

**NO. 46365-2**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RANDALL SMITH, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Bryan Schushcoff

No. 12-1-04415-7

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**AMENDED BRIEF OF RESPONDENT**

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MARK LINDQUIST  
Prosecuting Attorney

By  
JASON RUYF  
Deputy Prosecuting Attorney  
WSB # 38725

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to prove the search warrant for evidence of identity theft inside his fraudulently rented hotel room was unlawfully based on plain view observations since they were lawfully made by officers who entered to accept custody from bail agents who detained him in the room on an active arrest warrant?

2. Was defendant's unexplained utterance of the word "attorney" during his advisement of rights incapable of invoking the right to counsel because it was an ambiguous remark?

3. Does defendant's meritless challenge to the identity theft "to convict" instructions wrongly apply a drafting rule designed for the accomplice definition to the *mens rea* element of the offense?

4. Was any confusion resulting from the accomplice definition's failure to exempt leading organized crime from its application eliminated through the State's election of principle liability in closing argument and harmless due to the uncontroverted evidence of defendant's guilt?

5. Did the court properly refrain from issuing a unanimity instruction specific to leading organized crime that required agreement as to the identity of the people defendant organized and

the crimes amounting to a pattern of criminal profiteering when neither is an element of the offense?

6. Should defendant's sentence be remanded for correction of the identity theft community custody terms when they exceed the jurisdictional maximum for the offense?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant proceeded to trial on the twenty four count Second

Amended Information charging him with:

Identity theft first degree (Ct.I—victim Black<sup>1</sup>); unlawful possession of a firearm (Ct.II); firearm enhanced unlawful possession of personal identification device (Ct.IV); unlawful possession of a stolen vehicle (Ct.V); identity theft second degree: (Ct.VI—victim Stephens<sup>2</sup>), (Ct. VII—victim Daniel), (Ct.VIII—victim Rawson<sup>3</sup>), (Ct.IX—victim Brooks<sup>4</sup>), (Ct.X—victim Farinha<sup>5</sup>), (Ct.XI—victim E. Swanson<sup>6</sup>), (Ct.XII—victim Ibrahim<sup>7</sup>), (Ct.XIII—victim Trevino<sup>8</sup>), (Ct.XIV—victim A. Wilkins<sup>9</sup>), (Ct.XV—victim

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<sup>1</sup> **Paralegal Black's** identity was stolen during a purse theft. Defendant's team used it to make a fake ID, cash stolen bonds, apply for credit, fabricate checks, and bail defendant out of jail. 4RP 244-45, 298, 322-25, 244-45, 298; 5RP 435-38.

<sup>2</sup> Defendant possessed **Dental consultant Stephens'** stolen license with a copy of her credit card. 4RP 298-99; 5RP 482-84.

<sup>3</sup> Defendant possessed **Meat cutter Rawson's** missing passport. 4RP 330.

<sup>4</sup> Defendant possessed Nelson's missing license. 4RP 240; 5RP 425-26.

<sup>5</sup> He obtained **homemaker Farinha's** identity after a purse theft. 4RP 229-30, 269-73.

<sup>6</sup> Defendant possessed **Ninety year old Swanson's** undelivered ID. 4RP 305-06.

<sup>7</sup> Defendant possessed the ID, credit, and social security cards **Project manager Ibrahim** lost in a burglary. 4RP 330; 7RP 565-68.

<sup>8</sup> Defendant possessed the social security card **state employee Lee Trevino** lost in a vehicle theft. 4RP 330; 7RP 571-72.

<sup>9</sup> Defendant possessed a license **nursing assistant Olea** lost in a purse theft. 6RP 485-86.

Gathu<sup>10</sup>), (Ct.XVI—victim McLeod<sup>11</sup>), (Ct.XVIII—victim Crotto<sup>12</sup>), (Ct.XIX—victim Katz<sup>13</sup>), (Ct.XXI—victim A. Holden<sup>14</sup>), (Ct.XXII—victim G. Holden), (Ct.XXIII—victim Aiken); identity theft in the second degree (Ct. XXIV—victim Schonhardt); (Ct.XXV—victim Cottam<sup>15</sup>) firearm enhanced leading organized crime (Ct.XVII); unlawful possession of payment instruments (Ct.XX)CP 56-70.

Multiple-offense aggravators were charged. *Id.* Defendant's suppression motions were denied. *E.g.*, 2RP 19-24, 102-08, 112-18; CP 325, 327-33.

Ninety two exhibits were admitted at trial through thirty witnesses. CP 178-79, 362-70.<sup>16</sup> Count I was dismissed. 8RP 723. Defendant was convicted as charged except for the firearm enhancements and Count V. CP 281-82, 278. The convictions combined with his prior child molestation offense to produce an offender score of 9+. CP 305-06. A high-end sentence was imposed. The identity theft community custody

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<sup>10</sup> Defendant possessed copies of the license and social security card **nursing assistant Gathu** lost in a car prowl. 4RP 278; 8RP 690-93.

<sup>11</sup> Defendant possessed the license, social security card, retirement card, and VISA **Warehouse packer Teri McLeod's** lost in a car prowl. 4RP 230-31; 6RP 509-10.

<sup>12</sup> After **Stone mason Marvin Crotto's** identity was stolen in a vehicle prowl, defendant used it make a fake ID and credit cards, rent a car, rent rooms and create a stack of sham business checks using H. Katz stolen account numbers. 4RP 224, 248; 5RP 343-44, 354-55, 361; 6RP 520; 7RP 574-78.

<sup>13</sup> The Katz's financial records were stolen in a car theft, then exploited by defendant's team to make fraudulent access devices. 4RP 238, 247, 294, 326; 8RP 705-09.

<sup>14</sup> Defendant adopted the identity of a **deceased man named Andrew Holen** after the home occupied by his **ninety two year old wife, Genevieve Holen**, was burglarized. Defendant was depicted in a license bearing A. Holen's name. A birth certificate, power of attorney and will for A. Holen were found with it in his room. Holen savings bonds were altered to name his accomplice. 4RP 277, 327, 291; 5RP 351-53; 6RP 521-30.

<sup>15</sup> **Surgeon Jared Cottam** was also the victim of a vehicle prowl. The thief made off with business checks defendant put to use. 4RP 289, 319; 5RP 440-42.

<sup>16</sup> Citation to Clerk's papers above 361 estimate supplemental-designation numbering.

terms exceed the statutory maximum by nine months. 11RP 864; CP 309-10. A notice of appeal was timely filed. CP 334.

## 2. Facts

Defendant was the leader of a "significant identity theft ring" that used stolen personal information to fraudulently obtain money, goods, and services. 5RP 366-67; 6RP 500; 7RP 597-99, 601, 602, 607, 614-616, 622; 8RP 695. His difficult to summarize operation proceeded as follows: he began counterfeiting checks and credit cards with his girlfriend, Sara Stetson-Hayden, to subsidize their unsustainable lifestyle. 8RP 694. The operation expanded through his recruitment of women who became dependent on him through romantic entanglements or hardship. *E.g.* 5RP 392; 6RP 489-91, 502; 7RP 597-99, 607-08, 619; 8RP 695-96. His staff grew to include Kristine Carlson, Alissa Turner, Kaja Strong, and a series of transitory assistants. 5RP 401; 6RP 499; 7RP 598-99, 612-13. He typically would not employ men. 7RP 613. The women were loyal to him, but jealous of each other. 5RP 409-10. Defendant expected them to inform on one another, so he would know if any were breaking his rules, which extended to their interactions with men. *E.g.*, 5RP 392; 6RP 489-91, 499; 7RP 597-601, 607-08, 613-14; 619, 695-96.

Defendant acquired personal information used to fuel his operation from thieves who pillaged mail boxes, vehicles, and homes. 4RP 286-87; 7RP 601, 607, 620. It was amassed into stacks of victim profiles, variously consisting of names, social security numbers, birth certificates, financial accounts, tax documents, employment history, maiden names, physical descriptions, even blood types. 4RP 245-46, 250, 275, 279, 285-86, 294-95; 5RP 340-41; 8RP 697. The profiles were used to manufacture a vast array of counterfeit access devices. 4RP 309, 320; 5RP 394, 397-99; 7RP 600, 602, 614-15. 620-21.

Defendant's counterfeit credit card schemes began with telephonic verification of stolen accounts. 4RP 309, 320; 5RP 394, 397-99; 7RP 600, 602, 614-15. 620-21. Defendant's team then "put them to use." 4RP 309, 320; 5RP 394, 397-99; 7RP 600, 602, 614-15. 620-21. Verified account numbers were embossed onto recycled cards demagnetized to induce manual entry at the point of sale. 4RP 231-32; 5RP 396, 398; 7RP 600. Defendant tasked assistants to use the counterfeit cards on daily "shopping" trips to "fill orders for [his]... contractor[s]" by purchasing items he identified in advance. 5RP 392-95, 402, 416; 6RP 493, 499; 7RP 599-603, 602, 607, 619; 8RP 699. Sham businesses were used to attract contractors. 4RP 256, 293; 7RP 606-07. Successful assistants brought their proceeds to defendant; whereupon, he delivered merchandise to

contractors, keeping any money for himself. 6RP 495, 504; 7RP 602-05. Defendant compensated his assistants by giving them a place to stay and allowing them to make personal purchases with the counterfeit cards. 7RP 600-01. Unsuccessful assistants were disciplined. 7RP 604-05. Counterfeit cards were also used to secure bail, rent vehicles, and lease rooms. 5RP 396-97; 6RP 496-97; 7RP 614-16.

Defendant's check cashing scam took two forms. At banking institutions, assistants opened accounts, deposited counterfeit checks, withdrew any funds made available before the fraud was detected and delivered them to defendant. 4RP 241-42; 5RP 392-93; 6RP 491. The other scam consisted of assistants cashing counterfeit payroll checks at local businesses. 5RP 392-93; 6RP 491-93, 504, 508; 7RP 698. Counterfeit checks were also used to buy gift cards sold or redeemed for cash at other businesses. 6RP 505. Defendant received the proceeds. *Id.*

Defendant moved the operation to a La Quinta Inn to avoid bail agents trying to apprehend him on a warrant. 4RP 324; 5RP 400, 402; 6RP 507; 7RP 598, 616-17. Counterfeit access devices were used to rent several rooms for the team. 7RP 587, 588-90; 8RP 688-89, 698. The bail agents apprehended defendant in his room four days later. 5RP 429-31, 445. They advised police of defendant's apprehension, noting the evidence of suspected financial crimes present in the room. 5RP 431-32, 446-47.

Officers were dispatched to the scene. 6RP 536-38. They entered the room where defendant was being detained to accept the agents' surrender of his custody. 6RP 538-39, 540-44.

Police searched defendant's rooms pursuant to a warrant. 6RP 555. A loaded short barreled shotgun was found with "piles and piles of documents." 4RP 205-08, 213; 5RP 381-84, 401; 6RP 480-81; 7RP 620-21; Ex. 39-40. The lead detective had not seen so much consolidated evidence of identity theft in 19 years of service. 4RP 213-14. 5RP 376. One box contained hundreds of credit cards, IDs, and social security cards. 4RP 213, 296-98. Many were altered. 4RP 299. An envelope contained social security cards, identifications, passports, and checks. 4RP 329. He had "stacks" of altered credit cards. 4RP 259. Several bore his name. 4RP 277. Others bore the names of assistants Strong, Stetson-Hayden, and Carlson. 4RP 277, 316-17. There was a drummel tool adapted to flatten embossed card numbers with an envelope containing seventy seven shaved credit cards. 4RP 239, 301-02. Volumes of victim information were stored with these items. 4RP 210, 220-221, 226-27, 253; 7RP 618.

Police also seized evidence of mass counterfeit identification production. Defendant had a folder containing blank Washington driver's licenses with a detailed formatting guide for licenses issued in every state. 4RP 260-61, 276, 280, 309-10; 5RP 348-494. These materials were stored

with graphic design tools typical of ID production. 4RP 249, 260, 275-76, 280, 309-10, 312; 5RP 348-494. Defendant was depicted in one counterfeit license. 4RP 328; 5RP 398. Social security cards with obliterated identifying information were discovered with stacks of blank W-2 forms. Thieves use these materials to fabricate proof of employment for credit applications. 4RP 248, 260.

Evidence of defendant's counterfeit check operation was similarly abundant. He had the digital equipment used to counterfeit checks. 4RP 236, 310-11, 314. There were boxes of counterfeit checks with boxes of the "Versa checks" businesses use to generate payroll checks. 4RP 209-10, 221-22, 293; Ex.41. Thieves bypass retail screening protocols by drafting them with victim account information. 4RP 223-25.

Although police did not have adequate resources to contact every one of defendant's many victims, a common pattern of victimization emerged: a contributing community member's identity was exposed by a document theft exploited for profit by defendant's parasitic team of grifters. 4RP 224, 238, 242-48, 277, 298-99, 324-27; 5RP 343-44, 351-56, 436, 482-86; 6RP 520-30; 7RP 574-78; 8RP 706-08; Ex. 45. It would have taken years to investigate every piece of evidence seized from defendant's room. 5RP 376.

C. ARGUMENT.

1. DEFENDANT FAILED TO PROVE THE SEARCH WARRANT FOR EVIDENCE OF IDENTITY THEFT IN HIS FRAUDULENTLY RENTED HOTEL ROOM WAS UNLAWFULLY BASED ON PLAIN VIEW OBSERVATIONS LAWFULLY MADE BY OFFICERS WHO ENTERED TO ACCEPT CUSTODY FROM BAIL AGENTS WHO DETAINED HIM IN THE ROOM ON AN ACTIVE ARREST WARRANT.

Private affairs may be constitutionally intruded upon by police acting under authority of law. *State v. Hatchie*, 161 Wn.2d 390, 395, 166 P.3d 698 (2007); *State v. Williams*, 142 Wn.2d 17, 24, 11 P.3d 714 (2000); *State v. Hopkins*, 113 Wn. App. 954, 958, 55 P.3d 691 (2002); *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Defendants must prove the illegality of a search warrant for which probable cause was partially founded upon plain view<sup>17</sup> observations made by police during the execution of an arrest warrant. See *State v. Hopkins*, 113 Wn. App. at 958-60, (citing U.S. Const. Amend. IV; Wash. Const. art. I § 7; *State v. Jackson*, 82 Wn. App. 594, 602-03, 918 P.2d 945 (1996); *Payton* 445 U.S. at 603. Conclusions of law are reviewed *de novo*. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Challenged findings of fact should be affirmed if supported by evidence

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<sup>17</sup> The "plain view" exception permits search warrant applications to include observations made during a lawful entry into constitutionally protected space. See *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994).

sufficient to persuade a rational person of their truth. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Unchallenged findings are verities. *Id.*

Defendant only challenges the legality of the police entry addressed in Conclusion of Law No. II:

[T]he Court finds ... the officers lawfully entered hotel room 612 that defendant ... fraudulently rented ... officers spoke with ... one of the bail ... agents, prior to entering.... Defendant was already under arrest when the officers entered.... The valid arrest warrant for the defendant provided [the] [o]fficer[s] an independent basis to enter... The[y] were not required to independently confirm the warrant prior to entering .... CP 331; see also 2RP 25.

This conclusion is well supported by the record. Bail agents Chadwick and Kaufman were contracted to surrender defendant to police for a King County warrant. CP 327-28; 2RP 38-41, 54; CrR 3.6 Ex. 2. The warrant was confirmed in "JIS"<sup>18</sup> by the bonding company. 2RP 50-51. The agents tracked defendant to the La Quinta, where a clerk confirmed his presence in a room he rented under Marvin Crotto's name with Gordon Stone's stolen credit card. CP 327-28; 2RP 42, 52, 55-56, 101-102.

Kaufman notified police of his intent to force entry. CP 328; 2RP 56. The agents entered defendant's room with a key provided by the hotel. CP 328; 2RP 56-57. Defendant was restrained inside with accomplice

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<sup>18</sup> Judicial Information System.

Stetson-Hayden seated nearby. CP 87, 328; 2RP 57. Kaufman wore a shirt labeled "bail enforcement" and a jacket labeled: "fugitive recovery agent". 2RP 57. Chadwick was "undercover." 2RP 42. The lawfulness of the agents' entry was conceded below. CP 329; 2RP 18-19.

Both agents observed evidence of suspected financial crimes in defendant's room. CP 328-329; 2RP 46, 57-58, 60-61. Those observations were communicated to police. CP 329; 2RP 46, 57-58, 64. Dispatch sent officers to contact the bail agents who took a subject into custody on two felony warrants. 2RP 64, 82-84, 88. The first officer on scene did not confirm the warrants; however, dispatch typically confirms them and rarely dispatches officers "without some ... verification", yet the record is silent as to whether any confirmation occurred in this case. 2RP 73-74, 78-79, 83; Ex. 6 (discussed but not admitted).

The agent wearing fugitive recovery apparel met responding officers in the parking lot where he described the circumstances of defendant's apprehension. Officers entered an open door into the room where defendant was restrained in handcuffs, under guard poised for surrender. CP 329; 2RP 46-47, 64-66, 74-75, 79, 89, 92. They observed items consistent with the reported financial crimes, but did not search the room. CP 329-30; 2RP 66-67, 89-91. One of the agents gave the officers a surrender form to document the custody transfer; however, it remains

unclear whether this occurred before police entered the room. 2RP 58-59, 67-68; CrR 3.6 Ex. 4 (discussed but not admitted).

A Complaint detailing the evidence obtained at the hotel was drafted. CP 84-92, 330. Probable cause was based on the bail agents' report, Stetson-Hayden's description of defendant's crimes, defendant's admissions, and the officers' observations. CP 84-92. A search warrant was issued. CP 330; 2RP 67, 90. In its oral ruling, the trial court recognized Stetson-Hayden's statements strongly supported probable cause. 2RP 114-16. The officers' prudent decision to obtain a warrant prior to searching defendant's room was commended. 2RP 116.

- a. Defendant does not have standing to challenge the police entry into his fraudulently acquired hotel room.

Standing requires a reasonable expectation of privacy. *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007). A person cannot reasonably expect to exclude police from a hotel room he knowingly used a counterfeit credit card to obtain. See *State v. Wisdom*, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_ (2015WL 2405066 at 12); *State v. Zakel*, 61 Wn. App. 805, 809, 812 P.2d 512 (1991)(citing *Jones v. United States*, 362 U.S. 257, 265, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)), declining to follow plurality in *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980) compare *State v.*

*Coss*, 87 Wn. App. 891, 896-97, 943 P.2d 1126 (1997)); *Rakas v. Illinois*, 439 U.S. 128, 143 n.9, n.12, 99 S. Ct. 421 (1978); *State v. Jacobs*, 101 Wn. App. 80, 87 n.2, 2 P.3d 974 (2000).

Defendant's fraudulent acquisition of the hotel room deprived him any right to deny police the access required to remove him. Even assuming some yet to be pronounced expectation of privacy existed, it was extinguished the moment the hotel facilitated his ejection for the fraud by giving the bail agents a key to his room. See *Zakel*, 61 Wn. App. at 810. Automatic standing is unavailable to him on account of his wrongful presence in the room, as is the standing enjoyed by overnight guests entitled to rely upon a lawful invitation's implied promise of shelter. *Link*, 136 Wn. App. at 692-93 (citing *Minnesota v. Olson*, 495 U.S. 91, 98-99, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990)). Contrary to defendant's interpretation of the law, standing is not a door prize to be won by the burglars, trespassers and thieves who avoid detection long enough to take a nap.

- b. Defendant's arresting officers were statutorily authorized to enter the hotel room to assist the bail agents who apprehended him.

A statute's plain meaning should be given effect while avoiding constitutional deficiencies or absurd results. *State v. Jacobs*, 154 Wn.2d

596, 600, 115 P.3d 281 (2005); *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Plain meaning is derived from ordinary usage, context, and related provisions. In Washington, RCW 18.185.260(4) vests bail agents with the authority recognized by *Taylor v. Taintor*, 83 U.S. 366, 1872, 21 L. Ed. 287, 16 Wall. 366 (1872):

When bail is given, the principal is regarded as delivered to the custody of his sureties ... Whenever they choose ... they may ... deliver him up to their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may ... if necessary, ... *break and enter his house for that purpose....*

83 U.S. 366, 371-72 (emphasis added). This power is then extended by RCW 10.185.300(3) to police who "assist" or atten[d]" forced entries initiated by bail agents irrespective of whether there is a warrant for the bail's arrest. See *Stout v. Warren*, 176 Wn.2d 263, 276, fn. 6, 290 P.3d 972 (2012). "The legislature ... expressly granted immunity to any ... officer involved in a forced entry apprehension of a fugitive *on behalf of* a bond recovery agent." *Id.* (emphasis added); *State v. Portnoy*, 43 Wn. App. 455, 466, 718 P.2d 805 (1986). This authority is not dependent on the existence of a warrant for the bail's arrest since bonding companies may force entry to surrender a fugitive without a warrant whenever they lose confidence in the bail's promise to appear. App.Br. 11 (citing

*Johnson v. Cnty. of Kittitas*, 103 Wn. App. 212, 219, 11 P.3d 862 (2000); RCW 10.19.140).

Protecting the public through police oversight of forced entries initiated by bonding companies appears to be RCW 18.185.300(3)'s purpose. Compare WA LEGIS 105 (2008) with WA LEGIS 186 § 1 (2004). The benefits of the statute are unlikely to be appreciated by criminals who leave evidence of their illicit activities in plain view of forced entry teams. Every member of the community is nevertheless safer when its professional police force supervises often less trained or carefully vetted bail agents as they pursue profit through the societally useful, but inherently dangerous, enterprise of apprehending fugitives from justice. E.g., *Smith v. State*, 74 S.W.3d 868, 872 (2002) ("fugitives ... pillaged their way from Kansas to West Texas, ultimately ... killing a police officer ....").

Defendant's arresting officers acted in accordance with RCW 18.185.300(3) when they entered defendant's room to accept his surrender from the bail agents who apprehended him through a forced entry. It is immaterial whether the warrant prompting the entry was verified. The trial court should be affirmed on this basis even though it was not considered below. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

- c. The officers lawfully entered the room to take defendant into custody on a valid arrest warrant.

Police may force entry to execute an arrest warrant in the fugitive's place of abode. *See Hatchie*, 161 Wn.2d at 395-96, 400; *Payton*, 445 U.S. at 603. Possession of the warrant is not a prerequisite. *State v. Simmons*, 35 Wn. App. 421, 423-24, 667 P.2d 133 (1983); RCW 10.31.030; *State v. Smith*, 102 Wn.2d 449, 453-54, 688 P.2d 146 (1984); *United States v. Buckner*, 717 F.2d 297, 301 (6<sup>th</sup> Cir., 1983). Officers need only reasonably believe a warrant for the targeted individual exists based on practical considerations from the attending circumstances. *See Hatchie*, 161 Wn.2d at 404.

Washington courts apply the *Aguilar-Spinelli* test to determine whether a citizen's information creates probable cause for an arrest. *See Smith*, 102 Wn.2d at 455.<sup>19</sup> The test requires a basis for the informant's information as well as the officer's belief in its reliability. *Id.* The requisite reliability is relaxed for the detailed reports of known informants since they are presumptively credible without corroboration due to the liability attending negligent, reckless or criminally false reports. *See State v. Gaddy*, 152 Wn.2d 64, 72-73, 93 P.3d 872 (2004); *State v. Hall*, 53 Wn.

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<sup>19</sup> Citing *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), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *but adhered to by State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984)).

App. 296, 299, 766 P.2d 512 (1989); *State v. Northness*, 20 Wn. App. 551, 557, 582 P.2d 546 (1978); *State v. Conner*, 58 Wn. App. 90, 99-100, 791 P.2d 261 (1990); RCW 9A.76.175.

The known bail agents in defendant's case were presumptively reliable. Police were dispatched to the hotel following a notification of forced entry consistent with the one required of bail agents by RCW 18.185.300(1)(b). The agent who met the officer's in the parking lot wore fugitive recovery apparel consistent with RCW 18.185.300(2)(a)'s labeling requirements. He admitted to apprehending defendant through a course of conduct that would have exposed him to criminal liability if he was not a bail agent. *E.g.* RCW 9A.52.020 (burglary); RCW 9A.40.040 (imprisonment); RCW 9A.76.175 (false statement). And as a bail agent, he had an acute business interest in accurately ascertaining defendant's warrant status. *E.g.*, *Taylor*, 83 U.S. at 371-72; *United States v. Roper*, 702 F.2d 984, 988-89 (11<sup>th</sup> Cir., 1983)(bondsman's flyer justified detention).

Defendant urges this court to adopt an impractical independent corroboration requirement fundamentally at odds with the rapid police assistance and oversight contemplated by the bail recovery statute. RCW 18.185.300(1)(b), (3). Police are not statutorily required to verify the credentials of the bail agents they assist. Nor is there an identified

mechanism for quickly confirming the *bona fides* of people privately contracted by any number of bonding companies operating across time zones nationwide. *E.g.*, RCW 18.185.300; *State v. Barry*, 43 Wn.2d 807, 808, 264 P.2d 233 (1953); AMJUR BAIL § 4, *Regulation of Bail Bond Business*, p. 1-3 (2015); ER 201. Meanwhile, fugitive apprehensions are extremely time sensitive endeavors often undertaken at odd hours or in remote locations by profit motivated agents who are not statutorily obliged to postpone a lucrative apprehension until pre-assistance verifications can be made. Pragmatic appreciation for these logistical realities is the most obvious impetus for insulating police from the liability that would otherwise accompany the conduct authorized by RCW 18.185.300(3).

Some corroboration nevertheless occurred in defendant's case before police crossed the threshold into his room. The bail agent who reported defendant's detention to police led the officers to an open hotel room where defendant was restrained in handcuffs under guard. 2RP 65. The officers were also given a surrender form for defendant. Although it is unclear whether the officers observed the situation in the room from an open view<sup>20</sup> vantage before entering or when the surrender form was

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<sup>20</sup> An "open view" observation occurs from a "nonconstitutionally protected area", so it is not a search but may provide evidence supporting probable cause to search under a warrant. *State v. Lemus*, 103 Wn. App. 94, 102, 11 P.3d 326 (2000).

received, it is defendant's burden to prove the illegality of an entry made pursuant to a valid arrest warrant.

- d. The officers were entitled to enter defendant's hotel room to ensure he was not injured or unlawfully restrained.

The community caretaking exception empowers police to enter constitutionally protected places to check on an individual's health or safety. *State v. Weller*, 185 Wn. App. 913, 922, 344 P.3d 695 (2015) (citing *State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484 (2011); *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004); *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000)). To invoke the exception, the State must show the officer reasonably believed someone needed health or safety assistance and there was a reasonable basis to associate the need with the place entered. *Id.* at 924-25. The public's interest in the caretaking function must outweigh the individual's privacy interest. *Id.*

If one accepts defendant's contention that the officers did not know enough about the bail agent to accept his representations about defendant's warrant status, they were confronted with an unfamiliar subject who just admitted to having defendant restrained against his will in a hotel room. The challenged entry would have been reasonable to ensure defendant did not need immediate medical attention or liberation from his captors.

- e. Independent information supported the search warrant.

Evidence obtained through a search warrant partially based on unconstitutionally viewed evidence does not need to be suppressed if probable cause is supported by independent sources of information. *State v. Smith*, 177 Wn.2d 533, 540, 303 P.3d 1047 (2013); *Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)**Error! Bookmark not defined.**)

Defendant failed to prove probable cause for the search warrant was inadequately based on information independent of the officers plain view observations. *See Smith*, 177 Wn.2d at 540; *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992)(citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). A detailed description of the identity theft evidence observed by the officers was independently reported by the bail agents. CP 87. The evidence's criminal purpose was explained by accomplice Stetson-Hayden. CP 88. They combined to create probable cause for the warrant incapable of being undermined by the purported illegality of the officer's challenged observations. *E.g.*, CP 328-330; 2RP 46, 57-58, 60-61, 64-67, 74-75, 79, 89-91; *see Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 65 L. Ed. 1048 (1921); *Store v. Carter*, 151 Wn.2d 118, 124, 85 P.3d 887

(2004); *Smith*, 177 Wn.2d at 544. Defendant's motion to suppress was properly denied.

2. DEFENDANT'S AMBIGUOUS UTTERANCE OF THE WORD "ATTORNEY" DURING HIS ADVISEMENT OF RIGHTS WAS INCAPABLE OF INVOKING THE RIGHT TO COUNSEL.

A person participating in "custodial" "interrogation" may bring an end to questioning through an unambiguous request for counsel.<sup>21</sup> *Davis v. United States*, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 129 L. Ed. 2d 62 (1994). A remark is ambiguous if further questioning is needed to determine whether counsel was requested. *State v. Smith*, 34 Wn. App. 405, 408-09, 661 P.2d 1001 (1983). Questioning may continue when it only reasonably appeared the right might have been invoked. *Davis*, 512 U.S. at 461, 495; *State v. Whitaker*, 133 Wn. App. 199, 217, 135 P.3d 923 (2006); *State v. Radcliffe*, 164 Wn.2d 900, 194 P.3d 250 (2008).

CrR 3.5 findings of fact are affirmed if supported by substantial evidence. *State v. Rosas–Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013); *State v. Shuffelen*, 150 Wn. App. 244, 252, 208 P.3d 1167 (2009). Unchallenged findings are verities. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Conclusions of law are reviewed *de novo*. *State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158 (2012).

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<sup>21</sup> Article 1 § 9 and Article 1 § 22 of the Washington State Constitution are co-extensive with the Fifth and Sixth Amendments of the federal constitution. *State v. Russell*, 125 Wn.2d 24, 59-62, 882 P.2d 747(1994); *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991); *State v. Medlock*, 86 Wn. App. 89, 99, 935 P.2d 693 (1997).

Defendant's challenge to finding of fact No.VII claims he unambiguously invoked his right to counsel by uttering the word "attorney" during his advisement of rights. App.Br. at 1-2 (citing CP 323). He is mistaken. The trial court accurately concluded the remark was ambiguous. CP 325 (CL No. V). Defendant blurted out the remark amidst his advisement of rights and made no further reference to counsel once the advisement was complete. CP 323 (FF No. VI); 2RP 69-70. Instead, he intermittently responded to the officer's questions. *E.g.* 2RP 71-74; ***Berghuis v. Thompkins***, 560 U.S. 370, 383-84, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010)(waiver implied by silence, understanding of the rights and conduct indicating waiver); ***State v. Terrovona***, 105 Wn.2d 632, 646-47, 716 P.2d 295 (1986).

Defendant's use of the word "attorney" was too ambiguous to invoke the right to counsel. Precedent prevents courts from endowing the word "attorney" with talismanic significance. ***Whitaker***, 133 Wn. App. at 217. Defendant's isolated utterance of "attorney" was less communicative of a request for counsel than less ambiguous statements deemed too indefinite to invoke the right. *E.g.* ***Davis***, 512 U.S. at 461 ("maybe I should talk to a lawyer" not a request); ***State v. Radcliffe***, 164 Wn.2d 900, 194 P.3d 250 (2008)("maybe I should contact an attorney ... clearly equivocal); ***State v. Rosas–Miranda***, 176 Wn. App. 773, 779, 309 P.3d 728 (2013). And his meaning becomes more elusive when considered with

his mimicking repetition of the words "some questions" in response to the officer's inquiry into his willingness to answer questions. CP 223 (FF No. VII); 2RP 81. Taken together, the remarks could be just as easily interpreted as questions (*e.g., Attorney? Some questions?*), peevish acts of imitation, or equivocal expressions of his willingness to answer questions, which combine to embody the textbook definition of ambiguity. *See Webster's Third New International Dictionary* 66 (2002).

Defendant attempts to avoid the requirement of an objectively unambiguous invocation by claiming the officer's subjective assumptions about his meaning made it clear enough. But "[t]he likelihood ... a [person] would wish counsel to be present is not the test ...." *Davis*, 512 U.S. at 495. Lack of merit aside, the admission of defendant's statements was harmless if error. *See State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The overwhelming evidence of his guilt came from other sources as he never confessed to any offense resulting in conviction. 4RP 324; 5RP 400, 402; 6RP 507, 538-43; 7RP 587, 588-90, 598, 616-17; 8RP 688-89, 698. His claimed ownership of the stolen car is irrelevant on review since the associated charge resulted in acquittal. CP 282 (Count V); 5RP 453-54.

3. DEFENDANT'S MERITLESS CHALLENGE TO THE IDENTITY THEFT "TO CONVICT" INSTRUCTIONS WRONGLY APPLIES A DRAFTING RULE DESIGNED FOR THE ACCOMPLICE DEFINITION TO THE MENS REA ELEMENT OF THE OFFENSE.

A "to convict" instruction must set forth the charged offense's essential elements. They generally derive from statute in the form of an *actus reus*, *mens rea*, and causation. *State v. Teal*, 152 Wn.2d 333, 338, 96 P.3d 974 (2004); *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009)(quoting Black's Law Dictionary 559 (8<sup>th</sup> ed. 2004)); *State v. Pirtle*, 127 Wn.2d 628, 657, 904 P.2d 245 (1995). A person commits identity theft when he or she:

knowingly obtain[s], possess[es], use[s], or transfer[s] a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, **any crime**. RCW 9.35.020(1).

These elements are the same for a principle as they are for an accomplice. *Id.* at 339; *State v. Hayes*, 164 Wn. App. 459, 468-70, 262 P.3d 538 (2011); *Teal*, 152 Wn.2d at 338-39; *compare with* RCW 9A.82.060 (leading organized crime).

Defendant's jury was accurately instructed on the elements of identity theft. *E.g.*, CP 215, 217-32; *State v. Barnes*, 153 Wn2d 378, 382, 103 P.3d 1219 (2005). *De novo* review of his challenge to them easily fails, for he incorrectly claims the trial court committed a **Roberts** error by including the mandatory *mens rea* element of "intent to commit or aid or

abet *any crime*" in the identity theft "to convict" instructions. App.Br. at 24-25; *State v. Roberts*, 142 Wn.2d 471, 510-511, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); *Pirtle*, 127 Wn.2d at 657. *Roberts* errors only occur when the *accomplice definition* fails to confine accomplice liability to the charged offenses a defendant knowingly advanced by inviting convictions for them based on proof he or she was complicit in some other offense. *Roberts*, 142 Wn.2d at 513.

None of the identity theft "to convict" instructions erroneously defined accomplice liability as defendant claims. They incorporated the accurately drafted accomplice definition by reference through their proper inclusion of the "or an accomplice" phrase to describe a person for whom defendant would be responsible if he or she committed an act criminalized by RCW 9.35.020(1). CP 216 (Inst. 19A); 215, 217-32. The challenged "intent to commit, or to aid or abet, *any crime*" language was an accurate recitation of the essential *mens rea* element of "the crime" defendant had to knowingly advance to be guilty as an accomplice. No rational jury would misread the "to convict" instructions as permitting defendant to be convicted for each precisely designated count of identity theft based on proof he assisted someone commit some other offense.

This assignment of error wrongly treats the identity theft "to convict" instructions as serving the same purpose as the accomplice definition by playing upon the coincidental similarity between the

language used to describe identity theft's *mens rea* element and language disapproved for use in cases resolving the unrelated issue of how to properly designate "the crime" contemplated by the accomplice definition. Altering the "to convict" instruction in the manner defendant suggests would have required deviation from RCW 9.35.020(1)'s plain language. In addition to being wrong, the change would have needlessly increased the State's burden by obliging it to make an election the statute does not require. *State v. Fedorov*, 181 Wn. App. 187, 197-99, 324 P.3d 784 (2014)(citing *State v. Bergeron*, 105 Wn.2d 1, 15, 711 P.2d 1000(1985)).

Any error attributable to the challenged instructions would also be harmless if error since there was evidence defendant acted as a principal. *E.g.* 4RP 245-46, 250, 275, 279, 285-86, 294-95, 309, 320; 5RP 340-41, 394, 397-99; 7RP 600-02, 607, 614-15, 620-21; 8RP 697; *State v. Moran*, 119 Wn. App. 197, 210-11, 81 P.3d 122 (2003)(citing *State v. Brown*, 147 Wn.2d 330, 341-42, 58 P.3d 889 (2002)); *State v. Stovall*, 115 Wn. App. 650, 656-58, 63 P.3d 192 (2003)(citing *Needer v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

4. ANY CONFUSION RESULTING FROM THE ACCOMPLICE DEFINITION'S FAILURE TO EXEMPT LEADING ORGANIZED CRIME FROM ITS APPLICATION WAS CLARIFIED BY THE STATE'S ELECTION OF PRINCIPAL LIABILITY IN CLOSING ARGUMENT AND HARMLESS ON ACCOUNT OF THE UNCONTROVERTED EVIDENCE OF DEFENDANT'S GUILT.

The leading organized crime statute only targets the leader of a criminal profiteering hierarchy who organizes three or more people with the intent to engage in a pattern of criminal profiteering. RCW 9A.82.060; *Hayes*, 164 Wn. App. at 463, 467-68, 470. A conviction for the offense cannot be sustained on a theory of accomplice liability. *Id.* Appellate courts apply *de novo* review to claims of instructional error. *Pirtle*, 127 Wn.2d at 657; *State v. Byrd*, 125 Wn.2d 707, 714, 887 P.2d 396 (1995).

- a. The State unequivocally argued a theory of principal liability in closing from instructions drafted to support that theory of the case.

The "to convict" instruction for defendant's leading organized crime charge expressly required his direct participation as a principal:

To convict the defendant of the crime of leading organized crime as charged in Count XVII, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period between September 29, and November 25, 2012, *the defendant intentionally* organized, managed, directed supervised or financed three or more persons;

- (2) That *the defendant acted* with the intent to engage in a pattern of criminal profiteering activity; and
- (3) That any of these acts occurred in the State of Washington. CP 250 (Inst. 53) (emphasis added). CP 208.

This instruction is distinguishable from the "to convict" instructions for identity theft and unlawful possession of a payment instrument, which included "or an accomplice" language to invite conviction based on accomplice liability. The adjacent "pattern of criminal profiteering" definition reinforced the dichotomy between "principals" and "accomplices" by describing qualifying conduct as "acts [that] had the same or similar ... *accomplices, principals, [and] victims.*" CP 249 (Inst. 52) (emphasis added). Defendant was impliedly distinguished from his accomplices through Instruction No. 10's admonition to carefully examine testimony given by "an accomplice ... on behalf of the State[.]" CP 205.

The State unequivocally elected a theory of defendant's principal liability for the leading organized crime count in closing argument. See *State v. Bland*, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) *overruled in part on other grounds by State v. Smith*, 195 Wn.2d 778, 786-87, 155 P.3d 873 (2007)); *State v. Price*, 126 Wn. App. 617, 646, 109 P.3d 27 (2005); *State v. King*, 75 Wn. App. 889, 903, 878 P.2d 466 (1994)(unequivocal election would have obviated a clarifying instruction). The State's theory of the case was "[f]ollow the leader", which was explained by recalling the jury to the evidence of defendant's leadership:

The money was made through defendant. He was the leader, Sara told you that. He networked, got the account numbers. He recruited people to join their group. He obtained the items for the shopping lists. Once the girls went out and purchased the items, he is the one who took the items to sell.... 9RP 752-53; e.g., 756-61.

The State concluded its summary of the evidence by unequivocally electing a theory of principal liability:

I want to be clear on leading organized crime because in the packet we will get to in a little bit you have an instruction about accomplice liability. **There is no accomplice liability in terms of leading organized crime. The defendant is either the leader or he is not**, all right. If you find that he is the leader, then he is guilty with all of these elements of leading organized crime.

Now, we have gone over acts of accomplices. That's because the instructions tell you that he has to be organizing, managing, three or more people. We've talked about them and their acts and how he is related to them, **but an accomplice cannot be a leader**. In this charge, the State is submitting to you that the **defendant alone was the leader** of this organization. 9RP 761-62 (emphasis added).

Defense counsel used the same instruction to argue against defendant's status as principal. 9RP 790-91. Application of the accomplice liability instruction was properly reserved for the crimes to which it applied. 9RP 770-71, 780-97. Defendant's conviction for leading organized crime should be affirmed.

- b. Any lingering confusion was harmless if error.

It is harmless beyond a reasonable doubt to give an instruction that erroneously invites a conviction based on an impermissible theory of accomplice liability when there is evidence the defendant acted as a principal. See *Moran*, 119 Wn. App. at 210-11(citing *Brown*, 147 Wn.2d at 341-42); *Stovall*, 115 Wn. App. at 656-58 (citing *Needer*, 527 U.S. 1). Overwhelming *uncontroverted* evidence established defendant's singular status as the principal directly responsible for leading the women he recruited to carry out the riskier components of his criminal schemes. *E.g.* 4RP 245-46, 250, 275, 279, 285-86, 294-95, 309, 320; 5RP 340-41, 394, 397-99; 7RP 600-02, 607, 614-15, 620-21; 8RP 697; CP 206, 249-50. His case is materially different from *Hayes*, where the instructions, "as worded", impermissibly relieved the State of the burden to prove the defendant led organized crime by explicitly inviting a conviction based on mere complicity:

To convict the defendant of the crime of Leading Organized Crime in Count XV, each of the following element ... must be proved (1) That ... the defendant, ***or an accomplice***, intentionally organized, managed, directed, supervised or financed three or more persons in the commission of the crime of identity theft.

164 Wn. App. at 467 (emphasis added).

***A person is guilty of a crime ... committed by ... an accomplice... A person is an accomplice in the commission of ... Leading Organized Crime, if,*** with

knowledge it will promote or facilitate the commission of the crime, he or she ... [provided] assistance ... by words, acts, encouragement, support, or presence.

164 Wn. App. at 468-69 (emphasis added).

Defendant's case is not affected by such errors. There is no reason to believe the jury irrationally misapplied the accomplice definition to the leading organized crime count, so its verdict should be affirmed.

5. THE COURT PROPERLY REFRAINED FROM ISSUING AN INSTRUCTION SPECIFIC TO LEADING ORGANIZED CRIME THAT REQUIRED AGREEMENT AS TO THE IDENTITY OF THE PEOPLE DEFENDANT ORGANIZED AND THE CRIMES AMOUNTING TO A PATTERN OF CRIMINAL PROFITEERING SINCE NEITHER IS AN ELEMENT OF THE OFFENSE.

A person commits organized crime by intentionally organizing ... *any three* or more persons *with the intent to engage* in a pattern of criminal profiteering activity. RCW 9A.82.060(1)(a). "Pattern of criminal profiteering activity" means:

engaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act of criminal profiteering. In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events ....

Claims of instructional error are reviewed *de novo* to assess whether the instructions conform to the applicable law. See **Price**, 126 Wn. App. at 646. Instructions derived from statute are analyzed through the tools of statutory construction. Interpreting courts are to avoid absurd or unlikely results by giving effect to legislative intent as expressed through a statute's plain language. See **State v. Rhodes**, 58 Wn. App. 913, 919, 795 P.2d 724 (1990).

Unanimity concerns arise when the State adduces evidence of several acts, each capable of constituting a violation of a charged offense. **State v. Hanson**, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990) (citing **State v. Petrich**, 101 Wn.2d 566, 572, 683 P.2d 173 (1994)). No unanimity instruction is required if several proven acts only aggregate to one violation. Under those circumstances, a general verdict communicates unanimous agreement one violation occurred. *Id.*

A unanimity instruction specific to defendant's leading organized crime count was not required because the evidence adduced at trial only established one violation of the statute. The offense is not divisible by any combination of acts satisfying the pattern of criminal profiteering definition or the number of individuals organized to commit them.

- a. The jury did not need to unanimously agree which three or more crimes satisfied the pattern of criminal profiteering definition as it is not an element of leading organized crime.

Definition statutes do not add to a statutory offense or create additional alternative means, or means within means, of committing the offense. Their only purpose is to provide understanding. *State v. Strohm*, 75 Wn. App. 301, 309, 879 P.2d 962 (1994); *Hayes*, 164 Wn. App. at 476. Juries are not required to reach unanimity regarding a definition, nor must one be supported by substantial evidence. *State v. Linehan*, 147 Wn.2d 638, 650, 56 P.3d 542 (2002)(citing *State v. Laico*, 97 Wn. App. 759, 760, 987 P.2d 638 (1999)) *cert. denied*, 538 U.S. 945 (2003).

The criminal acts referenced in the pattern of criminal profiteering definition are legislatively assigned factual circumstances that give meaning to the term within the context of the leading organized crime statute. See *Laico*, 97 Wn. App. at 762-63. They are not essential elements of the offense. *State v. Munson*, 120 Wn. App. 103, 107, 83 P.3d 1057 (2004). Multiple violations of the statute cannot be sustained by aggregating those acts into a series of different clusters. See *Hanson*, 59 Wn. App. at 657. Jurors deciding whether a defendant is the leader of organized crime therefore need not unanimously agree which acts create the pattern, making a unanimity instruction unnecessary.

The plain language of the statute does not even require the criminal acts defining a pattern of criminal profiteering to be committed. It is enough that three or more people are organized with "the intent to" commit them. RCW 9A.82.060; *State v. Barnes*, 85 Wn. App. 638, 666, 932 P.2d 669 (1997). Even if unanimity precedent, which wisely confines the requirement to elements, were groundlessly extended to the three crime component of the profiteering definition, the absence of a conforming instruction would be harmless in this case since the jury unanimously found defendant guilty of eighteen definition-satisfying criminal acts. See *Barnes*, 85 Wn. App. at 665-68; *Munson*, 120 Wn. App. at 106-07.

- b. The jury did not need to unanimously agree upon the identity of the three or more people defendant organized.

RCW 9A.82.060 requires a showing defendant intentionally organized ... "*any* three or more persons." *Barnes*, 85 Wn. App. at 666. "The reference to leading three or more persons is not linked conjunctively to the commission of three predicate acts ...[T]here is no requirement that any of those three people actually engaged in any of the charged acts of criminal profiteering. The defendant may engage in some of the activities with others and perform others alone." See *Id.* at 666-67.

The identity of defendant's three or more underlings is not an element of the offense. RCW 9A.82.060; *see State v. Orange*, 78 Wn.2d 571, 575, 478 P.2d 220 (1971); *Barnes*, 85 Wn. App. at 665-68; *Munson*, 120 Wn. App. at 106-07. A unanimity instruction is not appropriate since the statute is not capable of being violated multiple times by dividing his underlings in different groups of three. The applicable element only requires each juror to maintain an abiding belief defendant organized three or more people. It does not matter which three, provided there is evidence to support a reasonable juror's decision at least three existed. This flexibility permits a crime boss to be convicted of leading organized crime when the record establishes he or she directed 10s, 100s, or 1000s of unnamed or unidentified assistants in a widespread criminal enterprise.

Uncontroverted evidence established defendant typically organized four underlings to operate his identity theft ring—Stetson-Hayden, Kristine Carlson, Alissa Turner, and Kaja Strong. 5RP 401; 7RP 598-99. At times the team was reinforced by a series of unnamed transitory assistants. 6RP 499; 7RP 612-13. It is immaterial whether the jury reached an accord as to which three were among the *any* three required by RCW 9A.82.060. The general verdict proves a unanimous jury decided the statutory threshold of at least three had been met.

6. DEFENDANT'S SENTENCE SHOULD BE REMANDED FOR CORRECTION OF THE IDENTITY THEFT COMMUNITY CUSTODY TERMS BECAUSE THEY EXCEED THE JURISDICTIONAL MAXIMUM BY NINE MONTHS.

Remand for correction of sentence is required when a defendant's prison time combines with a community custody term to exceed the jurisdictional maximum for the underlying offense. *State v. Boyd*, 174 Wn.2d 470, 322-23, 275 P.3d 321 (2012)(citing RCW 9.94A.701(9)). Identity theft in the second degree is a class C felony with a five year jurisdictional maximum. RCW 9.35.020(2)-(3); 9A.20.021(c).

Defendant received a fifty seven month prison sentence and twelve months of community custody for each identity theft in the second degree conviction. Those sentences exceed the jurisdictional maximum for each of those class C felonies by nine months. CP 310. Remand for correction of sentence is appropriate.

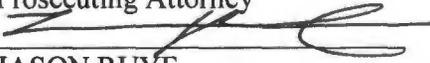
D. CONCLUSION.

Defendant's accurately instructed jury fairly convicted him based on admissible evidence lawfully discovered during his apprehension on a

valid arrest warrant and lawfully seized pursuant to a subsequently issued search warrant. His well proven convictions should be affirmed.

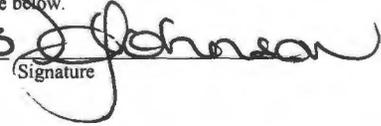
DATED: JULY 13, 2015

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
JASON RUYF  
Deputy Prosecuting Attorney  
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

*efile*  
7/13/15   
Date Signature

**PIERCE COUNTY PROSECUTOR**

**July 13, 2015 - 2:25 PM**

**Transmittal Letter**

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Court of Appeals Case Number: 46365-2

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- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
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Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
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