

NO. 35112-2-III

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION THREE

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

KARRLEE CLEMENTS,

Defendant/Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF BENTON COUNTY

The Honorable Bruce Spanner

REPLY BRIEF

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TABLE OF CONTENTS

	Page
I. ARGUMENT.....	1
A. Absent Compliant Declarations, RCW 10.96.030 Does Not Authorize the Admission of Business Records Comprising the Bulk of the Government’s Case.....	1
1. STANDARD OF REVIEW	1
2. THE DECLARATIONS WERE LEGALLY INSUFFICIENT	3
3. THE COURT’S CONSTRUCTION OF THE STATUTE WAS ERRONEOUS	5
4. ADMITTING THE BUSINESS RECORDS PREJUDICED CLEMENTS.....	6
B. The Prior Bad Acts Evidence Was Erroneously Admitted.....	7
1. CLEMENTS DID NOT WAIVE HER OBJECTION.....	7
2. FAILURE TO OBJECT IS NOT CONTROLLING WHERE THE STATE DELIBERATELY VIOLATES THE COURT’S RULING.....	8
3. THE STATE FAILED TO ESTABLISH THE EVIDENCE WAS RELEVANT.....	8
3. THE ERROR IN ADMITTING THE EVIDENCE WAS NOT HARMLESS.....	10
C. Omissions in the Jury Instructions Warrant Reversal of the Defendant’s Convictions	11

1.	THE COURT FAILED TO INSTRUCT THE JURY ON THE RELIANCE ELEMENT.....	11
2.	THE USE OF AN OUTDATED INSTRUCTION THAT OMITTED AN ESSENTIAL ELEMENT WAS NOT HARMLESS	13
3.	THE INSTRUCTIONAL ERRORS WERE NOT HARMLESS.....	15
D.	The Post-Discharge Verdicts Are Invalid.....	16
1.	THE RECORD ESTABLISHES THE JURY WAS DISCHARGED BEFORE DELIBERATING AND RETURNING THE REPLACEMENT VERDICTS.....	16
2.	THE COURT FAILED TO ENSURE THE JURORS DID NOT DISCUSS THE CASE OR COMMUNICATE WITH ANYONE AFTER BEING DISCHARGED.....	16
3.	VERDICTS ISSUED BY AN UNSWORN JURY ARE INVALID.....	20
4.	A NEW TRIAL SHOULD BE ORDERED IN ACCORDANCE WITH RCW 4.44.340.....	21
E.	The Defendant Was Denied Effective Assistance of Counsel.....	21
F.	The Exceptional Sentence Should Be Reversed	23
1.	THE COURT LACKS SENTENCING AUTHORITY WITHOUT VALID UNDERLYING CONVICTIONS.....	23
2.	THE OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT	24

3.	THE LENGTH OF SENTENCE WAS BASED ON UNTENABLE GROUNDS.....	24
II.	CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES	
Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 160 P.3d 13 (2007).....	24
State v. Ager, 128 Wn.2d 85, 904 P.2d 715 (1995).....	11
State v. Badda, 68 Wn.2d 50, 411 P.2d 411 (1964).....	28, 29
State v. Ben-Neth, 34 Wn. App. 600, 663 P.2d 156 (1983).....	4
State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002).....	15
State v. Butler, 198 Wn. App. 484, 394 P.3d 424 (Div. I 2017).....	1, 2, 6
State v. Casey, 81 Wn.App. 524, 915 P.2d 587 (1996), <i>rev. denied</i> , 130 Wn.2d 1009 (1996).....	12, 13, 15
State v. Edwards, 15 Wn.App. 848, 552 P.2d 1095 (Div. II 1976), <i>rev. denied</i> , 88 Wn.2d 1003 (1977).....	16, 17, 18, 19, 20, 21
State v. Evans, 177 Wn.2d 186, 298 P.3d 724 (2013).....	15, 20
State v. Humphries, 21 Wn.App. 405, 586 P.2d 130 (Div. I 1978).....	12
State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984).....	7
State v. Knutz, 161 Wn.App. 395, 253 P.3d 437 (2011).....	13
State v. Kyllo, 166 Wn.2d 856, 862, 866, 215 P.3d 177 (2009).....	22
State v. Lee, 159 Wn.App. 795, 247 P.3d 470 (Div. I 2011), <i>rev. denied</i> , 177 Wn.2d 1012 (2013).....	1, 2, 3, 5
State v. Linehan, 147 Wn.2d 638, 56 P.3d 542 (2002).....	11
State v. Mancilla, 197 Wn.App. 631, 391 P.3d 507 (Div. III 2017).....	10
State v. McNeil, 145 Wn.2d 352, 37 P.3d 280 (2002).....	22

State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005).....	11
State v. Mills, 116 Wn.App. 106, 64 P.3d 1253 (2003), <i>rev'd on other grounds</i> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	14
State v. Moe, 56 Wn.2d 111, 351 P.2d 120 (Div. I 1960).....	20
State v. Morales, 196 Wn.App. 106, 383 P.3d 539 (Div. I 2016), <i>rev. denied</i> , 187 Wn.2d 1015 (2017).....	16, 17, 21, 22, 23
State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001).....	1, 2, 3, 5, 6
State v. Ng, 110 Wn.2d 32, 750 P.2d 632 (1988).....	12
State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2012).....	13, 14
State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997).....	23
State v. Peterson, 168 Wn.2d 763, 230 P.3d 588 (2010).....	11
State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005).....	1
State v. Ross, 71 Wn.App. 556, 861 P.2d 473 (Div. II 1993).....	25
State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010).....	15
State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988).....	12, 13
State v. Smith, 189 Wash. 422, 65 P.2d 1075 (1935).....	8
State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997).....	13
State v. Zeferino-Lopez, 179 Wn.App. 592, 319 P.3d 94 (Div. I 2014)...	14

FEDERAL CASES

Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).....	11
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OTHER JURISDICTIONS

Barral v. State, 131 Nev. Adv. Op. 52, 353 P.3d 1197 (2015).....20
Harris v. State, 406 Md. 115, 956 A.2d 204 (2008)..... 20

STATUTES

RCW 4.44.260.....20
RCW 4.44.340.....21
RCW 9A.56.010.....11, 13
RCW 9A.56.020.....11
RCW 10.96.030.....1, 2, 3, 4, 5, 6

COURT RULES AND RULES OF EVIDENCE

CrR 6.6.....21
CrR 6.13.....2, 5, 6
ER 404(b).....10

PATTERN JURY INSTRUCTIONS

WPIC 131.02.....14
WPIC 300.50.....23

OTHER PUBLICATIONS

Black’s Law Dictionary.....11, 16

I. ARGUMENT.

A. **Absent Compliant Declarations, RCW 10.96.030 Does Not Authorize the Admission of Business Records Comprising the Bulk of the Government's Case.**

1. STANDARD OF REVIEW.

Questions of statutory construction are reviewed de novo. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). Appellant contends the plain language controls and supports her argument, but if the Court believes the interpretation the State advances in its response – that RCW 10.96.030(2)'s requirements do not apply if the defendant's attorney doesn't make a pretrial motion - is also reasonable, the statute is ambiguous and de novo review would apply. *Roggenkamp* at 621.

The de novo standard was applied in *State v. Lee*, 159 Wn. App. 795, 247 P.3d 470 (2011), the only case addressing RCW 10.96.030(2), because the admission of the business records implicated the Confrontation Clause. *Lee* at 814-15. Even if the Court applied the abuse of discretion standard, if the court's admission of the records was contrary to RCW 10.96.030(2), admitting the records would be an abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

In *State v. Butler*, 198 Wn. App. 484, 394 P.3d 424 (2017), Division One considered the narrow issue of whether the State's failure to notify the defense in accordance with RCW 10.96.030(3) of its intention

to introduce business records prejudiced the defendant. *Butler* at 491. The court did not construe the statutory language and, like in *Lee*, there was no indication the declaration was missing key statutorily-required information or was authored by someone other than the records custodian. *Butler* at 488 (website “provided the certification from its records custodian”); *Lee* at 817. As the court acknowledged, *Lee* addressed RCW 10.96.030(2), a different portion of the statute. *Butler* at 491, n.11. Even though the State cited *Lee* when arguing in favor of admissibility below, RP 114, the State never mentions *Lee* in its response. As noted in Appellant’s Brief, *Lee* determined the language of RCW 10.96.030(2) means declarations must include the specified information in order to be admissible. *Lee* at 817.

The State’s Brief likewise fails to address *State v. Neal*. In addition to being on point regarding the effect of failing to submit a declaration in compliance with the applicable rule/statute, *Neal* is also notable because, during the lengthy discussion of this issue below, the prosecutor explicitly referenced CrR 6.13 [the rule at issue in *Neal*] and told the court “it’s the same type of procedure, the same type of evidence.” RP 113.

The State’s argument focuses on the timing of counsel’s objections. While Appellant cannot dispute that her attorney did not raise the declarations’ facial invalidity before trial commenced, RCW 10.96.030(2)’s conditional requirements are mandatory and unambiguous,

and the proponent's failure to meet those requirements precludes admissibility of the records. In *Lee*, counsel's failure to file a pretrial motion did not waive the issue of the business records' admissibility. *Lee* at 814.

In *Neal*, the Court rejected the State's argument that the record was admissible because the defendant failed to demand the State produce the expert at least seven days before trial, as the rule required, explaining that the court's failure to enforce the rule's requirements was an abuse of discretion. *Neal* at 609-10. The same analysis applies to the State's argument about counsel's failure to raise the issue earlier: failing to comply with RCW 10.96.030(2)'s requirements precluded admitting the records, and the court's failure to enforce the statute's requirements was an abuse of discretion.

2. THE DECLARATIONS WERE LEGALLY INSUFFICIENT.

The State's assertion that "[b]oth documents" [Ex. 57 and 77] state the witness is the custodian, Respondent's Brief at 10, is belied by the exhibit itself: the American Express declaration [Ex. 77] conclusively shows it was not authored by the records custodian. App. Brief at 13-14. The Bancorp declaration [Ex. 86] likewise contains no showing of the non-custodian's qualifications. *Id.* The State makes no mention of the requirement that declarations set forth non-custodians' qualifications; in

fact, this critical requirement – the first requirement mentioned in the statute and the one on which all the others depend - is missing from the State’s list of RCW 10.96.030(2)’s requirements. Resp. Brief at 10-11.

The State’s contention that indicating records are attached is sufficient to both identify the records and their mode of preparation, Resp. Brief at 11, is at odds with the statutory plain language and the case law cited at p.11-12 of Appellant’s Brief. It would be a stretch to deem “attached” to be the equivalent of identifying dozens of different computerized business records, see *State v. Ben-Neth*, 34 Wn. App. 600, 603, 663 P.2d 156 (1983), but no stretch of that referential phrase could equate it to identifying how the records were prepared.

Compliance with RCW 10.96.030’s requirements, including identifying the records and how they were prepared, avoids due process concerns such as those in the present case where (a) defense counsel indicated that no records had been attached to the declaration, RP 119, (b) a State’s witness admitted he didn’t receive business records with the Bancorp certificate, RP 194, and (c) the State sought to admit another record which was emailed to the witness some time after the date of the declaration, RP 151.

RCW 10.96.030 does not create insurmountable hurdles, but contains only a few basic requirements, most of which can be

accomplished with generic language; qualifications of a non-custodian is not one of them. Two of the declarations failed to establish the witnesses were qualified to authenticate the records, and none identified how the records were prepared.

3. THE COURT'S CONSTRUCTION OF THE STATUTE WAS ERRONEOUS.

This case presents an issue of first impression: is admissibility of business records conditioned on compliance with the mandatory requirements of RCW 10.96.030(2), as *Neal* held with respect to CrR 6.13 and as indicated by the Legislature's use of conditional statements and mandatory language, or do the statutory requirements no longer apply once the trial commences if the defendant's attorney fails to object before then?

Whether the Court applies the plain language as Appellant contends in her brief, or finds the statute ambiguous and applies the Rule of Lenity, the trial court's interpretation was erroneous because it failed to regard the distinction between "affidavit, certification, or declaration" and "record." Pursuant to *Neal, Lee* and the statute's plain language, the failure to comply with RCW 10.96.030(2) should have precluded admissibility until the State could present declarations that complied with the statute.

4. ADMITTING THE BUSINESS RECORDS PREJUDICED CLEMENTS.

In addition to the fact that *Butler* never considered RCW 10.96.030(2) or the issue presented here, the significance of the business records was vastly different. In *Butler*, the court found no prejudice because the few pages of internet ads at issue were “of minor significance” to the whole of the State’s evidence of commercial exploitation of a minor, *Butler* at 492, but the business records here were virtually the State’s entire case.

Although the courts have held admitting business records generally does not violate an accused’s right to confrontation, the overriding of that right is conditioned on compliance with the statute authorizing their admission. The *Neal* Court held CrR 6.13 did not violate an accused’s right to confrontation “so long as all the substantive requirements of CrR 6.13(b) are complied with” and that “failure to comply with the rule implicates the constitutional confrontation rights of the accused and the evils of trial by affidavit. . .” *Neal* at 608. The instant case presents a good example of trial by affidavit, as the prosecution relied heavily upon the business records to prove its case. Pursuant to *Neal*, since RCW 10.96.030(2)’s substantive requirements were not complied with,

admitting the business records implicates the defendant's right to confrontation.

B. The Prior Bad Acts Evidence Was Erroneously Admitted.

1. CLEMENTS DID NOT WAIVE HER OBJECTION.

Prior to trial, the defense made a motion in limine regarding Catherine's testimony to minimize the risk she would testify to irrelevant and unfairly prejudicial matters; the court reserved ruling until she testified. CP 14 (MIL #9); RP 14. When the State elicited the testimony about Morse's seven-year-old act, the defense objected again and the jury was excused. RP 226. Counsel explained the evidence was an attempt to use someone else's prior bad act against Clements, that it was prejudicial, and that it was an attempt to show guilt by association. RP 229.

When a trial court rules on a motion in limine, unless the trial court indicates further objections are required, the party losing the motion has a standing objection. *State v. Kelly*, 102 Wn.2d 188, 192-3, 685 P.2d 564 (1984). Once the court ruled on the defense objection, the defense had a standing objection to further attempts to introduce that evidence.

2. FAILURE TO OBJECT IS NOT CONTROLLING
WHERE THE STATE DELIBERATELY VIOLATES THE
COURT'S RULING.

If the State deliberately disregards the trial court's evidentiary ruling, or if an objection would be equally or more damaging to the defendant's case, failure to object is not controlling and prejudice is presumed. *State v. Smith*, 189 Wash. 422, 428-29, 65 P.2d 1075 (1935). Here, the State deliberately continued associating Clements to the seven-year-old act during testimony and closing argument after the court specifically ruled it could not do so. Additional objections would have only called more attention to the association and been more damaging to the defendant's case. Under either prong of the *Smith* test, counsel's failure to object to each violation of the court's ruling does not constitute a waiver.

3. THE STATE FAILED TO ESTABLISH THE EVIDENCE
WAS RELEVANT.

According to the testimony, Morse was accused of using a credit card in Catherine's name in approximately 2010; the thefts at issue occurred from May, 2014-August, 2015. CP 1-2; RP 224, 241-42. When asked how the 2010 incident was relevant, the State told the court Catherine's "warning" came after the 2010 incident, and that Morse's prior bad act was relevant because it showed Catherine wouldn't allow

Karrlee to use “another credit card,” specifically “that if she ever touched a credit card or her Vanguard account the daughter would go to jail.” RP 228-30. However, the testimony was not consistent with the State’s proffer.

When Catherine was asked about what she did after the 2010 incident, she testified she contacted the credit card companies and reported she had never opened the accounts. RP 242. Most importantly, she did not testify to giving Karrlee a “warning” after Morse’s 2010 misdeed.

In the section entitled “Relevance,” the State quotes an excerpt about an alleged conversation between Catherine and Karrlee that occurred in late 2015, after the withdrawals were discovered, when Catherine confronted Karrlee about her sibling’s accusation. Resp. Brief at 14. It was then that Catherine gave the supposed “warning”¹ to Karrlee. RP 232.

This is quite different from the State’s offer of proof, which claimed that the “warning” came before the withdrawals and, because of the 2010 incident, Catherine wouldn’t have given Karrlee access to her account during 2014-15. See Resp. Brief at 1 (2010 incident “caus[ed] the victim to warn her daughter not to take her money in the future” and the

¹ Since the alleged thefts had already occurred, threatening to send her daughter to jail for her past actions is not a warning about accessing her account.

defendant “ignored the warning and hid her use of the victim’s 401(k) account”) (emphasis added).

Since the “warning” did not occur until at least August, 2015, and Clements was not involved in the 2010 incident, there was no basis for a finding that Morse’s 2010 act had any relevance, and the “warning” itself was also irrelevant, coming after the alleged thefts had already occurred². It is doubtful the court would have allowed the testimony had it been told it did not occur until after the withdrawals.

4. THE ERROR IN ADMITTING THE EVIDENCE WAS NOT HARMLESS.

The State bears the burden of proving any error was harmless beyond a reasonable doubt. *State v. Mancilla*, 197 Wn.App. 631, 641, 391 P.3d 507, 512 (Div. III 2017). The trial court ruled associating Clements to her ex-husband’s bad act would violate ER 404(b), but the State continued making that association. While the testimony might have been less prejudicial if the prior act was something other than theft or unauthorized use of credit cards, it was not, and the emphasis on the nature of their relationship, see RP 241, implied guilt from her constitutional right to freedom of association. RP 230 (“ . . . you have an ex-husband who was with the defendant at the time. . .”); *Roberts v. United States Jaycees*, 468

² The State also argues the “warning” was relevant because Karrlee testified that she had Catherine’s permission to access the account, Resp. Brief at 15, but this overlooks the fact that Karrlee had not testified when the State elicited the testimony.

U.S. 609, 617–19, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (freedom of association refers to the choice to enter into and maintain certain intimate human relationships, including those that attend to creation of a family).

C. Omissions in the Jury Instructions Warrant Reversal of the Defendant’s Convictions.

1. THE COURT FAILED TO INSTRUCT THE JURY ON THE RELIANCE ELEMENT.

Theft is an alternative means crime. *State v. Linehan*, 147 Wn.2d 638, 647, 56 P.3d 542 (2002). There are four distinct types of theft: theft by taking, embezzlement, by color or aid of deception, and wrongful appropriation of lost or mis-delivered property. RCW 9A.56.020(1); *State v. Ager*, 128 Wn.2d 85, 91, 904 P.2d 715 (1995). The prohibited conduct varies significantly for each type of theft. *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). Each type of theft has its own statutory definition. RCW 9A.56.010(2), (4), (23). Deception also has its own definition, which is distinct from by color or aid of deception. RCW 9A.56.010(4).

The elements of a crime are those facts that the prosecution must prove to sustain a conviction. *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005) (quoting *Black’s Law Dictionary*). The trial court in a criminal case is required to define technical words and expressions, but not words and expressions which are of common understanding. *State v. Humphries*,

21 Wn.App. 405, 411, 586 P.2d 130 (Div. I 1978). In contrast to the cases the State cites, both of which involved a single, commonly understood word, “by color or aid of deception” was the type of theft the State accused Clements of committing, and its language was held to be a required element in *State v. Casey*, 81 Wn.App. 524, 915 P.2d 587 (Div. I 1996), *rev. denied*, 130 Wn.2d 1009, 928 P.2d 412 (1996).

In *State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988), the jury was instructed on the definition of robbery, as well as all of its elements, but not separately instructed on the definition of “theft.” In *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988), the jury was likewise instructed on all the elements of the burglary charge; the issue was whether failing to separately define “knowledge” in the separate accomplice liability instruction amounted to constitutional error. Both cases involved a single word “of sufficient common understanding.” *Scott* at 689; *Ng* at 44-45. By contrast, “by color or aid of deception” is not a word of sufficient common understanding, it was both the type of theft Clements was accused of committing and the required reliance element.

In *Casey*, the court held:

Reliance is established where the deception in some measure operated as inducement. Therefore, the deception need not be the sole means of inducing the victim to part with his or her property.

Casey at 529.

The definition of “by color or aid of deception” is essentially the same:

“By color or aid of deception” means that the deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services.

RCW 9A.56.010(4).

Thus, including the definition of “by color or aid of deception” was required to ensure the jury was informed of the reliance element. In *State v. Knutz*, 161 Wn.App. 395, 253 P.3d 437 (2011), the court rejected the defendant’s claim that the instructions omitted *Casey*’s reliance element because they included the statutory definition of “by color or aid of deception.” *Knutz* at 404-05. Here, it is undisputed that no such instruction was given, so the jury was never told about *Casey*’s reliance element. Due to its absence, the jury was left to guess as to the meaning of “by color or aid of deception,” warranting reversal. *Id.*; *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

2. THE USE OF AN OUTDATED INSTRUCTION THAT OMITTED AN ESSENTIAL ELEMENT WAS NOT HARMLESS.

The courts have previously held the issue of whether an instruction omits an essential element may be raised for the first time on appeal. *Scott* at 495, n.5. The *O’Hara* Court explained that the focus on actual prejudice

“must be on whether the error is so obvious on the record that the error warrants appellate review.” *State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). Here, it is obvious that Instruction No. 8 omitted one of the elements required by WPIC 131.02.³

The State admits it did not use the pattern instruction, but argues the element which has been included in WPIC 131.02 since 2015, and which was held to be a separate required element in *State v. Zeferino-Lopez*, 179 Wn.App. 592, 319 P.3d 94 (Div. I 2014), is redundant. Resp. Brief at 22. The State’s argument that Instruction No. 8 “properly informs the jury that it must find the defendant knowingly possessed financial information and that it belonged to another person,” Resp. Brief at 18, contradicts the Comment to WPIC 131.02, which explains (emphasis added):

This instruction has been revised for this edition with the addition of element (3) to reflect recent case law. To be convicted of either first or second degree identity theft, the defendant must have knowledge that the means of identification or financial information belonged to another person; **it is insufficient to show simply that the defendant knew he was using or possessing a means of identification or financial information.** *State v. Zeferino-Lopez*, 179 Wn.App. 592, 319 P.3d 94 (2014).

³ The Committee on Jury Instructions operates under the auspices of the Washington Supreme Court and the WPICs are considered persuasive authority. *State v. Mills*, 116 Wn.App. 106, 116, n. 24, 64 P.3d 1253 (2003), *rev’d on other grounds*, 154 Wn.2d 1, 109 P.3d 415 (2005).

3. THE INSTRUCTIONAL ERRORS WERE NOT HARMLESS.

Error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds. *State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010). The State's use of an outdated instruction leaves it ambiguous as to whether the jury found the third identity theft element because it was never told about it, and failing to include it means Instruction No. 8 was an incomplete statement of the law. The failure to include *Casey's* reliance element, which also defined the type of theft Clements was accused of committing, leaves it ambiguous as to whether the State proved the crime charged in the information.

Finally, as mentioned by the State, the defendant testified that Catherine knew of and consented to her accessing and withdrawing from the account. RP 268-69. Consequently, whether she stole from Catherine's account by color or aid of deception and whether deception operated to bring about the obtaining of the property [*Casey's* definition of "reliance"] were not uncontroverted, so the error is not harmless. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

D. The Post-Discharge Verdicts Are Invalid.

1. THE RECORD ESTABLISHES THE JURY WAS DISCHARGED BEFORE DELIBERATING AND RETURNING THE REPLACEMENT VERDICTS.

Discharge is defined as “[t]he relieving of a witness, juror, or jury from further responsibilities in a case.” *Black’s Law Dictionary* (9th Ed. 2009). The record clearly establishes this occurred before the jurors left the courtroom: (1) the judge explicitly released the jurors from their oath before discharging and excusing them (see block quotation in Appellant’s Brief at p.5-6); and (2) the Clerk’s Minutes confirm the jury was “released from their duty” and, 16 minutes later, “was brought back into the courtroom.” CP 165-66. The record also shows the court never placed the jurors under oath before sending them back for further deliberations. RP 349-50. These facts stand in stark contrast to the case upon which the State relies.

2. THE COURT FAILED TO ENSURE THE JURORS DID NOT DISCUSS THE CASE OR COMMUNICATE WITH ANYONE AFTER BEING DISCHARGED.

The State relies on *State v. Edwards*, 15 Wn.App. 848, 850-51, 552 P.2d 1095 (Div. II 1976), *rev. denied*, 88 Wn.2d 1003 (1977), a case involving very different facts and a different legal issue, and which also predated *Morales* and its re-affirmation of the longstanding principle that “a jury has the authority to correct its verdict until it is discharged.” *State*

v. Morales, 196 Wn.App. 106, 115, 383 P.3d 539 (Div. I 2016), *rev. denied*, 187 Wn.2d 1015 (2017).

In *Edwards*, the foreman told the judge the jury could not reach a unanimous verdict. Although the defendant was charged with two counts, the court did not distinguish between them when asking the jury if it would be able to reach a verdict. *Edwards* at 848. After the court quickly declared a mistrial:

The jury thereupon filed from the courtroom into the adjacent jury room, the bailiff following immediately behind and, within a minute or two thereafter, the bailiff notified court and counsel the jury had apparently reached a verdict on one count and the jury was again returned to the courtroom . . .

Id. at 849.

After the bailiff informed the judge the jury had, in fact, reached a verdict on one of the counts, the foreman delivered the completed verdict form to the court, the jury was polled and excused, and the court was adjourned. *Id.* The following day, the judge placed the bailiff under oath and engaged in a lengthy colloquy about everything that occurred between the moment he was informed the jury was unable to reach a verdict and its re-assembly in the courtroom. *Id.* at 849-50. The bailiff testified under oath that the jury room had been locked and there was no way anyone could have communicated with any of the jurors. *Id.* at 850.

Unlike the present case, the jury had not delivered or been polled to confirm its verdict(s), and the judge never told the jury it was discharged or released it from its oath. The *Edwards* court recognized this, *Id.* at 850, and allowed the verdict to stand because:

No member of the jury had either the time or opportunity to separate from his fellows and commingle with nonmembers of the jury, nor did the jurors renew their deliberations or discuss the merits of the cause. The only words spoken were those of the foreman to the bailiff indicating they had, in fact, reached a verdict on one count, but had been unable to agree on the other.

Id. at 852.

The court also relied on a Texas case in which “[a]n evidentiary hearing revealed its members had not commingled with the general public and there had been no further discussion of the matter among the jurors or with the alternate jurors who had preceded them on the way to the jury room.” *Id.* at 851. In the present case, because no inquiry or evidentiary hearing was conducted, and because the record shows the bailiff did not remain with the jurors after they left the courtroom as in *Edwards*, see RP 345 (showing bailiff was present in the courtroom during discussion of how to proceed), there is no way to similarly establish the jurors had no discussions about the case. Appellant submits it is highly unlikely that, having just convicted someone of stealing a considerable sum from her mother and then being told they were free to discuss the case, all twelve

jurors were silent or merely discussed the weather after leaving the courtroom. Furthermore, while sworn testimony established the jury room in *Edwards* was locked, the record in this case indicates the contrary; the judge's instruction to the clerk to stop the jurors from leaving the building, RP 347, would make no sense if they were locked inside.

Back in 1976, there was no way for anyone to have communicated with the jurors, or vice-versa; there were no smartphones with mobile data, Wifi in government buildings, text messaging, or the other now-ubiquitous forms of instant communication. Unlike *Edwards*, where the court made a detailed record of what occurred (or didn't occur) during the interim, no such inquiry was made in this case, either of the jurors or the bailiff⁴. According to *Edwards*, the opportunity to discuss the case amongst themselves is sufficient to impugn their verdicts. *Edwards* at 850-51 (“contamination is presumed even though the jurors may not have taken advantage of the opportunity to discuss the case”).

The correction in *Edwards* was not “one of substance resulting from further deliberation.” *Edwards* at 851. In fact, there was no correction at all; the foreman merely handed the court the already-completed guilty verdict. The jury did not engage in further deliberations

⁴ The bailiff spoke to the discharged jurors at least twice – when she stopped them from leaving the building and then after the court decided how it would proceed – but, unlike *Edwards*, no record was made of what was said.

or change its non-verdict for the other charge. By contrast, the record in the present case shows the court sent the jury back for further deliberations and the replacement verdicts were “of substance” because they convicted her of a different crime. Thus, *Edwards* strengthens Appellant’s argument that the replacement verdicts were invalid.

3. VERDICTS ISSUED BY AN UNSWORN JURY ARE INVALID.

The juror’s oath and court’s instructions act as “the defendant’s safeguard against possible bias or prejudice resulting from the juror’s consideration of a collateral matter as evidence in the case.” *State v. Moe*, 56 Wn.2d 111, 116, 351 P.2d 120 (Div. I 1960). Although no Washington court has been presented with this issue, courts in other states have held that verdicts rendered by an unsworn jury constitute structural error, requiring automatic reversal. *Barral v. State*, 131 Nev. Adv. Op. 52, 353 P.3d 1197 (2015) (failure to administer oath prior to voir dire); *Harris v. State*, 406 Md. 115, 956 A.2d 204 (2008) (jury never sworn). While the jury in *Barral* was belatedly sworn, the Nevada Supreme Court held that, because it had not been sworn in accordance with state law, the defendant’s due process rights were violated, structural error occurred, and prejudice was presumed. *Barral* at 1200. Since Washington law and court rule both require the jury to be sworn, RCW 4.44.260 (oath or affirmation

“shall be administered”); CrR 6.6 (jury “shall be sworn”), and the jury was no longer under oath, the Court should hold the failure to re-swear the jury removed the defendant’s safeguard and, in light of the 10-15 minute gap and the absence of any inquiry about what transpired during it, invalidated the post-discharge verdicts.

4. A NEW TRIAL SHOULD BE ORDERED IN ACCORDANCE WITH RCW 4.44.340.

RCW 4.44.340 mandates a new trial when the jury is discharged. Although its placement in Title 4 indicates it is a civil statute, since it was cited and applied in *Edwards*, its application apparently is not limited to civil cases, and the same remedy – a new trial – should result since it is clear the jury was discharged.

E. **The Defendant Was Denied Effective Assistance of Counsel.**

While Appellant agrees that convictions based on flawed verdict forms are rare, neither the State’s claim that counsel’s actions were tactical and he was attempting to get the identity theft conviction dismissed nor that counsel couldn’t be expected to know of *Badda* or *Morales* is supported by the record or case law.

The record does not support the State’s claim that counsel was “hoping that the trial court might dismiss Count II,” or that he “thought he may be able to get Count II dismissed,” Resp. Brief at 25-26. Indeed, it is

difficult to see how when counsel made no motion to dismiss or set aside the verdict, either during the proceedings or via a post-trial motion.⁵ If anything, the record shows that counsel didn't know what to do. See RP 345. Had counsel, consistent with his duty to his client, remained silent and later moved to set aside the verdict, the court would have been constitutionally prohibited from changing it to a different crime. See *State v. McNeil*, 145 Wn.2d 352, 363, 37 P.3d 280 (2002). Clements was prejudiced by counsel's actions/inactions, which resulted in her conviction for a more serious crime.

Defense counsel has a duty to research and know the relevant law. *State v. Kyllo*, 166 Wn.2d 856, 862, 866, 215 P.3d 177 (2009). It would have only taken a few minutes of legal research to locate the *Morales* decision, which was only a few months old at the time (and thus would have been the first "discharged jury corrected verdict" search result), and the *Badda* case would have taken the same amount since it was relied upon in *Morales*. Citing *Morales* and its holding that the jury's authority to change its verdict ends with its discharge would have provided grounds to move for a new trial. However, counsel did nothing, either at the time or during the 10 days in which a motion for a new trial could have been

⁵ As explained in Appellant's Brief, counsel's failure to research this issue or file any post-trial motion in light of *Morales* and *Badda* fell below an objective standard of reasonableness.

filed, and doing nothing under the unusual circumstances presented when his client was facing an exceptional sentence and separation from her children is neither tactical nor reasonable.

E. The Exceptional Sentence Should Be Reversed.

1. THE COURT LACKS SENTENCING AUTHORITY WITHOUT VALID UNDERLYING CONVICTIONS.

The first special verdict form recited that Clements had been convicted of identity theft, CP 152, but she had not been convicted of that crime, CP 150; RP 340-43 (all jurors confirmed the theft verdicts were their individual and collective verdicts), invalidating the special verdict form.⁶ The validity of the second special verdict, and the exceptional sentence based on it, depends on the whether the post-discharge verdicts were valid.

The State's assertion that convicting a defendant of a different crime is a "clerical error" that can be corrected by motion, Resp. Brief at 27, cannot be reconciled with *Morales*, where the judge was prohibited from even changing the degree of the crime. Finally, as detailed in Appellant's Brief, the exceptional sentence was not authorized in any event because the trial court miscalculated the defendant's standard range. *State v. Parker*, 132 Wn.2d 182, 190, 937 P.2d 575 (1997).

⁶ Additionally, although WPIC 300.50's Note on Use requires a separate special verdict form for each count, the special verdict forms the State used included both counts on the same verdict form. CP 152, 156.

2. THE OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT.

Rather than concede the offenses were the same criminal conduct, the State claims for the first time that Vanguard is a victim. Resp. Brief at 28. This contradicts its own sworn charging document, which specifies Catherine Clements as the victim of both offenses, CP 1-2, the State's presentation at trial, see RP 136, 230, and portions of its own brief. Resp. Brief at 12 ("The victim, Catherine Clements, testified . . ."); Id. at 22 ("It was clear who the victim was – Catherine Clements"). The State should be estopped from contradicting numerous prior inconsistent statements. See *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

3. THE LENGTH OF SENTENCE WAS BASED ON UNTENABLE GROUNDS.

The State argues that, although it requested one month for every \$10,000 stolen, the court did not adopt that position because it only imposed 20 months. As noted in Appellant's Brief, this was due to the court's handwritten finding that less than \$210,000 was taken. CP 176. The State's argument also overlooks the fact that the record is devoid of any other basis for the sentence's length. 2/23 RP 14-24. The only bases in the record for the 20-month sentence are the State's request and the additional finding that the judge, not the jury, made about the amount,

which Clements submits were untenable. *State v. Ross*, 71 Wn.App. 556, 569, 861 P.2d 473 (Div. II 1993).

II. CONCLUSION.

For the reasons set forth above and in Appellant's Brief, the defendant's convictions and resulting sentence should be reversed and remanded for a new trial.

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