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NO. 36028-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

SEAN HUDSON,

Appellant.

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

The Honorable Scott Gallina, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by instructing the jury on an uncharged alternative means of committing each of the charged second degree thefts.

2. Double jeopardy was violated because the court's instructions permitted the jury to convict appellant twice of second degree identity theft based on the same act.

3. The court erred when it included two out of state convictions in appellant's offender score without conducting a comparability analysis.

4. Appellant's convictions from Idaho are not comparable to Washington felonies.

5. Appellant received ineffective assistance of counsel.

6. The \$200 "criminal filing fee" imposed by the trial court should be stricken under the Supreme Court's recent decision in State v. Ramirez.¹

7. The \$220 "sheriff service fee" imposed by the trial court at sentencing should be stricken under Ramirez.

8. The \$750 court appointed attorney fee imposed by the trial court under RCW 9.94A.760 should be stricken under Ramirez.

¹ State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

Issues Pertaining to Assignments of Error

1. A person may not be tried for an uncharged offense. Here, appellant was charged with two counts of second degree theft for allegedly "wrongfully obtain[ing] or exert[ing] unauthorized control over an access device[.]" CP 1, 3. The trial court instructed the jury however, that they could convict appellant for second degree theft if they found that he either "wrongfully obtained or exerted unauthorized control over an access device" or "appropriated lost or misdelivered property[.]" CP 25 (instruction 6); CP 33 (instruction 14). Where the trial court instructed the jury on an uncharged alternative means of committing each of the charged second degree thefts, must appellant's convictions for these two offenses be reversed because they violate his Fourteenth Amendment right to due process?

2. Appellant was convicted of two counts of second degree identity theft. Each count contained identical language that appellant or an accomplice knowingly obtained, possessed, or used a means of identification or financial information of another person. Neither count named a specific person, financial institution, or specific financial information, and the dates of the two counts are identical. The jury instructions did not state that a separate act was required for each count.

Was double jeopardy violated because the instructions permitted the jury to convict appellant twice based on the same act?

3. Appellant was sentenced for two counts each of second degree theft and second identity theft, and one count of second degree perjury. The trial court included two 2016 Idaho convictions described in the prosecutor's presentence report of appellant's criminal history as "forgery" and "grand theft." The State provided no documentation regarding the Idaho convictions and did not prove the comparability of either conviction. Appellant acknowledged the existence of the Idaho convictions in his criminal history and agreed with the State's calculation of the standard range based on an offender score of six. Appellant did not, however, specifically agree the Idaho convictions were for crimes comparable to Washington felonies. The sentencing court adopted the prosecutor's calculation of appellant's offender score without conducting a comparability analysis.

a. Did the court err by including the Idaho convictions in the offender score even though the State failed to show appellant's Idaho convictions were for crimes comparable to felonies in Washington?

b. In the alternative, did defense counsel provide ineffective assistance at sentencing by failing to hold the State to its burden of

proving appellant's Idaho convictions were for felonies that were comparable to Washington felonies?

4. Under the Supreme Court's decision in Ramirez, should the \$200 criminal filing fee, \$220 sheriff service fee, and \$750 fee for court appointed counsel be stricken from appellant's judgment and sentence because he was indigent at the time of sentencing?

B. STATEMENT OF THE CASE

1. Procedural History.

The Asotin County Prosecutor charged appellant Sean Hudson with two counts each of second degree theft by access device and second degree identity theft for incidents alleged to have occurred on October 27, 2016. CP 1-4. The State also charged Hudson with one count of second degree perjury for an incident alleged to have occurred on October 29, 2016. CP 5.

A jury convicted Hudson as charged. CP 41-42; 2RP² 214. Based on a calculated offender score of six, the trial court imposed a mid-range concurrent sentence of 23 months. The trial court also imposed 12 months of community custody. CP 55-63; 2RP 222.

² This brief refers to the verbatim report of proceedings as follows: 1RP – March 22, 2018 (Jury Selection); 2RP -- March 22, 23, and May 7, 2018.

The court ordered Hudson to pay \$2,270 in legal financial obligations as requested by the State, including, a \$500 crime victim assessment, a \$100 DNA database fee, a \$200 criminal filing fee, a \$220 sheriff service fee, a \$750 court appointed attorney fee, \$1,000 fine, and a \$100 Domestic Violence assessment fee. CP 56; 2RP 221-22. The trial court explained that "I think the record is replete with evidence of his employment and employability. He has been working and his work has been associated with all of his criminal history." 2RP 222.

As part of his notice of appeal, Hudson submitted a financial statement declaration indicating he had no source of personal gross monthly income. CP 78-80. The superior court found Hudson to be indigent and ruled that he was entitled to counsel on appeal at public expense. CP 81-83.

Hudson timely appeals. CP 66-77.

2. Trial Testimony.

On October 27, 2016, Kimberly Goddard entered a Walmart bathroom with her children and placed her purse on top of a garbage can in a bathroom stall. 2RP 102-03. She left her purse behind when she left the bathroom a short time later. 2RP 103-04.

Goddard then spent the next hour and half shopping at Walmart. It was only when she went to pay for her items that she realized she had left

her purse in the bathroom. 2RP 104. When Goddard returned to the bathroom and retrieved her purse, she noticed that a Wells Fargo debit card in her name was missing from her wallet. 2RP 16, 105-07. Also missing from Goddard's wallet was a Banner Bank debit card belonging her mother, Catherine Medlock. 2RP 16, 107-08, 114.

Goddard went to the Walmart customer service desk to cancel the debit cards after discovering they were missing. 2RP 108-10. By then however, the Banner Bank debit card had been used to purchase a \$600 laptop. 2RP 17-18, 83-84, 110, 114-15.

Surveillance video from Walmart showed Amanda Dummer enter the same Walmart bathroom with a young child. 2RP 18-22, 29-30, 34, 39. Upon leaving the bathroom, Dummer went by herself to the Walmart electronics department where she used the Banner Bank debit card to purchase the laptop. 2RP 19, 24, 26, 136. No Walmart employee assisted Dummer with the laptop purchase. 2RP 19, 38-39, 86, 127, 144.

Hudson was working at Walmart that same afternoon. 2RP 19-20, 39-40. After purchasing the laptop, Dummer contacted Hudson in the grocery department. 2RP 18-20, 29-30, 34, 124-25, 136-39, 144. Together they then made their way to the electronics department. Hudson obtained keys from other employees to unlock the electronics and assisted Dummer in selecting a television and PlayStation. 2RP 20, 27, 35, 124-

25, 136-39. Several other Walmart employees also assisted Dummer in the electronics section. 2RP 86-87, 92, 126, 139-40. The television in particular was large enough that it required two people to lift it. 2RP 30.

Hudson accompanied Dummer with her selected items to the register at the front of the store. 2RP 87, 127. He did not personally ring up Dummer's items. 2RP 87, 92. Dummer tried several times to purchase the television and PlayStation using both the Banner Bank and Wells Fargo debit cards. 2RP 17, 20, 35-38. After both cards were rejected, Hudson returned the items to the electronics department. 2RP 20, 38, 87.

Dummer waited for Hudson at the front of the store and they left the store together. 2RP 127, 134. Walmart loss prevention officer, James Gibson, contacted Dummer and Hudson in the parking lot where they were smoking next to a Black Nissan Xterra. 2RP 121, 130-31. The car was registered in both Dummer and Hudson's names. 2RP 41-42, 52, 130-31. Hudson told Gibson that Dummer was his neighbor. 2RP 51, 131-32.

Hudson met with Clarkston police officer, Chris Lorz, two days later. 2RP 42. Hudson told Lorz the woman he had helped in the electronics department two days earlier was his neighbor, Stephanie Miller. 2RP 45, 50, 57. Hudson explained that he had recently met Miller and that their children sometimes played together. 2RP 45. A telephone

number Hudson provided Lorz with to reach Miller did not work. 2RP 46, 49-50, 54. Hudson also provided conflicting addresses for himself and Miller. 2RP 46-47, 84. Hudson acknowledged that he and Dummer had a seven-year-old child in common. 2RP 47, 53.

At Lorz's request, Hudson provided a written statement under penalty of perjury, explaining his interactions with Miller. 2RP 39, 53-57, 91. Hudson explained that he had helped Miller select the television and PlayStation at her request, and then returned the items to the electronics department when she was unable to purchase them. 2RP 46, 57. Hudson then accompanied Miller outside to smoke and retrieve some Halloween masks that she had borrowed. 2RP 48-49, 57. Hudson acknowledged that the Xterra belonged to him but that he had let Miller borrow it because her own car had broken down. 2RP 52.

Hudson told Lorz that he did not know that the debit cards were stolen. 2RP 96. Lorz also failed to question Hudson as to whether Dummer ever told him the debit cards were stolen. 2RP 96. Lorz never attempted to contact Dummer or Miller. 2RP 85, 88.

3. Idaho Criminal History.

Before trial the State sought to admit as ER 404(b) evidence, the fact that Hudson had two 2016 convictions from Idaho for "forgery" and "grand theft". 2RP 4-5. The prosecutor noted that Hudson had been

“convicted of forgery – forged checks and theft, a felony theft, based upon these accusations.” 2RP 5. The prosecutor provided the trial court with copies of the police reports related to the incidents as an offer of proof. 2RP 4.

As the prosecutor explained, in June 2016 Hudson had been working for a delivery company and, while making a delivery to local high school in Idaho, had taken seven checks from the printer in the school office. Hudson then gave the checks to Dummer who personally passed five of the seven checks for a total amount of \$5,640. 2RP 6; CP 86-93.

In an apparently separate incident, in May or June of 2016, Hudson also took \$340 from a woman’s purse while delivering a Keurig coffee maker to her house. 2RP 9-10; CP 86-93.

The prosecutor sought to admit the incident involving the checks as 404(b) evidence of Hudson’s knowledge and common scheme or plan as it related to the second degree theft and second degree identity theft charges in this case. 2RP 4-9. The prosecutor acknowledged the incident involving the \$340 in stolen cash was only relevant as impeachment evidence if Hudson testified at trial. 2RP 10.

Defense counsel did not dispute the prosecutor’s recitation of the facts underlying the Idaho convictions, but disputed that they were

factually similar enough to warrant admission as 404(b) evidence. 2RP 9-11; CP 14-17.

The trial court agreed that the facts from Idaho were “substantially dissimilar” to warrant admission as 404(b) evidence. 2RP 11-12. As the court noted, the crimes appeared to be opportunistic rather than a common scheme or plan. 2RP 11. The court noted that admission of the Idaho convictions would therefore amount to improper propensity evidence. 2RP 11-12.

Hudson did not testify and the Idaho convictions were not admitted as impeachment evidence.

At sentencing for the five convictions at issue here, the State calculated Hudson’s standard range sentence for each offense based on offender score of six. 2RP 217-18; CP 86-93. The State maintained that each of the 2016 Idaho convictions, described in the prosecutor’s sentencing memorandum and statement of defendant’s criminal history as “forgery” and “grand theft,” each count as one point for offender score purposes. 2RP 217; CP 86-93. The State provided no documentation pertaining to the convictions or specific Idaho statutory provisions, and offered no comparability analysis.

Hudson acknowledged that his criminal history included two 2016 Idaho convictions for “forgery” and “grand theft.” 2RP 217; CP 51-54.

Defense counsel also acknowledged the prosecutor's standard sentencing range based on an offender score of six, but requested an exceptional downward sentence based on RCW 9.94A.535(1)(d) and (1)(g). CP 43-48; 2RP 218, 222. Defense counsel did not acknowledge the Idaho convictions were for crimes comparable to Washington felonies. CP 51-54; CP 84-85.

Hudson's request for an exceptional downward sentence was denied by the trial court. CP 43-48; 2RP 218, 222. The sentencing court instead adopted the State's calculated offender score of six based on the Idaho convictions. CP 55-63; 2RP 222. The trial court did not explicitly conclude that Hudson's Idaho convictions were comparable to Washington felonies and conducted no comparability analysis on the record.

C. ARGUMENT

1. THE TRIAL COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING EACH COUNT OF SECOND DEGREE THEFT.

A person is guilty of second degree theft if, he or she commits theft of an access device. RCW 9A.56.040(1)(d). The means of committing theft include:

- (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value

thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.020(1). Wrongfully obtaining or exerting unauthorized control over the property of another and appropriating lost or misdelivered property or services of another are alternative means of committing first degree robbery. State v. Lineham, 147 Wn.2d 638, 647, 56 P.3d542 (2002); State v. Southard, 49 Wn. App. 59, 62, 741 P.2d 78 (1987); RCW 9A.56.020(1)(a)-(c); RCW 9.56.010(2), (23)(a)-(c).

Hudson was charged with two counts of second degree theft -- one against Kimberly Goddard for wrongfully obtaining or exerting unauthorized control over her Wells Fargo debit card (count 1), and one against Catherine Medlock for wrongfully obtaining or exerting unauthorized control over her Banner Bank debit card (count 3). CP 1-5. The charges contained identical language and alleged only the alternative mean that “the Defendant wrongfully obtained or exerted unauthorized control over an access device[.]. CP 1-5 (citing RCW 9A.56.040(1)(d)). The information did not allege the alternative mean that Hudson appropriated lost or misdelivered property or services of another. CP 1-5.

The to-convict instructions for both charges, however, contained the uncharged alternative means of committing second degree theft:

(1)(a) wrongfully obtained or exerted unauthorized control over property of another; or

(b) appropriated lost or misdelivered property of another.

CP 25, 33 (Instructions 6 and 14). The jury was instructed it did not need to be unanimous as to which of these alternatives means had been proved beyond a reasonable doubt. CP 25, 33.

“Failing to properly notify a defendant of the nature and cause of the accusation of a criminal charge is a constitutional violation.” In re Pers. Restraint of Brockie, 178 Wn.2d 532, 536, 309 P.3d 498 (2013). An information may allege alternative means of committing the charged crime, “provided the alternatives are not repugnant to one another.” State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). However, “[i]t is error to instruct the jury on alternative means that are not contained in the charging document,” regardless of the strength of the trial evidence. State v. Brewczynski, 173 Wn. App. 541, 549, 294 P.3d 825 (2013); State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003).

State v. Nicholas, 55 Wn. App. 261, 776 P.2d 1385 (1989), is instructive in this regard. There, the State charged Nicholas with first degree robbery based only on the means of being armed with a deadly weapon. Id.

at 273. The trial court therefore erred in instructing the jury on the additional, uncharged means of displaying what appeared to be a deadly weapon. Id. at 272-73.

Like Nicholas, here the State did not charge Hudson with the alternative means of appropriating lost or misdelivered property of another, yet the trial court instructed on that uncharged means. This was error under clear and controlling case law. Although defense counsel did not object, instruction on an uncharged alternative means is an error of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5(a)(3). 2RP 150-51; Chino, 117 Wn. App. at 538.

“An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless.” Bray, 52 Wn. App. at 34-35. Because a jury instruction that contains uncharged alternative means is presumed prejudicial, “[o]n direct appeal, it is the State’s burden to prove that the error was harmless.” Brockie, 178 Wn.2d at 536.

Such an error may be harmless “if the other instructions clearly limit the crime to the charged alternative.” Brewczynski, 173 Wn. App. at 549. The error may also be harmless “if other instructions clearly and specifically define the charged crime.” Chino, 117 Wn. App. at 540. The error is not

harmless, however, where it remains possible the jury convicted the accused based on the uncharged alternative. Id. at 540-41.

Here, none of the remaining instructions limited the jury to considering only the charged alternative mean of committing second degree theft by "wrongfully obtained or exerted unauthorized control." CP 1-5. The definitional instructions included both the charged and uncharged alternative means of committing second degree theft. See CP 27 (instruction 8); RCW 9A.56.010(23)(a); CP 28 (instruction 9); RCW 9A.56.010(2). Likewise, in closing argument, the State urged the jury to consider both alternative means. 2RP176-78; Brewczynski, 173 Wn. App. at 549 (considering this significant in the harmless error analysis).

There are also no special verdicts forms related to the theft alternative means, as there was in Nicholas. Rather, there are general verdict forms where the jury found Hudson guilty of both counts of second degree theft, without specifying which means it relied on, just as in Brewczynski. CP 41-42.

Thus, unlike Nicholas, no special verdict in Hudson's case ensured the jury reached a verdict based solely on the charged alternative means of theft. It remains possible the jury convicted based on the uncharged alternative means, making the error not harmless. Reversal of Hudson's two

second degree theft convictions is therefore required. Brewczynski, 173 Wn. App. at 550.

2. THE JURY INSTRUCTIONS FOR SECOND DEGREE IDENTITY THEFT FAILED TO PRESERVE JURY UNANIMITY AND PERMITTED A DOUBLE JEOPARDY VIOLATION.

Hudson's convictions on two counts of second degree identity theft violate double jeopardy because the jury instructions permitted two convictions for only one act. The to-convict instruction listing the elements that must be proved for counts two and four were identical. The unanimity problem arises from the absence of any named person, financial institution, specified financial information, or separate charging date in either instruction. A jury could therefore have relied on the same act for both counts, thereby violating Hudson's constitutional right to be free from double jeopardy.

Double jeopardy was violated because the to-convict instructions permitted two convictions based on only one act, the other instructions did not clarify that a separate and distinct act was required for each count, and this case does not present the rare circumstances that avoided a double jeopardy violation in State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

- a. The To-Convict Jury Instructions for Second Degree Identity Theft Allowed a Double Jeopardy Violation by Permitting Dual Convictions Based on the Same Act.

The double jeopardy clause protects accused persons from being punished multiple times for the same offense. State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007); U.S. Const. amend. V; Const. art. I, § 9. A double jeopardy claim is reviewed de novo and may be raised for the first time on appeal. Mutch, 171 Wn.2d at 661-62; See also State v. Stine, 176 Wn.2d 742, 751, 293 P.3d 1177; (2013). To avoid a double jeopardy violation, the instructions must make it “manifestly apparent” to the jury that each count represents a separate and distinct act. Mutch, 171 Wn.2d at 665- 66. The jury instructions in Hudson's case did not meet this standard.

For count two, second degree identity theft, the to-convict instruction read:

To convict the Defendant of the crime of Identity Theft in the Second Degree as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 27th day of October, 2016, the Defendant or an accomplice knowingly obtained, possessed, or used a means of identification or financial information of another person;
- (2) That the defendant did so with the intent to commit any crime;

(3) That the defendant knew that the means of identification or financial information belonged to another person; and

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

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

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

CP 30 (instruction 11).

The language in the to-convict instruction for count four is identical except that it says, "To convict the Defendant of the crime of Identity Theft in the Second Degree as charged in Count 4[.]" CP 34 (instruction 15). This language did not make clear that the jury could not rely on the same act for counts two and four.

b. The Other Jury Instructions Did Not Prevent a Double Jeopardy Violation.

The instruction to decide each count separately does not resolve this issue. In addition to the above to-convict instructions, the jury was told, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 41 (instruction 21). This instruction is

insufficient to guard against double jeopardy violations because it fails to adequately inform the jury that each crime requires proof of a different act. Mutch, 171 Wn.2d at 663 (citing Borsheim, 140 Wn. App. at 367, 369-70). Nothing informed the jury that it could not, for example, find that Hudson's possession of a single means of identification or financial information could be used as the basis to find him guilty on both counts two and four.

The verdict is, at best, ambiguous because the jury was not given a special verdict form to specify which acts it relied on for each count. See State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008) (holding a verdict is ambiguous for double jeopardy purposes where multiple acts were alleged but the jury does not specify which act it relied on to convict). Thus, this Court cannot be certain the jury did not rely on the same act to convict for both counts of second degree identity theft.

While the appellate court looks to the entire trial record when considering a double jeopardy claim, “review is rigorous and is among the strictest.” Mutch, 171 Wn.2d at 664. “Considering the evidence, arguments, and instructions, if it is not clear that it was ‘manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense’ and that each count was based on a separate act, there is a double jeopardy violation.” Id. at 664 (quoting

State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008), abrogated on other grounds by Mutch, 171 Wn.2d 646).

As discussed above, neither the evidence nor the jury instructions in Hudson's case made it manifestly apparent that the jury could not rely on the same act of possessing a means of identification or financial information to convict him on counts two and four. Neither instruction specifies a named person, financial institution, or specific means of identification or financial information. CP 30, 34. Additionally, the charging date for each offense is identical. CP 30, 34. The failure to make clear the requirement of separate acts requires reversal for violation of double jeopardy. Mutch, 171 Wn.2d at 664.

c. The Evidence and Closing Arguments Failed to Make it Manifestly Apparent that the Jury Convicted Based on Separate Acts.

This case does not present the “rare circumstance[s]” that formed the basis for a different outcome in Mutch. 171 Wn.2d at 665. In Mutch, there were separate to-convict instructions and sufficient evidence for each of five separate counts of rape, but the jury was not instructed that each count must arise from a separate and distinct act. Id. at 662-63. The possibility that the jury convicted on all five counts based on a single criminal act created a potential double jeopardy problem. Id. at 663. However, the court held the case “presented a rare circumstance where,

despite deficient jury instructions,” it was nevertheless manifestly apparent jurors based each conviction on a separate and distinct act. Id. at 665.

Specifically: (1) the information charged Mutch with five counts based on allegations that constituted five separate units of prosecution; (2) the victim J.L. testified to five separate episodes of rape, the exact number of to convict instructions that were given alternatively for first and second degree rape; (3) during its cross-examination of J.L., the defense did not focus on challenging her account of how many sexual acts occurred but rather suggested all the acts were consensual; (4) Mutch admitted to a detective that he engaged in multiple sex acts with J.L.; (5) during closing, the prosecutor discussed each of the five alleged acts individually; and (6) the defense did not argue insufficiency of evidence as to the number of alleged criminal acts or question J.L.’s credibility regarding the number of rapes but instead argued she consented and was not credible to the extent she denied consenting. Id. The court concluded, “[i]n light of all of this, we find it was manifestly apparent to the jury that each count represented a separate act,” and, therefore, no double jeopardy violation had occurred. Id. at 665-66.

This case reflects very different circumstances than in Mutch. First, the charging information for counts two and four is also identical,

and fails to specify separate named victims, specific financial information, or separate charging dates. CP 1-5. Hudson did not admit to knowingly obtaining, possessing, or using a means of identification or financial information of any another person.

In closing argument, the prosecutor discussed counts two and four together, explaining only that:

Instruction 11 -- and Instruction 15 relate to that identity theft in the second degree charges. Again, what are we talking about? We're talking about Kim Goddard's card and Catherine Medlock -- . What does Instruction 11 say? Instruction 11 -- to convict the defendant of the crime of identity theft in the second degree as charged in Count 2 -- and again, --- Count 4 -- that on or about that same date defendant or an accomplice knowingly obtained or possessed -- or used -- a means of identification or financial information of another person, that the defendant did so with the intent to commit any crime, and that the defendant knew that the means of identification or financial information belonged to another person, -- these acts occurred -- Washington.

2RP 181. The prosecutor continued, "so again, identity theft in the second degree. Why -- why the two counts? Because of the use (inaudible) cards, -- use of the two different persons' identities." 2RP 184.

Thus, the prosecutor not only failed to specify which count pertained to which complaining witness, but never told the jury it could not rely on the same act for either, or both, of the charges. Moreover, a prosecutor's attempt to avoid a double jeopardy problem by making an

election in closing argument does not by itself avert a double jeopardy problem, especially where, as here, “the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel.” Kier, 164 Wn.2d at 813; See CP 19-20.

The jury instructions permitted the jury to find Hudson guilty twice based on the same act of knowingly obtaining, possessing, or using a means of identification or financial information of another person. Under these circumstances, it was not manifestly apparent the jury could not rely on the same act for both counts of second degree identity theft.

Based on the evidence and arguments presented, the court was required to clearly instruct the jury that it could not rely on the same act for both of the second degree identity thefts. Looking at the entire record, it is not manifestly apparent that a double jeopardy problem was avoided.

The remedy for a double jeopardy violation is vacation of one of the convictions. State v. Knight, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008). One of Hudson's convictions for second degree identity theft must be vacated and the case must be remanded for resentencing.

3. THE SENTENCE MUST BE REVERSED AND REMANDED BECAUSE THE SENTENCING COURT ERRED IN COUNTING OUT-OF-STATE CONVICTIONS IN THE OFFENDER SCORE WITHOUT ENGAGING IN THE REQUIRED COMPARABILITY ANALYSIS.

a. The State Did Not Prove the Idaho Offenses Were Comparable to a Washington Felony for Purposes of Computing the Offender Score.

“[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). This Court reviews a sentencing court’s offender score calculation de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009) (citing In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005)). The State does not meet its burden through bare assertions. Mendoza, 165 Wn.2d at 929 (citing Ford, 137 Wn.2d at 482); see also State v. Hunley, 175 Wn.2d 901, 917, 287 P.3d 584 (2012) (recognizing 2008 amendments to RCW 9.94A.500 and .530 unconstitutionally shifted to defendant burden of proof relating to defendant’s prior history).

Under the Sentencing Reform Act, a foreign conviction is included in a defendant's offender score if it is “comparable” to a Washington felony. RCW 9.94A.030(11); RCW 9.94A.525(3). To determine whether there is comparability, a court must first consider whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the conduct underlying the foreign offense would have violated the Washington statute. State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. Thieffault, 160 Wn.2d at 415.

Classification of an out-of-state conviction is a mandatory step. Ford, 137 Wn.2d at 483. Illegal or erroneous sentences may be challenged for the first time on appeal. Ford, 137 Wn.2d at 484-85. This includes challenges to the comparability of out-of-state convictions. Ford, 137 Wn.2d at 485.

According to the criminal history submitted by the State, Hudson had two 2016 Idaho convictions for “forgery” and “grand theft.” The State provided no evidence to show these convictions were comparable to

any Washington felony. The State did not even provide the specific statutes under which Hudson was convicted, the elements of either crime, or the judgment and sentences for the Idaho convictions.

The trial court calculated Hudson's offender score as six, with each Idaho conviction counting as one point. The court conducted no comparability analysis. The court therefore erred by including the Idaho convictions in Hudson's offender score.

Hudson anticipates the State may assert any objection to the comparability of his out-of-state convictions was waived because defense counsel acknowledged Hudson's criminal history. This argument is not supported by the record here and should be rejected.

A defendant must affirmatively acknowledge the “*facts and information*” the State introduces at sentencing before the State is relieved of its duty to prove criminal history by a preponderance of the evidence. Mendoza, 165 Wn.2d at 928-29 (emphasis added). Failure to object to the criminal history related by the State does not constitute such an affirmative acknowledgment. Mendoza, 165 Wn.2d at 928. And a defendant's silence on the issue is not sufficient to constitute such waiver. Cadwallader, 155 Wn.2d at 876.

Nor is a defendant deemed to have affirmatively acknowledged the State's asserted criminal history based on his or her agreement with the

sentencing recommendation. Mendoza, 165 Wn.2d at 928. Counsel's agreement to an offender score calculation is also not affirmative acknowledgment of criminal history. State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010). Here, Hudson never affirmatively acknowledged the Idaho convictions were comparable to Washington offenses.

Although the statement of defendant's criminal history "acknowledge[s] and agree[s] that the above information accurately reflects the Defendant's felony history to the best of the parties' knowledge and belief[.]" this is not an affirmative acknowledgement that the above mentioned Idaho convictions were comparable to Washington offenses. See State v. Richard, 3 Wn. App.2d 423, 437, 415 P.3d 1208 (recognizing that "a defendant's mere agreement with the State's offender score calculation and admission of the existence of an out-of-state conviction is insufficient to constitute an affirmative acknowledgement that an out-of-state conviction meets the terms of the comparability analysis.") (citing Lucero, 168 Wn.2d at 789), rev. denied, 191 Wn.2d 1009, 424 P.3d 1223 (2018)).

Lucero is instructive in this regard. Lucero was convicted of second degree assault. Lucero, 168 Wn.2d at 787. At sentencing, Lucero recited a standard sentencing range based on the inclusion of a California burglary conviction in his offender score. He conceded his offender score was at least six, which included the burglary conviction, arguing only that a

previous California conviction for possession of a controlled substance “washed out.” The trial court did not conduct a comparability analysis of the California convictions, and imposed a standard range sentence based on an offender score of seven, which included the California convictions. Lucero, 168 Wn.2d at 787.

On appeal, Lucero argued the trial court erred in calculating his offender score. The State argued Lucero waived any error by acknowledging his offender score and standard range. The Court of Appeals agreed, holding Lucero affirmatively acknowledged the comparability of the California convictions when he argued the possession conviction had washed out, but acknowledged that, without counting that conviction, he would have an offender score that necessarily included the California burglary conviction. Lucero, 168 Wn.2d at 787.

The Supreme Court reversed the Court of Appeals, concluding Lucero did not waive his challenge to his criminal history by acknowledging his offender score. Lucero, 168 Wn.2d at 789. The Court noted Lucero did not “affirmatively acknowledge” his California convictions were comparable to Washington crimes. Lucero, 168 Wn.2d at 789. The Court concluded that at most, Lucero acknowledged that without the challenged California drug possession conviction, his offender score would still include the California burglary conviction. That was not

a sufficient “affirmative acknowledgment” to demonstrate waiver. Lucero, 168 Wn.2d at 789.

Like Lucero, Hudson's agreement that his criminal history included two 2016 Idaho convictions, does not constitute an affirmative acknowledgement that his Idaho convictions were for felonies comparable to Washington felonies.

Finally, defense counsel’s acknowledgement of the prosecutor’s calculated standard range prison sentence is also insufficient to support a finding of waiver. Lucero, 168 Wn.2d at 789; Mendoza, 165 Wn.2d at 928.

- b. Hudson’s Conviction for Idaho Grand Theft is not Comparable to any Washington Felony and Should not have Added a Point to his Offender Score.

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. Thiefault, 160 Wn.2d at 415. If the elements of the out-of-state statute are broader than its Washington counterpart, it would “(at least) raise serious Sixth Amendment concerns” to attempt to discern the underlying facts that were not found by a court or a jury. Descamps v. United States, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013).

Here, the court added a point to Hudson's offender score based on a 2016 conviction for "grand theft" under Idaho law. But Idaho Grand Theft is not comparable to any Washington felony.

Grand Theft in Idaho can be committed in several distinct ways:

1. The value of the property taken exceeds one thousand dollars (\$1,000); or

....

3. The property consists of a check, draft or order for the payment of money upon any bank, or a check, draft or order account number, or a financial transaction card or financial transaction card account number as those terms are defined in section 18-3122, Idaho Code; or

...

8. When any series of thefts, comprised of individual thefts having a value of one thousand dollars (\$1,000) or less, are part of a common scheme or plan, the thefts may be aggregated in one (1) count and the sum of the value of all of the thefts shall be the value considered in determining whether the value exceeds one thousand dollars (\$1,000); or

...

9. The property has an aggregate value over fifty dollars (\$50.00) and is stolen during three (3) or more incidents of theft during a criminal episode. For purposes of this subparagraph a "criminal episode" shall mean a series of unlawful acts committed over a period of up to three (3) days[.]

Idaho Code Ann. § 18-2407(1)(b)(1)-(10).

But theft does not arise to a felony in Washington unless it involves property with a value of \$750 regardless of the number of

criminal episodes (unless it involves a firearm). See RCW 9A.56.040(1)(a). In contrast, one of Hudson's two convictions in Idaho stemmed from his alleged stealing of \$340 in cash from a purse while working as a delivery driver.

Accordingly, Idaho's Grand Theft statute is not legally comparable for sentencing purposes because it criminalizes conduct that does not constitute a felony in Washington. RCW 9.94A.525(3); RCW 9A.56.050. The sentencing court erred by adding a point to Hudson's offender score based on his prior conviction for Grand Theft in Idaho. RCW 9.94A.525(3).

c. The Idaho Forgery Statute is Broader than Washington's Offense of Forgery.

Here, the court also added a point to Hudson's offender score based on a 2016 conviction for "forgery" under Idaho law. There are multiple Idaho statutes involving "forgery." See infra. The State made no attempt to determine the specific statutory provision under which Hudson was found guilty of "forgery" under Idaho law. As a consequence, the trial court erred in concluding the conviction counted as a point to Hudson's offender score.

Washington defines "forgery" as:

- (1) A person is guilty of forgery if, with intent to injure or defraud:

(a) He or she falsely makes, completes, or alters a written instrument or;

(b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

(2) In a proceeding under this section that is related to an identity theft under RCW 9A.60.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

RCW 9A.60.020.

Idaho defines the crime of “forgery” as:

Every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits, any charter, letters, patent, deed lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, bank bill or note, federal reserve note, United States currency or United States money, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any state controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit action demand, or other thing, real or personal, or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of,

alien, or convey any goods, chattels, lands or tenements, or other estate, real or personal, or any acceptance or endorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine any of the above named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court, or the return of any officer to any process of any court, is guilty of forgery.

Idaho Code § 18-3601.

Besides “forgery,” Idaho also has statutes which criminalize, for example, Offering false or forged instrument for record (Idaho Code § 18-3203); Forging or Counterfeiting Public Seals (Idaho Code § 18-3603); Making, passing, uttering, or publishing fictitious bills, notes, and checks (Idaho Code § 18-3606); and Forging or counterfeiting trade-marks (Idaho Code § 18-3614).

Without further information, it is impossible to determine under which Idaho statute Hudson was convicted. Without a determination that the Idaho conviction for forgery was comparable, the trial court erred by including it in Hudson’s offender score.

d. In The Alternative, Defense Counsel Provided Ineffective Assistance at Sentencing.

Every criminal defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Counsel's failure to object to the inclusion of the out-of-state convictions without a finding a required finding of comparability has, in similar circumstances, been held to be ineffective assistance. Thiefault is instructive here.

There, Thiefault's attorney failed to object to the comparability of Thiefault's attempted robbery conviction from Montana. Thiefault, 160 Wn.2d at 414. The Court of Appeals agreed Thiefault's attorney provided deficient performance by failing to object, because the Montana offense was broader than its Washington counterpart. The Court further

concluded it could not determine whether the offenses were factually comparable because the record provided by the state – including a motion for leave to file information, an affidavit from a prosecutor, and a judgment – did not include facts Thiefault admitted. Thiefault, 160 Wn.2d at 415-16.

Nevertheless, the Court of Appeals found Thiefault could not establish his counsel's failure to object to the comparability analysis prejudiced his case. The court reasoned that the superior court would likely have given the state the opportunity to obtain information properly establishing the facts underlying Thiefault's Montana conviction had his attorney objected. The court further reasoned that Thiefault did not demonstrate a reasonable probability that the facts underlying the Montana conviction would not have satisfied the Washington crime. The court therefore concluded Thiefault's counsel was not ineffective. Thiefault, 160 Wn.2d at 416.

The Supreme Court agreed counsel provided deficient performance by failing to object to the comparability of the Montana conviction, but disagreed that Thiefault had not established prejudice. Thiefault, at 417.

The Court of Appeals improperly found that such deficient representation did not prejudice Thiefault. Although the state may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have

provided facts sufficient to find the Montana and Washington crimes comparable[.]

Thiefault, 160 Wn.2d at 417.

The court vacated Thiefault's sentence and remanded the case to superior court to conduct a factual comparability analysis of the Montana conviction. Id. Cf. State v. Birch, 151 Wn. App. 504, 213 P.3d 63 (2009), (finding counsel was not ineffective for failing to object to the absence of a comparability analysis of a California robbery conviction where Birch did not dispute conviction and explicitly agreed in writing that California conviction was equivalent of a Washington felony offense for offender score purposes), rev. denied, 168 Wn.2d 1004 (2010).

Although Hudson disputes that his counsel agreed to comparability, this Court should find that any agreement or acknowledgement was deficient as well as prejudicial under the rule set forth in Thiefault. As such, the statement of defendant's criminal history does not constitute evidence of waiver and, indeed, indicates another ground for challenging the sentence below since it is a constitutional defect that is apparent on the face of the documents.

e. Remand for Resentencing is Required.

The remedy for a miscalculated offender score is to remand for resentencing. Mendoza, 165 Wn.2d at 930. The State was not relieved of

its obligation to prove the comparability of out-of-state convictions. This Court should remand for resentencing so the trial court may engage in the statutorily required comparability analysis.

4. THE DISCRETIONARY LFOs IMPOSED BY THE TRIAL COURT SHOULD BE STRICKEN BECAUSE HUDSON WAS INDIGENT AT THE TIME OF SENTENCING.

Hudson is indigent under the applicable statutory criteria. Therefore, the \$200 criminal filing fee, \$220 sheriff service fee, and \$750 court appointed attorney fees, all of which are discretionary, should be stricken from Hudson's judgment and sentence under the recent Ramirez decision. CP 56.

In Ramirez, the Washington Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases pending on appeal. Ramirez, 426 P.3d at 718, 721-23.

HB 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is *indigent at the time of sentencing* as defined in RCW 10.101.010(3)(a) through (c).” Ramirez, 426 P.3d at 721 (citing LAWS OF 2018, ch. 269, § 6(3)) (emphasis added); see also RCW 10.64.015 (“The

court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”).

HB 1783 “also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17.” Ramirez, 426 P.3d at 722. Thus, HB 1783 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. Accordingly, the Ramirez court struck the fee due to indigency. Ramirez, 426 P.3d at 723.

Although not explicitly addressed by Ramirez, the sheriff service fee, RCW 10.46.160, was also amended by HB 1783. LAWS OF 2018, ch. 269, § 9. RCW 10.46.160 now reads, “Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay.” LAWS OF 2018, ch. 269, § 9. RCW 10.46.160 was also amended to include the proviso that the “court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” LAWS OF 2018, ch. 269, § 9. Thus, applying Ramirez’s reasoning to the sheriff service fee, it is clear that RCW 10.46.160 and RCW 10.46.190 are a discretionary obligations that

may not be imposed on an indigent defendant. Cf. Ramirez, 426 P.3d at 722-23.

In Hudson's judgment and sentence, both the criminal filing fee and the sheriff service fee were imposed. CP 56. Yet Hudson also qualified for a public defender following a determination of indigency and finding that "defendant/appellant is found to be financially unable to obtain an attorney without causing substantial hardship to the person or person's family." CP 78-81. Thus, the record indicates Hudson is indigent under RCW 10.101.010(3). Because HB 1783 applies prospectively to his case and because HB 1783 "conclusively establishes that courts do not have discretion" to impose certain fees against those who are indigent, the sentencing court lacked authority to impose the criminal filing fee and sheriff service fee. Ramirez, 426 P.3d at 723. Accordingly, the criminal filing fee and sheriff service fee should be stricken from Hudson's judgment and sentence.

The court also imposed \$750 for appointed counsel under RCW 9.94A.760, which addresses LFOs in general. CP 56. But, as amended by HB 1783, RCW 9.94A.760, was also amended to include the proviso that the "court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." LAWS OF 2018, ch. 269, § 9. Thus, applying Ramirez's

reasoning to the court appointed attorney fees, it is clear that RCW 9.94A.760 is also a discretionary obligation that may not be imposed on an indigent defendant. Cf. Ramirez, 426 P.3d at 722-23.

Because Hudson's case is not yet final, the new statute applies. Ramirez, 426 P.3d at 718, 721-23. The discretionary LFOs should be stricken.

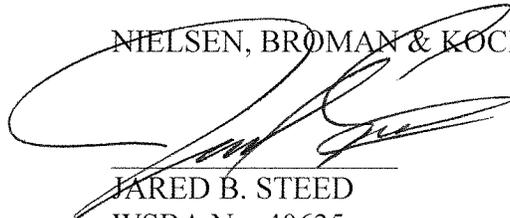
D. CONCLUSION

For the foregoing reasons, this Court should reverse Hudson's convictions. Alternatively, remand for resentencing is required. At the very least, discretionary LFOs imposed in the judgment and sentence must be stricken based on indigency.

DATED this 21st day of February, 2019.

Respectfully submitted,

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