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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, APPELLANT

v.

DUANE EDWARD GRAY, RESPONDENT

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APPEAL FROM THE SUPERIOR COURT

OF FERRY COUNTY

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**BRIEF OF APPELLANT**

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## I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by arresting the judgment and vacating the jury verdicts pursuant to CrR 7.4(a)(2).

A. The trial court erred in concluding RCW 9.91.144 is unconstitutionally vague and does not charge an offense.

B. The trial court erred in concluding that it is a vendor, not a holder or user of an EBT card that "redeems" it.

C. The trial court erred in concluding that it was judicial error to proceed on the instructions given to the jury.

2. The trial court erred by arresting the judgment and vacating the jury verdicts pursuant to CrR 7.4(a)(3).

A. The trial court erred in concluding that the evidence presented at trial was insufficient to prove a material element of the crimes charged.

## II. ISSUES PRESENTED

1. Whether RCW 9.91.144 is unconstitutionally vague such that the defendant could not reasonably have known that his conduct was illegal?

2. Whether the State presented sufficient proof by which a jury could find the material elements of the crimes charged beyond a reasonable doubt when the State presented evidence which showed the

defendant using an EBT card that was issued to someone else and where the State presented circumstantial evidence that the Defendant knew that he was not authorized to use the EBT card for his own benefit?

## III. STATEMENT OF THE CASE

*Summary*

Mr. Gray was convicted of four counts of unlawful redemption of food stamps after he used a food stamp EBT card which did not belong to him on four separate occasions between the dates of October 7, 2016 and October 10, 2016. Mr. Gray's use depleted the government benefit funds on the card which were issued to Vince Chapple and LaDeana Pellham, based on their need as determined by the Department of Health and Social Services ["DSHS"]. At trial, the jury heard testimony from three witnesses for the State, including Deputy Matthew Kersten, who aided in the investigation, Paula Brantner-Thomas, a DSHS Investigator with knowledge about DSHS policies and the account histories of the victims and the Defendant, and Kari Beedle, the manager of Anderson's Grocery Store, who testified regarding store policies and surveillance systems, as well as regarding the four transactions in question.

The jury heard that the investigating officers were provided with an EBT search summary which detailed four transactions that were not made by the DSHS account holder. The jury also head from Ms. Beedle

that she provided the investigating officers with photos and video of those transactions, which took place in her store. Ms. Beedle provided a lengthy explanation about how she was able to match those transactions to the specific transactions from her video surveillance system. The jury was shown videos of those transactions which showed that the Defendant was the person completing all four of the transactions in question.

Ms. Brantner-Thomas explained to the jury the process for obtaining an EBT food stamp card, as well as the rules for usage, and the paperwork and warnings a person on public benefits would receive. She further testified that the Defendant had gone through this process and received this paperwork and the warnings about unauthorized use.

The Defense did not present any witnesses. However, Defense Counsel stipulated to the admission of Defendant's written statement admitting to using all the funds on the EBT card. His counsel argued by way of defense first, that using someone else's EBT card does not constitute a crime, and second, that Mr. Gray did not know that his use was unauthorized. Defendant was convicted of all four counts.

*Deputy Kersten's Testimony*

Deputy Matthew Kersten was assisting Officer John Cruz in an EBT fraud investigation. RP 128. The two travelled to Moses Lake, Washington to contact and get statements from Vince Chapple and

LaDeana Pellham, who had reported unauthorized usage of their EBT card. RP 128-29; 140. They also went to the Moses Lake DSHS Office to meet with DSHS Supervisor Ochoa, who provided them with a copy of the EBT transaction history for Vince Chapple's account. RP 129-30. The officers were investigating four transactions that occurred at Anderson's Grocery store in Republic, Washington, which were shown on Chapple's EBT transaction history. RP 131; 138. As part of his investigation, Deputy Kersten also viewed still photos taken from the video at Anderson's store. RP 132. Deputy Kersten testified regarding the five photos, which showed the Defendant, whom he recognized from prior contacts, shopping at Anderson's Grocery on October 7, 2016, October 8, 2016, and twice on October 10, 2016. RP 138-39.

*Kari Beedle's Testimony*

Ms. Beedle is an employee and part-owner of Anderson's Grocery Store, where she has worked for 34 years. RP 195. Nearly every area of Anderson's is captured by surveillance cameras, which record video, but no sound. RP 195-96. The cameras above the check-out area record in color, and the footage is date and time-stamped. RP 196-97. Anderson's also maintains an electronic journal system that records all sales transactions through the cash registers, whether paid for by cash, credit card, check, or EBT card. RP 197-98. Ms. Beedle has the ability to

search the records for a particular transaction by date, amount of transaction, and by method of payment. RP 199. If a credit, debit, or EBT card is used, the system will record the last four numbers of the card. RP 200. The system will also record the time the transaction ends, what items were purchased, what order they are scanned in, which till they are purchased at, and who the cashier was. RP 200.

Ms. Beedle was asked to perform a record search based on transaction dates and amounts provided by law enforcement. RP 199. She was able to find transactions matching the dates, amounts, and last four digits of the card used as detailed in the information provided by law enforcement. Id. RP 199-200. Ms. Beedle created printouts from the electronic journal for those transactions, which were on October 7, 2016, October 8, 2016, and twice on October 10, 2016. RP 201. From the printouts, she was able to see that all four transactions were paid for with an EBT card ending in "0002". Id. She was also able to see that those were the only transactions on those days with that specific dollar amount. RP 202. Ms. Beedle then took the time of the transactions that were listed on the electronic journals and looked at the Anderson's security footage from those time periods. RP 202. She was able to match the transactions from the electronic journal to the video footage by the time stamp and by visually matching the items that were purchased, and the order they were

scanned. RP 203. Ms. Beedle observed from the video that the same person was making all four transactions. Id. Ms. Beedle created five still photos from the videos which were provided to law enforcement. RP 204. The individual in the photos and from the video was identified by Deputy Matthew Kersten as Defendant Duane Gray. RP 138-39; 204.

*Paula Brantner-Thomas's Testimony*

Ms. Brantner-Thomas is an employee of the DSHS Office of Fraud and Accountability. RP 143. She explained that one of the roles of DSHS is to administer public assistance benefits, including food stamps, which are also called SNAP benefits (short for "supplemental nutritional assistance program"). RP 143-44. The food stamps are administered by the United States Department of Agriculture ["USDA"] through the federal program, Food and Nutrition Service ["FNS"], using federal dollars. RP 144-45. However, the federal government contracts with Washington State DSHS to issue those benefits. Id. Washington's program, which is approved under the Federal Food Stamp Act, is authorized by state statute and administrative codes. RP 144-45.

Under Washington's program, a person must meet certain eligibility criteria and submit an application in order to receive food stamps, and the ultimate amount of the benefits is determined according to the household size, income, expenses, and other benefits received. RP

145. The benefits are automatically deposited at regular intervals on an electronic benefit transfer ["EBT"] card, which functions similarly to an ATM or debit card. RP 145-46. To access the benefits, the EBT card is swiped at a point of sale ["POS"] terminal at an authorized retailer, and the amount of the purchase is deducted from the EBT card. RP 146. The POS terminal will record the date, time, location, transaction amount, card number, and client number, which is assigned to the person the benefits belong to. RP 146-47. DSHS can perform an EBT search summary to look up a person's transaction history and to generate reports of such history. RP 147.

The actual EBT search summary report contains the client ID number, which is specific to the person who applied for and was issued the benefits, and which never changes. RP 149. The report also contains a transaction column which will detail the amount of a transaction, as well as if the transaction was denied and for what reason. RP 151. A "51" denial code means insufficient funds, and a "55" denial code means that an invalid pin number was entered. RP 152.

Ms. Brantner-Thomas was shown a copy of Vince Chapple's EBT transaction history that had been provided from the Moses Lake DSHS office to Deputy Kersten. RP 130; 148; Plaintiff's Exhibit 24. It showed how Mr. Chapple's card ending in "0002" had been used primarily in

Moses Lake, up through October 1, 2016. Plaintiff's Exhibit 24. However, the card was then used in Republic between October 7, 2016 and October 10, 2016, all but depleting the funds. Id., RP 152. Mr. Chapple went into Moses Lake DSHS on October 11, 2016 and requested a new card. RP 189. A new card was issued on October 13, 2016 and the old card was cancelled. RP 152. On October 13, 2016, the new card was attempted to be used, but was denied due to insufficient funds. Plaintiff's Exhibit 24. The new card was attempted to be used again on October 14, 2016, and denied again for insufficient funds. Id. Mr. Chapple came into DSHS again on October 18, 2016 after he had discovered that the benefits had been depleted and to inquire why there were no benefits on his card. RP 192.

Ms. Brantner-Thomas testified that usually only one card is issued per account, even though there may be more than one eligible user in the household. RP 154. She specified that all users must be listed with DSHS. Id. She explained that in order for someone else to be able to use the card to shop for the account holder, an application would have to be filled out and DSHS would have to approve the person as an "authorized representative" for the cardholder. RP 155. Ms. Brantner-Thomas testified that defendant Duane Gray was not a household member or authorized user for the EBT card on the Chapple account. RP 156.

Ms. Brantner-Thomas testified about the benefit application process. RP 156-174. When a person applies and is approved for benefits they are provided with a rights and responsibilities form which notifies them of the proper uses for their card. RP 156. There is also a second form provided to approved applicants which informs them of the EBT rules and penalties for misuse of EBT cards. Id. Specifically, approved applicants are informed that they cannot give their card to anyone else, they cannot sell their benefits, and they cannot exchange benefits or trade them for services. Id. All applicants have an interview with a DSHS financial worker who goes over their rights and responsibilities with them. RP 157. DSHS maintains a record of an applicant's interactions with financial workers as well as the documents they have received and the agreements they have signed. Id.

Ms. Brantner-Thomas testified that she had access to Defendant Duane Gray's DSHS history which showed that he had previously applied for and received food stamps. RP 158-62. The file showed that Defendant went through the application process and received the rights and responsibilities form which informed him that basic food benefits may only be used to buy food for members of your household. RP 165. His file also showed that he received another document called "Your DSHS Cash or Food Assistance Benefits" which informed him that food benefits may

only be used for members of the cardholder's household and that it is illegal to use food assistance for any purpose other than for eligible household members, that a cardholder cannot exchange his/her benefits for anything of value, and that benefits can only be used by people who are in the approved food assistance unit. RP 166-68. In addition, Defendant received a pamphlet which explained that if a cardholder wanted to allow for someone else to get their benefits for them, they would have to go through the process for an authorized representative, get approved by DSHS, and get their own card on the primary cardholder's account. RP 171-72. He was also given an address where he could view state statutes and administrative codes, as well as federal rules, pertaining to EBT cards. RP 173.

Finally, Ms. Brantner-Thomas testified that the EBT card that Defendant was lawfully issued ended in "7127" and that was *not* the card that he used on the four occasions at Anderson's Grocery. RP 169.

*Procedural History*

On November 1, 2016, the State charged Mr. Gray with one count of unlawful redemption of food stamps, one count of possession of stolen property in the second degree, one count of possession of a controlled substance, one count of possession of a controlled substance with intent to deliver, and one count of use of drug paraphernalia. CP 1-4. The

defendant was arraigned on November 4, 2016 and was given a trial date of January 3, 2017. CP 18. On December 23, 2016, the court held a 3.6 hearing to suppress, and on December 28, 2017 the Court entered findings of fact and conclusions of law and ruled that evidence obtained from Defendant's home (drug evidence and evidence of possession of stolen property) was inadmissible at trial due to issues with the search warrant, including staleness. CP 155-62. Based on the Court's ruling, the State could not proceed with drug charges, leaving only the stolen property and unlawful redemption of food stamps charges. CP 165.

The trial date was subsequently continued to February 6, 2017 at Defense's request. CP 166. On February 3, 2017, the trial date was continued again at Defense's request to April 3, 2017. CP 217. On March 13, 2017, the State filed a motion to continue the trial term after it learned that the State's main witness, Reserve Officer John Cruz, would be unavailable due to his attendance at the Criminal Justice Training Commission Police Academy, for which the City of Republic had paid a substantial non-refundable fee. CP 223-27. The State's motion was denied and the trial was left set. CP 261.

On March 31, 2017, Defendant signed a waiver of 3.5 hearing, as well as stipulations that he did provide a written statement to law enforcement which would be admissible without objection, that he

stipulated to the chain of custody of several videos obtained from a grocery store surveillance system, and that he stipulated to the chain of custody of the EBT search summary provided by DSHS. CP 301-04; RP 45; 85-86.

Also on March 31, 2017, the State moved to amend the Information to dismiss the possession of stolen property charge and to add three counts of unlawful redemption of food stamps (one for each transaction described in the police reports and discovery). CP 311-12; RP 61. The Court considered the motion, and after no objection from the defense, signed an order permitting the State to file an amended information. RP 71-72; CP 305. The Court did, however, require that the State designate the offenses with transaction amounts under $100 as gross misdemeanors rather than as felonies, based on the Court's reading of the federal statute referenced in the language of RCW 9.91.144. Id. Based on the Court's reading of the law, the State filed an amended information containing the approved language from the Court on April 3, 2017, prior to the start of trial. RP 90; 95; CP 311-13.

Trial commenced on April 3, 2017. RP 90. The State presented three witnesses: Deputy Matthew Kersten, DSHS Investigator Paula Brantner-Thomas, and store clerk Kari Beedle. RP 126; 142; 194. The State rested at the end of the first day of trial. RP 217.

Before the presentation of the defendant's case on Day 2 of trial, the Court held a conference on jury instructions. RP 227-307. The State had provided a full set of proposed jury instructions, which were filed January 31, 2017. CP 190-213. The State had proposed a definition instruction for unlawful redemption of food stamps based upon language lifted straight from the statute[1]:

> **Proposed Instruction:**
>
> A person commits the crime of unlawful redemption of food stamps when, in violation of U.S.C. Sec. 2024(c) he or she knowingly obtains and presents food stamps or food stamp benefits transferred electronically, for redemption or causes such stamps or benefits to be presented for redemption.

The State proposed a second jury instruction to define what qualifies as a violation of 7 U.S.C. Sec. 2024(c), which was based on 7 U.S.C. 2024(c)[2] itself, as well as 7 CFR 273.16(c)(2)[3], and RCW 74.08.580[4]:

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[1] RCW 9.91.144 reads as follows: **Food Stamps – Unlawful Redemption.** A person who, in violation of 7 U.S.C. Sec. 2024(c), obtains and presents food stamps as defined by the federal food stamp act, as amended, 7 U.S.C. Sec. 2011 et. Seq., or food stamp benefits transferred electronically, for redemption or causes such stamps or benefits to be presented for redemption through the program established under RCW 74.04.500 is guilty of a class C felony punishable according to chapter 9A.20 RCW.

[2] **(c) Presentation for Payment or Redemption of Benefits That Have Been Illegally Received, Transferred, or Used:** Whoever presents, or causes to be presented, benefits for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony[.]

**Proposed Instruction:**

It is a violation of 7 U.S.C. Sec. 2024(c) to knowingly present or cause to be presented, benefits for payment or redemption that were not issued to the person who is presenting or causing the benefits for payment to be presented.

The State's proposed "to-convict" instruction was phrased as follows as was based on the same sources[15-17]:

**Proposed Instruction:**

To convict the defendant of the crime of unlawful redemption of food stamps, 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 and presented food stamps or foods stamp benefits transferred electronically for redemption, or caused such stamps or benefits to be presented for redemption;
2. That the defendant knew the food stamps or electronic food stamp benefits were not issued to him;
3. That any of the acts occurred in the County of Ferry, State of Washington.

If you find from the evidence that all the elements have been proved beyond a reasonable doubts, then it will be your duty to return a verdict of guilty.

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[3] **(c) Definition of intentional Program Violation.** Intentional Program violations shall consist of having intentionally…(2) Committed any act that constitutes a violation of SNAP, SNAP regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of SNAP benefits or EBT cards.

[4] **Electronic benefit cards – Prohibited uses – Violations.** (4) Only the recipient, an eligible member of the household, or the recipient's authorized representative may use an electronic benefit card or the benefit and such use shall only be for the respective benefit program purposes. Unless a recipient's family member is an eligible member of the household, the recipient's authorized representative, an alternative cardholder, or has been assigned as a protective payee, no family member may use the benefit card. The recipient shall not sell, or attempt to sell, exchange, or donate an electronic benefit card or any benefits to any other person or entity.

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

Defense Counsel argued that the State's instructions were not a correct statement of the law. RP 230. The Court proposed modeling a jury instruction after a federal jury instruction for food stamp trafficking. RP 231-33; 239; 244. The Court also questioned whether a user of an EBT card was a "redeemer" under the law, positing that perhaps only stores could be considered "redeemers". RP 273-274. The State argued for its proposed jury instructions, breaking down the statute [RCW 9.91.144] piece by piece, to support its offered instructions. RP 277-281; 283. However, the Court would not allow the State to specify in the jury instructions that it is a violation to use someone else's benefits that are not issued to the person presenting them, or to specify which particular rule or regulation the Defendant was alleged to have violated. RP 289-293. Instead, the Court included language in the instructions requiring the State to show that the Defendant knew that his use of food stamps benefits was "not authorized by statute or regulation". RP 296-97.

After the Court finalized the jury instructions, Defense Counsel made a half-time motion to dismiss. RP 307. Defense Counsel argued first that the case should be dismissed because there was confusion regarding the appropriate jury instructions, and secondly, that the

prosecution should have been brought under [7 U.S.C.] 2024(b) rather than 2024(c), claiming that 2024(c) is *only* applicable to store owners who illegally accept food stamps from program participants. RP 307. Defense counsel argued that when RCW 9.91.144 was created, the legislature "made a mistake" by incorporating 2024(c), and that they really meant to incorporate 2024(b). RP 309. The Court found that there was no authority for the proposition that 2024(c) could only apply to stores and not individuals and denied the motion. RP 309-10. Defense then rested, having presented no witnesses or evidence. RP 312. Defendant was convicted of all four counts, as charged. RP 356.

Defendant subsequently filed a motion to arrest judgment, claiming (1) that the Amended Information did not charge a crime, (2) that the Amended Information violated the defendant's due process right to fair notice under the Fourteenth Amendment, and (3) that the State failed to present sufficient proof that the defendant knew that he had obtained and presented , or knew that he had caused to be presented, the EBT card in violation of section 2024(c) or the rules and regulations adopted pursuant to that chapter. CP 352-56. Defendant's arguments were based on differences in phrasing between RCW 9.91.144 and 7 U.S.C. 2024(c) ("whoever" versus "a person", "obtains and presents" versus "presents", etc.). Id. Defendant further argued that because 2024(c) was "couched in

the past tense", it was clearly not meant to apply to a person using the card, but rather "to a person seeking redemption after the card has already been used". Id.

The State opposed the motion to arrest judgment by way of a Response Brief, filed April 18, 2017. CP 360-67. However, on April 21, 2017, the Court granted Defendant's motion, making oral findings on the record. RP 364-87. The Court's Findings of Fact and Conclusions of Law were presented on May 19, 2017. RP 388-92. In particular, the Court concluded that only stores or other vendors can "redeem" an EBT card: "It is the vendor, not the holder and/or user of the EBT card, who redeems its value for cash." CP 375. The Court analogized redemption to buying groceries with a check: "An example of redemption is when a person buys groceries with a check. It is exchanged with the grocer for the food purchased. The grocer then presents the check to the bank to redeem it for cash." Id. The Court went on to find that "the amount deducted from the EBT card is what the grocer redeems for cash". Id. The Court also concluded that the elements of RCW 9.91.144 are unclear; that a "piecemeal" attempt to draft a jury instruction does not comport with the need for clarity and specificity, that because the determination of the elements was confusing to the parties and court, "the law cannot be clear to the average person", that the struggle to draft a correct jury instruction

based on RCW 9.91.144 "amounted to an attempt to make the law fit the facts", that it was judicial error to proceed on the instructions given to the jury, that the testimony and evidence introduced at trial was insufficient to identify what rule or regulation was violated by the defendant, and that no count of the amended information charged a crime. CP 375-76. The Court vacated all four guilty verdicts under CrR 7.4(a)(2) and (3). CP 376.

The State timely appealed the Court's decision to arrest judgment and vacate the verdicts on June 8, 2017. CP 377-83.

## IV. ARGUMENT

**THE TRIAL COURT ERRED IN ARRESTING THE JUDGMENT AND VACATING THE VERDICTS WHERE THE INFORMATION WAS ADEQUATE TO INFORM THE DEFENDANT OF THE NATURE OF THE ACCUSATION.**

Although the bulk of the trial court's finding of fact concerned the court's difficulties with jury instructions, the trial court granted the motion to arrest judgment in part based on insufficiency of the information, under CrR 7.4(a)(2), which allows for judgment to be arrested when the indictment or information does not charge a crime. The trial court reasoned that the "elements of RCW 9.91.144 are unclear" and found that only a vendor can "redeem" an EBT card, not an EBT card holder or user.

The trial court's ruling erroneously ignores the plain meaning of the word "redeem", as well as the context of RCW 9.91.144.

The trial court's findings of fact and conclusions of law are not specific as to whether the trial court was finding that the State's information simply was not specific enough or whether the trial court was finding that RCW 9.91.144 itself does not define a crime. Therefore, the State addresses both arguments on appeal.

**STANDARD OF REVIEW**

An appellate court reviews challenges to the sufficiency of a charging document de novo. State v. Goss, 186 Wn.2d 372, 376, 378 P.3d 154 (2016); State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).

**AUTHORITY**

A. The State's Amended Information was Sufficient

The accused in a criminal case enjoys a constitutional right to notice of the alleged crime the State intends to prove. Wash. Const. art. I, Sec. 22. While an information must allege every element of the charged offense, the elements need not be alleged in the exact words of the statute so long as the information alleges the elements of the crime in terms equivalent to or more specific than those of the statute. State v. Nonong, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). On review, an appellate court will read the information as a whole, according to common sense and

including facts that are implied, to see if it "reasonably apprises an accused of the elements of the crime charged", and if it does, then the defendant may only prevail if he can show actual prejudice from unartful charging language. Id. at 227.

Here, the charging language in the State's Amended Information substantially echoed the language of RCW 9.91.144 and further specified the date and whether the amount of benefits was over or under $100:

> On or about the 7th day of October 2016, in the County of Ferry, State of Washington, the above-named Defendant, in violation of 7 U.S.C Sec. 2024(c), did obtain and present food stamps as defined by the federal food stamp act, as amended, 7 U.S.C Sec. 2011 et. seq., or food stamp benefits transferred electronically, for redemption or did cause such stamps or benefits to be presented for redemption, in an amount under $100.00, through the program established under RCW 74.04.500; contrary to Revised Code of Washington 9.91.144.

CP 311. Therefore, the State's Information was as specific as the RCW which defines the offense, and even more so, because the Information sets forth the date, defendant, and whether the amount of the benefits was over or under $100.00. Thus, the information informed the defendant that he was accused of using, obtaining, and presenting food stamp benefits for redemption in violation of 7 U.S.C. 2024(c). This federal statute in turn describes that it is a violation to present benefits that have been illegally received, transferred, or used. 7.U.S.C. 2024(c). Therefore, the defendant

was reasonably apprised that he had violated RCW 9.91.144 by obtaining and presenting illegally used benefits.

B. RCW 9.91.144 is Constitutional

A statute is presumed constitutional and the party challenging the constitutionality of a legislative enactment has the burden of proving it is unconstitutionally vague. State v. Lira, 45 Wn.App. 653, 726 P.2d 1015 (1986), citing State v. Maciolek, 101 Wn.2d 259, 263, 676 P.2d 996 (1984). A statute or ordinance should not be declared unconstitutional unless is appears unconstitutional beyond a reasonable doubt. State v. Maciolek, 101 Wn.2d at 263. The procedural safeguards necessary to ensure the adequacy of the notice depends on the nature of the proceeding. State v. Lira, Id. at 655. In a criminal proceeding, due process requires only that an accused be notified of the charge against which to defend at trial. Id., citing Burlingame v. Consolidated Mines & Smelting Co., 106 Wn.2d 328, 722 P.2d 67 (1986). The criminal statute must give fair warning of the nature of the conduct declared to constitute an offense. RCW 9A.04.020(1)(c); State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). Common intelligence is the test of what is a fair warning; thus, if men of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement, it is not wanting in certainty. State v. Maciolek, Id. at 265.

Courts do not interpret sections of a statute in a vacuum, but look to the statutory setting of the challenged provision to determine whether the provision is so vague as to deny due process. State v. Lira, Id. at 656, citing State v. Foster, 91 Wn.2d 466, 474, 589 P.2d 789 (1979). Words used in a statute are sufficiently defined if a person of common intelligence and understanding can reasonably be expected to discover their meaning. State v. Lira, Id. at 657. "Impossible standards of specificity are not required." Id.

The issuance of food stamp benefits is preceded by a lengthy process whereby applicants are informed of the applicable laws, rules, and regulations, so a person who has been through this process cannot claim ignorance of the laws and rules for their use. Moreover, a person of ordinary intelligence could determine what is a legal, versus illegal, use of an EBT card by reference to the RCWs. The Washington Supreme Court previously addressed the issue of welfare fraud in State v. Holmes, 98 Wn.2d 590, 657 P.2d 770 (1983). In Holmes, six defendants were convicted of theft in violation of the welfare fraud statute. The statute in question, RCW 74.08.331, states that a person, who by means of misrepresentation regarding eligibility, or by other fraudulent device, obtains, attempts to obtain, or aids anyone else in obtaining public assistance to which the person is not entitled to is guilty of theft in the first

degree. Defendants in Holmes argued that the statute in question did not convey a sufficiently definite warning as to the prescribed conduct. The Supreme Court held that the statute passed the test of reasonable certainty because a recipient of public assistance, possessing ordinary understanding, should "know that public assistance grants by their very nature depend on such things as eligibility (RCW 74.08.025), need (RCW 74.04.005(16)), resources (RCW 74.04.005(17)), and income (RCW 74.04.005(15))." Id. at 597. In other words, because a person could figure out the prohibited conduct by a careful reading and with reference to other statutes, the statute was not unconstitutionally vague.

Here, we have a similar situation. Because a recipient could reasonably understand that use of a benefit card was limited to an authorized user by reference to RCWs, the statute which sets forth the penalty (RCW 9.91.144) is not unconstitutionally vague simply because it references other statutes.

C. RCW 9.91.144 Applies to Individuals who Illegally Redeem Food Stamp Benefits for Food.

The trial court accepted the Defendant's argument that the defendant could not possibly be convicted of RCW 9.91.144 because, defendant argued, that statute only replies to "redeemers," and a "user" of a card is not a "redeemer". The Court agreed that this statute is meant to

apply to store owners or vendors who illegally "redeem" benefits for money from the government. However, this interpretation of the word "redeem" flies in the face of common sense, as well as the statutory framework of RCW 9.91.144.

The word "redeem" has many meanings, including: to repurchase, to win back, to release from blame or debt, to change for the better, to free from the consequence of sin, to free from a lien, and to exchange for something of value. Merriam-Webster's Online Dictionary. In the context of food stamps, most of these definitions do not make sense, except for "to exchange for something of value" because that definition is inherent to the way food stamps work: a person or household is provided with paper or electronic benefits that they can exchange for something of value – food. It is erroneous to analogize food stamp benefits to checks. Checks are negotiable instruments; food stamps are not. Food stamps may only be used by preapproved persons for preapproved items that fall within the program parameters. A store owner or vendor may be *reimbursed* by the government for food that is acquired with food stamps, but it is plainly the card holder/user who *redeems* the benefits for food.

This is made clear when you examine RCW 9.91.144 in the context of the other two immediately preceding statutes, RCW 9.91.140 and RCW 9.91.142. One argument made by the defense is that the

defendant, having received and used food stamps that he was not entitled to, was not guilty of a crime because only the person who illegally *gives* their benefits can be guilty of a crime. However, RCW 9.91.140, a separate statute, clearly addresses and penalizes those who sell their benefits. Therefore, RCW 9.91.144 cannot be meant to apply only to the seller or transferor, because those individuals are already addressed by a separate statute. Likewise, the argument that RCW 9.91.144 only applies to stores who illegally "redeem" benefits is defeated by the existence of RCW 9.91.142. A store or vendor who deals illegally in food stamps commits the crime of trafficking, and RCW 9.91.142 already specifically addresses the crime of trafficking. These three statutes were adopted simultaneously, in Senate Bill 5758, Chapter 53, Laws of 2003, sections 49, 50, and 51, respectively. We presume that because the legislature adopted these three separate laws at the same time, that they knew what they were doing, and intended each of these statutes to address a different kind of criminal act.

Therefore, when we consider that the legislature already designated separate statutes to address the crimes that defendant argues are meant to be addressed by RCW 9.91.144, it becomes clear that 9.91.144 *is* meant to apply to individuals who illegally redeem food stamp benefits.

Consequently, the Court's conclusion of law number 6, that it is the vendor and not the holder/user of the card who redeems it, is erroneous.

D. The Jury Instructions Were Sufficient

In its motion to arrest judgment, Defendant alleged that because the parties and the trial court spent a lengthy amount of time working on jury instructions, that meant that the law was too complicated for an average person to understand and therefore the defendant could not have known his conduct was criminal. The trial court clearly accepted this line of thinking in its conclusions of law, holding: "when the determination of the elements of a crime is confusing to people who are well educated and experienced in the law, even after reading the statutes and caselaw [sic], then the law cannot be clear to the average person."

This conclusion of law ignores the reality that a great deal of what attorneys do is argue over minutiae that the average person, untrained in the law, would likely not understand. Furthermore, simply because the parties may argue over what the law is or ought to be, does not mean that citizens are not required to obey the law. For instance, a murder trial, including preparations and pretrial hearings, may take years and involve incredibly complex and nuanced legal arguments that would be above the heads of most jurors. However, the simple fact that the lawyers and the court are arguing over what the law is and how to conduct a fair trial does

not mean that the law itself is too confusing for an accused to be held accountable for murder, nor would we say that the law is just too confusing for the defendant to know that murder is wrong. This is essentially what the court concluded here, although the trial court never actually found that the parties' and court's confusion led to deficient jury instructions which could have prejudiced the defendant. Therefore, despite any confusion between the parties and/or the trial court about the jury instructions, it has not been claimed nor ruled that the jury instructions were deficient and therefore, the jury instructions are presumed sufficient and the trial court's confusion about them is irrelevant.

**THE TRIAL COURT ERRED BY ARRESTING THE JUDGMENT AND VACATING THE VERDICTS WHERE THE STATE PRESENTED SUFFICIENT PROOF OF THE MATERIAL ELEMENTS OF THE CRIMES CHARGED.**

**STANDARD OF REVIEW**

When reviewing an order arresting judgment, an appellate court's function is to determine whether evidence is legally sufficient to support jury's finding; evidence is sufficient if a rational trier of fact viewing it most favorably to the State could have found essential elements of charged crime beyond a reasonable doubt. State v. Robbins, 68 Wn. App. 873, 846 P.2d 585 (1993).

A motion in arrest of judgment raises the question of the sufficiency of the evidence to take the case to the jury. A challenge to the sufficiency of the evidence or a motion having that effect admits the truth of the evidence of the party against whom the challenge or motion is made and all inferences that reasonably can be drawn from such evidence, and requires that the evidence be interpreted most strongly against the challenger and in the light most favorable to the opposing party. State v. Reynolds, 51 Wn.2d 831, 833, 322 P.2d 356 (1958). In considering a challenge to the sufficiency of the State's evidence, a court's function is to determine whether there is substantial evidence to support the charge, assuming the truth of the State's evidence and all reasonable inferences from it, and viewing it most strongly against the defendant. State v. Sims, 14 Wn.App. 277, 539 P.2d 836 (1975), rev. denied, 86 Wn.2d 1010 (1976). A trial court in ruling on a motion in arrest of judgment may not weigh the evidence to determine whether the necessary quantum has been produced; it may only test or examine the sufficiency thereof. In determining whether the necessary quantum exists, the court must assume the truth of the State's evidence and review it most strongly against the defendant and in a light most favorable to the State; it must draw all inferences that reasonably can be drawn therefrom in favor of the State's position. State v. Randecker, 79 Wn.2d 512, 487 P.2d 1295 (1971). The

word "proof" is measured by the substantial evidence rule; a motion under this rule challenges the sufficiency of the evidence to take the issue to the jury, and if substantial evidence can be found, this is properly left to the jury and the motion is to be denied. Id.

In the case at hand, the defendant was charged with four counts of Unlawful Redemption of Food Stamps based on four occasions where the defendant presented a food stamp card that was not issued to him and redeemed the electronic benefits for food products from Anderson's Grocery Store. The jury was able to view the video which showed that the defendant did present someone else's card and received groceries in return. Indeed, the defense admitted that the defendant used someone else's EBT card.

The crux of the issue before the jury was whether the defendant knew that he was not authorized to use someone else's food stamp card for his benefit. Because the defendant did not testify, the jury had to rely on circumstantial evidence. The jury heard that the defendant had gone through the process of applying for and receiving food stamp benefits himself, a couple of years prior. The jury heard about and was able to examine the voluminous paperwork and pamphlets that the defendant received in connection with his own application, which explained that only the registered household members can use food stamp benefit cards

that are issued to their household and that the benefits may only be used for particular types of items. The jury was able to see from the video surveillance and receipts in evidence that the Defendant clearly recalled the portion of the rules as it related to which items could be purchased with a food stamp card because he carefully set aside the non-food items and made no attempts to use the EBT card to purchase them. The jury was obviously convinced, based on the evidence presented, that the defendant did know that he was not authorized to use the card and that he did so anyways.

The court's role is to determine whether there is substantial evidence to establish the elements of the crime. The jury is the sole and exclusive judge of the weight of the evidence and the credibility of the witnesses. State v. Randecker, Id. Substantial evidence was presented from which the jury could determine that the defendant knew that his use of another's EBT benefits card was not authorized, assuming the truth of the evidence and allowing the State all reasonable inferences. Therefore, there was substantial evidence which established circumstances on which a finding of guilt could be predicated, and the jury found that evidence sufficient to find the defendant guilty of the offenses charged beyond a reasonable doubt.

## V. CONCLUSION

The State respectfully requests that the court reverse the trial court's decision to arrest the judgment and vacate the jury's verdicts. The trial court erred in finding that the information did not charge a crime and that the state failed to provide sufficient proof of a material element of the crime charged.

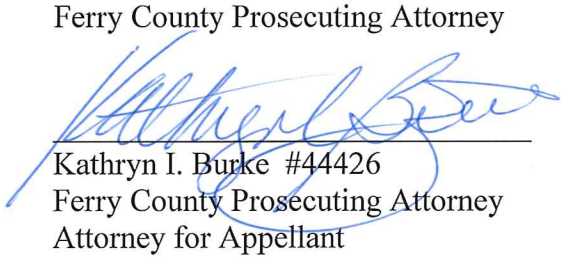
The court's conclusion of law that only vendors can "redeem" an EBT card disregards the common-sense and actual definitions of the word "redeem", as well as the reality of how EBT cards are used. Furthermore, such a definition is contradicted by the statutory scheme which already penalizes vendors for trafficking under a different statute. The court's conclusion that it was judicial error to proceed on the instructions given to the jury is unsupported by the facts: although the court found that the parties and court struggled to agree upon jury instructions, the court made no findings that the jury instructions were insufficient, inadequate, or otherwise misled the jury or misstated the law. Likewise, no evidence was provided from which the trial court could find beyond a reasonable doubt that RCW 9.91.144 is unconstitutionally vague where a person of common sense and ordinary intelligence could understand the statute. Finally, the State presented sufficient evidence of the material elements at trial upon

which the jury could – and did – convict the defendant of the charged offenses.

For the foregoing reasons, the State respectfully requests reversal of the lower court's order arresting judgment and vacating the verdicts, and asks this court to reinstate the verdicts of the jury.

Dated this 29 day of November, 2017.

KATHRYN I. BURKE
Ferry County Prosecuting Attorney



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## FERRY COUNTY PROSECUTORS OFFICE

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