73798-8

FILED
May 12, 2016
Court of Appeals
Division I
State of Washington

No. 73798-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARGARET COLSON,

Appellant.

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

APPELLANT'S OPENING BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington Court of Appeals Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

A. INTRODUCTION

The law of the case doctrine requires the State to prove all the requirements in a "to-convict" instruction. Under the "to-convict" instructions for identity theft in this case, the State was required to prove that the offenses occurred on or about a particular date or during a particular date range. The State was also required to prove the defendant committed the first element of identity theft as a principle rather than as an accomplice. Because the State failed to prove that the first two counts of identity theft were committed on the requisite date and failed to prove that the defendant herself committed the first element of the identity theft on the remaining seven counts, all the convictions for identity theft should be reversed. The conviction for possession of stolen mail should also be reversed because the State failed to prove that the defendant "disposed of" stolen mail, a distinct alternative under the "to-convict" instruction.

B. ASSIGNMENTS OF ERROR

1. Under the law of the case doctrine and in violation of due process as guaranteed by article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, sufficient evidence does not support the convictions for identity theft (counts 1, 2, 3, 5, 6, 7, 8, 9, and 10).

2. Under the law of the case doctrine and in violation of the defendant's right to a unanimous verdict, the jury was not instructed it had to be unanimous on the alternative means of committing possession of a stolen mail (count 4), and sufficient evidence does not support one of the means.

3. Without a requirement that it must find the defendant had the requisite knowledge, the jury erroneously found the defendant had committed "major economic offenses" as to counts 5 through 10.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State must prove all requirements in a "to-convict" instruction, including the date of the crime. Counts 1 and 2 required proof that the crimes were committed on or about February 16, 2012. The State proved that these two counts were perpetrated not on or about this date, but a couple of weeks earlier. Should these two counts be reversed for insufficient proof?

2. To prove identity theft, the State must prove that the identifying information belongs to a real person. On count 2, the State did not bring to court the person to whom the identifying information was purported to belong. The State only produced evidence of a check with the person's name. Should count 2 be reversed for insufficient proof?

3. When the jury is not properly instructed on accomplice liability, the State may assume the burden of proving principal liability. The fourth element in the "to-convict" instruction for count 7 used the language "the defendant or an accomplice." This language was not used in any of the other elements of this instruction or in any of the other "to-convict" instructions. Instead, they used the language, "the defendant." Excluding element 4 of count 7, did the State assume the burden of proving that "the defendant" committed the elements of the offenses as a principal rather than as an accomplice? Should counts 3, 5, 6, 7, 8, 9, and 10 be reversed because the State failed to prove that the defendant committed these counts as a principal?

4. Stolen mail was found in a vehicle driven by the defendant. In the "to-convict" instruction on possession of stolen mail, the State was required to prove the defendant "knowingly received, retained, possessed, concealed, or disposed of" stolen mail. When required by a "to-convict" instruction, these five various ways of committing the offense must be supported by sufficient evidence in order to uphold the verdict. Should this conviction be reversed because there was insufficient evidence that the defendant "disposed of" stolen mail?

5. The "major economic offense" aggravating factor must be based on the defendant's own conduct. An aggravating factor cannot be

applied to an accomplice unless the accomplice's own conduct or knowledge of the principle's conduct informs the aggravating factor. The jury was not required to find the defendant had the requisite form of knowledge in determining counts 5 through 10 were major economic offenses. Should the language in the judgement and sentence that the jury found the "major economic offense" aggravator as to counts 5 through 10 be stricken?

D. STATEMENT OF THE CASE

In late 2011, Shawn Schulze and his boyfriend, Vikram Chopra, were homeless. 7/20/15RP 151-52, 157; 7/21/15RP 81, 83. The couple were drug users and had lost their jobs. 7/20/15RP 152, 159; 7/21/15RP 83, 128. To make money and further their drug habits, they would steal merchandise and sell it on the streets. 77/21/15RP 58-59, 79.

Mr. Schulze was friends with Margaret Colson, whom he had met sometime around 2010 or 2011. 7/21/15RP 54, 78. Ms. Colson and her husband invited Mr. Schulze and Mr. Chopra into their home shortly before Christmas 2012. 7/20/15RP 157; 7/21/15RP 83. The couple had been expelled from a hotel and had nowhere to go. 7/21/15RP 83. As Mr. Chopra testified, Ms. Colson and her husband "pretty much rescued us." 7/21/15RP 53. Mr. Chopra and Mr. Schulze lived with Ms. Colson for about five months. 7/20/15RP 158.

While living at Ms. Colson's home, the three did drugs together. 7/20/15RP 160; 7/21/15RP 82. To make money and further their drug habits, they committed financial crimes. 7/20/15RP 164; 7/21/15RP 80. To obtain people's financial information, they would drive around neighborhoods and steal people's mail. 7/20/15RP 165. The information was then used to commit crimes and make money. 7/20/15RP 167.

One method used to make money was to make orders over the phone at Nordstrom's using people's Nordstrom's account numbers acquired from the mail. 7/20/15RP 168-169. When making phone orders, the person making the call would be of the same gender as the account holder. 7/21/15RP 97. He or she would tell the person that someone else would be picking up the merchandise, such as "my nephew, Vic; or, my cousin, Shawn; or, my Aunt Margaret – or something like that." 7/20/15RP 169. After the merchandise was picked up, they would return the merchandise for cash. 7/20/15RP 170. Mr. Schulze's and Mr. Chopra's friend, Kelsey Petersen, participated in the scheme and lived at Ms. Colson's house for about a couple of weeks. 7/20/15RP 161-62; 7/21/15RP 60, 84, 131.

Besides having a male impersonate a male and a female impersonate a female, there was no coordination and no one was assigned

particular roles. 7/21/15RP 132. As Mr. Schulze testified, it was a "Free for all, chaos." 7/21/15RP 132.

On the morning of February 16, 2012, Mr. Schulze and Ms. Colson were out stealing mail. 7/21/15RP 78, 86. A resident in a Kirkland neighborhood saw them and called the police, providing the license plate number for the vehicle. 7/14/15RP 8-9, 14-15, 23. Shortly thereafter, police stopped the vehicle on the freeway. 7/14/15RP 33. Ms. Colson and Mr. Schulze were arrested. 7/14/15RP 43; 7/21/15RP 79. The vehicle, a Dodge Charger registered to Ms. Colson's husband, was impounded. 7/14/15RP 33, 57, 93.

Police obtained a search warrant for the vehicle. 7/14/15RP 69. Inside, police found mail, debit cards, credit cards, identification cards, and checks in the names of people other than Ms. Colson, Mr. Schulze, and Mr. Chopra. 7/14/15RP 70-91; Ex. 6-17.

On April 10, 2012, Mr. Schulze and Mr. Chopra were out picking up merchandise at a Nordstrom in Bellevue Square Mall that had been fraudulently ordered on the phone. 7/21/15RP 2, 91-92. A man named Melvin Eisenhower was with them. 7/21/15RP 162-63. They were using the Dodge Charger, which had been returned. 7/21/15RP 4. Security personal working in the parking garage became suspicious and called the police. 7/15/15RP 69-70, 83, 85. As the vehicle was leaving the parking

garage, police stopped the vehicle on suspicion of either theft or vehicle prowl. 7/15/15RP 11; 7/20/15RP 7-10. All three men were arrested. 7/15/15RP 26-27.

Mr. Chopra spoke to the police and gave incriminating statements. 7/21/15RP 11. In an effort to protect himself and his boyfriend, Mr. Chopra did not take full responsibility for his actions and implicated primary responsibility to Ms. Colson. 7/21/15RP 11, 57-58. Mr. Schulze also spoke to the police and gave incriminating statements. 7/21/15RP 96.

Mr. Schulze and Mr. Chopra moved out of Ms. Colson's home around early to mid-May 2012. 7/20/15RP 158. The departure was not amicable. 7/21/15RP 41, 121-22. Mr. Chopra and Mr. Schulze continued to commit financial crimes afterward, leading to their incarceration. 7/20/15RP 144; 7/21/15RP 42, 73-74.

The State ultimately charged Ms. Colson with eight counts of identity theft in the second degree (counts 1-3, 5-6, 8-10), one count of identity theft in the first degree (count 7), and one count of possession of stolen mail (count 4). CP 29-33.[1] The State alleged that counts 5 through 10 were "major economic offenses." CP 31-33. The case went to trial in

[1] The State also charged Ms. Colson with one count of bail jumping (count 11). CP 33. This charge was severed and dismissed without prejudice after trial on the other charges. CP 76; 7/9/15RP 10; 7/29/15RP 16.

July 2015. Mr. Chopra and Mr. Schulze were ordered to testify. 7/20/15RP 141, 144; 7/21/15RP 70, 72. Recordings of two phone calls made by Ms. Colson while she was in jail, which tended to show she was culpable, were admitted. Ex. 25; 7/15/15RP 140-42. The jury convicted Ms. Colson as charged and found that counts 5 through 10 were "major economic offenses." 7/22/15RP 63-68. Ms. Colson appeals.

E. ARGUMENT

1. The State failed to prove that counts 1 and 2 of identity theft were perpetrated on or about February 16, 2012.

a. The State bears the burden of proving all the elements in a "to-convict" instruction beyond a reasonable doubt.

The State bears the burden proving all the elements of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. const. amend. XIV; Const. art. I, § 3. Under the law of the case doctrine, jury instructions not objected to became the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The State assumes the burden of proving all the elements in a "to-convict" instruction, including any added requirements. Id.

"The law of the case is an established doctrine with roots reaching back to the earliest days of statehood." Id. at 101. Hence, in the late 19th

century, the Washington Supreme Court held "whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case. . . ." Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896). The doctrine finds special support in the Washington Constitution, which provides that judges "shall declare the law." Const. art. I, § 16; see id. at 185 (discussing provision in connection with the doctrine).

When reviewing whether the State has met its burden to prove a requirement in a to-convict instruction, the court uses the familiar sufficiency of the evidence standard. Hickman, 135 Wn.2d at 103. The court inquires whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the requirements beyond a reasonable doubt. Id. While inferences are drawn in the State's favor, these inferences must be reasonable and cannot be based on speculation or conjecture. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

b. The State bore the burden of proving that Ms. Colson committed counts 1 and 2 on or about February 16, 2012.

The State alleged that Ms. Colson committed three counts of identity theft in the second degree on or about February 16, 2012. CP 29-

30 (counts 1, 2 and 3). Each of the three charges had different alleged victims. CP 29-30.

Identity theft is a statutory offense and has two degrees:

> (1) 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.
>
> (2) Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.
>
> (3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

RCW 9.35.020.

Consistent with the information, the "to-convict" instructions on the first three counts required proof that Ms. Colson committed the offenses "on or about February 16, 2012." CP 114-16 (Instructions 10-12). Excluding the named victims and the count number, the instructions were identical. CP 114-16. The first instruction reads:

> To convict the defendant of the crime of Identity Theft in the Second Degree, pertaining to Brett Stanewich, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

> (1) That on or about February 16, 2012, the defendant knowingly obtained, possessed, transferred, or used a means of identification or financial information of another person, living or dead;
>
> (2) That the defendant acted with intent to commit or to aid or abet any crime;
>
> (3) That the defendant knew the means of identification or financial information belonged to another person; and
>
> (4) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count 1.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count 1.

CP 114.

Under these instructions, the State bore the burden of proving that these offenses were committed on or about February 16, 2012. See Hickman, 135 Wn.2d at 105 (venue, while not an element of the crime, became a requirement under the law of the case doctrine); State v. Jensen, 125 Wn. App. 319, 326, 104 P.3d 717 (2005) (rejecting State's argument that the charging period need not be proved despite its presence in a to-convict instruction).

c. The evidence was insufficient to prove that count 1 was committed on or about February 16, 2012.

Count 1 concerned Brett Stanewich. CP 114. On February 16, 2012, the police stopped Ms. Colson and Mr. Schulze on a report of mail theft that morning. 7/14/15RP 14, 31, 33. The police arrested them and impounded the vehicle Ms. Colson had been driving. 7/14/15RP 42-43, 57. The police obtained a warrant to search the vehicle. 7/14/15RP 68-69. Under the front passenger seat was a small silver case. 7/14/15RP 80, 93; Ex. 12, p. 1. The case contained debit cards, identification cards, and checks. 7/14/15RP 80-84; Ex. 12, p. 2-24. Some of these cards and checks formed the bases for counts 1 through 3. Ex. 12, p. 1-2, 4-8. Mr. Chopra testified that he, Ms. Colson, and Mr. Schulze kept cards inside of the case and that it was kept in the house or in the vehicle they were driving. 7/21/15RP 37-38.

One of the checks and debit cards, both issued by Bank of America, bore the name of Brett Stanewich. 7/14/15RP 105-07; Ex. 12, p. 4, 8. Concerning the check, Mr. Chopra testified that he deposited it into an Ally bank account he had opened online under the name of Joe Eskridge. 7/21/15RP 30-32. The check was dated **February 5, 2012**. Ex. 12, p. 4. Bank records from Ally show that the check had been deposited electronically on **February 6, 2012**. Ex. 18. p. 4. As for the debit card,

Mr. Chopra testified that it had been used to make purchases, specifically iPads at Macy's, but the timeframe was not elicited. 7/21/15RP 31. Like the check, there was no evidence that it had been used on or about February 16, 2012.

Hence, while the State may have proved that identity theft was perpetrated using Mr. Stanewich's identity in early February 2012, the State did not prove that this occurred on or about **February 16, 2012**.

Any argument from the State that the offense continued to February 16, 2012 should be rejected. The legislature has instructed the unit of prosecution is per each act:

> 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. The unit of prosecution for identity theft by use of a means of identification or financial information is each individual unlawful use of any one person's means of identification or financial information. Unlawfully obtaining, possessing, or transferring each means of identification or financial information of any individual person, with the requisite intent, is a separate unit of prosecution for each victim and for each act of obtaining, possessing, or transferring of the individual person's means of identification or financial information.

RCW 9.35.001. This overruled the Supreme Court's interpretation of the statute, which had held that unit of prosecution was in terms of a particular victim. State v. Leyda, 157 Wn.2d 335, 345, 138 P.3d 610 (2006).

The State may also argue Ms. Colson committed the offense on February 16, 2012 because she was in possession of Mr. Stanewich's identifying information. However, mere possession of person's identifying information is insufficient to prove intent to commit a crime using that information. See Vasquez, 178 Wn.2d at 14-16. In Vasquez, our Supreme Court discussed the proof necessary to infer criminal intent in the context of a challenge to the sufficiency of the evidence supporting a forgery conviction. The court held that the defendant's possession of forged identification cards, together with his statement to a security guard that the cards were his and evidence that the defendant held a job, was insufficient to support the necessary inference of intent to injure or defraud. Id. at 14-18. Similarly, there was no evidence indicating that Ms. Colson, Mr. Chopra, or Mr. Schulze intended to use Mr. Stanewich's identifying information on or about February 16, 2012.

Count 1 should be reversed and dismissed.

d. The evidence was insufficient to prove that count 2 was committed on or about February 16, 2012.

Count 2 concerned "Rafic Farah." CP 115. A check bearing the name of Rafic Farah was found inside the container in the vehicle. Ex. 12, p. 6-7. Mr. Chopra testified that he, Mr. Schulze, and Ms. Colson obtained this check in the mail they had taken. 7/21/15RP 34. The check

had been blank and Mr. Chopra wrote out the information on it and signed it. 7/21/15RP 35. It is dated **February 4, 2012** and written out to "Joe Eskridge" in the amount of $500. Ex. 12, p. 6. It has a signature on the front and back. Ex. 12, p. 6-7. Like the other check, Mr. Chopra deposited the check electronically on **February 6, 2012** into the Ally bank account he had opened in the name of Joe Eskridge. 7/14/15RP 101; 7/21/15RP 34-35; Ex. 12, p. 6-7; Ex. 18, p. 4.

For the same reasons as argued previously, this evidence was inadequate to prove that the offense occurred on or about **February 16, 2012**. Count 2 should be reversed and dismissed.

2. The State failed to prove the identifying information in count 2 belonged to a real person.

Additionally, count 2 should be reversed because the State did not prove that the identifying information belonged to a real person. To commit identity theft, the identifying information must belong to a specific, real person. State v. Berry, 129 Wn. App. 59, 62, 67, 117 P.3d 1162 (2005); State v. Hayes, 164 Wn. App. 459, 482, 262 P.3d 538 (2011). In count 2, the specific person identified was "Rafic Farah." CP 115 (Instruction 11). "Rafic Farah," however, did not testify at trial.

The only evidence offered at trial as to Rafic Farah's existence as a real person was a check. Ex. 12, p. 6. In the upper left hand corner, the check reads:

> RAFIC FARAH
> GENIEVIEVE ATTIE
> 9190 NE 9TH ST.
> BELLEVUE, WA 98004-4841

Ex. 12, p. 6. The check number is 933. Ex. 12, p. 6. The check bears a Chase bank insignia. Ex. 12, p. 6.

Viewed in the light most favorable to the State, this evidence was insufficient to prove beyond a reasonable doubt that "Rafic Farrah" was a real person for two reasons. First, the check might have been forged. The account number might have belonged to another person rather than "Rafic Farrah." See Berry, 129 Wn. App. 66-67 (presented name was fictitious; account number belonged to someone else). Second, even if the check was not altered, the name of "Rafic Farrah" might have been fictitious. In either case, "Rafic Farrah" would not be a "real person." It is purely speculative to conclude that a person is real simply because a name appears on a check.

This evidence can be contrasted with evidence found to be sufficient in Hayes. There, the State also did not call a witness in order to prove that identifying information belonged to a real person. Hayes, 164

Wn. App. at 482-83. However, in that case the identifying information was on a receipt from a Great Clips salon, which was generated through a customer's use of a credit card. Id. at 482-83. The receipt had been stolen from a storage unit and found in the defendant's possession. Id. at 482. Unlike the check in this case, the receipt with the customer's credit card information bore the signature of its owner. Id. at 483. Also unlike this case, the owner of the salon testified about how the receipts were generated. Id. at 482. No one from Chase testified about how the check at issue was generated. Unlike Hayes, it is not reasonable to conclude that the State met its burden to prove the "real person" requirement.

For this additional reason, count 2 should be reversed and dismissed.

3. The State failed to prove that Ms. Colson committed the remaining counts of identity theft as a principal.

a. If the jury is not properly instructed on accomplice liability, the State assumes the burden of proving principal liability.

Criminal liability is the same whether one acts as a principal or as an accomplice. RCW 9A.08.020(1), (2)(c). Accomplice liability is not an element or alternative means of a crime. State v. Teal, 152 Wn.2d 333, 338, 96 P.3d 974 (2004). 'Principal' and 'accomplice' are, however, alternative theories of liability requiring different considerations. RCW

9A.08.020(3) (defining complicity); State v. Jackson, 137 Wn.2d 712, 726-27, 976 P.2d 1229 (1999). Although the State need not charge the defendant as an accomplice in order to pursue liability on that basis, the court must properly instruct the jury on accomplice liability. State v. Davenport, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984).

There are at least two ways to properly instruct the jury on accomplice liability. One way is to simply give a general accomplice liability instruction.[2] Teal, 152 Wn.2d at 339. A second (and preferable) way is to modify the "to-convict" instructions to include the language, "the defendant or an accomplice," where pertinent. See id. at 336 n.3. If the jury is not properly instructed on accomplice liability, the State assumes the burden of proving principal liability under the law of the case doctrine. State v. Willis, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005) (failure to include the phrase "or an accomplice" in instruction on firearm enhancement required the State to prove that defendant himself was armed).

[2] 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (3d Ed).

b. The State assumed the burden of proving that Ms. Colson committed the crimes of identity theft as a principal and not as an accomplice.

The jury was given a general accomplice liability instruction. CP 134. However, the "to-convict" instruction for count 7 (first degree identity theft) used the language "the defendant or an accomplice." CP 120. Specifically, it used this language in the fourth element, requiring that the State to prove:

> (1) That between April 22, 2012 and April 24, 2012, the defendant knowingly obtained, possessed, transferred, or used a means of identification or financial information of another person, living or dead;
>
> (2) That the defendant did so with the intent to commit or to aid or abet any crime;
>
> (3) That the defendant knew the means of identification or financial information belonged to another person; and
>
> (4) That **the defendant or an accomplice** obtained credit or money or goods or services or anything else in excess of $1500 in value from the acts described in element (1); and
>
> (5) That any of these acts occurred in the State of Washington.

CP 120 (emphasis added). Unlike this "to-convict" instruction, none of the other "to-convict" instructions used the language "the defendant or an accomplice." CP 114-19, 123-25.

A jury looking at these instructions would rationally conclude that only element 4 on count 7 could be proven through accomplice liability. Otherwise there would have been no need to include the language. Accordingly, under the law of the case doctrine, the State assumed the burden of proving principal liability on all the counts except for the fourth element of count 7. Willis, 153 Wn.2d at 374-75.

Citing Teal, the State may argue that the general accomplice liability instruction was adequate to permit accomplice liability as to all the counts and as to any element that used the language "the defendant." The problem for the State, however, is that the jury was instructed in one of the "to-convict" instructions with the language "the defendant or an accomplice." Hence, Teal is not controlling. The State assumed the burden of proving principal liability. As detailed below, the State did not meet this burden as to counts 3, 5, 6, 7, 8, 9 and 10.

c. The State did not meet its burden to prove count 3.

The to-convict instructions on second degree identity theft are essentially identical. CP 114-16, 118-19, 123-25 (counts 1-3, 5-6, 8-10). They instructed that the State must prove four elements:

> (1) That [on or about] [between] [date or date range], **the defendant** knowingly obtained, possessed, transferred, or used a means of identification or financial information of another person, living or dead;

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

(3) That **the defendant** knew the means of identification or financial information belonged to another person; and

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

CP 114-16, 118-19, 123-25 (emphasis added).

Count 3 pertained to Joe Eskridge and required proof that defendant committed the crime "on or about February 16, 2012." CP 116. The evidence was insufficient to prove that Ms. Colson committed this offense as a principle on or about February 16, 2012.

The evidence proved that Mr. Chopra opened an Ally bank account in the name of Joe Eskridge. 7/21/15RP 30-32; Ex. 18. He used Mr. Eskridge's name to deposit the two checks recounted earlier. 7/21/15RP 30-35; Ex. 12, p. 4-7. He also obtained a debit card in Mr. Eskridge's name from the bank. 7/21/15RP 36-37; Ex. 9 p.3. Police found this card in a wallet inside the vehicle that Mr. Schulze and Ms. Colson had been stopped in on February 16, 2012. 7/14/15 RP 77; Ex. 9, p. 3. Mr. Chopra testified this wallet probably belonged to Mr. Schulze. 7/21/15RP 39.

Based on this evidence, the State argued that Ms. Colson had committed identity theft through Mr. Eskridge's identifying information on or about February 16, 2012. 7/22/15RP 9-10; CP 178-79. The acts of

opening up the Ally bank account and obtaining a debit card, however, were not proven to have been committed by Ms. Colson. Neither were these acts committed on or about February 16, 2012. Ex. 18.

As for the use of the debit card, exhibit 18 shows that the card was used on February 15 and 16 to make withdrawals and for a purchase. Ex. 18, p. 4. No evidence, however, supports a reasonable inference that Ms. Colson herself made the withdrawals or purchase. It may have been Mr. Chopra or Mr. Schulze. Accordingly, the evidence was inadequate to prove that Ms. Colson committed this offense as a principle on or about February 16, 2012. Count 3 should be reversed and dismissed.

d. The State did not meet its burden to prove count 5.

Count 5 pertained Douglas Rogers and required proof Ms. Colson committed the crime of second degree identity theft as a principle "between March 28, 2012 and April 12, 2012." CP 118. The State failed to prove the first element of the offense: that Ms. Colson "knowingly obtained, possessed, transferred, or used a means of identification or financial information" of Douglas Rogers between the requisite time period. CP 118.

The State proved purchases were made using Mr. Roger's Nordstrom account during this period. Ex. 40 at 16-17; 7/14/15RP 122-

24. The State also proved there were returns made on the purchases in exchange for cash.

The State did not prove that Ms. Colson made any of these purchases. Mr. Chopra and Mr. Schulze testified the purchases at Nordstrom were done over the phone. The caller would impersonate the holder of the account. 7/21/15RP 97. If the owner of the account was male, a male would impersonate the person. 7/21/15RP 97. If the owner of the account was female, a female would impersonate the person. 7/21/15RP 97. Thus, because Mr. Rogers was male, the only reasonable inference is that a male made the purchases over the phone. As for evidence on picking up the merchandise, no evidence indicates that Ms. Colson picked up merchandise purchased from Mr. Rogers' account.

Concerning returns, the State proved that Ms. Colson made one return associated with a purchase that had been made through a gift card. This gift card had been purchased using Mr. Rogers' account. 7/14/15RP 122; 7/20/15RP 89; Ex. 40, p. 16. Using the name "Erika Vandenbos," Ms. Colson made a return on March 29, 2012 and received $304.41 in cash. Ex. 40, p. 17, 19-20; 7/20/15RP 90; 7/21/15RP 14. The State, however, did not prove that she used Mr. Rogers' "means of identification" or "financial information" to do so.

"Means of identification" is defined as:

> information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person, including: A current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; a social security, driver's license, or tax identification number of the individual or a member of his or her family; and other information that could be used to identify the person, including unique biometric data.

RCW 9.35.005(3); accord CP 126. "Financial information" means:

> any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit:
>
> (a) Account numbers and balances;
>
> (b) Transactional information concerning an account; and
>
> (c) Codes, passwords, social security numbers, tax identification numbers, driver's license or permit numbers, state identity card numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

RCW 9.35.005(1); accord CP 127.

Neither a "means of identification" nor "financial information" belonging to Mr. Rogers was necessary for a person to make a return of merchandise purchased under his account at Nordstrom. See 7/20/15RP 64-66. Returns could be made using receipts or the unique item identifier (UII) number connected with the purchase. 7/20/15RP 60-61, 64-65; Ex. 39. But these were not "means of identification" or the "financial

information" of Mr. Rogers. Moreover, the representative from Nordstrom testified that neither a receipt nor a UII was necessary for Nordstrom to accept a return for cash. 7/20/15RP 65. In short, while returning the merchandise in exchange for cash might have satisfied the second element of the offense ("intent to commit or to aid or abet any crime"), this did not satisfy the first element.

Count 5 should be reversed and dismissed.

e. The State did not meet its burden to prove count 6.

Count 6 pertained to John Rubenis and required proof that Ms. Colson committed the crime of second degree identity theft as a principle "between April 25, 2012 and April 26, 2012." CP 119. The State failed to prove the first element of the offense: that Ms. Colson "knowingly obtained, possessed, transferred, or used a means of identification or financial information" of John Rubenis between the requisite time period. CP 118.

The State proved there was a phone purchase made using Mr. Rubenis' account on April 25, 2012. Ex. 40, p. 29; 7/20/15RP 97. Because Mr. Rubenis was a male, the reasonable inference is that a male impersonated him. 7/21/15RP 97. The merchandise was signed for and picked up by Mr. Schulze. Ex. 40, p. 32. While Ms. Colson was present

in the Nordstrom at this time, she did not sign the receipt or pick up the merchandise. Ex. 40, p. 30; 7/21/15RP 16.

As for evidence concerning returns of merchandise purchased using Mr. Rubenis' account, the State proved that Mr. Chopra made one return and attempted to make a second return. Ex. 40, p. 29; 7/20/15RP 102-06; 7/21/15RP 16-18 The State did not prove that Ms. Colson made a return. And even if the State had, this would be insufficient for the same reasons discussed earlier as to count 5.

Count 6 should be reversed and dismissed.

f. The State did not meet its burden to prove count 7.

Count 7 pertained to Janice Conner and, excluding element 4, required proof that Ms. Colson committed the crime of first degree identity theft as a principle "between April 22, 2012 and April 24, 2012." CP 120. The State failed to prove the first element of the offense: that Ms. Colson "knowingly obtained, possessed, transferred, or used a means of identification or financial information" of Janice Conner between the requisite time period. CP 120.

The State proved that purchases were made using Ms. Conner's Nordstrom account on April 22 and April 24, 2012. Ex. 40, p. 34, 37, 39; 7/20/15RP 107, 112-13. While it is possible that Ms. Colson impersonated Ms. Conner on the phone, the State did not prove this.

During this time period, a woman named Kelsey Peterson was involved in working with Mr. Chopra and Mr. Schulze. 7/20/15RP 161-62; 7/21/15RP 21-22, 131. In fact, it was Ms. Peterson and not Ms. Colson who returned merchandise from these sales. 7/20/15RP 109-12; 7/21/15RP 21-22, 112-13; Ex. 40, p. 36-38. Thus, the State did not prove that Ms. Colson committed count 7 as a principle.

Count 7 should be reversed and dismissed.

g. The State did not meet its burden to prove count 8.

Count 8 pertained William Hagge and required proof Ms. Colson committed the crime of second degree identity theft as a principle "between March 4, 2012 and March 11, 2012." CP 123. The State failed to prove the first element of the offense: that Ms. Colson "knowingly obtained, possessed, transferred, or used a means of identification or financial information" of William Hagge within the requisite time period. CP 123.

The State proved purchases were made using Mr. Hagge's Nordstrom account over the phone during the requisite time period. Ex. 40, p. 43, 45-48; 7/20/15RP 114-17. Because Mr. Hagge was a male, a male must have impersonated him and made the purchases. 7/21/15RP 97.

Concerning returns, the State proved Ms. Colson made a return on March 5, 2012 regarding one of these purchases. Ex. 40, p. 48-50; RP 7/20/15RP 117-19; 7/21/15RP 14, 114-15. However, as explained earlier in connection with count 5, the return of merchandise at Nordstrom did not involve the use of a means of identification or financial information of Mr. Hagge. Accordingly, the evidence was inadequate to prove that Ms. Colson committed count 8 as a principle.

Count 8 should be reversed and dismissed.

h. The State did not meet its burden to prove count 9.

Count 9 pertained Steven Klein and required proof that Ms. Colson committed the crime of second degree identity theft as a principle "between March 26, 2012 and March 29, 2012." CP 124. The State failed to prove the first element of the offense: that Ms. Colson "knowingly obtained, possessed, transferred, or used a means of identification or financial information" of Steven Klein between the requisite time period. CP 124.

The State proved that purchases were made using Mr. Kline's Nordstrom account over the phone during the requisite time period. Ex. 40, p. 53, 55-56; 7/20/15RP 120. Because Mr. Kline was a male, a male must have impersonated him and made the purchases. 7/21/15RP 97.

Concerning returns, the State proved that Ms. Colson made a return on March 29, 2012 regarding one of these purchases. Ex. 40, p. 57-58; RP 7/20/15RP 121-22; 7/21/15RP 27. However, as argued earlier in connection with count 5, the return of merchandise did not involve the use of a means of identification or financial information of Mr. Kline. Accordingly, the evidence was inadequate to prove that Ms. Colson committed count 9 as a principle.

Count 9 should be reversed and dismissed.

i. The State did not meet its burden to prove count 10.

Count 10 pertained to Lawrence Meitl and required proof that Ms. Colson committed the crime of second degree identity theft as a principle "between January 30, 2012 and February 19, 2012." CP 125. The State failed to prove the first element of the offense: that Ms. Colson "knowingly obtained, possessed, transferred, or used a means of identification or financial information" of Lawrence Meitl between the requisite time period. CP 125.

The State proved that purchases were made using Mr. Meitl's Nordstrom account over the phone during the requisite time period. Ex. 40, p. 61, 64, 66-68; 7/20/15RP 123, 126-27. Because Mr. Meitl was a male, a male must have impersonated him and made the purchases. 7/21/15RP 97.

Concerning returns, the State proved that Ms. Colson made returns regarding two of these purchases on January 30, 2012 and February 2, 2012. Ex. 40, p. 62-63, 65; RP 7/20/15RP 123-25; 7/21/15RP 116. However, as argued earlier in connection with count 5, the return of merchandise did not involve the use of a means of identification or financial information of Mr. Kline. Accordingly, the evidence was inadequate to prove that Ms. Colson committed count 10 as a principle.

Count 10 should be reversed and dismissed.

4. The State failed to prove count 4, possession of stolen mail.

a. When in a to-convict instruction for possession of stolen mail, the terms "receive," "retain," "possess," "conceal," and "dispose of" are alternative means that must be supported by sufficient evidence.

"A person is guilty of possession of stolen mail if he or she: (a) Possesses stolen mail addressed to three or more different mailboxes; and (b) possesses a minimum of ten separate pieces of stolen mail." RCW 9A.56.380(1); accord CP 113. The term "mail" is also defined by statute. RCW 9A.56.010(7)[3]; accord CP 129.

---

[3] The statute reads:

> "Mail," in addition to its common meaning, means any letter, postal card, package, bag, or other item that is addressed to a specific address for delivery by the United States postal service or any commercial carrier performing the function of

"'Possesses stolen mail' means to knowingly receive, retain, possess, conceal, or dispose of stolen mail knowing that it has been stolen, and to withhold or appropriate to the use of any person other than the true owner, or the person to whom the mail is addressed." RCW 9A.56.380(2) (emphasis added); CP 128. This definition is substantially the same as the definition of "possessing stolen property", which "means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW

> delivering similar items to residences or businesses, provided the mail:
>
> (a) (i) Is addressed with a specific person's name, family name, or company, business, or corporation name on the outside of the item of mail or on the contents inside; and
>
> (ii) Is not addressed to a generic unnamed occupant or resident of the address without an identifiable person, family, or company, business, or corporation name on the outside of the item of mail or on the contents inside; and
>
> (b) Has been left for collection or delivery in any letter box, mailbox, mail receptacle, or other authorized depository for mail, or given to a mail carrier, or left with any private business that provides mailboxes or mail addresses for customers or when left in a similar location for collection or delivery by any commercial carrier; or
>
> (c) Is in transit with a postal service, mail carrier, letter carrier, commercial carrier, or that is at or in a postal vehicle, postal station, mailbox, postal airplane, transit station, or similar location of a commercial carrier; or
>
> (d) Has been delivered to the intended address, but has not been received by the intended addressee.

RCW 9A.56.010(7).

9A.56.140(1) (emphasis added). Though these five terms are not defined, the terms must be read distinctly because the Legislature does not include superfluous words in statutes. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) ("statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.") (internal citations omitted).

This Court has indicated that RCW 9A.56.140(1) does not create alternative means. Hayes, 164 Wn. App. at 477. Nevertheless, under the law of the case doctrine, if more than one of these alternative definitions of "possession" are placed in a "to-convict" instruction, there must be sufficient evidence to support each alternative in order to uphold the verdict. State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004) (so holding in, but determining there was sufficient evidence that the defendant received, retained, possessed, concealed, and disposed of stolen property); Hayes, 164 Wn. App. at 480-81 (applying Lillard where "to-convict" instructions for offense of possession of a stolen vehicle included all five alternative definitions and reversing for lack of proof defendant "concealed" or "disposed of" vehicles).

b. The State assumed the additional burden of proving that Ms. Colson "disposed of" stolen mail, which it failed to prove.

The "to-convict" instruction on the crime of possession of stolen mail required the State to prove that Ms. Colson "knowingly received, retained, possessed, concealed, or disposed of ten or more pieces of stolen mail addressed to three or more different addresses." CP 117 (emphasis added). This "to-convict" instruction is materially indistinguishable from the "to-convict" instructions in Lillard and Hayes. Compare CP 117 with Lillard, 122 Wn. App. at 434 n.25; Hayes, 164 Wn. App. at 480. Accordingly, the State assumed an additional burden and there must be sufficient evidence to support each alternative means on each count. Hayes, 164 Wn. App. at 480-81.

There was insufficient evidence that Ms. Colson "disposed of" stolen mail. To "dispose of" means:

> to transfer into new hands or to the control of someone else (as by selling or bargaining away): relinquish, bestow . . . to get rid of: throw away: discard . . . to treat or handle (something) with the result of finishing or finishing with . . .

Webster's Third International Dictionary, 654 (1993).

In Hayes, this Court applied this meaning. Hayes, 164 Wn. App. at 481 ("The parties agree that 'dispose of' means to transfer into new hands or to the control of someone else."). Applying this meaning, this

Court reversed a conviction for possession of a stolen vehicle, a Tahoe, because there was "no evidence to show that someone other than [the defendant] himself drove the Tahoe to Puyallup or that he transferred control of it to another person." Id. at 481. Similar to the Tahoe in Hayes, there is no evidence that Ms. Colson transferred control of the mail to someone else. Cf. Lillard, 122 Wn. App. at 435 (sufficient evidence that defendant "disposed of" stolen property where stolen merchandise was returned to store). The mail was being stored in her car, not gotten rid of. As Mr. Schulze testified, he and Ms. Colson had been out stealing mail that morning. 7/21/15RP 86. Accordingly, the State did not meet its burden. The conviction for possession of a stolen mail should be reversed. Hayes, 164 Wn. App. at 481.

5. The jury erroneously found that counts 5 through 10 for identity theft were "major economic offenses." If these counts are not reversed, the associated aggravators should be stricken from the judgment and sentence.

The jury found that counts 5 through 10 were "major economic offenses." CP 156, 158, 161, 163, 165, 167. This aggravator is identified in statute and has four factors:

> The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:
>
> (i) The current offense involved multiple victims or multiple incidents per victim;

> (ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;
> (iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
> (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.53(3)(d). The jury was instructed on the first three alternative means:

> To find that a crime is a major economic offense, at least one of the following factors must be proved beyond a reasonable doubt:
>
> (1) The crime involved multiple victims or multiple incidents per victim; or
>
> (2) The crime involved attempted or actual monetary loss substantially greater than typical for the crime; or
>
> (3) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time.
>
> . . .

CP 141. The jury was further instructed that it was determining "[w]hether the crime was a major economic offense or series of offenses." CP 135-140.

These instructions did not impose any knowledge requirement. When a defendant is convicted as an accomplice, the lack of a knowledge

requirement in the jury instructions on the major economic offense aggravator is fatal. State v. Hayes, 182 Wn.2d 556, 566-67, 342 P.3d 1144 (2015). "[F]or aggravating factors that are phrased in relation to 'the current offense' to apply to an accomplice, the jury must find that the defendant had some knowledge that informs that factor." Id. at 566. In Hayes, our Supreme Court vacated an exceptional sentence for first degree identity theft premised on a jury finding that it was a major economic offense. Id. at 567. The defendant had been convicted as an accomplice and it was impossible to tell from the special verdict whether the jury found that the defendant had any knowledge that informed the aggravating factors. Id. at 566-67. Thus, the exceptional sentence had to be vacated. Id. at 567.

The law of the case doctrine notwithstanding, if it was permissible for the jury to convict Ms. Colson as an accomplice on counts 5 through 10, the convictions may be premised on accomplice liability. As in Hayes, the jury was not required to find that Ms. Colson had some knowledge that informed the aggravating factors. CP 135-141. Accordingly, the findings are erroneous. Hayes, 182 Wn.2d at 567 ("Without a finding of knowledge that indicates that the jury found the aggravating factors on the basis of Hayes's own conduct, they cannot apply to Hayes."); State v. Weller, 185 Wn. App. 913, 929-30, 344 P.3d 695 (2015), review denied,

183 Wn.2d 1010 (2015) (applying Hayes and reversing exceptional sentences premised on ongoing pattern of abuse aggravator because finding could have been premised on another person's conduct).

While the State did not seek an exceptional sentence based on these findings, the judgement and sentence recounts the jury's findings. CP 205. Accordingly, if any of convictions under counts 5 through 10 survive, the associated aggravator stating that the offense was a major economic offense should be stricken from the judgement and sentence.

6. This Court should direct that no costs will be awarded to the State for this appeal.

If Ms. Colson does not substantially prevail in this appeal, the State may request appellate costs. RCW 10.73.160(1) ("The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs."); RAP 14.2 ("commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review."). This Court has discretion under RAP 14.2 to decline an award of costs. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). This means "making an individualized inquiry." Sinclair, 192 Wn. App. at 391, citing State v. Blazina, 182 Wn.2d 827,

838, 344 P.3d 680 (2015). A person's ability to pay is an important factor. Id. at 389.

Here, Ms. Colson was found to be indigent. Supp. CP __ (sub. no. 100). This creates a presumption of indigency that continues on appeal. RAP 15.2(f); Sinclair, 192 Wn. App. at 393. The trial court further recognized this indigency by declining to impose discretionary legal financial obligations upon Ms. Colson. CP 206. Given this record, the Court should exercise its discretion and reject any request for costs. Cf. Sinclair, 192 Wn. App. at 392-93 (declining State's request for costs in light of defendant's indigency and lack of evidence or findings showing that defendant's financial situation would improve).

F. CONCLUSION

Under the law of the case doctrine, the State failed to meet its burden to prove all the offenses. The convictions should be reversed.

DATED this 12th day of May, 2016.

Respectfully submitted,

s/ Richard W. Lechich_____
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON, Respondent, v. MARGARET COLSON, Appellant.	)))))))))	NO. 73798-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF MAY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] MARGARET COLSON 378514 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF MAY, 2016.

X_____

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