Supreme Court No. 94490-3
Court of Appeals No. 73798-8-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARGARET COLSON,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington Court of Appeals Cases

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

Margaret Colson, the petitioner, asks this Court to review the Court of Appeals' decision issued on March 27, 2017.[1] In its decision, the Court of Appeals (1) refused to apply the law of the case doctrine despite precedence; (2) reasoned that Ms. Colson could be convicted of two of the offenses despite the lack of evidence that she perpetrated these offenses "on or about" the requisite dates; (3) held that a general instruction on accomplice liability extended to all the counts rather than just to the count that used the language "a defendant or an accomplice" in the "to-convict" instruction; and (4) refused to hold that the offense of possession of stolen mail is an alternative means offense. This Court should grant review and overrule the Court of Appeals on the foregoing four determinations.

B. ISSUES PRESENTED FOR REVIEW

1. Under the law of the case doctrine, the jury instructions control when evaluating whether the State has met its burden to prove an offense. This is an independent Washington common law doctrine. Nevertheless, the Court of Appeals chose to follow the contrary approach under federal law. Did the Court of Appeals err by refusing to apply the law of the case doctrine? RAP 13.4(b)(1), (2).

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[1] A copy of the Court of Appeals' unpublished opinion, issued on March 27, 2017, is attached in the appendix.

2. Counts 1 and 2 required proof that the crimes of identity theft were committed "on or about" February 16, 2012. The State elected February 16, 2012 as the pertinent date during closing argument. Despite the lack of evidence that these offenses were committed on this date, the Court of Appeals affirmed because there was evidence these offenses had been perpetrated about a couple of weeks earlier. Did the Court of Appeals err when the State did not prove these offenses were committed "on or about" February 16, 2012? RAP 13.4(b)(1), (2), (4).

3. The jury must be properly instructed that accomplice liability applies to the offense being considered. Otherwise, the State bears the burden of proving principal liability. One of the "to-convict" instructions used the language "the defendant or an accomplice." The jury was also provided an instruction explaining accomplice liability. Despite that only one of the to-convict instructions specifically referred to "an accomplice," the Court of Appeals reasoned accomplice liability extended to every offense and every element. Was this error when caselaw holds otherwise? RAP 13.4(b)(1), (2), (4).

4. Under the to-convict instruction for possession of stolen mail, the State was required to prove the defendant "knowingly received, retained, possessed, concealed, or disposed of" the mail. Possession of stolen mail is also an alternative means offense. Did the Court of Appeals

incorrectly hold that the State did not need to prove that Ms. Colson "disposed of" the mail? RAP 13.4(b)(1), (2), (4).

C. 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 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. The case went to trial in 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 some culpability, were admitted. Ex. 25; 7/15/15RP 140-42. The jury convicted Ms. Colson of the offenses. 7/22/15RP 63-68. The Court of Appeals affirmed.

D. ARGUMENT

1. The law of the case doctrine remains good law. The Court of Appeals' failure to apply the doctrine is in conflict with caselaw.

Under the law of the case doctrine, jury instructions not objected to become the law the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The jury instructions are used in assessing whether there was sufficient evidence for the jury to render its guilty verdict. See id.

The Court of Appeals refused to apply the law of the case doctrine in Ms. Colson's appeal, concluding this Court's decision in Hickman was no longer good law. Op. at 9-10 & n.2. As of the filing of this petition, this Court is reviewing the validity of the law of the case doctrine. State v. Johnson, 194 Wn. App. 1020 (2016) (unpublished), review granted, 186 Wn.2d 1025, 385 P.3d 125 (2016).[2] Panels on the Court of Appeals are currently split on the question. Some have held that Hickman is no longer good law and that the law of the case doctrine is dead. State v. Tyler, 195 Wn. App. 385, 382 P.3d 699 (2016); accord Johnson, 194 Wn. App. 1020 (unpublished). Others have held that that the law of case doctrine still lives and that Hickman must be followed. State v. Jussila, No. 32684-5-III, 2017 WL 88209 (Wash. Ct. App. Feb. 28, 2017); accord State v.

[2] Oral argument took place in Johnson on February 28, 2017. Available at: http://www.tvw.org/watch/?eventID=2017021497.

Camarata, 197 Wn. App. 1042, No. 32960-7-III, 2017 WL 237823, at *5 (Wash. Ct. App. Jan. 19, 2017) (unpublished).

The basis for the dispute stems from a United States Supreme Court case. Musacchio v. United States, 577 U.S. ___, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016). In Musacchio, the court held that a challenge to the sufficiency of the evidence under due process "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." Musacchio, 136 S. Ct. at 715.

This holding does not overrule Hickman or abrogate long-standing Washington precedent on the law of the case doctrine. Contrary to Tyler and Johnson, the law of the case doctrine in Washington is not premised on the due process clause of the Fourteenth Amendment. Jussila, 2017 WL 88209 at *8. Rather, it is premised on the Washington Constitution and Washington common law. See Hickman, 135 Wn.2d at 101-02 (collecting cases); Jussila, at *8-10. For example, the doctrine finds special support in the Washington Constitution, which provides that judges "shall declare the law." Const. art. IV, § 16; Jussila, at *9. Thus, until this Court holds otherwise, the Court of Appeals is bound by Hickman. Jussila, at *10.

The Court of Appeals' ruling conflicts with Hickman and Jussila. RAP 13.4(b)(1), (2). Because this Court is currently reviewing this issue, the Court may stay this petition until Johnson is decided.[3]

2. Under the law of the case doctrine, the State bore the burden of proving that Ms. Colson committed counts 1 and 2 "on or about" February 16, 2012. The Court of Appeals improperly determined that evidence showing the offenses occurred about two weeks earlier was sufficient.

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.

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 victim 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

[3] This Court has stayed the petition for discretionary review in Tyler pending a decision in Johnson.

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 (emphasis added).

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). Moreover, the prosecutor elected February 16, 2012 as the date that counts one and two were committed. 7/22/14RP 8-9.

Accordingly, the State was stuck with February 16, 2012 and could not change its theory on appeal. See State v. Mills, 80 Wn. App. 231, 234, 907 P.2d 316 (1995) (rejecting State's new theory on appeal that it proved defendant possessed a firearm "about" May 26, 1992 when it had argued in the trial court that defendant constructively possessed firearm on the precise date of May 26, 1992).

The evidence proved the crimes had actually been committed on February 4 and 5, 2012. Br. of App. at 12-14. Still, the Court of Appeals did not reverse. Op. at 5. The court did not apply Hickman, Jensen, or Mills. Rather, the court inexplicably cited to an inapposite decision from 1973 involving the issue of an alibi defense, not the law of the case doctrine or the sufficiency of the evidence. Op. at 4-5 (citing State v. Danley, 9 Wn. App. 354, 357, 513 P.2d 96 (1973)). This was error.

The Court of Appeals' decision conflicts with precedence. RAP 13.4(b)(1), (2). Further, the effect of "on or about" language in a to-convict instruction is an issue that will recur frequently and qualifies as a matter of public interest. RAP 13.4(b)(4). Review is warranted.

3. Under the jury instructions, the State was required to prove that Ms. Colson committed the crimes of identity theft as a principle rather than as an accomplice, except as to the fourth element in count 7. The Court of Appeals' contrary conclusion conflicts with caselaw.

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 definitional instruction. 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 that accomplice liability applies to a charged count, the State bears 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).

In this case, the jury was given the general accomplice definitional instruction. CP 134; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (4th Ed). Additionally, 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 reasonable jury looking at these instructions would conclude that the accomplice definitional instruction applied only to element 4 on count 7. Otherwise there would have been no need to include the language "or an accomplice," and it would be superfluous. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012) ("If possible, every word and every provision is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."). Accordingly, under the law of the case doctrine, the State bore 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.

The Court of Appeals reasoned this analysis was contrary to Teal. Op. at 6.[4] But in Teal, there was not a to-convict instruction which had the language "the defendant or an accomplice." Rather, the jury was simply

[4] Oddly, the Court of Appeals did not cite to this Court's decision in Teal. Rather, the court cited to the Court of Appeals' decision in Teal. Op. at 6 (citing State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003)).

given a general accomplice liability instruction. Teal, 152 Wn.2d at 339. Thus, it is not on point.

The Court of Appeals also reasoned Ms. Colson's analysis improperly "nullifies the general accomplice liability instruction." Op. 7. This is incorrect. Rather, the general accomplice definitional instruction is read in conjunction with the to-convict instruction for count 7. See State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) ("Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror."). It is the Court of Appeals' analysis that nullifies or renders superfluous the language "the defendant or an accomplice" in the to-convict instruction for count 7.

The Court of Appeals' analysis is contrary to this Court's decision in Willis. There, the failure to include the phrase "or an accomplice" in an instruction on a firearm enhancement required the State to prove that the defendant himself (rather than an accomplice) was armed. Willis, 153 Wn.2d at 374-75. This makes sense because, as memorialized in the Court of Appeals' opinion, the to-convict instruction on burglary in Willis used the language "the defendant or an accomplice." State v. Willis, 118

Wn. App. 1026 n. 9 & 11 (2003) (unpublished).[5] Because another instruction used the phrase, "the defendant or an accomplice," a reasonable jury would read the other instruction, which simply said "the defendant," as requiring proof that defendant himself possessed the firearm.

Similar to Willis, element 4 in the to-convict instruction for count 7 used the phrase "the defendant or an accomplice," but none of the other elements in any of the to-convict instructions used this language. Instead, they used the language "the defendant." CP 114-20, 123-25. Hence, the State bore 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.

As argued in the briefing, the State did not prove principle liability as to counts 3, 5, 6, 7, 8, 9, and 10. Br. of App. at 22-30. The State did not contest this argument. Br. of Resp't at 17-21. Applying the law of case doctrine, the Court of Appeals should have reversed those seven convictions.

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[5] This unpublished opinion is not cited as authority, but only to show what the instructions in Willis stated. This is appropriate. See State v. Conover, 183 Wn.2d 706, 717 n.7, 355 P.3d 1093 (2015) (citing unpublished opinions not as authority, but to show reader that Court of Appeals had reached divergent results on issue before Supreme Court).

The Court of Appeals' decision is contrary to caselaw. RAP 13.4(b)(1), (2). And instructing juries properly on accomplice liability is an issue of substantial public interest. RAP 13.4(b)(4). Review is warranted.

4. To prove possession of stolen mail, the State bore the burden of proving that Ms. Colson "disposed of" stolen mail, an alternative means. The Court of Appeals' contrary determination conflicts with caselaw.

Ms. Colson was charged with possession of stolen mail. RCW 9A.56.380. 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). When the jury is instructed in this manner, these are alternative means and there must be sufficient evidence to support each means. See State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004); State v. Hayes, 164 Wn. App. 459, 480-81, 262 P.3d 538 (2011).

The Court of Appeals refused to apply Lillard and Hayes because it concluded the law of the case doctrine was no longer good law. Op. at 9-10. As explained earlier, the court was wrong.

Moreover, the crime of possession of stolen mail is akin to theft, which is an alternative means crime. State v. Linehan, 147 Wn.2d 638,

647, 56 P.3d 542 (2002). This is so even though the theft alternatives come from a "definitional" statute. RCW 9A.56.020; Linehan, 147 Wn.2d at 649 (jury must be unanimous as to whether defendant commits theft by wrongfully obtaining, exerting unauthorized control, or obtaining the property by color and aid of deception).

While there are not different degrees for the offense of possession of stolen mail, RCW 9A.56.380(2) essentially defines the crime of possession of stolen mail. Like RCW 9A.56.020 (the theft statute), RCW 9A.56.380(2) (the possession of stolen mail statute) is set apart from the general definition section at RCW 9A.56.010. Accordingly, like the unique definitional statute for "theft," which sets out three alternative means, the unique definitional statute for possession of stolen mail sets out five alternative means.

The Court of Appeals refused to address this second argument because it was made in Ms. Colson's Reply Brief. Op. at 9, n.1. The argument, however, was made in response to the State's argument that possession of stolen mail is not an alternative means crime. Moreover, when Ms. Colson filed her Opening Brief in May 2016, Lillard and Hayes were still being treated as good law. The decision in Tyler, which reasoned Hayes (and impliedly Lillard) was no longer good law, was issued in August 2016. Tyler, 195 Wn. App. at 399. Accordingly, that

this second argument was omitted from the Opening Brief should not be held against Ms. Colson. See RAP 1.2(a) ("rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.").

The Court of Appeals' decision is contrary to other decisions. RAP 13.4(b)(1), (2). The possession of stolen mail statute is relatively new and interpretative guidance would be helpful. Thus, the matter is an issue of substantial public interest. RAP 13.4(b)(4). Review should be granted on this issue.

E. CONCLUSION

Applying the law of the case doctrine, the Court of Appeals should have reversed all of the convictions. This Court should grant review. The Court may stay this petition pending Johnson.

DATED this 26th day of April, 2017.

Respectfully submitted,

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Appendix

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARGARET COLSON, Appellant.	)	No. 73798-8-I DIVISION ONE UNPUBLISHED OPINION FILED: March 27, 2017

SPEARMAN, J. — Margaret Colson participated in an identity theft ring in which she and her associates stole from residential mailboxes, then used information found in the mail for financial gain. Colson was convicted of nine counts of identity theft and one count of possession of stolen mail. The jury also found, as an aggravating factor, that some counts were major economic offenses. On appeal, she argues the evidence is insufficient to support her convictions, that the jury was improperly instructed on accomplice liability and that the State failed to prove the aggravating factor. Finding no error, we affirm.

FACTS

In December 2011, Shawn Schulze and his boyfriend, Vikram Chopra, were living with Margaret Colson in the home she shared with her husband. Colson had only recently met them through a methamphetamine dealer. They

moved in with her because they had become homeless. Both Chopra and Schulze regularly used heroin and methamphetamine. Prior to moving in with Colson, Schulze and Chopra sometimes sold stolen items for cash. After moving in with Colson, the three began stealing mail. They drove Colson's car to wealthy neighborhoods and stole mail from mailboxes. Id. They also used identifying information found in the mail to steal merchandise from retail stores.

A method they repeatedly used involved Nordstrom. Using Nordstrom account numbers discovered in stolen mail, they purchased items by phone, picked up the items in person, and then returned them for a cash refund. At trial, the State presented evidence from Nordstrom that correlated the purchase and return of an item with surveillance photos and video recording of the transactions. Colson was always involved in either the phone order, pick-up, or cash refund. The three shared the proceeds of each transaction, with Colson receiving slightly more because Chopra and Schulze were staying with her.

On February 16, 2012, Schulze was driving Colson's car in a Kirkland neighborhood, with Colson in the passenger seat. A resident observed Schulze get out of the car and check for mail in a group of mailboxes on a cul-de-sac. Schulze found a piece of mail and removed it. Colson rolled down the window and checked other mailboxes. When the car came back around the cul-de-sac, it sped past the resident who was attempting to flag it down. The resident called police, who stopped the car on the freeway. Colson and Schulze were arrested, the car was impounded and the officers obtained a warrant to search the car.

During the search, the officers discovered mail underneath the car seats, between the seats and the center console, in the glove compartment and trunk. Also under the front passenger seat was a small metal box containing debit cards, credit cards, and checks in the names of people other than Colson and Schulze. Id. at 80-81. One of the debit cards belonged to Brett Stanewich and there was a check in Stanewich's name that was written to Joe Eskridge. Another check was in the name of Rafic Farah and Genevieve Attie, and was also written to Joe Eskridge. These checks had been deposited into an Ally Bank account that was opened by Chopra in the name of Joe Eskridge. Colson and Schulze used a debit card for this account to withdraw cash and make purchases.

Colson was charged with nine counts of identity theft and one count of possession of stolen mail. The jury convicted Colson of all ten counts, and found that counts 5 through 10 (all relating to the Nordstrom scheme) were "major economic offenses" that could support an exceptional sentence beyond the standard range. Colson received concurrent sentences of 50 months for the eight counts of second degree identity theft, 12 months for count 4 (possession of stolen mail), and 36.75 month prison-based the Drug Offender Sentencing Alternative (DOSA) sentence for count 7 (first degree identity theft), which were all within the standard range. CP at 205; 207. Colson appeals.

DISCUSSION

Sufficiency of the Evidence

Colson challenges the sufficiency of the evidence to prove that counts 1 and 2 of identity theft were committed "on or about February 16, 2012." Clerk

Papers (CP) at 114-15. She contends that the State's evidence showed that she actually committed those counts in early February.

The State must prove all elements of a charged crime beyond a reasonable doubt. State v. Larson, 184 Wn.2d 843, 854, 365 P.3d 740 (2015). When a criminal defendant challenges the sufficiency of the evidence against him, we determine whether, viewing the evidence in the light most favorable to the State, "any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216,220-22, 616 P.2d 628 (1980)). We accept as true all the State's evidence and any inferences that the jury could reasonably have drawn from it. Id. at 201.

The jury was instructed that to convict Colson of counts 1 and 2 of second degree identity theft, they must find "[t]hat 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, [knowing] that the means of identification or financial information belonged to another person. . . ." CP at 114-15. Contrary to Colson's argument, listing a date in the jury instructions does not convert it to an element which the State must prove with precision. "[O]n or about" jury instructions do not require proof that the crime occurred on a precise date so long as the instructions do not mislead the jury into rejecting an otherwise valid defense. State v. Danley, 9 Wn. App. 354, 357, 513 P.2d 96 (1973) (evidence that the crime occurred within a week of the date in the

"on or about" instruction was sufficient). Colson does not argue that the jury instructions prevented her from presenting evidence of an alibi or other defense.

The State presented evidence that on February 16, 2012, Colson possessed the stolen financial information of Brett Stanewich and Rafic Farah, the victims in counts 1 and 2 for identity theft. In Colson's car, police found a debit card belonging to Stanewich and a check dated February 5, 2012 from Stanewich to Joe Eskridge, deposited in Ally Bank. Police also found a check from Farah to Joe Eskridge dated February 4, 2012, and deposited in Ally Bank. The evidence of identity theft in counts 1 and 2 is sufficient to prove that they occurred "on or about" February 16, 2012.

Colson additionally argues that there is insufficient evidence to sustain count 2 because the State did not prove that the victim was 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, 117 P.3d 1162 (2005). In Berry, the defendant attempted to use a check listing a real bank account, but a fake name. He was charged with identity theft of the fictitious name. The court held that an identity theft victim must be a real person. Id. at 62. Colson argues that because victim Rafic Farah did not appear at trial, there is insufficient evidence that he is a real person. Unlike in Berry, there is no evidence that Farah is fictitious. Colson, Chopra, and Schulze stole Farah's checks in the mail and successfully made a deposit. This evidence supports an inference that he is a real person.

Accomplice Liability Instructions

Colson contends that the State had the burden to prove that she acted as a principal for each charge, and that they failed to meet that burden. Colson reasons that even though there was a general accomplice liability jury instruction, the inclusion of accomplice liability in the to-convict instruction in count 7 nullified that instruction as to the remaining counts. She argues that as a result, the State was required to prove principal liability on all other counts.

An instruction on accomplice liability may be included in the "to convict" jury instruction for each charge, or in a separate, stand-alone instruction. State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003). If there is no accomplice liability instruction, the State must prove that the defendant's own conduct meets the elements of the crime. State v. Willis, 153 Wn.2d 366, 371, 103 P.3d 1213 (2005).

Here, the court instructed the jury on accomplice liability in instruction 29:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

CP at 134. In addition, the to-convict instruction for count 7 included accomplice liability in one element: "That the defendant or an accomplice obtained credit or money or goods or services or anything else in excess of $1500 in value. . . ." CP at 120. Contrary to Colson's argument, the stand-alone accomplice instruction is adequate to instruct the jury. Teal, 117 Wn. App. at 838. We presume that the jury followed all instructions, including the general accomplice liability instruction.

Tennant v. Roys, 44 Wn. App. 305, 315-16, 722 P.2d 848 (1986) (citing In re Municipality of Metro. Seattle v. Kenmore Properties, Inc., 67 Wn.2d 923, 930-31, 410 P.2d 790 (1966)). Colson cites no authority for her argument that the accomplice liability instruction in count 7 somehow nullifies the general accomplice liability instruction and we do not find the argument persuasive. Under the instructions given, Colson could be found guilty as either principal or accomplice on all counts.

Possession of Stolen Mail

Colson argues that the State must prove that Colson received, retained, possessed, concealed, and disposed of stolen mail because each term is included in the to-convict jury instructions. She contends that the State failed to prove that she disposed of stolen mail. The State does not dispute that its proof failed in that regard. Instead it argues that it is not required to prove each means listed in the jury instructions because they are merely definitional.

The State charged Colson with possession of stolen mail under RCW 9A.56.380, accusing her of possessing more than ten separate pieces of stolen mail that were addressed to twelve different addresses. The jury was instructed that to convict Colson, the State must prove:

> (1) That on or about February 16, 2012, the defendant knowingly received, retained, possessed, concealed, or disposed of ten or more pieces of stolen mail addressed to three or more different addresses; (Emphasis added.)
> (2) That the defendant acted with knowledge that the mail had been stolen;
> (3) That the defendant withheld or appropriated the mail to the use of someone other than the true owners or the persons to whom the mail was addressed; and
> (4) That any of these acts occurred in the State of Washington.

CP at 117. According to Colson, this instruction identifies five alternative means to commit possession of stolen mail.

"[T]he alternative means doctrine does not apply to mere definitional instructions; a statutory definition does not create a 'means within a means.'" State v. Owens, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014) (quoting State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007)). Washington courts have not examined whether possession of stolen mail is an alternative means or single-means crime. In crimes of possession, however, definitional statutes do not expand the number of alternative means for a given offense. E.g., State v. Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011), aff'd 182 Wn.2d 556, 342 P.3d 1144 (2015) abrogation on other grounds recognized by State v. Tyler, 195 Wn. App. 385, 382 P.3d 699 (2016) (in conviction for possession of stolen property, reference to "receive, retain, possess, conceal, or dispose of stolen property" is definitional and does not create alternative means of committing the crime); State v. Makekau, 194 Wn. App. 407, 409, 378 P.3d 577 (2016) (in conviction for possession of a stolen vehicle, the terms "receive, retain, possess, conceal, or dispose of" are definitional and do not create alternative means); Tyler, 195 Wn. App at 401 (possession of a stolen vehicle is single means crime). Consistent with these authorities, "received, retained, possessed, concealed, or disposed" are definitional and do not create alternative means of committing possession of

stolen mail.[1]

Relying on State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998), Colson also contends that under the law of the case doctrine, the State must prove each of the five methods of possession because each is included in the to-convict instruction. But we recently rejected this argument in Tyler, concluding that Hickman is no longer controlling on this issue in light of the United States Supreme Court decision in Musacchio v. United States, ___ U.S. ___, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016).

In Musacchio, the court examined what process is due, under the Fourteenth Amendment, to a defendant who challenges the sufficiency of the evidence supporting his or her conviction. It rejected the idea that the law of the case doctrine has any relevance at all to this analysis. Id. at 716. Instead, the court held that due process simply requires that "when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." Id. at 715.

In Tyler, we recognized that because Washington courts apply the federal constitutional standard for evidentiary sufficiency review, decisions of the United States Supreme Court are the controlling authority on the proper application of that standard. Thus, on the standard to be applied to a challenge to the

[1] In her reply brief, Colson argues that possession of stolen mail is an alternative means statute by analogizing it to the theft statute. We will not consider arguments raised for the first time on reply. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

sufficiency of the evidence, Musacchio supersedes all inconsistent interpretations by the courts of this state. Northern Pac. Ry. Co. v. Longmire, 104 Wash. 121, 125, 176 P. 150 (1918). Accordingly, here, as in Tyler, we disregard "additional elements" and "false alternative means" in a to-convict instruction and instead, assess the sufficiency of the evidence against the elements of the charged crime. Tyler, 195 Wn. App. at 400 (citing Musacchio, 136 S. Ct. at 715).[2]

Because possession of stolen mail is a single-means crime, we evaluate the sufficiency of the evidence against the essential elements of the charged crime: possession of at least ten separate pieces of stolen mail addressed to at least three different mailboxes. RCW 9A.56.380(1). The State met this burden by presenting evidence that at least ten pieces of stolen mail, addressed to three different addresses were found in Colson's car on February 16, 2012.

Major Economic Offense

Colson argues that the "major economic offense" aggravators for the Nordstrom scheme counts should be stricken from the judgment and sentence due to a flaw in the jury verdict forms. The State argues that this issue is moot because the trial court did not actually impose an exceptional sentence based on those aggravators.

The trial court can impose an exceptional sentence based on aggravating circumstances considered by the jury. One aggravating factor is if the current

[2] In a statement of additional authority, Colson cites to a recent decision from Division Three of this court. In State v. Jussila, No. 32684-5-III (Wash. Ct. App. Feb. 28, 2017), a divided court declined to follow Musacchio, concluding that Hickman remained the binding authority in this state. For the reasons set forth in Tyler, we respectfully disagree.

offense was a major economic offense or series of offenses. RCW 9.94A.535(3)(d). The jury was instructed that,

> 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 at 141.

"As a general rule, we do not consider questions that are moot." State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012) (citing State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995)). "A case is technically moot if the court can no longer provide effective relief." Id. An appeal of an expired sentence is moot because the court can no longer offer effective relief. Id. at 901; In re Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). However, a court will review an appeal if the sentence has collateral effects. State v. Rinaldo, 98 Wn.2d 419, 422, 655 P.2d 1141, (1982) (appeal of designation as sexual psychopath was not moot because the designation affected defendant's parole status and eligibility for early release, and "the stigma associated with the classification is of no small consequence") (citing United States, ex rel Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975); State v. Vike, 125 Wn.2d 407, 409 n.2, 885 P.2d 824 (1994) (appeal of a sentencing matter was not moot even though defendant already served his sentence due to impact on how future convictions would be scored for future sentencing).

Colson argues that even though she did not receive an exceptional sentence, the major economic offense aggravator could have a collateral impact. She proposes that the aggravator is stigmatizing, and a hypothetical registration system for perpetrators of major economic offenses would be detrimental. Colson's registration system for financial crimes is an imagined collateral consequence. And the stigma of a major economic offense aggravator is no greater than Colson's convictions for identity theft, and is of much smaller consequence than that of the "sexual psychopath" in Rinaldo. Just as the expiration of a sentence renders an issue moot, the non-existence of an exceptional sentence renders this issue moot.

Even if this issue were ripe for review, the record supports that Nordstrom scheme counts are major economic offenses. "[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." State v. Hayes, 182 Wn.2d 556, 566, 342 P.3d 1144 (2015). The "major economic offense" aggravator can be sustained only for the offenses that Colson committed as a principal, or those for which the jury found that she had knowledge of the major economic offense. There is sufficient evidence of an aggravator if, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements beyond a reasonable doubt. State v. Hyder, 159 Wn. App. 234, 258, 244 P.3d 454 (2011).

Here, viewing the evidence in the light most favorable to the State, testimony by Chopra supports that Colson was involved in at least one aspect of

each Nordstrom count. That evidence is sufficient for a rational juror to conclude that Colson was either a principal or had knowledge of the multiple crimes involved in the Nordstrom scheme. This is sufficient to sustain the major economic offense findings.

Attorney Fees

Colson also asks that no costs be awarded on appeal. The State asks that it be awarded its costs. Appellate costs are generally awarded to the substantially prevailing party. RAP 14.2. However, when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." Id.

Here, the trial court's determination as to Colson's indigency status is not in the record. But the record does show that Colson declared herself indigent and that she was permitted to appeal in forma pauperis. If a finding of indigency was made and the State has evidence indicating that Colson's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner. If no such determination exists, then the State may seek an award of costs and the commissioner shall decide in the first instance whether Colson has "the current or likely future ability to pay such costs." RAP 14.2.

Because none of the claimed errors has merit, Colson's appeal is denied.

Affirmed.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73798-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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