

NO. 46365-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

RANDALL C. SMITH,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The police lacked authority of law to enter the hotel room in which Mr. Smith was staying as an overnight guest under the Fourth Amendment and article I, section 7, based on an unconfirmed allegation of an arrest warrant.

2. To the extent the court's CrR 3.6 written conclusion of law II is construed as a finding of fact, it is not supported by substantial evidence. CP 331 (attached as Appendix A).

3. The police violated Mr. Smith's right to counsel when they did not cease questioning him after he said he wanted an attorney during custodial interrogation.

4. The court erred by entering finding of fact VII following the CrR 3.5 hearing because it is not supported by substantial evidence. CP 323 (attached as Appendix B).

5. The court's to-convict instructions for each count of identity theft relieved the State of its burden of proving the essential elements of accomplice liability. CP 214, 21-32 (Instructions 19, 21-35).

6. The court's instructions improperly permitted the jury to convict Mr. Smith as an accomplice to leading organized crime.

7. Mr. Smith was denied his right to a unanimous jury verdict for the multiple acts essential to proving leading organized crime.

8. The court impermissibly imposed sentences for identity theft in the second degree that exceed the statutory maximum.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Police may enter a person's home to arrest him due to a warrant only if they have probable cause that the warrant is validly enforceable. The police entered Mr. Smith's hotel room because a person claiming to be a bail recovery agent said Mr. Smith had an arrest warrant, but the police never confirmed the warrant and had never before met the person who told them to arrest Mr. Smith. Did the police lack lawful authority to enter Mr. Smith's residence based on the allegation of someone they did not know without any corroboration of this informant's allegations?

2. When a person says he wants a lawyer during *Miranda* warnings, all questioning must cease. The interrogating police officer assumed Mr. Smith wanted a lawyer when he said "attorney" in the course of *Miranda* warnings but the officer questioned him without providing counsel. Was the officer required to stop questioning Mr.

Smith when he reasonably understood Mr. Smith was requesting counsel during *Miranda* warnings?

3. To be held legally accountable for another person's actions, the accused person must knowingly aid the other person in a specific crime. In the to-convict instruction containing the essential elements of identity theft in the second degree, the court told the jury that Mr. Smith could be guilty as an accomplice if he knowingly aided another person in committing "any crime." Did the court's instruction erroneously permit the jury to convict Mr. Smith without finding he knowingly participated in a particular offense?

4. Because leading organized crime is intended to punish the person who directs others in committing certain fraudulent acts, it does not permit a conviction based on accomplice liability. Here, the court gave a general accomplice liability instruction to the jury which let the jury convict Mr. Smith based on the actions of other people. The court did not instruct the jury that leading organized crime may not rest on accomplice liability. Did the court's instructions permit the jurors to base their verdicts on the legally impermissible theory of accomplice liability?

5. A criminal defendant is constitutionally entitled to a unanimous jury verdict. The prosecution alleged multiple acts underlying the offense of leading organized crime and the court did not instruct the jury that its verdict must be unanimous on the acts essential to committing the offense. Did the court's failure to inform the jury that its verdict must be based on unanimous agreement of the conduct essential to commit leading organized crime deny Mr. Smith his right to a verdict by a unanimous jury?

6. A sentencing court lacks authority to impose a sentence that exceeds the statutory maximum, including the combination of prison and community custody terms. Identity theft in the second degree has a five-year statutory maximum but the court imposed a sentence of 57 months in prison and 12 months of community custody. Did the court erroneously order Mr. Smith to serve a sentence that exceeds the 60-month statutory maximum?

### C. STATEMENT OF THE CASE

On November 25, 2012, several police officers entered Randall Smith's hotel room and arrested him.<sup>2</sup>RP 65, 87.<sup>1</sup> They acted at the

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<sup>1</sup> The verbatim report of proceedings ("RP") is contained in consecutively paginated volumes.

behest of a bail recovery agent who told the police that Mr. Smith had an arrest warrant, but the police did not confirm this warrant before entering the hotel room and arresting Mr. Smith. 2RP 73. They had never met the bail bondsmen who claimed Mr. Smith was wanted for arrest. 2RP 78, 83-84.

Mr. Smith and Sarah Stetson-Hayden were inside the hotel room. 2RP 46; 7RP 616-17. Ms. Stetson-Hayden's clothes and shoes were in the room, as well as a substantial array of identification documents, credit cards, blank checks, computers and equipment for making credit cards and checks. 2RP 66-67; 7RP 625-26. The police arrested Mr. Smith and prepared a search warrant application based on the suspicious false identification products in the hotel room. 2RP 68.

As police officer Jared Tiffany read *Miranda* warnings to Mr. Smith, Mr. Smith said, "attorney." 2RP 69. Officer Tiffany "assumed" Mr. Smith wanted to speak with an attorney. 2RP 75-76. Rather than acknowledge Mr. Smith's request, Officer Tiffany continued reading the final part of the *Miranda* warnings and asked Mr. Smith if he would answer questions. 2RP 70. Mr. Smith said, "some questions." *Id.* The officer did not ask if he wanted a lawyer and instead asked him about

the items in the hotel room. 2RP 70-73, 77. He did not give Mr. Smith a written advice of rights form to sign. 2RP 73.

The search of the hotel room disclosed identifying information from at least 18 individuals as well as tools for creating credit cards and checks. 4RP 213; *see, e.g.*, 4RP 228-57, 271-304. Ms. Stetson-Hayden testified at Mr. Smith's trial as part of an agreement after she pled guilty to 29 felony charges. 7RP 596, 626. She explained that because she had worked at a bank, she understood how to create a false check and where it would be easier to cash one, which was her "expertise." 7RP 631-32, 639. She went on "shopping trips" with other women, including Kristina Carlson, Alissa Turner, and two others: Kaja and Kristina, where they would use checks or credit cards to buy goods. 7RP 599-600, 607. They did not need direction from Mr. Smith to make purchases, but Mr. Smith would tell them items to buy and he would sell them to others. 7RP 635, 641. She called Mr. Smith the "boss" but said they were part of a disorganized group like a "commune" where they would "randomly" receive identification documents, often taken from mailboxes, and anyone present would make checks or credit cards. 7RP 612, 620, 645. Mr. Smith told the women to buy certain items that he would sell. 7RP 619.

Before she was found in the hotel room on November 25, 2012, Ms. Stetson-Hayden had been arrested trying to buy items with false financial information at a Home Depot in September 2012, along with Ms. Carlson and Ms. Turner. 5RP 417; 6RP 493-94; 7RP 603. All three women were charged with identity theft and forgery related offenses, pled guilty, and testified against Mr. Smith as part of their plea bargains. 5RP 404; 6RP 500-01; 7RP 596-97.

Based on the items found in the hotel room on November 25, 2013, Mr. Smith was charged with and convicted of 18 counts of identity theft in the second degree, unlawful possession of a firearm in the first degree, unlawful possession of payment instruments, unlawful possession of a personal identification device, and leading organized crime.<sup>2</sup> CP 258-77, 279-80. He was also charged with but not convicted of one count of identity theft in the first degree, unlawful possession of a stolen vehicle, and firearm enhancements in association with counts 4 and 17. CP 180-92, 278, 281-82. He received a sentence of 198 months in prison as well as community custody.

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<sup>2</sup> The charging period for leading organized crime was September 29 – November 25, 2012. CP 187. All other offenses were alleged to have been committed on November 25, 2012. CP 180-92.

Pertinent facts are addressed in further detail in the relevant argument sections below.

D. ARGUMENT

**1. The police lacked authority to arrest Mr. Smith when they did not have probable cause that a valid arrest warrant existed.**

*a. The police do not have legal authority to arrest someone based on a private citizen's unconfirmed contention that an arrest warrant exists.*

Article I, section 7 of the Washington Constitution “is a jealous protector of privacy.” *State v. Buelna Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009).<sup>3</sup> It is “well-settled” that Article I, section 7, provides greater protection to individual privacy than the Fourth Amendment. *State v. Rankin*, 151 Wn.2d 689, 694, 76 P.3d 217 (2003).<sup>4</sup> While the Fourth Amendment bars searches and seizures that are “unreasonable” based on evolving norms, Article I, section 7 “prohibits any disturbance

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<sup>3</sup> Article I, section 7 states, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

<sup>4</sup> The Fourth Amendment provides, The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

of an individual's private affairs 'without authority of law.'" *Buelna Valdez*, 167 Wn.2d at 772.

The protections of article I, section 7 are at their "apex" when the government intrudes upon a person's residence. *State v. Eisfeldt*, 163 Wn.2d 628, 635, 185 P.3d 580 (2008). "A house is considered a castle and entitled to the greatest protection from government entry and roaming. The intrusion into privacy begins at the home's threshold." *State v. Budd*, \_ Wn.App. \_\_, \_ P.3d \_\_, COA 31638-6-III, at 22 (Mar. 3, 2015).

A valid arrest warrant does not authorize the police to enter any home in search of the subject of the warrant. *State v. Hatchie*, 161 Wn.2d 390, 402, 166 P.3d 698 (2007). An arrest warrant alone does not "allow the police to enter a third person's residence." *Id.* (citing *Steagald v. United States*, 451 U.S. 204, 213, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981)). Despite an arrest warrant, police may not enter as a pretext; the wanted person must be actually present; and the police must have probable cause to believe the subject of the arrest warrant is actually present. *Id.* at 392–93. When police recognize someone as a person with an outstanding warrant, they do not have probable cause

for arrest without “confirmation of the outstanding warrant.” *State v. Sinclair*, 11 Wn.App. 523, 531, 523 P.2d 1209 (1974).

When the basis for an arrest is information provided by a citizen, there must be probable cause that the informant’s allegations are reliable and he is credible. *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984). Police must establish (1) that the informant has a factual basis for his or her allegations, and (2) that the information is reliable and credible. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

Here, the police entered Mr. Smith’s hotel room and arrested him at the direction of a bail enforcement contractor, Joseph Kaufman. 2RP 58, 79. The police did not know Mr. Kaufman or have information affirming his reliability or credibility. 2RP 83. They did not verify his employment. *Id.* The police “took the word” of Mr. Kaufman, and did not confirm the information given before entering the hotel room and arresting Mr. Smith. 2RP 73, 79. Although the police later obtained a search warrant for the items within the hotel room, the search warrant application was premised on the information the police gathered after entering the hotel room. 2RP 66-67; CP 329 (Finding of Fact 9). The

validity of the search warrant hinges on whether the police had lawful authority to enter the hotel room. If legitimately inside the home, the plain view exception to the warrant requirement permits the police to act upon observations. *State v. O'Neill*, 148 Wn.2d 564, 582-83, 62 P.3d 489 (2003).

Without checking on the warrant, the police “assumed” the bail bondsman wanted Mr. Smith to surrender for a valid warrant. 2RP 73, 84. Yet, a bail bond agency may request a person surrender on a bail bond without regard to whether a warrant has been issued. Bail agencies have a “wide scope of surrender authority” and may insist that a person surrender for reasons other than failing to appear in court or the issuance of a bench warrant. *Johnson v. Cnty. of Kittitas*, 103 Wn.App. 212, 219, 11 P.3d 862 (2000); *see* RCW 10.19.140. A bail bond company may demand a person’s surrender simply because it feels “insecure” about the defendant’s intent to return to court as promised. *Id.* Inexplicably, the police did not make a simple check to confirm that Mr. Smith had a warrant, and without that confirmation, they police did not have reliable information on which to arrest Mr. Smith.

The two prongs of the *Aguilar-Spinelli* test must be independently satisfied to ensure the validity of the information supplying probable cause to arrest someone upon the allegation of a citizen. *Jackson*, 102 Wn.2d at 437. When the police lack information about one prong of the test, they may establish probable cause only by “independent police investigatory work that corroborates the tip to such an extent that it supports the missing elements of the *Aguilar-Spinelli* test.” *Id.* at 438. No independent police investigation occurred prior to entering the hotel room and arresting Mr. Smith. The police did not have any basis to assess the reliability and credibility of the contractor seeking Mr. Smith’s arrest.

Article I, section 7 does not recognize a “private search” exception that authorizes police to search someone else’s property at the behest of a citizen. *Eisfeldt*, 163 Wn.2d at 636. In *Eisfeldt*, a repairman invited police to enter a home after the repairman saw evidence of a marijuana grow operation. The Supreme Court held that the repairman’s consent to the search did not give police authority to enter the home. *Id.* at 638. Consent to search must come from an individual with free access to the shared area and authority to invite

others into it. *Id.* A repairman has “no authority to grant consent” and his consent does not validate an otherwise unlawful entry. *Id.* at 639.

Similarly to *Eisfeldt*, the two bail bondsmen present had no authority to invite the police into the hotel room occupied and rented by Mr. Smith and others. They were not hotel guests and the police did not think the bondsmen had authority over the property. The invitation of the bail bondsmen to enter Mr. Smith’s hotel room does not supply lawful authority for the police entry under the Washington Constitution. *Eisfeldt*, 163 Wn.2d at 639. The police were not relieved of their obligation to obtain authority of law to enter the hotel room simply because a citizen alleged he had been inside the room and seen potential criminal activity. *Id.*

Police lack authority to enter a hotel room without a warrant or recognized exception to the warrant requirement, just as any residence. *See State v. Williams*, 148 Wn.App. 678, 688, 201 P.3d 371, *rev. denied*, 166 Wn.2d 1020 (2009); *see also State v. Ramirez*, 49 Wn.App. 814, 817, 746 P.2d 344 (1987) (“for purposes of the Fourth Amendment, the constitutional protections afforded homes are extended to other residential premises such as rented hotel rooms”). Here, the police did not have a search warrant, did not obtain consent to enter

from a person who rented the room, and did not verify the arrest warrant. *Id.* at 688-89. The State did not prove that the police had lawful authority to enter the hotel room.

*b. The court incorrectly concluded that bail bondsmen arrested Mr. Smith even though they lack authority to make an arrest.*

The court entered several legally incorrect conclusions of law and unsupported factual findings that undermine its determination that Mr. Smith was lawfully arrested and the property in his hotel room searched. CP 331-33.

It found Mr. Smith “was already under arrest when the officers entered the room.” CP 331 (Conclusion of Law II). But Mr. Smith could not have been arrested before the police entered the room because the bail bondsmen who held Mr. Smith were not state actors with arrest authority. The bond recovery agents have authority to “return to custody” a person whose presence they have guaranteed, but they do not have arrest power. RCW 10.19.160. The authority to arrest resides with the police. *See* RCW 10.31.060; RCW 10.31.100. Mr. Smith was not already “arrested” when he was held by bail bondsman.

The court also concluded that the “valid arrest warrant” gave the bondsmen “independent authority to enter the hotel room.” CP 331

(Conclusion of Law II). But the bondsmen's authority to enter the room stemmed from their status as independent contractors of a bail company and not as law enforcement. *See* Pretrial Ex. 2 (contract with bail bond company hiring people to find Mr. Smith). Mr. Kaufman and his partner David Chadwick did not have the warrant with them or offer to provide it to Mr. Smith as a police officer must. *See* RCW 10.31.030. Police officers would not have been permitted to simply demand the key from the hotel clerk while in undercover clothes and simply "slide" the key into the door and enter without warning, as the bail bondsmen did. 2RP 42, 57; *see* RCW 10.31.040.

The bail bondsmen had merely checked to confirm the validity of the warrant within the last few weeks; it had been over one month since the warrant was issued and they did not ensure the warrant remained valid on the day they found Mr. Smith. 2RP 51-52; Pretrial Ex. 2. The bail bondsmen's actions did not authorize the police to enter the room and arrest Mr. Smith without any corroboration of the basis for arresting Mr. Smith. *See Eisfeldt*, 163 Wn.2d at 638-39.

Police are only permitted to enter a hotel room with a valid arrest warrant and did not have such a confirmed warrant when they entered Mr. Smith's hotel room. They did not have Mr. Smith's consent

to enter, or the consent of a registered guest. They did not even check with anyone, such as the owner of the hotel, before entering the hotel room. Absent lawful authority to enter the hotel room, the police officer's entry violated article I, section 7 and the Fourth Amendment.

*c. The State's baseless standing argument should be rejected if raised on appeal.*

The trial court did not address the prosecution's claim that Mr. Smith lacked standing to challenge the search because he obtained the hotel room with fraudulent identification.<sup>2RP 114</sup>. In the event the prosecution revives this argument on appeal, it should be rejected.

A person has "standing" to challenge a search under the Fourth Amendment or Article I, section 7 of the Washington Constitution, if she establishes that her personal rights have been infringed; i.e., she has a legitimate expectation of privacy in the thing or place searched. *See Rakas v. Illinois*, 439 U.S. 128, 138, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978); *State v. Simpson*, 95 Wn.2d 170, 174, 622 P.2d 1199 (1980).

"An overnight guest has standing to challenge a warrantless search." *State v. Link*, 136 Wn.App. 685, 692, 150 P.3d 610 (2007); *Minnesota v. Olson*, 495 U.S. 91, 96–97, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). Mr. Smith had stayed in the room overnight and had an array

of personal items in the room, showing he had a legitimate expectation of privacy in the residence. *Link*, 136 Wn.App. at 695.

In addition, Washington recognizes a person's "automatic standing" in certain circumstances. *Simpson*, 95 Wn.2d at 175.

[A] defendant 'has automatic standing' to challenge a search or seizure if: (1) the offense with which he is charged involves possession as an 'essential' element of the offense; and (2) the defendant was in possession of the contraband at the time of the contested search or seizure.

*Id.* at 181. Mr. Smith is entitled to automatic standing. He was accused of possessing the means of identification and tools used for creating identifications, credit cards, or checks found in the room at the time of his arrest. Furthermore, having rented the room and stayed there overnight, he has standing to challenge the search of items he was accused of possessing inside the room.

*d. The evidence gathered as a fruit of the unlawful arrest must be suppressed.*

As a result of entering the hotel without confirming the existence of a warrant or corroborating the claims of Mr. Kaufman, who had been hired by a bail bonds company, the police observed potential contraband and interrogated both Mr. Smith and Ms. Stetson-Hayden. CP 329-330, 332. The information the police gathered after

entering the hotel room formed the basis of the search warrant application, as the court found, and the evidence recovered formed the basis of all trial charges. CP 330, 332. Because the police would not have the information used to search the hotel room without the unlawful entry, the fruits of the search must be suppressed. *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002) (“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.”); *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (“The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.”).

This suppressed evidence and its fruits constituted the bulk of the evidence against Mr. Smith. Its erroneous admission requires reversal.

**2. The court improperly admitted statements Mr. Smith made to police after he requested counsel**

a. *Mr. Smith’s request for an attorney during his Miranda warnings was understood by the police but disregarded.*

The right to counsel and the right to remain silent when accused of criminal activity are bedrock protections guaranteed by the Fifth and Sixth Amendments as well as article I, sections 9 and 22 of the

Washington Constitution. *Miranda v. Arizona*, 384 U.S. 436, 458, 466, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Custodial interrogation must be preceded by advice that the defendant has the right to remain silent and the right to the presence of an attorney during interrogation. *Miranda*, 384 U.S. at 479.

If an arrested person requests counsel, “the interrogation must cease until an attorney is present.” *Miranda*, 384 U.S. at 474. So long as the accused has made “some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney,” questioning must end. *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Law enforcement officers may not resume interrogation until counsel has been made available. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). This is a “rigid rule” protecting an “undisputed right.” *Id.* at 485.

To invoke the right to counsel during custodial questioning, the suspect’s request must be unequivocal. *State v. Nysta*, 168 Wn. App. 30, 41, 275 P.3d 1162, 1168 (2012), *rev. denied*, 177 Wn.2d 1008 (2013) (quoting *Davis*, 512 U.S. at 459). This means that “the suspect must articulate his desire to have counsel present sufficiently clearly

that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Id.*

In *Nysta*, the defendant said he wanted an attorney but this request arose in the context of a discussion about whether he would agree to take a polygraph. *Id.* at 39. The prosecution claimed the request was equivocal because he couched it as a request for counsel only for the purpose of deciding whether to take a polygraph. *Id.* at 41-42. But the Court of Appeals refused to consider this request equivocal. *Id.* at 42.

When the detective said he would set up a polygraph if the defendant wanted to take it, Mr. Nysta said, “I gotta talk to my lawyer someone.” *Id.* at 39. The detective said, “Okay,” and Mr. Nysta said, “man if it is cool which [sic] you then I take it.” *Id.* The detective said, “fair enough,” and told Mr. Nysta to give him a call or have his attorney call him to set up the polygraph if he decided to take it. *Id.* But *sua sponte*, the defendant continued talking about the allegations and the detective resumed questioning him. *Id.*

In *Nysta*, this Court explained, “all questioning must cease” when the request for counsel is not ambiguous. *Id.* at 42. “If the interrogator does continue, the suspect’s post request responses ‘may

not be used to cast retrospective doubt on the clarity of the initial request itself.” *Id.* (quoting *Smith v. Illinois*, 469 U.S. 91, 98, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984)). In *Nysta*, the fact that the defendant continued to answer questions and agreed his statements were voluntary did not render equivocal his statement that he needed to “talk to my lawyer.” *Id.*

*b. Mr. Smith requested an attorney and the officer understood his request.*

Mr. Smith said “attorney” as the officer read him *Miranda* rights. The officer thought it was “safe to assume” Mr. Smith meant he wanted to speak with an attorney. 2RP 75. But the officer did not contact an attorney, cease questioning, or ask Mr. Smith whether he wanted a lawyer. 2RP 75-76. Instead, he kept reading the *Miranda* rights and once finished, he asked Mr. Smith if he would answer some questions without mentioning Mr. Smith’s request for counsel. *Id.* Mr. Smith agreed to answer “some questions.” 2RP 76. The police officer understood Mr. Smith’s mention of “attorney” during the reading of *Miranda* rights as a request for a lawyer but impermissibly ignored this request and instead persisted with his interrogation. *Nysta*, 168 Wn. App. at 41-42. By pressing forward with the *Miranda* warnings and

ignoring the request for counsel, the officer signaled to Mr. Smith that he would not be provided with counsel before he was expected to answer questions.

*c. The request for counsel was not honored by the police, contrary to the court's inaccurate findings.*

By saying “attorney” while receiving *Miranda* warnings, the court found Mr. Smith’s statement “could have been a request for counsel but it was ambiguous.” CP 325. The court then found he “waived” his right to counsel “and chose to proceed and answer questions” because Mr. Smith did not continue to insist on having an attorney when the police questioned him about the incident. *Id.*

The State has the “heavy burden” of proving an accused person waived his right to counsel before being interrogated. *Miranda*, 384 U.S. at 479. To be valid, the waiver must be a voluntary, knowing, and intelligent relinquishment of a known right. *Edwards*, 451 U.S. at 482; *State v. Earls*, 116 Wn.2d 364, 379, 805 P.2d 211 (1991).

The court misapplied this legal standard. The interrogating officer understood Mr. Smith’s statement “attorney” during *Miranda* warnings to be a request for counsel. He did not hedge his request by saying maybe or perhaps. *Nysta*, 168 Wn.App. at 41-42. At that point,

the officer was not free to continue his interrogation or press Mr. Smith to change his mind. Instead, he was required to cease questioning until an attorney was present. *Edwards*, 451 U.S. at 484-85.

The court also misrepresented the factual testimony. It found “the defendant indicated that he understood his Miranda rights,” but Officer Tiffany never asked him that. CP 323 (Finding of Fact VII). The officer only asked Mr. Smith if he would answer some questions after he completed reading the Miranda warnings and without acknowledging Mr. Smith’s request for an attorney. 2RP 70, 73. The officer assumed he was invoking his right to an attorney, contrary to the court’s finding. 2RP 75-76; CP 323 (finding “The defendant did not invoke his right to an attorney.”). Because Mr. Smith’s unequivocal statement “attorney,” during *Miranda* warnings, was properly understood by the officer to be a request for counsel, all questions should have ceased, including asking Mr. Smith if he would answer questions.

*d. The statements elicited after Mr. Smith requested counsel must be suppressed.*

Admitting an accused person’s statements that were obtained in violation of a request for counsel are “presumed to be prejudicial.”

*Nysta*, 168 Wn.App. at 42. The prosecution must prove the error is harmless beyond a reasonable doubt. *Id.*

The State used Mr. Smith's statements to obtain a search warrant, show he possessed the items in the hotel room, and allege his knowing possession of stolen vehicles parked in the hotel lot. CP 331-32. This evidence formed the crux of the case against Mr. Smith and, because it was elicited in violation of Mr. Smith's right to counsel as well as his right to be free from intrusions in his private affairs, its suppression requires reversal of his convictions.

**3. The court's instructions diluted and confused the legal standard for accomplice liability necessary to prove identity theft.**

*a. Complicity for another person's actions requires the defendant knowingly aided in the crime charged.*

When legal culpability is imposed for the actions of another, the State must prove beyond a reasonable doubt that the person is guilty as an accomplice. RCW 9A.08.020. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2001).; U.S. const. amend. 14; Wash. Const. art. I, §§ 21, 22. A person may be convicted as an accomplice of another person if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

- (i) Solicits, commands, encourages, or requests such other person to commit it; or
- (ii) Aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020 (3). As the United States Supreme Court recently described this longstanding common law principle of accomplice liability, a person is liable “for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense. (2) with the intent of facilitating the offense’s commission.” *Rosemond v. United States*, \_\_ U.S. \_\_, 134 S.Ct. 1240, 1245, 188 L.Ed. 2d 248 (2014) (citing 2 W. LaFare, *Substantive Criminal Law* § 13.2, p. 337 (2003)).

Accomplice liability may not rest on a person’s mere presence at the scene even with knowledge of ongoing criminal activity. *In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). It may not be predicated on knowing that his or her acts will promote or facilitate “a crime” rather than the crime charged. *State v. Grendahl*, 110 Wn.App. 905, 907, 911, 43 P.3d 76 (2002). It requires knowledge of “the specific crime,” and *not merely any foreseeable crime* committed as a result of the complicity.” *State v. Stein*, 144 Wn.2d 235, 246, 27 P.3d 184 (2001).

b. *The jury instructions diluted the essential elements of accomplice liability necessary to prove identity theft.*

The court instructed the jury that to convict Mr. Smith of identity theft in the second degree, the prosecution must prove “the defendant or an accomplice” knowingly obtained, possessed, used, or transferred a means of identification belonging to a specified person, and “the defendant or an accomplice acted with the intent to commit or aid or abet *any crime*.” CP 214 (Instruction 19, emphasis added; copy attached as Appendix C).<sup>5</sup>

Yet the governing law regarding complicity requires that the accused person knowingly aids in a particular crime. *Roberts*, 142 Wn.2d at 512; *see, e.g., Rosemond*, 134 S.Ct. at 1248 (“An intent to advance some different or lesser offense is not, or at least not usually, sufficient [for accomplice liability]. Instead, the intent must go to the specific and entire crime charged.”); *State v. Brown*, 147 Wn.2d 330, 338, 58 P.3d 889 (2002) (“It is a misstatement of the law to instruct a jury that a person is an accomplice if he or she acts with knowledge that his or her actions will promote *any crime*.” (emphasis in original)).

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<sup>5</sup> The to-convict instructions for all 18 charges for identity theft in the second degree are identical; varying only in the name of the person whose identifying information was obtained. CP 217-32 (Instructions 21-35).

By permitting a conviction based on another person's acts and another person's intent to commit *any* crime, the instructions removed the requirement that the defendant knowingly aided the particular crime which the other participant intended to commit. *Roberts*, 142 Wn.2d at 512. The prosecution must prove the accused person knowingly aided that crime to be held legally accountable for the actions of another. *Id.*

The jury also received the general definition of accomplice liability. CP 215. This instruction accurately explained that a person is legally accountable for the acts of another "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." *Id.*

But while this general definitional instruction was accurate, it does not cure the ambiguity in the to-convict instruction. "The 'to convict' instruction carries with it a special weight because the jury treats the instruction as a 'yardstick' by which to measure a defendant's guilt or innocence." *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). The to-convict instruction for identity theft does not require the defendant knowingly aid in a particular crime. CP 214. It let the jury

convict Mr. Smith based on the acts of another without requiring his knowledge that he aided or encouraged the particular crime intended by the person whose conduct he is held legally accountable.

*c. Relieving the prosecution of its burden to prove the essential elements of identity theft requires reversal.*

“Instructional error is presumed to be prejudicial *unless it affirmatively appears to be harmless.*” *Brown*, 147 Wn.2d at 340 (quoting *Stein*, 144 Wn.2d at 246 (emphasis added in *Brown*)). If an element has been misstated in a jury instruction, “the error is harmless if that element is supported by uncontroverted evidence.” *Id.* at 341.

Mr. Smith’s convictions for identity theft in the second degree did not rest on his personal use of identifying information of the complainants. Other than Mr. Smith’s possession of an identification card in Marvin Crotto’s name and his presence in the hotel room, his culpability involved his connection to other people who used the identifying information. There was no single, unambiguous crime that all participants jointly intended for each individual charge.

Mr. Smith contested his liability for the actions of others. Sarah Stetson-Hayden had far more knowledge of banking protocol than Mr. Smith and she appeared to organize and control the creation of financial

documents, which she called her “expertise.” 7RP 632, 639. She was also a registered guest, present in the hotel room that contained the vast amount of identifying information and tools for making identifications. 6RP 537; 7RP 588, 592. The evidence did not unambiguously connect Mr. Smith to using or knowing about all 18 complainants for each identity theft allegation. Based on the ambiguity of the evidence, the court’s instruction diluting the State’s evidentiary burden cannot be harmless.

The failure to clearly and accurately inform the jury that an accomplice must knowingly aid another person in a specific crime, and not any crime, impermissibly relieved the State of its burden of proving the essential elements of accomplice liability and requires reversal.

**4. The court’s instructions impermissibly permitted the jury to convict Mr. Smith of leading organized crime as an accomplice.**

Leading organized crime punishes the leader and not the accomplice, and therefore the jury may not base its conviction on accomplice liability. *State v. Hayes*, 164 Wn.App. 459, 469-70, 262 P.3d 538 (2011). The court did not instruct the jury that Mr. Smith’s conviction for leading organized crime must rest on Mr. Smith’s

conduct as the leader and not his knowing encouragement or aid to another. This error requires reversal.

*a. The court's instructions let the jury base its verdict on accomplice liability.*

Even “[w]hen a ‘to convict’ instruction only refers to the conduct of the ‘defendant,’ and not to the conduct of the ‘defendant or an accomplice,’” the jury may base its verdict on accomplice liability under the general instruction defining accomplice liability. *State v. Teal*, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004). In *Teal*, the to-convict instruction only mentioned “the defendant.” *Id.* at 335. On appeal, Mr. Teal claimed his conviction could not be upheld based on accomplice liability because the to-convict instruction only asked the jury to weigh the conduct of “the defendant” and not an accomplice. *Id.* at 337. The Supreme Court rejected this argument.

The *Teal* Court held that when the jury receives the general instruction defining accomplice liability, it may base its verdict upon accomplice liability even when the court does not explicitly direct the jury to consider accomplice liability in the to-convict instruction. *Id.* at 339. “In reading the jury instructions as a whole,” including the general

definition defining accomplice liability, the jury had authority to decide Mr. Teal's guilt as an accomplice. *Id.*

*b. The court's instructions impermissibly permitted the jury to convict Mr. Smith of leading organized crime premised on accomplice liability.*

Leading organized crime is an exception to the general rule that a person may be punished equally as either the principal or an accomplice. *Hayes*, 164 Wn.App. at 470. The "conduct criminalized" by this statute "is the conduct of the leader." *Id.* In order for the jury to convict the defendant, it must find "a hierarchy in which the defendant is at the apex and three or more other persons are below." *Id.*

But the court's instructions did not make this distinction manifestly apparent to the average juror, as required. *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). Instead, they misled the jury and implied that accomplice liability was an available premise for a guilty verdict. The court's failure to make the essential elements of a crime manifestly apparent is an error of constitutional magnitude that may be raised the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 866, 10 P.3d 977 (2000).

The court's instructions control the jury's understanding of the law. The prosecutor's closing argument urged the jury to convict Mr.

Smith of leading organized crime based on his acts alone, not as an accomplice. But the prosecutor's argument is not legal instruction that binds the jury. *State v. Kier*, 164 Wn.2d 798, 813, 194 P.3d 212 (2008). On the contrary, the jury is told that it "must disregard" any argument not supported by the court's instructions. CP 197.

The court's instructions permitted the jury to rest its verdict on the unavailable theory that Mr. Smith aided another person in the commission of leading organized crime. CP 250. Given the evidence that Ms. Stetson-Hayden had expertise in the banking aspect of the fraudulent activity, taught others how to make credit cards and checks, and was involved in the individual purchases as well, jurors may have considered her the organizer and leader. *See* 7RP 632, 639, 650. Ms. Stetson-Hayden supervised the creation of the false checks and credit cards, while Mr. Smith's role was identifying and selling product that others obtained through identity theft. 7RP 635. She claimed that "everybody" made checks and credit cards, showing that Mr. Smith was not the organizer. 7RP 602. One of the women, Kaja, thought "she was in charge of this business." 7RP 607. Because the instructions did not make manifestly apparent the necessity of basing the verdict solely upon Mr. Smith's own actions, and there was evidence that he was one

actor who participated alongside a disorganized group of people taking advantage of the account information that had, his conviction may have rested on his complicity with others rather than his role as leader. This error requires reversal. *Hayes*, 164 Wn.App. at 471.

**5. Mr. Smith was denied his right to a unanimous jury verdict on the essential elements of leading organized crime.**

*a. When an offense may be based on multiple acts, the court must ensure the jury's verdict is unanimous.*

“In a criminal case we must be certain that the verdict is unanimous.” *State v. Badda*, 63 Wn. 2d 176, 183, 385 P.2d 859 (1963); Const. art. I, §§ 21, 22. When the prosecution presents evidence of several acts which could form the basis of one charged count, it must either tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). By requiring a unanimous verdict for one criminal act, the court protects a criminal defendant’s right to a unanimous verdict based on an act proved beyond a reasonable doubt. *State v. Coleman*, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007).

In *Petrich*, the court held that where evidence indicates several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity is assured by either: (1) requiring the prosecution to elect the act upon which it will rely for conviction; or (2) instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt. Failure to follow one of these options is “violative of a defendant’s state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” *Kitchen*, 110 Wn.2d at 409; see *State v. Hepton*, 113 Wn.App. 673, 684, 54 P.3d 233 (2002); *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990).

If the State elects a certain act, the pattern jury instructions direct the mechanism for the prosecution to explain its election. 11 Wash. Prac., Pattern Jury Instr. Crim., WPIC 4.26 (3d Ed 2014). By using this instruction, the court informs the jury that the prosecution is relying upon certain evidence of a single act to constitute the essential elements and tells the jury that to convict the defendant, they “must unanimously agree that this specific act was proved.” *Id.* Otherwise, the court must give a *Petrich* instruction, informing the jury that “one

particular act . . . must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved.” WPIC 4.25.

A defendant may not waive his right to a unanimous verdict should the defendant elect a jury trial. *State v. Noyes*, 69 Wn.2d 441, 446, 418 P.2d 471 (1966) (When a hung jury stands 11 to 1 for acquittal, defendant is not permitted to waive a unanimous verdict and accept the vote of 11 jurors as a valid verdict). The court is obligated to ensure juror unanimity is preserved.

The court did not give either the unanimity or election instructions, WPIC 4.25 or 4.26. It did not tell the jury that the prosecution was relying upon specific allegations to prove leading organized crime. It did not tell the jurors that it needed to agree on the three or more persons Mr. Smith purportedly directed or agreed on his intent to engage in at least three separate acts of criminal profiteering.

To convict Mr. Smith of leading organized crime, the State needed to prove that he intentionally managed “three or more persons” and acted “with the intent to engage in a pattern of criminal profiteering activity,” defined as “at least three acts” that were: (1) committed for financial gain, (2) constituted either forgery or identity theft, and (3) these acts that the same or similar intent, results, accomplices,

principals, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics.” CP 249-50.

The jury heard evidence of more than three acts, although there were few details of specific instances during the charging period of September 29 to November 25, 2012. CP 187, 250. Ms. Stetson-Hayden, Ms. Turner, and Ms. Carlson were all arrested on or about September 24 or 25, 2012, and they did not explain specific acts committed after this September arrest, which was a critical element of the leading organized crime as charged. CP 250; 5RP 391; 6RP 489.

There were also more than three people purportedly involved in fraudulent acts. In addition to Ms. Stetson-Hayden, Ms. Turner, and Ms. Carlson, Kaja, and Katrina<sup>6</sup> committed various acts involving “this business.” 7RP 607, 621. And while called a “business” in court, Ms. Stetson-Hayden clarified that it was really “a bunch of people showing up on their own,” and was “haphazard and disorganized.” 7RP 623. They did not wait for or “need” direction from Mr. Smith to engage in any of the fraudulent acts. 7RP 635.

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<sup>6</sup> Kaja and Kristina did not testify and their last names were not mentioned by witnesses.

It was unclear what happened or who was involved during this charging period. Ms. Carlson testified that she did not commit any acts of identity theft or forgery after her September 25, 2012 arrest, because she had not done anything other than what she was charged with when arrested in September at Home Depot. 5RP 391, 409. She helped take things into the hotel room in November but did not say she was otherwise involved and no evidence indicated she was. 5RP 405. Ms. Turner said she was not on speaking terms with Mr. Smith in the fall of 2012, although she admitted to a single act of shopping for goods with Kaja and Kristina in October 2012. 6RP 503, 508. Kaja was arrested in early November 2012. 6RP 503, 506.

A *Petrich* instruction is required in sexual abuse cases where there is “generic testimony” regarding prolonged and consistent sexual abuse. *State v. Hayes*, 81 Wn.App. 425, 430–31, 914 P.2d 788 (1996). The trial court must also instruct the jury that they need to be unanimous as to which act constitutes the count charged and if there are multiple counts, the jurors must be instructed to base each count on “separate and distinct acts” *Id.* at 431.

Similarly, the general testimony about various acts committed by various people over an extended period of time, not necessarily

within the charging period, required an instruction that the jury must be unanimous as to which act constitutes the elements of leading organized crime. *Id.* The court did not give such an instruction and there was no specific election of particular conduct by the prosecution that protected Mr. Smith's right to a unanimous jury verdict.

*b. The lack of unanimity instruction is presumed to be harmful.*

The constitutional error resulting from the failure to either elect the acts and actors relied upon for conviction or properly instruct the jury is harmless only if the reviewing court is satisfied beyond a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 405-06. Where the trial court failed to give a required *Petrich* instruction, "the standard of review for harmless error is whether a 'rational trier of fact could find that each incident was proved beyond a reasonable doubt.'" *Camarillo*, 115 Wn.2d at 65 (quoting *State v. Gitchee*, 41 Wn.App. 820, 823, 706 P.2d 1091 (1985)). It is also a manifest error that may be raised for the first time on appeal. *State v. Bobenhouse*, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009).

Here, there was no clear evidence of distinct acts. There was conflicting testimony about the involvement of others and no specific explanation of the necessary acts occurring within the charging period. Ms. Stetson-Hayden saw herself as the expert who “taught” others how to engage in fraud, but she also described Kaja as believing she was in charge. 7RP 650. She said it was a “commune” where many people made checks or credit cards independently of Mr. Smith. 7RP 645, 645-48. Ms. Stetson-Hayden, Ms. Turner, and Ms. Carlson all testified that they, and others, made various purchases but did not discuss discrete acts during September 29 to November 25, 2012. CP 250. Based on the ambiguity of the evidence and the multiple people potentially involved, the failure to instruct the jury on the requirement of juror unanimity for the essential elements of leading organized crime is not harmless beyond a reasonable doubt.

**6. The court imposed a sentence in excess of the statutory maximum for each count of second degree identity theft.**

The statutory maximum sentence for identity theft in the second degree, a class C felony, is 60 months. RCW 9A.20.021; RCW 9.35.020(3). The court sentenced Mr. Smith to 57 months for each

count of identity theft in the second degree, as well as 12 months of community custody for each count.

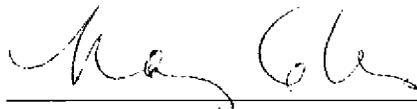
When the combined term of community custody and prison exceeds the statutory maximum, RCW 9.94A.701(9) requires the trial court to reduce the term of community custody. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). This error requires remand for resentencing. *Id.* at 473.

E. CONCLUSION

This Court should reverse Randall Smith's convictions and sentence, and order that he receive a new trial as well as sentences within the statutory maximum and any other relief this Court finds appropriate.

DATED this 5th day of March 2015.

Respectfully submitted,



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Washington Appellate Project (91052)  
Attorneys for Appellant

## **APPENDIX A**

FILED 2014/05/06 10:18



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 12-1-04415-7

vs.

RANDALL CHRISTOPHER SMITH,

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW FOR CrR 3.6  
HEARING

Defendant.

THIS MATTER having come on before the Honorable Bryan Chushcoff, judge of the above entitled court, for a CrR 3.6 motion on the 5th day of May, 2014, the defendant having been present and represented by attorney Kent Underwood, and the State being represented by Deputy Prosecuting Attorney Melody Crick, and the court having considered all the evidence, heard testimony and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

That on November 25, 2012, bail bond recovery agents David Chadwick and Joseph Kaufman had received information that defendant, Randall Smith, was staying at the La Quinta hotel in Tacoma. The bail bond recovery agents had a contract from A Affordable Bail Bonds to arrest defendant after he failed to appear for a King County case. David Chadwick testified his practice is to confirm the warrant. The contract was admitted at the CrR 3.6 hearing.

## II.

The bail bond recovery agents were licensed and followed procedures for entering the hotel. They called the Tacoma Police Department to let them know they were going in to obtain defendant, showed defendant's picture to the front desk, confirmed he was in the hotel and then entered room 612 with a pass key in order to obtain defendant. Defendant was in room 612 and was detained by the recovery agents. Co-defendant Sarah Stetson-Hayden was also in the room.

## III.

The bail bond recovery agents observed large amount of credit cards, computers, shopping bags and other items filling the room. All of the items the bail recovery agents observed were in plain view. Suspecting criminal activity, the bail recovery agents called Tacoma Police Department and stayed at the scene until they arrived a few minutes later. The bail recovery agents were only at the hotel to arrest the defendant on his outstanding warrant. They do not investigate crime.

## IV.

Defendant obtained the rooms fraudulently. Defendant was not registered in the room under his real name. Defendant had an identification card, that Officer Tiffany observed was obviously fake, in the name of Marvin Crotto. Defendant had used that identification to rent the room. In addition, defendant had used a stolen credit card to rent the room. The true owner of the credit card was Gordon Stone.

## V.

1 Defense counsel conceded at the CrR 3.6 hearing that the entry into room 612 by the bail  
2 recovery agents was lawful. There was no dispute that there was a valid warrant for defendant's  
3 arrest.

4 VI.

5 That on November 25, 2012, Tacoma Police Officer Jared Tiffany was working in his  
6 official capacity. Officer Tiffany was dispatched to the LaQuinta Inn at 1425 E. 27<sup>th</sup> St. in  
7 Tacoma, WA at about 8:30pm. Dispatch indicated that bail recovery agents had discovered  
8 items in a hotel room that were possibly related to financial crimes.

9 VII.

10 Officer Tiffany spoke to one of the bail recovery agents, Joseph Kauffman, who told the  
11 officer what he had observed. Officer Tiffany then contacted Sgt. Michael Lim who told him to  
12 wait for Officer Phillip Hoschouer. Once Hoschouer arrived the officers went to room 612 of the  
13 La Quinta.

14 VIII.

15 When the officers entered the room, defendant was secured in handcuffs and was being  
16 guarded by another bail recovery agent, David Chadwick. Co-defendant Sarah Stetson-Hayden  
17 was sitting on the bed.  
18

19 IX.

20 Officers Tiffany and Hoschouer both observed a large amount of items in the hotel room.  
21 There were bins, computers, shopping bags, stacks of checks, mail, office supplies, and a box on  
22 the bed that contained ~~hundreds of~~ <sup>numerous</sup> credit cards. All of the items noted by the officers were in <sup>BEC</sup>  
23 plain view. Officer Tiffany noted that one part of the room, with the electronics, appeared to be  
24 organized while the other part did not.  
25

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## X.

1 Officer Tiffany interviewed defendant. After advising defendant of his *Miranda* rights,  
2 defendant answered questions including the fact that he and his girlfriend Sarah had checked into  
3 the hotel earlier in the week and had rented five rooms. He gave no reason why he had rented  
4 that many rooms but did say that he had let several of his friends stay in the other rooms.  
5 Defendant refused to provide the room numbers, stating "You can find it." Defendant said that  
6 he and Sarah had stayed in room 612 since they checked in. The night before, they decided to do  
7 a room switch with their friend Trina and had started to move some of their belongings to room  
8 215 but still had some of their things in room 612. Officer Tiffany observed that defendant was  
9 arrogant and argumentative during the entire contact.  
10

## XI.

11  
12 Officer Hoschouer interviewed Sarah Stetson-Hayden. Stetson-Hayden's statements  
13 were included in the affidavit for search warrant which defense counsel attached to his brief and  
14 which the Court took notice of at the CrR 3.6 hearing. Stetson-Hayden admitted that there was  
15 stolen merchandise in the room and that defendant would forge checks and have his friends cash  
16 the checks.  
17

## XII.

18  
19 The officers did not search the rooms, including room 612, until after search warrants  
20 were obtained. As soon as the officers saw what was in the rooms, defendant and Stetson-  
21 Hayden were removed and the room was secured. Officer Tiffany wrote the search warrants and  
22 had them signed by a judge. The search of the rooms only commenced after the search warrants  
23 were obtained.  
24

## XIII.

1 Defendant himself claimed ownership of the two vehicles in the LaQuinta hotel parking  
 2 lot. Officer Luke Wallin transported defendant to jail. While defendant was in Officer Wallin's  
 3 car, defendant observed his two vehicles being towed. Defendant asked why his vehicles were  
 4 being impounded and Officer Wallin told him they were being impounded pending a search  
 5 warrant. Defendant stated that he purchased both vehicles off Craigslist a couple of weeks  
 6 earlier. He said he paid \$4,500 for the 2012 Chrysler and \$3,500 for the 2102 Subaru and did not  
 7 think that there was anything odd about the purchase prices. Officer Wallin advised they were  
 8 registered to a rental company and defendant still insisted the vehicles were his.

9 XIV.

10 That the State's witnesses that testified at the CrR 3.6 hearing are credible.

11 CONCLUSIONS OF LAW

12 I.

13 That the Court finds that the bail bond recovery agents lawfully entered hotel room 612  
 14 that defendant had fraudulently rented. The bail bond recovery agents properly called the police  
 15 when they discovered evidence of criminal activity.

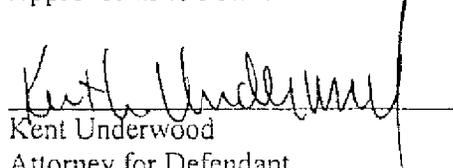
16 II.

17 That the Court finds that the officers lawfully entered hotel room 612 that defendant had  
 18 fraudulently rented. The officers spoke with the reporting party, one of the bail bond recovery  
 19 agents, prior to entering the room. Defendant was already under arrest when the officers entered  
 20 the room. The valid arrest warrant for the defendant provided Officer Tiffany and Officer  
 21 Hoshouer with an independent basis to enter the hotel room. The officers were not required to  
 22 independently confirm the warrant prior to entering the hotel room.

23 III.



Approved as to Form:

1   
 2 Kent Underwood  
 3 Attorney for Defendant  
 4 WSB# 27250  
 5 srp

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## **APPENDIX B**

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12-1-04415-7 42665720 FNFCI 06-09-14



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 12-1-04415-7

vs.

RANDALL CHRISTOPHER SMITH,

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW FOR CrR 3.5  
HEARING

Defendant.

THIS MATTER having come on before the Honorable Bryan Chushcoff, judge of the above entitled court, for a CrR 3.5 motion on the 5th day of May, 2014, the defendant having been present and represented by attorney Kent Underwood, and the State being represented by Deputy Prosecuting Attorney Melody Crick, and the court having considered all the evidence, heard testimony and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

That on November 25, 2012, bail recovery agents David Chadwick and Joseph Kaufman, had received information that defendant, Randall Smith, was staying at the La Quinta in Tacoma. They called TPD to let them know they were going in to obtain defendant, showed defendant's picture to the front desk, confirmed he was in the hotel and then entered room 612 with a pass key in order to obtain defendant. Defendant was in room 612 and was detained by the recovery

agents. When they observed large amount of credit cards and other items filling the room, the recovery agents called Tacoma Police.

## II.

That on November 25, 2012, Tacoma Police Office Jared Tiffany was working in his official capacity. Officer Tiffany was dispatched to the LaQuinta Inn at 1425 E. 27<sup>th</sup> St. in Tacoma, WA at about 8:30pm. Dispatch indicated that bail recovery agents had discovered items in a hotel room that were possibly related to financial crimes.

## III.

Officer Tiffany spoke to one of the bail recovery agents, Joseph Kauffman, who told the officer what he had observed. Officer Tiffany then contacted Sgt. Michael Lim who told him to wait for Officer Phillip Hoschouer. Once Hoschouer arrived the officers went to room 612 at the La Quinta hotel.

## IV.

When the officers entered the room, the defendant was secured in handcuffs and was being guarded by another bail recovery agent, David Chadwick. Co-defendant Sarah Stetson-Hayden was sitting on the bed.

## V.

Officers Tiffany and Hoschouer both observed a large amount of items in the hotel room. There were bins, computers, shopping bags, stacks of checks, mail, office supplies, and a box on the bed that contained hundreds of credit cards. All of the items noted by the officers were in plain view. Officer Tiffany noted that one part of the room, with the electronics, appeared to be organized while the other part did not.

## VI.

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1 Officer Tiffany interviewed defendant. Officer Tiffany started the interview by advising  
2 defendant of his *Miranda* rights using a pocket card that he carried with him. Those rights  
3 included his right to remain silent, his right to refuse to answer questions, his right to have an  
4 attorney present for any questioning, and his right to have an attorney provide for him at no cost  
5 if he could not afford an attorney. The defendant was also told anything he said would be used  
6 against him in a court of law. As the officer was reading defendant his rights, defendant blurted  
7 out the word, "Attorney." As Officer Tiffany had not yet completed reading defendant his rights,  
8 Officer Tiffany continued to read the *Miranda* rights to completion.

9 VII.

10 That after being advised of his *Miranda* rights, the defendant indicated that he  
11 understood his *Miranda* rights. The defendant never expressed confusion about his *Miranda*  
12 rights. When asked if he wanted to answer questions, defendant answered, "some questions."  
13 The defendant did not invoke his right to an attorney. The defendant never invoked his right to  
14 remain silent or refused to answer questions. The defendant was never made any promises or  
15 threats to waive his *Miranda* rights.  
16

17 VIII.

18 The defendant was asked his name which he refused to provide and instead said that  
19 Officer Tiffany already had his ID and wallet. The defendant identified his female companion as  
20 his girlfriend Sarah and stated that they checked into the hotel earlier in the week and rented five  
21 rooms. He gave no reason why he had rented that many rooms but did say that he had let several  
22 of his friends stay in the other rooms. The defendant refused to provide the room numbers,  
23 stating "You can find it." Defendant said that he and Sarah had stayed in room #<sup>612</sup>~~88~~ since they  
24 HE ALSO SAID THAT his arrest, checked in <sup>the</sup> night before, they decided to do a room switch with their friend Trina and had  
25

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1 started to move some of their belongings to room 215 but still had some of their things in room  
2 612.

3 IX.

4 Officer Luke Wallin transported the defendant to jail. While defendant was in Officer  
5 Wallin's car, defendant observed his two vehicles being towed. Defendant asked why his  
6 vehicles were being impounded and Officer Wallin told him they were being impounded pending  
7 a search warrant. Defendant stated that he purchased both vehicles off Craigslist a couple of  
8 weeks earlier. He said he paid \$4,500 for the 2012 Chrysler and \$3,500 for the 2102 Subaru and  
9 did not think that there was anything odd about the purchase prices. Officer Wallin advised they  
10 were registered to a rental company and defendant still insisted the vehicles were his.

11 X.

12 Officer Wallin did not advise the defendant of his *Miranda* rights but was aware that he  
13 had already been advised. Defendant initiated the conversation with Officer Wallin.

14 XI.

15 That all of the State's witnesses that testified at the CrR 3.5 hearing are credible.

16 CONCLUSIONS OF LAW

17 I.

18 That the Court finds the State has the burden of showing the statements are admissible by  
19 a preponderance of the evidence

20 II.

21 That the Court finds in order for *Miranda* to apply that the defendant must both be "in  
22 custody" and "interrogated" by police.

23 III.

FILED 09/10/2014 00110

1 That the Court finds that the statements made in Findings of Fact VIII and IX were made  
2 after the defendant was placed in custody for purposes of *Miranda*. *Miranda* was needed at this  
3 time.

## 4 IV.

5 The Court finds that prior to the statements made in Findings of Fact VIII and IX the  
6 defendant received *Miranda* warnings from Officer Tiffany. When the defendant blurted out the  
7 word, "Attorney," defendant had not yet been fully advised of his rights and questioning had not  
8 yet started. The officer was trained to advise arrestees of their rights in their entirety and the  
9 officer did so in this instance. By continuing to read the defendant his rights, Officer Tiffany  
10 properly and fully advised the defendant of his *Miranda* rights.

## 11 V.

12 The Court finds that the defendant understood his *Miranda* warnings. At no time did the  
13 defendant express any confusion about those warnings, nor did the defendant invoke his right to  
14 remain silent. The single word, "Attorney" could have been a request for counsel but it was  
15 ambiguous. Defendant then waived that right and chose to proceed and answer questions.

## 16 VI.

17 The Court finds that the statements made by defendant to Officer Wallin were made after  
18 defendant had been fully and properly advised of his *Miranda* rights.

## 19 VII.

20 The Court finds that the defendant's waiver of his *Miranda* rights was made knowingly,  
21 intelligently and voluntarily.

## 22 VIII.

The Court finds that the statements made in Findings of Fact VIII and IX are admissible.

DONE IN OPEN COURT this 6<sup>th</sup> day of June, 2014.

[Signature]  
JUDGE

Presented by:

[Signature]  
Melody M. Crick  
Deputy Prosecuting Attorney  
WSB# 35453

Approved as to Form:

[Signature]  
Kent Underwood  
Attorney for Defendant  
WSB# 27250  
srp



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## **APPENDIX C**

INSTRUCTION NO. 19

To convict the defendant of identity theft in the second degree, as charged in Count VI, the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 25th day of November, 2012, the defendant or an accomplice knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, living or dead, to wit: Marianna Stephens;

(2) That the defendant or an accomplice acted with the intent to commit or aid or abet any crime;

(3) That the defendant or an accomplice obtained credit, money, goods, services or anything else that is \$1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods, services or other items of value; and

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

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

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

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5/20/2014

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 46365-2-II
	)	
RANDALL SMITH,	)	
	)	
Appellant.	)	

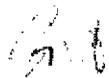
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5<sup>TH</sup> DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |                                                                                                                                                         |                   |                                                                 |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-----------------------------------------------------------------|
| [X] KATHLEEN PROCTOR, DPA<br>[PCpatcecf@co.pierce.wa.us]<br>PIERCE COUNTY PROSECUTOR'S OFFICE<br>930 TACOMA AVENUE S, ROOM 946<br>TACOMA, WA 98402-2171 | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>E-MAIL BY AGREEMENT<br>OF PARTIES |
| [X] RANDALL SMITH<br>375048<br>WASHINGTON CORRECTIONS CENTER<br>PO BOX 900<br>SHELTON, WA 98584                                                         | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____                             |

**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF MARCH, 2015.



X \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

# WASHINGTON APPELLATE PROJECT

March 05, 2015 - 3:54 PM

## Transmittal Letter

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Case Name: STATE V. RANDALL SMITH

Court of Appeals Case Number: 46365-2

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### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

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Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

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