

64187-5

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In the Court of Appeals  
of the State of Washington  
Division I

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STATE OF WASHINGTON,  
Plaintiff,

v.

ANDREW L. BRANCH JR.,  
Appellant,

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AUG 10 2010

C.O.A. NO. 64187-5-I

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2010 AUG 11 PM 4:54  
COURT OF APPEALS  
DIVISION I

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APPELLANT'S  
STATEMENT OF ADDITIONAL GROUNDS

RAP 10.10

\*\*\*\*\*

Andrew L. Branch Jr.  
Appellant  
Clallam Bay Corrections  
1830 Eagle Crest Way  
Clallam Bay, WA. 98326

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## A. ASSIGNMENTS OF ERROR

1. The defendant's identity theft, possession of stolen property, and VUCSA drug possession convictions must be reversed because there was insufficient evidence that Mr. Branch "possessed" the contraband.

2. There was no evidence that Mr. Branch had knowledge that the property was stolen.

3. Without the inaccurate statement signed Mr. Van Lam and taken by police there is no probable cause to charge Mr. Branch with identity theft, poss. of stolen prop., and VUCSA.

4. The evidence was insufficient to establish dominion and control.

5. The court erred in allowing the accomplice liability instruction. *Also, Court Errored Not Admitting A Jury Unanimity Instruction.*

6. The prosecutor committed flagrant incurable misconduct causing manifest constitutional error in closing argument.

7. The cumulative error of both accomplice liability and prosecutor misconduct denied Mr. Branch a fair trial.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Must the defendant's identity theft and possession of stolen property convictions be reversed where there was no evidence that Mr. Branch had "physical possession" of anything and the law of the case requires Physical possession on these counts.

2. Was the evidence insufficient to establish dominion and control over the contraband and apartment in question when a tenant of the apartment and Mr. Branch's C.C.O. give testimony that he maintains another address. Also the manager of the apartment Van Lan gives conflicting statements under penalty of perjury?

3. Was there lack of evidence where knowledge in all counts must be proven?

4. Would there be sufficient probable cause to file charges against Mr. Branch without the inaccurate statement signed under penalty of perjury by the manager of apt.#4 Mr. Van Lam?

5. Was the defendants constitutional amendment 6 and 14 violated from admitting the accomplice liability instruction after both state and defense rested, also did the instruction relieve the state of the burden of proof for the crimes charged?

5b. DID THE LACK OF A JURY UNANIMITY INSTRUCTION CAUSE MANIFEST ERROR?

6. Did the prosecutor commit incurable flagrant misconduct in closing rebuttal by misleading the jury, making prejudicial argument outside the evidence, and commenting on Mr. Branch's constitutional permitted silence?

7. Was the cumulative effect from both accomplice liability and prosecutor misconduct; causing manifest error and denying Mr. Branch a fair trial? Const. amend. 14 violation.

#### C. STATEMENT OF THE CASE

In April of 2008, Andrew Branch Jr. was placed under community custody probation. Nina Jackson is Mr. Branch's probation officer. In Oct. 2008 Mr. Branch resided at 6605 Francis loop SE. in Auburn. In a scheduled meeting between Ms. Jackson and Mr. Branch at the Auburn field office (420 e. Main st., Auburn) Mr. Branch put in a request to change addresses to a 9038 Greenwood ave n., Seattle. The request was not approved. Mr. Branch also informs Ms. Jackson that He has employment with Paula's Boutique. Mr. Branch's employer, Anna Paula Lopes, faxes employment info to Ms. Jackson varifying his status. 7/14/09 RPat56-78. Mr. Branch remained at 6606 Francis loop se. until Dec. 1st 2008.

Anna Paula Lopes was the tenant of 9038 Greenwood n. apt.#4. On Dec.1st,2008, Ms. Lopes called the police saying that Mr. Branch has an active Department of corrections warrant and was inside said apt.#4.7/7/09RPat41,7/8/09RPat157. The police did not contact Mr. Branch at that time. The other tenant of the apartment, Cerise Brown, was in the shower and by the time she got to the door the police were gone. Police talk to a downstairs neighbor and ask if anyone matching the description of a blackmale shows up, call the Police. Cerise Brown leaves apt.#4 but leaves the door unlocked for Andrew Branch and Ariel Hudson who she is expecting to come by to hang out later.

7/14/09 RPat 122-126  
7/14/09RPat122-

According to the probable cause statement the neighbor called police saying she could here footsteps in apt.#4. The police respond again around 1am Dec.1st,2008,and immediately breach the door of apt.#4. Inside police see Ariel Hudson by the door and Mr. Branch crawling towards police in the living room as commanded.7/709Rpat47, 7/9/09RPat18-9. As a result of a search of apt.#4 several financial document, stolen property, drugs,and a lease showing Anna Lopes as the tenant of apt.#4. Hudson and Branch were both taken into custody; Hudson was released and Branch was held on a D.O.C. warrant.

While Mr. Branch is being held only on a warrant police obtain a statement signed under penalty of perjury, by the manger of apt.#4 Van Lam, that Mr. Branch was the "leasee" of apt.#4 from July '08 to Feb.24th '09 when the statement was signed. It was later discovered that Mr. Lam did not write the statement and Mr. Branch had no lease. 7/14/09RPat48-51. From the false statement charges were filed against Mr. Branch,two days after it was signed, Feb.26th'09.see crt.min.atP.1

Following jury trial Mr. Branch is found guilty of poss. stln. prop.,VUCSA, and identity theft.CP144-56. Mr. Branch appeals.

D. ARGUMENT

(1) THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT ANDREW BRANCH "POSSESSED" IDENTITY THEFT DOCUMENTS, STOLEN PROPERTY, OR A CONTROLLED SUBSTANCE. VIOLATING HIS U.S. CONST. 14 AMED. ART.1 SEC.3

To convict Mr. Branch the state had to prove beyond a reasonable doubt that he knowingly possessed with the intent to commit identity theft. In the case of stolen property possessed knowing each article was stolen.

Possession can be actual or constructive. But for the evidence to be sufficient to save the two above charges actual knowing physical custody must be proven beyond a reasonable doubt.

Actual possession was not proven in any of the charges or counts against Mr. Branch. The law of the case for both identity theft 2nd° and possession of stolen property are in the instructions. With no further definition to the word "possession" it must be taken as actual physical custody. see CP88-109. To further argue the law of the case see the Appellates' Opening Brief; at pg. 5-10. Regardless what's thought to be proceeded under the element to be proven are in the jury instructions. Such a challenge to the sufficiency may be raised the first time on appeal. St. v. Hickman, 135 Wn.2d at 103n.3 (citing St. v. Alvarez, 128 Wn.2d 1,9,204 p.2d(1995)).

Since Mr. Branch had physical custody of nothing at all, this case centered around whether Mr. Branch was the owner of 9038 Greenwood n.#4 and had dominion and control over the contraband found inside. No evidence what so ever was put forth to prove beyond a reasonable doubt that Mr. Branch had actual physical custody over anything at all. Point being to convict, actual physical possession "must" have been established. see CP88-89, 105-106. Making both charges, convictions, and all counts under them constitutionally insufficient.

The instructions for CP.88 and 105 were:

A PERSON COMMITS IDENTITY THEFT 2ND° WHEN, WITH INTENT TO COMMIT AID OR ABET ANY CRIME, HE OR SHE OBTAINS, POSSESSES, USES, OR TRANSFERS A MEANS OF IDENTIFICATION OR FINANCIAL INFORMATION OF ANOTHER PERSON.

POSSESSING STOLEN PROPERTY MEANS KNOWINGLY RECEIVES, RETAINS, CONCEALS, OR DISPOSE OF STOLEN PROPERTY KNOWING ITS BEEN STOLEN AND TO WITHHOLD IT OR APPROPRIATE THE SAME TO THE USE OF ANY OTHER PERSON OTHER THAN THE TRUE OWNER OR PERSON ENTITLED THERE TO.

Both the above instruction should have expressed that possession can be actual or constructive which is what W.P.I.C. instructions say to do for issues involved in the particular case. The state may argue that see CP121 blankets all charges in this case. This can't be possible since see WPIC 50.03 notes on use state clearly that the instruction is for "controled substance or legend drug cases only". As there is a drug charge in this case constructive possession only applies to it. Also to blanket every charge with an instruction that does'nt apply causes manifest error. Which is what happend in this case. Mr. Branch had no physical custody of anything nor was there any evidence to support such. Both charges and all counts under identity theft 2nd° and stolen proprty 1st° along with there convictions must be reversed. Const. Amend. 14 violation.

(ii) THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO SUPPORT KNOWLEDGE OR DOMINION AND CONTROL OVER CONTRABAND FOUND IN APT. #4

Since Mr. Branch had no possession over anything in apt.#4 the state attempted to show constructive possession by establishing dominion and control over the apartment. Which still would fall short of the needed dominion and control over the contraband.

Many items were said to be found in plain view within the bedroom. So hearsay and unfounded statements were used to put Mr. Branch there saying he attempted to jump out the window. The evidence would say otherwise. Both Officers Inouye and Chan say they never saw Mr. Branch by any windows nor in the bedroom. Both say seconds after entry into the apartment both saw Mr. Branch on his stomach in the livingroom crawling towards officers, as commanded. 7/7/09Rp at 47, 7/9/09RP at 18-19. Although the state did not elect to use a theory that Mr. Branch handled any of the contraband in the apartment (computer keyboards, drug paraphernalia, credit cards, or identification documents) or attempted to "sluff" or throw anything from his person, it would have been disputed by testimony. Det. Hansen said he had various items tested for fingerprints. Zero prints came back as matching Mr. Branch. 7/8/09RP at 126-127. This crucial piece of evidence implies that there was no contact in passing or otherwise by Mr. Branch in a dominion where he is supposed to have control over the contraband obtained, possessed, or used on or about Dec. 1st, 2008; which is an essential element of the crime.

To simply show dominion and control is not necessarily sufficient to establish possession. The state must also show knowledge. State v. Shumaker, 147 Wn.App.330,334,174 P.3d 1214(2007); State v. Roberts, 80 Wn App.342,353-54,908 P.2d 892(1996).

The state provided absolutely no evidence of knowledge in any of the charges which is an essential element not met. In fact its

noted that in the case of the stolen property that not even the police could determine if the computers were stolen without the help of a tech person who built the computer and serial numbers inside.7/8/09RPat104-107. There is not any evidence at all in this case to show that Mr. Branch was connected to any car theft, burglary, obtaining any stolen property, or selling of any stolen property. There is not a single victim nor is there any testimony participation or knowledge. For lack of proof on the knowledge element alone all convictions of Mr. Branch must be reversed. Const 14 Amend. violation.

No single factor is dispositive when determining dominion and control; the totality of the circumstance must be considered.State v. Turner,103 Wn.App.515,512,13 P.3d 234(2000).

Witness testimony was used to establish dominion and control. But each give evidence contrary to the objective. Mr. Branch argues theres neither one piece of direct or circumstantial evidence nor total circumstance that would lead a rational trier of fact to believe beyond a reasonable dout that Mr. Branch had dominion and control over the apartment or the contraband in question.

Ms. watkins,(a 7yr. tenant of the 9038 Greenwood builg.) says she was never told by the manager that Mr. Branch lived in apt.#4. Ms. watkins says she did know that a Mr.Jones and his family lived upstairs in Apt.#4 and thought Mr. Branch was his roommate.7/14/09 RPat12,39,45. Ms. Watkins then says Mr.Branch went to jail sometime in the summer and woman named "Paula"(Anna Paula Lopes) moved into apt.#4 with her son. Ms. Watkins says Ms Lopes has keys to apartment. Comes and goes frequently with several men and woman and Ms. Lopes began painting, cleaning, and decorating, because "the other tenants left it a mess"(implying not Mr. Branch).7/14/09RPat12-19.

Ms. watkins also knew when Ms. Lopes was home because either her son would be playing outside or Ms. Lopes' car would be parked outside.7/14/09at22-26.

Ms. Watkins testimony does associate Mr. Branch with apt.#4 but none of what she says is conclusive evidence of dominion and control over the contaband in apt.#4. In fact most of what she says shows if nothing more that many people had access to the apartment, that Ms. Lopes has moved into apt.#4, and that Mr. Branch is in jail while all of this is going on.

Cerise Brown is the present tenant of 9038 Greenwood apt.#4. and has been the tenant since october 2008. Ms. Brown was also the roommate of Ms. Lopes.(corrobrated by the manager Van Lam) 7/14/09RPat101,37. Ms. Brown testifies how she and Ms. Lopes are roommates. She would sleep on the couch and Ms. Lopes slept in the bedroom. Ms. Brown says the place was fairly well kept and it was a pretty small one bedroom apartment.7/14/09RPat102-103. When she was asked about Mr. Branch she says she met him around the middle of october. Mr. Branch would come hang out sometimes with Ms. Lopes because he worked with her and they were "seeing" each other.7/14/09RPat104. During her testimony Ms. Brown is shown pictures of the apartment. Ms. Brown identifies several of hers, Ms. Lopes, and Ms. Lopes sons' property. Things like the childs, video game, clothing, furniture, computers, tools, pink candles, k-9 and parenting magazines. She even says where many of these things are bought.7/14/09RPat110-117. Ms. Brown says many of the things were taken in the search of the apartment.Some of which were hers. She contacted Det. Hansen to get them back(a computer

camera, and, tools)Ms. Brown met with Det. Hansen on Jan. 14th 2008.7/14/09RPat133(also corroborated by Det. Hansen) Ms. Brown says Ms. Lopes had done some repairs to apt.#4 like painting,and fixings a few things.7/14/09RPat103. Ms. Brown admitted to putting a file cabinet together for Ms. Lopes saying, it was a two drawer roll on wheels kind of like you would get at Ikea.(this file cabinet was found in the living room with checkstock and financial documents inside).7/14/09RPat125. When asked about the night in Question Ms. Brown admitted being at home on Nov.30th, 2008. Ms. Brown came and went several times hours before the police kicked in the door. When asked how did you get in and out of the apartment she says "with a key".7/14/09RPat122. Ms. Brown says she was actual there the first time the police came to the door but she was in the shower and by the time she got dressed the police were gone.7/14/09Rpat122-123.This was all around 11pm Nov.30th,2008. Shortly after that Ms. Brown left. Ms. Brownn says she left the door unlocked for Andrew Branch and Ariel Hudson. When asked how did she know they were coming back to the apartment? Ms. Brown answers, "Paula(Ms. Lopes)had called me an said they were coming back after dropping off their friend Amanda in Renton".7/14/09RPat126. Ms Brown tried to get ahold of Ms. Lopes the next morning but could'nt but Ms. Hudson ended up calling her letting her know what happend.7/14/09RPat125. Ms. Brown was worried about her computers and other property inside the apartment but waited until police left to go inside. When asked did she see Mr. Branch with a key to Apt. #4? Ms Brown says no, there was only two keys"Paula had one and I had one". When asked did Mr. Branch live at apt.#4 in Oct.2008? Ms. Brown says "no". When asked did Mr Branch live in apt.#4 in Nov.2008? Ms. Brown answers,

no, he was living at his parents house because I spent Thanksgiving with them. Ms. Brown says the home is in Algona(a suburb of Auburn)in south King County.7/14/09RPat121. Ms. Brown even says she recalls the address as being 6605 Francis loop.7/14/09RPat148 .(corroborated by Mr. Branch's prob. offc. Ms. Nina Jackson.7/14/09RPat70-73)

Whats important about Ms. Browns testimony is she has first hand knowledge of the goings on in apt.#4 and its corroborated by other states witnesses. Not only does she have dominion at apt.#4 but she even goes to get some of her property back from police. She is Ms. Lopes roommate and admits that only the two of them have keys to the apartment. Ms. Brown says Mr. Branch did not live with Ms. Lopes Her son and herself but she knows exactly where he lives and that she spent Thanksgiving there four days before Dec.1st,2008.

Although there is evidence that Mr. Branch attempted to change his address this was not approved. He remained at his Auburn address where he reported tohis probation officer at the Auburn field office.

Nina Jackson is Mr. Branch's probation officer. The State calls her because she has direct knowledge of Mr. Branch's work and living situation.

Ms. Jackson begins her testimony by saying she is a Community Corrections Officer out of the Auburn field office(hence Mr. Branch resides in Auburn).7/14/09RPat56. Ms. Jackson speaks about her duties, how clients are supervised in Auburn, and, how Mr. Branch is supervised by her begining in Apr.2008. Within 24 hour of someones release from custody they go to 420 E. Main st. in Auburn to meet with their C.C.O. and to the best of her Knowledge Mr. Branch

did that.7/14/09Rpat59-61. Ms. Jackson says at their meetings they would talk about Mr. Branch was living with his father and was employed by a Anna Paula Lopes who faxed Ms. Jackson info regard- ing Mr. Branch's employment.

On cross examination certain date are established to show when Mr. Branch is in and out of custody. Ms. Jackson is is asked if and when Mr. Branch is released from custody does he need permission to live at a particular location in order to make it legal. Ms.Jackson answers thats correct.7/14/09RPat70. Ms. Jackson is asked, when Mr. Branch was released was he living with his father? She answers yes. When asked, did you go there and visit him? She says "I did not make a home visit but, once released Lillian Wilbur did how ever".7/14/09RPat70. When asked, "Is Lillian Wilbur someone you trust?" Ms. Jackson says, "Yes, she is also another C.C.O..""So he was staying with his Father from with in the chronilogical records yes."(the chronilogical record expresses yhe events of a person on supervision. since Mr. Branch has been incarcerated since the night in question 12/1/08 it shows he lived with his father to that point .) Ms. Jackson is given a form that she identifies is from her office that relates to to Mr. Branch and is asked to read what his address is. She does and reads, 6605 francis loop SE Auburn.7/14/09 RPat71.(this is the same address Mr. Branch was livingat on Thanks- giving testified to by Cerise Brown on7/14/09RPat121,148.) The same form also shows that Mr. Branch is starting community college and is a sales rep. for Ms. Lopes at Paulas Boutique.

Ms. Jackson is handed another form that she indicates is what someone submits when they want to change addresses. It shows that Mr. Branch wants to change his address to 9038 Greenwood #4.

When asked if the form indicates the move was approved? Ms. Jackson says, no. When asked does the form indicate when the request was made. Ms. Jackson says 10-16-08. When asked does it say if my client Mr. Branch is residing at that address? Ms. Jackson say, no. As of 10-16-08 Mr. Branch was not living at the apt.#4 address yet. 7/14/09 Rpat73-75.

The next part of Ms. Jackson's testimony is stating the time spent in and out of custody by Mr. Branch. In custody from 9-5-08 thru 10-9-08. Then out of custody from 10-9-08 thru 12-1-08. Then in custody from 12-1-09 thru the present (these times only reflect the period alleged to be spent at apt.#4). 7/14/09 RPat78.

Ms Jackson takes away opinionated testimony and gives direct evidence to the fact that Mr. Branch did not live at apt.#4 but lives at 6605 Francis loop SE. Auburn, and did so until Dec. 1st, 2008.

It would seem that the manager of apt.#4, Mr. Van Lam would be the best person to tell you who lives there. Mr. Lam contradicts and essentially purjures himself to the point theres doubt doubt to who at all lives there.

Mr. Lam's tetimony begins by him saying he has owned the 9038 Greenwood building for 20 years. He says Watkins is the tenant of apt.#2 and Cerise Brown is the tenant of apt.#4. When asked about Mr. Branch he says that he did not know his name until police told him that is what it was and that he only knew him as "Love". Mr. Lam says Mr. Branch rented apt.#4 from him but he is not sure if he began renting in Sept. or Oct. of 2008. Mr. Lam says that Mr. Branch lived with the previous tenant, Sam Jones, for one or two months and at some point Sam Jones leaves and Mr.

Branch takes over. Mr. Branch does not have a lease but he does ask for one. Mr. Lam says he makes a verbal agreement to rent the apartment to Mr. Branch (who he only knows as "Love") and give him a lease twice. 7/14/09RPat37-40. Mr. Lam then begins to change his story dramatically.

Mr. Lam says he never gave Mr. Branch a lease but he did give a lease to "Paula" (Ms. Lopes) twice. Mr. Lam then says Mr. Branch continued to pay rent for Oct. 08, and Nov. 08, on time. 7/14/09RP at 40-41. (note that Mr. Branch did not get released until 10-9-08 and was living in Auburn. 7/14/09RPat75,78.) When shown a sublease agreement Mr. Lam says he has never seen it. The sublease shows Mr. Lam as the owner, Ms. Lopes as the tenant, and she would like to sublease to Mr. Branch. When Mr. Lam is asked that would make the actual tenant Ms. Lopes? He says that's correct. 7/14/09RPat44. When asked, who paid rent and for what months? Mr. Lam says that Mr. Branch did not pay rent in July '08. Sam Jones paid rent in Aug. '08. And Mr. Branch would take over in Oct. '08. When asked, what happened in Sept. '08? Mr. Lam says, Ms. Lopes paid me. 7/14/09RPat46. Mr. Lam says he can't remember if she paid with cash or check but he does remember at one point she bounced a check. Mr. Lam says Ms. Lopes was also remodeling apt. #4 and that he liked her work. When asked, Ms. Lopes paid you rent in Sept. '08 and then began remodeling? Mr. Lam answers, yes. 7/14/09RPat46. Mr. Lam received complaints from Ms. Watkins about the noise Ms. Lopes was making (corroborated by Watkins test. 7/14/09RPat16-17).

When shown exhibit 240 Mr. Lam says he recognizes it. He is told put his attention halfway down the page where it says that

Mr. Branch "leased" 9038 Greenwood apt.#4. Mr. Lam says, "yes". When asked if he signed this document under penalty of perjury that Mr. Branch "leased" that property from july '08 to the present, which at that time was Feb. 24th '09? Mr. Lam say, "yes". 7/14/09Rpat48-49. When asked is that still your testimony today Mr. Lam says "no". Mr. Lam's testimony next was that Mr. Branch never had a lease, and the police put in the word "lease", that the police put in the dates, and in Mr. Lam's words "they wrote in what I say". "I just signed it".7/14/09RPat50. When Mr. Lam is asked again, "was Anna Lopes or Paula Lopes ever the tenant of apt.#4" inreference to the sublease agreement, Mr. Lam answer is "She was in there cleaning stuff, so I got no idea. She was cleaning in that period of time. I just dont know. I don't live there and so she is the one who takes care of it , so ."7/14/09RP at54. The last thing Mr. Lam says is that Ms. Lopes had permission by him to do all that she did in the apartment.7/14/09RPat54

Consequently from that false statement charges were filed against Mr. Branch two days after it was made on Feb. 26th '08. court mins./court doc.at P.1.

There is just nothing in this case thatwould say that Mr. Branch had dominion and control over the property or the contraband. With regards to the sublease agreement without it being signed by anyone, the only thing to be infered is that if Ms. Lopes is trying to sublease it than she must must be the leasee. Mr. Lam says he gave a lease to her twice.

For a person to have dominion and control over a substance you are to consider all the relevant circumstance. Whether a

defendant has the immediate ability to take possession, whether the defendant has the capacity to restrict others from possession, and whether the defendant has dominion and control over the place where it is found.

In this case Mr. Branch can't restrict someone from possession because the tenants have keys. He can't take possession immediately because he doesn't live there. And he can't have dominion and control over the place because quite frankly he is not out of custody soon enough or long enough to establish such.

The only things found at the apartment of a personal nature were video on a hard drive of a computer that was not said to be stolen, where Mr. Branch is in the video and it is thought to be recorded in the bedroom of apt.#4. When detective Hansen is asked is there something specific to the apartment that makes you think it was recorded there? Det. Hansen says, the layout of the room the "door" and the closet. 7/8/09RPat102. When shown pictures of the apartment and room he notices there are no doors on any of the rooms or closet. 7/8/09RPat135. Making it very unlikely that the video was made in the apartment. The video could've been made any time and put on the computer in a number of ways.

The other thing found was located in the lower drawer of the file cabinet. It was made by Ms. Brown for Ms. Lopes and was in the livingroom of the apartment. 7/14/09RPat125. In the bottom drawer was an envelope with document pertaining to Mr. Branch sort of like a personnel file for a job. The envelope had an expired WA State drivers license with a different address from apt.#4, forms that shown his actual address of 6605 Francis loop, Auburn, and, some forms that C.C.O. Nina Jackson testified were faxed to her by Ms. Lopes 7/14/09RPat125.

Ms. Lopes.7/14/09RPat65. Whats odd about the placement of the envelope is that its out of sight in a drawer in the livingroom.  
7/8/09RPat114-117. This is suppose to be Mr. Branch's apartment, his personal things should'nt be hidden but rather it should be in the open in possibly a bedroom. Just as the true tenant Ms. Lopes's work i.d., social security card, and clothes were.7/8/09RPat131.

There were absoluty no mens clothing found but there was many articles of womens clothing.7/7/09RPat52,7/8/09RPat148-49. Even with more found, that would not give him control over the contraband.

The mere pressence of personal documents does'nt conclusively establish dominion and control over the premises.see State v Alvarez,105,Wn.App.at217,223.State v Hagen,55,WN.App.at500;State v Callahan,77,Wn.App.at31.

Det. Hansen testified that the U.S. Postal Service had 9038 Greenwood apt.#4 listed as Ms. Lopes mailing address as late as 11-20-09.7/8/09.144-145. Mr. branch argues even if he had mail addressed to apt.#4, which he did not, would still fall short of the necessary requirement. Regardless of evidence a person has received mail at a residence is not sufficient to show dominion and control.State v Hagen,55,Wn.App.494,500,781 P.2d892(1989).; State v. Alvarez,105,Wn.Appat223.

The landlord switched is testimony from Mr. Branch living at apt.#4 to him not Knowing who lives there but the Ms. Lopes was taking care of it.7/14/09RPat54. Given the testimony of all the other witnesses its clear that Mr. Branch was only assocaited with apt.#4 did not have dominion and control and resided in Auburn.

The courts are clear. Temporary residence, personal property or knowledge of the presence of contraband without more is insufficient to show dominion and control. A defendant does not have

dominion and control of "contraband" where he is a temporary occupant of the home, has personal possessions on the premises, or knows about contraband. State v Hystad, 36, Wn. App. at 42, 49, 671 P.2d 793, (1983) supra.

State v Hystad, 1983 supra and State v Callahan 1969 control the issues in this case.

The State would like you to believe that from July '08 to Feb. 24th '09 Mr. Branch had dominion and control over apt. #4 without there being a lease, not one receipt of payment of rent, not one cable bill, electric bill, or phone bill. There is not even one piece of mail addressed to apt. #4 with Mr. Branch's name on it. Not one stitch of clothing in the residence nor even a fingerprint on the contraband. There is no way to live somewhere for one month let alone seven without having at least one of these things. Not to mention the landlord did not no Mr. Branch's name.

The charges and counts under identity theft and possession of stolen property are constitutionally insufficient for lack of possession. In essence the State conceded to that fact when they asked for the Accomplice Liability instruction. Even in the more broad light of constructive possession the evidence is still insufficient. U.S. Const. Violation 14 Amend.; All convictions of Mr. Branch's must be reversed.

(2) WITHOUT THE INACCURATE STATEMENT(S) TAKEN FROM MR. VAN LAM, BY POLICE, THERE WAS NO PROBABLE CAUSE TO CHARGE MR. BRANCH WITH IDENTITY THEFT, PSP, AND VUSCA.

RAP 2.5(a)(3) allows the appellant to raise the issue of any violation of an constitutional rights the first time on appeal. Probable cause and due process were both violated when the false statement of Mr. Lam was used to file charges against Mr. Branch. Const. amend. 4 and 14.

Mr. Branch was arrested on Dec.1st'08 inside apt.#4. While being held only on a D.O.C. warrant police try to find evidence that can be used first to file charges first against anyone.

Since all the evidence was found in the apartment it was needed to establish who are the tenants of the apartment. There was a considerable amount of of circumstantial and direct evidence that Ms. Lopes and Ms. Brown were the tenants. There was a lease showing Ms. Lopes was the tenant. There were business cards for Ms. Lopes's business. Ms. Brown actually met with Det. Hansen to get her things back that were taken in the search.7/14/09RPat133. The police noticed right away that there were only womens clothes found inside apt.#4.

There was some circumstantial evidence that associated Mr. Branch to apt.#4 most of which was found in a single envelope in the bottom drawer of a file cabinet. One of the articles found actual shown Mr. Branch's address as other than apt.#4. It wasn't until the manager Van Lam signed a statement under penalty of perjury that Mr. Branch was the "leasee" of apt.#4 from July'08-Feb.24th'09 the same day it was signed. Two days later on Feb.26th'09 charges were filed against Mr. Branch.

Without this false statement taken 89 days after Mr. Branch's arrest there is no probable cause. Wash. Const. art. I, sec. 7 due process violt. Wash. Const. art. I, sec. 3 U.S. Const. amend. violation 4 and 14.

**(3) THE COURT ERRORED ALLOWING THE TO CONVICT INSTRUCTION OF ACCOMPLICE LIABILITY. IT VIOLATED THE DEFENDANTS 6th AND 14th AMENDMENT RIGHT AND IT RELIEVED THE STATE OF ITS BURDEN OF PROOF.**

The defense is well aware that the state may proceed on the theory of accomplice liability any even if the original information does not charge as such. State v Davenport, 100 Wn.2d 757, 764, 765, P.2d 1213 (1983) State v Thompson, 60 Wn. App. 662, 666, 806, P.2d 1251 (1991). Amendment of the information anytime before the verdict will also be allowed unless the defendant can show substantial rights were violated. Cr.2.

In this case the state did not amend the infomation at all. The charging information and the jury instructions are two separate concepts. The first time the state and defense formally argued on Accomplice Liability was after the state and defense had rested. 7/14/09 RPat156. If the defense had known it was being charged as an accomplice could have prepared a defense for such. The Accomplice Liability is not a lesser included offense but an jury instruction and a charge. What the court did is in essence allow the state to charge the defendant through instruction since the state only amended the instructions and not the information. The charges and instructions must both contain every element of the crime. The defendant has the right to know, defend, and be heard on all charges against he or she. In this case the defedant was not allowed to do so. U.S. Const. Violation Amend. 6 and 14.

**(ii) ACCOMPLICE LIABILITY RELIEVED THE STATE OF PROVING EVERY ELEMENT CAUSING MANIFEST ERROR.**

The court should have had an evedendtry hearing deciding on the principals guilt. Or the court should have instructed the jury

who the principal is and if they believe that he or she committed a crime then the jury can decide on whether the defendant aided or abetted the principal thus causing guilt.

In these cases there was no shared intent or prior knowledge of a crime on the defendant's part. The crimes that Mr. Branch is accused of being an accomplice to have no evidence connecting him to the crime. Not only was he in custody during many of the car prowls, burglaries, and thefts but one complainant said that his accounts were still being used in Jan. '09, one month after Mr. Branch's arrest on Dec. 1st 2008. 7/9/09 RPat128. The State argued that Mr. Branch is not being charged with what he couldn't have done but with what he did do, possess contraband. 7/15/09 RPat66. If this logic is used then the instruction is not needed.

The State presents no evidence to show Mr. Branch aided or abetted anyone with criminal culpability. There is no proof of anyone saying Mr. Branch helped them or told them what to do. Not one complainant ever heard of the defendant nor is there any testimony implicating Mr. Branch in any theft or having prior knowledge of any theft.

When an instructional error may be construed as relieving the State of the burden of proving every element of its case the error is manifest and of constitutional nature. Rap2.5(a)(3). It has been concluded that if evidence of an uncharged crime is before the jury and the State argues that the defendant's participation in such triggered liability, <sup>Esq</sup> the specific crime charged, reversal is required. State v Stein, 44 Wn.App.2d 236, 241, 27 P.3d 184 (2001).

Violation of U.S. Constitution art. 1 sec.22(usa sec.6) and Wash. State Const. (Amend.10). State v Cronin, 142 Wash.2d 568,142, Wash.2d 568,142 Wash.2d 568(Wash. 12/14/2000). Reversal is the only remedy for relief. It can not be ruled harmless.

**(4) THE TRIAL COURT FAILED TO GIVE A JURY UNANIMITY INSTRUCTION CAUSING MANIFEST CONSTITUTIONAL ERROR.**

This issue may be raised the first time on appeal because the failure to provide a Unanimity instruction in a multiple counts or acts case amounts to Manifest Constitutional Error. Rap2.5(a); State v Holland, 77 Wn. App.420,424,891 P.2d 49(1995).

In this case the evidence presented by the State's evidence was so insufficient in certain counts that no rational trier of fact could of found Mr. Branch guilty of every count as an accomplice or otherwise. In none of the counts did Mr. Branch have possession nor was he directly implicated in any of the thefts. As in the case with the Acccomplice Liability instruction, the Defense argued that admitting the instruction in an insufficient case can cause a blanket convaiction; saying if the defendants guilty of one thing he is guilty of evrything since he is the only defendant. 7/14/09RPat162-63. The same applies here whenthere is a lack of a instruction that would help prevent that.State v Brown, 100 Wn. App.104,106,995 P.2d(2000).

The trial court failed to give the jury unanimity instruction. State v Crane, 116,Wn.2d 315,325,804 P.2d 10(1991)citing(State v Kitchen,110 Wn.2d 403,409,756,P.2d 105(1988)). This can not be ruled harmless.

(5) THE PROSECUTION COMMITTED FLAGRENT INCURABLE MIS-  
CONDUCT AND CAUSED MANIFEST CONSTITUTIONAL ERROR IN  
CLOSING ARGUMENT VIOLATING THE DEFENDANTS 5 AND 14  
AMEND. RIGHT AND USING ARGUMENT OUTSIDE THE EVIDENCE.

To preserve argument without objection the issue of prosecutor misconduct can be raised on appeal if the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice engendered by the misconduct. State v Hoffman 116 Wn.2d 51, 93 804, P.2d 577(1991) State v Belgarde, 110 Wn.2d at 507; State v Jerrels, 83 Wn.App. 503, 508, 925, P.2d 209(1996).

A Defendant must show improper conduct and prejudicial effect e.g. State v Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245(1995) citing State v Furman, 122 Wn.2d, 440, 455, 858 P.2d 1092(1993). Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict.

In this case the prosecutor committed intentional flagrant misconduct in closing. The entire rebuttal is an attack on the Mr. Branch's constitutional amend. 5 and 14 right. The prosecutor begins his attack sort of like a prize fighter using a combination of shots starting with, "So the question is there an innocent explanation for any one thing becomes much greater when this innocent explanation needs to cover all this". 7/15/09 RPat65. Its painfully obvious that the prosecutor is speaking of Mr. Branch's lack of testimony or "innocent explanation". This is proven by the next shots taken. The prosecutor says, "Think about the witnesses that you have'nt heard from, what they might of said". 7/15/09 RPat69. There is no need to draw a conclusion to the fact that the state is speaking of Mr. Branch because his next attack flagrantly says his name. Saying, "With regard to Mr. Branch" and "The complete lack

of innocent explanation for that much stuff".7/15/09RPat69. As if that is not enough the prosecutor again pounds into the jury that "There might be some innocent explanation but this is not that case". All of this equals flagrant intentional misconduct.

The state may not use a defendant's constitutional permitted silence to substantiate guilt. This causes manifest error and violates constitutional rights./Rap2.5(a)(3)State v Lewis, 130 Wn.2d,700,705, 927P.2d235(1996).

It is well established that prosecutorial comment against a defendant's failure to testify is strictly forbidden. U.S. Const. amend. 5; Wash. Const. art.1 sec.9.State v Romero(Wash.App.Div.3(2002));State v Silva,(Wash.App.Div.3(2003)).Due process violation State v Doyle,426 U.S.619,96,s.ct.2240,49 L.ed.2d.91(1976).

This is exactly what the prosecution did. In essence the state says to the jury that Mr. Branch may be innocent with an explanation but since he did not testify he must be guilty. The jury took an oath through the eye of terrorism. The state basis its entire rebuttal on the lack of testimony from the defendant in addition to arguing outside the evidence and misleading the jury. It must be considered that this prejudiced the jury so much it being the last words they hear before deliberation. This caused manifest error and Const. amend. 5 and 14 violation. This cannot be ruled harmless. Reversal is the only remedy.

**(ii)THE PROSECUTOR MADE UNFOUNDED REMARKS BY ARGUING OUTSIDE THE EVIDENCE MISLEADING THE JURY.**

In this case the prosecutor misleads the jury into believing Mr. Branch had some incriminating evidence that established guilt. The prosecutor says,"You have Mr. Branch's email with emails directed to him relating to his ordering check writing supplies". Until that

point Mr. Branch was directly associated with cashing, writing, or obtaining any check writing supplies. There was no evidence Mr. Branch ordered anything nor was there any evidence that Mr. Branch had an email address.

What the prosecutor did in essence is plant evidence. In a case that is circumstantial at best, to say in closing that the defendant had a bloody glove is improper. Mr. Branch did not have any e-mail address or order anything. The statements are prejudicial, unfounded, and outside the evidence of the case.

A prosecutor is a quasi-judicial officer charged with the duty to seek a verdict based upon reason. State v Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Prosecutors must therefore act impartially and "with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided". State v Torres, 16 Wn.App. 254, 263, 554, P.2d 1069 (1976).

**(6.) THE CUMULATIVE ERRORS DENIED MR. BRANCH A FAIR TRIAL VIOLATING CONST. AMEND. 14.**

1. Accomplice liability instruction
2. Flagrant prosecutorial misconduct

If the two above errors are deemed individually harmless Mr. Branch argues the cumulative effect they had was fatal. The State proceeded under a principal theory. When it seems that their case is insufficient, they concede on that argument and ask for an accomplice instruction without presenting any evidence to support it. Combine the fact that knowing the evidence is weak and that error#1 may not save the conviction the prosecutor uses Mr. Branch's lack of testimony to substantiate guilt. This causes the jury to be so mis-

lead and prejudiced that no instruction or evidence could be presented to extinguish their bias; being that the remarks are made in closing it is the last thing that is heard. Using all rational and argument of both the Appellate's Opening Brief and Statement of Additional Grounds, the cumulative errors of the trial can not be ruled harmless. The following cases have shown how the court has proceeded with the issue. State v Maddaus, instruction that omit an element of a crime is per se reversible citing State v Jackson, 137, Wn.2d 712, 727, 976 P.2d 1229 (1999) State v Eastmond, 129 Wn.2d 497, 503 919, P.2d 577 (1996). And cumulative error/misconduct, State v Fisher (2009); State v Nemitz, 105 Wn.App. 205, 215, 19 P.3d 480 (2001); State v Henderson, 100, Wash.App. 794, 998, P.2d 998 P.2d 907 Wash.App. 5/12/2000. Reversal of is the only remedy. U.S. Const. Amend. 14.

#### **E. CONCLUSION**

The State fails to prove actual physical custody of anything making the convictions under identity theft and possession of stolen prop. constitutionally insufficient. Violating amend. 14. Dominion and control over apt. #4 is weak at best with the lack of so many items making a total circumstance for control as in State v Partins. Without more there still is not control over the contraband. The false statement signed under penalty of perjury leaves questionable probable cause to charge Mr. Branch. Along with the manifest errors caused by the accomplice liability instruction and the prosecutor misconduct violating Mr. Branch's 5th and 14th amendment rights, there was no way for Mr. Branch to receive a fair trial. Mr. Branch asks that all convictions of his be reversed. Const. Amend. 14.

  
Andrew L. Branch Jr. #303132  
Appellant pro se

**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 of the document **Appellant's Pro Se Statement of Additional Grounds for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 64187-5-I** and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for  respondent **Dennis McCurdy - King County Prosecuting Attorney-Appellate Unit**,  appellant and/or  other party, at the regular office or residence or drop-off box at the prosecutor's office.

  
MARIA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: August 11, 2010

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