in the recorded call to The Standard insurance company but he assumed a false identity by identifying himself multiple times as the nephew of Meador, or, in turn, Meador as his aunt. RP 660-68. Mark Miller qua Mark Miller is not in “the condition of being same with” the relationship he “described, claimed, or asserted” on the telephone call, i.e., that of Lillian Meador’s nephew; the “authenticity of a person,” his person, is *not* Lillian Meador’s nephew. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1123 (2002); BLACK’S LAW DICTIONARY 748 (7th ed. 1999). Consequently, by identifying himself as Meador’s nephew on the phone, Miller assumed a false identity. This is all the more true when considering that one does not have to “use a false name” to assume a “false identity” and in assessing the evidence in the light most favorable to the State. *Donald*, 68 Wn.App. at 550; *Presba*, 131 Wn.App. at 55.

Furthermore, that Miller acted *with intent* to defraud is overwhelming. On the phone call alone Miller falsely represented his relationship to Meador, Meador’s financial situation, how Meador’s financial situation was impacting her medical needs, and that he was “really concerned about loading up my credit card” to pay for Meador’s

care. RP 660-68. When combined with all the other evidence presented to include (1) the first, contemporaneous theft from Meador, Miller's dire financial situation; (2) Miller's lack of employment; (3) Miller's suspicious behavior anytime anyone charged with looking out for Meador's best interests, e.g., Williams, Harvey, and David, asked Miller for assistance in figuring out Meador's financial situation; and (4) the lack of financial sense it made to cash out the annuities, the evidence that Miller's intent was to defraud when he assumed the identity of Meador's nephew in order to get the annuity forms⁶ was prodigious.

III. Sufficient evidence supported Miller's conviction for attempted theft in first degree where his substantial step involved assuming a false identity to receive financial forms, helping to fill out the forms, and providing those forms to Meador, and where these actions resulted in checks in excess of \$230,000 being sent to Meador.

Our Supreme Court has advised that “[i]n considering the dimensions of attempt law, the purposes served by this crime must constantly be kept in mind.” *State v. Nelson*, 191 Wn.2d 61, 69, 419 P.3d 410 (2018) (quoting 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.2(b) at 292 (3d ed. 2017)). Those purposes are to “to stop, deter, and reform a person who has unsuccessfully attempted to

⁶ That Miller could have downloaded the same blank forms over the internet is irrelevant. The focus of the criminal impersonation statute is on the defendant's *intent* not whether he successfully defrauded anyone or anything. RCW 9A.60.040.

commit a crime” and to “provide[] a basis for . . . preventive action by the police before the defendant has come dangerously close to committing the intended crime.” *Id.* (internal quotation omitted). With those purposes in mind, the determination of whether a person has attempted to commit a crime “focuses on the actor’s criminal intent, rather than the impossibility of convicting the defendant of the completed crime.” *Id.* at 69-70 (citing cases).

In other words, it is “generally of no consequence in the context of an anticipatory or inchoate offense, what the actual attendant circumstances were at the time the actor engaged in proscribed conduct.” *Id.* at 70. More specifically, “it is no defense to a prosecution of . . . attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible.” RCW 9A.28.020(2); *State v. Luther*, 157 Wn.2d 63, 73, 134 P.3d 205 (2006). Instead, the State must only prove beyond a reasonable doubt the defendant’s “(1) intent to commit a specific crime and (2) any act constituting a substantial step toward the commission of that crime.” *Nelson*, 191 Wn.2d at 71; *State v. Wilson*, 1 Wn.App.2d 73, 83, 404 P.3d 76 (2017).

In turn, a “substantial step” is an act “that is strongly corroborative of the actor’s criminal purpose.” *Wilson*, 1 Wn.App.2d at 83 (internal

quotation marks and citation omitted). And while “[m]ere preparation to commit a crime is not an attempt,” any “slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime.” *Id.* (quoting *State v. Price*, 103 Wn.App. 845, 852, 14 P.3d 841 (2000)). Importantly, the “question of what constitutes a ‘substantial step’ under the particular facts of the case is clearly for the trier of fact.” *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978) (emphasis added) (also noting that when “preparation ends and an attempt begins . . . always depends on the facts of particular case”).

Here, taking the evidence in the light most favorable to the State establishes that Miller acted with the intent to commit the crime of theft. The evidence that Miller acted with the intent to commit theft is buttressed by fact that after committing the crime of criminal impersonation on September 1 in order to get the annuity forms that: (1) The Standard insurance company received the completed forms by September 6⁷; (2) the completed forms appeared to include the handwriting of Miller; (3) the

⁷ The quick turnaround in filling out and submitting the annuity forms belies Miller’s claims on the phone call that insinuated that cashing out the annuities was a backup plan or at least something that was going to happen further into the future, e.g., “we’re just at the beginning of this, so we just want to make sure we have the paperwork we need” and “just trying to get things prepared” and that “[h]opefully we don’t have to surrender these in any way – and just keep them, but it’s good to know that we have alternatives.” RP 660-67.

annuity forms were either filed without a waiver form for which Meador would have been eligible and which would have prevented her from being financially penalized for cashing out annuities early or she would have been eligible for the waiver in mere days but the forms were sent in early anyway; (4) the checks were back and ready to cash by September 9; and Meador claimed that Miller tried to cash them out but could not.⁸ *See* Ex. 69, 70; RP 357-58, *see also* RP 1371-72, 1410-11. Of course, all of this was also happening within days of Miller telling APS that he did not “handle [Meador’s] finances in any way, shape, or form” and denied to others that he was advising her financially. RP 569-571. The evidence in total established Miller’s intent to commit theft and his lack of success does not diminish what is apparent.

Moreover, the criminal impersonation evidence plus Miller’s help in filling out the forms, providing those forms to Meador, and where these actions resulted in checks totaling approximately \$240,000 being sent to Meador contemporaneous to Miller getting Meador associated with an attorney for the purposes of fighting a guardianship is more than sufficient to allow the jury to conclude that preparation had ended and a substantial step had begun. In fact, Miller went well past “mere preparation” when he turned Meador’s two annuities worth approximately \$240,000 into two

⁸ David essentially intercepted them. RP 1114-17.

checks in just eight days, and then had them sent to the elderly woman from whom he had just swindled \$50,000—the only step left was the completed crime.

IV. Double Jeopardy was not violated in entering judgment on the criminal impersonation count and the attempted theft count because the two crimes were not the same in law and in fact

The legislature has the power to criminalize every step leading to a greater crime, and the crime itself. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005) (citing *Garrett v. U.S.*, 471 U.S. 773, 779, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985)). The question is what the legislature intended; and when the legislative intent is not clear courts turn to the *Blockburger* test. *Id.* at 771-72; *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). If crimes are not the same “in law *and* fact” they may be punished separately. *State v. Martin*, 149 Wn.App. 689, 698-99, 205 P.3d 931 (2009) (emphasis added); *Blockburger*, 284 U.S. at 304. Put another way, “offenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other.” *Trujillo*, 112 Wn.App. at 390 (citation omitted). The result of the *Blockburger* test is presumed to be

the legislature’s intent unless there is some other “clear evidence of contrary legislative intent.” *Freeman*, 153 Wn.2d at 777.⁹

In applying the *Blockburger* test where one of the two crimes is an attempt crime the “term ‘substantial step’ must be given a factual definition to assess whether the attempted crime *requires* proof of a fact that is *not required* in proving the other crime.” *In re Borreo*, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007) (emphasis added). Thus, double jeopardy is not violated where the completed crime does “not *necessarily* constitute the substantial step because . . . there was other conduct not constituting” the completed crime “that would be sufficient to establish that the defendant took a substantial step toward commission of” the substantive crime underlying the attempt. *Id.* at 538 (emphasis in original). Applied here, there is no double jeopardy violation if “it was not *required* for the State to prove facts sufficient to convict [the defendant] of [criminal impersonation] in order for it to prove [he] committed the offense of [attempted theft in the first degree].” *Id.* at 538-39 (emphasis in original).

In looking at the facts and charging document—the criminal impersonation was not listed as the substantial step for the attempted

⁹ The “independent purpose test,” which Miller intones, is not “used to discern legislative intent,” but functions as “an exception when another test suggests that legislature precluded multiple punishments for a particular set of crimes.” *State v. Wilkins*, 200 Wn.App. 794, 811-12, 403 P.3d 890 (2017); *Freeman*, 153 Wn.2d at 778; Br. of App. at 49. Thus, if two crimes “do not pass the *Blockburger* test” the “independent purpose exception does not apply.” *Id.* at 812.

theft—the State was not *required* to prove the criminal impersonation in order for it to prove that Miller committed the offense of attempted theft in the first degree. CP 51-52. This is so because even if Miller had not “assume[d] a false identity” or the State had failed to prove that he did, the evidence presented, including the other false statements Miller made during the phone call and his actions afterwards, would still be sufficient to prove Miller took a substantial step toward the commission of attempted theft in the first degree.

More specifically, the criminal impersonation was itself a substantial step and was evidence of Miller’s plan—the intent to defraud or deprive Meador of her money—but proof of is not *required* and “different facts would support the two convictions.” *Borreo*, 161 Wn.2d at 539-540. And the State’s closing argument supports this position, as it stated: “[a]nd 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.*” RP 1322-23 (emphasis added).

Moreover, as charged the two crimes each contain an element the other does not; the criminal impersonation as charged requires proof the defendant “assume[d] a false identity,” “did an act in such assumed

character,” and acted “with the intent to defraud another or for any other unlawful purpose.” CP 52. The attempted theft, as charged, requires proof the defendant intended to “wrongfully obtain or exert unauthorized control” of over \$5,000 in United States currency and “did an act which was a substantial step toward the commission of that crime.” These crimes are not same in law *and* fact and any evidentiary overlap does not turn the separate convictions into a double jeopardy violation. *Borreo*, 161 Wn.2d at 540 (applying the “same evidence test and the additional analysis provided for . . . where one offense is an attempt crime” to hold that first degree kidnapping and attempted first degree murder were “not the same in law and fact”). Therefore, Miller’s double jeopardy argument fails.

V. The judgment and sentence contains a scrivener’s error that should be corrected on remand.

The judgment and sentence contains a scrivener’s error in which the sentence for the criminal impersonation is listed as 365 months of total confinement. CP 101. The crime, an unranked class C felony, has a standard range sentence of 0 to 365 days. CP 99. The intent of the trial court was to impose 365 days of total confinement—a lawful sentence—on that count. CP 111; RP 1467-69. This Court should remand for the trial court to correct this error.

CONCLUSION

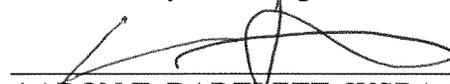
For the reasons argued above, this Court should affirm Miller's convictions and remand to correct the scrivener's error.

DATED this 27th day of August, 2019.

Respectfully submitted:

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