

NO. 48289-4-II

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

STATE OF WASHINGTON, RESPONDENT

v.

EARL A. POLLEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson, Judge

No. 15-1-01256-0

BRIEF OF RESPONDENT

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

1. Does defendant fail to establish insufficient evidence was presented to prove the possession and intent elements of his convictions for identity theft and forgery, when the evidence presented and viewed in the light most favorable to the State, firmly supported the conclusion that he unlawfully possessed the financial documents of the victims with the intent to commit a crime? (Appellant's assignment of error nos. 1-2).
2. Did the trial court properly exercise its discretion in admitting text messages into evidence after sufficient proof was presented to establish a proper foundation for the admission of the messages? (Appellant's assignment of error no. 3).
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5. Has defendant failed to show defense counsel was ineffective for choosing not to move for mistrial when such a motion would be based upon an unsupported claim of juror misconduct? (Appellant's assignment of error no. 8).

B. STATEMENT OF THE CASE.

1. Procedure

On July 28, 2015, Earl A. Polley ("defendant") was charged by Second Amended Information with 10 counts of Identity Theft in the Second Degree (Counts I, II-X, XI), One count of Forgery (Count II), and one count of Driving While In Suspended or Revoked Status in the Third Degree (Count XI). CP 1-6.

The Honorable Kathryn J. Nelson presided over the trial. 1RP 1. After careful consideration of the evidence, the jury returned guilty verdicts on all counts as charged. 6RP 555-8; CP 66-77. Defendant was sentenced within the standard range to 48 months confinement on Counts I, II-X, XI, and 29 months on Count II to be served concurrently. CP 83, 86-7. Additionally the court imposed 12 months of community custody following defendant's release from confinement. The court waived all discretionary legal financial obligations ("LFOs") and imposed \$600 in mandatory LFOs. CP 83. Defendant filed timely appeal. CP 98.

2. Facts

On or around March 18, 2015, Doreen Silvernail, defendant's aunt, found an unfamiliar backpack in her garage. 3RP 135, 138-9; Ex. 43-50. Ms. Silvernail opened the bag believing it belonged to one of her grandchildren. 3RP 139. Ms. Silvernail discovered checks, financial documents, credit cards, and other personal information from several individuals in the backpack. Many of these documents were addressed to defendant or otherwise labeled with his name. 3RP 141-2.

Ms. Silvernail contacted defendant via text message to inform him she found the backpack along with the documents and that she would report the incident to the police. 3RP 146. Ex 41, 42. Defendant responded to her text: "Yep i will n their is no way you could have found it it was put away n if i had a ride i would have already been there to get the back pack [sic]." *Id.* Ms. Silvernail then reported the incident to the police. 3RP 148. Pierce County Sheriff's Deputy Alexa Moss responded to the call and procured a search warrant for the backpack. 3RP 148, 163-4, 167.

Investigators found a check from Robert Hoover's account in defendant's backpack. 3RP 174-6; Ex. 4. The check was made payable to defendant in the amount \$650 and was endorsed with defendant's signature on the reverse. *Id.* The check's memo line read "for work." *Id.* Several checks purporting to be from the account of Steven McClendon were found

in defendant's backpack among other financial documents. 3RP 178-9, 185-7, 216-8 Ex. 6, 8 Two of those checks, #1130 and #1132, were payable to defendant in amounts totaling \$500 and contained the phrase "for work" on the memo lines. 3RP 179. Ex. 6. Defendant possessed a checkbook from the Steven McClendon account containing carbon copies of those two checks. Ex. 6.

Defendant possessed an envelope addressed to Steven McClendon from BankMobile that included a return check, #0097, from the McClendon account and a letter from the underwriting bank explaining the check could not be cashed. 3RP 216-8; Ex. 33. Handwritten notes containing Steven McClendon's date of birth, social security number, and other personal information was found with the these checks. 3RP 246; Ex. 40. The note listed the approximate time required for each of the Steven McClendon checks to clear. *Id.*

Checks from the accounts of Jason Lisonbee, Flor Rivera, Peter Dorros, Joesph Baley, Keith Jester, Michael Hoover, Dina Franz, Myong Chin, and Judson Webb all made payable to and endorsed by either defendant or Steven McClendon were all found in defendant's backpack. 3RP 176-216 Ex. 6, 11, 28, 29, 30, 31. Some of these checks contained "for work" in the memo line. *See e.g.*, 3RP 178, 209-211; Ex. 6, 29. The address

on Steven McClendon's checks matches the defendant's address as found on his driver's license and on his received mail. 3RP 206-8; Ex 27, 33, 53.

Defendant's backpack also contained the social security number, date of birth, and other identifying information belonging to Michael Lawrence. Ex 40. The check found in defendant's backpack from a fictitious "Aaron Bedker Trucking Co." and the check from the deceased victim, Willie Horace, were made payable to Michael Lawrence. 4RP 336-8; Ex. 9, 26.

On March 27th, 2015, defendant was stopped by police for driving a vehicle registered to an individual with outstanding warrants. 4RP 348, 352-4. Defendant's driver's license was suspended at the time of the traffic stop. 3RP 290-1; Ex. 52. Officers arrested defendant after they discovered he was wanted for identity theft charges related to the documents inside his backpack. 4RP 359-60. Defendant asked if he was being arrested for driving while suspended and the arresting officer replied he was being arrested "for some items you left at a relative's house." 4RP 360. Defendant immediately replied, without further disclosure from the officer, "That wasn't my backpack." 4RP 360-1; Ex. 57. The officer asked to which backpack defendant was referring, defendant responded, "The one at my aunt's house." 4RP 362. Defendant was then transported to the Pierce County Jail for processing. 4RP 363.

Also inside defendant's backpack were documents related to the following victims and their corresponding criminal charge:

a. Debbie Anderson: Counts I and II

Mail labeled with Debbie Anderson's name and address and checks associated with her Sears MasterCard were found in defendant's backpack. 3RP 168-73; Ex. 3. Additionally, investigators found two checks for \$250 and \$500, respectively #21526 and #21506, made payable to defendant "for work." 3RP 169-72; Ex. 1, 2. Ms. Anderson testified she did not recognize the checks, had never met defendant, did not give him permission to possess her mail, and the signature purporting to be hers was forged. 4RP 376, 379.

b. Aaron Bedker: Count III

Aaron Bedker's Washington State driver's license and related mail from the Department of Licensing was found in defendant's backpack. 3RP 204-5; Ex. 25. Check #0997 from the account of "Aaron Bedker Trucking, Inc." was also in the backpack. 3RP 206; Ex. 26. Mr. Bedker testified he owned the company, he did not know defendant, and defendant did not have permission to possess his driver's license. 4RP 338-9.

c. Willie Horace: Count IV

Check #2590, dated February 5, 2015, was made out to defendant in the amount of \$400 for "work" from the account of Willie Horace. 3RP 190-2; Ex. 9. Mr. Horace's name was also found on checks made payable to

Michael Lawrence. Mr. Horace died on March 11, 2011, a little under four years before the checks purporting to be from him were dated. 3RP 192; Ex. 51.

d. Scott Jester: Count V

Defendant's backpack contained personal financial information containing Mr. Jester's name, his Social Security Number, various credit/debit card numbers linked to his accounts, his date of birth, and his mother's maiden name. 3RP 198. Mr. Jester testified he had never met defendant nor given him permission to possess his personal information. 3RP 267.

e. Ronald Chrum: Count VI

A Washington State driver's license, road test results and birth certificate belonging to Ronald Chrum were found in defendant's backpack. 3RP 227-9; Ex. 34, 35. Mr. Chrum testified that he had several financial documents stolen from his home and that he had never met defendant nor given him permission to possess his personal information. 3RP 255, 259.

f. Keith Jester: Count VII

Inside defendant's backpack were documents containing Keith Jester's tax identification number, Social Security Number, Washington State driver's license number, email account information, phone number, and other personal information. 3RP 274-7; Ex. 29, 36. Mr. Jester testified

he did not know defendant nor did he give him permission to possess or use his personal documents and information. 3RP 278.

g. David Estes: Count VIII

David Estes's W-2 form containing his Social Security Number, address, date of birth, and other information was found inside defendant's backpack. 3RP 269-70; Ex. 15. Mr. Estes testified he had never met defendant and did not give him permission to use his personal information. 3RP 310-1.

h. Brandon Cohen: Count IX

Brandon Cohen's W-2 form containing his Social Security Number, address, date of birth, and other information was found inside defendant's backpack. 3RP 308-10; Ex. 13. Mr. Cohen testified he had never met defendant and did not give him permission to use his personal information. 3RP 310-1.

i. Christopher Lennox: Count X

Defendant's backpack contained the W-2 of Christopher Lennox which contained his Social Security Number, address, date of birth, and other personal information. 3RP 383. Mr. Lennox testified he had never met defendant and did not give him permission to use his personal information. 4RP 383.

j. Britney Rader: Count XII

Defendant possessed three checks purporting to be from Britney Rader's account made payable to defendant "for work" along with a checkbook containing several blank checks purporting to be from the same account. 3RP 300-3; Ex 10. Ms. Rader testified the signature seemingly belonging to her was not hers. 3RP 301. She also testified she had never met defendant, written a check payable to him, or otherwise authorized him to possess checks bearing her name. 3RP 302-3.

C. ARGUMENT.

1. THE JURY'S CONCLUSION THAT DEFENDANT COMMITTED TEN COUNTS OF IDENTITY THEFT AND ONE COUNT OF FORGERY IS SUPPORTED BY THE EVIDENCE WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE.

For a court to find there was sufficient evidence for a conviction on review, it must determine, after viewing the evidence in the light most favorable to the State, any rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. *State v. Thereoff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Salinas*, 119 Wn.2d at 201. Credibility determinations are

for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

- a. The State presented sufficient evidence to prove defendant possessed the documents underlying his convictions for Identity Theft in the Second Degree on Counts I, III-X, XII.

Defendant was convicted on Counts I, III-X, and XII, the elements of which were presented to the jury as follows:

- 1) That on or about the 18th day of March, 2015, the defendant knowingly obtained, possessed, transferred or used a means of identification or financial information of another person, [name of victim for each count], living or dead;
- 2) That the defendant acted with the intent to commit or aid or abet any crime.
- 3) That the defendant obtained credit, money, goods, services, or anything else that is \$1500 or less in value from the acts described in element (1) or did not obtain any credit, money goods, services, or other items of value; and
- 4) That any of these acts occurred in the State of Washington.

CP 119-28; WPIC 131.06; RCW 9.35.020(3).

Defendant challenges his convictions on all ten counts of Identity Theft in the Second Degree (Counts I, III-X, XII). Brief of Appellant at 8. Defendant challenges all ten counts on identical grounds; claiming the state failed to prove Element 1, that defendant possessed the backpack, and Element 2, that defendant acted with intent to commit a crime. *Id.* at 8-12. Defendant's

claims are without merit because the State presented sufficient evidence for a rational jury to convict defendant on all ten counts of Identity Theft in the Second Degree.

Defendant argues that the evidence supports a reasonable inference that he did not possess the financial documents underlying his convictions on Counts I, III-X, XII that were found in the backpack left at his aunt's home. Brief of Appellant at 11. For the sake of argument, even if this may be true, defendant fails to acknowledge that the evidence also supports reasonable inferences that he did in fact possess the backpack and documents therein. The applicable standard of review requires that all evidence be viewed in the light most favorable to the State, not the defendant, and accords great deference to jury determinations inferred from the evidence. *State v. Green*, 94 Wn.2d at 220-22; *State v. Camarillo*, 115 Wn.2d at 71; *State v. Carver*, 113 Wn.2d 591, 604, 789 P.2d 306 (1990).

To prevail under this standard, defendant must show that the inferences supporting guilty knowledge are all unreasonable. Conversely, any reasonable inference supported by the evidence is sufficient to sustain the conviction. Defendant's sufficiency claim is defeated because several reasonable inferences establish defendant was in possession of the financial documents underlying his convictions.

Among the many financial records found in the backpack, investigators discovered 8 envelopes containing documents from various financial agencies bearing defendant's name and mailed to his known addresses. 3RP 216-24; Ex 33. One envelope contained a BankMobile Visa debit card in defendant's name and eight checks preprinted with defendant's name and address. CP 223-4; Ex. 33. Inside another envelope was a letter addressed to defendant informing him that a check he attempted to cash was invalid because the account associated with said check had been closed; the check, made out to defendant, was attached to the letter. 3RP 217-8; Ex. 33. The other six envelopes all contained various credit, debt, and prepaid cards, all in defendant's name, accompanied by account statements or other financial documentation addressed to defendant. 3RP 218-24; Ex. 33.

The quantity of official financial documents and credit cards bearing defendant's name and address found inside defendant's backpack allow a reasonable fact finder to conclude the defendant possessed the backpack. The documents were mailed to defendant at his mailing address. Defendant's name appeared on all of the mailings as the primary and sole account holder. It is unlikely that a person other than defendant would possess so many official records and credit cards with his name and address. Therefore, a reasonable fact finder could conclude defendant possessed the backpack that contained these documents.

Moreover, defendant acknowledged the backpack was his in his text message exchange with his aunt, further allowing a reasonable conclusion that the backpack belonged to him. When defendant's aunt texted him to tell him she found the backpack and would call law enforcement, defendant immediately responded that he planned to retrieve the backpack from his aunt's house and expressed surprise she found it despite his attempts to cache it. Ex. 41, 42. Defendant's quick, unquestioning response shows a close familiarity with the bag's location and its illegal contents consistent with an owner's knowledge.

Defendant again acknowledged he owned the backpack when he was questioned following a traffic stop. As defendant was being taken into custody, he asked the officer if he was being arrested for driving while suspended. 4RP 360. The officer responded he was being arrested "For that and some items found at a relative's house" without mentioning the backpack. Defendant's first response was "That's not my backpack." *Id.*

When viewed in the light most favorable to the State, a reasonable fact finder could conclude the backpack and the multiple financial documents contained therein belonged to defendant based on the multiple occasions he acknowledged ownership of the bag. Defendant's acknowledgments, coupled with the specific documents addressed to him

inside the backpack, allow a reasonable fact finder to conclude that defendant possessed the backpack.

- b. The State presented sufficient evidence to allow a reasonable fact finder to conclude defendant intended to commit a crime with the financial information of others.

A person acts with the intent to commit a crime “when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). A jury may infer defendant’s specific criminal intent from his or her conduct if it “plainly indicates such intent as a matter of logical probability.” *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985).

Defendant’s claim that no reasonable inference can be made that he acted with the intent to commit a crime in Counts I, III-X, XII is without merit. The applicable standard of review requires that all evidence be viewed in the light most favorable to the State while giving great deference to jury determinations inferred from the evidence. *State v. Green*, 94 Wn.2d at 220-22; *State v. Camarillo*, 115 Wn.2d at 71; *State v. Carver*, 113 Wn.2d at 604.

As noted above, to prevail under this standard, defendant must show that the inferences supporting guilty knowledge are all unreasonable. Meaning that any reasonable inference supported by the evidence is

sufficient to sustain the conviction. Reasonable inferences establishing defendant's intent to commit a crime can be made on each challenged count, thereby defeating defendant's claims.

The State presented sufficient evidence to allow a reasonable fact finder to conclude defendant intended to commit a crime with the financial information he unlawfully possessed. The Steven McClendon and Michael Lawrence related documents show defendant was involved in a series of schemes to use the documents in the backpack to unlawfully obtain money. It is highly inconsistent with lawful banking practices for defendant to possess a checkbook purporting to belong to someone else, for those checks to have defendant's address printed on them, and for that checkbook to contain the carbon copies of checks made payable to defendant from that account. The presence of handwritten notes containing Social Security numbers, dates of birth, bank account numbers, and other personal identifying information of individuals who purported to transfer a check to defendant is also highly incongruent with lawful banking activities. There is a strong and reasonable inference, when the evidence is viewed in the light most favorable to the State, defendant collected the information belonging to McClendon and Lawrence and used it in a scheme designed to unlawfully obtain money.

The evidence presented supports the conclusion defendant intended to use the financial and identity documents found inside the backpack to unlawfully obtain money from the named victims in Counts I, III-X, and XI. The documents underlying Counts I, III-X, and XI were found in the same bag and were of the same character as the McClendon and Lawrence documents. It logically follows that defendant intended to use the large trove of stolen financial documents to unlawfully obtain funds from other victims as he did with McClendon and Lawrence. Defendant possessed several checks prepared to be cashed purporting to be from the named victims. They were made out to and endorsed by defendant from account holders who had never met him or made a check out to him. Such behavior suggests defendant intended to use the checks to transfer unauthorized funds from victims' accounts to his own as he had done with previous documents found in the bag. The defendant also added the phrase "for work" in the memo line of several of the checks indicating an attempt by defendant to conceal the illegitimate nature of the checks by creating the false impression that they were earned in exchange for services rendered.

Defendant's unauthorized possession of a several credit cards belonging to the victims and mail related to those cards strongly suggests defendant intended to use the cards to preform unauthorized transactions. Taken as a whole, these facts support a reasonable conclusion that defendant

intended to use the prepared checks and credit card to make unauthorized financial transactions.

c. Evidence presented proved defendant committed Forgery.

Defendant was convicted on Count II, the elements of which were presented to the jury as follows:

- 1) That on or about the 18th day of March, 2015, the defendant possessed or offered or disposed of or put off as true a written instrument which had been falsely made, completed, or altered;
- 2) That the defendant knew that the instrument had been falsely made, completed or altered;
- 3) That the defendant acted with intent to injure or defraud; and
- 4) That this act occurred in the State of Washington.

CP 131; WPIC 130.03; RCW 9A.60.020.

Defendant challenges his Count II conviction claiming the State failed to prove Element #1, that defendant possessed the forged instrument. Brief of Appellant at 13. Defendant's claim is without merit because the State presented sufficient evidence to prove Element #1.

As noted above, the applicable standard of review requires only that a reasonable conclusion could be drawn from the evidence to support defendant's guilt when viewed in the light most favorable to the State. In order to prevail under this standard defendant must show that no reasonable

inference supports his guilt. Evidence presented by the State allows a reasonable conclusion that defendant possessed a forged instrument.

The checks belonging to Debbie Anderson that gave rise to defendant's conviction on Count II were found in the same backpack as the rest of the documents. As noted above, sufficient evidence was presented to allow a reasonable fact finder to conclude defendant possessed the backpack containing the documents. Defendant's multiple acknowledgements of the backpack and the presence of multiple documents bearing his name and address allow such a conclusion. Ms. Anderson testified that the signature on the checks purporting to be hers was forged. 4RP 375-6. She further testified that she had never met defendant and she never made a check payable to defendant. 4RP 375-6. Therefore, the State presented sufficient evidence to prove defendant possessed the documents underlying his conviction on Count II, and those documents were falsely made.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED TEXT MESSAGES INTO EVIDENCE WHEN WITNESSES TESTIMONY AND SURROUNDING CIRCUMSTANCES DEMONSTRATED THEIR AUTHENTICITY.

Authentication as a condition precedent to the admission of documentary or physical evidence is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). Admission of evidence is reviewed for abuse of discretion.

State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008), citing *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). “Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds.” *State v. Bradford*, 175 Wn. App. 912, 927, 308 P.3d 736 (2013), citing *State v. Magers*, 164 Wn.2d at 181.

A party offering evidence must make a prima facie showing of proof sufficient to permit a reasonable fact finder to determine the evidence is authentic. *State v. Young*, 192 Wn. App 850, 854; 369 P.3d 205 (2016) (quoting *State v. Bashaw*, 169 Wn.2d 133, 140-1, 234 P.3d 195 (2010)). Once a prima facie showing is established, the evidence is admissible under ER 901. *State v. Young*, 192 Wn. App at 855 (quoting *In re Det. of H.N.*, 188 Wn. App 744, 751-2, 355 P.3d 294 (2015)). The offeror of the evidence is not required to rule out all theories or explanations inconsistent with authenticity or conclusively prove that evidence is what it purports to be. *In re Det. of H.N.*, 188 Wn. App at 751. Any contrary evidence offered by the other party speaks to weight, not admissibility. *State v. Tatum*, 58 Wn.2d 73, 76, 360 P.2d 754 (1961).

The rules of evidence provide a series of non-exhaustive illustrative examples of valid authentication methods including testimony of a witness with “knowledge that the matter is what it is claimed to be”, ER 901(b)(1), and the “appearance, contents, substance, internal patterns, or other

distinctive characteristics, taken in conjunction with circumstances.” ER 901(b)(4). The rules provide a specific section illustrating some methods for authenticating email messages:

Testimony by a person with knowledge that (i) the email purports to be authored or created by the particular sender or the sender's agent; (ii) the email purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

ER 901(b)(10)

Divisions One and Two of this Court have both examined text message admissibility using ER 901(b)(10) by analogy. *In re the Detention of H.N.*, 188 Wn. App 744, 759, 355 P.3d 294 (2015); *State v. Young*, 192 Wn. App 850, 856, 369 P.3d 205 (2016); *See also*, Karl B. Tegland, *Courtroom Handbook on Washington Evidence*, § 901.17 (Vol. 5D. 2015-2016) (stating that ER 901(b)(10) serves as a guideline for the authentication of electronic communications including text messages).

In *State v. Young*, 192 Wn. App 850, 852-3, two defendants used text messages to direct two women in prostitution activities. Defendants' phone numbers were stored in the women's phones under the aliases, "Y.G." and "Papi." *Id.* at 853. Defendants argued on appeal that the trial court abused its discretion when it found the State presented sufficient evidence to authenticate that the texts sent under the aliases originated from the

defendants. *Id.* at 854. This Court held the trial court acted reasonably and did not abuse its discretion because the text message recipients had personal knowledge that the messages were sent by defendants using an aliases and the context of the messages confirmed that personal knowledge. *Id.* at 858.

In this case, defendant argues the State failed to conclusively prove defendant was the sender of the text messages. Brief of Appellant at 14. Defendant fails to acknowledge that the proponent of the evidence is not required to conclusively prove the evidence is what it purports to be. It is only necessary to present sufficient proof to allow a reasonable fact finder to conclude the evidence proffered is authentic. *State v. Magers*, 164 Wn.2d at 181. To prevail under this standard, defendant must show no reasonable inference can be drawn from the evidence to support admissibility. Several inferences support the authentication of the text messages, therefore the trial court properly admitted them.

The trial court properly exercised its discretion when it ruled sufficient proof existed to allow a reasonable fact finder to conclude exhibits 41 and 42 were authentic text messages exchanged between defendant and his aunt, Ms. Silvernail. The State presented testimony showing Ms. Silvernail possessed personal knowledge that of the two phone numbers used in the text exchange one was hers, the other belonged to defendant. Further, the substance and context of the messages corroborate defendant was the other party in the text exchange.

Defendant's father provided Ms. Silvernail with defendant's phone number after she requested it following her discovery of defendant's backpack. 2RP 107. A reasonable fact finder could conclude defendant's father, who had been with defendant a few days prior, had an accurate phone number for his son and provided it to his sister, the defendant's aunt, so she could contact him about his belongings. Therefore, it was reasonable to conclude the phone number Ms. Silvernail used was an accurate contact number for defendant.

Ms. Silvernail called defendant using the number provided and reached his voice mail. 2RP 108. Defendant responded to a phone call from Ms. Silvernail, his aunt, with a text message asking "Whos this[?]" Ms. Silvernail responded with "Your aunt", informed defendant that she had found the backpack, and directed him to come retrieve the bag before she informed law enforcement. 2RP 108; Ex. 41, 42. Defendant's answer, suggesting he hid the backpack too well to be found and claiming he would retrieve it, allows a reasonable fact finder to determine defendant was the sender of the text messages. Defendant's response reveals that he had knowledge that he left a bag at his aunt's house, and his claim he would recover the bag suggest he knew the location of the house. If a party without knowledge of a hidden backpack at a particular aunt's home was responding to Ms. Silvernail, a reasonable fact finder would expect that party to question the premise of the text message.

Defendant contends his testimony denying knowledge of the text message conversation and the phone number in question should defeat the admission of the messages. On the contrary, such testimony goes to the weight placed on the text messages by the fact finder. Deference is given to the trier of fact in making determinations about the persuasiveness of evidence presented at trial. Const. art. I, §21; *State v. Furth*, 5 Wash.2d 1, 104 P.2d 925 (1940)(“Courts cannot trench on province of jury upon questions of fact under [Const. art. I, §21].”); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). Therefore, the court properly admitted the text messages as evidence.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED OTHER SUSPECT EVIDENCE BECAUSE NO NON-SPECULATIVE EVIDENCE OR OTHER FOUNDATION WAS PRESENTED TO SHOW SOMEONE OTHER THAN DEFENDANT COMMITTED COUNT XII.

While a defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible, “the constitutional right to present a defense is not unfettered.” *State v. Rehak*, 67 Wn. App 157, 162, 834 P.2d 651 (1992). Washington courts have long held that “before a defendant can introduce evidence connecting another person with the crime charged, a proper foundation must be laid.” *State v. Mak*, 105 Wn.2d 682, 716, 718 P.2d 407 (1986).

Admission of other suspect evidence requires a “train of facts or circumstances” or other proof that creates a clear, non-speculative link between another suspect other than defendant and the crime. *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Franklin*, 180 Wn.2d at 380. In addition to demonstrating a combination of motive, ability, and opportunity to commit the crime, defendant must show that the third party intended to act in furtherance of the crime. *State v. Streizheus*, 163 Wn. App 820, 830, 262 P.3d 100 (2011); *State v. Rehak*, 67 Wn. App at 163. “Remote acts, disconnected and outside of the crime itself, cannot be separately proved [to establish other suspects with the commission of a crime].” Evidence simply establishing a suspicion that another person committed a crime is inadmissible because it is more prejudicial than probative. *State v. Franklin*, 180 Wn.2d 371, 380, 325 P.3d 159 (2014). A trial court’s decision to exclude evidence is reviewed for abuse of discretion. *State v. Perez-Valdez*, 172 Wn.2d 808, 814, 265 P.3d 853 (2011). Abuse of discretion occurs when the court exercises its discretion on “untenable grounds or for untenable reasons.” *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27, 30 (2012).

Here, defendant wished to introduce as evidence speculative statements connecting Daniel Espinoza with the defendant’s crimes. IRP 7-12. Defendant wished to introduce statements of Tina James who would

have claimed he received mail at her address and she then gave the mail to Mr. Espinoza to deliver to defendant. CP 57-60; 1RP 7-8. Defense presumably intend to argue that Espinoza then put these documents in the backpack without defendant's knowledge. Defendant did not present any non-speculative evidence supporting this theory or linking Espinoza with the backpack or documents found in Ms. Silvernail's garage. No documents in Mr. Espinoza's name —whether checks, financial statements, credit cards, mail, or otherwise— were found in the backpack. *See*, 3RP 159-250.

Because defendant did not provide any non-speculative connection between Mr. Espinoza, Ms. James, and the documents the trial court properly exclude the speculative suspect evidence.

4. THE RECORD DOES NOT SUPPORT DEFENDANT'S CLAIM OF JUROR MISCONDUCT.

The party who asserts juror misconduct bears the burden of showing that the alleged misconduct occurred. *State v. Hawkins*, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). Substantial deference is due the trial court's exercise of its discretion in handling situations involving potential juror bias or misconduct. *See, Hawkins*, 72 Wn.2d at 567 (holding that trial court did not abuse its discretion); *Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir. 2003); *United States v. Aiello*, 771 F.2d 621, 629 (2d Cir. 1985); *United States v. Webster*, 750 F.2d 307, 338 (5th Cir. 1984), *cert. denied*, 471 U.S.

1106, 105 S. Ct. 2340, 85 L. Ed. 2d 855 (1985), *United States v. Kelly*, 722 F.2d 873, 881 (1st Cir. 1983), *cert. denied*, 465 U.S. 1070, 104 S. Ct. 1425, 79 L. Ed. 2d 749 (1984). Moreover, the determination of whether misconduct has occurred lies within the discretion of the trial court. *State v. Havens*, 70 Wn. App. 251, 255-56, 852 P.2d 1120, *review denied*, 122 Wn.2d 1023 (1993).

There is nothing in the record to substantiate any juror misconduct. Following the verdict and dismissal of the jury, defense counsel informed the trial court that a friend of defendant present in the gallery claimed to have seen Juror Number 11 leaving a casino under the influence of alcohol the morning of the verdict. 6RP 566-7. Nothing in the record corroborates Juror 11's presence at a casino that morning. *Id.* There were no reports from other jurors or indication from courtroom observations that Juror 11 was intoxicated or incapacitated. *Id.* The allegation against Juror 11 is a bare, unsupported, unsubstantiated claim made by defendant's friend. The trial court properly determined no misconduct occurred and nothing in the record supports disturbing that decision. 6RP 567.

5. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL'S REPRESENTATION WAS OBJECTIVELY REASONABLE AND NO PREJUDICE RESULTED.

To demonstrate ineffective assistance of counsel, a defendant must show that: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong “*Strickland* test” from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The burden is on the defendant alleging ineffective assistance to show deficient representation under the *Strickland* test based on the record below. *Strickland*, 466 U.S. at 667-68; *McFarland*, 127 Wn.2d at 335; *In re Davis*, 152 Wn. 2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). In the instant case, the defendant alleges that defense counsel was ineffective for failing to move for a mistrial after an unsupported allegation of juror misconduct was made. Brief of Appellant at 26.

There is a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335; *State v. Brett*, 162 Wn.2d 136, 198, 892 P.2d 29 (1995). A defendant must rebut this presumption by showing that counsel's mistakes "so upset the adversarial balance", *Kimmelman*, 477 U.S. at 374, that the trial was unfair and the verdict unreliable. *Id.* See also, *Strickland*, 466 U.S. at 693. Only in the most egregious circumstances does counsel's failure to object constitute ineffectiveness of counsel that justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

The defendant does not meet his burden under the first prong of the *Strickland* test, as he failed to show counsel's representation was unreasonable based on the record on review. As noted above, nothing in the record substantiates a claim of juror misconduct. Counsel cannot be deemed ineffective for failing to make a baseless motion.

The *Strickland* test also requires the defendant to show the prejudice resulted from counsel's deficient representation to establish a valid ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687.

Prejudice means there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). The defendant must show that the proceeding would have had a different outcome, but for counsel's deficient representation. *McFarland*, 127 Wn.2d at 337; *See also, Strickland*, 466 U.S. at 687. The failure of a defendant to show either deficient performance or prejudice defeats his claim. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

Defendant has failed to show that a different result would have occurred even if counsel's representation was deficient. The trial court heard the baseless allegations of juror misconduct and took no action, finding there was nothing to support those allegations. 6RP 567. The court would have been unlikely to reach a different result if defendant's contention had come as a motion. Therefore, defendant has failed to demonstrate prejudice occurred from counsel's decision not to make an unfounded motion.

D. CONCLUSION.

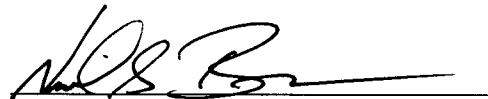
For the above reasons, the State respectfully requests the Court decline to review defendant's challenges and affirm his convictions on all counts.

DATED: August 9, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



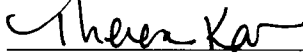
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298



Neil S. Brown
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~PS~~ e-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.

8.10.16 
Date Signature

PIERCE COUNTY PROSECUTOR

August 10, 2016 - 11:43 AM

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