NO. 47647-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ELIZABETH JENSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge G. Helen Whitener

No. 14-1-02297-4

BRIEF OF RESPONDENT

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3. A statute may be unconstitutionally overbroad only where it reaches a substantial amount of constitutionally protected conduct. Where neither committing a crime nor possessing personal and financial information of others is constitutionally protected conduct, can the identity theft statute be unconstitutionally overbroad?

4. Counts I–V were not the same criminal conduct because the counts were based on three separate and distinct bank accounts and completed with three different criminal purposes. Therefore, was the defendant's offender score properly scored as a two?

5. Where the court instructed the jury on the beyond a reasonable doubt burden, in accordance with pattern jury instructions and case law, including the optional "abiding belief in the truth of the charge" language, has defendant shown the instruction was a constitutional error?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Elizabeth Jenson (hereinafter "defendant") with two counts of first degree identity theft, two counts of second degree theft, one count of second degree identity theft, and one count of third degree theft. CP 44–47.

The jury found defendant guilty as charged. CP 59–64. The jury further found by special verdict for Counts I–V that the victim was particularly vulnerable and that defendant abused her position of trust, confidence, or fiduciary responsibility. CP 65–69.

Given the aggravating factors found by the jury on the five felonies (Counts I–V), the trial court sentenced defendant to an exceptional sentence totaling 26 months. CP 158, 162. On the gross misdemeanor

(Count VI), the trial court sentenced defendant to 364 days to run concurrent to the felony sentence. CP 173–74.

Defendant filed this timely appeal. CP 179.

2. Facts

Defendant served as the representative payee for Jack Falk. 3RP 270.[1] Falk was a 68 year old man who lived at the Tacoma Rescue Mission property where defendant worked. 2RP 167, 170. Falk spent his days volunteering at a museum in Tacoma, and he lived off of Social Security payments. 2RP 171–72. A handwritten agreement provided that defendant would be Falk's payee on a temporary basis. 4RP 379. In it, Falk agreed to pay defendant $75 per month to handle his finances. 4RP 380. When defendant managed Falk's finances, she gave him a fifty dollar check every week and paid his bills. 2RP 175–76.

In April 2014, Falk became concerned about his finances, and he approached his friend—and power of attorney—Mark Sylvester. 2RP 214. Falk had seen bills on his accounts that did not make sense, such as a cell phone bill and tuition payment when Falk had no cell phone and did not

[1] The verbatim report of proceedings will be referred to by the volume number, RP, and the page number (#RP #). The verbatim report of proceedings for 4/8/15, 4/9/15, and 5/15/15 will be volume VII.

attend college. 2RP 215. After Sylvester and Falk reviewed the account statements, they went to police with the discrepancies. 2RP 216.

Tacoma Police Detective Elizabeth Schieferdecker began investigating the case in April 2014. 3RP 268. The accounts investigated included:

Account ending in **1645** (Counts V and VI)	Falk's primary checking account, held solely by Falk, and does not list defendant as representative payee (3RP 277–78; ex. 2, 3)
Account ending in **2171** (Counts I and II)	Account where Falk's Social Security payments were deposited, held by Falk with defendant listed as representative payee (3RP 279–80; ex. 7)
Account ending in **2039** (Counts III and IV)	Joint savings account held by Falk and defendant – not as representative payee, but as joint account holder (3RP 281; ex. 6)
Account ending in **1805**	Falk's bank account closed in May 2010 (3RP 276; ex. 8)
Account ending in **6949**	Defendant's account opened in 2011 with a $100 transfer from 2039 account (3RP 282; ex. 4, 5)

Schieferdecker described Falk's expenses as very basic; the expenses included $255–300 for rent, $50–100 for Comcast, $50 a week for spending money, and infrequent larger checks to Safeway for groceries. 3RP 290.

Schieferdecker described seeing "questionable withdrawals" made from Falk's 1645 account. 3RP 304. For example, there was a $200 check written to defendant. 3RP 305. There were payments made to Verizon for defendant's account. 3RP 306.[2] There were additional payments made to Target, Shell, an insurance company, and Firefox salon. 3RP 306.[3] Schieferdecker analyzed defendant's account and found multiple payments associated with those same accounts. 3RP 306.

There were additionally multiple transfers from Falk's 2171 account to defendant's 6949 account. 3RP 307. Schieferdecker calculated that a total of $4,246 was transferred from Falk's 2171 account to defendant's 6949 account. 3RP 312.[4] These transfers included a $400 transfer made on August 3, 2011, the same day defendant wrote a check for $400—an amount she did not have in her account until after she transferred the money from Falk's account. 3RP 316.

Schieferdecker additionally found transfers from Falk's 2039 account to defendant's 6949 account. *See, e.g.*, 3RP 343–44. For example, on September 19, 2011, a $100 transfer was made. 3RP 343. Overdraft protection for defendant's 6949 account was also set up with Falk's 2039

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[2] Further detailed at 4RP 387–92.
[3] Further detailed at 4RP 392–97.
[4] These consistent transactions are detailed in 3RP 313–27. Some transfers were made when defendant's spending would have otherwise overdrawn her account. *See, e.g.*, 3RP 322, 3RP 324, 3RP 326. The transfers were done over the phone. 3RP 317.

account, meaning that if defendant overdrew funds from her 6949, it was set up to automatically draw funds from Falk's 2039 account. 3RP 345. On December 1, 2011, there were three purchases charged to defendant's 6949 account for which she did not have sufficient funds. 3RP 346. The automatic overdraft protection transferred $50 from Falk's 2039 account to defendant's 6949 account to cover the charges. 3RP 346. Schieferdecker gave additional examples of the automatic overdraft protection withdrawing money from Falk's 2039 account into defendant's 6949 account. *See* 3RP 348–50, 354.

Schieferdecker calculated a total financial loss attributable to defendant of $8,254.38. 4RP 403.

According to Falk, he and his friend Roger Johnson went on a trip to Disneyland in California while defendant was his payee. 2RP 178. Defendant gave Falk $200 of his money to spend on the trip. 2RP 179. When Falk ran out of that money, Johnson lent him more, which Falk remembered paying him back for. 2RP 180. Johnson recalled inviting Falk on the trip and paying for the trip. 4RP 452, 454. Johnson could not recall defendant giving him money, but believes she may have booked the trip for them. 4RP 461.

Defendant chose to testify. *See* 5RP 516–657. According to defendant, she often gave Falk money out of her pocket and told him she

would collect it from his account later. 5RP 523. Defendant would also purchase Falk's groceries and bus passes with her personal debit card. 5RP 530, 535. Defendant also claimed to have bought Falk a camera on her Stoneberry account and paid for part of Falk's vacation to Disneyland. 5RP 541–42, 551. Defendant never collected any fee for her services as Falk's representative payee. 5RP 527. Defendant guessed that by the time she stopped being Falk's representative payee, he owed her about $1,600 but she had no plans to recoup the money. 5RP 556. She had kept a ledger of the money that was transferred back and forth, but she threw it away before being arrested. 5RP 530–31.

C. ARGUMENT.

1. ALL ESSENTIAL ELEMENTS OF THE CRIMES CHARGED APPEAR IN THE INFORMATION BY FAIR CONSTRUCTION. FURTHER, DEFENDANT HAS FAILED TO PROVE ACTUAL PREJUDICE.

All essential elements of a crime must be included in the charging document to afford notice to an accused of the nature of the accusation against him. ***State v. Kjorsvik***, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This rule is grounded in the constitutional requirement that defendants be informed of the nature and cause of the accusation against them. ***State v. Taylor***, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). When a charging

document is challenged for the first time on appeal, as in the present case, it will be construed liberally and in favor of validity. *Id.* at 102.

When analyzing the sufficiency of a charging document under the liberal constructions, the court employs a two-prong test: "(1) do the necessary elements appear in any form, or by fair construction can be they be found in the Information and, if so, (2) can the defendant show he or she was actually prejudiced by the vague of inartful language." ***State v. Rivas***, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) (citing ***State v. Zillyette***, 173 Wn.2d 784, 786, 270 P.3d 589 (2012)).

a. Liberal construction of the Information shows all necessary elements.

Under the first prong, the court is to consider the charging document alone, "reading it as a whole, construing it 'according to common sense,' and including facts that are necessarily implied by the document's language." ***Rivas***, 168 Wn. App. at 888 (citing ***State v. Goodman***, 150 Wn.2d 774, 788, 83 P.3d 410 (2004)). The charging document must include some language that places the defendant on notice of any missing essential element to satisfy the first prong. ***Rivas***, 168 Wn. App. at 888.

The corrected Information in the present case contains by liberal construction all the essential elements of the crime charged.[5] Count I alleged that defendant, during the period of July 5, 2011 to April 11, 2014:

> did unlawfully, feloniously, knowingly obtain, possess, use or transfer a means of identification or financial information of . . . Jack Falk, with the intent to commit . . . any crime and thereby obtains an aggregate total . . . of value in excess of one thousand five hundred dollars.

CP 44. Count II alleged that defendant committed second degree theft,

> a crime of the same or similar character, and/or a crime based on the same conduct or on a series of act connected together or constituting parts of a single scheme or plan

during the same July 5, 2011 to April 11, 2014 period, when she "did unlawfully and feloniously obtain control over property . . . belonging to another, of a value exceeding $750[.]" CP 45.

Count III alleged that defendant committed first degree identity theft,

> a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan

during the period between May 5, 2011 and May 20, 2013, when she

> did unlawfully, feloniously, knowingly obtain, possess, use or transfer a means of identification or financial information of . . . Jack Falk, with the intent to commit . . . any crime and

[5] Defendant assigns error only to Counts I-IV, therefore the State will focus only on those counts. Br. of App. p. i, 1, 5.

> thereby obtains an aggregate total . . . of value in excess of one thousand five hundred dollars.

CP 45. Count IV alleged that defendant committed second degree theft,

> a crime of the same or similar character, and/or a crime based on the same conduct or on a series of act connected together or constituting parts of a single scheme or plan

during the same May 5, 2011 to May 20, 2013 period, when she "did unlawfully and feloniously obtain control over property . . . belonging to another, of a value exceeding $750[.]" CP 46.

The State acknowledges that the Information could have been written more clearly, however, fair construction shows that it contains the essential elements of the crimes charged. The essential element defendant alleges was omitted was the "common scheme or plan" element required when the State seeks to aggregate offenses. *See* Br. of. App. p. 6; ***Rivas***, 168 Wn. App. at 890.[6] When reviewing the Information in the present case, however, as a whole with a liberal construction in favor of validity, the common scheme or plan element was alleged.

Counts I and II alleged defendant committed the crimes over a period of years; within the same July 5, 2011 to April 11, 2014 dates. CP

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[6] ***Rivas*** held that a common scheme or plan is an essential element of *second degree malicious mischief* when the State aggregates the value of damages items to reach the damage threshold. ***Rivas***, 168 Wn. App. at 890. Although the present case does not involve charges of second degree malicious mischief, the operative language allowing for aggregation of damages in the malicious mischief and identity theft statutes both require the "common scheme or plan." *See* RCW 9.35.020(5), RCW 9A.48.100(2).

44–45. Count I included an allegation that defendant obtained "an *aggregate* total" in excess of $1,500. CP 44 (emphasis added). To charge based on an aggregate total, a series of transactions must be part of a common scheme or plan. RCW 9.35.020(5). Therefore, including the word "aggregate" necessarily implies an allegation of multiple acts in a common scheme or plan. Further, Count II alleged that the second degree theft may have been "a series of acts connected together or constituting parts of a *single scheme or plan.*" CP 45 (emphasis added). Thus, Count II included common scheme or plan language. Taken together and construed liberally, Counts I and II contained all essential elements of the crimes charged.

Similarly, Counts III and IV alleged defendant committed the crimes within another two year period; May 5, 2011 to May 20, 2013. CP 45–46. Count III included both an allegation that the crime may have been "a series of acts connected together or constituting parts of a *single scheme or plan*" and that the charge was based on "an *aggregate* total" exceeding $1,500. CP 45 (emphasis added). Count IV also included the "a series of acts connected together or constituting parts of a *single scheme or plan*" language. CP 46. Therefore, taken together and construed liberally, Counts III and IV contained all essential elements of the crimes charged.

Further, Count I–IV all alleged the crimes took place over a two to three year time period. An Information is to be construed using common

sense. ***Goodman***, 150 Wn.2d at 786. Applying common sense to the two to three year time periods, along with the aforementioned "aggregate total" and "single scheme or plan" language, necessarily implies the criminal conduct occurred as the result of a multi-year common scheme or plan.

Defendant cites ***Rivas*** to support her critique of the charging document. Br. of App. p. 6–8. But the present case is distinguishable from ***Rivas***, where the court found the Information deficient. ***Rivas***, 168 Wn. App. at 890. In ***Rivas***, the Information alleged that Rivas, "knowingly and maliciously cause[d] physical damage to the property of another in an amount exceeding seven hundred and fifty dollars ($750)." *Id.* at 885 (alteration in original). The Information in ***Rivas*** did not allege either "an aggregate total" or a "single scheme or plan." Further, the Information in ***Rivas*** did not allege the crime took place over a lengthy period of time, such as a range of two to three years. Rather, the crimes took place on the same day. *See*, *id.* at 884. Therefore, the Information found deficient in ***Rivas*** is factually distinguishable from the Information in the present case, and ***Rivas*** does not require the Information in this case be found deficient.

b. Defendant fails to show actual prejudice.

If, under the first prong of ***Zillyette***, 173 Wn.2d at 786, the necessary facts do appear in the charging document in some form, the second prong requires the court determine whether the defendant can show that she was *actually prejudiced* by the inartful language. ***Rivas***, 168 Wn. App. at 888 (citing ***State v. Williams***, 162 Wn.2d 177, 185, 170 P.3d 30 (2007)). In the present case, defendant has failed to prove she was actually prejudiced by the inartful language of the Information. Defendant presented a defense that focused on the series of transactions between her and Falk over the multi-year period.

According to defendant, Falk had been taking sums of money from her over the course of a period of time. 5RP 530. Defendant claimed she logged all these transactions:

> I had a little spiral notebook, one of the medium-sized ones that I wrote everything down, how much I paid, how much was returned, how much I took back, how much – and then I made notes, like, when we would go and if anything, you know, different happened, so I would have it.

5RP 530.[7] In closing, defense counsel acknowledged that "there was money transferred back and forth." 7RP 821. The "common scheme or

[7] Defendant claims she threw this notebook away after she left her job at the Mission in June 2013. 5RP 531.

plan" and the "aggregate total" used for the charges was not what was at issue in the case – nor was it what the defense focused on.

The defense at trial was that defendant was *entitled* to the money she took from Falk's accounts because he had owed her money. *See* 7RP 820. Defendant was fully able to defend herself against the charges; she called three witnesses and testified in her own defense to advance her theory of defense. *See* 4RP 449, 4RP 462, 5RP 516, 6RP 697. Defendant fails to prove that inartful language in the Information concerning the "common scheme or plan" element actually prejudiced her.[8]

2. THE IDENTITY THEFT STATUTE IS NOT UNCONSTITUTIONALLY OVERBROAD BECAUSE IT DOES NOT MAKE UNLAWFUL ANY CONSTITUTIONALLY PROTECTED BEHAVIOR.

Statutes are presumed constitutional. ***State v. Pualing***, 149 Wn.2d 381, 386, 69 P.3d 331 (2003) (citing ***State v. Crediford***, 130 Wn.2d 747, 752, 927 P.2d 1129 (1996)). A law may be overbroad, for example, if it sweeps within its prohibitions constitutionally protected speech. ***State v. Glas***, 147 Wn.2d 410, 419, 54 P.3d 147 (2002) (citing ***City of Seattle v. Webster***, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990)); *see also*, ***City of***

[8] Defendant does not articulate in the opening brief how she was prejudiced, instead relying on the presumption of prejudice when an information is found deficient. Br. of App. p. 6. Because the State argues that the elements can be fairly construed from the information, the presumption of prejudice does not apply.

Tacoma v. Luvene, 118 Wn.2d 826, 844, 827 P.2d 1374 (1992) (holding an ordinance prohibiting drug loitering was not unconstitutionally overbroad because, by requiring specific intent and overt acts, it did not reach constitutionally protected First Amendment conduct). To invalidate a law on its face under the overbreadth doctrine, the law must be "substantially overbroad." *Id.* A court's first task in analyzing overbreadth is determining whether the statute reaches a "substantial amount of constitutionally protected conduct." *Id.*

A statute will be overturned only if "the court is unable to place a sufficiently limiting construction on a standardless sweep of legislation." ***Glas***, 147 Wn.2d at 421 (quoting ***City of Tacoma v. Luvene***, 118 Wn.2d 826, 840, 827 P.2d 1374 (1992)). "Criminal laws require particular scrutiny and may be facially invalid if they 'make unlawful a substantial amount of constitutionally protected conduct . . . even if they also have legitimate application.'" ***City of Seattle v. Huff***, 111 Wn.2d 923, 925, 767 P.2d 572 (1989) (quoting ***City of Houston v. Kill***, 482 U.S. 451, 459, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987)).

The challenged statute reads, in relevant part:

> No person may knowingly obtain, possess, use, or transfer 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). The legislature codified the intent behind the challenged statute:

> The legislature finds that means of identification and financial information are personal and sensitive information such that if unlawfully obtained, possessed, used, or transferred by others may result in significant harm to a person's privacy, financial security, and other interests. . . . The legislature intends to penalize for *each unlawful act of improperly* obtaining, possessing, using, or transferring means of identification or financial information of an individual person.

RCW 9.35.001 (emphasis added).

As a general rule, every crime must contain both an actus reus and a mens rea. ***State v. Eaton***, 168 Wn. 2d 476, 480, 229 P.3d 704 (2010). The actus reus is the wrongful act that comprises the physical components of a crime. *Id.* at 481. The mens rea is the state of mind required to commit the crime. *Id.* For identity theft, the mens rea is "*knowingly*. . . with the *intent* to commit, or to aid or abet, any crime." RCW 9.35.020(1) (emphasis added). The actus reus is to "*obtain*, *possess*, *use*, or *transfer* a means of identification or financial information of another person." RCW 9.35.020(1) (emphasis added). A person would have to satisfy both the mens rea and actus reus requirement to be found guilty of identity theft.

The identity theft statute is not unconstitutionally overbroad because it does not reach a substantial amount of constitutionally protected conduct. Except arguably in cases of civil disobedience, criminal acts are

not constitutionally protected behavior. Defendant argues the statute is overbroad because it "criminalizes thought." Br. of App. p. 10. The actus reus of the crime, however, is not "thought." It is to "*obtain*, *possess*, *use*, or *transfer* a means of identification or financial information of another person." RCW 9.35.020(1) (emphasis added). The plain meaning of to obtain, possess, use, or transfer is that they are all *acts*. Characterizing obtaining, possessing, using, or transferring as someone's "thought" is an overstatement of the statute.

That the statute does not criminalize "thought" is particularly apparent when the statute is read as a whole. The legislature's clear intent is to punish unscrupulous persons who seek to use the personal and financial records of other to advance fraudulent activity. The codified intent states the intent to penalize, "each *unlawful act* of improperly obtaining, possessing, using, or transferring means of identification or financial information of an individual person." RCW 9.35.001 (emphasis added). This shows the legislature did not intend to "criminalize thought," but rather to criminalize the *acts* of unscrupulous persons that fell within the statute.

Further, possessing the personal and financial records of others is not constitutionally protected behavior. There are, of course, many legitimate and lawful reasons a person would be in the possession of

another's records, but legitimate and lawful activities are not necessarily constitutionally protected. For example, accountants, school administrators, human resources personnel, and tax preparers, in the course of their business, routinely possess such records. These are lawful—but not necessarily constitutionally protected—activities. Possessing personal and financial information of others is not constitutionally protected behavior.

Courts must avoid absurd results when interpreting statutes and let common sense inform their analysis. ***State v. Alvarado***, 164 Wn.2d 556, 562, 192 P.3d 345 (2008). In this case, interpreting the identity theft statute to criminalize the thought of a child considering sending an email, *see* Br. of App. p. 11, would lead to such absurd results. A law can only be unconstitutionally overbroad if it sweeps within its legitimate scope constitutionally protected activity. Criminal acts and possessing the personal and financial records of others are not constitutionally protected behaviors. Therefore, the identity theft statute is not unconstitutionally overbroad.

3. THE TRIAL COURT PROPERLY CALCULATED DEFENDANT'S OFFENDER SCORE.

The analysis of same criminal conduct for calculating a defendant's offender score is found in RCW 9.94A.589(1)(a), which provides:

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . *"Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involved the same victim.*

RCW 9.94A.589(1)(a) (emphasis added). The definition of "same criminal conduct" is construed narrowly and proof of all three elements is required to support a "same criminal conduct" determination. ***State v. McGrew***, 156 Wn. App. 546, 552, 234 P.3d 268 (2010) (citing ***State v. Vike***, 125 Wn.2d 407, 410, 885 P.2d 824 (1994)). "If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score." ***State v. Wilson***, 136 Wn. App. 596, 613, 150 P.3d 144 (2007).

A trial court's determination on same criminal conduct is reviewed for an abuse of discretion. ***State v. Nitsch***, 100 Wn. App. 512, 521, 997

P.2d 1000 (2000); ***Wilson***, 136 Wn. App. at 613 (citing ***State v. Elliott***, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 2d 80 (1990)). A trial court abuses its discretion only if the decision was manifestly unreasonable or based on untenable grounds. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In the present case, the court calculated defendant's offender score as a two. 7RP 899. This was based on finding that Counts I and II were the same criminal conduct, and Counts III and IV were the same criminal conduct. CP 158. The trial court did not abuse its discretion by finding defendant's offender score was a two. In the course of exercising its discretion, the trial court received and read sentencing memorandums from both defense counsel and the State. 7RP 877. The court then heard argument on the calculation of the offender score from both defense counsel and the State. 7RP 877–79, 7RP 884–87. After reading the briefing and considering the argument, the trial court scored defendant at a two.

The trial court properly scored defendant as a two because Counts I and II were the same criminal conduct, and Counts III and IV were the same criminal conduct,[9] but Counts I–V were not all the same criminal

[9] Defendant does not assign error to these Counts being found to be the same criminal conduct. Rather, she assigns error to Counts I–V not *all* being the same criminal conduct. Br. of App. p. 13.

conduct. First, Counts I and II were based on conduct involving the 2171 account from July 5, 2011 to April 11, 2014. 7RP 790; CP 44–45. Counts III and IV were based on conduct involving the 2039 account from May 5, 2011 to May 20, 2013. 7RP 802; CP 45–46. Count V was based on conduct involving the 1645 account from September 13, 2011 to February 5, 2014. 7RP 807; CP 46. Therefore, the three sets of counts were based on three separate and distinct bank accounts and three different time periods.

Further, defendant did not act with the same criminal purpose toward each account – thus, each set of counts. Defendant used Falk's 2171 account (Counts I and II) to transfer money to her 6949 account. 3RP 312. Defendant additionally used Falk's 2039 account (Counts III and IV) to transfer money to her 6949 account. 3RP 343–44. But defendant also used Falk's 2039 account as automatic overdraft protection her 6949 account. 3RP 345. Finally, defendant used Falk's 1645 account (Counts V and VI) to make payments to defendant's Verizon account, Target account, insurance company, and Firefox salon. 3RP 306. The evidence showed that, not only did defendant use three separate and distinct bank accounts of Falk, but she also used each account in a different way to further a different criminal purpose. Therefore, although Counts I and II,

and Counts III and IV were the same criminal conduct, Counts I-V were not all the same criminal conduct.

After fully and carefully considering the arguments before it, the trial court properly exercised its discretion by finding that Counts I–V were not *all* the same criminal conduct, and that only Counts I and II, as well as Counts III and IV, were the same criminal conduct. There was no error.

4. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE BEYOND A REASONABLE DOUBT STANDARD OF PROOF.

Jury instructions, when read in their entirety, must inform the jury "the State bears the burden on proving every essential element of a criminal offense beyond a reasonable doubt." ***State v. Pirtle***, 127 Wn. 2d 628, 656, 904 P.2d 245 (1995) (citing ***In re Winship***, 397 U.S. 358, 367, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). A challenge to a jury instruction is reviewed de novo, evaluating the challenge within the context of the instructions in their entirety. ***Pirtle***, 127 Wn.2d at 656.

The jury instruction at issue in this case is instruction number two. In its entirety, instruction two reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of

> each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find that it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*

CP 74 (emphasis added). Defendant assigns error to the last sentence of the instruction, the "abiding belief in the truth of the charge" language. Br. of App. p. 15.

The United States Supreme Court has held, "so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt," the federal Constitution does not require any particular form of jury instruction. ***Victor v. Nebraska***, 511 U.S. 1, 5, 114 S. Ct. 1239 (1994) (citations omitted). The standard is simply that, taken as a whole, the instructions properly convey the concept of reasonable doubt. *Id.* at 15.

Washington State uses pattern jury instructions. *See, e.g.*, 11 Wash. Prac., Pattern Jury Instr. Crim. 4.01 (3d Ed.) (hereinafter "WPIC 4.01").

The Washington State Supreme Court has made it clear, in exercising their inherent supervisory power, Washington trial courts are to "use only the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving each and every element of the crime beyond a reasonable doubt." ***State v. Bennett***, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). The instruction given in this case follows WPIC 4.01. CP 74.

An instruction in accordance with WPIC 4.01, including the abiding belief in the truth of the charge language, has been approved repeatedly. *See, e.g.*, ***Pirtle***, 127 Wn.2d at 658 (finding the State's burden of proof was not misstated in the abiding belief instruction); ***State v. Kinzle***, 181 Wn. App. 774, 784, 326 P.3d 870, *review denied*, 337 P.3d 325 (2014) ("The phrase 'abiding belief in the truth of the charge' merely elaborates on what it means to be 'satisfied beyond a reasonable doubt.'"); ***State v. Lane***, 56 Wn. App. 286, 299–300, 786 P.2d 277 (1989) (finding WPIC 4.01 instruction to properly inform the jury of the State's duty to prove each element beyond a reasonable doubt); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988) (finding WPIC instruction with abiding belief in the truth of the charge language adequately instructed the jury); ***State v. Price***, 33 Wn. App. 472, 476, 655 P.2d 1191 (1982) (finding the abiding belief language could not have mislead or confused the jury and

the WPIC 4.01 instruction was not an error). The United States Supreme Court has similarly upheld using abiding belief language in a reasonable doubt instruction. ***Victor***, 511 U.S. at 5 ("[a]n instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof").

Despite the overwhelming approval of the "abiding belief in the truth of the charge" instruction in Washington courts, defendant proposes a change in the language based on the Washington State Supreme Court's analysis in ***State v. Emery***, 174 Wn.2d 741, 278 P.3d 653 (2012). But the Court in ***Emery*** did not discuss the propriety of the "abiding belief in the truth of the charge" instruction. Rather, the Court found the prosecutor's argument that the jury was to "speak the truth" or "declare the truth" to be improper. *Id.* at 760. The prosecutor's argument in ***Emery***, however, did not require reversal. This was, in part, because the jury was properly instructed on the burden of beyond a reasonable doubt. *See, id.* at 764, n.14.

The argument raised by defendant—that this court should change the instruction language based on ***Emery***—was rejected by Division One of the Court of Appeals in ***State v. Federov***, 181 Wn. App. 187, 324 P.3d 784, *review denied*, 181 Wn.2d 1009 (2014). Federov similarly contended that the abiding belief instruction "improperly encourages the jury to

undertake an impermissible search for the truth" as condemned in ***Emery***. ***Federov***, 181 Wn. App. at 200. Division One of the Court of Appeals disagreed, holding that, when read in context, the "abiding belief in the truth of the charge" instruction accurately informed the jury of its job as stated in ***Emery***. ***Federov***, 181 Wn. App. at 200 (citing ***Emery***, 174 Wn.2d at 760 ("a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt")). This court should follow Division One in following the Washington State Supreme Court's approval of the abiding belief in the truth of the charge language. *See* ***Pirtle***, 127 Wn. 2d at 658.

D. CONCLUSION.

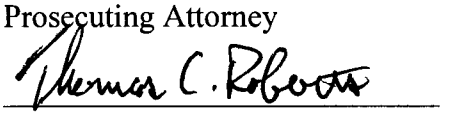
The Information adequately alleged a common scheme or plan because it alleged an aggregate total, a single scheme or plan, and a two to three year time period for the crimes. Further, defendant cannot show she was actually prejudiced by the inartful language of the Information because her defense fully recognized the aggregate total over the multi-year charging period. The identity theft statute is not unconstitutionally overbroad because committing a crime and possessing personal and financial information are not constitutionally protected activities. The trial properly calculated defendant's offender score as a two where Counts I

and II, as well as Counts III and IV, were the same criminal conduct, but Counts I–V were not. The trial court did not err in instructing the jury with the "abiding belief in the truth of the charge" pattern jury instruction that has been upheld numerous times in Washington courts.

For the foregoing reasons, the State respectfully requests this court affirm defendant's convictions.

DATED: DECEMBER 16, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney



THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Jordan McCrite
Rule 9

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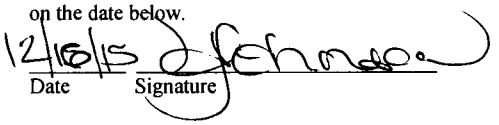
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under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

12/16/15 
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