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Court of Appeals
Division III
State of Washington
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No. 36028-8-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

SEAN M. HUDSON, Appellant.

BRIEF OF RESPONDENT

CURT L. LIEDKIE
Asotin County Chief Deputy
Prosecuting Attorney
WSBA #30371

P. O. Box 220
Asotin, Washington 99402
(509) 243-2061

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I. **SUMMARY OF ISSUES**

1. DID THE COURT IMPROPERLY INSTRUCT THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THEFT IN THE SECOND DEGREE AND DOES THIS ERROR REQUIRE REVERSAL?

2. DID FAILURE OF THE JURY INSTRUCTIONS TO DIFFERENTIATE THE CHARGED ACT CONSTITUTING IDENTITY THEFT IN THE SECOND DEGREE RESULT IN A DOUBLE JEOPARDY VIOLATION?

3. SHOULD THIS COURT REMAND FOR A HEARING TO DETERMINE COMPARABILITY OF THE APPELLANT'S IDAHO GRAND THEFT AND FORGERY CONVICTIONS?

4. SHOULD DISCRETIONARY COSTS AND THE FILING FEE BE STRICKEN DUE TO THE DEFENDANT'S INDIGENCE?

II. SUMMARY OF ARGUMENT

1. INSTRUCTIONAL ERROR RELATING TO THE TWO COUNTS OF THEFT IN THE SECOND DEGREE SHOULD NOT RESULT IN REVERSAL OF THESE CONVICTIONS.

2. FAILURE OF THE JURY INSTRUCTIONS TO DIFFERENTIATE THE CHARGED ACT CONSTITUTING IDENTITY THEFT IN THE SECOND DEGREE DID NOT RESULT IN A DOUBLE JEOPARDY VIOLATION WHERE THE CLEAR CIRCUMSTANCES OF THE CASE AND ARGUMENT OF THE STATE MADE CLEAR THE ACTS CONSTITUTING IN EACH COUNT.

3. THIS COURT SHOULD REMAND FOR A HEARING TO DETERMINE COMPARABILITY OF THE APPELLANT'S IDAHO GRAND THEFT AND FORGERY CONVICTIONS.

4. DISCRETIONARY COSTS AND THE FILING FEE SHOULD BE STRICKEN DUE TO THE DEFENDANT'S INDIGENCE.

III. STATEMENT OF THE CASE

In the evening hours of October 27, 2016, Kim Goddard came to the Walmart store in Clarkston, Washington, to do some shopping with her children. Report of Proceedings (*hereinafter* RP¹) 101. Prior to beginning her shopping, Ms Goddard stopped into the store's restroom where she inadvertently left her wallet and keys. RP 102-4. She shopped for approximately an hour and brought her purchases to the front check stands. RP 104. When Ms Goddard went to pay for her purchases, she realized that she had accidentally left her wallet and keys in the restroom. RP 104. Ms Goddard went back to the restroom where she recovered her wallet and keys. RP 104-5. She checked her wallet and found that two bank cards were missing. RP 105.

One bank card was blue and issued by Banner Bank and the other was red and issued by Wells Fargo Bank. RP 105. The Wells Fargo (red) card was issued to Ms Goddard and accessed her debit account. RP 106-7. The Banner Bank (blue) card was issued to Ms Goddard's mother Catherine Medlock and accessed her bank account. RP 102, 107-8.

¹The State will simply refer to transcribed record as Report of Proceedings, which refers strictly to the trial record and does not contain the jury selection portion thereof. Should the need arise the State will refer to the jury selection portion as the Supplemental Report of Proceedings (*hereinafter* SRP). The State requested and has provided transcripts of the State's opening statement and will refer to those as the Second Supplemental Report of Proceedings (*hereinafter* SSRP).

When Ms Goddard realized that the cards had been stolen from her wallet, she recontacted cashier and was forced to cancel her purchases. RP 108. She further sought help from customer service and was able to cancel the bank cards. RP 108-9. While in the process of cancelling the cards, one of the banks reported that one of cards had just been used in the Walmart store to purchase a laptop computer. RP 109-10.

During this same period of time, Amanda Dummer arrived at the Walmart store and had also gone into the bathroom. RP 18-9. Ms Dummer found Ms Goddard's wallet and took the two bank cards, leaving the wallet in the restroom. RP 19, 105. Ms Dummer then went to the electronic section where she used one of the cards to purchase the laptop computer. RP 19.

After successfully purchasing the laptop, Ms Dummer circumnavigated the Walmart store and contacted the Appellant, Sean M. Hudson, in the grocery section. RP 19. Ms Dummer was the significant other of the Appellant and they resided together, and had a child in common. RP 42, 47, 140-1. The Appellant was employed by and was on duty at the Walmart store when he met up with Ms Dummer. RP 19. Ms Dummer had a toddler aged child with her during her shopping spree. RP 18-19.

After speaking for a short time, the Appellant and Ms Dummer went to the electronics section. RP 20. The Appellant asked for the

keys to the electronics case and selected a Play Station IV video game console. RP 20. The Appellant and Ms Dummer then selected a large screen TV. RP 20. Despite the availability of sales associates from electronics, the Appellant insisted on helping Ms Dummer with the selection and purchase of these items. RP 139. The Appellant accompanied Ms Dummer to the front registers where she attempted to purchase the TV and gaming console using the stolen bank cards. RP 20. Neither Ms Goddard nor Ms Medlock knew Ms Dummer or the Appellant and did not give either of them permission to use the bank cards. RP 111.

Ms Dummer attempted to use both cards and made several attempts with each while the Appellant waited with her. RP 20. After several unsuccessful² attempts, the TV and gaming console were returned and Ms Dummer walked to the front of the store near one of the exits. RP 20. The Appellant joined up with her and the two exited the store and went to the parking lot to the vehicle registered to both of them, where they smoked cigarettes. RP 20, 130.

During this time, Loss Prevention Officer (LPO) James Gibson had been assisting with the stolen credit card complaint of Ms Goddard. RP 126. He became aware of the transactions and that the perpetrator might still be in the store. RP 125-6. Mr. Gibson

²It appears the cards had been successfully cancelled by this time, thwarting the Appellant's and Ms Dummer's criminal efforts.

began reviewing store security video and observed Ms Dummer using the cards to purchase the laptop and her subsequent failed efforts to purchase the TV and gaming console. RP 126-7. Mr. Gibson then left his office and went outside where he observed the Appellant and Ms Dummer by their vehicle smoking. RP 130. Mr. Gibson casually asked the Appellant to borrow a lighter and asked him who the female was. RP 130. The Appellant lied and stated that Ms Dummer was a neighbor and he didn't know her name. RP 131-2.

Officer Chris Lorz of the Clarkston Police Department was contacted and began investigating. RP 15-16. Officer Lorz took a statement from Ms Goddard, collected store video, and obtained register records. RP 16-7, 82-3. On October 29, 2016, Officer Lorz responded to Walmart and contacted the Appellant who was working a shift at the store on that date. RP 42. Officer Lorz interviewed the Appellant in the loss prevention office. RP 42. During the interview, the Appellant was told the purpose of the interview was with regard to the credit card theft a couple days earlier. RP 45. The Appellant was asked whether he remembered helping a female with a TV and he admitted that he had. RP 45.

The Appellant lied and identified the female as "Stephanie," claiming she was his neighbor. RP 45. Later the Appellant recalled her last name was "Miller." RP 45. During the interview, the Appellant acknowledged that his girlfriend was Amanda Dummer. RP

48. The Appellant gave conflicting statements and had difficulty providing an address and phone number for the neighbor "Stephanie Miller." RP 46-7. At one point he provided his own address as the address of his neighbor, "Stephanie." RP 47. The Appellant was asked about the small child with "Stephanie" and he initially claimed it was "Stephanie's" child. RP 47. Later, he stated that the child was Ms Dummer's. RP 47. The Appellant was shown a picture of Ms Dummer from the video and he lied and said the female was his neighbor. RP 48.

Officer Lorz asked the Appellant what the neighbor was driving and he described the vehicle but conspicuously left out the fact that the vehicle was his. RP 48-9. Officer Lorz confronted the Appellant with the fact that the vehicle that the supposed neighbor left in was registered to him and Ms Dummer. RP 49. He again lied and claimed that the neighbor had borrowed his vehicle. RP 51-3. The Appellant was provided a statement form and he filled out the statement denying the female in the video was Amanda Dummer, and signed the form under penalty of perjury. RP 55-7.

Officer Lorz attempted to contact the neighbor at the address the Appellant provided. RP 84. No one answered and the vehicles present were not registered to any of the names provided by the Appellant. RP 84.

In addition to Perjury in the Second Degree, the Appellant was charged with two counts of Theft in the Second Degree, one for each card that was purloined as an accomplice. Clerk's Papers (*hereinafter* CP) 001, 003. 005. The Appellant was further charged with two counts of Identity Theft in the Second Degree for the use of each of the stolen bank cards under an accomplice theory. CP 002, 004.

The matter proceeded to trial and the jury heard testimony from Ms Goddard, Ms Medlock, Officer Lorz, and LPO Gibson. RP, *generally*. The jury also received the security video from Walmart, as well as a video and audio recording of Officer Lorz interview with the Appellant. RP 21, 60-82. The jury was instructed, and returned verdicts of guilty as charged. CP 041-2, RP 214. At sentencing, the Appellant signed a Statement of Defendant's Criminal History, acknowledging his prior felony convictions in Idaho County, Idaho, for Forgery and Grand Theft. The Appellant did not dispute his offender score calculation, and instead argued for an exceptional sentence downward. CP 043-8, RP 218-9, 221. The sentencing court imposed a standard range sentence of twenty-three (23) months based upon an offender score of six (6). The court imposed legal financial obligations including the two hundred dollar (\$200.00) filing fee. CP 056. The court also imposed discretionary costs for sheriff's service fees in the amount of two hundred twenty dollars (\$220.00) and court

appointed attorney recoupment in the amount of seven hundred fifty dollars (\$750.00). CP 056.

The Appellant filed a notice of appeal claiming various instructional and sentencing errors.

IV. DISCUSSION

In his appeal, the Appellant argues that the Court improperly instructed the jury on an uncharged alternative means of committing Theft in the Second Degree. The Appellant further argues that the Court failed to instruct the jury that the same act cannot be the basis for both convictions for Identity Theft in the Second Degree. The Appellant also argues that the court failed to determine the comparability of his two Idaho felony convictions. Finally, the Appellant argues that the filing fee and court appointed attorney recoupment fee should be stricken. Because the instructions given were, effectively, defense proposed instructions, based upon local procedure, any claim of error was invited. With regard to the charges of Identity Theft, the record is substantially clear that there was no risk or concern of a violation of Double Jeopardy. The record is substantially clear that the acts committed by the Appellant which were the basis for his convictions for Grand Theft and Forgery in Idaho were comparable. At best, the Appellant would be entitled to remand for a hearing on comparability of those convictions. At the

same time, the filing fee and court appointed counsel fee can be stricken.

1. INSTRUCTIONAL ERROR RELATING TO THE TWO COUNTS OF THEFT IN THE SECOND DEGREE SHOULD NOT RESULT IN REVERSAL OF THESE CONVICTIONS.

The State concedes that it is error to instruct the jury on alternative means that are not contained in the charging document. See State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942). In the present case and with regard to the two counts of Theft in the Second Degree, the Information alleged that the Appellant “wrongfully obtained or exerted unauthorized control over an access device,” pursuant to RCW 9A.52.020(1)(a). CP 001, 003. The Information didn’t not specifically allege that the Appellant “appropriated lost or misdelivered property of another” under subsection (1)(c) of that statute. Court’s Instructions 6 and 14, relating to the two counts of Theft in the Second Degree however, provided both means of committing theft.

The State would submit that someone who misappropriates lost property, also wrongfully obtains or exerts unauthorized control. Stated differently, misappropriation of lost property is merely a means by which someone “wrongfully obtains” property, not unlike the distinction drawn in embezzlement where the possession is only wrongful when the person exercises possession in contravention of

the true owner's rights. See State v. Linehan, 147 Wn.2d 638, 647, 56 P.3d 542 (2002). To the extent that the finder of property becomes a gratuitous bailee, with an obligation to seek out the true owner and return the property, the bailee's failure to do so amounts to exerting unauthorized control over property. See State v. Kealey, 80 Wn.App. 162, 173, 907 P.2d 319 (Div. II, 1995), as amended on denial of reconsideration (Feb. 26, 1996)(*finder/bailee has an obligation to seek out the owner of the goods and to try to return them*)(citing Maitlen v. Hazen, 9 Wn.2d 113, 124, 113 P.2d 1008 (1941)). The Appellant was therefore adequately apprized of the accusations and duly able to defend against them, albeit, in vain.

The State does however recognize the authorities in this state and cases that have determined that RCW 9A.56.020(1)(a)-(c) sets forth three means by which theft is committed: (1) by taking or exerting wrongful control; (2) by color or aid of deception, obtaining control; and (3) by appropriating lost or misdelivered property or services. See Linehan, 147 Wn.2d at 644–45. The State further recognizes that these cases establish that these three descriptions of theft are treated as alternative means. *Id.* The State further recognizes that, as such, the current state of the law precludes instructing a jury on an uncharged alternative means of committing the crime of theft such as occurred herein.

While under the current state of the law, error occurred by instructing the jury on an uncharged alternative means, review should, in any event, be precluded. “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.” State v. Bray, 52 Wn. App. 30, 34–35, 756 P.2d 1332 (Div. I, 1988). However, where the instruction given is one which the defendant himself proposed, the defendant can not later complain on appeal that the requested instruction was given. See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (citing State v. Boyer, 91 Wn.2d 342, 344–45, 588 P.2d 1151 (1979)). Here, the instruction given was, by usual local custom and procedure, a defense proposed instruction.

By local custom and in an effort to avoid duplication of efforts and unnecessary additional copies in the court file, the Asotin County Superior Court requires that, in a criminal trial, the State prepare a complete proposed set of jury instructions and submit them to the court and the defense in advance of trial. RP 148. Rather than submit a complete proposed set, the defense is required to submit any additional instructions not included in the State’s set. RP 148. If the defense has an objection to a specific instruction offered by the State, they are to offer an alternate instruction. RP 148. Otherwise, the

defense must object to the giving of a particular instruction if the defense does not believe the instruction is appropriate. RP 148. Otherwise, it is presumed that the instruction offered by the State and not objected to by the defense is being accepted and jointly offered by the defense. RP 148.

As stated by this Court:

The invited error doctrine precludes a criminal defendant from seeking appellate review of an error she helped create, even when the alleged error involves constitutional rights. The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal.

State v. Mercado, 181 Wn.App. 624, 629–30, 326 P.3d 154(Div. III, 2014)(*internal citation omitted*). The doctrine applies where the defendant affirmatively assented to the error. See State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

The Appellant offered no objection to the instructions proffered by the State, including Court's Instructions 6 and 14, and, other than offering WPIC 6.31 concerning the Appellants right to not testify, offered no additional or alternative instructions. RP 147-151. As such, Court's Instructions 6 and 14 were jointly proffered, and therefore, the invited error doctrine precludes him from seeking review of the instruction he effectively proffered and to which he assented.

Finally, it is clear from the record that any error was harmless beyond any doubt. Instructing the jury on uncharged alternative

means is presumed to be prejudicial unless the State can show that the error was harmless. See Bray, 52 Wn.App. at 34–36 (“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.”). Here, the Appellant was fully aware of that he was accused being an accomplice to the use cards that were misappropriated by Ms Dummer. He defended against the accusations by arguing that Ms Dummer should be on trial and he didn’t know that she was using stolen cards to purchase the TV and gaming console, and therefore he wasn’t an accomplice to her crimes. RP 190, 198. Considering the other overwhelming evidence of his participation³ and consciousness of guilt immediately after, it is clear that the results would have been the same, beyond a reasonable doubt.

2. FAILURE OF THE JURY INSTRUCTIONS TO DIFFERENTIATE THE CHARGED ACT CONSTITUTING IDENTITY THEFT IN THE SECOND DEGREE DID NOT RESULT IN A DOUBLE JEOPARDY VIOLATION WHERE THE CLEAR CIRCUMSTANCES OF THE CASE AND

³The Jury was not allowed to hear testimony about how the Appellant stole the checks from the school in Idaho and then had Ms Dummer pass the forged checks at area businesses and, when caught, how he claimed Ms Dummer had no knowledge that the checks were stolen. The State sought admission of this evidence to prove the Appellants’ knowledge. The State argued that it showed how the Appellant and Ms Dummer would act in concert in a criminal enterprise and then provide the other with “plausible deniability” of culpability. RP 6 - 9.

ARGUMENT OF THE STATE MADE CLEAR THE ACTS
CONSTITUTING IN EACH COUNT.

Next, the Appellant complains that the trial court failed to include “separate and distinct” language in the instructions concerning the two counts of Identity Theft Second Degree. Without repeating the analysis set forth above, the complained of instructions were effectively defense proposed or endorsed and as such, Invited Error would preclude review. See Studd, *supra*, at 547.

Assuming *arguendo* that review is not precluded, the Appellant’s claims fail on the merits. Where multiple counts of the same crime are charged, the trial court should include in its instructions language that makes clear that the jury must find that each count arises from a “separate and distinct” act in order to convict. See State v. Mutch, 171 Wn.2d 646, 662, 254 P.3d 803, 813 (2011). Failure to include language that “separate and distinct” acts are charged in each count and the same act cannot be the basis for more than one conviction potentially creates a Double Jeopardy concern. See *id.* In Mutch, the Court clarified that this does not equate to error:

However, flawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant potentially received multiple punishments for the same offense.

Mutch, at 663. The Court further explained:

This court has established that “[i]n reviewing allegations of double jeopardy, an appellate court may review the entire record to establish what was before the court.”

Id. (Quoting State v. Noltie, 116 Wn.2d 831, 848–49, 809 P.2d 190 (1991)). The Mutch Court recognized that it is appropriate to consider the information, instructions, testimony, and arguments of counsel to determine whether the record as a whole clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense. 171 Wn.2d at 664. While Instructions 11 and 15 do not contain language regarding separate and distinct acts, the record makes clear that the jury had no confusion that the State was seeking multiple punishments for the same act, nor was there any risk of a Double Jeopardy violation.

Here, the Information charged Theft in the Second Degree in Count 1 and specifically named Kimberly Goddard as the cardholder. CP 001. The very next charge, set forth in Count 2, was Identity Theft in the Second Degree relating to use of the card. CP 002. The Information then charged in Count 3, Theft in the Second Degree, identifying Catherine Medlock as the cardholder. CP 003. The next charge in Count 4 was Identity Theft in the Second Degree for use of the card. CP 004. While not specifically identifying the victim or card used in Counts 2 and 4, the Information clearly delineates that each

of these counts related to the card charged in the preceding count. The two charges of Identity Theft were preceded by a charge of Theft in the Second Degree for the taking of access devices. The two charges of Identity Theft were separated by the charge in Count 3, which identified a different card and account holder. Fairly read, the order of the charges in Information make clear that each count of Identity Theft is based upon the separate use of each card.

The evidence at trial further makes clear the two separate acts charged in Counts 2 and 4. During testimony, Ms Goddard established that the two cards were red and blue. RP 105-6. She further clarified that the red card (Wells Fargo) belonged to her and the blue card (Banner Bank) belonged to her mother. RP 105-6. During Officer Lorz's testimony, it was pointed out how Ms Dummer attempted to use both the red and blue cards to purchase the TV and gaming console. RP 36-7.

The jury instructions given and their structure further confirms the separate nature of each charge and the acts related thereto. While not dispositive, the Court did instruct the jury to consider each charge separately. CP 040. See Mutch, at 663. More significantly, the instructions for Theft in the Second Degree and Identity Theft, in relation to Ms Goddard's card, were only separated only by definitional instructions. CP 025, 030. Further, the instructions for

Theft in the Second Degree and Identity Theft, in relation to Ms Medlock's card were sequential. CP 033, 034. This confirmed for the jury that counts 1 and 2 related to Ms Goddard's card and Counts 3 and 4 related to Ms Medlock's.

Finally, if there was any question remaining, the arguments of State's counsel cleared up any confusion. In its opening statement, State's counsel recited the elements of each charge and told the jury that Counts 1 and 2 related to the theft and use of the same card. SSRP 3-4. The State further clarified that Counts 3 and 4 related to the theft and use of a different bank card. SSRP 4-5. The State made a clear election as to the acts constituting the two crimes. In summation, State's counsel repeated the significance of the two bank cards and their relationship to the two separate sets of charges. RP 176. Specifically addressing Counts 2 and 4, State's counsel again reiterated that each card comprised the separate charges. RP 181. The State referenced Instructions 11 and 15, and pointed out:

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--.

RP 181, II. 9-12. Later in its argument and to assure that no residue of confusion remained, the State again clarified:

So again, identity theft in the second degree. Why -- why the two counts? Because of the use of (inaudible) cards, -- use of the two different persons' identities.

RP 184, ll. 17-20. The facts of the entire record make it “manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense” Mutch, 171 Wn.2d 664. (*Quoting and partially disapproving of State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (Div. I, 2008)).

In Mutch, on a less clear record than the case at bar, the Supreme Court was confident that no Double Jeopardy violation occurred

Mutch's case presents a rare circumstance where, despite deficient jury instructions, it is nevertheless manifestly apparent that the jury found him guilty of five separate acts of rape to support five separate convictions. In fact, we are convinced beyond a reasonable doubt, based on the entire record, that the jury instructions did not actually effect a double jeopardy violation. The information charged Mutch with five counts based on allegations that constituted five separate units of prosecution. J.L. testified to five separate episodes of rape. This is the exact number of “to convict” instructions that were given alternatively for first and second degree rape. During its cross-examination of J.L., the defense did not focus on challenging her account of how many sexual acts occurred but rather asked more about her relationship and previous interactions with Mutch, suggesting consent. A detective testified that Mutch admitted to engaging in multiple sexual acts with J.L. The State discussed all five episodes of rape in its arguments, and 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 that she consented and was not credible to the extent she denied consenting. In light of all of this, we find that it was manifestly apparent to the jury that each count represented a separate act; if the jury believed J.L. regarding one count, it would as to all. Mutch is not

being punished multiple times for the same criminal act. We are convinced of this beyond a reasonable doubt: a double jeopardy violation did not actually follow from the jury instructions.

State v. Mutch, 171 Wn.2d 646, 665–66, 254 P.3d 803, 814 (2011)(*internal citations omitted*). Here, we not only have a consistent number of charges and victims/cards used, we have the opening statement and summation of counsel, wherein the State specified that it was the use of each separate card that comprised each separate charge of Identity Theft. The Appellant's arguments and concerns for Double Jeopardy are without merit.

3. THIS COURT SHOULD REMAND FOR A HEARING TO DETERMINE COMPARABILITY OF THE APPELLANT'S IDAHO GRAND THEFT AND FORGERY CONVICTIONS.

The Appellant next argues that the Court failed to determine whether his convictions for Forgery and Grand Theft in Idaho are comparable to felony offenses under Washington law. The Appellant is correct that the sentencing court did not conduct a comparability analysis, but this was largely because the Appellant signed a statement agreeing to and acknowledging his two Idaho felony convictions. CP 51. Further, the Appellant never disputed his offender score and instead sought an exceptional sentence downward. RP 218-9, CP 043-048.

It should be noted that the Appellant's counsel misstates or misunderstands the factual basis underlying his two convictions. The Appellant's brief states that his conviction relates to the theft of a purse and cash therein while making a delivery. Brief of Appellant, p. 31. This is not the case. There were two separate criminal incidents in which the Appellant was involved and that the Appellant filed a motion to preclude the State from introducing at trial. CP 14-17. On May 12, 2016, the Appellant was working as a delivery driver and stole three hundred forty dollars (\$340.00) cash from a purse inside a residence. CP 15, He was not convicted of this crime. See State of Idaho vs. Sean Michael Lee Hudson,⁴ CR-2016-6393. On June 17, 2016, the Appellant, while making a delivery to the highschool, stole bank checks from the printer and later completed some or all of the checks and had Ms Dummer pass them. CP 15. In total, law enforcement identified five checks which were cashed for a total of five thousand six hundred forty dollars (\$5,640.00). The Appellant was convicted of Forgery (Possession of Forged Checks) and Grand Theft based upon these acts. See State of Idaho vs. Sean Michael Lee

⁴Although GR 14.1 generally and conditionally prohibits citing unpublished opinions as authority and, under RCW 2.06.040, they lack precedential value, here this brief does not cite this lower court case for precedential authority and only does so to "establish facts in a different case that are relevant to the current case."

Regan v. McLachlan, 163 Wn.App. 171, 174, 257 P.3d 1122 (Div. II, 2011).

Hudson,⁵ CR-2016-64719. The criminal history table confirms that it was the June 2016 incident upon which his felony convictions were based.

These being the facts, it becomes readily apparent that the two crimes were, beyond any reasonable argument, comparable. When an offender has prior out-of-state convictions, the SRA requires the trial court to treat those convictions "according to the comparable offense definitions and sentences provided by Washington law." State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994). A foreign conviction is equivalent to a Washington offense if there is either legal or factual comparability. See In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255–58, 111 P.3d 837 (2005). A foreign offense is legally comparable if "the elements of the foreign offense are *substantially similar* to the elements of the Washington offense." See State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007)(*emphasis added*). If the elements of the two statutes are not identical or if the foreign statute is broader than the Washington definition of the particular crime, the trial court must then determine whether the offense is factually comparable. See State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). A conviction is factually comparable where the defendant's conduct would have violated a comparable

⁵See footnote 4.

Washington statute. Lavery, 154 Wn.2d at 255. Comparability of prior out-of-state convictions must be shown by a preponderance of the evidence. See State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

Idaho Code Section 18-3605 defines the crime of Forgery, and the law under which the Appellant was convicted provides as follows:

POSSESSION OF FORGED NOTES OR BANK BILLS OR CHECK OR CHECKS. Every person who has in his possession, or receives from another person, any forged promissory note or bank bill, or bills, or check or checks, for the payment of money or property, with the intention to pass the same, or to permit, cause, or procure the same to be uttered or passed, with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bank bill or check made in the form or similitude of any promissory note or bill or check for payment of money or property, made to be issued by any incorporated bank or banking company, with intention to fill up and complete such blank and unfinished note or bill or check, or to permit, or cause, or procure the same to be filled up and completed in order to utter or pass the same, or to permit, or cause, or procure the same to be uttered or passed, to defraud any person, is punishable by imprisonment in the state prison for not less than one (1) nor more than fourteen (14) years.

The Idaho statute is legally comparable to Forgery under Washington law. RCW 9A.60.020(1) defines the crime of Forgery, under Washington law as follows

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.

Arguably, the Idaho statute is more narrow in that it applies only to bank notes, bills, and checks, whereas the Washington statute includes any written instrument which would include these documents and many others. See RCW 9A.60.010 (7).⁶ Both statute preclude possessing, passing, or uttering the instrument with intent to defraud. The only area in which the Idaho law is more broad is with regard to its prohibition against possessing blank or unfinished notes with the same intent to defraud. However, this act is also a felony under Washington law and constitutes the crime of Unlawful Possession of Payment Instruments, pursuant to RCW 9A.56.320.

Idaho's Grand Theft statute is more complex, but broken down, it is clear that all but one of the alternative means of committing the crime is comparable to a felony crime in Washington. The Idaho statute provides:

18-2407. GRADING OF THEFT. Theft is divided into two (2) degrees, grand theft and petit theft.
(1) Grand theft.

⁶ This statute states: "Written instrument" means: (a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or (b) any access device, token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.

(a) A person is guilty of grand theft when he commits a theft as defined in this chapter and when the property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will:

1. Cause physical injury to some person in the future; or
2. Cause damage to property; or
3. Use or abuse his position as a public servant by engaging in conduct within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

(b) A person is guilty of grand theft when he commits a theft as defined in this chapter and when:

1. The value of the property taken exceeds one thousand dollars (\$1,000); or
2. The property consists of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant; 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
4. The property, regardless of its nature or value, is taken from the person of another; or
5. The property, regardless of its nature and value, is obtained by extortion; or
6. The property consists of one (1) or more firearms, rifles or shotguns; or
7. The property taken or deliberately killed is livestock or any other animal exceeding one hundred fifty dollars (\$150) in value.

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; or
10. The property is anhydrous ammonia.

Taking each section in turn, if the Appellant were convicted under any of the alternatives in subsection (1)(a), this would be comparable to Extortion under RCWs 9A.56.120, 9A.56.130 depending upon the nature of the threat. *See also* RCW 9A.04.110(28)(a), (b), and (h). In fact, on this point, the Idaho statute is narrower than the Washington statute, where Washington more broadly defines "threat."

Under subsections (1)(b)(1) and (8) of the Idaho statute, this more than meets the legal requirements for Theft in the Second Degree under Washington law. Idaho requires that the value of the property be greater than one thousand dollars (\$1,000.00), where Washington only requires seven hundred fifty dollars (\$750.00), and both states allow for aggregated value where multiple thefts involve a common scheme or plan. *See* RCW 9A.56.040(1)(a). Subsection

(1)(b)(2) is identical to Theft in the Second Degree involving theft of public records or instruments. See RCW 9A.56.040(1)(b). Acts violating subsection (1)(b)(3) under the Idaho statute would necessarily constitute Theft in the Second Degree under RCW 9A.56.040(1)(d) for theft of an access device. A violation of subsection (1)(b)(3) would be a violation of RCW 9A.56.030(1)(b) for theft from the person. As discussed above, (1)(b)(5) relates to theft by extortion which would be comparable to extortion under either RCWs 9A.56.120 or 9A.56.130. Section (1)(b)(6) relates to theft of firearms which is a felony under RCW 9A.56.300. Theft of livestock, as addressed in section (1)(b)(7) is a felony under Washington law pursuant to RCWs 9A.56.080 and 9A.56.083. Subsection (1)(b)(10) proscribing theft of anhydrous ammonia is identical to and addressed by RCW 69.55.010.

This leaves only subsection (1)(b)(9) as lacking a direct Washington analog. While this makes the Idaho statute broader and therefor not precisely legally comparable, the Appellant's conviction for Grand Theft is still comparable under the factual prong. As stated above, where the foreign statute is broader than the Washington definition of the particular crime, the court must then determine whether the offense is factually comparable. See Morley, 134 Wn.2d at 606. A conviction is factually comparable where the defendant's

conduct would have violated a comparable Washington statute. Lavery, at 255. "The key inquiry is under what Washington statute could the defendant have been convicted if he or she had committed the same acts in Washington." State v. McCorkle, 88 Wn.App. 485, 495, 945 P.2d 736 (Div. II, 1997).

It bears repeating at this point that, contrary to the Appellant's intimations in his brief, the Grand Theft conviction resulted from the theft of checks from the school and the subsequent forgery and passing of those stolen checks in June of 2016, and not the purloined cash from the purse in May of 2016. Because the Appellant did not object to the inclusion of these convictions in his offender score, the record was not further developed as to whether it was cumulative theft of over five thousand dollars (\$5,000.00) by passing the checks or merely the theft of the checks themselves that constituted the offense under I.C. 18-2407. Either would suffice under the Idaho statute. More importantly, either act would constitute Theft in the Second Degree under Washington law. Further, his conduct of possessing the checks with intent to commit forgery would be sufficient to convict him under Washington law with Identity Theft pursuant to RCW 9.35.020.

The Appellant did not challenge the inclusion of these convictions at sentencing because it was clear, based upon the

information known to the State and the Defense concerning the underlying facts, that these convictions were comparable. Further, additional discussion of the facts thereof would have, no doubt, highlighted for the Court the similarities of the current crimes with the prior convictions. This was further exacerbated by the fact that, a mere seven days prior to committing the current crimes for which the Appellant was convicted herein, he stood before an Idaho judge and was sentenced to a probationary sentence for Grand Theft and Forgery there. CP 051, 055, RP 220. To the extent this Court is disinclined to rule as a matter of law, that the Appellant's prior convictions are comparable, remand for hearing on the issue is appropriate, at which time the State can offer evidence to demonstrate legal and factual comparability. See State v. Cobos, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014).

4. DISCRETIONARY COSTS AND THE FILING FEE SHOULD BE STRICKEN DUE TO THE DEFENDANT'S INDIGENCE.

The Appellant also claims that the filing fee, sheriff's service fees, and court appointed attorney fee costs should be stricken, in the event that the Court remands for resentencing. Recent changes to imposition of legal financial obligations are procedural and is applicable prospectively to cases not yet final on appeal. See LAWS OF 2018, ch. 269 (*hereinafter* HB 1783) See State v. Ramirez, 191

Wn.2d 732, 426 P.3d 714 (2018). Under HB 1783, a sentencing court is precluded from imposing costs, pursuant to RCW 10.60.160(3) against a defendant who is indigent. HB 1783 further precludes a court from imposing a filing fee under RCW 36.18.020 against an indigent defendant. The Appellant was certainly capable of working as evidenced by the fact that he was at work when he committed these crimes. However, at current, it appears that the Appellant meets the indigency requirements for court appointed counsel. CP 78-81. The State hereby concedes that, should remand be ordered, these legal financial obligations should be stricken.

V. CONCLUSION

The Appellant's claims of instructional error are not well taken and precluded by the doctrine of Invited Error. These instructions were jointly proposed by both the State and the Defense. With regard to his convictions for Identity Theft, the record is manifestly clear that the Appellant was not convicted of both counts based upon a single act, but rather, the State made clear in argument and evidence presentation, that each count was based upon a separate act. The Appellant's prior Idaho convictions were comparable to Washington felony crimes and therefore properly included in his offender score. Should this Court determine that remand for a hearing on comparability is merited, the complained of legal financial obligations

should be stricken at the time of hearing on comparability. The State respectfully requests this Court enter a decision affirming the convictions and, at the most, remand for a comparability hearing.

Dated this 11th day of April, 2019.

Respectfully submitted,



CURT L. LIEDKIE, WSBA #30371
Attorney for Respondent
Deputy Prosecuting Attorney for Asotin County
P.O. Box 220
Asotin, Washington 99402
(509) 243-2061

COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III

THE STATE OF WASHINGTON,
Respondent,

v.

SEAN M. HUDSON,
Appellant.

Court of Appeals No: 36028-8-III

DECLARATION OF SERVICE

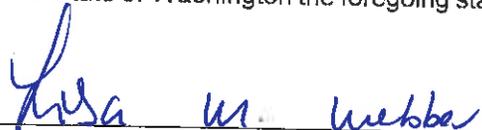
DECLARATION

On April 12, 2019 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

JARED B. STEED
steedj@nwattorney.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on April 12, 2019.



LISA M. WEBBER
Office Manager

DECLARATION
OF SERVICE

ASOTIN COUNTY PROSECUTOR'S OFFICE

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