

No. 35112-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

KARRLEE CLEMENTS,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 16-1-00189-4

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. (“The trial court admitted unauthenticated business records contrary to state law.” Br. of Appellant at 1.) Disagree. The records were properly admitted under RCW 10.96.030.
- B. (“The trial court admitted irrelevant and prejudicial evidence.” Br. of Appellant at 1.) Disagree. The trial court did not abuse its discretion in allowing testimony that the defendant’s ex-husband fraudulently used the victim’s credit card causing the victim to warn her daughter (the defendant) not to take her money in the future. The fact that the defendant ignored the warning and hid her use of the victim’s 401(k) account was relevant.
- C. (“The jury instructions omitted the definition of ‘by color or aid of deception’ and instruction No. 8 omitted an essential element.” Br. of Appellant at 1.) Disagree. The jury instructions properly defined the elements of the two counts.
- D. (“The defendant did not receive effective assistance of counsel.” Br. of Appellant at 1.) Disagree. The defendant cannot meet her burden: the defense attorney made a tactical decision hoping that the court would vacate the conviction in Count I.
- E. (“The second set of verdicts, rendered after the jury was discharged and excused, violated the defendant’s right to trial by

jury.” Br. of Appellant at 1.) Disagree. The jury was not discharged because they did not disperse from the jury room. The trial court acted appropriately. The verdict of the jury was clear.

F. (“The trial court committed sentencing errors warranting a reversal of the exceptional sentence.” Br. of Appellant at 1.) Disagree. The jury found the crimes were a Major Economic Offense. The trial court properly sentenced the defendant

G. (“The cumulative effect of the errors deprived Clements of her constitutional right to a fair trial.” Br. of Appellant at 1.) The State disagrees with the premise.

II. STATEMENT OF FACTS

The individuals involved in the case:

Catherine Clements: Victim and mother of the defendant. The balance of her 401(k) account went from \$303,922.33 as of June 30, 2014, to \$85,163.64 on September 30, 2015, without her knowledge. RP at 155, 158, 240.

Karrlee Clements Canas: The defendant, daughter of Catherine. RP at 220, 262.

Monique Clements: Defendant’s sister-in-law. App. A (transcript of Exhibit 89 interview) at 6. Defendant told her she was inappropriately

accessing Catherine's 401(k) account, which led to a family investigation of the situation. App. A at 10, 14.

Daniel Welch: Brother-in-law of Catherine. RP at 51. Assisted Catherine with her 401(k) account. RP at 53. Found the email address for the 401(k) had been changed to the defendant's and reported the Theft to the police. RP at 63.

Detective Dan Todd: Detective with the Kennewick Police Department. RP at 134-35.

Background

In 2013, Catherine Clements retired at age 55, paid off her house, and planned to live frugally with a nest egg of over \$300,000 in her 401(k) retirement with Vanguard. RP at 217-18, 221. She took \$15,000 out of the 401(k) on December 13, 2013, to cover living expenses for a year, with an expectation of spending \$1,000 per month. RP at 223. She did not use credit cards. RP at 221.

Catherine was computer illiterate, according to Daniel Welch. RP at 52. She had never owned a computer or taken a class on computers. RP at 220. She used Mr. Welch's computer to do her taxes. RP at 52. To take out the loan from her 401(k) account to pay off her house in 2013, she directly called Vanguard. RP at 222. She gave Vanguard Mr. Welch's

email address (rrtestian@hotmail.com) since she did not have one. RP at 54, 222.

Until a family get-together with Monique, Brice (Catherine's son), and Mr. Welch around August 29, 2015, Catherine did not know anything was missing from her 401(k). RP at 24, 61-62.

Investigation—"follow the money."

The investigation revealed that the defendant had changed the email address from Mr. Welch's to hers: ktc2013@live.com. RP at 278. She also used other email addresses to access the 401(k) account, including kccanas@outlook.com and tendie10@outlook.com. RP at 184. The defendant also acquired an American Express card in Catherine's name. RP at 173. She also obtained subaccounts in the names of "Karrlee Canas-Clements," "Karrlee Clements-Canas," "KC Canas," and "Karlee Clements." RP at 80-81.

The defendant then would transfer funds from Catherine's 401(k), to Catherine's American Express card, to one of the cards in the defendant's name. RP at 173-74.

In this manner, the following amounts were taken from Catherine's 401(k) and transferred to a card in the defendant's name:

Date	Amount taken	Net amount taken	RP
5-27-14	\$18,000.00	\$18,000.00	152, 178
6-25-14	\$6,000.00	\$6,000.00	159, 178
7-9-14	\$4,500.00	\$3,600.00	160, 178
8-11-14	\$5,000.00	\$4,000.00	162, 178
8-20-14	\$11,331.00	\$10,156.29	164, 178
9-9-14	\$22,000.00	Unknown (Amount not traced to any known account. Not included in restitution total.)	164-65
9-12-14	\$14,850.99	\$13,365.65	166-67, 178
10-6-14	\$8,334.00	\$7,500.00	167, 178
11-17-14	\$13,212.04	\$10,569.63	165, 178
1-13-15	\$20,000.00	\$16,000.00	167, 178
2-25-15	\$16,500.00	\$13,200.00	167, 177
3-24-15	\$16,000.00	\$12,800.00	167, 177
4-23-15	\$16,000.00	\$12,800.00	167, 177
6-2-15	\$16,990.00	\$13,592.00	167, 177
6-23-15	\$16,500.00	\$13,200.00	167, 177
8-7-15	\$17,000.00	\$13,600.00	167, 177
8-21-15	\$12,400.00	\$9,920.00	167, 199, Ex. 70

The defendant admitted this scheme and that she accessed around \$100,000. RP at 283. She testified that Catherine knew about the transactions, although in an interview with Detective Todd she refused at least three times to answer direct questions whether or not her mother had knowledge of the withdrawals from the 401(k) account. RP at 212, 269; App. B (transcript of Ex. 90 interview) at 21-22.

The defendant claimed that she and her husband withdrew the money to repair the house. RP at 271. However, Mr. Welch took photos of the residence on September 9, 2015, which show shoddy and incomplete work on the residence. RP at 64, 66, 68. See Appendix C for various photos admitted into evidence. Further, Catherine sold the house for \$135,000. RP at 238.

Verdicts and sentencing:

The jury found the defendant guilty of Count I, Theft in the First Degree, and Count II, Identity Theft in the First Degree, with an aggravating factor of Major Economic Offense for both offenses. *See* CP 154, 155, 156; RP at 351-53.

There was a mistake on the original Verdict Form on Count II. *See* CP 151. The verdict form referred to “Theft in the First Degree” rather than “Identity Theft in the First Degree.” The special verdict form –A referred to both counts correctly and the jury found that both the Theft and

Identity Theft were Major Economic Offenses. CP 152. The defense attorney noted the mistake before any of the jurors had left the jury room. RP at 344.

The court furnished new verdict forms on both counts and both special verdicts with an instruction that there was an error on one of the verdict forms, without informing the jurors what the error was. RP at 349. None of the verdicts changed.

At sentencing, the State requested a sentence of 21 months and the Court imposed 20 months. RP 02/23/2017 at 16.

III. ARGUMENT

A. **State's response to defendant's argument "A"** ("The trial court admitted unauthenticated business records contrary to State law." Br. of Appellant at 7.)

1. **Standard on review: abuse of discretion.**

State v. Butler, 198 Wn. App. 484, 490, 394 P.3d 424 (2017), dealt with an objection to the admissibility of documents under RCW 10.96.030 and held that it was an evidentiary issue, which is reviewed for abuse of discretion.

2. **The trial court did not abuse its discretion by determining that the defendant waived this argument by not filing a motion objection to admission of the evidence before trial.**

The State gave the defendant written notice "several months" before trial that it would admit the documents from Vanguard and

American Express under RCW 10.96.030(3). RP at 96. The burden is then on the defendant to: a) file a motion opposing admission, b) before the trial, c) with sufficient time to allow the prosecution to produce the custodian.

The defendant failed to do any of these requirements. She thereby waived an objection to admission of the records. RCW 10.96.030(4).

This outcome is consistent with the Findings of the legislature in RCW 10.96.005. The legislature wanted law enforcement and prosecutors to obtain *and use* business records. RCW 10.96.005 (emphasis added). That includes not bringing the custodian of records from Pennsylvania (Vanguard) or Florida (American Express) to Washington State for a few minutes of testimony.

Further, the statute provides relief for a defendant who fails to object timely for good cause. But that relief is not available if the defendant simply chooses to wait until trial to argue about the sufficiency of the affidavits. RCW 10.96.030(4) provides for relief to the defendant who has not made a timely objection “for good cause.” It does not state that the defendant can be relieved from her duty to object timely “for good cause *or if the affidavit is not sufficient under subsection (2).*”

Likewise, the defendant’s argument that the statute requires an objection only to hearsay or opinions in a particular business record, but

not to deficiencies in an affidavit, fails. *See* Br. of Appellant at 18. The statute does not state, “A motion opposing admission in evidence *of the contents* of the record shall be made and determined by the court” The basis for admitting a business record without the testimony of the custodian under RCW 10.96.030 is by providing those business records and an affidavit from the custodian. The objection to admission of business records under this statute has to be based on the sufficiency of the custodian’s affidavit.

The trial court made the correct decision to overrule the objection; it did not abuse its discretion.

3. Response to other arguments raised by defendant.

a. Defendant’s argument: “Authentication of business records requires strict compliance with RCW 10.96.030.” Br. of Appellant at 7.

The defendant’s claim that strict compliance is required for admission is not supported by the case law. In *Butler*, the State provided the defense with business records and a certification from the records custodian months prior to trial. 198 Wn. App. at 486. The State did not give the required written notice of its intent to rely on the provisions of RCW 10.96.030. *Id.* The *Butler* court ruled against the defendant, holding that the defendant had ample opportunity to prepare to challenge the

business records when the State provided those records and the certification from the custodian. *Id.* at 492-93.

With all due respect to the defendant, she is probably arguing that the State must strictly comply with the requirements for an affidavit, declaration, or certificate under RCW 10.96.030(2), while the defendant's requirement to object can be all but ignored.

b. Defendant's argument: "The declarations failed to satisfy RCW 10.96.030(2)." Br. of Appellant at 11.

Both affidavits from American Express (Exhibit 57) and Vanguard (Exhibit 77) substantially comply with the requirements of RCW 10.96.030(2).

- *Contact information:* The American Express affidavit has full contact information. The Vanguard affidavit has the location of the custodian and other documents have contact information.
- *Witness is the custodian:* Both documents so state.
- *The records were made at or near the time of the event:* Both documents so state.
- *Made in the regular course of business:* Both documents so state.

- *The identity of the record and mode of its preparation:* The Vanguard affidavit refers to the records attached. There was no legitimate issue that the defendant did not know what these records were. The American Express affidavit refers to the records attached.
- *The record is the original or a duplicate:* Both affidavits so state.
 - c. **Defendant’s argument:** “The trial court erroneously ruled Clements could not object to the defective declarations.” Br. of Appellant at 15.

The trial court did not so rule. The trial court ruled that the defendant waived her objection to the affidavits under RCW 10.96.030(3). The defendant could have objected to the affidavits, but had to do so in a timely manner.

In this case, the defendant had a choice. If she timely objected pursuant to the statute, the State may have been able to produce the custodians or produce affidavits that satisfied any objections. The defendant chose to wait until trial to raise an objection. However, the statute is that a defendant cannot “wait in the weeds” to spring an objection. By doing so, she waived an objection to the admissibility of the documents.

d. Defendant's argument: "Rule of Lenity."
Br. of Appellant at 20.

The rule of lenity only applies if a statute is ambiguous. *State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015). There is nothing ambiguous about RCW 10.96.030. The legislature intended to allow prosecutors to admit business records without the testimony of custodians of records. The defendant waives an objection by not filing a motion opposing admission before trial. The defendant herein waived any objection by failing to file such a motion opposing admission of the business records.

B. State's response to defendant's argument "B" ("The court allowed irrelevant and prejudicial testimony." Br. of Appellant at 21.)

Facts relating to this issue:

Testimony:

The victim, Catherine Clements, testified as follows:

A: I'm unfortunately talking too fast.

Q: You're fine. Okay, you were talking about a credit card that you had.

A: Yeah.

Q: Okay. Do you remember what credit card it was?

A: I had a HAPO Visa card—credit card, and in 2010 I found out I had a balance of \$10,000 on it, and I hadn't been usin' it, and when I got the printout I saw all the printouts of, at that time, my daughter and her---

Q: Let me hold—let me stop you right there.

RP at 224.

A colloquy concerning this issue was held resulting in the following:

THE COURT: Okay, I think [ER] 404(b) would be violated if you were to have testimony that associated this defendant with the Rocco Morris' misuse of the card.

MR. BLOOR: Okay.

THE COURT: 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.

Any objection to that, Mr. Hanson?

MR HANSON: No.

RP at 231.

Clarification:

Q: Okay. Anyway, you mentioned something about him, Rocco, putting or accessing credit cards and running up like \$10,000.00 in debt.

A: Yeah.

...

Q: Okay, and Rocco was the one that was actually charged?

A: Yes, he was.

RP at 241-42.

Relevance:

5 BY MR. BLOOR:
6 Q. I think where we left off, I think I'd asked you
7 if you'd gotten a phone call from Brice in 2015 in maybe
8 the spring or so?
9 A. Yeah.
10 Q. Okay.
11 A. I got a phone call from him.
12 Q. You got a phone call, and the nature of the
13 phone call was your Vanguard account?
14 A. Yes.
15 Q. Okay. Did you go back and talk to your
16 daughter --
17 A. Yeah.
18 Q. -- about anything?
19 A. After I hung up the phone I went to Karrlee and
20 I said, "Brice has told me that you've gotten into my
21 401K," and she said, "Brice is just tryin' to get --
22 cause trouble, mom. He hasn't even been havin' anything
23 to do with you. Why would you believe him?" and I said,
24 "If you've gotten in my 401K, I don't care if it's a
25 dime, you're goin' to jail."

RP at 232, ll. 5-25.

Argument:

1. Standard on review is abuse of discretion.

See the above discussion; evidentiary issues are reviewed for abuse of discretion. *Butler*, 198 Wn. App. at 484.

2. The defendant did not object to the testimony.

There could have been a technical objection to original comment because it was not responsive to the question. RP at 224. However, the defendant did not object to the question when asked or after the colloquy. RP at 231, 242. She should not be allowed to object at this point. RAP 2.5.

3. In any event, the trial court did not abuse its discretion; it was correct to allow the testimony.

After Catherine was burned by her daughter's former significant other, it would seem obvious that she would be unwilling to share her 401(k) with her daughter. The defendant testified at trial that Catherine fully participated and allowed her to access the 401(k). Catherine's warning to her is directly relevant.

4. This testimony had little to do with the reasons for the defendant's convictions.

The defendant was convicted because over \$200,000 was missing from her mother's 401(k); she changed the email address for the 401(k) to her own, took out several credit cards in various names, and transferred money out of the 401(k) account and into those credit cards; and she made contradictory statements about it at trial and in a police interview. The evidence was admissible. But even accepting the defendant's argument, it was a harmless error.

C. **State’s response to defendant’s argument “C”** (“The jury instructions omitted the definition of ‘by color or aid of deception’ and instruction No. 8 omitted an essential element.” Br. of Appellant at 25.)

1. **This court should refuse to review the issue because the defendant did not object to or propose such instructions in the trial court.**

State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009), is on point.

Although he failed to object at trial, the defendant challenged the failure of the trial court to instruct on the complete definition of “malice” in a self-defense case. 167 Wn.2d at 104. The Court of Appeals had reversed the conviction. *Id.* at 107. The Supreme Court reversed the Court of Appeals, holding that it should not have reviewed the court instructions because there was no objection in the trial court. *Id.* at 108.

The *O’Hara* court stated that the general rule is that an error can be raised for the first time on appeal under RAP 2.5(a) if it is a “manifest error affecting a constitutional right.” 167 Wn.2d at 98. The appellant must demonstrate: 1) the error is manifest, and 2) the error is truly of constitutional error that actually affected the appellant’s rights at trial. *Id.* “Manifest” requires a showing of actual prejudice. *Id.* at 99. To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial. *Id.* In determining whether the error was

identifiable, the trial record must be sufficient to determine the merits of the claim. *Id.*

Actual prejudice and harmless error are analyzed separately. Actual prejudice occurs when the error is so obvious that the error warrants appellate review.

Jury instructional errors that have been held to constitute manifest constitutional error include directing a verdict, shifting the burden of proof to the defendant, failing to define the “beyond a reasonable doubt” standard, failing to require a unanimous verdict, and omitting an element of the crime charged. 167 Wn.2d at 100-01. In contrast, instructional errors not falling within the scope of RAP 2.5(a) include the failure to instruct on lesser offenses and the failure to define individual terms. *Id.*

Therefore, this Court should decline to review the assigned error relating to not defining the term “by color or aid of deception.” There is no requirement that this Court review an unpreserved claim that “theft” was not defined in a robbery case, *State v. Ng*, 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988), or “knowledge” was not defined for an accomplice instruction, *State v. Scott*, 110 Wn.2d 682, 689-91, 757 P.2d 492 (1988).

Regarding the defendant’s argument that the “knowledge” element was missing from the “to-convict” instruction for Identity Theft, the jury was instructed that *the defendant knowingly obtained a means of*

identification or financial information of another person. The issue is whether this adequately informed the jury that it would need to find the defendant knew the means of identification or financial information belonged to another person. As argued below, this instruction properly informs the jury that it must find the defendant knowingly possessed financial information and that it belonged to another person.

2. Reviewing the merits of the argument, the jury instructions sufficiently informed the jury of the applicable law, were not misleading, and allowed counsel to argue the defendant’s theory of the case.

a. Standard on review regarding jury instructions.

Jury instructions are reviewed de novo, evaluating the Instruction in the context of the instructions as a whole. *State v. Knutz*, 161 Wn. App. 395, 403, 253 P.3d 437 (2011). Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Id.* They are sufficient if they are readily understood and are not misleading to the ordinary mind. *Id.* Even if an instruction may be misleading, the conviction will not be reversed unless prejudice is shown by the complaining party. *Id.*

b. State's response to "By color or aid of deception" argument.

The "to-convict" instruction, instruction number 7, states that the jury must find that "the defendant by color or aid of deception *obtained* control over property of another." CP 134 (emphasis added). The term "deception" was defined in instruction number 9. CP 136.

The jury instructions told the jury that an element of Theft in the First Degree concerned whether the defendant obtained control over her mother's 401(k) account by deception. The defendant offered contradictory reasons why she did so. In a pre-trial interview, she claimed she was entitled to the funds for taking care of her mother and for repairs to the house. At trial, she claimed that her mother knew about, and consented to, her accessing the funds. Either way, the jury found beyond a reasonable doubt that the defendant obtained the funds by deception.

c. State's response to identity theft.

The "to-convict" instruction for Identity Theft had been updated by the Washington Supreme Court Committee on Jury Instruction (WPIC Committee) in October 2016 based on *State v. Zeferino-Lopez*, 179 Wn. App. 592, 319 P.3d 94 (2014). WPIC 131.02 (post-October 2016). The State did not propose that updated version. For the below reasons, this should not result in a reversal of the conviction.

First, the WPIC Committee may have recommended updating the “to-convict” instruction for Identity Theft in an abundance of caution, but it was not required by *Zeferino-Lopez*. In that case, the court noted that the jury instructions used, which were the same used in this case, mirrored the statutory language. 179 Wn. App. at 598. In that case, as well as this case, the jury was instructed that an element was that “the defendant knowingly possessed or used a means of identification of another person.” *Id.* at 597.

The problem in *Zeferino-Lopez* was that the prosecutor argued that the defendant only had to knowingly possess a means of identification, but did not have to know that it belonged to another person. *Id.* at 595-96. The court held that this interpretation was not correct. *Id.* at 599. “Knowledge” referred to the defendant’s knowledge that the means of identification belonged to another person. *Id.* at 599.

The *Zeferino-Lopez* court cited *State v. Killingsworth*, 166 Wn. App. 283, 269 P.3d 1064 (2012). That case dealt with a “to-convict” instruction for trafficking in stolen property, which stated an element was that the defendant “knowingly trafficked in stolen property.” The court held that the most natural reading of this sentence was that “knowingly” modified both “trafficked” and “stolen property.” 179 Wn. App. at 599.

The court in *Zeferino-Lopez* did not find fault with the jury instructions. Instead, that court reversed the conviction because there was

insufficient evidence to prove that the defendant knew the number on the Social Security card he possessed belonged to another person. *Id.* at 599-600. Mr. Zeferino-Lopez came to the U.S. from Mexico when he was nine years old. *Id.* at 594. Some friends told him he needed a Social Security card to get work, so he bought one with his name on it for \$100. *Id.* The court held this was insufficient to prove the defendant knew the Social Security number belonged to another. *Id.* But, the court did not hold the to-convict instruction was incorrect. *Id.* at 599-600.

A review of the WPIC Committee's suggested instruction shows that the added element is redundant. Both versions of the to-convict instruction had this element: "*1) That on or about (date) the defendant knowingly obtained a means of identification or financial information of another person.*" See App. D – former WPIC 131.02 (pre-October 2016) (emphasis added).

The WPIC committee added: "*3) That the defendant knew that the means of identification or financial information belonged to another person.*" See App. E – current WPIC 131.02 (post-October 2016) (emphasis added).

As stated in *Zeferino-Lopez*, the most natural reading of element number 1 is that the defendant must knowingly obtain a means of identification and must know that it belongs to another person. Elements 1

and 3 therefore state the same thing: the defendant must know he has a means of identification or financial information and must know it belongs to another person.

The element added by the WPIC Committee was not required by the Identity Theft statute or the *Zeferino-Lopez* case.

d. Harmless error.

In any event, there is simply no chance that defining “color or aid of deception” or including the WPIC Committee suggestion for a third element for Identity Theft would have affected the jury’s verdicts. A harmless error analysis occurs after the court determines the error is a manifest constitutional error. *O’Hara*, 167 Wn.2d at 98. It was clear who the victim was—Catherine Clements. The defense was based on whether Catherine consented to the defendant accessing the 401(k) account. There was no argument that the defendant did not know that the victim was a real person, namely her mother.

D. State’s response to defendant’s argument “D” (“The second set of verdicts, rendered after the jury had been discharged and excused, violated the defendant’s right to trial by jury.” Br. of Appellant at 28.)

The jury is “discharged” when the jurors are “permitted to pass from the sterility of the court’s control and allowed to separate or disperse and mingle with outsiders.” *State v. Edwards*, 15 Wn. App. 848, 850, 552 P.2d 1095 (1976).

The *Edwards* court held that a judge's verbal discharge does not preclude a later correction of the verdict to conform to the actual finding where the jury has not separated or dispersed, but has remained sequestered and insulated from any outside influence and the correction is not one of substance resulting from further deliberation on the merits of the cause. *Id.* at 851.

That was the situation in this case. The jurors did not disperse. The trial judge stated he would like to speak with the jurors in the jury room after "a little bit of business." RP at 343. The bailiff escorted the jurors from the courtroom to the jury room and they did not disperse. RP at 344.

This definition of "discharge" is consistent with *State v. Morales*, 196 Wn. App. 106, 383 P.3d 539 (2016). The defendant was charged with Child Molestation in the First Degree and the jury was instructed on that charge. 196 Wn. App. at 111. However, the jury verdict stated the defendant was guilty of Child Molestation in the Second Degree. *Id.* This was noted some 11 days after the verdict was received. *Id.* The *Morales* court held the trial court had no authority to sentence the defendant on the charge of Child Molestation in the First Degree. On the other hand, when the mistake is noted before the jury disperses, the court is allowed to give

the jury a new verdict form and tell the jury to deliberate again. *State v. Badda*, 68 Wn.2d 50, 59-60, 411 P.2d 411 (1966).

E. State’s response to defendant’s argument “E” (“The defendant did not receive effective assistance of counsel.” Br. of Appellant at 32.)

1. Standard on review.

Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must establish 1) counsel’s performance fell below an objective standard of reasonableness, and 2) the defendant was prejudiced by that performance.

The defendant has the burden of overcoming a strong presumption that her counsel’s performance was reasonable. If counsel’s conduct can be characterized as legitimate trial tactics, the performance is not deficient. A fair assessment of an attorney’s performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time. To satisfy the prejudice prong of *Strickland*, 466 U.S. 668, the defendant must establish that there is a reasonable probability that but for counsel’s deficient performance, the outcome of the proceedings would have been different; a reasonable probability is a probability sufficient to undermine confidence

in the outcome. *State v. Grier*, 171 Wn.2d 17, 33-35, 246 P.3d 1260 (2011).

2. The attorney's performance was not deficient (did not fall below a reasonable standard of performance).

First, the attorney brought the mistake in the verdict form to the court's attention clearly hoping that the trial court might dismiss Count II. This was a legitimate tactic. Instead, the trial court took charge of the situation without asking for suggestions from the attorneys. RP at 345-47.

Second, this is a rare occurrence. A Westlaw search for annotated cases under RCW 4.44.340, Effect of Discharge of Jury, shows only five cases. The subject is specialized and requires some specific experience or research. With the benefit of hindsight, the defense attorney's tactic did not work. And with the benefit of research, the outcome might have been different if the jury had dispersed. But, a reasonably prudent defense attorney would be expected to raise the issue, hoping for a dismissal, and would not be expected to know the exact parameters of cases such as *Edwards, Badda, and Morales*.

Finally, the defense attorney also had a duty of candor to the tribunal under Rule of Professional Conduct (RPC) 3.3. In hindsight and after reviewing RPC 3.3, the State believes the defense attorney could have not said anything about the verdict form he knew was incorrect

without violating the requirements of RPC 3.3. However, the spirit of RPC 3.3 is set forth in the Comment section:

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process . . . although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

The defense attorney not only thought he may be able to get Count II dismissed, he would further his duty to disclose material facts and correct false statements by notifying the court.

- 3. The defendant was not prejudiced.**
 - a. The trial court would have sentenced the defendant to an exceptional sentence in any event.**

The special verdict form on “major economic offense” distinguishes this case from *Morales*. First, the jury answered “yes” to the question of whether the Theft in the First Degree and the *Identity Theft in the First Degree* were major economic offenses. CP 152 (emphasis added). This fact was not present in *Morales* or the case that the *Morales* court found instructive, *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010). In *Williams-Walker*, the special verdict forms asked whether the defendants were armed with deadly weapons, but they were sentenced for firearm enhancements. 167 Wn.2d at 893. The court in this

case had the authority to impose an exceptional sentence on the charge of Identity Theft in the First Degree as well as Theft in the First Degree based on the special verdict forms.

Second, this fact should make the original verdict form submitted on Count II, which referred to “Theft” rather than “Identity Theft,” a clerical error rather than a judicial error, as described in *Morales*. Clerical errors are those that do not embody the trial court’s intention as expressed in the trial record and can be corrected by a motion under CrR 7.8.

Third, the trial court obviously found that a sentence of 20 months was appropriate based on the amount taken, the sophistication and planning, and the period of time over which the crimes occurred. CP 176-77. The defendant would have been sentenced to 20 months regardless. The defendant was not prejudiced by any error on the original verdict form.

F. State’s response to defendant’s argument “F” (“The trial court committed sentencing errors warranting a reversal of the exceptional sentence.” Br. of Appellant at 34.)

1. State’s response to “same criminal conduct argument.”

First, the Identity Theft statute, RCW 9.35.020(6), specifically provides that a person who commits other crimes in the commission of Identity Theft may be prosecuted for each crime separately.

Second, the offenses are not in the same course of criminal conduct under RCW 9.94A.589 because the victims are not the same. Vanguard, the company managing Catherine's 401(k), could be required to reimburse Catherine. Vanguard and Catherine are the victims of the Theft. Catherine is the sole victim of the Identity Theft.

State v. Baldwin, 111 Wn. App. 631, 45 P.3d 1093 (2002), is helpful. In that case, the defendant was charged with the theft of Kaytie Allshouse's identity, the forgery of her name on a deed, and the forgery of her name on a junior deed. The court held these offenses were not in the same criminal conduct because the victims were Ms. Allshouse, the lending institution, and the purchasers of the deeds. 111 Wn. App. at 640-41.

2. State's response to exceptional sentence argument.

The trial court had the authority to impose an exceptional sentence. The jury found by special verdicts that both the Identity Theft and the Theft were Major Economic Offenses, based on the allegation that the defendant's crimes were highly sophisticated and involved an amount of around \$209,000. The trial court found that the evidence justified this verdict.

The prosecution recommended a sentence of 21 months based on “one month for every \$10,000 that was stolen.” RP 02/23/2017 at 5. The trial court did not adopt that position and did not follow the prosecutor’s recommendation, albeit by sentencing the defendant to 20, not 21, months.

The case of *State v. Knutz*, 161 Wn. App. 395, is helpful. That case stated that when a sentencing court bases an exceptional sentence on proper reasons, an appellate court will hold that a sentence is excessive only if the length “shocks the conscience,” which would be one that “no reasonable person would adopt.” 161 Wn. App. at 410-11. In *Knutz*, the defendant was sentenced to five years in prison and stole \$340,000. *Id.* at 399, 402. The sentence was affirmed on appeal. Here, the State proved the defendant stole \$209,000 and she was sentenced to 20 months.

G. State’s response to defendant’s argument “G” (“The cumulative effect of errors deprived Clements of her fundamental right to a fair trial.” Br. of Appellant at 38.)

The State disagrees with the premise. There were no errors and the defendant had a fair trial.

IV. CONCLUSION

The evidence of the defendant’s guilt was overwhelming. By following the money, it was clear that she had accessed her mother’s 401(k) account, which was her mother’s nest egg for retirement income. The defendant then set up the account email in her name and obtained

American Express cards in her mother's name and several subaccount cards in variations of her name. She then transferred at least \$209,000 from her mother's account to the American Express card she obtained in her mother's name and then transferred the funds to her own account.

The defendant chose to "wait in the weeds" until objecting to the admission of business records obtained pursuant to RCW 10.96.030. She thereby waived an objection under the statute. Even looking at the substance of the defendant's argument, the declarations for Vanguard and American Express under RCW 10.96.030 satisfy that statute.

The trial court did not abuse its discretion in allowing testimony that a former spouse of the defendant unlawfully used Catherine Clements's previous credit card, which caused her to warn the defendant against taking money from the 401(k) account.

The jury instructions contained all the elements required. The jury was instructed that the defendant had to knowingly possess financial information of another person. In any event, there was no question in this case that the defendant possessed financial information of her mother; any error is harmless.

There was an error in the jury verdict form for Count II. It said "Theft in the First Degree" when it should have read "Identity Theft in the

First Degree.” However, this was corrected before the jury was discharged, which cases hold means when the jurors disperse.

The defense attorney pointed out the error in the verdict form obviously as a tactic, hoping the court would dismiss Count II. In any event, the jury in a special verdict form confirmed that it found the defendant guilty of Identity Theft in the First Degree and that it was a Major Economic Offense. The trial court could have sentenced the defendant to an exceptional sentence based on this verdict.

There were no sentencing errors. The charges of Theft and Identity Theft involve different victims, and the Identity Theft statute specifically allows separate punishment for that crime and others committed in the course of Identity Theft. The trial court did not follow the State’s recommendation to impose a sentence based on one month in prison for each \$10,000 stolen.

The convictions and sentence should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of September, 2017.

ANDY MILLER
Prosecutor



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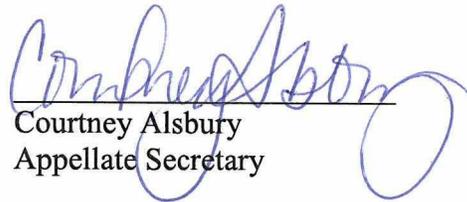
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on September 21, 2017.


Courtney Alsbury
Appellate Secretary