97010-6

No. 77012-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MODI JAGANA,

Appellant.

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

PETITION FOR REVIEW

TIFFINIE B. MA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATE SUPREME COURT

WASHINGTON SUPREME COURT CASES

WASHINGTON COURT OF APPEALS

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

A. IDENTITY OF PETITIONER AND DECISION BELOW

Modi Jagana asks this Court to review the opinion of the Court of Appeals in State v. Jagana, No. 77012-8-I. A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. In violation of due process, did the State seek to convict Mr. Jagana based on uncharged conduct?

2. Was defense counsel constitutionally deficient for proposing a to-convict instruction which did not accurately reflect the charging document and which permitted the State to seek a conviction based on uncharged conduct?

C. STATEMENT OF THE CASE

Modi Jagana and Fatou Dibba had an oral agreement for Mr. Jagana to complete construction work on Ms. Dibba's business. RP 177. Mr. Jagana originally agreed to complete the job for $7500, but he later reduced the price to $4000 and Ms. Dibba paid for all the supplies. RP 176, 214. The work took place in the fall of 2012. RP 217. During the project, Ms. Dibba left the country for several weeks, and Mr. Jagana completed the work during that time. RP 180, 195.

Ms. Dibba had not paid Mr. Jagana or his employees for their labor, so Mr. Jagana paid his employees out of pocket. RP 191. Before Ms. Dibba left the country, she gave Mr. Jagana two signed checks, one made out for $650 and the other for $750. RP 188, 190-92. Other than the signature line and the dollar amount, the rest of the checks were blank. RP 190-92. She told Mr. Jagana not to cash the checks right away, and she would call him from abroad once the money was available in her account. RP 189. Mr. Jagana told her he would need to cash the checks if she did not pay him. RP 193. Ms. Dibba returned to Washington on October 18, 2012 but never again spoke with Mr. Jagana. RP 195.

According to Ms. Dibba, on the other hand, the agreed cost was $3000. RP 143. Ms. Dibba claimed she paid Mr. Jagana both in cash and by directly depositing money into his bank account. RP 95. She also claimed she paid him an extra $200 as a kindness. RP 153. She denied ever paying him with checks and denied giving him any signed checks. RP 97. She testified that she normally kept loose, blank checks

in her purse, although she could not say when or where Mr. Jagana might have obtained her checks.[1] RP 125, 150.

Sometime in November or December 2012, Mr. Jagana also lef the country, returning to Africa to visit his older children. RP 197. By January 2013, after he had returned to Washington, Mr. Jagana needed reimbursement for the labor costs he had paid upfront while waiting for Ms. Dibba to pay him. RP 198. He decided to cash the checks Ms. Dibba had given him and completed the blank portions. RP 190-92. He opened a new bank account using his real name and personal information, and chose a bank at which he already had an account. RP 30, 199. The bank noticed nothing untoward about opening Mr. Jagana's new account. RP 55-56. He cashed the checks one at a time to be sure they did not bounce. RP 199-200. When the first check went through, Mr. Jagana deposited the second check via mobile deposit, which did not go through. RP 201. Ms. Dibba saw Mr. Jagana had deposited the checks, contacted the bank, and claimed the checks were fraudulent. RP 98.

[1] Ms. Dibba stated in an earlier recorded defense interview that she carried her entire checkbook in her purse. Ex. 21. Her checkbook contained carbon copies. Id. She stated in her interview that both the checks and carbon copies had been torn out of the checkbook. Id. This portion of the interview was played for the jury as impeachment evidence. RP 257-58, 260.

Ms. Dibba reported the incident to the Lynnwood Police Department. RP 98. Detective Douglas Teachworth received the case and contacted Mr. Jagana by phone. RP 78. Mr. Jagana told the detective Ms. Dibba had given him the checks as payment for construction work, whereas Ms. Dibba led Detective Teachworth to believe she had already paid Mr. Jagana. RP 86-87.

The State charged Mr. Jagana with one count of forgery and two counts of identity theft in the second degree in the first amended information. CP 90-91. The information alleged Mr. Jagana had committed both counts of identity theft with the specific intent to commit forgery. Id. The State later filed a second amended information, again alleging Mr. Jagana had the intent to commit forgery. CP 88-89. Despite the charges, the State argued in closing Mr. Jagana had the intent "take [Ms. Dibba's] money," i.e. the intent to commit theft. RP 271.

Compounding the error, defense counsel proposed two to-convict instructions for identity theft that both broadly instructed the jury to determine if Mr. Jagana had the intent to commit "any crime," rather than the forgery specifically alleged in the charging document.

RP 318; CP 78-79. The jury acquitted Mr. Jagana of forgery outright, but convicted him of both counts of identity theft. CP 63-65.

D. ARGUMENT

1. This Court should address whether it violates due process for the State to seek a conviction for identity theft based on an intent to commit a crime different than what the State alleged in the charging document.

a. The charging document must provide notice of all elements of the offense.

An accused has a constitutional right to notice of the crimes alleged against him. Wash. Const. art. I, § 22[2]; U.S. Const. amend. VI[3]. Notice of the nature of the charges and cause of the allegations is provided through the information. CrR 2.1. The State must include all essential elements of the allegation in the information. State v. Kosewicz, 174 Wn.2d 683, 691, 278 P.3d 184 (2012) (citing State v. Kjorsvik, 117 Wn.2d 93, 101–02, 812 P.2d 86 (1991)). A defendant's right to notice is violated when he or she is put on trial for an

[2] Wash. Const. art. I, section 22 provides in pertinent part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof . . .."
[3] The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . .."

uncharged act. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

The charging document must contain (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted the crime. City of Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992). The description of the alleged conduct is essential to providing the accused person with adequate notice and the opportunity to prepare a defense. State v. Tandeki, 153 Wn.2d 842, 847, 109 P.3d 398 (2005). This is because a defendant must be fully informed of the charges against him so he may adequately prepare a defense. Kjorsvik, 117 Wn.2d at 101.

b. Due process principles prohibit a prosecution based on uncharged acts.

The Sixth Amendment and Article I, § 22 require that in a criminal case, the jury must unanimously find the prosecution proved every necessary element of the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1998).

When the information presents one method of committing a charged crime, it is error for a trial court to instruct the jury it may convict the defendant based on a different method of committing the

same offense. State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); State v. Chino, 117 Wn. App. 517, 539, 72 P.3d 256 (2003). This error occurs "regardless of the strength of the trial evidence" pertaining to the charged or uncharged means presented to the jury. Chino, 117 Wn. App at 540. Since the constitution prohibits the court from instructing the jury on an uncharged means of conviction, the error may be raised for the first on appeal even if not objected to below. State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996); RAP 2.5(a)(3).

c. Here, the information alleged a single act but the prosecution argued Mr. Jagana committed a different, uncharged act that established the charged offense.

The information alleged Mr. Jagana committed two counts of identity theft in the second degree as follows:

> Count 2: . . .on or about the 12th day of January, 2013, did knowingly obtain, possess, use and transfer a means of identification and financial information of a person, to-wit: check #116 belonging to the Bank of America account of Fatou Dibba, with the intent to commit, aid and abet a crime, to-wit: Forgery . . ..
>
> Count 3: . . .on or about the 12th day of January, 2013, did knowingly obtain, possess, use and transfer a means of identification and financial information of a person, to-wit: check #115 belonging to the Bank of America account of Fatou Dibba, with the intent to commit, aid and abet a crime, to-wit: Forgery . . ..

CP 88-89 (emphasis added).

Both identity theft to-convict instructions provided:

> (1) That on or about the 12th day of January, 2013, the defendant knowingly obtained, possessed, or transferred, or used a means of identification or financial information of another person . . .
> (2) That the defendant did so with the intent to commit any crime . . .

CP 78, 79.

Although the State is not required to identify which crime a defendant intended to commit via identity theft, where it elects to do so, it is not given free rein to pursue a conviction based on uncharged conduct. State v. Federov, 181 Wn. App. 187, 197, 324 P.3d 784 (2014); see e.g., State v. Rivas, 97 Wn. App. 349, 354, 984 P.2d 432 (1999) (conduct described in charging documents indicates State's election to prosecute specific conduct).

Here, the State elected to specify which crime Mr. Jagana intended to commit via identity theft. By specifying forgery in the information, the State gave Mr. Jagana notice of just that: the State would argue Mr. Jagana intended to commit forgery. Not once prior to closing arguments did the State allege Mr. Jagana committed identity theft with the intent to commit theft, despite two separate amendments

to the information. CP 88-93. Yet, this is precisely what the State argued in closing. RP 271.

The Court of Appeals found the State was not "required to specify in the information that Jagana intended to commit the crime of forgery." Slip Op. at 5. It determined that this "surplus language" could be disregarded. Slip Op. at 5-6. However, this language is not merely surplus; rather, the State elected to specify the crime which it believed Mr. Jagana intended to commit via identity theft but later argued otherwise.

State v. Morales, 174 Wn. App. 370, 298 P.3d 791 (2013), is instructive. There, the defendant was charged with two counts of felony harassment. One count involved a statement the defendant made to Trinidad Diaz, in which he said he was going to kill Yanett Farias the next morning. As to that count, the charging document read:

> On or about February 14, 2011, in the state of Washington, without lawful authority, you knowingly threatened to cause bodily injury immediately or in the future to Yanett Farias and the threat to cause bodily injury consisted of a threat to kill Yanett Farias or another person, and did by words or conduct place the person threatened in reasonable fear that the threat would be carried out.

Id. at 376.

Although the charging document alleged the "person threatened" was "Yanett Farias," the jury was instructed that it could find guilt if "the words or conduct of the defendant placed Trinidad Diaz &/or Yanett Farias in reasonable fear that the threat to kill would be carried out[.]"Morales at 376. The jury found the defendant guilty, but the Court reversed. Id. at 376, 384.

The Court noted that because a defendant has a constitutional right to be informed of the nature of the cause against him, it is error to instruct the jury on "uncharged offenses or uncharged alternative theories." Morales, 174 Wn. App. at 382. The Court determined that in light of the evidence presented, it was possible the jury found the defendant guilty of the uncharged alternative theory – that the "person threatened" was Mr. Diaz. Thus, reversal was required. Id. at 384.

Similarly here, the information alleged Mr. Jagana acted with intent to commit forgery. However, the prosecution later argued an alternative theory, that Mr. Jagana had the intent to commit theft, contrary to the charging document. The Court of Appeals found the State did not make such an argument, but that is contrary to the record. Slip Op. at 6-7; RP 271 ("Yeah. He intended to take her money.") Since the jury instructions did not specify what crime the jury had to

find Mr. Jagana had intended to commit, it is possible, as in Morales, the jury convicted Mr. Jagana on this alternate, uncharged theory. This error requires reversal and remand for a new trial. Morales, 174 Wn. App. at 384.

Moreover, Mr. Jagana maintained throughout the case that Ms. Dibba gave him the checks, and he cashed them because she owed him payment for his work. Under RCW 9A.56.020(2)(a), it is a defense to theft if "[t]he property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." The evidence at trial clearly established Mr. Jagana opened a bank account using his real name and personal information, using proper identification, and using a bank at which he already owned an account. RP 30, 199.

Thus, given proper notice by the State, Mr. Jagana could have requested instructions on theft and its statutory defenses, and argued such to the jury. Instead, the court's instructions allowed the jury to decide whether Mr. Jagana had the intent to commit any crime. Notably, the jury acquitted Mr. Jagana of forgery outright, so it stands to reason the jury did not find him guilty of identity theft based on forgery as charged. Rather, it would seem the jury convicted Mr.

Jagana precisely because the State argued he intended to commit theft, a crime for which the jury did not have instructions, a definition, or statutory defenses.

Without the requisite notice, Mr. Jagana was ambushed by the State's eleventh-hour decision to argue he intended to commit theft, after the close of all evidence and after jury instructions had been given. s This Court should accept review to determine whether Mr. Jagana's due process rights were violated as a result of the State's arguments urging the jury to convict him based on uncharged acts.

2. This Court should accept review to determine whether counsel was constitutionally ineffective for proposing jury instructions which did not accurately reflect offenses charged.

a. Counsel who, without legitimate tactical purpose, proposes an instruction permitting the jury to consider an uncharged means as the basis for conviction is ineffective and the defendant is prejudiced by counsel's deficient performance.

An accused in a criminal case has a Sixth Amendment right to "effective assistance by the lawyer acting on the defendant's behalf." State v. Adams, 91 Wn.2d 86, 89-90, 586 P.2d 1168 (1978); U.S. Const. amend. VI. To establish an ineffective assistance of counsel claim, Mr. Jagana must show that his attorney's performance was deficient and that he was prejudiced as a result. Strickland v.

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is deficient if there is no legitimate, tactical reason for the incompetent act, and a defendant is prejudiced where counsel offers an instruction that permits a jury to use uncharged means of committing a crime as a basis for conviction. Doogan, 82 Wn. App. at 189

b. Mr. Jagana's counsel was ineffective for proposing an identity theft jury instruction which allowed the jury to consider whether Mr. Jagana had the intent to commit crimes not alleged in the information, and Mr. Jagana was prejudiced.

Here, counsel proposed the to-convict jury instructions on identity theft which employed the broad language contained in the identity theft statute: "with intent to commit, or to aid or abet, any crime." CP 78, 79; RCW 9.35.020(1). Although these proposed instructions were virtually identical to the ones proposed by the State, the court accepted defense's versions. RP 318. Defense's proposed instructions failed to incorporate the specific language from the information, namely that Mr. Jagana had committed identity theft with the intent to commit, aid or abet forgery in particular. The Court of Appeals found counsel was not ineffective merely because the jury instructions were accurate. Slip Op. at 8.

However, that the proposed instructions were generally accurate does not automatically render counsel effective. Here, counsel had no legitimate, tactical reason for proposing the overbroad instructions when the State charged specific conduct in the information. This is evident from counsel's Motion for Arrest of Judgment, where counsel avers, "Unfortunately, the jury instructions were not clear that the crime the state must prove the Defendant had the intent to commit was the crime of Forgery, as charged in the amended information." CP 59-62. Moreover, counsel argued, "The instructions and the state's argument permitted the Defendant to be convicted if the state thought that the defendant intended to obtain money he believed owed to him, which is a crime of theft." Id. It appears from the pleading that counsel became aware of the error only after trial and attempted to remedy the issue. This strongly indicates counsel proposed the identity theft instructions without any legitimate, tactical reason; otherwise, counsel would have no reason to attack the very instructions she proposed.

Mr. Jagana was prejudiced by his counsel's deficient performance because counsel's proposed jury instructions for identity theft which were more broadly worded than the information. "The error of offering an uncharged means as a basis for conviction is prejudicial

if it is possible that the jury might have convicted the defendant under the uncharged alternative." Doogan, 82 Wn. App. at 189.The broader language permitted the jury to consider other uncharged means of committing identity theft, specifically that Mr. Jagana had the intent to commit theft rather than forgery. It is not only reasonably possible, but likely, the jury convicted Mr. Jagana because it found he had the intent to commit theft. Therefore, Mr. Jagana was prejudiced by his counsel's deficient performance and reversal is required.

F. CONCLUSION

For the reasons stated above, this Court should accept review to determine whether Mr. Jagana was denied due process of law and whether he received ineffective assistance of counsel. RAP 13.4(b).

DATED this 27th day of March, 2018.

Respectfully submitted,

/s Tiffinie B. Ma
Tiffinie B. Ma (51420)
Attorney for Appellant
Washington Appellate Project (91052)
1511 Third Ave, Ste 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711

Appendix A

FILED
2/25/2019
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. JAGANA, MODI MAMA, DOB: 01/10/1969, Appellant.	)	No. 77012-8-I UNPUBLISHED OPINION FILED: February 25, 2019

SCHINDLER, J. — A jury convicted Modi Mama Jagana of two counts of identity theft in the second degree. Jagana claims (1) his conviction on an uncharged crime violated due process, (2) his attorney provided ineffective assistance of counsel, and (3) insufficient evidence supports the jury verdict. Because neither the record nor case law supports his arguments, we affirm.

FACTS

Fatou Dibba planned to open a hair salon and beauty supply store in Lynnwood. In mid-2012, Dibba hired Modi Mama Jagana as a contractor to do the necessary renovations. Dibba and Jagana did not enter into a written contract. Dibba gave Jagana a key to the store so he could work when she was not there.

During the fall of 2012, Dibba traveled to Amsterdam for several weeks. Jagana finished working on the renovation project while Dibba was away. When Dibba returned, city inspectors told her the construction work did not meet code requirements. Dibba hired a different contractor to redo the construction work so she could obtain city approval and open the store.

In January 2013, Dibba discovered her Bank of America checking account was nearly overdrawn. Dibba accessed her account online and found that Jagana had cashed two of her checks without her permission. Dibba immediately contacted the bank and the police.

Lynnwood Police Detective Douglas Teachworth interviewed Jagana. Jagana admitted cashing the checks but insisted the checks were payment for the construction work. Dibba told Detective Teachworth that she had already paid Jagana for his work. Detective Teachworth tried to call Jagana again but the phone was disconnected.

The State charged Jagana by amended information with one count of forgery in violation of RCW 9A.60.020(1)(b) and two counts of identity theft in the second degree in violation of RCW 9.35.020(1) and (3).[1] Jagana pleaded not guilty.

Dibba testified that she agreed to pay Jagana $3,000 for the construction work. Dibba also paid for Jagana's license and bond, as well as supplies. Dibba testified she paid Jagana half at the beginning and the other half when she returned from Amsterdam. Dibba said she paid Jagana $200 in addition to what she owed him.

[1] At the start of trial, a second amended information was filed for the sole purpose of correcting a scrivener's error regarding one of the check numbers.

Dibba testified she paid Jagana in cash. Dibba said she often carried two or three blank checks with her in her purse. Dibba said Jagana had access to her purse when she was at the store. Dibba denied issuing a check to Jagana for any purpose.

Jagana testified the original estimate for the work was $7,500. Jagana said he agreed to reduce the price to $4,000 because Dibba paid for his license and bond, as well as supplies. Jagana testified Dibba gave him two signed personal checks before leaving for Amsterdam—one check made out for $650 and the other for $750. Jagana said the checks were blank except for Dibba's signature and the dollar amount. Jagana said he completed the signed checks by filling in his name, the date, and the dollar amount "in letters." On the "memo line" of one of the checks, Jagana wrote "[p]ayment for work."

Jagana said Dibba asked him not to cash the checks right away. Jagana testified Dibba said she would call him from Amsterdam when the money was available in her account. Jagana said he told Dibba he would need to cash the checks if she did not pay him. Jagana said he attempted to call Dibba after she returned from Amsterdam but she blocked his number.

Jagana testified he went to Africa to visit family sometime in November or December 2012. After he returned, Jagana decided to cash Dibba's checks. Jagana said he needed money for labor costs he paid while waiting for Dibba to pay him. Jagana opened a new bank account in his name at the bank where he had a mortgage account. Jagana cashed the $650 check, taking $600 in cash and depositing the other $50 in the account. Two days later, Jagana attempted to deposit the other check using mobile deposit but the transaction did not go through.

Jagana admitted Dibba never gave him permission to cash the checks. Jagana said he cashed the checks because Dibba never paid him for his work.

The jury found Jagana not guilty of forgery. The jury convicted Jagana of two counts of identity theft in the second degree.

ANALYSIS

Due Process

For the first time on appeal, Jagana contends the State violated his right to due process by seeking to convict him on conduct that was not charged in the information.

A defendant has a constitutional right to be informed of the nature and cause of the charges against him. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. An information is constitutionally sufficient only if all essential elements of a crime are included in the document. State v. Porter, 186 Wn.2d 85, 89, 375 P.3d 664 (2016). " 'An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.' " State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013)[2] (quoting State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). "The purpose of this essential elements rule is to sufficiently apprise the defendant of the charges against them so that he or she may prepare a defense." State v. Kosewicz, 174 Wn.2d 683, 691, 278 P.3d 184 (2012).

A person commits the crime of identity theft in the second degree when with intent to commit "any crime," he or she knowingly obtains, possesses, uses, or transfers a means of identification or financial information of another person and obtains money or anything else that is $1,500 or less in value. RCW 9.35.020(1), (3).

[2] Internal quotation marks omitted.

The charging document plainly and accurately informed Jagana of all essential elements of the charged crime. The amended information alleged Jagana committed two counts of identity theft in the second degree as follows:

> Count 2: SECOND DEGREE IDENTITY THEFT committed as follows: That the defendant, on or about the 12th day of January, 2013, did knowingly obtain, possess, use and transfer a means of identification and financial information of a person, to wit: check #116 belonging to the Bank of America account of Fatou Dibba, with the intent to commit, aid, and abet a crime, to-wit: Forgery; proscribed by RCW 9.35.020 (1) and (3), a felony.
>
> Count 3: SECOND DEGREE IDENTITY THEFT committed as follows: That the defendant, on or about the 12th day of January, 2013, did knowingly obtain, possess, use and transfer a means of identification and financial information of a person, to wit: check #115 belonging to the Bank of America account of Fatou Dibba, with the intent to commit, aid, and abet a crime, to-wit: Forgery; proscribed by RCW 9.35.020 (1) and (3), a felony.

Jagana contends that contrary to the language of the amended information that states he intended to commit forgery, the prosecutor argued during closing argument that he acted with the intent to commit theft. The record does not support Jagana's assertion that the State sought to convict him on an alternative theory that he committed identity theft with the intent to commit theft.

Identity theft is not an alternative means crime. State v. Fedorov, 181 Wn. App. 187, 197-198, 324 P.3d 784 (2014). "It is reversible error to try a defendant under an uncharged statutory alternative because it violates the defendant's right to notice of the crime charged." State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). But the State is not required to specify in the information that Jagana intended to commit the crime of forgery. It is sufficient for the information to allege Jagana committed identity theft with the intent to commit "any crime." RCW 9.35.020(1). Surplus language in an

information may be disregarded. State v. Tvedt, 153 Wn.2d 705, 718, 107 P.3d 728 (2005). The to-convict jury instructions on identity theft in the second degree correctly state that the State must prove beyond a reasonable doubt that Jagana knowingly obtained, possessed, or transferred or used the checks with the intent to commit "any crime." The to-convict jury instructions state:

> To convict the defendant of the crime of Identity Theft in the Second Degree, . . . each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 12th day of January, 2013, the defendant knowingly obtained, possessed, or transferred, or used a means of identification or financial information of another person — Check #116 [and #115]
> (2) That the defendant did so with the intent to commit any crime; and
> (3) That the defendant knew that 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.
>
> On the other hand, if, after weighing all 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.

The prosecutor did not use the term "theft" at any point during closing or rebuttal argument. During closing argument, the prosecutor addressed the elements in the to-convict jury instructions and described how the State's evidence applied to each charge. In regard to the identity theft charges, the prosecutor argued:

> [O]n or about the 12th day of January, 2013, the defendant knowingly obtained, possessed, or transferred, or used as a means of identification or financial information of another person, check 116. It is uncontested the defendant used check 116 on January 12th of 2013. He possessed it. Had it in his hand. He opened up the account and he cashed it. Transferred it. Done. The defendant did so with the intent to commit a crime. Yeah. He intended to take her money.

Jagana contends that by using the phrase, "He intended to take her money," the prosecutor invited the jury to convict him of identity theft on the uncharged theory of intent to commit theft. We disagree. In the context of the entire argument, it is apparent that the prosecutor argued Jagana knowingly obtained, possessed, and transferred Dibba's check 116 to obtain money from her bank account. The prosecutor's argument is entirely consistent with the charging document and the jury instructions. The information provided sufficient notice for Jagana to defend against the charges.

Ineffective Assistance of Counsel

Jagana contends his attorney provided ineffective assistance of counsel by proposing the to-convict identity theft jury instructions. The trial court used the proposed to-convict instructions to instruct the jury.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To establish ineffective assistance of counsel, Jagana must show (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective. Strickland, 466 U.S. at 689; McFarland, 127 Wn.2d at 335. Failure to meet either prong of the two-part test for ineffective assistance of counsel ends the inquiry. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Jagana cannot establish ineffective assistance of

counsel. The to-convict jury instructions that defense counsel proposed accurately state the law. The instructions mirror the language of the identity theft statute and 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 131.06, at 616 (4th ed. 2016).

Nevertheless, Jagana argues his attorney should not have proposed instructions that stated he acted with the intent to "commit any crime" but instead, should have proposed instructions that used the surplusage language in the amended information. The surplusage language in the amended information states Jagana acted with the intent to commit "a crime, to-wit: Forgery." But as noted, unnecessary language that is included in an information is not an element of the crime that either must be proved or included in the jury instructions. Tvedt, 153 Wn.2d at 718.

State v. Morales, 174 Wn. App. 370, 298 P.3d 791 (2013), is distinguishable. The State charged the defendant Morales with two counts of felony harassment of Yanett Farias in violation of RCW 9A.46.020. Morales, 174 Wn. App. at 375-76. However, the to-convict jury instruction stated Morales placed " 'Trinidad Diaz &/or Yanett Farias in reasonable fear that the threat to kill would be carried out.' " Morales, 174 Wn. App. at 376.[3] In closing argument, the prosecutor referred to the jury instruction to argue the testimony of Diaz established he was fearful Morales would carry out the threat to kill. Morales, 174 Wn. App. at 383. We held the court erred by instructing the jury on an uncharged crime and the error was not harmless. Morales, 174 Wn. App. at 383-84. Unlike in Morales, here, the jury instructions correctly state the law.

[3] Emphasis in original.

Sufficiency of the Evidence

Jagana argues insufficient evidence supports the identity theft in the second degree jury convictions. Due process requires the State to prove all essential elements of the charged crime beyond a reasonable doubt. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed 2d 368 (1970). In determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). A challenge to the sufficiency of the evidence admits the truth and all reasonable inferences from the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact on issues of witness credibility. State v. Witherspoon, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

Jagana contends the State failed to prove he intended to commit "any crime" as required by RCW 9.35.020(1). Viewing the evidence and logical inferences in the light most favorable to the State, the evidence demonstrates Jagana's intent to commit "any crime" and supports the jury convictions for identity theft in the second degree.

Dibba testified Jagana did not work on the construction of the store after October 2012 and she paid him only in cash. Dibba said she never wrote Jagana a check or gave him a blank check for any purpose. Dibba also testified that she often left a few checks in her purse and Jagana had access to her purse, as well as access to business documents containing her actual signature. Dibba said she did not give Jagana

permission to cash the checks. Dibba testified the two checks Jagana cashed were not in her handwriting.

Jagana admitted he wrote his name and date on the checks, spelled out the dollar amounts, and wrote "[p]ayment for work" in the memo lines. Jagana admitted Dibba never gave him permission to cash the checks. The evidence shows Jagana knowingly possessed the checks and deprived Dibba of the funds in her account. Sufficient evidence supports the jury finding the intent to commit a crime.

We affirm the jury conviction of two counts of identity theft in the second degree.

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. 77012-8-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:

☒ respondent J. Scott Halloran
[shalloran@co.snohomish.wa.us]
[Diane.Kremenich@co.snohomish.wa.us]
Snohomish County Prosecuting Attorney

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 27, 2019
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

March 27, 2019 - 3:23 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77012-8
Appellate Court Case Title:	State of Washington, Respondent v. Modi Mama Jagana, Appellant
Superior Court Case Number:	15-1-02543-5

The following documents have been uploaded:

- 770128_Petition_for_Review_20190327152222D1056957_3840.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.032719-06.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- greg@washapp.org
- shalloran@co.snohomish.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Tiffinie Bie Ha Ma - Email: tiffinie@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190327152222D1056957