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No. 36027-0-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 17-1-00704-9

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

DAVID THANG,
Defendant/Appellant.

BRIEF OF RESPONDENT

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I. COUNTER-STATEMENT OF ISSUES

1. Do WPIC 10.51 (defining accomplice liability) and WPIC 131.06 (to-convict: identity theft second degree) misstate the law?
2. Did the superior court abuse its discretion by excluding hearsay statements of the defendant offered by Mr. Thang at trial?
3. Did the trial court conduct an inadequate inquiry into Mr. Thang's ability to pay?
4. Did the trial court err by finding the defendant used a motor vehicle in the commission of a felony?

II. STATEMENT OF THE CASE

David Barragan stole checks out of his father's neighbor's mailbox. 1 RP 132. The checks had been made out to pay various bills and were intended to be picked up by the postal service for delivery.

Mr. Barragan altered those checks. 1 RP 133-135. Mr. Barragan then enlisted his best friend and former roommate, David Thang, to help him deposit the altered checks. 1 RP 69, 123-124. The pair met while attending Wenatchee Valley College together. 1 RP 69.

Over the course of a week in October 2017, Mr. Thang deposited the four forged checks into his personal account at Cashmere Valley Bank. 1 RP 93-96. Upon depositing each check, Mr. Thang immediately withdrew, in cash, the face value of the check or as much as the ATM would permit. 1 RP 93-94.

The branch manager testified that the forgeries were of such poor quality and so obvious that they would have been immediately rejected if presented in-person to a teller. 1 RP 102. For example, people typically deposit into their account checks made out to them, not made out to multinational corporations like Verizon, and also do not deposit into their personal accounts checks made out to pay bills. 1 RP 102-103; Ex. 1. The second check Mr. Thang deposited still said “thirty five only” in long-hand, but in numerals had been changed to read \$535; the payee information was obviously changed from VFW to “DAvid Barragan”; and the memo line said “foundation work.” Ex. 3. The third check Mr. Thang deposited was originally made out to Costco, but “David Barragan” was obviously written over it; the long-hand dollar amount was also written over to say “Nine Hundred” instead of “One Hundred.” Ex.

5. The last check was also obviously written over on the payee line to say David Barragan where it originally said Visa, was intended to pay the victim's credit card bill, and had an altered memo line. Ex. 7; 1 RP 54.

But, a check deposited in an ATM bypasses real-time fraud detection procedures—staving off detection until that check is eventually reviewed by a human being. 1 RP 103, 106. For Cashmere Valley Bank it can take upwards of a week before a human reviews checks deposited by ATM. 1 RP 103. An ATM deposit also provides immediate access to a portion of the funds. At Cashmere Valley Bank, the depositor can immediately withdraw up to the face value of the check or \$500, even if their account has a \$0 balance. 1 RP 106. Thus, Mr. Thang and Mr. Barragan were able to immediately gain access to funds from the stolen checks, while staving off detection until the deposits were reviewed by a human.

On October 19th, the same date as the final deposit, a bank employee flagged one of the previously deposited checks as fraudulent and the bank put a hold on Mr. Thang's account. 1 RP 89. The bank contacted Mr. Thang to talk to him about the checks

and also notified law enforcement. Law enforcement investigated, and both Mr. Barragan and Mr. Thang gave statements to police. 1 RP 62.

The State charged Mr. Barragan and Mr. Thang with forgery, identity theft, and possessing stolen property. Mr. Barragan pleaded guilty and testified at Mr. Thang's trial on behalf of the defense. 1 RP 130. Mr. Thang did not testify. 1 RP 121.

During the trial, the State filed written motions in limine with supporting authority. CP 24-26. The defendant did not file any motions in limine. The defendant's counsel agreed with the State's motions 1-4, and only took issue with numbers 5 and 6 (not at issue on appeal). 1 RP 6. Number 4 prohibited the defendant's lawyer from eliciting hearsay statements of his client. CP 25. During the trial, the defendant's lawyer sought to introduce the defendant's recorded statement to police. The judge denied the motion on several grounds, including that counsel was bound by the State's motion in limine 4. 1 RP 78, 80.

The jury convicted Mr. Thang on all counts. Mr. Thang now appeals.

III. MR. THANG'S NATIONAL ORIGIN WAS NOT A PROPER TOPIC AT TRIAL AND IS NOT A PROPER TOPIC FOR APPEAL EITHER

In Mr. Thang's Introduction and Statement of the Case, his appellate counsel discusses his national origin and immigration status. App. Br. at 1 and 5. The apparent intended effect of these references is either to engender emotional sympathy or to re-argue the facts of the case and suggest he was an unwitting participant due to his lack of familiarity with America and the English language. This is not proper.

At trial, the jury did not hear any testimony from any witness about where Mr. Thang was born. Additionally, the State sought, and the trial court granted, a pretrial order excluding evidence of Mr. Thang's "immigration status" and "related information." CP 25. The trial in this case occurred prior to adoption of ER 413, which generally prohibits evidence of a party's or witness's immigration status. Accordingly, counsel's statements at pages 1 and 5 of the Brief of Appellant are not actually evidence that was ever presented to the jury.

Finally, the Statements at 1 RP 8 give a false impression of Mr. Thang. As explained during the trial, Mr. Thang has a bank

account that he has had for years, he has a driver's license, and is able to function in English at the college level as evidenced by his enrollment at Wenatchee Valley College. 1 RP 90-91, 69. As evidenced in the audio recordings of Mr. Thang that are before this Court—including his statement to police and his jail calls presented during sentencing—Mr. Thang is fluent in the English language and thoroughly “Americanized.” He is not a naïve immigrant as his lawyers seem to imply.

IV. ARGUMENT

Mr. Thang presents four arguments on appeal. First, he argues WPIC 10.51 and WPIC 131.06 misstate the law. Second, he argues the trial court abused its discretion by excluding hearsay statements offered by his lawyer. Third, he argues the trial court erred as a matter of law at sentencing by conducting an inadequate inquiry into his ability to pay. Fourth, he argues the trial court erred as a matter of law by finding that Mr. Thang's use of a motor vehicle was integral to the commission of his crimes. The State responds to each of these arguments in turn.

A. WPIC 10.51 (defining accomplice liability) and WPIC 131.06 (to-convict identity theft second degree) do not misstate the law.

For the first time on appeal, Mr. Thang challenges the trial court's accomplice liability instruction and the to-convict instruction for identity theft in the second degree. App. Br. at 8-11. The court's instructions are found at Clerk's Papers 44 and 50, respectively. Importantly, these instructions are verbatim the same as the Supreme Court's pattern instructions: WPIC 10.51 and WPIC 131.06. Thus, when properly framed, Mr. Thang's real argument is that WPIC 131.06, when combined WPIC 10.51, is transformed into an unconstitutional instruction.

1. Mr. Thang's trial lawyer failed to preserve this issue for review.

Mr. Thang's trial lawyer failed to preserve this issue for review. Below, Mr. Thang's lawyer did not make any objection or exceptions to the instructions proposed by the State and given by the Court. 1 RP 137 (MR. FORD: I reviewed the State's [instructions], and I don't have any objection to those."). Accordingly, Mr. Thang's lawyer failed to preserve this issue for review.

“Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or **agreed to its wording.**” *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (citing *State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358 (2000); *In re Det. of Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998)) (emphasis added).

Furthermore, “[a]n attorney has an obligation to object to instructions that appear to be incorrect or misleading and must also propose instructions necessary to support argument of the client’s theory of the case. Failure to preserve error by objecting in the trial court generally operates as a waiver, RAP 2.5(a), and this case is no exception.” *State v. Hood*, 196 Wn. App. 127, 135, 382 P.2d 710 (2016).

The one exception to this rule is when it is a manifest error affecting a constitutional right. A constitutional error is “manifest” under RAP 2.5 only if it was “an obvious error that the trial court would be expected to correct even without an objection.” *Id.* at 135-36 (citing *State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756

(2009)). Because “[o]ur Supreme Court has instructed trial courts to use only the pattern instruction[s],” trial courts are not obligated to anticipate that use of a particular WPIC “would be challenged on appeal as undermining the presumption of innocence.” *Id.* (citing *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007)). Thus, Mr. Thang’s challenge to the use of WPIC 10.51 and WPIC 131.06 cannot be raised for the first time on appeal.

Notably, this exact same argument concerning identity theft and accomplice liability was raised in *State v. Smith*, No. 46365-2-II (Unpublished 2016).¹ Although it is hard to tell from the Court’s decision that this is the exact same issue, a review of the Appellant’s Brief from *Smith* reveals that Smith’s lawyer raised the exact same issue raised in this case concerning the pattern instructions lowering the State’s burden of proof. *See* App. Br., No. 46365-2-II at 24-29 (2016). The Court of Appeals rejected review of this issue in *Smith* because it was neither preserved, nor a manifest error affecting a constitutional right: “Smith’s challenge to the second degree identity theft instruction is based upon the specific wording of the

¹ The State cites this unpublished decision not as binding precedent, but for its persuasive value. GR 14.1(a).

instruction, which he did not challenge in the trial court. Therefore we decline to address this issue for the first time on appeal.” *Smith*, No. 46365-2-II at 16.

Because Mr. Thang did not object to the instructions below, this Court should follow the reasoning in *Smith*, as well as the precedent set in *Winings* and *Hood*, and find this issue was not preserved for review.

2. WPIC 10.51 and WPIC 131.06 do not conflict.

This court “review[s] a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole.” *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Each instruction is considered in the context of the instructions as a whole rather than in isolation. *State v. Butler*, 165 Wn. App. 820, 835, 269 P.3d 315 (2012).

Mr. Thang’s argument fails on the merits because it misstates the law under *Roberts/Cronin*. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). Mr. Thang relies on *Cronin* as his sole authority for his argument. App. Br. at 9. Parties frequently refer to these errors

interchangeably as *Cronin* or *Roberts* errors. E.g. *In re Pers. Restraint of Sims*, 118 Wn. App. 471, 476, 73 P.3d 398 (2003).

Prior to *Cronin* and *Roberts*, WPIC 10.51 allowed juries to convict accomplices based on the knowledge that the principal intended to commit “a crime.” *Cronin*, 142 Wn.2d at 578. Following these cases, the Supreme Court amended WPIC 10.51, to require knowledge of “the crime,” which tracked with the language in RCW 9A.08.020(3)(a) which says “the crime” and not “a crime.”

The defendant’s argument goes awry by failing to acknowledge that *Roberts* errors only occur when the *accomplice* definition fails to confine accomplice liability to the knowledge of the instructed offenses by inviting convictions based on proof the defendant was knowingly complicit in some other offense. *Roberts*, 152 Wn.2d at 513. No case has ever extended *Roberts* beyond the specific statute at issue in that case. The reason why *Roberts* has not been so extended is because it was a simple issue of the jury instructions not mirroring the language of the statute. No one denies that the Legislature, could if it so desired, amend the accomplice liability statute to say “a crime.” See *Roberts*, 142 Wn.2d at 511.

In other words, this assignment of error wrongly treats the identity theft “to convict” instruction as serving the same purpose as the accomplice definition by playing upon the coincidental similarity between the language used in the identity theft statute with the language used in the accomplice liability statute. Altering the “to convict” instruction in the manner Mr. Thang suggests would require deviation from RCW 9.35.020(1)’s plain language, which actually uses the phrase “any crime.” In addition to being wrong, the change would also impermissibly increase the State’s burden of proof by requiring it to make an election the statute does not require. *State v. Fedorov*, 181 Wn. App. 187, 197-99, 324 P.3d 784 (2014) (citing *State v. Bergeron*, 105 Wn.2d 1, 15, 711 P.2d 1000 (1985)). In *Fedorov*, the Court of Appeals held that identity theft, like burglary, does not require the State to specify the “any crime” that the defendant intended to commit in order to prove *mens rea*. *Id.*

Identity theft requires a principal to use another person’s means of identification with intent to commit *any* crime. RCW 9.35.020. Accomplice liability requires an accomplice to act with knowledge that his actions will facilitate the commission of the

underlying crime. RCW 9A.08.020(3)(a). “[A]ccomplice liability is not an element of the crime . . . charged, nor is accomplice liability an element of, or alternative means of, committing a crime.” *State v. Teal*, 152 Wn.2d 333, 338, 96 P.3d 974 (2004). The defendant “need not have specific knowledge of every element of the crime committed by the principal, provided he has general knowledge of that specific crime.” *State v. Roberts*, 142 Wn.2d at 512. The accomplice only needs to know “that he or she was facilitating the generic crime.” WPIC 10.51, cmt. Thus, in order for an accomplice to be found guilty of identity theft, he or she only needs to know that their actions will promote or facilitate the crime of identity theft, but that does not translate to requiring specific knowledge of the principal’s *mens rea*.

Because the defendant’s argument improperly extends *Roberts* outside of the plain language of the accomplice liability statute at issue in that case, and would require the Court to re-write the identity theft statute to say something that it does not, this Court should reject Mr. Thang’s argument.

3. The doctrine of election cured any error.

Assuming any error occurred, the doctrine of election cured it. *State v. Stovall*, 115 Wn. App. 650, 658, 63 P.3d 192 (2003) (holding that the doctrine of election can cure a *Roberts* error); *see also State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); *State v. Kitchen*, 110 Wn.2d 403, 405-06, 414, 756 P.2d 105 (1988). During closing argument, the State (although not required to do so), clearly elected that the intent to commit “any crime” alleged for purposes of identity theft was the other charged crimes of forgery and possessing stolen property. 1 RP 183-84.

B. The trial court did not abuse its discretion by excluding hearsay statements offered by Mr. Thang’s lawyer.

Mr. Thang argues Judge McSeveney abused his discretion when excluding an audio recording of hearsay statements of the defendant, which included an additional layer of hearsay from the defendant relaying statements made by others. This argument fails because Mr. Thang’s lawyer invited any error. This argument fails because Mr. Thang’s lawyer failed to preserve the issue for review. Ultimately, this argument fails on the merits.

1. Mr. Thang invited any error involving exclusion of his hearsay statements.

“The [invited error] doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take the action that that party later challenges on appeal.” *In re Pers. Restraint of Salinas*, 189 Wn.2d 747, 757, 408 P.3d 344 (2018) (brackets in original), quoting 15A KARL B. TEGLAND & DOUGLAS J. ENDE, WASHINGTON PRACTICE: WASHINGTON HANDBOOK ON CIVIL PROCEDURE § 88.4, at 758 (2015 ed.); *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723-24, 10 P.3d 380 (2000) (doctrine of invited error prohibits a party from knowingly setting up an error by an affirmative act and then complaining on appeal); *State v. Henderson*, 114 Wn.2d 867, 871, 792 P.2d 514 (1990) (invited error precludes judicial review even where the alleged error raises constitutional issues). “In determining whether the invited error doctrine applies, we have considered whether the defendant affirmatively assented to the error, *materially contributed to it*, or benefited from it.” *Salinas*, 189 Wn.2d at 755 (citations and quotations omitted) (emphasis in original).

Here, Mr. Thang's trial counsel both affirmatively assented to and materially contributed to the alleged error when he agreed to the State's motion in limine 4. This motion and order read:

To prohibit defense counsel from eliciting from witnesses hearsay statements of his client. ER 801(d)(2); 802; *See State v. Perez*, 139 Wn. App. 522, 531, 161 P.3d 461 (2007); *State v. Finch*, 137 Wn.2d 792, 824-25, 975 P.2d 965 (1999); *State v. Sanchez-Guillen*, 135 Wn. App. 636, 645, 145 P.3d 406 (2006).

CP 25. Mr. Thang's trial counsel affirmatively assented to the State's Motion in Limine 4: "MR. FORD: . . . So I don't real [sic] have a problem with 1 through 4." 1 RP 6. When the issue later came up during the trial, the court denied Mr. Thang's request to admit his prior statements on the grounds that he was bound by the State's Motion in Limine 4: "THE COURT: All right. Mr. Ford, I think you're bound by the motion in limine." 1 RP 78. Accordingly, the invited error doctrine precludes review of this alleged error.

2. Mr. Thang failed to preserve any error involving exclusion of his hearsay statements.

Review of this alleged error is further precluded because Mr. Thang's trial counsel failed to follow ER 103's error preservation

requirements and because he failed to lay a proper foundation for admissibility.

ER 103(a)(2) states that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” Here, Mr. Thang’s attorney did not make an offer of proof. He told the court he had the audio recording with him, but never asked to play it for the Court outside the presence of the jury. 1 RP 72. Nor did he ask to have it marked as an exhibit and made part of the court’s record. *See generally* 1 RP 71-81. Furthermore, the substance of the evidence was not apparent from the context of the questions asked, because the State made a timely objection which cut off any answer, as required by ER 103(a)(1) and *State v. Sullivan*, 69 Wn. App. 167, 171, 847 P.2d 953 (1993). Thus, by failing to make an offer of proof to the trial court, as required by ER 103(a)(2), Mr. Thang failed to preserve his claimed error for review.

Although Mr. Thang’s appellate counsel received leave from this Court’s commissioner to have the recording made part of the

record on appeal, his late actions do not impact this Court’s error analysis.² That is because evidentiary rulings are reviewed for abuse of discretion. *See* App. Br. at 12 (citing *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997)).

A trial court cannot abuse its discretion based on information, arguments, and exhibits that were never presented to it. *State v. Curtiss*, 161 Wn. App. 673, 703, 250 P.3d 496 (2011) (citation omitted) (“We do not accept evidence on appeal that was not before the trial court. Moreover, on direct appeal, we cannot consider matters outside the record.”); *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 891, 251 P.3d 293 (2011) (materials that “were not before the trial court at the time of the trial . . . [were not] necessary to reach a decision on the merits of the trial rulings at issue.”). Where an exhibit was never offered into evidence and where the defendant was given an opportunity to lay a proper foundation but failed to do so, the trial court cannot err in excluding the evidence. *Herring v. Dep’t of Social & Health Servs.*, 81 Wn.

² Because Mr. Thang’s lawyer failed to put the recording in front of the trial court for consideration, the recording’s only relevance on appeal would be with respect to prejudice—not error. Even then, that would be prejudice resulting from ineffective assistance of counsel, which Mr. Thang does not argue on appeal.

App. 1, 20-21, 914 P.2d 67 (1996). To hold that a trial court can abuse its discretion by not considering information that it was never asked to consider would turn the abuse of discretion standard on its head.

Furthermore, as the proponent of admission, Mr. Thang bore the burden of establishing admissibility at the trial court. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993) (“A party seeking to admit evidence bears the burden of establishing a foundation for that evidence.”). This rule applies just the same to criminal defendants seeking to admit evidence. *E.g. State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015) (“As the proponent of the evidence, the defendant bears the burden of establishing relevance and materiality.”).

Here, Mr. Thang’s only arguments for admission before the trial court were “how is it fair and just,” “this doesn’t seem fair,” and “I think everything that’s in there is admissible.” 1 RP 77, 78. Such statements from counsel come nowhere close to laying a foundation for admissibility or identifying an applicable hearsay exception. As the State explained below, “The burden of admission is on the

proponent of the evidence. The proponent of the evidence here, defense counsel, has not cited any rule in favor of admissibility.” 1 RP 79. The Court then took the matter under advisement and recessed to review the law. 1 RP 79-80. When the Court returned, it sustained the State’s objection based on *Finch* and Tegland’s Evidence Handbook. 1 RP 80.³

Unlike the State and the trial court, Mr. Thang did not cite any cases or court rules in support of admissibility. Under such circumstances, this Court will not review an issue absent argument and citation to authority, *State v. Farmer*, 116 Wn.2d 414, 432, 805 P.2d 200 (1991) (“issues not supported by argument and citation to authority will not be considered on appeal.”), and, as *Land* and *Starbuck* show, the rule is no different for trial courts considering evidence admissibility.

Furthermore, as a matter of public policy, our appellate courts should require more from lawyers than simply saying “it’s unfair” before finding an issue properly raised and argued for appellate review. “It’s unfair” is not a legal argument. It is a subjective

³ Citing *State v. Finch*, 137 Wn.2d 792, 975 P.2d 965 (1999); 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, § 801:16 (2017-2018 Ed.).

statement of opinion that contributes nothing to a court’s legal analysis. To find an abuse of discretion on so little, amounts to nothing more than overbearing paternalism and a lack of due respect for the independent judgment of our trial court judges.

Recognizing that Mr. Thang did not make any cognizable argument for admissibility at the trial court level, Mr. Thang has developed a new theory on appeal—that excluding the recording violated ER 106. But, this Court will not entertain “a new theory of admissibility for the first time on appeal.” *State v. Brown*, No. 71820-7-I (unpublished 2015).⁴ See also *Makoviney v. Svinth*, 21 Wn. App. 16, 27, 584 P.2d 948 (1978) (“A third theory of admissibility is urged in the brief, . . . This theory was not presented to the trial court and cannot be raised for the first time on appeal.”); *State v. Goebel*, 36 Wn.2d 367, 378, 218 P.2d 300 (1950) (same); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (defendant prohibited from presenting a new theory for excluding evidence for the first time on appeal); *Payless Car Rental Sys. v. Draayer*, 43 Wn. App. 240, 243, 716 P.2d 929 (1986) (“Having failed to specifically

⁴ Pursuant to GR 14.1(a), the State cites this unpublished decision not as precedent, but for whatever persuasive value this Court assigns to it.

object to [plaintiff's] testimony in terms of foundation or best evidence concerning profits, [defendant] is precluded from raising the issue now.”). Notably, the new theory that the Court refused to consider in *Brown* was a new theory for overcoming the State's hearsay objection to admitting the defendant's prior statements. *Brown*, No. 71820-7-I, slip op. at 14.

Based on ER 103 and the cases cited above, the State asks this Court to hold that Mr. Thang failed to preserve this alleged error for review.

3. Mr. Thang's argument fails on the merits.

Finally, Mr. Thang's brand new argument concerning ER 106 fails on the merits because it still fails to establish admissibility.

The first reason why the argument fails is because ER 106 does not apply. By its plain terms, ER 106 is only triggered when “a writing or recorded statement or part thereof is introduced by a party.” The State never played any part of the recording. Thus, that rule does not apply.

Furthermore, the State only inquired with the deputy about what he remembered of his conversation with the defendant. The

State never asked the deputy to testify regarding the contents of the recording or to refresh his recollection by using the recording. The State never once mentioned the recording to the jury. The first mention of a recording came from the defendant's lawyer. 1 RP 71.

This situation is similar to *Lozano*. In *Lozano*, the State asked an officer to silently refresh his recollection as to a defendant's statement by referring to a transcript. The State did not admit the transcript into the record and the officer did not read from the transcript. On cross-examination, the defendant's lawyer sought to have the officer read from the transcript, but the court sustained the State's objection. The Court of Appeals affirmed, holding that ER 106 was inapplicable when the recorded statement was only used to refresh a recollection and never put in front of the jury. Notably, the defendant's trial lawyer properly preserved the issue for appeal by citing to ER 106 at the trial court. *State v. Lozano*, 189 Wn. App. 117, ¶ 31-34 (2015) (unpublished portion of opinion)⁵

Moreover, Mr. Thang's appellate counsel does not cite to any case law applying ER 106 to this type of situation or that ER 106 can

⁵ Pursuant to GR 14.1(a), the State cites the unpublished portion of this partially-published decision not as precedent, but for whatever persuasive value this Court assigns to it.

provide an exception to the rest of the Rules of Evidence. Mr. Thang's lawyer just baldly states ER 106 overrides *Finch* (i.e. ER 801(d)(2)). But, bald assertions are insufficient to establish admissibility. To the contrary, *Perez* (one of the cases cited to the trial court in support of the motions in limine) explicitly holds that ER 106 does not apply to the situation here:

ER 106 is limited to a writing or recorded statement and does not apply to *Perez*. The rule of completeness did not require that *Perez's* statement to Officer Brand be admitted to the jury. Instead, ER 801 provides the proper framework.

Perez, 139 Wn. App. at 531; CP 25. The Court of Appeals held the same in *Lozano* as an additional reason for excluding the recorded statements. *State v. Lozano*, 189 Wn. App. 117, ¶ 35 (2015) (unpublished portion of opinion). Because *Perez* and *Lozano* hold that ER 106 does not provide an exception to ER 801(d)(2) and because Mr. Thang does not cite any other authority, his new argument on appeal for admissibility fails.

As *Perez* and *Lozano* show, ER 106 does not provide an exception to the entire rulebook. This is good public policy. If ER 106 were allowed to act as an exception to swallow the rule of ER

801(d)(2), “a party could simply tell his or her story out of court, and then present it through the testimony of other witnesses without taking an oath and without facing cross-examination.” 5D TEGLAND, § 801:16, p. 387 (2018-2019 Ed.). Put into practice, the defendant could prepare a witness beforehand, wait for the State to elicit a statement of the defendant from that witness, and then ambush on re-direct/cross-examination with a previously undisclosed and prepared statement from the defendant. The story would be untestable and unassailable—every conceivable follow-up question would necessarily be met with honest answers of “I don’t know” because the witness has no personal knowledge of the events and knows no more than what the defendant told him/her. To allow ER 106 to swallow ER 801(d)(2) would eviscerate the very reason why it was specifically worded to only apply to party opponents.

Mr. Thang also assumes on appeal that he would have been able to play the entire interview for the jury. But, he fails to address the fact that much of the interview is inadmissible for other reasons. For example, the first part of the interview involves the defendant recounting a substantial amount of hearsay of a bank representative.

At approximately 6:55 and 16:05, the defendant also relays hearsay of David Barragan. ER 805 provides that hearsay within hearsay requires a separate exception for each layer of hearsay. At 15:30, the conversation discusses what a reasonable person would do and whether a reasonable person would know the checks are forged and stolen. But, that is a lay opinion on the ultimate issue and invades the province of the jury. Throughout the interview, the officers provide their personal opinions as to the defendant's guilt—again invading the province of the jury. Mr. Thang does not provide an exception for any of that layered hearsay as required by ER 805, nor does he explain how he would have excised the portions of the interview that clearly invade the province of the jury. Because he cannot establish the admissibility of the entire recording the trial court did not abuse its discretion by excluding the recording.

Because Mr. Thang's lawyer either invited any error and/or failed to preserve any error, this issue does not merit review. The issue additionally fails on the merits because Mr. Thang's appellate lawyer has not established how the recorded statement would have been otherwise admissible.

C. The State has no objection to remand to strike the discretionary costs.

Pursuant to *Ramirez*, the State has no objection to Mr. Thang's request to remand to strike discretionary costs. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

D. The trial court properly found that Mr. Thang's use of a motor vehicle was integral to the commission of his crimes.

RCW 46.20.285(4) requires suspension of a defendant's driver's license for "[a]ny felony in the commission of which a motor vehicle is used." The applicability of this statute is reviewed *de novo*. *State v. Hearn*, 131 Wn. App. 601, 609, 128 P.3d 139 (2006). "The relevant test under RCW 46.20.285(4) is whether vehicle *operation or use* contributed in some reasonable degree to the commission of a felony. In other words, the vehicle must be an instrumentality of the crime, such that the offender uses it in some fashion to carry out the crime." *State v. B.E.K.*, 141 Wn. App. 742, 747-48, 172 P.3d 365 (2007) (emphasis in original). The threshold for making a vehicle an instrumentality of the crime is low. For example, the mere act of using a vehicle as a repository for drugs or

a firearm is enough to trigger this statute. *State v. Batten*, 140 Wn.2d 362, 997 P.2d 350 (2000).

In an amicus brief supporting *Batten*, WACDL argued that this statute should be limited to felonies whose commission “necessarily” involves use of a motor vehicle. *Batten*, 140 Wn.2d at 367. The Supreme Court rejected that argument as an improper attempt to read words into the statute. *Id.* Instead, the Court relied on the ordinary dictionary definition of “used” to interpret the statute to mean “employed in accomplishing something.” *Id.* at 365 (citations and quotations omitted).

Using the ordinary definition of “used,” the trial court did not err by ordering the Department to revoke Mr. Thang’s license. Mr. Thang made the calculated decision to commit his crimes by using the drive-up ATM to deposit the checks. As Ms. Pulver testified, presentation of any of these forgeries in person to a bank teller would have set off immediate red flags and under the bank’s rules would not have been accepted for deposit without first verifying the check with the payor. 1 RP 102-103, 112-113. But, a check deposited in an ATM provides immediate access to a portion of the

funds while bypassing those real-time fraud detection procedures—staving off detection until that check is eventually reviewed by a human being. 1 RP 103, 106. Thus, by using his car to access the drive-up ATM, Mr. Thang was able to obtain immediate access to the stolen funds while avoiding detection of these obvious forgeries.

Mr. Thang cites to *Alcantar-Maldonado* to argue that use of his vehicle was merely “incidental” and could have been accomplished just the same as by walking up or by riding a bicycle. App. Br. at 18 (citing *State v. Alcantar-Maldonado*, 184 Wn. App. 215, 340 P.3d 859 (2014)). That argument fails because it relies on the rejected argument from *Batten* that the vehicle must be “necessary” to the crime and also relies on a misreading of *Alcantar-Maldonado*.

In *Alcantar-Maldonado*, the Court of Appeals held a vehicle was not used in the commission of a burglary and assault because the defendant only used it to drive to and from the residence where he committed his crimes. *Alcantar-Maldonado*, 184 Wn. App. at 229. The court distinguished use for the purpose of coming to and from a crime scene from use where the felony takes place from

inside the motor vehicle. *Id.* at 230. Here, Mr. Thang committed his crimes while still inside his car. He never had to leave his car to commit them. Thus, under *Alcantar-Maldonado*, the statute applies.

Mr. Thang argues he could have just as easily walked up to the ATM or ridden a bicycle up to the ATM. But, that is of no matter. Whether he could have used a different means of conveyance is just another way of trying to revive the rejected “necessity” argument from *Batten*. The true focus of *Alcantar-Maldonado* is whether a part of the crime took place within the vehicle. *Alcantar-Maldonado*, 184 Wn. App. at 230. Furthermore, use of the vehicle aided the crime more than a bicycle or a walk-up would have because it helped ward off detection. These crimes took place mid-day, some of which during normal banking hours. 1 RP 93. Seeing a person using a drive-up ATM on foot or on a bicycle could have easily aroused suspicion and a 9-1-1 call by bank employees or passers-by. Accordingly, the trial court did not err by applying RCW 46.20.285(4) to suspend the defendant’s license.

V. CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully asks this Court to affirm Mr. Thang's convictions and hold that Mr. Thang's counsel failed to preserve issues I and II for review, affirm the finding that the defendant used a motor vehicle in the commission of a felony, and remand to strike discretionary costs.

DATED this 25th day of January, 2019.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



By: Andrew B. Van Winkle WSBA #45219
Deputy Prosecuting Attorney

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

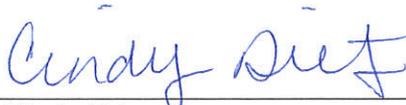
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| STATE OF WASHINGTON, |) | No. 36027-0-III |
| Plaintiff/Respondent, |) | Chelan Co. Superior Court No. 17-1-00704-9 |
| vs. |) | DECLARATION OF SERVICE |
| DAVID THANG, |) | |
| Defendant/Appellant. |) | |

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 25th day of January, 2019, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 25th day of January, 2019.



Cindy Dietz
Legal Administrative Supervisor
Chelan County Prosecuting Attorney's Office

CHELAN COUNTY PROSECUTING ATTORNEY

January 25, 2019 - 2:15 PM

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