

NO. 35112-2-III

IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION THREE

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

KARRLEE CLEMENTS,

Defendant/Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF BENTON COUNTY

The Honorable Bruce Spanner

APPELLANT'S BRIEF

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- I. ASSIGNMENTS OF ERROR.
  1. THE TRIAL COURT ADMITTED UNAUTHENTICATED BUSINESS RECORDS CONTRARY TO STATE LAW.
  2. THE TRIAL COURT ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE.
  3. THE JURY INSTRUCTIONS OMITTED THE DEFINITION OF “BY COLOR OR AID OF DECEPTION” AND INSTRUCTION NO. 8 OMITTED AN ESSENTIAL ELEMENT.
  4. THE DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.
  5. THE SECOND SET OF VERDICTS, RENDERED AFTER THE JURY WAS DISCHARGED AND EXCUSED, VIOLATED THE DEFENDANT’S RIGHT TO TRIAL BY JURY.
  6. THE TRIAL COURT COMMITTED SENTENCING ERRORS WARRANTING A REVERSAL OF THE EXCEPTIONAL SENTENCE.
  7. THE CUMULATIVE EFFECT OF THE ERRORS DEPRIVED CLEMENTS OF HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Where the supporting declarations failed to satisfy RCW 10.96.030's mandatory requirements for admissibility of business records, including the requirement that the witness be qualified to authenticate them, did the trial court err by admitting the computerized financial records into evidence? (Assignment of Error #1)
2. Where the plain language of RCW 10.96.030 requires that supporting declarations include specific information in order for business records to be admissible, did the trial court err by overruling the defendant's objections to their sufficiency? (Assignment of Error #1)
3. Did the trial court commit error by allowing the State to elicit testimony about a seven-year-old crime committed by someone else, and did the State's repeated references to it and the defendant's relationship to the actor violate ER 403 and the court's evidentiary ruling? (Assignment of Error #2)
4. Where the jury instructions omitted the essential element of reliance and a definition of "by color or aid of deception," did the instructions unconstitutionally relieve the State of its burden to prove every element beyond a reasonable doubt? (Assignment of Error #3)
5. Where the defendant was charged with theft and identity theft, but the jury returned two guilty verdicts for theft and was polled, discharged

and excused, and the court declared the trial concluded, did the court commit error by re-assembling the jurors and sending them back with a second set of verdict forms? (Assignment of Error #5)

6. In light of the verdict irregularities, was the exceptional sentence authorized by the jury verdicts and the findings of fact? (Assignment of Error #5)

7. Where the defendant was charged with two theft offenses which occurred simultaneously, one crime furthered the other, and the Information specified theft as the intent for both offenses, did the trial court miscalculate the defendant's offender score and standard range by not finding the offenses were the same criminal conduct? (Assignment of Error #6)

8. Is an exceptional sentence based on 30 days imprisonment per \$10,000 stolen based on untenable grounds, contrary to RCW 9.94A.585(4)(a)? (Assignment of Error #6)

### III. STATEMENT OF THE CASE.

In March, 2016, Karrlee Clements was charged by Information with one count of Identity Theft in the First Degree and one count of Theft in the First Degree. CP 1-3. The State accused her of accessing and making a series of sizeable electronic withdrawals from Catherine

Clements's<sup>1</sup> Vanguard account without her knowledge over a 15-month period in 2014-2015.

The State's case relied on computerized financial records such as account statements, emails, transaction confirmations, and tax statements purporting to show withdrawals from Catherine's Vanguard account and deposits into another bank account and pre-paid cards. Rather than present live testimony, the State sought to introduce three categories of electronic records into evidence as business records via RCW 10.96.030: (1) withdrawals from Catherine's Vanguard account; (2) deposits into, and purchases using, an American Express account in Catherine's name; and (3) deposits into, and purchases using, a Bancorp bank account in Karrlee's name. CP 81-83; Exhibits 1, 60-76, 78-85.

Defense counsel opposed admissibility because the supporting declarations did not meet RCW 10.96.030's requirements for admissibility, such as including contact information and being authored by a qualified witness. RP 60-61; 95-104. Citing RCW 10.96.030(4), the trial court ruled the defendant had waived any objection to the sufficiency of the declarations by not objecting early enough, and admitted the business records and their declarations as separate exhibits. RP 103-04.

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<sup>1</sup> Karrlee and Catherine are mother and daughter. Since they share the same last name, Catherine Clements will be referred to as "Catherine."

During Catherine's testimony, the State elicited testimony about a seven-year-old act committed by another person – Rocco Morse, Jr., the father of two of Karrlee's children. RP 338. After the court ruled such evidence would violate ER 404(b) and instructed the State to make no further associations between Clements and the prior act, and even though the witness never gave the proffered testimony, the State continued associating her to it during testimony and closing argument.

The case was submitted to the jury on February 1, 2017. After announcing it had reached a verdict, the jury returned to the courtroom and presented its verdicts to the court. RP 338. After the court received them, the clerk read the verdicts in open court: the jury convicted Clements of two counts of theft in the first degree, along with a "major economic offense" special finding. CP 150-52 (App. D); RP 338-40. Neither the judge, the clerk who announced the verdicts nor any of the jurors indicated any issue with the verdicts. After polling the jurors, the court announced the trial was concluded and discharged them:

That completes the polling of the jury. This will bring the proceedings to a conclusion. You are all now discharged as jurors and discharged from my instructions regarding independent research and speaking about the case. You are free to talk to anyone you wish, and you're also free to decline to talk to anyone.

\* \* \*

So, on behalf of the court, Benton-Franklin County Superior Court, we want to thank you all for your service. These are never easy decisions. It's not a particularly easy process either. So, thank you for coming and doing your civic duty. You are excused.

RP 343-44.

After the jury left the courtroom, defense counsel said he'd heard something "odd" when the clerk read the verdicts. After reviewing the verdicts again, the judge directed the clerk to stop the jurors from leaving the building, and informed the parties it would tell the jurors there was an error and instruct them to deliberate further using four blank verdict forms.

RP 347. After the jury re-assembled in the courtroom, and without considering whether the jurors had been exposed to extra-judicial information or discussed the case among themselves after being discharged, the court told them there was an error "on one of the four verdict forms" and sent them back out. Contrary to what it had just told the parties and the jury, the court then had the State prepare a brand new set of verdict forms, which were handed to the jury without affording defense counsel an opportunity to review them. RP 349, 353-54. After the jury returned with a second set of verdicts, convicting Clements of theft and identity theft, the court excused it for a second time. RP 353.

At sentencing, the defense requested a first-time offender waiver, while the State requested a 21-month exceptional sentence representing

“one month for every \$10,000 that was stolen.” 2/23 VRP at 5. The court entered a finding regarding the amount at issue and sentenced Clements to 20 months on each count. CP 167-78.

IV. ARGUMENT.

A. THE TRIAL COURT ADMITTED  
UNAUTHENTICATED BUSINESS RECORDS  
CONTRARY TO STATE LAW.

At trial, the State offered three authenticating declarations<sup>2</sup> into evidence as their own one-page exhibits, with no financial records attached. As explained below, none of the declarations met RCW 10.96.030’s threshold requirements to be admissible as evidence in a criminal trial.

1. Authentication of Business Records Requires  
Strict Compliance with RCW 10.96.030.

Business records of regularly conducted activity are admissible as an exception to the rule against hearsay, but only in accordance with specific statutory procedures set forth in RCW Chapter 5.45. See ER 803(a)(6). RCW 5.45.020 provides:

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<sup>2</sup> For ease of reference, the affidavit (Ex. 57), declaration (Ex. 77) and certification (Ex. 86) involved in this case will be collectively referred to as the declarations.

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The statute does not require examination of the person who actually made the record; testimony “by one who has custody of the record as a regular part of his work or has supervision of its creation (“other qualified witness” under the statute) will suffice.” *State v. Ben-Neth*, 34 Wn. App. 600, 603, 663 P.2d 156 (1983). Computerized records are treated the same as other business records, but the proponent must show that “the sources of information, method and time of preparation were such as to justify admission.” *Id.*

The trial court admitted the records based on RCW 10.96.030 (Appendix A), a 2008 statute enacted to facilitate the production of business records in criminal cases. Whereas RCW 5.45.020 still requires live testimony in civil trials, RCW 10.96.030 allows records to be admitted in criminal trials in lieu of live testimony, but only if the supporting declaration meets specific conditions. Beginning with its opening sentence, the statute is clear about what must be included for the records to be admissible (emphasis added):

. . .the recipient of criminal process shall verify the authenticity of records that it produces by providing an affidavit, declaration, or certification **that complies with subsection (2) of this section**. The requirements of RCW 5.45.020 regarding business records as evidence may be satisfied by an affidavit, declaration, or certification **that complies with subsection (2) of this section**. . .

The need for a compliant declaration as a condition to admissibility is reiterated in the opening words of the next section:

**To be admissible** without testimony from the custodian of records, **business records must be accompanied by an affidavit, declaration, or certification by its record custodian or other qualified person that includes contact information for the witness completing the document and attests to the following:**

- (a) The witness is the custodian of the record or sets forth evidence that the witness is qualified to testify about the record;
- (b) The record was made at or near the time of the act, condition, or event set forth in the record by, or from information transmitted by, a person with knowledge of those matters;
- (c) The record was made in the regular course of business;
- (d) The identity of the record and the mode of its preparation; and
- (e) Either that the record is the original or that it is a duplicate that accurately reproduces the original.

RCW 10.96.030(2) (emphasis added).

It logically follows that, absent a declaration from a custodian or other qualified person that complies with (2), the records are not admissible. This deductive reasoning was integral to the decision in *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001). In *Neal*, the trial court admitted a lab report which failed to include information required by court rule (the name of the person from whom the substance or object was

received); instead, the report stated it was received from the Tacoma Crime Laboratory Evidence Vault. After holding the language required strict compliance, *Id.* at 608, the Court reasoned:

If the certification strictly complies with the requirements of the rule, the report is admissible (even over objection) without further proof or foundation. See CrR 6.13(b)(1). “Shall be admitted” thus means that a certificate that strictly complies with the rule qualifies as a hearsay exception and will survive a hearsay objection. The converse is that a certificate that does not strictly comply with the rule is hearsay. In the face of a validly stated objection that the certificate is defective, the report is hearsay evidence and further proof or foundation in the form of witnesses is required.

*Neal* at 609-10.

The Court ultimately held the State’s failure to comply with the rule’s requirements mandated exclusion of the report. *Neal* at 610-11; *State v. Nation*, 110 Wn.App. 651, 665, 41 P.3d 1204 (Div. III 2002) (CrR 6.13(b) “does not violate a defendant's constitutional right to confront witnesses *so long as all of its substantive requirements are strictly complied with*”) (emphasis added). Although RCW 10.96.030 does not explicitly mandate exclusion, as the court rule in *Neal* did, the Court’s logical analysis of the rule’s mandatory language applies – business records unsupported by a declaration which complies with RCW 10.96.030(2) are inadmissible hearsay.

2. The Declarations Failed to Satisfy RCW 10.96.030(2).

There is virtually no case law interpreting RCW 10.96.030, but considerable case law interpreting RCW 5.45.020. Although they involved live testimony, a survey of business records cases decided under RCW 5.45.020 demonstrates, by contrast, the insufficiency of the declarations in the present case.

a) Identity of Records and Mode of Preparation.

Two of the declarations (Ex. 57 and 86) fail to identify the records, and none include any information about how they were prepared, the most basic information the statute requires. Boilerplate recitals that the records were kept in the regular course of business are not sufficient, as attesting to the records being made in the regular course of business [RCW 10.96.030(2)(c)] is distinct from identifying the records and their mode of preparation [RCW 10.96.030(2)(d)].

The need for information about how the records were prepared takes on greater importance when the records are computer-generated. For example, in *Ben-Neth*, the court held the computerized bank records had been properly authenticated because the witness was familiar with the bank's recordkeeping procedures and was able to describe the method for retrieving monthly account statements from the computer. *Ben-Neth* at

604. Criminal cases decided under RCW 5.45.020 also hold that failure to meet the statutory requirements precludes admissibility.

In *State v. Hopkins*, 134 Wn.App. 780, 142 P.3d 1104 (Div. II 2006), the court held the State “failed to establish the necessary prerequisites for the business record exception [because the witness] did not testify how the reports were made or whether they were produced in the regular course of business.” *Hopkins* at 789; *State v. Smith*, 55 Wn.2d 482, 484, 348 P.2d 417 (1960) (subscribing witness was qualified because testimony disclosed “he had intimate knowledge of the mode of preparation. The particular records were taken by [him] from their customary place of deposit in the shop”); *State v. Walker*, 16 Wn.App. 637, 557 P.2d 1330 (Div. I 1976) (error to allow officer to testify about a computer report absent a proper business records foundation); see also *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (“[a]ppropriate testimony must establish its identity and mode of preparation in order to lay a foundation for admission”); *State v. Low*, 192 Wash. 631, 74 P.2d 458 (1937).

b) Witness’s Contact Information.

The affidavit from The Vanguard Group (Ex. 57) is printed on a single sheet of white paper signed by Nichole Lobodzinski, Vanguard’s custodian of records. It does not include the witness’s contact information,

nor is it on Vanguard letterhead (while letterhead is not statutorily required, it would contain some contact information). The affidavit does not satisfy RCW 10.96.030(2), which mandates inclusion of “contact information for the witness completing the document.”

c) Absence of Qualified Witness.

Both statutes require “testimony” from either (a) the records custodian or (b) some other qualified person. Although the courts broadly construe the terms “custodian” and “other qualified person,” both statutes require evidence of the witness’s qualifications. For example, in *State v. Weeks*, 70 Wn.2d 951, 425 P.2d 885 (Div. II 1967), the court held that a hospital record, which had been received and relied upon by a testifying physician, was not competent evidence because “[t]here was no evidence by the custodian of the records of the Arkansas hospital or by any other qualified person that the document in question was a business record . . .” *Weeks* at 953; *Walker* at 640. RCW 10.96.030(2) is more specific than RCW 5.45.020, explicitly requiring that, if someone other than the records custodian is involved, the declaration must “set[] forth evidence that the witness is qualified to testify about the record.”

The American Express declaration (Ex. 77) reveals the declarant, Paula Coleman, is not the records custodian, but is an assistant to the (unidentified) custodian. It is unclear whether she is an Assistant Records

Custodian, or merely a “regular” office assistant to the unnamed custodian, bearing no custodian-type powers or responsibilities. Regardless, while an assistant could be an “other qualified person,” depending upon her job duties, Ms. Coleman did not write anything in the section that specifically requested a description of her qualifications to authenticate the records, or even check the box indicating she was qualified to testify the attached records were authentic.

Similarly, the Bancorp certificate (Ex. 86) contains no showing as to how Ms. Mathews’s job as an “AML Litigation and Subpoena Senior Analyst” qualifies her to attest to the authenticity of a multinational corporation’s computerized banking records, or even that she holds any custodian-type duties. This job title is not explained (for that matter, it is unclear what AML means). As with Ex. 77, the certification sets forth no evidence or information about how she is qualified to testify to the records’ authenticity, an indispensable requirement for non-custodians.

As the *Hopkins* court said, in words apt to the case at bar, “[w]hile the State is undoubtedly correct that medical records can be admitted under the business records exception, the State is not excused from laying the appropriate foundation.” *Hopkins* at 789. For the reasons set forth above, because the declarations did not meet the threshold requirements of

RCW 10.96.030(2), the records were unverified and inadmissible. *Neal*; *Weeks*; *Walker*, supra.

3. The Trial Court Erroneously Ruled Clements Could Not Object to the Defective Declarations.

Citing RCW 10.96.030(4), the court concluded that, because Clements' attorney did not object early enough, there was no barrier to admissibility. RP 103-04. The court's decision was flawed in two respects: (1) it misconstrued the language of RCW 10.96.030; and (2) noncompliance with RCW 10.96.030(2) meant the records were inadmissible.

a) The Plain Language Precludes Admissibility.

If statutory language is unambiguous, the plain language controls. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). A court may neither add words or clauses to, nor delete language from, an unambiguous statute. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutory construction is reviewed de novo. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013).

In contrast to RCW 5.45.020, which merely states records are competent evidence if the witness testifies to the listed characteristics, RCW 10.96.030 repeatedly states - no fewer than three times - that, in order to be admissible, the accompanying affidavit, declaration, or

certification must comply with (2). The plain language allows for only one interpretation: in order “[t]o be admissible without testimony,” the business records “must be accompanied by an affidavit, declaration, or certification” that complies with RCW 10.96.030(2). As was the case in *Neal*, the language demonstrates strict compliance is required. To paraphrase *Neal*, this Court should hold “it is error to admit [computerized business records] in lieu of testimony if the certificate does not meet the requirements of [RCW 10.96.030].” *Neal* at 612.

b) The Court Misconstrued the Language of RCW 10.96.030.

It is well-established that each word in a statute is to be given meaning, that the courts assume the drafters used no superfluous words, and that no portion should be rendered meaningless or superfluous. *Roggenkamp* at 624. A related rule of statutory construction is that, when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word. *Id.* at 625.

The trial court overruled the defense’s objection based on its interpretation of RCW 10.96.030(3) and (4), which provide:

(3) A party intending to offer a record into evidence under this section must provide written notice of that intention to all adverse parties, and must make the record and affidavit, declaration, or certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. A motion opposing admission in evidence of the record shall be made and determined by the court before trial and with sufficient time to allow the party offering the record time, if the motion is granted, to produce the custodian of the record or other qualified person at trial, without creating hardship on the party or on the custodian or other qualified person.

(4) Failure of a party to timely file a motion under subsection (4)<sup>3</sup> of this section shall constitute a waiver of objection to admission of the evidence, but the court for good cause shown may grant relief from the waiver. When the court grants relief from the waiver, and thereafter determines the custodian of the record shall appear, a continuance of the trial may be granted to provide the proponent of the record sufficient time to arrange for the necessary witness to appear.

RCW 10.96.030 references two types of relevant documents: (a) the affidavit, declaration, or certification; and (b) the record(s). Of greatest significance is the phrase “affidavit, declaration, or certification,” which appears four times, three of which are in the context of mandatory compliance with (2). The word “record,” which appears 13 times, refers to the actual records. The final appearance of “affidavit, declaration, or certification” in (3) is the clearest evidence that, contrary to the trial court’s construction, the motion/waiver does not apply to whether a declaration is facially defective (emphasis added):

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<sup>3</sup> Since there is no “motion under subsection (4),” a strict literal reading would mean the court could not have found Clements failed to file such a motion.

A party intending to offer a record into evidence under this section must provide written notice of that intention to all adverse parties, and must make *the record and affidavit, declaration, or certification* available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Not only does “and” distinguish “record” from “affidavit, declaration, or certification,” the end of the sentence highlights they are distinct categories. The next sentence – the trial court’s stated justification for admitting the records - refers to only one of those: a “motion opposing admission in evidence of the record. . .” In light of the immediately preceding sentence, and the distinction in terms evident throughout the statute, the only interpretation which affords meaning to the statutory language used is that it refers to a motion or objection having to do with a particular record, not whether a declaration meets RCW 10.96.030’s threshold requirements.

In that regard, a business record could satisfy the statute’s requirements, yet include objectionable content such as hearsay, opinions about the defendant’s guilt, uncharged prior bad acts, or testimonial statements, while other records contain no objectionable material. See *State v. White*, 72 Wn.2d 524, 530, 433 P.2d 682 (1967). For example, some of the Vanguard records contained objectionable references to fraud and “Account Concern.” See Ex. 78, 81-83.

The trial court conflated “record” and “affidavit, declaration, or certification” into “record,” ignoring the distinction in terms. Viewed another way, the court unconstitutionally added language to the statute, effectively inserting “or affidavit, declaration, or certification” into the second sentence of (3). In doing so, the court made the mandatory language (“shall/must”) of RCW 10.96.030(1)-(2) superfluous by concluding it need not be honored if the defendant’s attorney fails to object early enough, thereby granting priority to (4) over (1)-(2).

In the only reported case addressing RCW 10.96.030, *State v. Lee*, 159 Wn.App. 795, 247 P.3d 470 (Div. I 2011), *rev. denied*, 177 Wn.2d 1012 (2013), the court focused on whether admitting the business records violated the Confrontation Clause. *Lee* at 814-18. Nothing in the opinion suggests any defects in, or challenges to, the affidavit; to the contrary, the opinion confirms it conformed to the statute. *Lee* at 817 (“[i]n accordance with RCW 10.96.030, the cell phone records were properly authenticated by affidavits from the record custodians”).

The *Lee* court’s discussion of the waiver language was limited to concluding that, because the defendant never raised any challenge to the records in the trial court, he waived the issue. *Lee* at 814.<sup>4</sup> Unlike *Lee*, Clements challenged admissibility based on the facially flawed

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<sup>4</sup> However, the court still analyzed the issue because it involved a manifest error affecting a constitutional right.

declarations. More importantly, the court emphasized that a compliant declaration was necessary for business records to be admissible:

**RCW 10.96.030(2) requires that** “to be admissible without testimony from the custodian of records, business records must be accompanied by an affidavit, declaration, or certification by its record custodian or other qualified person....” **The affidavit must include:** ‘contact information for the witness. . .

*Lee* at 817 (emphasized portions are the court’s analysis).

c) Rule of Lenity.

Even if this Court determined the language is ambiguous, such that (3)’s reference to “record” could also include “affidavit, declaration, or certification,” according to the Rule of Lenity, an ambiguous statute must be strictly construed in a criminal defendant’s favor, and will be interpreted adversely to her “only if statutory construction ‘clearly establishes’ that the legislature intended such an interpretation.” *State v. Evans*, supra, at 193 (citing *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 219 P.3d 686 (2009)). The trial court failed to adhere to this rule, and construed the statute in the State’s favor. The court’s conclusion that allowing the objections would be contrary to the statute’s purpose, RP 103, indicates it looked beyond the plain language. Should the Court reject the defendant’s plain language argument, the motion/waiver language should be strictly construed to only apply to the “records” themselves.

d) The Error Was Not Harmless.

The State bears the burden of proving erroneously admitted evidence was harmless beyond a reasonable doubt. *State v. Mancilla*, 197 Wn.App. 631, 641, 391 P.3d 507, 512 (Div. III 2017). The business records permeated the State's case: nearly every witness referred to them, the State used Powerpoint slides to summarize them, CP 21-24, and at least one law enforcement witness devoted the majority of his testimony to reading and, at times, interpreting them. RP 154-85. Without the electronic records, the State would have been unable to track the withdrawals and deposits, and would have had difficulty surviving a motion to dismiss. Given the State's heavy reliance on the business records to establish the elements of both offenses, the error in admitting them was not harmless.

For the reasons set forth above, Defendant requests the Court clarify that strict compliance with RCW 10.96.030 is required, and that inclusion of the information mandated by RCW 10.96.030(2) is the minimum requirement for admitting business records in lieu of testimony in criminal trials.

**B. THE COURT ALLOWED IRRELEVANT AND PREJUDICIAL TESTIMONY.**

ER 404(b) excludes evidence of prior bad acts because it "presents a danger that the defendant will be found guilty not on the strength of

evidence supporting the current charge, but because of the jury's overreliance on past acts as evidence of his character and propensities.” *State v. Slocum*, 183 Wn.App. 438, 442, 333 P.3d 541 (2014). Evidence of prior crimes “must be closely scrutinized,” *State v. Sartarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982), and a trial court “must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). ER 403 requires exclusion of evidence, even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice.

Just prior to a morning recess, the State elicited testimony about the defendant’s ex-husband, Rocco Morris, Jr., allegedly running up unauthorized charges on a credit card in Catherine’s name seven years earlier. RP 224. When asked for an offer of proof, the prosecutor responded he wanted to show “we’ve got a person associated with the defendant who fraudulently used Mrs. Clements’ credit card.” RP 228-29. After defense counsel objected, and the court learned Karrlee was not involved in the 2010 crime (the conclusion it had drawn from the testimony), it ruled:

That would not be appropriate, but I do think it would be appropriate to correct the impression that the jury may have that the defendant is the one who misused that card and ran up the \$10,000.00. If you want to argue that that made Catherine Clements more careful, I don't see a problem with

that so long as you don't, again, associate the defendant with the misappropriation that apparently occurred several years ago.

RP 231.

When the trial resumed, the prosecutor did not correct the misimpression the jury was given before recess. Instead, at the very end of the testimony (ten pages later in the RP), after eliciting more testimony about the intimate nature of Karrlee's association to Rocco - that they had children together, had been living together seven years earlier, and whether or not they were formally married - the State re-emphasized Rocco's actions, then added Karrlee "wasn't charged." RP 242. This was hardly clearing up the mis-impression the court expressed concern about, and violated the court's ruling to make no further association between Karrlee and the incident.

The court's sole justification for allowing the testimony, that the incident caused Catherine to give Karrlee some sort of warning and/or be more careful, was erroneous because a non-witness's seven-year-old actions with a credit card was neither relevant nor necessary to prove any of the elements, especially given the seven-year gap. Perhaps most importantly, the record reflects Catherine never testified to doing either, RP 242, eliminating whatever conditional relevance it might have had, and making the prosecutor's reference to it in closing argument improper.

*State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d. 43 (2011) (improper vouching occurs when prosecutor indicates evidence not presented at trial supports a witness's testimony).

The court also failed to consider the prejudicial effect of allowing evidence of someone else's prior theft-like action to be admitted in a theft trial. Evidence of prior bad acts is presumed prejudicial, ER 404(b), but this evidence was even more prejudicial, allowing the jury to infer guilt from her association to her ex's seven-year-old act. A jury could easily assume Clements was involved in Morse's crime once the State informed it they had been living together, an association the State continued making after the court admonished it to make no further associations. RP 241-42, 316.

The State never elicited the testimony it claimed made the evidence relevant, so even ER 401 did not justify allowing the testimony. Since there was no contention that Clements was involved in Morse's seven-year old crime, the State's repeated references to how she was related to, and living with, the person who committed it compounded the prejudicial effect. In a case involving theft and identity theft charges, repeatedly associating the defendant to a theft-like incident she was not involved in, while emphasizing her intimate relationship to that person, violated ER 403. Due to the lack of relevance to any of the elements and

the prejudicial effect, and given that the witness never gave the proffered testimony, the testimony should have been excluded.

C. THE JURY INSTRUCTIONS OMITTED THE DEFINITION OF “BY COLOR OR AID OF DECEPTION” AND INSTRUCTION NO. 8 OMITTED AN ESSENTIAL ELEMENT.

A to-convict jury instruction must contain all of the elements of the crime because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The jury has the right to regard the to-convict instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand. *Id.* at 263. It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element or if the jury might assume that an essential element need not be proved. *Id.*

In general, an instruction that relieves the State of its burden to prove an element of a crime is presumed prejudicial and requires reversal. *State v. Silbert*, 168 Wn.2d 306, 312, 230 P.3d 142 (2010). Where a to-convict instruction omits an essential element, it is constitutionally defective and the remedy is a new trial unless the State can prove the omission was harmless beyond a reasonable doubt. *State v. Kirwin*, 166 Wn.App. 659, 669, 271 P.3d 310 (2012). Although the instructions were

not objected to at trial, omitting an essential element is considered a manifest error affecting the right to due process which may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2012). Jury instructions are reviewed de novo. *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009).

1. Instruction No. 8 Omitted the Essential Element of Knowledge.

In *State v. Zeferino-Lopez*, 179 Wn.App. 592, 319 P.3d 94 (Div. I 2014), the court held that identity theft's knowledge element refers not only to the defendant's knowledge that he is using or possessing a means of identification or financial information, but also knowledge that it was a means of identification or financial information of another person, living or dead. *Zeferino-Lopez* at 599. In response to the court's holding, since 2015, WPIC 131.02 includes this separate knowledge element as (3), and the Comment references both *Zeferino-Lopez* and the need to include the element. The to-convict instruction in this case, CP 135, is contrary to the pattern instruction and omits this essential element, requiring reversal.

2. The Theft Instructions Omitted the Definition of By Color or Aid of Deception.

In *State v. Casey*, 81 Wn.App. 524, 915 P.2d 587 (1996), *rev. denied*, 130 Wn.2d 1009, 928 P.2d 412 (1996), Division One held that "reliance" is an essential element of first degree theft by color or aid of

deception, and defined reliance as deception that “in some measure operated as inducement.” *Casey* at 527–529. More recently, in *State v. Knutz*, 161 Wn.App. 395, 253 P.3d 437 (2011), the court rejected the defendant’s claim that the instructions failed to include this element because they:

. . . expressly informed the jury that the element “[b]y 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 [the] deception be the sole means of obtaining the property or services.” This jury instruction tracks almost identically the approved language from *Casey*, which under *Casey*’s definition of “reliance,” the trial court’s jury instruction clearly included as an element.

*Knutz* at 404-05 (internal citations omitted).

In contrast to *Knutz*, not only was WPIC 79.03, the definition of “by color or aid of deception,” absent from the instructions, the instructions also omitted the basic theft definition, WPIC 79.01.

Constitutional error is presumed prejudicial, and the State bears the burden of proving beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Smith* at 264. Since the instructions omitted essential elements for both offenses, the error was neither trivial nor academic. Due to the omissions, the jury was forced to guess at the meaning of “by color or aid of deception” and was never

informed the State needed to prove the “reliance” element. The instructions violated due process and the right to a fair trial. *Smith*, supra.

D. THE SECOND SET OF VERDICTS, RENDERED AFTER THE JURY HAD BEEN DISCHARGED AND EXCUSED, VIOLATED THE DEFENDANT’S RIGHT TO TRIAL BY JURY.

Under the Sixth Amendment to the United States Constitution and article I, Sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). If a court imposes a sentence not authorized by the jury's verdict, harmless error analysis does not apply. *Id.* at 900–01.

A jury returns a verdict when all members have agreed upon the verdict and the presiding juror completes and signs the verdict form, returning it to the judge in open court. CrR 6.16(2). No statute authorizes post-discharge replacement verdicts, and the Washington courts have consistently cited the jury’s discharge as the point after which their verdicts may not be changed. Most Washington cases have involved a judge changing the jury’s verdict, with only a few discussing if and when a jury may change a delivered verdict.

In *State v. Badda*, 68 Wn.2d 50, 411 P.2d 411 (1964), the defendant was charged with Robbery in the Second Degree, but one of the

verdict forms said Burglary in the Second Degree. Everyone recognized the error as soon as the verdict was read; the jury had not been discharged, or even polled. *Badda* at 59. For those reasons, the Court allowed the jury to correct its verdict. *Id.* at 60. None of those facts exist in this case.

In contrast to *Badda*, the record establishes the jury had been polled, and the court had declared the proceedings concluded, discharged the jurors, released them from their collective oath, thanked them for their service, and excused them, and they had left the courtroom before the error was discovered. RP 343-44. No Washington case has involved such a factual scenario, but the courts have historically emphasized discharge as the line in the sand.

The most recent case discussing this issue is *State v. Morales*, 196 Wn.App. 106, 383 P.3d 539 (Div. I 2016), *rev. denied*, 187 Wn.2d 1015 (2017), where the defendant was charged with Child Molestation in the First Degree, but the verdict convicted him of Child Molestation in the Second Degree. A week after discharging the jury, and in response to the defendant's motion to set aside the verdict, the court corrected the verdict and sentenced him for the greater crime. *Morales* at 109-110. The court's analysis of *Badda* emphasized that its jury had not been discharged: "We read this to mean that a jury has the authority to correct its verdict until it is discharged." *Id.* at 115.

The *Morales* court also quoted *Beglinger v. Shield*, 164 Wash. 147, 2 P.2d 681 (1931), a case also relied upon in *Badda*:

The power of the jury over their verdict, unlike that of the court, ceases on their discharge. With their assent to the verdict as recorded their functions with respect to the case cease, and the trial is closed, and after the verdict is received and the jury discharged the control of the jury is at an end, and they cannot be recalled to alter or amend it.

*Beglinger* at 152 (quoting 27 R. C. L. 985).

The court ultimately held the sentence was invalid because it was not authorized by the jury's verdict. *Morales* at 121-22. Although *Morales* involved a judge changing the verdict, the court's re-affirmation of the longstanding rule that verdicts may not be corrected after the jury is discharged applies to the present case. Like *Morales*, the replacement verdicts caused Clements to be convicted and sentenced for a greater crime.

The transcript omits relevant time references, but the Clerk's Minutes indicates at least 16 minutes passed between the jury's verdicts and their re-assembly in the courtroom, CP 165-66, yet the record is devoid of information about what happened during that time: Did any jurors call, text or email a loved one or friend to tell them what happened? Did any of them discuss any aspect of the case, including what they had just witnessed in the courtroom? Even googling the defendant's name on a

smartphone would have produced articles about her and the case posted on local newspaper and television station websites. These, and other, unanswered questions affected their qualifications to serve. Last, but certainly not least, the fact that the discharged jury was not sworn vitiates the subsequent verdicts. See CrR 6.6 (jury “shall be sworn”).

No Washington case has allowed a court to “un-discharge” a discharged jury and send it back to re-deliberate with a new set of verdict forms after the jury has delivered its verdicts, the verdicts have been read and delivered in open court, the court has declared the proceedings concluded, the jury has been polled, and the jurors have been discharged, excused and left the courtroom. In the civil context, since the jury had been formally discharged, state law would have mandated a new trial:

In all cases where a jury are discharged or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial or after the cause is submitted to them, the action shall thereafter be for trial anew.

RCW 4.44.340.

For at least eighty years, the Washington courts have held a verdict cannot be changed once the jury is discharged, and the replacement verdicts rendered by the unsworn jury in this case are contrary to Article I, Sections 21 and 22 of the Washington Constitution.

E. THE DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.

To prevail on a claim of ineffective assistance of counsel, the defendant must establish (1) counsel's performance fell below the standard of reasonableness; and (2) the defendant was prejudiced by that performance. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In reviewing the first prong of the *Strickland* test, the appellate courts presume defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. *Strickland*, 466 U.S. at 689-90; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To establish prejudice, a defendant must show that, but for counsel's performance, the result would have been different. *State v. McNeil*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

In *McNeil*, the court held counsel's failure to object to inconsistent verdicts was tactical because "[h]ad McNeal objected at trial to the apparent inconsistency between jury verdicts, the trial court might well have ordered the jury to resume deliberations in order to resolve the alleged inconsistency," which would have resulted in an additional special finding and a longer sentence. *McNeil* at 363. By not objecting, McNeal's

counsel “eliminated the possibility that the jury might harmonize the verdicts in a way that would not have been favorable to his client.” *Id.*

The instant case presents the opposite scenario. Knowing that his client had been convicted of a lesser crime, counsel took action he knew, or should have known, would result in his client being convicted of a greater crime. There is no possible tactical explanation for counsel’s action. Clements was prejudiced because, but for counsel’s action, she would not have been convicted of identity theft since, as explained in *D.*, *supra*, the judge could not have legally changed the verdict. Clements would have been entitled to a mistrial or a new trial. CrR 7.5(a)(5), (7).

A reasonable attorney, faced with the unusual circumstance of his client being convicted with two sets of verdicts, one set coming after the trial had concluded, would have, at minimum, investigated the issue, which would have produced the cases cited in this brief. Such an attorney would have also moved for a new trial based on the fact that the jury had been discharged. Counsel’s failure to do any of these things after the verdicts fell below an objective standard of reasonableness.

F. THE TRIAL COURT COMMITTED SENTENCING ERRORS WARRANTING A REVERSAL OF THE EXCEPTIONAL SENTENCE.

1. The Trial Court Miscalculated the Defendant's Offender Score and Standard Ranges.

When calculating a defendant's offender score, current convictions are counted separately unless some or all of the convictions are the same criminal conduct. RCW 9.94A.589(1)(a). Multiple convictions are the same criminal conduct if the offenses: (1) required the same criminal intent, (2) were committed at the same time and place, and (3) involved the same victim. *Id.* The sentencing court must correctly calculate the standard range before imposing an exceptional sentence, and failure to do so is legal error subject to de novo review. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). In such a case, remand is the remedy unless the record clearly indicates the court would have imposed the same sentence anyway. *Id.* The trial court counted the defendant's offenses separately, CP 168, even though the charging document and evidence and arguments presented at trial established all three elements.

The Information establishes the second and third prongs: both counts alleged the offenses occurred "during the time intervening between the 1<sup>st</sup> day of May, 2014, and the 1<sup>st</sup> day of September, 2015" and that both offenses were committed against the same victim – Catherine Clements. CP 1-2. The Information also establishes the first prong by

specifying the same criminal intent for both offenses: Count II specifically alleged the identity theft was committed “with the intent to commit or to aid or abet any crime, to wit: theft . . .” CP 2.

As part of the same criminal conduct analysis, courts consider whether one crime furthered another. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Whether consideration is limited to the charging document, or broadened to include the evidence and arguments presented at trial, there should be no doubt that the identity theft furthered the electronic theft of funds and that, but for the identity theft, the electronic withdrawals would not – and could not - have occurred. Finally, the State’s arguments that Clements committed the identity theft in order to remove money from Catherine’s account, see RP 314, furnished additional support. The court misapplied the law by counting the offenses separately, resulting in an erroneous offender score calculation. With an Offender Score of 0, the defendant’s standard range for the identity theft would be 3-9 months, while the standard range for the theft would be 0-90 days. The findings of fact underlying the exceptional sentence recite the incorrect standard range for both offenses, and are therefore erroneous. CP 176 (Finding #2, 5).

In considering whether remand for re-sentencing was necessary, the *Parker* Court explained:

We are hesitant to affirm an exceptional sentence where the standard range has been incorrectly calculated because of the great likelihood that the judge relied, at least in part, on the incorrect standard ranges in his calculus. Affirming such would uphold a sentence which the sentencing judge might not have imposed given correct information and would defeat the purpose of the SRA.

*Parker* at 190.

The Court held the error was not harmless because it appeared likely the exceptional sentence was based on the incorrect standard range. *Parker* at 192. In the present case, the judge stated his consideration was “between the 12 months that’s the top of the range for Count II and the 21 months the State is asking for. . . .12 months versus 21 months, I could go either way on that, I think.” 2/23VRP at 16. As in *Parker*, the exceptional sentence was based on an incorrect standard range, requiring reversal and re-sentencing.

2. The Exceptional Sentence Was Based on Untenable Grounds and Was Clearly Excessive for a First-Time Offender.

When reviewing an exceptional sentence under RCW 9.94A.585(4), the courts review (1) whether the record supports the jury's special verdict on the aggravating circumstances under the clearly erroneous standard; (2) whether, as a matter of law, the reasons justify an exceptional sentence under a de novo standard; and (3) whether the sentence is clearly excessive or too lenient under an abuse of discretion

standard. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). With respect to the sentence's duration, the reviewing court asks whether the grounds relied on in determining the length of the sentence are tenable and whether the amount of incarceration imposed is such that no reasonable person would have imposed it. *State v. Ross*, 71 Wn.App. 556, 569, 861 P.2d 473 (Div. II 1993). In this case, sentencing a defendant to one month for every \$10,000 stolen<sup>5</sup> is an untenable basis for determining the length of the sentence. The sentence was therefore erroneous, contrary to RCW 9.94A.585(4)(a).

Finally, assuming the Court agrees with the same criminal conduct argument, a sentence equivalent to as much as 20 times the standard range for theft for a first-time offender whose offenses involved a single victim is clearly excessive, contrary to RCW 9.94A.585(4)(b). In *State v. Bowen*, 2015 WL 5566281<sup>6</sup> (Div. II 2015), the court reversed a 48-month sentence imposed under the major economic offense prong as "grossly disproportionate" to the standard range of 0-3 months where the defendant repeatedly stole state lottery tickets from her workplace over a 32-month period. Like the defendant in *Bowen*, Clements faced a standard range of 1-3 months for the theft charge, and her 20-month sentence was at least

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<sup>5</sup> Although not included in the jury's special verdict, the court made an additional finding of fact that less than \$210,000 was involved. CP 176 (Finding #4a).

<sup>6</sup> Pursuant to GR 14.1, unpublished opinions are not binding, but are cited for such instructive or persuasive value as the Court deems appropriate.

ten times the standard range. In contrast to *Bowen*, where the State was designated the victim, but the theft arguably affected and potentially defrauded millions of other lottery players, Clements's offenses involved a single victim. The sentence was clearly excessive, contrary to RCW 9.94A.585(4)(b).

G. THE CUMULATIVE EFFECT OF ERRORS DEPRIVED CLEMENTS OF HER FUNDAMENTAL RIGHT TO A FAIR TRIAL.

Where an individual error, standing alone, would be considered harmless, reversal is required where the cumulative effect of multiple errors produce a trial that is fundamentally unfair. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). Here, the combined effect of the admission of the unauthenticated business records, the irrelevant and prejudicial testimony associating Clements with someone else's old theft, the omission of essential elements for both offenses, and the two sets of jury verdicts resulted in a fundamentally unfair trial.

V. CONCLUSION.

For the reasons set forth above, Clements respectfully requests the Court reverse her convictions and remand for a new trial or, in the alternative, reverse the exceptional sentence and remand for re-sentencing.



# APPENDIX A

**RCW 10.96.030****Authenticity of records—Verification—Affidavit, declaration, or certification.**

(1) Upon written request from the applicant, or if ordered by the court, the recipient of criminal process shall verify the authenticity of records that it produces by providing an affidavit, declaration, or certification that complies with subsection (2) of this section. The requirements of RCW 5.45.020 regarding business records as evidence may be satisfied by an affidavit, declaration, or certification that complies with subsection (2) of this section, without the need for testimony from the custodian of records, regardless of whether the business records were produced by a foreign or Washington state entity.

(2) To be admissible without testimony from the custodian of records, business records must be accompanied by an affidavit, declaration, or certification by its record custodian or other qualified person that includes contact information for the witness completing the document and attests to the following:

(a) The witness is the custodian of the record or sets forth evidence that the witness is qualified to testify about the record;

(b) The record was made at or near the time of the act, condition, or event set forth in the record by, or from information transmitted by, a person with knowledge of those matters;

(c) The record was made in the regular course of business;

(d) The identity of the record and the mode of its preparation; and

(e) Either that the record is the original or that it is a duplicate that accurately reproduces the original.

(3) A party intending to offer a record into evidence under this section must provide written notice of that intention to all adverse parties, and must make the record and affidavit, declaration, or certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. A motion opposing admission in evidence of the record shall be made and determined by the court before trial and with sufficient time to allow the party offering the record time, if the motion is granted, to produce the custodian of the record or other qualified person at trial, without creating hardship on the party or on the custodian or other qualified person.

(4) Failure by a party to timely file a motion under subsection (4) of this section shall constitute a waiver of objection to admission of the evidence, but the court for good cause shown may grant relief from the waiver. When the court grants relief from the waiver, and thereafter determines the custodian of the record shall appear, a continuance of the trial may be granted to provide the proponent of the record sufficient time to arrange for the necessary witness to appear.

(5) Nothing in this section precludes either party from calling the custodian of record of the record or other witness to testify regarding the record.

[ 2008 c 21 § 4.]

# APPENDIX B

COMMONWEALTH OF PENNSYLVANIA

:  
: SS  
:

COUNTY OF CHESTER

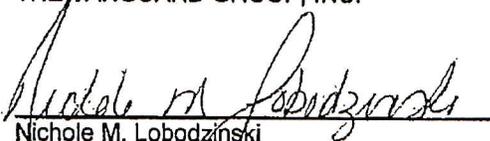
**AFFIDAVIT**

Before me, the undersigned authority, this day personally appeared Nichole M. Lobodzinski, who being duly sworn by me, deposed as follows:

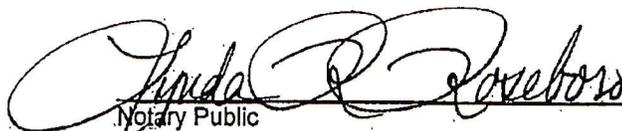
My name is Nichole M. Lobodzinski. I am of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein stated:

I serve as Custodian of Records of The Vanguard Group, Inc. ("Vanguard"). Attached are records kept by Vanguard in the regular course of its business. It is the regular business practice of Vanguard for an employee or representative of Vanguard with knowledge of the act, event, condition or opinion to make the records or to transmit information to be included in such records. The records were made at or near the time of the act, event, condition or opinion. The records attached are the originals or exact duplicates of the originals.

THE VANGUARD GROUP, INC.

  
Nichole M. Lobodzinski  
Custodian of Records

Sworn to and subscribed before me this 22nd day of December, 2016.

  
Notary Public

COMMONWEALTH OF PENNSYLVANIA  
NOTARIAL SEAL  
Lynda R. Roseboro, Notary Public  
Tredyffrin Twp., Chester County  
My Commission Expires Feb. 6, 2020  
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

1 SUPERIOR COURT, BENTON COUNTY, WASHINGTON

2  
3 IN RE: The Search Warrant for:

NO.

4  
5 KPD Case #: 15-28333

6 **DECLARATION OF**  
7 **AUTHENTICATION OF**  
8 **ATTACHED RECORDS BY**  
9 **CUSTODIAN OF RECORDS**

10 I Paula Coleman, state the following under penalty of perjury:  
11 (Print Name)

12 1. I am a/ the:

13 Assistant to the  
14  Custodian of the Records for American Express  
(Name of Business)

15  Qualified person to testify that the attached records are authentic.

16 My qualifications to authenticate the records are (describe):  
17 \_\_\_\_\_  
18 \_\_\_\_\_

19 My contact information is:

20 Printed Name: Paula Coleman Title: Assistant to the Custodian of Records  
21 Address: 777 American Express Way State: Fl. Lauderdale Zip: 33337  
22 Phone: (888) 257-7775 (ext: ) Email: amexsrn@aexp.com

23 2. The attached records were made at or near the time of the act, condition, or event set  
24 forth in the record by, or from information transmitted by, a person with knowledge  
of those matters.

25 3. The attached records were made in the regular course of the business.

26 4. The attached records are (describe what they are/what they show):

27 If issued by a Superior Court Judge and served outside Washington State: This warrant is issued  
28 pursuant to RCW 10.96.020. A response is due within twenty business days of receipt, unless a shorter  
time is stated herein, or the applicant consents to a recipient's request for additional time to comply.

SEARCH WARRANT FOR EMAILING

Page 4 of 5 Summary of Records-lists transactions, amounts, dates, and locations, if  
12.18.14. available.

Customer Profile-lists all demographic information for CM including email,  
address, phone number, SS#, and DOB.

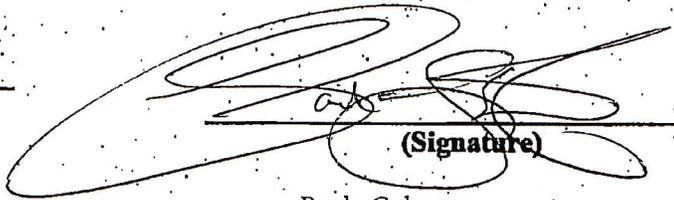
Statement History- lists transaction amounts and dates.

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5. The mode of preparation of the attached records are (describe how the records were prepared): All records were retrieved from American Express systems; copies printed, and forwarded to requestor.
6. The attached records are originals or are duplicates that accurately reproduce the originals.

I state under penalty of perjury that the above is true and correct to the best of my knowledge and understanding.

Date: January 7, 2016



(Signature)

Paula Coleman

(Printed Name)

27. If issued by a Superior Court Judge and served outside Washington State: This warrant is issued pursuant to RCW 10.96.020. A response is due within twenty business days of receipt, unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to comply.

28. SEARCH WARRANT FOR EMAILING



**CERTIFICATE OF AUTHENTICITY OF DOMESTIC BUSINESS  
RECORDS PURSUANT TO FEDERAL RULES OF EVIDENCE 902 (11)**

I, Jamila Matthews, pursuant to 28 U.S. Code § 1746, attest that:

I am employed by The Bancorp Bank; and

That my official title is AML Litigation and Subpoena Senior Analyst.

Each of the produced records is the original or a duplicate of the original records in the custody of The Bancorp Bank. Pursuant to Federal Rules of Evidence Rule 803 (6) (a) through (c)- the produced records are the product of regularly conducted business activity.

I further certify that the documents produced are:

- Made at or near the time of the occurrence of the matters set forth therein, by, or from information transmitted by, a person with knowledge of those matters;
- The records are kept in the course of regularly conducted business activity; and
- The records are made by regularly conducted business activity as a regular practice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 11/22/2016  
Date

  
Signature

Jamila Matthews  
Subpoena Analyst  
Legal Service of Process Team  
The Bancorp

302.385.5053 (o)

409 Silverside Rd, Wilmington, DE 19809

thebancorp.com

# APPENDIX C

INSTRUCTION NO. 8

To convict the defendant of the crime of identity theft in the first degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the time intervening between May 1, 2014 and September 1, 2015, the defendant knowingly obtained, possessed, or used a means of identification or financial information of another person;

(2) That the defendant did so with the intent to commit any crime;

(3) That the defendant obtained money in excess of \$1500 in value from the acts described in element (1); and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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**WESTLAW Washington Criminal Jury Instructions**[Home Table of Contents](#)*WPIC 131.02 Identity Theft—First Degree—Elements*Washington Practice Series TM  
Washington Pattern Jury Instructions--Criminal

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 131.02 (4th Ed)

Washington Practice Series TM  
Washington Pattern Jury Instructions--Criminal  
October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part XIII. Miscellaneous Crimes  
WPIC CHAPTER 131. Identity Theft

WPIC 131.02 Identity Theft—First Degree—Elements

To convict the defendant of the crime of identity theft in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant knowingly [obtained, possessed, or transferred] [or] [used] a means of identification or financial information of another person [, living or dead];
- (2) That the defendant did so with the intent to commit any crime;
- (3) That the defendant knew that the means of identification or financial information belonged to another person;
- (4) That the defendant obtained [credit] [money] [goods] [services] [or] [anything else] in excess of \$1,500 in value from the acts described in element (1); and
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

**NOTE ON USE**

Use this instruction for first degree identity theft cases.

In element (1), the phrase "obtained, possessed, or transferred" is separately bracketed from the word "used." The separate bracketing is intended to emphasize that, for cases in which the defendant is charged only with "use" of the designated items, jurors should not also be instructed with the other statutory terms.

With this instruction use WPIC 131.10 (Identity Theft—Financial Information—Definition), WPIC 131.11 (Identity Theft—Means of Identification—Definition), WPIC 10.01 (Intent—Intentionally—Definition), and WPIC 10.02 (Knowledge—Knowingly—Definition).

Use bracketed material as applicable.

For a discussion of the phrase "any of these acts" in element (5), see the Introduction to WPIC 4.20 and the Note on Use to WPIC 4.21 (Elements of the Crime—Form).

**COMMENT**

RCW 9.35.020(1), (2). 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).

In order to constitute identity theft, the defendant must use the identity of a specific, real person. *State v. Fedorov*, 181 Wn.App. 187, 324 P.3d 784, review denied 181 Wn.2d 1009 (2014); *State v. Hayes*, 164 Wn.App. 459, 262 P.3d 538 (2011).

The term "person" includes corporations. *State v. Evans*, 177 Wn.2d 186, 298 P.3d 724 (2013).

As to element (2), the jury need not be instructed on the elements of the crime the defendant intended to commit, so long as the jury is required to find that a crime was committed and the jury is not left guessing as to which crime the defendant intended to commit.

State v. Fedorov, 181 Wn.App. 187, 324 P.3d 784 (2014), review denied 181 Wn.2d 1009 (2014).

As to element (4), first degree identity theft requires that the defendant obtain \$1,500 in value by the use of the means of identification or financial information.

Possession of another person's identification with intent to commit a crime may constitute second degree identity theft; actual use of the false identification is not required. State v. Sells, 166 Wn.App. 918, 271 P.3d 952 (2012), review denied 176 Wn.2d 1001 (2013), habeas corpus denied Sells v. Warner, August 6, 2014.

For a general discussion of the identity theft statutes, see the Introduction to this chapter, WPIC 131.00.  
[Current as of December 2015.]

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**WESTLAW** Washington Criminal Jury Instructions

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*WPIC79.03* By Color or Aid of Deception—Definition

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11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 79.03 (4th Ed)

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Washington Pattern Jury Instructions--Criminal  
October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part IX. Crimes Against Property  
WPIC CHAPTER 79. Theft—Definitions

WPIC 79.03 By Color or Aid of Deception—Definition

**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.**

**NOTE ON USE**

Use WPIC 79.04 (Deception—Definition) with this instruction.

**COMMENT**

RCW 9A.56.010.  
[Current as of December 2015.]

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*WPIC 79.01 Theft—Definition*

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Washington State Supreme Court Committee on Jury Instructions

Part IX. Crimes Against Property  
WPIC CHAPTER 79. Theft—Definitions

WPIC 79.01 Theft—Definition

### 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] [or]

[by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services] [or]

[to appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive that person of such property or services].

### NOTE ON USE

Use bracketed material as applicable. With this instruction use whichever of the following instructions is appropriate: WPIC 2.21 (Property—Definition), WPIC 10.01 (Intent—Intentionally—Definition), WPIC 79.02 (Wrongfully Obtains—Exerts Unauthorized Control—Definition), WPIC 79.03 (By Color or Aid of Deception—Definition), WPIC 79.04 (Deception—Definition), WPIC 79.05 (Appropriate Lost or Misdemeanor Property or Services—Definition), WPIC 79.06 (Services—Definition), and WPIC 79.20 (Value—Definition).

Do not use this instruction for unlawful issuance of bank checks.

### COMMENT

RCW 9A.56.020.

For a discussion of the different types of theft, see the Comment to WPIC 70.02 (Theft—First Degree—Value of Property—Elements). [Current as of December 2015.]

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# APPENDIX D



JOSIE DELVIN  
BENTON COUNTY CLERK

FEB 01 2017

FILED *RM*

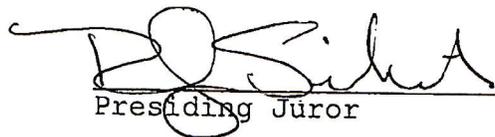
IN THE SUPERIOR COURT OF  
STATE OF WASHINGTON FOR BENTON COUNTY

STATE OF WASHINGTON, )  
Plaintiff, ) No. 16-1-00189-4  
vs. ) VERDICT FORM -II  
KARRLEE THERESA CLEMENTS )  
Defendant.)

We, the jury, find the defendant Guilty  
(write in "not guilty" or "guilty")

of the crime of Theft in the First Degree as charged in Count II.

DATED this 1 day of FEBRUARY 2017.

  
Presiding Juror

FEB 01 2017

FILED *pl*

IN THE SUPERIOR COURT OF  
STATE OF WASHINGTON FOR BENTON COUNTY

STATE OF WASHINGTON, )  
Plaintiff,) No. 16-1-00189-4  
)  
vs. ) SPECIAL VERDICT FORM - A  
)  
KARRLEE THERESA CLEMENTS )  
Defendant.)

We, the jury, having found the defendant guilty of Theft in the First Degree, return a special verdict by answering as follows:

QUESTION [1]:

Was the crime a major economic offense or series of offenses?

ANSWER: YES (Write "yes" or "no")]

We, the jury, having found the defendant guilty of Identity Theft in the First Degree return a special verdict by answering as follows:

QUESTION [2]:

Was the crime a major economic offense or series of offenses?

ANSWER: YES (Write "yes" or "no")]

DATED this 1 day of FEBRUARY 2017.

*[Signature]*  
Presiding Juror

# APPENDIX E

190 Wash.App. 1013

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,  
SEE WA R GEN GR 14.1

Court of Appeals of Washington,  
Division 2.

STATE of Washington, Respondent,  
v.  
Katrina Marie BOWEN, Appellant.

No. 46069-6-II.

Sept. 22, 2015.

Appeal from Lewis County Superior Court; Hon. Richard  
Lynn Brosey, J.

**Attorneys and Law Firms**

Jodi R. Backlund, Backlund & Mistry, Olympia, WA, for  
Appellant.

Sara I. Beigh, Lewis County Prosecutors Office, Chehalis,  
WA, for Respondent.

**UNPUBLISHED OPINION**

BJORGEN, J.

\*1 Katrina Bowen pleaded guilty to first degree theft and stipulated that her crime constituted a major economic offense for which the trial court could impose an exceptional sentence. The trial court did so. Bowen now appeals, contending that her guilty plea was involuntary because there was not a sufficient factual basis for it. Alternatively, Bowen argues that the trial court abused its discretion by imposing a clearly excessive exceptional sentence and erred by ordering her to pay legal financial obligations without first inquiring into her present or future ability to pay. We reject Bowen's contention that her plea lacked a factual basis, agree that the trial court imposed a clearly excessive sentence, vacate the exceptional sentence, and remand for resentencing.<sup>1</sup>

**FACTS**

Bowen worked as a cashier at the Flying K gas station in Lewis County in a position that gave her access to unsold lottery tickets. Bowen availed herself of this access, taking tickets and scratching them off in a search for winners. Bowen admitted to paying for some, but not for all of the tickets she took.

The State charged Bowen, by amended information, with first degree theft in violation of RCW 9A.56.020(1) and RCW 9A.56.030(1)(a). The State alleged that the thefts constituted a major economic offense under RCW 9.94A.535(3)(d).

Bowen agreed to plead guilty. In her statement on plea of guilty, she acknowledged that the State had charged her with first degree theft and that proving the offense required the State to show that "on a date certain in Lewis County" she did "unlawfully take [the] property of another valued in excess of [\$]5000." Clerk's Papers (CP) at 22. In the statement, Bowen was asked "to state what [she] did in [her] own words that ma[de][her] guilty of" the theft offense. She responded that "[b]etween 1-1-12 and 9-30-1[4] in Lewis County I knowingly took property of another (lottery tickets) unla[w]fully—without paying for the tickets, with the intent to deprive the owner." CP at 29.

At the hearing to enter the guilty plea, the trial court held an extensive colloquy to ensure that her plea was done knowingly, voluntarily, and intelligently. Bowen acknowledged that she was not making the plea under threat or because anyone had promised her anything for the plea. Bowen also stated that she understood the rights she was waiving with the guilty plea. When the trial court asked her to explain what made her guilty of the crime, Bowen stated that "I guess I did what I was charged with." Report of Proceedings (RP) (Jan. 29, 2014) at 6. When the trial court pressed Bowen for more details, she said, "I scratched tickets while I worked. I thought I was keeping track of them, pay [sic] for all of them, and I guess I wasn't, and I scratched about 500 per shift." RP (Jan. 29, 2014) at 6-7. The trial court then asked her, "So you were working for the victim and you were ... taking lottery tickets that were not being sold to you and you were scratching them off I assume looking for winners; is that correct?" RP (Jan. 29, 2014) at 7. Bowen replied, "Yes." RP (Jan. 29, 2014) at 7. Bowen then stipulated that the theft constituted a

major economic offense under RCW 9.94A.535(d)(ii) and (iv) and that the trial court could impose an exceptional sentence based on that stipulation.

\*2 The trial court found a factual basis for the guilty plea based on the statement on plea of guilty and the colloquy at the hearing. It entered findings of fact and conclusions of law stating its determination that Bowen had offered the plea knowingly, voluntarily, and intelligently and accepted the plea.

The State sought an exceptional sentence of 24 months' incarceration, noting that a standard range sentence based on Bowen's offender score would be only 3 months' incarceration. Bowen requested leniency based on her acceptance of responsibility for the crime.

The sentencing court imposed an exceptional sentence of 48 months based on Bowen's stipulations. This appeal followed.

## ANALYSIS

### I. VOLUNTARINESS OF THE PLEA

Bowen first contends that the trial court erred by accepting her guilty plea as voluntary because the plea lacked a sufficient factual basis. She argues that the State presented no evidence that she had stolen more than \$5,000 of property of another, an essential element of a first degree theft conviction. The State contends that the record as a whole contained evidence that Bowen stole more than \$5,000. We agree with the State.

The superior court criminal rules prescribe the procedures the trial court must follow before accepting a guilty plea. CrR 4.2. The relevant rule provides that a trial court may not accept a guilty plea "without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). Further, before entering a judgment upon plea of guilty, the trial court must be "satisfied that there is a factual basis for the plea." CrR 4.2(d). This "factual basis" requirement in CrR 4.2(d) protects a defendant from "pleading voluntarily with an understanding of the nature of the charge but without realizing that his [or her] conduct does not actually fall within the charge." *State v. Powell*, 29 Wn.App. 163, 166,

627 P.2d 1337 (1981) (quoting *McCarthy v. United States*, 394 U.S. 459, 467, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)). The requirement is satisfied "if there is sufficient evidence for a jury to conclude that [the defendant] is guilty." *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976) (quoting *United States v. Webb*, 433 F.2d 400, 403 (1st Cir.1970)).

The record contains an adequate factual basis for Bowen's plea. She correctly listed the elements of first degree theft in her statement on plea of guilty and stated that she had committed the crime by taking lottery tickets over a period of 20 months. Bowen stated in open court that she was guilty of first degree theft and, when asked to provide a factual account of her crime, Bowen stated that "I scratched tickets while I worked ... and I scratched about 500 per shift." RP (Jan. 29, 2014) at 6–7. When the trial court followed up, Bowen admitted that the thefts had occurred over a 20-month period. Bowen also stipulated that her offense was a major economic offense under RCW 9.94A.535(3)(d)(ii) because the loss inflicted by her theft was "greater than typical for the offense," meaning greater than \$5,000. RP (Jan. 29, 2014) at 8; see RCW 9A.56.030(1)(a). From this evidence the trial court could readily conclude that Bowen understood that she had committed first degree theft and that there was a factual basis for the plea.

### II. EXCEPTIONAL SENTENCE

\*3 Bowen next contends that the trial court abused its discretion when it imposed an exceptional sentence of four years' incarceration. The State contends that Bowen's stipulation to the major economic offense aggravator provided the authority for the trial court to impose the exceptional sentence. We hold that the exceptional sentence was manifestly unreasonable, vacate it, and remand for resentencing.

The legislature enacted the exceptional sentence provision of the Sentencing Reform Act (SRA), chapter 9.94A RCW, "to authorize courts to tailor the sentence—as to both the length and the type of punishment imposed—to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid." *State v. Davis*, 146 Wn.App. 714, 719–20, 192 P.3d 29 (2008) (quoting *State v. Smith*, 139 Wn.App. 600, 603, 161 P.3d 483 (2007)).

We review an exceptional sentence

us[ing] a three-pronged test: (1) Are the reasons supported by the record under the clearly erroneous standard of review? (2) Do those reasons justify a departure from the standard range as a matter of law? And (3) was the sentence imposed clearly too excessive or lenient under the abuse of discretion standard of review?

*Davis*, 146 Wn.App. at 720. A trial court abuses its discretion under the third prong when it imposes a sentence that is “ ‘clearly excessive,’ “ meaning one based on untenable grounds or reasons or which no reasonable trial court would have imposed. *State v. Bluehorse*, 159 Wn.App. 410, 433–34, 248 P.3d 537 (2011) (quoting *State v. Ritchie*, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995)).

We recognize that our Supreme Court has forbidden mechanical comparisons of exceptional sentences to standard range sentences, *Ritchie*, 126 Wn.2d at 397, and that the sentencing court is not bound by the recommendations of the prosecuting attorney. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003); RCW 9.94A.431(2). However, Bowen's 48–month sentence was grossly disproportionate to the standard range sentence of

zero to three months. Her sentence also greatly exceeded the prosecutor's recommendation for an exceptional sentence of 24 months. We hold that the sentencing court abused its discretion, and we vacate the sentence.

## CONCLUSION

We hold that the record contained an adequate factual basis for the trial court to accept Bowen's guilty plea to the first degree theft charge. However, we hold that the exceptional sentence imposed by the trial court was an abuse of its discretion. We vacate that sentence and remand for resentencing consistently with this opinion. On resentencing, the court shall enter findings supporting the length of any exceptional sentence imposed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur: JOHANSON, C.J. and SUTTON, J.

## All Citations

Not Reported in P.3d, 190 Wash.App. 1013, 2015 WL 5566281

## Footnotes

- 1 Because we vacate Bowen's exceptional sentence and remand for resentencing, we do not address her challenge to the requirement that she pay legal financial obligations. On resentencing, before imposing legal financial obligations, the trial court shall comply with the requirements of *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015), requiring sentencing courts to inquire into a defendant's current and future ability to pay, including factors such as incarceration and a defendant's other debts.

**July 25, 2017 - 3:23 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35112-2  
**Appellate Court Case Title:** State of Washington v Karrlee Theresa Clements  
**Superior Court Case Number:** 16-1-00189-4

**The following documents have been uploaded:**

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