No. 452324

(consolidated with No. 452626)

COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

FRANK SHANNON BELLUE, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

JUDGE THOMAS LARKIN

CORRECTED BRIEF OF APPELLANT

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Issues Related To Assignments of Error

1. Where police officers arrest suspects outside of a motel, is a warrantless entry into and search of the motel room of a guest a violation of Article 1 § 7 of the Washington State Constitution?
2. Was Mr. Bellue unlawfully detained where police officers handcuffed him, removed him from his hotel room, and transported him to the police station for an interview?
3. Did the court err when it instructed the jury that it could convict the defendant based on accomplice liability, but then impose an exceptional sentence based on major economic offense ?
4. Was the evidence sufficient to sustain a conviction for leading organized crime?
5. Was the evidence sufficient to sustain convictions for identity theft, possession of stolen property, unlawful possession of payment instruments, unlawful possession of instruments of financial fraud?
6. Did the trial court err when it failed to enter written findings of fact and conclusions of law required for imposition of an exceptional sentence?

7. Did Mr. Bellue receive ineffective assistance of counsel where counsel did make any motions to suppress evidence that was illegally obtained?

II. STATEMENT OF FACTS

1. Charging and Consolidation of Causes

On June 12, 2013, Frank Shannon Bellue was charged by amended information, under Pierce County cause number 12-1-02120-3, with 5 counts of second degree identity theft, 1 count of forgery, 1 count of unlawful possession of instruments of financial fraud, 1 count of unlawful possession of payment instruments, 1 count of second degree possession of stolen property, 1 count of leading organized crime, and 1 count of tampering with a witness. With the exception of the tampering charge, each charge included aggravating circumstances of a major economic offense and multiple current offenses that would result in some offense going unpunished. The tampering count included the multiple current offenses aggravator. (CP 54-61).

On June 25, 2013, under Pierce County cause number 12-1-04771-7, he was charged by amended information with 18 counts of second degree identity theft, 1 count of forgery, 2 counts of unlawful possession of payment instruments, and 1 count of leading organized crime. Each count included the aggravating circumstances of a major economic offense

and multiple current offenses that would result in some offenses going unpunished. (CP 542-557).

Over defense objection, the court granted the State's motion to consolidate the causes. (RP 17-18; CP 40-43). [1]

2. Trial Evidence

On June 5, 2012, Lakewood police impounded a 1990 green Audi driven by Yolanda Carlson. (Vol. 4RP 327). That same day, Konstance Kendrick saw Ms. Carlson and Mr. Bellue and offered them use of a room at the Morgan Motel, for which she paid. (Vol. 5RP 484-85). Spencer Bellue[2] and Rochelle Moore joined them and all four adults stayed at the motel on June 5 and June 6. (Vol. 5RP 395;447).

On June 6, Spencer and Moore left the Morgan Motel and walked to a nearby Rite Aid to purchase cigarettes. (Vol. 5 RP 395;447). Moore became concerned the store clerk knew she was using a false ID and an altered check to pay for her items. (Vol. 5 RP 400). She did not hand over the check but simply left the store with Spencer. (Vol. 5 RP 398-400). The clerk called the police. (Vol. 2 RP 19).

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[1] For purposes of this brief, the hearing date of 3/18/13 will be referenced as RP page no.; each hearing date after that will be referenced as Vol. no. RP

[2] Frank Spencer Bellue is the son of the defendant Frank Shannon Bellue. For purposes of this brief he will be referred to as "Spencer" to avoid any confusion.

Spencer and Moore walked back to the motel and as she smoked a cigarette, police officers drove into the parking lot. (Vol. 2RP 20; Vol. 5RP 400). They both started to run but Officer Lopez-Sanchez caught Ms. Moore. (Vol. 2RP 21). He handcuffed her and placed her in his patrol car. (Vol. 2RP 42). Spencer went into the motel room. (Vol. 2RP 21). Within about twenty seconds Spencer walked out and Officer Cockroft arrested, handcuffed, searched, and questioned Spencer about the Rite-Aid incident. (Vol. 2RP 24,41, 82-84)

Steve Sweney and Tara Zimmer and their infant child had stopped by to pick up Mr. Bellue and Ms. Carlson, and were preparing to leave when the police arrived. (Vol. 5RP 448, 485). Police excused the couple and their child from the scene. (Vol. 2RP 66). Mr. Bellue was still inside the motel room with Ms. Carlson. (Vol. 2RP 26;68-69). He sat on the edge of the bed with his suitcase in front of him; Ms. Carlson stood next to him wearing her backpack. (Vol. 2RP 68-70).

Ms. Carlson testified that officers entered the room and she was taken out. (Vol. 5RP 447-48). Officer Boyd detained her and searched her backpack. (Vol. 2RP 37). It contained various personal effects as well as the following items, which were later entered as evidence:

- United States Uniform Services identification card for Brandy Brandenburg;

- Driver's license and Military ID of Karlina Yoshitaro Robert;
- Corner of a personal check with the names Lauren Carlson and Silvestri Cervantes;
- A temporary paper Driver's license of Lauren Carlson;
- 2 Personal checks with the names of Lorena Sutter and Lindsey Jensen;
- Personal check with the names Brandy Brandenburg and Lindsey Jensen
- Military ID of Carlena Robert
- A personal check in the name of LindseyJensen
- A wage statement for Teresa Congemi
- Washington state ID card for Lorena Sutter

(Vol. 2RP 27-34).

Other officers entered the hotel room. (Vol. 2RP 26, 38-39,61, 91, Vol. 5RP447-48;492). Officer Lopez-Sanchez initially testified that he did not enter the motel room, but from the outside doorway he was able to not only see some ripped up checks laying in a garbage can, on the floor, and on a nightstand, but he could actually read the names on the torn pieces. (Vol. 2RP 26-27;41-42). In later testimony he admitted that he actually entered the motel room while Mr. Bellue was still seated on the

bed. (Vol. 2RP 38-39). He determined officers needed a search warrant to gather the items he saw around the room. (Vol. 2RP 27).

Officer Wurges testified he handcuffed Mr. Bellue and Mr. Bellue was not free to leave. (Vol. 2RP 71). He did not read his Miranda rights to him. (Vol. 2RP 54). Although he stated Mr. Bellue was not formally under arrest at the time, he handcuffed and transported him to the police station, where he conducted a search. (Vol. 2RP 56). The officer found debit/ credit cards in his wallet. One of the cards was in the name "Angela Patterson". Mr. Bellue explained Ms. Patterson was his girlfriend. (Vol. 2RP 57;73).

Officer Hensley was stationed outside the motel room to make sure no one went into the room while awaiting a warrant. (Vol. 3RP 187). Detective Roland Hayes of the Tacoma Police Department was assigned the task of preparing the search warrant for the motel room. (Vol. 3RP 177). Once the warrant was granted, detectives including Detective Joseph Canion again entered the room. (Vol. 3RP 182; Vol. 4RP 231; 238).

Detective Canion's task was to catalog the items taken from the motel room. (Vol. 3RP 185). He testified that when he first entered the room, the ripped up checks seen earlier by Officer Lopez-Sanchez were already contained in a police evidence bag and placed next to the waste

paper basket, on top of a chair. (Vol. 3RP 217). The detective did not know how the checks, which prior to the search warrant had been seen on the floor, came to be found inside a police evidence bag when he entered the room for the first time with the warrant. (Vol. 3RP 217).

In a connecting room, used by Spencer and Moore, officers lifted a mattress and found: two checkbooks for Silvestre Cervantes, a brown wallet containing the social security card, passport, a BJs bingo card and student ID for Kaitlin Chaput, the military ID for Stephanie Frazier, a Washington driver's license for Lauren Carlson, and some needles. (Vol. 3RP 210-211; Vol. 4RP 244; Vol. 5RP 487). The second wallet, black, contained A Tribal One Stop card for Frank Bellue[3], a bank of America debit visa card in the name of Stephanie Frazier, a social security card and driver's license for Nickolas Fraizer, a BJ Bingo card with Spencer's picture on it, and receipts from Macy's, Burger King, Fred Meyer and Albertson's and a Qwest card in the name of Rochelle Moore. (Vol. 4RP 296-98).

In a nightstand in the first room, they found two glass pipes, and a NetSpend MasterCard in the name of Frank Bellue. (Vol. 3RP 212).

[3] Officers could not determine if the card belonged to the defendant Frank Shannon Bellue or his son, Frank Spencer Bellue.

They seized a printer, a black ink cartridge and some receipts. (Vol. 3RP 216;220).

Defense counsel did not make a motion for a suppression hearing regarding any of the items seized at the motel.

3. Telephone Calls

Prior to trial, Detective Williams began to monitor Mr. Bellue's phone calls from the jail. (Vol. 4RP 325-26; Vol. 5RP 379). Detective Williams believed the Audi impounded on June 5 might contain evidence for the investigation. (Vol. 4 RP 327). He obtained and executed a search warrant on July 12, 2012. (Vol. 4RP 329). The registered owner of the car was Steve Sweney, the individual who had been released at the scene. (Vol. 5RP 388).

In a black bag in the trunk of Ms. Carlson's car, the following pertinent items were seized:

- Washington State driver's license for Amanda Sheppler
- Washington State driver's license for Taylor Pritchard
- Washington State intermediate license for Kirsten O'Neil
- Oregon State driver's license for Meagan Casey
- Washington State driver's license for Steven Daffer
- Social Security cards for AJ John Robert, John Robert, John S, Robert, Joana John Robert, Joma Siam Robert, Athelia L. Robert

- Social security card for Teresa Congemi
- Two checks with the names Teresa Congemi and Samuel and Kendra Barnes
- USA Insurance cards for Nickolas and Stephanie Fraizer
- Social Security card for Kendra Barnes
- Social Security card for Gavin Barnes
- US Bank printed checks with the names John W and Lisa A. Johnson
- Timberland Bank check in the name of Kaitlin Chaput
- Timberland Bank Check in the name of Susan Lewis
- A check with the names of Jessica Dill, Stephanie Frazier and Craig Wollmershauser
- A printed check with the name of Joanne Strand
- A social security number for Brandy Brandenburg
- Checkbook with unendorsed checks n the name of Susan Lewis
- Nurse's aide certification for Stephanie Fraizer
- Two laptop computers, check making software, blank checks and printer cartridges.

(Vol. 4RP 330-343; Vol. 5RP 352-367).

4. Surveillance Videos

At trial, the State showed still photos and surveillance videos from various Target stores. (Vol. 4RP 3162). In a video dated May 24, 2012, Moore and Spencer were seen attempting to pay for items with a check. (Vol. 4RP 313-14). The check was not accepted and Spencer paid with cash. *Id.* The second video dated May 29, 2012, showed Spencer and Moore returning a printer cartridge. Moore purchased a netbook computer with a prepaid Visa card. (Vol. 4RP 314-15).

The third video dated June 4, 2012, showed Ms. Carlson, Ms. Kendrick and Mr. Bellue walking into a Target store. (Vol. 4RP 316). Mr. Bellue left the store and the women continued shopping. Ms. Carlson made a purchase, but Ms. Kendrick's check was denied. (Vol. 4RP 318). Both women left the store. Ms. Kendrick returned to the store and tried to make another purchase with a check, which was also denied. (Vol. 4RP 320).

On June 4, 2012, in a Graham Target store, the video showed Ms. Carlson getting out of the passenger side of the Audi. She entered the store and attempted to make a purchase, but the cashier denied the transaction. (Vol. 4RP 321). The last surveillance video was from a Lakewood Target. Ms. Carlson again attempted to make a purchase and the transaction was denied. (Vol. 4RP 321).

The State also presented a store manager from CarQuest, as a witness. (Vol. 5RP 427). He testified that on May 24, 2012, Ms. Carlson, Mr. Bellue and another man men entered the store. (Vol. 5RP 428). The store video showed Ms. Carlson at the register buying the car parts. She later admitted she used a stolen check and Teresa Congemi's ID to purchase the parts for her car. (Vol. 5RP 431-433).

5. Ms. Carlson

Ms. Carlson was charged with 21 counts of identity theft, second degree, two counts of forgery, six counts of unlawful possession of a personal identification device, and one count of unlawful possession of payment instruments, all with aggravating circumstance of multiple victims. (Vol. 5RP 467-68). She pleaded guilty to those counts. As part of an agreement for a recommendation on her prison sentence, Ms. Carlson testified in Mr. Bellue's trial. (Vol. 5 RP 468). The agreement for a sentence recommendation was "dependent on how she testified." *Id.*

Ms. Carlson had convictions for identity theft beginning in 2007. In 2009 she had a conviction for unlawful possession of a controlled substance. And in 2012 she was charged with 11 counts of forgery, unlawful possession of a controlled substance, identity theft in the second degree and criminal impersonation. Those charges were pending at the time of this trial. (Vol. 5RP 466).

She testified she drove the Audi the day it was impounded. (Vol. 5RP 451;481). The black bag retrieved from the car trunk belonged to her and contained stolen IDs. (Vol. 5RP 481). She purchased stolen IDs and checkbooks regularly, but Mr. Bellue was not involved in it with her and never gave her any stolen checks. (Vol. 5RP 452-54). She saw Mr. Bellue alter a check once before, but admitted that she had added the name "Lindsey Jensen" to the Lorena Sutter checks that were found in her backback. (Vol. 5RP 454;458;460).

6. Ms. Moore

Rochelle Moore testified that during the six weeks prior to her arrest she and Spencer stayed in various motels off and on with Mr. Bellue and Ms. Carlson. (Vol. 5RP 394-95;409). At that time, she was using drugs and would pass fraudulent checks to obtain cash or gift cards to purchase drugs for her and Spencer. (Vol. 5RP 398-99;405). She said that she had not passed bad checks with Mr. Bellue. (Vol. 5RP 399). She recounted that she in the past she had seen Mr. Bellue and Ms. Carlson use a computer to alter checks. (Vol. 5RP 403) and that Mr. Bellue had given her the check and ID to use at the Rite-Aid store. (Vol. 5RP 398). She stated that she and Spencer "were doing it (altering checks) on our own" to obtain money to buy drugs. (Vol. 5RP 405).

Prior to meeting Spencer, Moore had four previous convictions for theft and trafficking in stolen property. (Vol. 5RP 412). At the time of this trial she was serving a sentence in the Pierce County drug court on the previous charges. (Vol. 5Rp 412).

As a result of the Rite-Aid incident, she was originally charged with second-degree identity theft, forgery, misuse of a personal ID device and misleading a public servant. (Vol. 5 RP 416). She instead pleaded guilty to one count of second-degree identity theft. (Vol. 5RP 412). On direct examination by the prosecutor, she was asked if testifying against Mr. Bellue was part of her plea agreement. She answered "no." (Vol. 5RP 413). However, in an earlier hearing, the prosecutor informed the court that Moore was in drug court and "I believe that as part of that, that she will have to [testify] if she wants to stay in drug court." (RP 11).

7. Witness Testimony Regarding Stolen Checks and ID

The State presented the following individuals who testified their checkbooks and or identification had been stolen within the previous several months, they did not know Mr. Bellue, and they did not give him permission to possess their identification or financial documents: Teresa Congemi, Jessica Dill, Lisa Johnson, Amber Craig, Megan Casey, Amanda Sheppler, Brian Jensen, Kirsten O'Neil, (Vol. 2 RP 45; 102; Vol. 3RP 151,159,165,170; Vol. 5RP 390, 422).

8. Jury Instructions and Closing Arguments

With the exception of the charges of leading organized crime and witness tampering, the jury was instructed it could convict on the basis of accomplice liability. (CP 78-82;88;93;95;98;101;573-576;578-590;596;603-604). Each count, with the exception of witness tampering, also contained an instruction for the aggravating circumstance of whether the crime was a major economic offense or series of offenses[4]. (CP 93; 99; 106;112; 593;605).

During deliberations, the jury posed the question:

> "Should we consider the same evidence/people in case 02120-3 count 5 and 04771-7 count 22 on counts "Leading organized crime" and why the exact same charge in both cases? Change verdict form X (04771-7 to "leading organized crime"?
>
> The court responded,
> "They are the same charges in two different cause numbers. Count XXII should be "leading organized crime" on verdict for "V".
>
> (CP 62).

In closing, the prosecutor argued the following:

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[4] The jury was instructed that to find a crime is a major economic offense, at least one of the following factors must be proved beyond a reasonable doubt: (1) the crime involved multiple victims or multiple incidents per victim; or (2) the crime involved a high degree of sophistication or planning or occurred over a lengthy period of time. The above factors are alternatives. This means that if you find from the evidence that anyone of the alternative factors has been proved beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form. To return a verdict of "Yes" the jury need not be unanimous as to which if the juror finds that at least one alterative has been proved beyond a reasonable doubt. (CP 86; 594).

> "But now getting back to all of the other charges, there's two ways he can be convicted of this crime, either he is a principal in these crimes, he is the one doing it, or the court instructed you if he's an accomplice he's also just as guilty....the getaway driver is just as guilty as the bankrobber..." (Vol. 7RP 559)

and again,

> "So I would submit to you that the evidence has been proven beyond a reasonable doubt that the defendant was a principal to all these crimes. But even if you don't believe that, you still have the accomplice liability instruction..."
> (Vol. 7RP 569).

Mr. Bellue was found guilty on all counts and aggravating circumstances. (CP 597-611). The court denied a motion for a new trial and arrest of judgment. (Vol. 9RP 623). Mr. Bellue was sentenced to 225 months, which included a 27-month sentence enhancement. (Vol. 10RP 638). The court did not prepare written findings of fact and conclusions of law for the enhanced sentence. The court vacated the second leading organized conviction, as it was duplicative. (CP 881). Mr. Bellue makes this timely appeal. (CP 473-490; 890-908).

III. ARGUMENT

A. Mr. Bellue's Constitutional Right To Privacy Was Violated Where Police Officers Made A Warrantless Entry Into His Hotel Room, Seized Evidence, And Detained Him.

1. Warrantless Unlawful Entry

Although defense counsel did not challenge Mr. Bellue's seizure nor make a motion to suppress the motel room evidence, a reviewing court will consider an issue raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3)[5]. If the error is of constitutional magnitude, the defendant must show how the alleged error actually prejudiced him in the context of the trial. *State v. McFarland,* 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *Id.*

Here, the alleged error affects Mr. Bellue's constitutional right to privacy under Article 1, § 7 of the Washington State Constitution: No person shall be disturbed in [that person's] private affairs, or [the person's] hoe invaded, without authority of law. The provision protects a person's home or private affairs from warrantless searches. *State v. Johnson,* 128 Wn.2d 431, 446, 909 P.2d 293 (1996). The same right to privacy in residential premises applies to rented hotel rooms. *State v. Ramirez,* 49 Wn.App. 814, 818, 746 P.2d 344 (1987); *State v. Davis,* 86 Wn.App. 414,419, 937 P.2d 1110 (1997). Ms. Kendrick paid for the room and Mr.

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[5] This Court held in *State v. Contreras,* 92 Wn.App. 307, 966 P.2d 915 (1998) that an illegal seizure claim raised for the first time on appeal may be reviewed or the issue may be reached through an ineffective assistance counsel of claim.

Bellue was legitimately on the premises as an overnight guest. As a motel guest, Mr. Bellue had the same expectation of privacy as an owner or renter of a private residence and was entitled to believe that the law protected his room from an unreasonable search. *State v. Mathe,* 102 Wn.2d 537, 688 P.2d 859 (1984).

A warrantless search is per se unreasonable as a matter of law unless the State establishes that one of a very narrow and jealousy guarded set of exceptions applies. *Johnson,* 128 Wn.2d at 446-47. Because officers entered and searched the motel room without a warrant, the burden rests with the State to prove the presence of one of the narrow exceptions. *Johnson,* 128 Wn.2d at 446.

Police responded to a fraudulent check complaint that involved Spencer and Moore, not Mr. Bellue. Moore was immediately arrested *outside* the motel and taken to a patrol car. Spencer ran to the motel room, emerged within 20 seconds, was quickly arrested and taken to a patrol car. Officers had arrested their suspects and there was no justification for intrusion into the motel room.

Officer Lopez testified he was concerned for officer safety. (Vol. 2RP 23). Officers may make a "protective sweep" to ensure their safety while making an arrest. *State v. Boyer,* 124 Wn.App. 593, 601, 102 P.3d 833 (2004). A protective sweep requires a rational inference from facts

that would warrant a reasonably prudent person to believe that the area to be swept harbors an individual posing a danger to those on the arrest scene. *State v. Hopkins,* 113 Wn.App. 954, 960, 55 P.3d 691 (2002). It is limited to a cursory visual inspection of places where a person may be hiding. *Id.* at 959. However, an overall general desire to insure there are no other individuals present, alone, is not sufficient to justify a protective sweep. *Id.*

The officers here articulated no specific facts that would support the belief that a dangerous person was hiding in the motel room. More significantly, because Moore and Spencer were arrested *outside* of the motel room, there was no justification for a protective sweep based on officer safety concerns and no lawful authority to enter and search the motel room.

The "plain view" exception, which requires a prior justification for the intrusion and inadvertent discovery of incriminating evidence, is similarly inapplicable here. *State v. Chrisman,* 94 Wn.2d 711, 715, 619 P.2d 971 (1980), *overruled on other grounds,* 455 U.S. 1, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982). The plain view doctrine "does not apply to render lawful a seizure of evidence procured or brought into view by invasion of an accused's constitutional rights." *State v. Dennis,* 16 Wn.App. 417, 424, 558 P.2d 297 (1976). Such evidence is inadmissible against a defendant.

Officers had no authority to enter the motel room and anything that was observed after they unlawfully entered should be found inadmissible.

Similarly, an exception based on exigent circumstances does not does not provide grounds for the unauthorized entry and search either. The suspects had already been arrested outside the motel and there were no dangerous circumstances that warranted immediate entry by the police. *See State v. Flowers,* 57 Wn.App. 636, 789 P.2d 333 (1990).

Officer Lopez's testimony that from the outside doorway he peered into the motel room and read the names on ripped up checks that were in and around the wastebasket underneath the television console strains credulity. (Vol. 2RP 26-27;40; Vol. 4RP 254). Moreover, he later testified that he entered the motel room without a warrant and saw ripped checks. Ripped up checks in a wastebasket does not give rise to reasonable suspicion of criminal activity on the part of Mr. Bellue and certainly does not authorize warrantless entry into a constitutionally protected space. Similarly, the observation from the same vantage point of a needle on the console was also insufficient to reasonably suspect that Mr. Bellue was engaged in criminal activity, nor does it authorize warrantless entry into a constitutionally protected space.

Further, prior to obtaining a search warrant, officers seized items from Mr. Bellue's motel room. Officer Hensley testified he did not see any

ripped up checks. (Vol. 2RP 71). Some time between the unlawful entry and the stationing of Officer Hensley outside of the room to protect evidence, an officer began collecting evidence inside of the room.

Officer Canion testified that when they first entered the room with the search warrant, he discovered the torn checks had already been bagged in a police evidence bag and set on a chair. The State produced no witness who could testify how the items came to be bagged before the warrant was executed. It is clear that at least one officer entered the room prior to the search warrant and began seizing items.

Because the officers' warrantless entry into and search of the motel room violated article 1 § 7 of the Washington Constitution, the evidence was illegally seized. Evidence seized during illegal searches and evidence derived from illegal searches is subject to suppression under the exclusionary rule. *State v. Gaines,* 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Derivative evidence will be excluded unless it was obtained without exploiting the original illegality or by means sufficiently distinguishable to be purged of the primary taint. *State v. Le,* 103 Wn.App. 354, 361, 12 P.3d 653 (2000).

Mr. Bellue argues the all the evidence obtained from the motel room search and seizure must be suppressed. Although officers eventually obtained a search warrant for the motel room, it was based on information

obtained from and motivated by the earlier unlawful entry, search and seizure. *State v. Gaines,* 154 Wn.2d 711, 718 116 P.3d 993 (2005). There were no intervening circumstances that attenuated the link between the illegality and the evidence. Mr. Bellue respectfully asks this court to reverse and remand with instructions to suppress the fruits of the warrantless search obtained from the motel room and reverse Mr. Bellue's convictions for evidence obtained as a result of that search. *State v. White,* 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

2. Mr. Bellue Was Unlawfully Seized When Officers Entered His Motel Room, Handcuffed Him and Transported Him To The Police Station Without A Warrant.

Whether police conduct amounts to a seizure is reviewed *de novo. State v. Armenta,* 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). All police seizures of a person, including brief detention, must be tested against the Fourth Amendment guarantee of freedom from unreasonable searches and seizures. U.S. Const. Amend. IV; *Mapp v. Ohio,* 367 U.S. 643, 648, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). A warrantless seizure is considered per se unreasonable unless it falls within one of the exceptions to the warrant requirement. *State v. Ladson,* 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Pursuant to Article 1 § 7, seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the

individual would not believe he is free to leave or decline a request due to an officer's use of force or display of authority. *State v. O'Neill,* 148 Wn.2d 564, 574, 62 p.3d 489 (2003). The standard is a purely objective one, looking to the actions of the police officer: the relevant question is whether a reasonable person in the individual's position would feel he was being detained. *Id. State v. Young,* 135 Wn.2d 409, 501, 957 P.2d 681 (1998).

Here, officers arrived at the motel because of a report involving Spencer and Moore. Mr. Bellue was inside his motel room, sitting on the bed, preparing to leave with friends. The officers unlawfully entered and removed Mr. Bellue from his motel room. He was handcuffed, put in a patrol car and transferred to the police station for an 'interview'. Officer Wurges testified that Mr. Bellue was not under arrest. Objectively, these actions restrained Mr. Bellue's freedom of movement; he was not free to leave or to decline officer directives. This was a warrantless seizure.

A Terry stop only authorizes police officers to *briefly* detain a person for questioning without grounds for arrest if they reasonably suspect, based on specific and articulate facts, that the person detained is engaged in criminal activity. *State v. Day,* 161 Wn.2d 889, 896, 168 P.3d 1265 (2007); *Terry v. Ohio,* 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). (Emphasis added). Mr. Bellue argues that not only was the

initial intrusion into his motel room not justified, but officers also unlawfully detained him by handcuffing him and transporting him to the police station for an interview, without specific and articulable facts pointing to him having committed a crime. "Detention for a custodial interrogation, regardless of its label, intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the safeguards against illegal arrest." *State v. Williams,* 102 Wn.2d 733, 737, 689 P.2d 1065 (1984).

Mr. Bellue was searched at the police station before he was placed in a holding cell awaiting his interview. His detention was hardly brief. At a 3.5 hearing, over defense objection, the court admitted the statements Mr. Bellue gave about the credit/debit cards officers found in his wallet after searching him but before he was arrested. The court allowed the evidence in for purposes of the charge of leading organized crime. (Vol. 2RP 60-61). If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained because of the government's illegality. *State v. Duncan,* 146 Wn.2d 166, 176, 43 P.3d 513 (2002); *See Mapp,* 367 U.S. at 655 (holding all evidence obtained by searches and seizures in violation of the Constitution is …inadmissible in a state court).

B. The Major Economic Offense Sentence Enhancement Statute Does Not Extend To Convictions Based On Accomplice Liability.

Standard of Review

A court may sentence a defendant to an exceptional sentence if (1) the jury finds by special verdict beyond a reasonable doubt one or more aggravating factors alleged by the State; and (2) the trial court determines that the facts are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535; RCW 9.94A.537. To reverse the trial court's imposition of an exceptional sentence, the reviewing court must find that either the record does not support the court's reasons, those articulated reasons do not justify a sentence outside of the standard range for that offense, or the length of the sentence is clearly excessive. RCW 9.94A.595(4).

The State charged Mr. Bellue, among other counts, with 23 counts of second degree identity theft, 3 counts of unlawful possession of payment instruments, 2 counts of forgery, 1count of unlawful possession of instruments of financial fraud, and 1 count of possession of stolen property. The court instructed the jury that for each of the above listed charges Mr. Bellue could be convicted as either a principal or an accomplice. The court defined accomplice liability in Jury Instruction 11:

> "A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime. A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime. The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. (CP 76; CP 571).

The State also alleged that each count (listed above) was aggravated by being a major economic offense. The court gave jury instructions No. 21 and 34 :

> To find that a crime is a major economic offense, at least one of the following factors must be proved beyond a reasonable doubt: (1) the crime involved multiple victims or multiple incidents per victim; or (2) the crime involved a high degree of sophistication or planning or occurred over a lengthy period of time. The above factors are alternatives. This means if that if you find from the evidence that any one of the alternative factors has been proved beyond a reasonable doubt, then it will be your duty to answer 'yes' on the special verdict form. To return a verdict of 'yes' the jury need no be unanimous as to which of the alternatives has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt. (CP 86;594).

This Court recently held that a major economic offense sentence enhancement could not be imposed after the trial court instructed the jury that first-degree identity theft conviction could be based on accomplice liability. *State v. Hayes,* 177 Wn.App. 801, 312 P.3d 784 (2013).

This Court noted that a trial court's imposition of a sentence enhancement generally must depend on the defendant's own conduct; the aggravating factor cannot be premised solely on accomplice liability for the underlying substantive crime without explicit evidence of the legislature's intent to create strict liability. *Hayes,* at 787, citing *State v. McKim,* 98 Wn.2d 111, 117, 653 P.2d. 1040 (1982). The major economic offense sentence enhancement statute, RCW 9.94A.535(3)(d) does not explicitly extend responsibility to an accomplice. *Hayes* at 787.

The trial court here did not enter the required findings of fact and conclusions of law for the exceptional sentence. However, the court orally stated, "I think there are some exceptional circumstances, and I'm going to impose a sentence of 225 months. So that's 27 months above the high end". (Vol. 10RP 638). The court noted on the judgment and sentence that the exceptional sentence was imposed for counts 1-10 and 1-22 (CP 431; CP879). Count 22 was later vacated. (CP 881).

As in *Hayes*, because 30 of the counts allowed the jury to convict based on accomplice liability, the major economic offense sentence enhancement should be vacated for those counts.

C. The Evidence Was Insufficient To Sustain A Conviction For Leading Organized Crime.

A reviewing court does not weigh evidence or sift through competing testimony. Rather, the question presented is whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The reviewing court will consider the evidence in a light most favorable to the prosecution. *State v. Green,* 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). Sufficiency of the evidence is a question of constitutional magnitude and may be raised for the first time on appeal. *State v. Baeza,* 100 Wn.2d 487, 488, 670P.2d 646 (1983).

To convict Mr. Bellue of leading organized crime, the State was required to prove that between May 24, 2012 and June 6, 2012, he intentionally organized, managed, directed, supervised or financed three or more persons in the commission of the crimes of identity theft, forgery, possession of stolen property, unlawful possession of payment instruments and/or unlawful possession of instruments of fraud and that he acted with

the intent to engage in a pattern of criminal profiteering. RCW 9A.82.060(1)(a). (CP 108). Mr. Bellue argues the State's evidence is insufficient to establish a pattern of criminal profiteering and insufficient to show that he organized, managed, directed, supervised or financed three or more persons in the charged unlawful activity.

Here, because the State charged Mr. Bellue with and the jury was instructed on every alternative means of committing the offense of leading organized crime, there must be substantial evidence supporting each alternative means. In *Strohm,* the court defined "supervise" to mean "to coordinate, direct, and inspect continuously and at first hand the accomplishment of: oversee with powers of direction and decision the implementation of one's own or another's intention." *State v. Strohm,* 75 Wn.App. 301, 305, 879 P.2d 962 (1994).

In *Strohm,* the evidence showed that the defendant did more than simply ask people to steal cars: he told them which cars to steal, where to steal them, how to steal them and what do with them once they were stolen. He monitored the performance of his crew and when they fell short, he disciplined them. *Id.*

By contrast, here there is no evidence that Mr. Bellue supervised anyone. Moore testified she stayed in hotels with Spencer, Bellue and Carlson off and on in April and May 2012. (Col. 5RP 394-95). Although

she reported that Mr. Bellue gave her the ID and check she tried to use at the Rite-Aid, she said he did not give her information about using them or instruct her to do so. Further, she reported that she and Spencer "were doing it on our own" that is, not with Mr. Bellue when they altered checks and used IDs to purchase prepaid gift cards for their drugs. (Vol. 5RP 409; 417).

Ms. Carlson testified that she was the individual who purchased the stolen checkbooks and IDs, all later found in her black bag or her backpack. She never saw Mr. Bellue purchase any and he never gave her false IDs or altered checks.

Most important, the State presented no evidence that Spencer participated in any way, other than accompany to accompany Moore to the Rite-Aid store on the day they were arrested and to a Target store where he paid cash for his purchase, and another Target where Moore paid for her items with a prepaid Visa card. There was no evidence that Mr. Bellue supervised Spencer. The statute requires supervision of three or more individuals. The State has not met its burden.

Similarly, there is no evidence that Mr. Bellue organized a group either. Organize means "to arrange or constitute into a coherent unity in which each part has a special function or relation." *Strohm,* 75 Wn.App. at 306. Moore testified she and Spencer stayed with Mr. Bellue and

Carlson when they had nowhere else to go. (Vol. 5RP 394). She testified she used the altered checks to purchase items so she could buy drugs for herself. She did not give Mr. Bellue any of the money she made when she sold the prepaid gift cards. (Vol. 5RP 398;408). There was no evidence that Mr. Bellue organized her as part of a larger group.

Ms. Carlson testified she purchased stolen identities and bought prepaid gift cards that she then sold. She said Mr. Bellue did not alter checks or use stolen IDs "because he doesn't do that type of stuff because it was my thing." (Vol. 5RP 471). In *Strohm,* the State produced evidence that *Strohm* made all the decisions about what was to be stolen, by who, and he verified that everything had gone according to plan before he made the thief. *Strohm,* 75 Wn.App. 306. There is no such evidence in this case.

Further, as referenced above, there was no evidence that Mr. Bellue organized Spencer as part of a coherent unity with a special function. As the State pointed out in cross-examination of Ms. Carlson:

> "Why didn't Spencer do this? Why don't you make force Spencer to do this....Could you have had Spencer do this....So out of the four of you, we have two men and two only the two women are going into stores and passing checks. Does that strike you as odd?" (Vol. 5RP 474-476).

The State presented no evidence that Mr. Bellue financed, organized, managed, directed or supervised three people with the intent to engage in a pattern of criminal profiteering. Taking the evidence in a light most favorable to the State, the evidence is insufficient to show Mr. Bellue led a an organized crime ring. The State has additionally failed to meet its burden of showing a third person (Spencer) was being led in crime. Insufficiency of the evidence to prove all elements requires the conviction to be reversed and dismissed. *State v. Teal,* 117 Wn.App. 831, 837, 73 P.3d 402 (2003). For this reason, the conviction for leading organized crime must be reversed and dismissed with prejudice.

D. The Evidence Was Insufficient To Sustain Convictions For Unlawful Possession Of Payment Instruments, Unlawful Possession Of Instruments Of Financial Fraud, Identity Theft, And Possession Of Stolen Property.

Constitutional due process of law requires the State to prove all essential elements of the crime charged beyond a reasonable doubt. *Baeza,* 100 Wn.2d at 490. A challenge to the sufficiency of the evidence admits, for purposes of the challenge, the truth of the State's evidence and any reasonable inferences from it. *State v. Salinas,* 119 Wn.2d 192, 201, 829, P.2d 1068 (1992). Any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process

violation. *State v. Moore,* 7 Wn.App. 1, 499 P.2d 16 (1972). Substantial evidence, in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Collins,* 2 Wn.App. 757, 759, 470 P.2d 227 (1970).

The State's case here had to rest on accomplice liability as the State presented no evidence that Mr. Bellue, as a principal obtained, used, or possessed a means of identification of financial information necessary for a conviction of identity theft in the second degree, or unlawfully possessed payment instruments, instruments of financial fraud, or stolen property.

Ms. Carlson testified all the fraudulently obtained IDs and checks belonged to her: they were in her backpack, not Mr. Bellue's suitcase. They were also in the black bag found in the car, both of which she identified as hers. Actual possession means the contraband is in one's personal custody. Ms. Carlson was in actual possession not Mr. Bellue.

Constructive possession requires that the individual have dominion and control over the contraband or over the premises where the item is found; mere proximity to contraband is inadequate to prove constructive possession. *State v. Callahan,* 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Here, Mr. Bellue was one of four people who stayed at the motel. The

items that were found in the motel room were located in the bedroom under a mattress where Moore and Spencer slept, in Ms. Carlson's backpack, and in the wastebasket. There was no evidence to justify a jury finding that Mr. Bellue could or did exercise dominion and control over the room, the backpack, mattress or wastebasket.

Where another individual claims ownership of the items, it is a factor in evaluating whether the defendant has constructive possession. *State v. Turner,* 103 Wn.App. 515, 522, 13 P.3d 234 (2000). Ms. Carlson testified the black bag belonged to her. She also testified, corroborated by Detective Williams that she was the individual who drove the Audi on the day it was impounded. (Vol. 4RP 327). On the day the car was impounded, the IDs, computers, check-making software, and printer cartridges were in a vehicle over which Mr. Bellue had no dominion and control. Mr. Bellue did not own the vehicle nor did he have actual control over it. While he may have been aware there was contraband in the car that is not equal to actual or constructive possession.

Because the evidence is insufficient to sustain the convictions for unlawful possession of payment instruments, unlawful possession of instruments of fraud, second degree identity theft, and possession of stolen property, Mr. Bellue's convictions should be reversed and dismissed with prejudice.

E. The Trial Court Erred When It Failed To Enter Written Findings of Fact and Conclusions of Law to Support An Exceptional Sentence.

If a jury finds, unanimously and beyond a reasonable doubt, facts alleged by the State in support of an aggravated sentence, the court may impose a sentence that exceeds the standard range, if it determines that the facts found are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.537(6); *State v. Hyder*, 159 Wn.App. 234, 259060, 244 P.3d 454, *rev. denied,* 171 Wn.2d 1024 (2011).

Whenever a sentence outside the standard sentence range is imposed, the trial court *shall set forth the reasons* for its decision in *written findings of fact and conclusions of law.* RCW 9.94A.535 (Emphasis added). "Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range." *In re Pers. Restraint of Breedlove,* 138 Wn.2d 298, 311, 979 P.2d 417 (1999). The Court of Appeals reviews de novo whether the trial court's reasoning for imposing an exceptional sentence are substantial and compelling. *Hyder,* 159 Wn.App. at 262.

Here, the trial court did not enter any written findings of fact or conclusions of law, but rather, just checked the box on the preprinted

judgment and sentence form that the aggravating factors were found by a jury by special interrogatory. The judgment and sentence indicated the exceptional sentence was imposed on counts 1-10 and 1-22. As argued above, however, imposition of an exceptional sentence on 30 of the counts was error. The oral ruling does not shed any light on the court's thinking process.

In the absence of written findings, an appellate court should not uphold a trial court's reliance on aggravating factors said to support an exceptional sentence. *State v. Batista,* 116 Wn.2d 777, 789, 808 P.2d 1141 (1991). In the alternative, Mr. Bellue respectfully asks this Court to remand for written entry of the required findings. *Breedlove,* 138 Wn.2d at 311. The findings and conclusions must be based only on evidence already taken and this court should allow for supplemental briefing in accordance with *State v. Hale,* 146 Wn.App. 299, 304, 189 P.3d 829 (2008). *See also State v. Head,* 136 Wn.2d 619, 625, 964 P.2d 1187 (1998).

F. Mr. Bellue Received Ineffective Assistance of Counsel Where Counsel Did Not Make Any Motion To Suppress Evidence Which Was Unlawfully Seized.

The Sixth Amendment guarantees the right to counsel. An attorney must perform to the standards of the profession; failure to meet

those standards requires a new trial when the client has been prejudiced by counsel's deficiency. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Claims of ineffective assistance of ocunsel are reviewed de novo. *State v. White,* 80 Wn.App. 406, 410, 907 P.2d 310 (1995). On review, the court applies a two-prong analysis: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *McFarland,* 127 Wn.2d at 334-35. A strategic or tactical decision is not a basis for finding error. *State v. Adams,* 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). There is a strong presumption that defense counsel's conduct is not deficient in the context of a claim of ineffective assistance of counsel, but where there is a no conceivable legitimate tactic explaining counsel's performance, there is a sufficient basis to rebut such a presumption. *State v. Reichenbach,* 153 Wn.2d 126, 131, 101 P.3d 80 (2004).

Here, the items retrieved from the motel room were crucial evidence in supporting the State's theory of the crimes. It was clear that officers entered the motel room without a warrant, conducted a warrantless search and seizure of items and Mr. Bellue, and then applied for the warrant on the basis of what they saw in the room. This argument was available to counsel and his failure to challenge the initial entry and

search and resulting search warrant cannot be explained as a legitimate tactic.

The second prong of an ineffective assistance of counsel claim requires a showing or prejudice. *Reichenbach,* 153 Wn.2d at 131. Here, because the State cannot show a valid exception to the warrant requirement, there was no tactical reason for failing to move to suppress. The motion should have been granted. Without the evidence obtained from the room, the State could not prove Mr. Bellue was involved in any criminal activity beyond a reasonable doubt. Mr. Bellue's right to the effective assistance of counsel was violated.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bellue respectfully asks this Court to reverse his convictions and dismiss with prejudice. In the alternative, he requests a new trial where the evidence is properly suppressed based on a violation of his constitutional rights.

Respectfully submitted this 18th day of August 2014.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Frank Shannon Bellue., do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Corrected Appellant's Brief was mailed by USPS, postage prepaid, first class, on August 18, 2014 to

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