No. 33987-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent,

v.

SHANE SAYER MORGAN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITTITAS COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00072-1

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

Maureen Webb had a Chase Bank credit card. (VRP 89-90, 96). On June 11, 2014, Maureen let her teenage daughter Elizabeth Webb use this credit card to purchase gas for her car. (VRP 90, 9-97). Elizabeth left work around 5:30 or 6:00 pm, stopped and purchased gas, and went home.

(VRP 97-98, 100).

Maureen later received a text message from Chase Bank fraud protection, asking if she made a purchase at Fred Meyer in Ellensburg. (VRP 90-92, 102). Maureen then contacted Elizabeth, who informed Maureen she did not have the credit card. (VRP 91, 97). Elizabeth had not gone to Fred Meyer in Ellensburg. Elizabeth remembered putting the card in her wallet, and thought either she dropped the card at the pump or someone entered her car and got it; but she did not give the defendant or Mr. Snyder permission to use the card at any time. (VRP 98-99). Maureen called the police to report the credit card as stolen. (VRP 92-93). Maureen did not make any of the charges on the date in question, nor did she give the defendant or Mr. Snyder permission to use her card. (VRP 93-95)

City of Cle Elum Police Officer Jennifer Rogers worked with Maureen to obtain records for Maureen's credit card from Chase Bank. (VRP 102 – 104). From these records, Officer Rogers identified two approved transactions and two declined transactions at Fred Meyer. (VRP 108-109). He first transaction was the purchase of two drinks for $4.61 at a self-checkout kiosk; and the second was a purchase of clothing and shoes for $538.92 from a cashier. The declined purchases were both for an attempted purchase of an iPad for $538.92. (VRP 115-119, 139-140, 142, 181-182). Officer Rogers requested and received surveillance video from Fred Meyer for the four transactions. (VRP 109-111).

Fred Meyer Loss Prevention Specialist Perry Lomax provided Officer Rogers with the surveillance footage. (VRP 140-141). In retrieving the footage, Lomax was able to track the defendant and Mr. Snyder together throughtout the store. (VRP 141). He tracked the two men through the apparel department, through the main part of the store without splitting up, through the cold beverage coolers, and through the photo-electronics department. (VRP 142, 154-155, 160).

The surveillance video of the first transaction showed the defendant and Joshua Snyder at a self-checkout kiosk. M. Snyder scans two beverages, slides the card, and the defendant is shown pushing buttons to complete the transaction. Then each grab one of the drinks and walk away. (VRP 111-112).

The surveillance video of the second transaction shows Mr. Snyder and the defendant purchasing clothing and shoes at a check out area; and whiled the defendant does not help with the check out process because it is not self checkout, he is close to the check out counter. (VRP 112).

Officer Rogers interviewed Mr. Snyder during her investigation, and that interview was recorded. During the interview, Mr. Snyder indicates that he isn't friends with the defendant, and that he doesn't really remember going shopping with the defendant, doesn't remember anything about the card, and offers general denial of the events, including denying that the defendant was involved. (VRP 122-132).

The defendant was charged as a principle or accomplice via an amended information of 16 counts: Theft in the Second Degree (Count 1); Identity Theft in the Second Degree (Counts 2,5,7,9,11,13,15); Theft in the Third Degree (Counts 3, 4); Attempted Theft in the Third Degree (Counts 6,8,10,12,14,16). (CP 303-307).

The case proceeded to jury trial. (VRP 51-324). The witnesses testified to the events as stated. Mr. Snyder testified at trial that he found the card sitting on top of a gas pump and took the card for his own use. (VRP 175-177). Mr. Snyder also testified that he went and picked up the defendant and hung out. He also testified that the defendant did not know the credit card was stolen and that it was a random occurrence that they went to Fred Meyer, that it was the one and only time they had ever been shopping together. He testified he had been friends with the defendant for about ten years and they would hang out a couple times a year. (VRP 170-175, 177-181, 197, 199). He admitted that he purchased two drinks at the self checkout kiosk and that the defendant assisted him with the check out, but that he couldn't remember why he needed assistance. (VRP 181-182, 189, 197, 199, 201). He testified that himself and the defendant were shopping throughout the store together, and that they were together when the clothes and shoes were purchased with the credit card. (VRP 183, 197).

During the jury instruction conference, the State discussed an

amendment to the information to include the alternate means. The court gave the to convict instruction for the alternate means of committing theft. (VRP 234).

The defendant was convicted of counts 1-8 and found not guilty of counts 9-16. (RP 319-320).

At sentencing, the State argued that the convictions were not the same criminal conduct. The sentencing court heard argument, and the following day issued a ruling that indicated the felony convictions were not the same criminal conduct, stating "each use of the credit card was a distinctive act that furthered a different, distinct criminal purpose." (CP 590).

The court imposed a sentence of 57 months confinement and 12 months of community custody. (CP 551-552, 591). The judgment and sentence includes the notation "combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. (CP 552).

The defendant timely filed this appeal.

C. ARGUMENT

1. There was sufficient evidence to convict the Defendant.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the jury's verdict, any rational jury could find the essential elements of a

crime beyond a reasonable doubt." *State v. McCreven,* 284 P.3d 793, 809, 170 Wn.App.444 (2012) (emphasis added) (citing *State v. Johnson*, 159 Wn.App. 766, 744, 247 P.3d 11(2011) (internal citations omitted).

A sufficiency review is a limited inquiry which addresses whether "the governement's case was so lacking that it should not have even been submitted to the jury." *Burks v. United States*, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed 2d 1(1978). A narrow sufficiency review does not override the jury's role concerning how the jury weighs the evidence or what inferences they draw from evidence. *Musacchio v. United States*, 577 U.S. _____, 136 S. Ct. 709, 193 L.Ed.2d 639 (2016). The Supreme Court outlines that a reviewing court on a sufficiency of the evidence review has a narrow role, where they make a "*limited* inquiry tailored to ensure that a defendant receives the minimum that due process requires: a 'meaningful opportunity to defend' against the charge against him and a jury finding of guilt 'beyond a reasonable doubt; and that a "sufficieny challenge is for the court to make a 'legal' determination whether the evidence was strong enough to reach a jury at all" *Id.* (emphasis added) (quoting *Jackson v. Virginia*, 443 U.S. 307, 314-319, 99 S.Ct.2781, 61 L.Ed. 2d 560 (1979)).

Washington case law follows suit. *State v. Green*, 94 Wn. 2d 216, 221, 616 P.2d 628 (1980) explains that the job of the court when conducting a sufficiency review is not to "reweigh the evidence and substitute judgment" but rather "because [the jury] observed the witnesses

testify first hand, we defer to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given to the evidence."

All reasonable inferences that could be made from the evidence "must be drawn in favor or the verdict and interpreted strongly against the defendant." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The "jury is the sole and exclusive judge of the evidence." *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

When conducting a sufficiency of the evidence review, the only question should be if there was enough evidence to send to the jury; it is not the job of the reviewing court to make determinations on the evidence. See *State v. McCreven*, 170 Wn.App.444, 284 P.3d 793(2012); *State v. Johnson*, 159 Wn.App. 766, 247 P.3d 11(2011); *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Bencivenga*, 137 Wn.2d 703, 974 P.2d 832 (1999); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Walton*, 64 Wn.App.410, 824 P.2d 533 (1992); *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979).

a. There was sufficient evidence to support convictions for Theft in the Second Degree (count 1)

A person is guilty as an accomplice if, "with knowledge that it will promote or facilitate the commission of a crime, he solicits, commands, encourages, or requests the person to commit it; or aids or agrees to aid

such other person in planning or committing it" RCW 9A.08.020(3)(a).

The to convict instruction for Theft in the Second Degree as instructed in this case are as follows:

1) That on or about June 11, 2014, the defendant
   a. Wrongfully obtained or exerted unauthorized control over property of another; or
   b. By color or aid of deception, obtained control over property of another; or
   c. Appropriated lost or misdelivered property of another; and
2) That the property was an access device
3) That the defendant intended to deprive the other person of the access device; and
4) That this act occurred in the State of Washington (CP 336)

There was no evidence that the defendnat was not present when the card was obtained. Mr. Snyder did testify that he picked up the defendant after he took the credit card; however, it is up to the jury to determine the credibility of a witness.

Further, it was Mr. Snyder's testimony that the defendant did not know he had the card. During direct examination, it was the clear the State was directing his questions to attach the credibility of this testimony. The State asked how long Mr. Snyder and the defendant had been friends – to which Mr. Snyder answered roughly ten years (VRP 171). This was different than what Mr. Snyder told Officer Rogers during his initial interview. Following up, the State asked Mr. Snyder what kinds of things they did together when they hung out, and specifically how many times in that ten year friendship they had ever gone shopping together – to which

Mr. Snyder answer "once." (VRP 172). The night they went to Fred Meyer and used Maureen Webb's credit card. Mr. Snyder went on to testify that he just randomly decided to go pick up the defendant and they randomly decided to go to Fred Meyer and shop together, even though they had never done that before, and that the defendant didn't know the card wasn't his.

A sufficiency review is not intended to re-weigh the evidence, to resolve conflicting testimony, to evaluate credibility of witnesses, or to make decisions regarding the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-416, 824 P.2d. 533 (1992). Rather, the jury is the "sole and exclusive judge of the evidence." *State v. Johnson*, 159 Wn.App.766 at 774.

Here, the jury clearly could have decided that Mr. Snyder wasn't credible when he testified that the defendant didn't know about the card and that having the card didn't play a role in determining their decision to go shopping at Fred Meyer.

To exert unauthorized control means "having any property or services in one's possession, custody, or control, and to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto." (CP 314-371; WPIC 79.02). The jury could determine that when the defendant and Mr. Snyder made the decision to use the card they both were exerting unauthorized

control of the card.

b. There was sufficient evidence to support convictions for Theft in the Third Degree theft and Attempted Theft in the Third Degree (counts 3,4,6,8)

"Theft" means:

a) to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
b) by color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
c) to appropriate lost or misdelivered property or services or another, or the vaule thereof, with intent to deprive him or her of such property or services. RCW 9A.56.020(1)

The appellant argues that the defendant could not have committed Theft in the Third Degree or Attempted Theft in the Third Degree because there was no intent to deprive Fred Meyer of the "property or services." The appellant relies on *State v. Graham*, 182 Wn.App. 180, 327 P.3d. 717 (2014), in arguing that the Court of Appeals affirmed the dismissal of "the" charge by the trial court. Importantly, that charge was Trafficking in Stolen Property.

The issue in *Graham* is different than the issue at hand. *Graham* deals with whether or not taking an item from the shelf and then taking it directly to the customer service and claiming it was purchased earlier and asking for a gift card is trafficking in stolen property. That is not analgous to the case at hand. Interestingly, *Graham* specifically states that the defendant's actions amount to theft, and not trafficking in stolen property.

The *Graham* court states that "since the merchandise was not "stolen" when brought to the customer service counter, . . . did not amount to trafficking in stolen property." *Graham* at 185. Further, *Graham* holds that "She did not intend to deprive Walmart of those items; rather, her intent was to obtain their value. Rather than trafficking in stolen property, her actions amount to theft." They reach the same analysis that using that gift card she fraudulently obtained to purchase an item, and then returning the item – still doesn't constitute trafficking in stolen property – but *it does* amount to theft. The concept and analysis that because payment was offered means there was no intent to deprive fails when applying that concept to theft – because the payment was offered fraudulently and without permission, offered for the only intent to obtain the items or value of the items without themselves having to pay for it.

The appellant uses the analogy of purchasing something with stolen cash from a neighbor. That isn't what happened here. Just because fraudulent payment was offered does not meant there was no intent to deprive.

The appellant wrongfully adds "Fred Meyer" to the to-convict instructions, when in reality, the instructions read "wrongfully obtained or exerted unauthorized control over property <u>of another</u> or <u>the value thereof</u> not exceeding $750 in value." (emphasis added) (CP 314-371; WPIC 70.11).

It is not the jury's job to determine who is owed restitution. It was not an element that the jury had to determine that it was the intent to deprive Fred Meyer and only Fred Meyer or the items or value of the items.

The intent of the defendant was to deprive another of the items or the value of the items, because the defendant was offering payment fraudulently.

c. There was sufficient evidence to support convictions for Identity Theft in the Second Degree (counts 2,5,7)

While it is true that "mere presence is not enough for criminal liability" *In re Wilson*, 91 Wn.2d 487, 491-492, 588 P.2d 1161 (1979). But, "to support conviction of a defendant as an accomplice, there must be evidence that he was 'ready to assist' or intended to encourage the conduct of his coparticipant" *State v. Lozier*, 32 Wn. App. 376, 378, 647 P.2d 535 (1982) quoting *In re Wilson* at 491; *State v. Aiken*, 72 Wn.2d 306, 349, 434 P. 2d 10 (1967).

In the case at hand there was testimony and surveillance footage of the defendant helping Mr. Snyder check out by participating in the process and hitting buttons in an effort to assist with the check-out (VRP 160). This is clear evidence that the defendant was "ready to assist." It was not simply mere presence.

There was also testimony that on the surveillance they were

tracked throughout the store together, and specifically Loss Prevention Officer Lomax testified that the two were shopping for mens apparel together, using the same cart, and checking out with one transaction (VRP 160). A jury could determine on this testimony that the two were acting together.

Again, it is not the reviewing Court's duty to reweigh the evidence and substitute any judgment for that of the jury. *State v. Green,* 94 Wn.2d 216 at 221, 616 P.2d 628 (1980). Rather, the jury observed the witnesses testify first hand, viewed the evidence first hand, and it is up to the jury to resolve conflicting testimony, evaluate the credibility of the witneses, and make decisions regarding the persuasiveness and the appropriate weight to be given the evidence. *State v. Walton,* 64 Wn.App. 410, at 415-16.

It is clear the jury did not believe that the defendant did not know the credit card was stolen. It is very strange that Mr. Snyder would need help checking out – that he wouldn't know how to use his own card. They did not find Mr. Snyder's testimony credible – and there was other evidence presented that is sufficient to determine that the defendant was participating.

The defendant was ready to assist when he helped in the transaction, as well as participating in the shopping.

Mr. Lomax testified that he was able to track them together, throughout the store, through the self checkout, the electronics department

where they attempted to purchase an iPad twice, and the clothing department. He specifically said that "it didn't seem like they ever split up" (VRP 160). This testimony, along with the other evidence of participation, supports accomplice liability for all the transactions – the clothing, the self checkout, and the two declined attempted iPad purchases.

2. The court did not err in instructing on alternative means on counts 1, 3, 4, 6, and 8

The defendant correctly points out that "one cannot be tried for an uncharged offense" *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). The analysis behind this concept is that the information must put the defendant on notice of the alternative means of committing the crime. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 309 P.3d 498 (2013).

In the case at hand, the prosecution put the defendant on notice of the alternative means when the discussion to orally amend the information took place during the jury instruction conference.

The State indicated that they wanted to include the alternative means of committing theft in the to convict instructions. (VRP 229). The defense objected, based on the fact they weren't in the information. The State argued about why the alternative means can be given, including requesting to orally amend the information. The Court even commented "we've already had four amendments to the information." (VRP 234). The

Court further commented "we could amend the inromation again" *Id.* Further, the Court decided to instruct on all the alternative means rather than amending the information, even though the State orally indicated they could amend the information.

Because the State sought to orally amend the information based on the evidence that came out during testimony, the defense was properly put on notice that the alternative means of committing the theft were in play. The Court never denied amending the information – there was never a ruling on the amending the information. Instead, the Court gave the full WPIC, which included the alternative means, creating effectively an amended information – because "it's all the same." (VRP 234). The court meant that it was all the same whether the information was orally amended or the instruction was given – because at that point the defendant was on notice.

Because the defendant was on notice, and the State sought to orally amend the information, the jury instructions did not wrongfully instruct on uncharged offenses.

3. The court did not violate the right to a unanimous jury verdict on counts 1,3,4,6, and 8

In an alternative means case, "jury unanimity as to the means used to commit the crime is not required if there is substantial evidence to support each of the alternative means." *State v. Linehan*, 147 Wn.2d 638,

645, 56 P. 3d 542 (2002).

Here, there was substantial evidence that could sustain a finding as to each alternative mean.

The first means is to wrongfully obtain or exert unauthorized control. In this case, the victim never gave anyone permission to use the card, so using the card is exerting unauthorized control.

The second means is by color or aid of deception. Here, the defendant and Mr. Snyder presented the card at Fred Meyer as if it was their own. That is deception, because they were deceiving in the fact that they were pretending that they had the right to use the card when they did not. Here, the cashiers relied solely on the deception that the credit card was their own card to use – otherwise, the purchase would not have been allowed. If the defendant had attempted to buy something at Fred Meyer, but indicated it was not his card, he just found it, the purchase would not have been allowed. The deception was relied upon in order to allow the transactions to be completed.

Third and finally, appropriating lost or misdeliverd property of another. Here, that is exactly what Mr. Snyder testified that he did – that he found the card at the gas station and used it.

Because there is substantial evidence to convict on all three alternative means, a unanimity instruction is not required. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

4. The court did not violate the right to a unanimous jury verdict by failing to give a unanimity instruction for Identity Theft in the Second Degree

"An alternative means crime is one that provide[s] that the proscribed criminal conduct may be proved in a variety of ways." *State v. Butler*, 194 Wn.App. 525, 528, 374 P.3d 1232 (2016) quoting *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010); *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). There is no bright line rule for making the determination of whether or not a crime is considered an alternate means crime. *State v. Butler* at 528. "Merely stating methods of committing a crime in the disjunctive does not mean that there are alternative means of committing a crime. *Id.* quoting *State v. Lindsey*, 177 Wn. App. 233, 240-241, 311 P.3d 61 (2013).

Identity Theft in the Second Degree as charged in count 2, is not considered an alternative means crime. Here the State did not allege any alternate means that the crime was committed, just a continuation of how the act was committed. The to convict instructions for Identity Theft in the Second Degree did not allege alternative means to commit the crime; but rather just that the defendant "knowingly obtained, possessed, transferred, or used a means of identification or financial information of another person" (CP 314-371; WPIC 131.06).

State v. Butler is on point with determining this issue, and holds

"identity theft is not an alternative means crime, and therefore the trial court did not err by not issuing a unanimity instruction." *State v. Butler* at 530.

5. There was no ineffective assistance of counsel

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both that there was deficient performance, as well as the deficient performance prejudiced the defendant. *State v. Cienfuegos*, 144 Wn. 2d 222, 226, 25 P.3d 1011 (2011). The defendant must show that "but for the counsels deficient performance, there is a 'reasonable probability' that the outcome would have been different. *Strickland v. Washington,* 466 US 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish that performance was deficient, a defendant must show "that the representation fell below an objective standard of reasonableness under professional norms." *State v. Townsend*, 142 Wn.2d 838, 843-844, 15 P. 3d 145 (2001).

Trial strategy and tactical decisions cannot serve as the only basis for a claim of ineffective assistance of counsel. *State v. Grier*, 171 Wn. 2d 17, 33, 246 P. 3d 1260 (2011); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Here, the defense counsel's failure to object to a statement that is otherwise hearsay and would have been inadmissible could easily have been intended as part of the strategy at trial, and a strategy that is

reasonable.

Mr. Snyder was a witness for the State, but was testimony that the defenst pointed to to show that the defendant was not guilty. Mr. Snyder testified that the defendant didn't know that the credit card was stolen, and had no idea that it wasn't Mr. Snyder's card. He testified that the only reason the defendant helped him with the self check out was because he wasn't familiar with it. Mr. Snyder never implicates the defendant during his trial testimony - just as he never implicates the defendant in the first interview.

The defense could have intended to use the hearsay statements to their advantage – pointing out that Mr. Snyder never implicated the defendant even before he was charged.

Further, the defendant fails to show how the hearsay statements that were not objected to were caused an outcome that deprived the defendant of a fair trial. *Strickland*, 466 US at 687.

There is no showing that if the jury had not heard the statement of Mr. Morgan that there was any substantial likelihood of a different result – especially considering that Mr. Snyder testified substantially the same to his interview. Further, if Mr. Snyder had not testified substantially the same – then the interview would have been admissible as impeachment evidence as a prior inconsistent statement. ER 613. The appellant states that it was improperly admitted prior to Mr. Snyder's testimony; however,

it could have been played after his testimony. This fact shows that not objecting by defense counsel could not have created a different outcome – as it would have been admissible after Mr. Snyder testified, both as a prior inconsistent statement and to go towards credibility. However, as previously stated, the police interview could have worked in the favor of the defendant if the jury belived Mr. Snyder.

Without showing that trial counsel was deficient and that allowing the police interview to be played was a trial tactic and that the deficient performance created a prejudice, there cannot be ineffective assistance of counsel.

6. The court did not err in failing to count Counts 5 and 7 as the same criminal conduct when calculating the offender score.

An appellate court will only reverse a sentencing court's decision if there has been a clear abuse of discretion or misapplication of the law. *State v. Porter*, 133 Wn. 2d 177, 181, 942 P.2d 974 (1997).

The sentencing court here determined that the two crimes were not the same course of conduct because "each use of the credit card was a distinctive act that furthered a different, distinct criminal purpose." (CP 590)

Here, it was clear that the sentencing court took into account the applicable law, and after thought, decided that it was not the same criminal conduct. The sentencing court specifically indicated that the subsequent

use of the card after it had been declined was different. The sentencing court had the benefit of listening to all the evidence presented at trial. The sentencing court clearly believed that it did not meet the requirements for the same criminal conduct, and was able to articulate those reasons.

The appellate court will not disturb a trial courts ruling absent of a clear abuse of discretion. *State v. Stenson*, 132 Wn. 2d 668, 940 P.2d 1239 (1997). A "trial court abuses its discretion if its ruling is manifestly unreasonable or based upon untenable grounds or reasons." *Id.*

Here, the sentencing court indicated that there was a distinct criminal purpose when using the credit card, and that each use was a distinctive act. That ruling is not based on untenable grounds; therefore there is no abuse of discretion and the ruling should not be disturbed.

7. Did the trial court impose a total term of confinement and community custody that exceeds the statutory maximum?

The state agrees that the total term of confinement and community custody should not exceed the statutory maximum. The court sentenced the defendant to the high end of the range, 57 months, and the mandatory 12 month community custody. The judgement and sentence indicates that the combined term of confinement and community custody cannot exceed the statutory maximum, a *Brooks* notation. *In re Personal Restraint of Brooks*, 166 Wn. 2d 664, 674, 211 P.3d 1023 (2009). Under *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012) the court could have reduced the period of community custody; or the sentencing court could impose 12 months of community custody or the period of

earned release, whichever is shorter, as allowed by *State v. Bruch*, 182 Wn.2d 854, 346 P.3d 724 (2015); as DOC has the right to supervise a term of community custody in lieu of earned early release. *Bruch* 182 Wn.2d at 870.

8. Should the Court impose costs on appeal?

The state defers to the Court of Appeals on whether or not costs on appeal should be assigned to the defendant, in light of *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) and the inquiry of his ability to pay and the fact that the defendant receives social security benefits.

D. CONCLUSION

Because the only question that should be answered when conducting a sufficiency of the evidence review is whether or not there was enough evidence to send to the jury, convictions for counts 1 – 8 should be upheld on a sufficency of the evidence basis. There was clearly enough evidence presented, and it is not the job of the reviewing court to substitute their judgment for that of the jury.

The court did not err in instructing the jury on alternative means of committing the crimes of Theft in the Second Degree, Theft in the Third Degree, and Attempted Theft in the Third Degree as charged in counts 1,3,4,6, and 8. The defense was on notice when the State discussed amending the information due to the evidence presented at trial. The convictions should be upheld.

No unanimity instruction was required for Theft in the Second Degree, Theft in the Third Degree, and Attempted Theft in the Third Degree as charged in counts 1,3,4,6, and 8. There was substantial evidence that could support a conviction for all three alternate means. The convictions should be upheld.

No unanimity instruction was required for the crime of Identity Theft in the Second Degree, because Identity Theft in the Second Degree is not an alternative means crime. This conviction should be upheld.

The defendant did not receive ineffective assistance of counsel. The decision to allow the police interview of Mr. Snyder was clearly a trial tactic; as well as the defendant has failed to show that there was any deficient performance that prejudiced the defendant.

The trial court did not err in finding that counts 5 and 7 were not the same criminal conduct. The court listened to argument and ruled the following day, clearly taking relevant argument and caselaw into account, and his decision was not an abuse of discretion.

The trial court did not wrongfully impose a term of confinement when combined with the term of community custody exceedeed the stautory maximum. The court did include a *Brooks* notation; however, the Court may need to include language that clarifies the judgement and sentence. This court should remand for clarification, to allow the court to

either sentence to a term of 12 months or period of early release, whichever is shorter, or to simply shorten the term of community custody.

This court should determine if costs on appeal should be imposed in accordance with *Blazina.*

Respectfully submitted this 3rd day of October, 2016.

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PROSECUTING ATTORNEY

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PROOF OF SERVICE

I, Dustin Davison, do hereby certify under penalty of perjury that on October 3rd, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the cover page for the Respondent's Brief:

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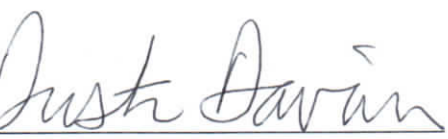

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