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NO. 52858-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KYLE INGALLS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Michael Schwartz, Judge
No. 17-1-04706-8
18-1-00355-7
18-1-01702-8
18-1-00660-2

BRIEF OF RESPONDENT

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I. INTRODUCTION

The State charged Kyle Ingalls with one count of theft in the third degree and one count of trafficking in stolen property in the first degree after he selected items from the Lakewood Lowe's and returned them for an in-store credit merchandise card. He then sold that card to a pawn shop for \$96.

After a jury found him guilty at trial on the felony trafficking and misdemeanor theft charges, Ingalls entered factual guilty pleas in three subsequent cases to a total of fourteen other felony charges, including forgery, identity theft, and theft in the second degree.

Ingalls challenges his two convictions from the trial on several grounds. First, despite not raising this in the trial court, he now alleges that the charging documents were insufficient by failing to identify what he stole or having a general lack of specificity. However, he was provided proper notice to the charges against him through the charging documents and by the Declarations of Probable Cause filed with the charging documents. Similarly, he failed to raise this argument below prior to entering a knowing, intelligent, and voluntary guilty plea to the additional charges. The only challenge he raises now to those charges are that the charging documents were insufficient. Ingalls was well-notified of the charges against him based

on the charging documents and Declarations of Probable Cause in each count to which he entered a factual guilty plea.

Ingalls raises claims of insufficient evidence against the crimes a jury convicted him of: theft in the third degree and trafficking in stolen property. However, the evidence proved beyond a reasonable doubt that Ingalls stole the value of the merchandise card from Lowe's, and then sold that card for \$96 to a pawn shop, and he has failed to show that the evidence is deficient when viewed in the light most favorable to the State. At the conclusion of the trial, the prosecutor properly explained to the jury what a reasonable doubt is, and that jurors may be convinced beyond any reasonable doubt they may have when the evidence is overwhelming. Ingalls did not object to this argument. Consequently, even if the argument was error, Ingalls must establish the error was so flagrant and ill-intentioned that it was incurable by an instruction. He has failed to do so.

Finally, the cumulative error doctrine does not apply to this case, where Ingalls cannot establish individual errors and where the evidence against him is overwhelming. This Court should affirm all of his convictions.

II. RESTATEMENT OF THE ISSUES

- A. Where Ingalls did not object below, has he established he suffered a manifest constitutional error warranting review of his claim where the charging documents sufficiently apprised him of the charges

against him and he cannot establish prejudice from any alleged deficiency? (Appellant's Assignment of Error 1).

- B. Where he did not object to the prosecutor's statement in closing argument, has Ingalls failed to show prosecutorial misconduct occurred, or that any alleged error was so flagrant and ill-intentioned that a curative instruction would not have cured any alleged prejudice? (Appellant's Assignment of Error 2).
- C. Did sufficient evidence support the jury's conclusion that Ingalls committed theft in the third degree and trafficked in stolen property? (Appellant's Assignment of Error 3).
- D. Does the cumulative error doctrine apply where Ingalls cannot establish individual errors, and where the evidence against him is overwhelming? (Appellant's Assignment of Error 4).

III. STATEMENT OF THE CASE

The State charged Kyle Ingalls with one count of trafficking in stolen property in the first degree and one count of theft in the third degree under cause number 17-1-04706-8. CP 2-3. The State subsequently filed the following charges: one count of forgery under cause number 18-1-00355-7; two counts of theft in the second degree and four counts of forgery under cause number 18-1-00660-2; and seven counts of identity theft in the second degree under cause number 18-1-01402-8. CP 174, 269-271, 364-367.

Ingalls proceeded to trial on only the first case. RP 3. Scott Patronaggio, loss prevention officer and operations supervisor at Lowe's of Lakewood, testified about the events that lead to Ingalls's first set of charges. RP 176. Ingalls entered Lakewood Lowe's on February 8, 2017,

with empty hands. RP 194, 200. He was in the store for about an hour without leaving and re-entering. RP 200. Ingalls first entered the store and proceeded to the Outdoor Power Equipment aisle but did not select anything. RP 224. He next went to the lumber department. RP 225-26. He walked up to a lumber cart with a large aluminum roll, approximately four feet long, in his hand. RP 201, 225-27. Ingalls then went to another aisle and selected a few more products before proceeding to the customer service desk labeled "Return Desk." RP 202, 229.

Once at the Return Desk, he returned the aluminum roll from the insulation aisle and a cart of plywood from the lumber department. RP 200. Non-receipted refunds at Lowe's require a person to furnish their identification. RP 188. The cashier is required to make sure the person in the identification is the person before them. RP 254. Ingalls provided his driver's license, which the cashier used to import his information into the Lowe's refund system to effectuate the return. RP 204-06. Ingalls's license identified him as Kyle Ingalls. RP 206. Ultimately, Ingalls was provided a merchandise card, distinct from a purchasable gift card, for the return that totaled \$138.42 in store credit. RP 185, 197.

The next day, Ingalls went to Gold and Silver Traders in Tacoma. RP 237. Gold and Silver Traders purchases gift cards for approximately 90% of what they could sell it for. RP 243. Gold and Silver Traders keeps

track of who comes and sells products to them through a program called GoldTracker. RP 239-40. When a person already has a Gold Tracker profile, the workers still check the person's identification before accepting the sale. RP 241, 244.

Ingalls already had a GoldTracker account. RP 248. So, his identification was checked. RP 246-47. Ingalls then sold the merchandise card to Gold and Silver Traders for \$96.89 cash. RP 253-54.

As part of the Lowe's loss prevention officer's duties, he pays particular attention to "direct from sales floor refunds" and non-receipt refunds. RP 183, 199. He looks for refunds approximately \$100 or above, and researches those transactions in full video, including backtracking the video to see where the products came from. RP 183. Because Ingalls's non-receipt return was over \$100, it automatically triggered his review. RP 197. After reviewing the video footage of Ingalls selecting unpurchased product off the shelves and returning it to the store without paying for it, the loss prevention officer contacted the Lakewood Police Department to file a report. RP 206. Ingalls was subsequently arrested.

At the conclusion of trial, the State delivered its closing argument. RP 271. The prosecutor explained how the State had proven its case beyond a reasonable doubt, and then explained, based off the jury instructions, what a reasonable doubt means. RP 278. The prosecutor explained,

Here is your definition: It's an abiding belief in the truth of the charge. That's what you get. It's not a standard higher than that. It's not beyond a reasonable doubt, all belief, or beyond all doubt. But you can have a doubt. Beyond a reasonable doubt means that you can have a doubt that's reasonable, and if you are so convinced even with that doubt, you are convinced beyond a reasonable doubt. It's an abiding belief in the truth of the charge.

RP 279. Ingalls did not object to this argument. RP 279. The jury convicted Ingalls of both counts. CP 116-17.

Two business days later, Ingalls pleaded guilty to his remaining fourteen charges. CP 209-18, 300-09, 393-402. Ingalls received one 63 month sentence, two 29 month sentences, and one 57 month sentence all to run concurrent. CP 133-146, 233-246, 419-33, 454-468. Ingalls never challenged the sufficiency of the charging documents below. This timely appeal follows. CP 157.

IV. ARGUMENT

- A. **Ingalls fails to establish he suffered a manifest constitutional error warranting review of his claim for the first time on appeal where the charging instruments sufficiently apprised him of the charges against him and he cannot establish prejudice from any alleged deficiency.**

For the first time on appeal, Ingalls challenges the sufficiency of the Information charging him with the fourteen counts he pleaded guilty to and the two counts a jury found him guilty of. Generally, reviewing courts will not review an issue raised for the first time on appeal. RAP 2.5(a). A defendant may raise a new claim of error on appeal if it is a manifest error

affecting a constitutional right. RAP 2.5(a)(3). To demonstrate manifest constitutional error, Ingalls bears the burden of showing actual prejudice by identifying a constitutional error and showing that the error actually affected his rights at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before or during trial. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). “A two-pronged test defines this liberal construction: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, (2) if so, can the defendant show that he or she was nonetheless *actually prejudiced* by the inartful language that caused a lack of notice?” *State v. Courneya*, 132 Wn. App. 347, 351, 131 P.3d 343 (2006) (citing *State v. Goodman*, 150 Wn.2d 774, 787-88, 83 P.3d 410 (2004)) (emphasis added).

“The first prong of the test—the liberal construction of the charging document's language—looks to the face of the charging document itself.” *Kjorsvik*, 117 Wn.2d at 106. This prong requires at least some language giving notice of the allegedly missing elements. *Id.* The second prong may look beyond the face of the information to determine if the accused actually received notice of the charges he must have been prepared to defend; it is

possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges. *Id.*

Here, Ingalls was properly informed of the specific nature of the charges against him, where the Information listed every element of the charged crime, and the Declarations of Probable Cause listed the factual basis of the charges. The Probable Cause certification in the trafficking in stolen property and theft case (17-1-04706-8) clearly stated the following:

That in Pierce County, Washington, on or about February 8, 2017, the defendant, KYLE INGALLS, did create trafficking stolen property 1st and theft 3rd. On February 8, 2017, the defendant entered Lowes and selected 2 items worth \$138.42. The defendant took the items to the return counter and returned the selected items without a receipt. He was given a Lowes gift card in that same amount. The defendant had to use his ID to complete the return. The next day on February 9, 2017, the defendant went to Gold and Silver pawn store and sold the gift card and got \$96.89 for it. The defendant used his ID to complete the pawn. The store originally sold the card without holding it for 30 days. The store was able to get the card back and police verified it was the same card that the defendant was given by Lowes.

CP 1. The Probable Cause certification in the forgery case (18-1-00355-7)

stated:

That in Pierce County, Washington, on or about March 8, 2017, the defendant, KYLE LYNN INGALLS, did commit forgery.

On March 8, 2017, the defendant went to the Emerald Queen Casino and tried to cash a check for \$680.98 from Fred Meyer. The cashier cage called police because it thought the check was fraudulent. The defendant left his license and the

check and fled the casino. Police later confirmed that the person on the video matched a prior photo of the defendant. Police contacted the defendant and advised him of Miranda. The defendant claimed he got the check from "Randy Thompson." He said that Thompson gave him the check for his vehicle repair services. He did not have contacted information for Thompson. When asked why the check was from Fred Meyer, the defendant claimed that he thought Thompson was the CEO of Fred Meyer. He later told police another person made the check. Police contacted Fred Meyer and learned the defendant did not have permission to have the check and the signature on the check was wrong.

CP 172-73. The Probable Cause certification in the theft in the second degree and forgery case (18-1-00660-2) stated:

On February 3, 2017 an Agent with the Washington State Gambling Commission received an email from an employee at the Macau Casino in Lakewood regarding three returned checks that had been received by their bank on a closed account. The email included copies of the three checks, all of which were cashed at the Macau Casino on January 20, 2017.

All three checks, which appeared to be payroll checks, were written to defendant KYLE LYNN INGALLS and were dated January 17, 2017 and January 20, 2017. The three checks, #2367, #2359 and #2367 (this was a repeat check number), were cashed in the amounts of \$473.34, \$523.87 and \$482.68 respectively. The checks were returned by the Casino's bank due to the accounts being closed, but the checks also appeared to be forgeries. The Agent noticed that two of the checks contained the same check number (2367), the checks were not issued in sequential order by date, and all three checks were purportedly issued within three days of each other, with two of them being issued on the same date. All three checks had a driver's license and expiration date written on the top by the on-duty cage cashier. The driver's license that was presented was issued to defendant Ingalls. The Agent was able to obtain video surveillance of the

defendant cashing one of the checks on January 20, 2017. An employee stated that the defednatn [sic] played at the casino somewhat frequently, but on January 20th, he just cashed the three checks without gambling. Per that employee, the defendant cashed the first check, then waited for a new cashier to start her shift and cashed the second check, and then waited for another cashier to come on duty and cashed the third check. The checks were purportedly issued by Pacific NWPRO. The Agent compared the defendant's driver's license photo to the person depicted in the surveillance footage and concluded that it was the same person depicted in both.

On July 17, 2017 the Agent was advised by the Casino that the defendant had returned and cashed what appeared to be another forged check. The Agent obtained a copy of this fourth check and reviewed surveillance footage of the incident. This review showed that the defendant returned to the Casino on July 6, 2017 and cashed a check purportedly issued on the account of Pacific Medical Centers that was written in the amount of \$985.55. He again provided his driver's license and signed the back of the check. The Agent reviewed this check and noted that there was a clear indication that this check was a forgery in that the address listed for the business had Seattle mis-spelled as "SSEATTLE." The Agent began investigating the checks and saw that the first three checks that were cashed on January 20th listed "BCN Bank" as the issuing bank.

The Agent was able to find a "BBCN Bank" and contacted a representative of the bank. The Agent eventually learned that the account that these check had been written on had been closed for over a year. After reviewing the information on the checks, the representative confirmed they were forgeries.

The Agent also spoke to the Accounting Department supervisor at Pacific Medical Centers regarding the check that the defendant cashed on July 6, 2017. The Agent provided the check information and was told that they had no record of the defendant in their system, and the supervisor

said that she approves all checks over \$500.00 and did not recall this check.

CP 272-73. Finally, the Probable Cause certification¹ in the identity theft case involving seven counts of identity theft in the second degree (18-1-01402-8) stated:

That in Pierce County, Washington, between the 17th day of August, 2017, and the 17th day of September, 2017, the defendants, KYLE LYNN INGALLS, KEITH WAYNE BISHOP, BRYAN ADAM NIETIEDT, KELSEA DAWN BAKER, CHELSI ANN IBARRA, JUSTIN JOHN NIEFFENEGGER and LAUREN LANAY ORGILL, did commit IDENTITY THEFT. KEITH BISHOP DID ADDITIONALLY COMMIT LEADING ORGANIZED CRIME.

In August 2017, Puyallup Police Detective Waller (who has since been promoted to sergeant) met with CI #17-17 regarding a large group of individuals who are committing various crimes to gain access to numerous financial accounts. The CI was contacted because of his/her involvement in the organization. The CI stated that the group's leader and organizer is Keith BISHOP, the defendant. The CI explained that under BISHOP there are several "team leaders." Those "team leaders" maintain 3-5 "cashiers/cashers" at any given time. The "team leaders" obtain a forged check and facilitate the cashing of the checks by traveling with the "cashiers" to the business used to cash the forged checks. The CI stated that the "cashiers" are required to possess a "valid" identification, which does not need to be in the "cashier's" own name. The "cashiers" carry checks to various businesses to cash them. The CI stated that the "cashiers" constantly change and are typically different people during each transaction. The CI stated that he/she has created various forms of identification for other "team leaders" and that he/she has recruited numerous "cashiers"

¹ The Probable Cause certification is six pages long and is quoted in its entirety for completeness. See CP 368-73.

and has facilitated their obtaining a counterfeit check by sending messages to the group's organizer, BISHOP.

The CI stated that once the check is created and issued to a "cashier," the expectation is for the forged check to be cashed quickly. Once cashed, the "cashier" is required to bring the groups organizer (BISHOP) \$250 for each check cashed. The checks issued are approximately \$1000, more or less. The "team leader" charges the "cashier" a small undetermined fee for facilitating this process. The CI stated that local casinos are mostly used because there is no verification system.

The CI stated that the BISHOP has been identified as the leader because of his involvement in obtaining various personal and business financial accounts and creating payroll and/or personal checks to be issued to "team leaders" and "cashiers." BISHOP expects a return of approximately \$250.00 per cashed check. BISHOP obtains the account information by purchasing it from various individuals who commit crimes such as vehicle prowling and mail theft. The CI stated that the organization makes a substantial profit based from this operation, possibly \$3,000-\$5,000 per day.
(COUNT 1 – BISHOP)

Because the CI was not considered reliable by police based his/her criminal history, Det. Waller sought to corroborate the CI's information independently. The CI agreed to introduce an undercover Puyallup Police Department Detective as a new "cashier" in the organization. Det. Massey played the role of "Brian Kraft" and provided this name and a phantom address to the CI.

On August 17, 2017, the CI made a phone call on "speaker phone" to BISHOP in Det. Waller's presence. During the conversation, Det. Waller heard the CI and BISHOP reference "cashiers." BISHOP inquired about how they did the night before with BISHOP saying he "made out very well." BISHOP stated something to the effect of, "Bring me more cashiers so we can continue to cash checks against this account before it hits zero." The CI then communicated to

BISHOP that he recruited "Brian Kraft" as a new "cashier." The CI also provided BISHOP with an alias of "Cory Murawski" to obtain a forged check in that name also. BISHOP agreed to make checks in those names.

Puyallup Police transported the CI to 601 172nd Street East in Spanaway, which was rented by A. Kohls and Kyle INGALLS. INGALLS had been identified as being one of the "team leaders" and/or "cashiers" in this organization. Keith BISHOP lives at this location in the garage. The transaction was postponed due to uncontrollable circumstances.

On approximately August 19, 2017, the CI obtained five checks created by BISHOP. One was a check written to "Brian Kraft" for \$843.55, dated August 17, 2017, from the Starplex Corporation Payroll account at Wells Fargo Bank. Another similar check was written to "Cory Murawski" for \$863.85. Three other checks created from the same account were written to Chelsi IBARRA, Danielle Butcher, and Michelle Deda. The CI confirmed that the checks were created by BISHOP and each individual payee was a "cashier." The CI confirmed that numerous checks were created and issued against this Wells Fargo account prior to the police investigation but within the past 30 days. Det. Waller verified that the account belonged to Wells Fargo.

On approximately August 21, 2017, Det. Waller met with the CI to purchase the two checks issued to "Brian Kraft" and "Cory Murawski." Police purchased each for \$250 for a total of \$500. The CI was directed to pay BISHOP this money for the issued checks so the CI could maintain a positive working relationship with BISHOP. This also allowed police to have access to the Wells Fargo account. The CI was provided the money and released. Police then followed the CI without his/her knowledge to corroborate the information provided by the CI. Police maintained surveillance of the CI to BISHOP's location on 172nd Street. Police observed the CI as he/she met with BISHOP outside the residence for several minutes. The CI left the location

and then contacted Det. Waller by phone to say that he paid BISHOP the \$500.

Det. Waller then contacted Wells Fargo and learned that the Starplex Corporation was a legitimate business in Oregon. The account in question was put on hold due to fraudulent activity. Police then contacted the Vice President of Operations for CMS, which is a crowd management services company being operated by the Starplex Corporation. The VP stated that he was made aware of the fraudulent activity on their Wells Fargo payroll account on August 17, 2017. The VP stated that an employee of their company who lives in Graham, Washington was a victim of mail theft. The employee reported the theft to police. The VP had copies of the checks used by each suspect and he provided them to police. The checks cashed included payees Chelsi IBARRA (check #59580) for \$1114.12 dated August 15, 2017 **(COUNT 2 - IBARRA/BISHOP)**; Kelsea Dawn BAKER (check #59547) for \$925.16 dated August 15, 2017 **(COUNT 3 - BAKER/BISHOP)**; and Tyler Bible (check #58933) for \$1200.71 dated August 15, 2017. A fourth check (check #59005) was attempted to be cashed at Money Tree in Tacoma by Chelsi IBARRA for \$1432.85, but not accepted. **(COUNT 4 - IBARRA/BISHOP)** Each check had the same Wells Fargo routing number and same account number as the checks the CI purchased from BISHOP for the phantom identities created by police. The checks were cashed at Emerald Queen Casino. The CI admitted that "Tyler Bible" was one of his/her aliases. The CI said the other two individuals, IBARRA and BAKER, are "cashiers." Police later obtained surveillance video of IBARRA's attempted transaction at Money Tree and confirmed her identity as such. Police also received surveillance of the transactions by Kelsea BAKER and Chelsi IBARRA at the Emerald Queen Casino. Det. Waller contacted a Human Resources Manager for Starplex Corporation who confirmed that each check number listed in this case was not created or issued by them. She also confirmed that the names listed on each check were not past or present employees.

On August 23, 2017, the CI learned that BISHOP and others staying at the INGALLS' residence had been evicted. The CI contacted BISHOP and learned that the account owned by the Starplex Corporation was no longer operational for the organization, but BISHOP stated that a new account was opened, meaning a different account number was acquired and a check was forged utilizing that account number and business. On August 29, 2017, the CI contacted BISHOP by phone in police presence. Det. Waller heard BISHOP advise that he was getting "set up" at Motel 6 in Fife, room 228. BISHOP stated that he was almost ready to print checks but was waiting on INGALLS to return with a printer. BISHOP requested the names and addresses to be printed on the checks as payee. The CI gave BISHOP two names and addresses: Amy Ratterre and "Erik Larsen." The first name was provided to the CI from an unknown person. The second was an alias given to the CI by police. BISHOP told the CI to respond to the room and wait for the printer. Under constant surveillance and assistance by police, the CI went to the Motel 6 in Fife. Once there, the CI entered room 228. A blue Ford Ranger registered to INGALLS arrived. INGALLS, who has been identified as a "cashier" in the enterprise, exited the vehicle and retrieved a printer from the truck bed. INGALLS was observed carrying the printer into the room. Later, BISHOP exited the room and frantically began looking through the Ford Ranger. Police received information from the CI that the bottom of the printer was missing a crucial working part. BISHOP then went to his Nissan truck and was observed retrieving a small piece of printer from the trunk before going back into the motel room.

Within minutes, the CI exited the room, met with Det. Waller, and handed him four checks from two different Key Bank accounts. One of the checks was in the name police provided ("Erik Larsen") and one was in the name of the female the CI provided in police presence. The other two checks were made payable to Tyler Bible, the CI's alias. Three of the four checks were written on the Key Bank account of Vigor Shipyard Inc. and the other was written on the Key Bank account of Rubinstein Law Offices. The check amounts were between \$937 - \$1002. A Key Bank

investigator confirmed that the account numbers belonged to the listed companies. The investigator stated that the Rubinstein Law Offices account was closed in February 2017 and purged. The investigator stated that the Vigor Shipyard Inc. account was active but had a record of recent fraudulent activity. The investigator provided police with five checks cashed locally. Those checks were made payable to Alexis Williams (check #813167 cashed at the Emerald Queen Casino on August 22, 2017), Joshua Salkin (check #813170 cashed at the Emerald Queen Casino on August 23, 2017), Alexis Williams (check #813165 cashed at the Red Wind Casino on August 22, 2017), Kyle INGALLS (check #813179 cashed at the Spanaway Key Bank on August 28, 2017), and Bryan NIETIEDT (check #813175 cashed at a Spanaway Walmart on August 29, 2017). A surveillance photograph confirmed INGALLS cashing the check at the Spanaway Key Bank branch. **(COUNT 5 - INGALLS/BISHOP)** Surveillance video for the NIETIEDT transaction at the Spanaway Walmart was also obtained and NIETIEDT was positively identified as the suspect who cashed the fraudulent check. **(COUNT 6 - NIETIEDT/BISHOP)**

Det. Waller spoke with a representative from Vigor Shipyard Inc. who confirmed the checks cashed were fraudulent. The representative also stated that an additional check (#813181) was also fraudulent and it was cashed by Kyle INGALLS.

On September 5, 2017, police facilitated and observed a transaction between the CI and BISHOP whereby the CI gave BISHOP three checks, which were unable to be cashed, and \$180 as a partial payment for the check issued to "Erik Larsen." The exchange occurred and BISHOP placed the money in his pocket and put the checks in his vehicle. BISHOP was eventually followed to a residence at 242 168th Street East in Spanaway where the daughter of an elderly man lives. The daughter, Melinda Johnson, is a known associate of BISHOP, has been named as a "cashier," and allows people in and out access to the garage she stays in. The CI stated that BISHOP has his laptop computer with him in the car, which is what BISHOP uses to create the checks.

The CI learned that BISHOP was opening three new accounts with account numbers he was purchasing from a local bank teller. The CI stated that the printer was at the residence on 168th Street. The printer has a "special magnetic ink" that is essential to the operation.

On September 10, 2017, BISHOP met with the CI in Spanaway and provided him a payroll check made payable to "Scott Soden" and a Washington identification. The check was written for \$765.32 on a Timberland Bank account belonging to Northwest Bus Sales Inc. in Federal Way. The CI received a second check with "Soden" as the payee. That check (#26891) was drawn on the Key Bank payroll account of Flying Tomato Italian Grill in Graham, Washington. The check amount was \$847.93. BISHOP told the CI that he expected payment for the checks. Police confirmed with a Key Bank representative that the account number listed on the Flying Tomato check was an actual payroll account for the business. She also confirmed that the account was active and that the check number given was a duplicate as the actual check already cleared the account.

Police contacted the owner of Flying Tomato who confirmed that Scott Soden was not an employee of the company. The owner thought this was the first fraudulent attempt on this account. Police contacted Northwest Bus Sales Inc. in Federal Way. The account manager confirmed that the account belonged to their business and Scott Soden was not an employee. The manager verified that the check number was already processed. The manager stated that two other checks were processed on September 8, 2017, at the Emerald Queen Casino. One of those checks was made payable to Justin NIEFFENEGGER for \$875.96, and was dated September 7, 2017. **(COUNT 7 - NIEFFENEGGER/BISHOP)** The other check was made payable to Lauren ORGILL for \$775.96, and was dated September 1, 2017. **(COUNT 8 - NIEFFENEGGER/BISHOP)** Neither of those individuals are employees of Northwest Bus Sales. Surveillance video confirmed NIEFFENEGGER and ORGILL conducting those fraudulent transactions.

On September 11, 2017, police began conducting surveillance at the Motel 6 in Fife where BISHOP was believed to be. Room 231 was identified as being used by BISHOP. Photographs of INGALLS and NEIFFENEGGER were captured as they entered the room. The CI was directed there a short time later because BISHOP was being forced to leave for non-payment and he was there alone moving his possessions out of the room. The CI was followed by police. At the hotel, BISHOP and the CI were observed loading BISHOP's personal belongings into the vehicle. They loaded storage boxes, printers, a laptop computer, file boxes, clothing, and other miscellaneous items into the vehicle. INGALLS arrived in his Ford Ranger and met with BISHOP and the CI. INGALLS and BISHOP were observed getting into the Ford Ranger and driving to Sportco in Fife where INGALLS and BISHOP entered. INGALLS exited the store a short time later with a loss prevention officer behind him. Fife Police arrived and INGALLS was taken into custody. BISHOP was located inside the store and arrested regarding an attempt to refund items they selected off the shelves. Neither were charged with a crime. Both were transported to the Puyallup Police Department to be interviewed. The CI's vehicle (a Chrysler PT Cruiser) and the Ford Ranger were impounded pending a search warrant.

After being read his Miranda warnings, INGALLS told police that he did legitimate work for people, which led to those people issuing him a check. INGALLS gave an example and eventually admitted he did not believe the checks to be legitimate. INGALLS later admitted that BISHOP used his laptop and printers to print checks issued to him. INGALLS stated that BISHOP did this mostly because of his "good will" nature but would take payment for these checks at times. He stated there was not a "written contract" for how much BISHOP would get paid for each check. INGALLS described BISHOP's laptop as being set up and connected to printers in the Motel 6 room. When asked about cashing the check on the Vigor Shipyard account, INGALLS began to tell police that he did mechanical work for that company's vehicle. When police questioned the story, INGALLS agreed it did not seem

correct. INGALLS admitted to cashing "10 to 12" checks on this account.

INGALLS admitted to cashing checks at Fred Meyer, Safeway, Kmart, Wells Fargo, and Key Bank. INGALLS eventually admitted that BISHOP was the one supplying checks to him, although he initially claimed the checks were coming from "Dave Gurnackey." INGALLS stated that he would never see BISHOP completing the check making and printing process from "start to finish," but he would see portions of the process. INGALLS stated that he did pay BISHOP for the checks but it was never a set amount.

A search of INGALLS' person pursuant to his arrest included a military ID for Phillip Werkheiser and three personal checks with Werkheiser's information on them. The checks were from an Umpqua Bank. Two of the checks were filled out for payment to Walmart and were signed. The third check was blank. Police contacted Werkheiser who stated that he had his retired military ID on his person and does not have an account with Umpqua Bank. The personal information on the ID (DOB, SSN) were correct. Police also found two checks from Northwest Bus Sales Inc. account with the payee listed as Kyle INGALLS. **(COUNTS 9-11 – INGALLS/BISHOP)** Police told police he did not want to talk with them, so no interview was conducted.

On September 12, 2017, Det. Waller executed search warrants on the two vehicles impounded at the Sportco, the CI's vehicle and the vehicle that INGALLS and BISHOP were riding in. Inside the PT Cruiser were several items that Det. Waller witnessed BISHOP load into the vehicle including a laptop computer, personal items, a HP printer with two parts, a paper tray containing "Docugard" check printing paper with perforation edges (same paper used to print the check from the Flying Tomato restaurant), and three clear plastic totes containing a large amount of check printing paper with three types of blank check stock, various checks, financial documents, and other miscellaneous documents. Police also located a grey plastic container with original personal and business account checks and

identifications and passports not belonging to BISHOP or any other known person in his organization.

A search of the Ford Ranger's passenger area revealed two VISA debit cards, one of which was a US Bank VISA card with the name "A. Kozhenevsky" on it. Police also found a book of personal checks from a Red Canoe Credit Union account for Craig Weber which included his address and phone number and two payroll account checks printed on "Docugard" check printing paper and a generic check stock. One of the two checks was drawn on an Umpqua Bank account made payable to Phillip Werkheiser and was issued by Justin NIEFFENEGGER and Timbered Rangeland Management LLC. The other check was drawn on a US Bank account and made payable to Phillip Werkheiser.
(COUNTS 12-13 –INGALLS/BISHOP)

Police contacted the owner of Timbered Rangeland Management and confirmed that the account information found on the check was a legitimate business account for his company. He also confirmed that neither Werkheiser nor NIEFFENEGGER were employees of the company.

Police contacted Craig Weber, who stated that the personal checks from the Red Canoe Credit Union were part of a book of checks he previously ordered. Weber stated that there was no fraudulent activity on this account.

Police contacted Phillip Werkheiser whose personal checks and military ID were found on INGALLS when he was arrested. Werkheiser stated that he did not work for Fred Meyer or Timbered Rangeland Management and did not know why a check would be issued to him. Police contacted a Fred Meyer investigator who confirmed that the account information does contain a legitimate Fred Meyer account.

Police processed the plastic storage box that contained checks. The storage box also contained blank check stock/paper for business accounts and personal checks. The box also contained check writing software material and an installation software CD for "CheckSoft," which is a check

writing program. There were also various notes and a journal containing names and addresses. Police also located a counterfeit WA driver's license with the name "James L. Jazbec" on it. The DOB, address, and physical descriptors were included. The photograph on the license was Keith BISHOP. Police ran a records check on Jazbec's name and found a Lakewood Police report that listed Jazbec as a burglary victim. Police noted that the name, DOB, and address on the fictitious license matched those of Jazbec's. **(COUNT 14 -BISHOP)**

Police then processed the grey plastic tote which contained numerous checks from business and personal accounts, a Washington identification, a US passport, and a US passport card. There were 158 checks from various business accounts in the box. There were also three personal check books.

Police later received additional reports from Timberland Bank that reflected additional attempts at cashing fraudulent checks. One report included a check-cashing attempt by Lauren ORGILL. The check was from "Grannys Inc," dated September 8, 2017, and made payable to Lauren ORGILL. The bank teller at the Edgewood Timberland Bank denied the transactions. Surveillance footage confirmed ORGILL's identity. **(COUNT 15 - ORGILL/BISHOP)** One photograph shows a Ford Expedition in the parking lot which belonged to and was occupied by NIEFFENEGGER. The other report indicated a check cashing attempt at the Edgewood Timberland Bank branch by Kyle INGALLS also using a "Grannys Inc" check. The check was cashed for \$912.47. Police identified INGALLS using surveillance footage provided by the bank. **(COUNT 16 - INGALLS/BISHOP)**

A search warrant was executed on BISHOP's cell phone, which was seized after BISHOP was arrested. An examination of the phone's contents revealed that Keith BISHOP was the sole user of the phone. The analysis revealed numerous conversations between BISHOP and several other individuals regarding fraudulent check cashing. The conversations included discussions about

misspellings on the checks, how to accuse the casino managers of "profiling" to get them to cash a check, how to fix errors on the checks using a computer or typewriter, locations to cash the checks, company accounts used for the fraudulent checks, the use and recruiting of "cashers," the acquiring of new accounts, photos of checks and identifications, and "selfie" photos of BISHOP. There were also conversations on the "Facebook Messenger" app on the phone. The people BISHOP was communicating with were identified as: "Kyle," "Scott," "Lily," "Lauren," "Austin," "Crash," "Melinda's cell," "Lori Laney," "Kayla Brookes Friend," and "Adam Nietiedt."

A search warrant was executed on BISHOP's laptop computer recovered from the PT Cruiser. A forensic examination of the computer revealed user accounts for "keith," "tyler," and "Public." There was a significant amount of check-making activity and software, data such as names, business names, account numbers, and phone numbers to be printed on checks, personal information and monetary statements related to checks and account numbers, configuration data and strings of personal information relating to creating checks, autofill information for "Keith Wayne Bishop," file downloads associated with making checks, websites for banks and businesses, graphic images of check stubs including watermarks, bank and business logos (including Flying Tomato and Vigor Shipyards), images of saved photos for driver's licenses, and search queries for websites related to pay stubs, fake ID's and businesses such as Vigor Shipyards and Fred Meyer. Most of the searched identified by police originated from the "keith" user account.

To date, Vigor Shipyard suffered a total loss from the fraudulent checks of \$5334.66. Starplex Corporation suffered a total loss of \$5730.94. Northwest Bus Sales suffered a total loss of \$1651.92. Flying Tomato Italian Grill did not report a financial loss. These amounts may change and losses from other individuals or businesses may be forthcoming.

CP 368-73. Accordingly, Ingalls has failed to show that he was not given notice of the charges against him, and this Court should affirm.

1. Ingalls knowingly, voluntarily, and intelligently pleaded guilty to fourteen crimes after having been adequately advised of the nature of the charges against him.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *State v. Weyrich*, 163 Wn.2d 554, 556, 182 P.3d 965 (2008). For a guilty plea to be voluntary, the defendant must be informed of the nature of the charged offense. *State v. Holsworth*, 93 Wn.2d 148, 153, 607 P.2d 845 (1980). The defendant is sufficiently informed of the nature of the charged offense if the charging document includes the offense's essential elements. *Id.* at 153. Challenges to the sufficiency of the charging document are reviewed de novo. *State v. Lindsey*, 177 Wn. App. 233, 244, 311 P.3d 61 (2013).

By framing his argument as one of insufficient information, Ingalls attempts to portray his claim as a constitutional error. However, all of the charging documents meet the two prong test as they identify the necessary facts and Ingalls cannot show actual prejudice. *See* CP 1, 172-73, 272-73, 368-73. Thus, Ingalls fails to show *manifest* constitutional error warranting withdrawal of his guilty pleas. Moreover, Ingalls acknowledged this notification during his plea colloquy with the court, where he responded affirmatively when asked if he understood the elements of the crimes of

identity theft, forgery, and theft as charged in the original Information he pleaded guilty to. RP 319, 324, 328-30. Accordingly, Ingalls fails to provide a basis warranting review of his guilty pleas to fourteen crimes, and this Court should affirm.

2. The identity of the stolen property is not an essential element of theft, the charging documents were sufficient, and Ingalls cannot show prejudice.

Even if this Court agrees with Ingalls's claim that the charging instruments on the fourteen counts he pleaded guilty to meet the threshold for review, his claim fails on its merits. Ingalls pleaded guilty to two counts of theft in the second degree and was convicted by a jury of one count of theft in the third degree. All of these convictions are valid and should be affirmed.

A person commits theft in the second degree when that person commits theft of (a) property or services exceeding \$750 in value but not exceeding \$5000 in value; or (b) a public record, writing, or instrument kept, filed or deposited according to law, or in the keeping of, any public office or public servant; or (c) commercial metal property, nonferrous metal property, or private metal property, and the costs of the damage to the owner's property exceed \$750 but does not exceed \$5,000 in value; or (d) an access device. RCW 9A.56.040; WPIC 70.05.

To prove that a person committed theft in the second degree under the “value” prong, the State must prove: (1) on a particular date, a defendant either, (a) wrongfully obtained or exerted unauthorized control over property or services of another or the value thereof; or (b) by color or aid of deception, obtained control over property or services of another or the value thereof; or (c) appropriated lost or misdelivered property or services of another or the value thereof; and (2) that the property exceeded \$750 in value but did not exceed \$5,000 in value; (3) the defendant intended to deprive the other person of the property or services; and (4) the acts occurred in the State of Washington. WPIC 70.06.

The Information charging Ingalls with theft in the second degree states the following:

That KYLE LYNN INGALLS, in the State of Washington, on or about the 20th day of January, 2017, did unlawfully and feloniously, by color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services, commit theft of: 1) property or services which exceed(s) seven hundred fifty dollars but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9A.41.010 or a motor vehicle; 2) a public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant; or 3) an access device, contrary to RCW 9A.56.020(b) and 9A.56.040(1)(a), and against the peace and dignity of the State of Washington.

CP 269-71. This Information alleged each essential element of the crime of theft in the second degree. Furthermore, the Certification for Determination of Probable Cause attached to the Information charging Ingalls with theft in the second degree specifically spelled out the nature of the charges and Ingalls's conduct that lead to the charge. As quoted above, the Probable Cause Certificate stated:

On February 3, 2017 an Agent with the Washington State Gambling Commission received an email from an employee at the Macau Casino in Lakewood regarding three returned checks that had been received by their bank on a closed account. The email included copies of the three checks, all of which were cashed at the Macau Casino on January 20, 2017.

All three checks, which appeared to be payroll checks, were written to defendant KYLE LYNN INGALLS and were dated January 17, 2017 and January 20, 2017. The three checks, #2367, #2359 and #2367 (this was a repeat check number), were cashed in the amounts of \$473.34, \$523.87 and \$482.68 respectively. The checks were returned by the Casino's bank due to the accounts being closed, but the checks also appeared to be forgeries. The Agent noticed that two of the checks contained the same check number (2367), the checks were not issued in sequential order by date, and all three checks were purportedly issued within three days of each other, with two of them being issued on the same date. All three checks had a driver's license and expiration date written on the top by the on-duty cage cashier. The driver's license that was presented was issued to defendant Ingalls. The Agent was able to obtain video surveillance of the defendant cashing one of the checks on January 20, 2017. An employee stated that the defednatn [sic] played at the casino somewhat frequently, but on January 20th, he just cashed the three checks without gambling. Per that employee, the defendant cashed the first check, then waited

for a new cashier to start her shift and cashed the second check, and then waited for another cashier to come on duty and cashed the third check. The checks were purportedly issued by Pacific NWPRO. The Agent compared the defendant's driver's license photo to the person depicted in the surveillance footage and concluded that it was the same person depicted in both.

On July 17, 2017 the Agent was advised by the Casino that the defendant had returned and cashed what appeared to be another forged check. The Agent obtained a copy of this fourth check and reviewed surveillance footage of the incident. This review showed that the defendant returned to the Casino on July 6, 2017 and cashed a check purportedly issued on the account of Pacific Medical Centers that was written in the amount of \$985.55. He again provided his driver's license and signed the back of the check. The Agent reviewed this check and noted that there was a clear indication that this check was a forgery in that the address listed for the business had Seattle mis-spelled as "SSEATTLE." The Agent began investigating the checks and saw that the first three checks that were cashed on January 20th listed "BCN Bank" as the issuing bank.

The Agent was able to find a "BBCN Bank" and contacted a representative of the bank. The Agent eventually learned that the account that these check had been written on had been closed for over a year. After reviewing the information on the checks, the representative confirmed they were forgeries.

The Agent also spoke to the Accounting Department supervisor at Pacific Medical Centers regarding the check that the defendant cashed on July 6, 2017. The Agent provided the check information and was told that they had no record of the defendant in their system, and the supervisor said that she approves all checks over \$500.00 and did not recall this check.

CP 272-73.

A person commits theft in the third degree when he commits theft of property or services not exceeding \$750 in value. RCW 9A.56.050; WPIC 70.10. To prove that person committed theft in the third degree, the State must prove that (1) on or about a certain date, the defendant, (a) wrongfully obtained or exerted unauthorized control over property or services of another or the value thereof not exceeding \$750 in value, or (b) by color or aid of deception obtained control over property or services of another or the value thereof not exceeding \$750 in value, or (c) appropriated lost or misdelivered property or services of another or the value thereof not exceeding \$750 in value. WPIC 70.11. The State must also prove that (2) the defendant intended to deprive the other person of the property or services; and (3) the act occurred in the State of Washington. *Id.*

The Information charging Ingalls with theft in the third degree described each element of that crime:

That KYLE INGALLS, in the State of Washington, on or about the 8th day of February, 2017, did unlawfully and wrongfully obtain or exert unauthorized control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value that does not exceed \$750 or includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates, with intent to deprive said owner of such property and/or services, contrary to RCW 9A.56.020(1)(a) and 9A.56.050(1),(2), and against the peace and dignity of the State of Washington.

CP 2-3.

This Information alleged each essential element of the crime of theft in the third degree. Furthermore, the Certification for Determination of Probable Cause attached to the Information charging Ingalls with theft in the third degree specifically spelled out the nature of the charges and Ingalls's conduct that lead to the charge. The Probable Cause Certificate stated:

On February 8, 2017, the defendant entered Lowes and selected 2 items worth \$138.42. The defendant took the items to the return counter and returned the selected items without a receipt. He was given a Lowes gift card in that same amount. The defendant had to use his ID to complete the return. The next day on February 9, 2017, the defendant went to Gold and Silver pawn store and sold the gift card and got \$96.89 for it. The defendant used his ID to complete the pawn. The store originally sold the card without holding it for 30 days. The store was able to get the card back and police verified it was the same card that the defendant was given by Lowes.

CP 1.

Ingalls was adequately apprised of the nature of the charges against him as the charging documents charging Ingalls with theft were sufficient. Nonetheless, the specific identity of the stolen property is not an essential element of theft. The reasoning in *State v. Tresenriter*, 101 Wn. App. 486, 495, 4 P.3d 145 (2002) supporting this assertion is persuasive. In *Tresenriter*, this Court rejected the argument that a possession of stolen property charge was deficient where the charging instrument did not

identify what the stolen property was because the identity of the property was not an essential element. *Id.* Specifically, this Court looked to the enumerated elements of possession of stolen property and reasoned that the definition of the crime only included a description of the value of the property. *See Tresenriter*, 101 Wn. App. at 495 fn. 3.

Here, the same logic applies to a theft in the second degree charge, where the definition of the property only has a value requirement under one prong, and the remaining prongs identify other types of specific property, i.e. public records, metal property, or access devices. *See RCW 9A.56.040*. Accordingly, because Ingalls was only alleged to have stolen property that met the value requirement, the State need not identify the specific property in order to adequately inform Ingalls of the charges against him. *See State v. Smith*, No. 79063-3-I, 2019 WL 931748 at *5 (Wash. Ct. App. February 25, 2019)² (State did not charge defendant Smith with stealing specific property listed in the statute, thus with the Information liberally construed, the exact nature of allegedly stolen property is not required to inform defendant of charge against her).

Ingalls cites to *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002) as support for the proposition that the State must specifically

² Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

describe the stolen property within the Information. Brief of Appellant at 11. Ingalls's assertion fails to recognize the similarities between the charging documents in *Greathouse* and those in this case.

In *Greathouse*, the Court addressed whether the victim must be named in an Information charging theft. *Greathouse*, 113 Wn. App. at 900. *Greathouse* argued that because the name of the victim of the thefts and the true owner were not identified, it was impossible to prepare an adequate defense. *Id.* The Court rejected this claim, and instead held that the Information was sufficient because it contained all of the required elements of the crime of theft by embezzlement: each count specified the date and place of the crime, the number of "gallons of fuel alleged to have been converted on that date, the value of the fuel, the allegation that the fuel belonged to another, and the allegation that *Greathouse* exerted unauthorized control over the fuel with intent to deprive another of that value." *Id.* at 905. Evidently, the Court found that any requirement that the property be "specifically described" was met in *Greathouse*.

As such, based on *Greathouse* and the reasoning in *Tresenriter*, the charging documents in this case were necessarily sufficient. The documents identified the date and place of the crimes, the nature of the source of the stolen property, the value of the property, and the allegations that the property belonged to another and that Ingalls exercised unauthorized

control over that property with the intent to deprive another of that value. CP 1, 172-73, 272-73, 368-73.

Moreover, with respect to the second prong of the *Kjorsvik* test, the *Greathouse* Court explained that the defendant could not show prejudice from the alleged deficiencies in the charging document where the State's theory was spelled out in the Declaration of Probable Cause and where he could have requested a bill of particulars. *Greathouse*, 113 Wn. App. at 906.

If a defendant believes a charging document is deficient and too general, his remedy is to ask for a bill of particulars. *Tresenriter*, 101 Wn. App. at 495. A charging document that states the statutory elements of a crime, but is vague as to some other significant issue, may be corrected under a bill of particulars. *State v. Leach*, 113 Wn.2d 679, 687, 782 P.2d 552 (1989). "A defendant may not challenge a charging document for 'vagueness' on appeal if no bill of particulars was requested at trial." *Id.*; *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985) (a defendant is not entitled to challenge the Information on appeal if he failed to request a bill of particulars at an earlier time). Here, the State clearly laid out its theory of the case, including the identity of the stolen property in its Declaration of Probable Cause, and Ingalls was free to request a bill of particulars. CP 1, 272-73. He did not. Accordingly, the charging documents were sufficient, and Ingalls cannot show prejudice from any alleged

deficiency. This Court should affirm Ingalls's jury conviction for theft in the third degree and his guilty pleas to the theft in the second degree charges.

3. The forgery, identity theft, and trafficking in stolen property charging documents were similarly sufficient, and Ingalls cannot establish prejudice.

For the same reasons listed above validating the charging instruments for Ingalls's theft convictions, the charging documents for Ingalls's forgery, identity theft, and trafficking in stolen property offenses are also sufficient. Ingalls only challenges the "factual specificity" of these documents: accordingly, he cannot establish the charging instruments were constitutionally deficient and this Court should affirm.

The charging documents each enumerated the essential elements of the respective charges. CP 2-3, 174, 269-71, 364-67. Ingalls was apprised of the nature of the charges against him, which was specifically evidenced by Ingalls's *factual guilty pleas* to the forgery and identity theft counts detailing the actions that made him guilty of each of those crimes. CP 209-18, 300-09, 393-433. As argued, the Information and Declaration of Probable Cause provided the factual basis of the trafficking in stolen property charge that the jury convicted Ingalls of. And, similar to the above argument, Ingalls cannot establish prejudice from any alleged deficiency in the charging documents for any of these charges where the State's theory

was spelled out in the Declarations of Probable Cause and where Ingalls could have requested a bill of particulars. CP 1, 172-73, 272-73, 368-73.

It is also worth noting that Ingalls's current argument—that he was not given adequate notice of the charges against him—appears to be in conflict with his Statement of the Case in his Opening Brief in this appeal, where he relies on the Declarations of Probable Cause to explain to this Court the basis of the charges he pleaded guilty to. Brief of Appellant at 3-4 (citing CP 172-73, 272-73, 368-73).

Accordingly, the charging documents were sufficient to notify Ingalls of the charges against him. Ingalls cannot show prejudice from any alleged deficiency, and this Court should affirm.

B. Ingalls fails to show prosecutorial misconduct occurred, or that any alleged error was so flagrant and ill-intentioned that a curative instruction would not have cured any alleged prejudice.

Ingalls did not object to the prosecutor's closing argument at trial. Consequently, he has a heightened burden on appeal. He must show that the prosecutor's brief remarks in closing argument were so flagrant and ill-intentioned that any curative instruction could not have obviated any prejudicial effect. Ingalls has not met this burden. Indeed, a short curative instruction regarding the beyond a reasonable doubt standard would have cured any confusion the prosecutor's remarks may have caused. This Court should affirm.

Ingalls bears the burden of showing that a prosecutor's comments were improper and prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). A prosecutorial misconduct inquiry consists of two prongs: (1) whether the prosecutor's comments were improper, and (2) if so, whether the improper comments caused prejudice. *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). If a defendant fails to object or request a curative instruction at trial, the issue of misconduct is waived unless the conduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Here, Ingalls did not object to the prosecutor's allegedly improper argument. Therefore, even if the comments were improper, Ingalls waived any error unless the comments were so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. *See State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Under this heightened standard, a defendant must show that: (1) no curative instruction would have obviated any prejudicial effect on the jury; and (2) the misconduct resulted in prejudice that had "a substantial likelihood of affecting the verdict." *Id.* The prosecutor's brief remarks explaining the meaning of "reasonable doubt" did not give rise to prejudice that had a substantial likelihood of affecting

the verdict. And any claimed prejudice could have been cured by an instruction.

Ingalls challenges the prosecutor's argument describing what "beyond a reasonable doubt" means. Brief of Appellant at 15. The prosecutor made the following remarks in closing argument:

... beyond a reasonable doubt is one of those phrases that we use in our criminal justice system all the time. Here is your definition: It's an abiding belief in the truth of the charge. That's what you get. It's not a standard higher than that. It's not beyond a reasonable doubt, all belief, or beyond all doubt. But you can have a doubt. Beyond a reasonable doubt means that you can have a doubt that's reasonable, and if you are so convinced even with that doubt, you are convinced beyond a reasonable doubt. It's an abiding belief in the truth of the charge.

RP 279. The prosecutor continued to explain that, even if the jury had lingering questions that it wished she had asked, it may not be enough to negate the standard of beyond a reasonable doubt. RP 279. The prosecutor stated, "So ask yourself if you are satisfied beyond a reasonable doubt, if you still have an abiding belief in the truth of the charge, even without whatever evidence you think that I didn't convey or didn't get out of a witness, or they didn't know, ask yourself if you still have an abiding belief in the truth of the charge. If you do, then you must find him guilty." RP 279-80. This is a proper statement of the State's burden of proof. The State must prove every essential element of a crime beyond a reasonable doubt—not

every fact discussed at trial. *See In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (due process requires the State prove the *elements of the charged crime* beyond a reasonable doubt); *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

The jury was properly instructed as to the State's burden of proof and the meaning of "reasonable doubt":

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 96. Accordingly, the prosecutor's argument concerning what *beyond* a reasonable doubt was, was proper. The statement acknowledged the definition of a reasonable doubt but explained that proof beyond that doubt may still meet the State's burden of proof. There was no error.

However, even if this Court finds the prosecutor's brief remark was error, Ingalls's claim still fails because he cannot show that an instruction could not have cured any error and he cannot show that any prejudice had a substantial likelihood of affecting the verdict. As stated, to prevail on his claim of prosecutorial misconduct, he must show that the prosecutor made ill-intentioned and flagrantly improper statements, that those statements caused prejudice such that it likely affected the verdict, and that any

prejudice was incurable by an instruction. *Emery*, 174 Wn.2d at 760-61. When analyzing prejudice, reviewing courts do not look at the comment in isolation, but in the context of the entire case. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). “Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Ingalls fails to show a substantial likelihood that the prosecutor’s remark affected the jury’s verdict or that any prejudice was incurable by an instruction. The prosecutor’s remark was brief and isolated. The jury was properly instructed on the evidence it was to consider, the burden of proof, and that the lawyer’s remarks are not evidence. CP 92-94, 97. Jurors are presumed to follow the court’s instructions. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). Had Ingalls objected at the time, he could have requested a curative instruction that reiterated the standard of proof and that emphasized that counsel’s remarks are not evidence. Any prejudice would have been easily cured.

Accordingly, the prosecutor’s brief remark did not give rise to prejudice that had a substantial likelihood of affecting the verdict or that could not have been cured by an instruction. This Court should affirm the

convictions for trafficking in stolen property in the first degree and theft in the third degree.

C. Viewing the evidence in the light most favorable to the State, overwhelming evidence proved that Ingalls committed theft and trafficking in stolen property.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction when, viewing the evidence in the light most favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). Sufficiency of the evidence is reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265-66, 401 P.3d 19 (2017). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are considered equally reliable. *Id.* at 201; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering the evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014); *State v. Martinez*, 123 Wn. App. 841, 845, 99 P.3d 418 (2004). Therefore, when the State has produced sufficient evidence of all the elements of a crime, the decision of the trier of fact should be upheld. Finally, when a defendant fails to challenge jury instructions, the jury instructions become the law of the case. *State v. Perez-Cervantes*, 141 Wn.2d 468, 476, 6 P.3d 1160 (2000). Here, Ingalls has not assigned error to any jury instructions in this appeal.

Ingalls seems to narrow his argument that the State failed to prove his crimes beyond a reasonable doubt by “fail[ing] to prove that the gift card was stolen[.]” Brief of Appellant at 20. This claim, like the rest, fails.

The jury was instructed on theft in the third degree as follows:

To convict the defendant of the crime of Theft in the Third Degree (Count 2), each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 8th day of February, 2017, the defendant wrongfully obtained or exerted unauthorized control over the property of another;
- (2) That the defendant intended to deprive the other person of the property; and

(3) That this act occurred in the State of Washington.
[...]

CP 109. The jury was also instructed that “theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.” CP 111. The State proved beyond a reasonable doubt that Ingalls wrongfully obtained the merchandise card, or the value thereof, with intent to deprive Lowe’s of that property.

On February 8, 2018, Ingalls entered a Lowe’s store with empty hands. RP 194, 223-25. He eventually approached the Customer Service Desk from the sales floor without ever leaving the store. RP 199-200. At the Customer Service Desk, he returned an aluminum roll and a lumber cart, without a receipt, and received a merchandise card with a value of \$138.42 in exchange because he did not have a receipt. RP 197, 229-31, 233. He provided his driver’s license, identifying himself as Kyle Ingalls, to effectuate the return. RP 204-06. Given this information, any rational jury could conclude that Ingalls wrongfully exerted control over materials to furnish a return for the value of those items, given to him on a gift card, with the intent to deprive the store of the value of that gift card.

Ingalls’s intent to deprive the store of the value of that gift card was then solidified when he sold that card, the very next day, to a Gold and

Silvers Trade store for cash. *See State v. Graham*, 182 Wn. App. 180, 185, 327 P.3d 717 (2014) (a defendant presenting merchandise for return, and receiving a gift card, was evidence that he concealed merchandise with required statutory intent to deprive the owner of *the value* of the property).

Factually, *Graham* is directly on point. In *Graham*, a woman returned a battery kit and a television wall mount that she had not yet purchased for a gift card. *Graham*, 182 Wn. App. at 182. She then used that gift card to purchase a second television wall mount the next day. *Id.* The Court held that, while her intentions were dishonest, the first wall mount and battery kit were not obtained by theft when she brought them to the customer service desk and requested cash or credit because she did not intend to deprive the store of those items. *Id.* at 185. Instead, the Court explained that her intent was to obtain the *value* of the items. *Id.* Thus, the Court concluded that her actions amounted to theft, and not trafficking in stolen property. *Id.*

In the present case, Ingalls's initial actions of returning the merchandise he never purchased in exchange for the value of those items for store credit also amounted to theft. While he may not have intended to deprive Lowe's of the lumber cart and aluminum roll, he did intend to deprive Lowe's of the items' value. Any rational jury would have come to

the same conclusion under the facts of this case. Accordingly, the evidence was sufficient to support Ingalls's theft in the third degree conviction.

Because Ingalls obtained the merchandise card by theft, he trafficked in stolen property when he then sold that gift card to a pawn shop in exchange for cash. The jury needed to find that the State proved beyond a reasonable doubt the following:

- (1) That on or about the 9th day of February, 2017, the defendant knowingly
 - (a) initiated, organized, planned, financed, directed, managed or supervised the theft of property for sale to others, or
 - (b) trafficked in stolen property knowing the property was stolen; and

- (2) That any of these acts occurred in the State of Washington. [...]

CP 101. To "traffic" means to "sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person [...]" CP 105. Any reasonable jury would have concluded that Ingalls trafficked the stolen merchandise card when they were presented with the evidence in this case. Ingalls went to Gold and Silver Traders on South Tacoma Way in Tacoma, Washington. RP 237, 245. Ingalls already had an account with the store. RP 248. He provided his identification, again identifying himself as Kyle Ingalls. RP 246-47. Ingalls then sold a Lowe's merchandise card in exchange for \$96.89 cash. RP 254.

When viewing the evidence in the light most favorable to the State and admitting the truth of the State's evidence, sufficient evidence proved beyond a reasonable doubt that Ingalls obtained a Lowe's merchandise card by theft and then trafficked that card when he sold it to a pawn shop for \$96.89. This Court should affirm Ingalls's convictions for trafficking in stolen property in the first degree and theft in the third degree.

D. The cumulative error doctrine does not apply where Ingalls cannot establish individual errors and where the evidence against him is overwhelming.

The cumulative error doctrine is limited to situations when a defendant has proven several errors at trial that standing alone may not be sufficient to justify reversal but when combined may deny him a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The test to determine whether cumulative errors require reversal is whether the totality of the circumstances substantially prejudiced the defendant and denied him a fair trial. *In re Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). Ingalls bears the burden of showing multiple trial errors and that the accumulated prejudice affected the outcome of the trial. *Cross*, 180 Wn.2d at 690. The cumulative error doctrine does not apply where the evidence is overwhelming against a defendant. *Id.* at 691.

As argued above, Ingalls has failed to establish any error occurred at his trial. Moreover, evidence of Ingalls's guilt was overwhelming, and included video evidence of him entering a store empty handed, selecting items from the shelves, approaching the Return Desk from the sales floor and returning merchandise he never purchased without a receipt to receive a merchandise card comprised of the value of the items he took from the store. Then, the next day, he sold that card to a pawn shop for \$96.89, which the store was then deprived of when it had to return the card to law enforcement after learning the card was stolen. Even if Ingalls had established any one individual error, he has not proven the accumulation of multiple errors was so great that he was deprived of a fair trial. The cumulative error doctrine does not apply here, and this Court should affirm.

V. CONCLUSION

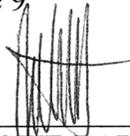
For the foregoing reasons, this Court should affirm Ingalls's convictions from his jury trial for trafficking in stolen property in the first degree and theft in the third degree, as well as his guilty pleas to the

remaining fourteen counts of theft in the second degree, identity theft, and
forgery.

RESPECTFULLY SUBMITTED this 27th day of September,
2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

ANGELA SALYER
Rule 9

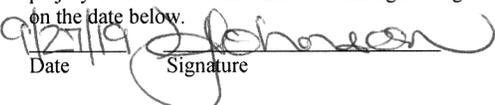


KRISTIE BARHAM WSB# 32764
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail
to the attorney of record for the appellant / petitioner and appellant / petitioner
c/o his/her attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington
on the date below.

9/27/19
Date


Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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