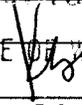


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DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

LARRY HAYES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Eric Schmidt

No. 07-1-05967-1 & 07-1-04771-1

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has the defendant failed to show that the terms of the statute proscribing leading organized crime precludes the use of accomplice liability – a showing that is necessary for him to succeed on a claim that the court’s “to convict” instruction for this offense was improper?
2. Does the record show that there was evidence supporting the various alternative means listed in the “to convicts” for possession of a stolen motor vehicle, leading organized crime and possession of stolen property?
3. Has defendant failed to meet the heavy burden imposed upon him by *Strickland* as required for him to succeed in his claim of ineffective assistance of counsel?
4. Does the record show that there was sufficient evidence supporting the jury’s verdicts finding defendant guilty of identity theft and possession of stolen property relating to victim Jeffrey Call?
5. Did the trial court properly instruct the jury with regard to the aggravating circumstance of whether the crime was a major economic offense?

6. As the trial court found that defendant's multiple current offenses constituted the same criminal conduct – as opposed to finding a double jeopardy violation- did the court properly list all of the convictions on the judgment and impose concurrent punishment for each?

B. STATEMENT OF THE CASE.

1. Procedure

On September 13, 2007, the Pierce County Prosecutor's Office charged appellant, Larry Hayes ("defendant"), with one count of possession of a stolen vehicle in Pierce County Cause number 07-1-04771-1. 1CP 1.¹

On November 27, 2007, the Pierce County Prosecutor's Office charged appellant, Larry Hayes ("defendant"), with one count of identity theft in the first degree, possession of a stolen vehicle, five counts of identity theft in the second degree, five counts of possessing stolen property in the second degree, one count of unlawful possession of a personal identification device and one count of unlawful possession of a controlled substance in Pierce County Cause number 07-1-05967-1. CP 1-

¹ There are two cause numbers at issue in this appeal which were consolidated for trial. The Clerk's Papers for Cause No. 07-1-04771-1 will be referred to as "1CP" and the Clerk's Papers for Cause No. 07-1-07-1-05967-1 will be referred to as "CP."

9. An amended information was filed adding a count of leading organized crime. CP 15-24.

The two cause numbers were consolidated for trial. 5/19/09 a.m. RP 53. The matter was tried before the Honorable Eric Schmidt, Judge pro tem. After hearing the evidence the jury convicted defendant of everything but the drug charge. CP 39-53, 1CP 2. The jury also returned special verdicts finding that Counts I through XIV and XV were major economic offenses. CP 31-38.

At sentencing the court found that all of defendant's current offenses were the same criminal conduct as the conviction of leading organized crime. 9/11/09 RP 26-27. He was sentenced on each count using an offender score based solely on defendant's prior criminal history. CP 111-125, 1CP 11-23. Based upon the jury's special verdict finding the crime to be a major economic offense, the court imposed an exceptional sentence of 180 months on the leading organized crime conviction, which was 34 months over the high end of the standard range. CP 111-125; 1CP 11-23. The sentences on all counts were run concurrently. *Id.*

Defendant filed a timely notice of appeal from entry of these judgments. CP 109-110, 1CP 9-10.

2. Facts

Deputy Larson testified that he went to defendant's residence at 3918 56th St Ct NW in Gig Harbor on September 8, 2007, in an effort to

serve him with some papers. III RP 16-18; IV RP 65. When he was unable to locate the defendant at his residence he came back on the 9th, 10th, and several times on September 11th, 2007. III RP 18-22. While he had contact with people at the residence on these visits, he was unable to locate defendant. *Id.* Deputy Larson noted several vehicles were parked at the defendant's residence; on September 9th, Deputy Larson ran a records check on the vehicles' license plates to see if any were registered to defendant. III RP 21. Deputy Larson learned that the black BMW was registered to defendant and that a white Hummer was a rental car belonging to an Oregon rental agency. III RP 21. On September 11th he made several trips to defendant's residence; he noted the presence of the BMW and a red Chevy Tahoe, which was a rental car from a different Oregon car rental agency than the Hummer, parked among the vehicles at the residence. III RP 22. The Hummer was sometimes there and sometimes not. III RP 22.

Deputy Wulick called the rental agencies that were the registered owners of the two rental cars. He learned that both cars had been rented to a "Todd Cotton" who presented a Washington driver's license. III RP 37. He then used his computer to search department of licensing records to see if there was a record of a Todd Cotton; he could find no such record. III RP 38. He also searched phone books but could not find a listing for a "Todd Cotton." *Id.* He informed the rental car agencies of this information; he later received calls indicating that the agencies had

reported the cars as stolen. III RP 38. Deputy Wulick testified that he and two other deputies were watching the residence when the Hummer pulled out and began to head toward Highway 16. III RP 39-40. They initiated a traffic stop on the Hummer on Highway 16; defendant was driving and Dawn Fleming was a passenger. III RP 40. Deputy Wulick testified that after receiving his Miranda warning, defendant stated that he did not know anything about the Hummer being stolen as a friend had loaned him the car so he could get home. III RP 40-43. Defendant was then arrested. III RP 43.

The defendant's house was cleared and secured on September 11, 2007. IX RP 72. Deputy Wulick obtained a search warrant for defendant's residence which was served on September 12, 2007. III RP 44-46; IX RP 70-72. A search of defendant's residence revealed many items associated with the production of fake identifications and credit cards, some parts of a stolen motorcycle - including an Idaho license plate - and some methamphetamine. III RP 46-47, 49, 55. The motorcycle parts were found in the garage and were in the process of being sanded; there was a large amount of blue dust surrounding these parts. III RP 47. In the defendant's bedroom, deputies seized computers, two printers including a photo printer, photo paper, business cards, and laminating materials. III RP 60 - 63. Also found in his bedroom was a laser cutter. III RP 66-67. A bag of white powder was found on the bed. III RP 69.

Deputy Wulick explained the process how a person could remove the lettering on a valid credit card by using acetone or fine grade sandpaper and then use a magnet to make the card unreadable by a machine; once this was done the person could print new information on a clear piece of laminate and apply this over the credit card to change the name that appears on the card. III RP 76-77. This process requires a very precise cutting implement such as a laser cutter. *Id.* Deputy Wulick recalled seeing fine grade sandpaper in defendant's bedroom. III RP 77.

Also found in defendant's bedroom was a metal briefcase that contained numerous business receipts, several loose credit cards and gift cards. III RP 69-76. Some of the credit cards revealed evidence of manipulation, as if too much background was taken off when the lettering was being sanded off or otherwise removed. III RP 103-104. Among the credits cards were two belonging to a John Harlowe and a letter from a bank regarding one of them. III RP 73-74. In this briefcase were three Visa cards issued to "Todd Cotton" each bearing a different account number. III RP 74-75. Deputy Wulick could see from his examination that at least one of these cards had been faked. III RP 104-106. The majority of the business receipts were from several different Great Clips salons; there was a total of 862 receipts. III RP 78-79. The names on these Great Clips business receipts included Vanessa [Cable], Barbara Douglas, Jeffrey Call, Joseph Ryan and Geri Conrad. III RP 79-82; CP 216-223. These receipts were from business transactions conducted in

2005 - at a point in time where a credit card receipt contained the full credit card number, expiration date, and name of the authorized user. III RP 91. Also in the brief case was a piece of paper that had a handwritten list of several different credit card numbers with their expiration dates, with a cross-out line through each. III RP 77. Other computer equipment was seized from other portions of the house. III RP 86-87; VI RP 100-104, 106. A forensic investigator took pictures of the defendant's home, as well as the vehicles still parked outside, prior to these items being taken into evidence to document their location. IV RP 64-82.

In an effort to track down the source of the Great Clips receipts Deputy Wulick contacted a manager of a Great Clips store to see where its business records were kept and whether there had been a break in at this location. III RP 93-293. These calls led him to Carol and Cliff Robertson, who owned several Great Clips franchises. III RP 93. They kept business records from these stores in a storage facility in Gig Harbor; upon checking it was discovered that this facility had been broken into. III RP 93-94.

Cliff Robertson owns 17 Great Clips franchises in Washington State. IV RP 6-7. Approximately half of his customers pay with credit cards which produce a merchant's receipt; he is required to keep these receipts as business records for several years. VI RP 7-12. Mr. Robertson testified to his process for collecting and storing these receipts; he keeps these receipts in one of three places: a storage area at his main office, at a

little corporate office, or in a locked storage facility in Gig Harbor. VI RP 10-15. Mr. Robertson testified that at one point in time the entire credit card number and expiration date appeared on the receipt, although it is no longer done this way. VI RP 8-9. In the summer of 2007, Mr. Robertson was alerted by law enforcement to the possibility that the security of some of these receipts might have been compromised; he and his wife searched the storage areas and –ultimately- discovered that his Gig Harbor storage facility had been broken into. VI RP 15-20. Mr. Robertson identified numerous exhibits as being copies of receipts that had come from his stores/storage facility; these receipts had been recovered from the metal briefcase in defendant’s bedroom during the execution of the search warrant. III RP 78-79; VI RP 16-24. Mr. Robertson had not given anyone permission to access this information or to use it. VI RP 25.

Melissa Hurley is an employee of the Enterprise Rental car agency in Eugene, Oregon. V RP 26-27. Ms. Hurley testified that in order to rent a car from her agency, every customer is required to present a driver’s license and a credit card. V RP 27-28. Ms. Hurley testified that on August 26, 2007, she was working at the airport counter for Enterprise, when a man approached her and stated that he – Todd Cotton - had a reservation for a car. V RP 28, 38. Ms. Hurley obtained his credit card and license to verify that the information matched. *Id.* The man asked if it was possible to upgrade and she informed him that she did have a full-size SUV, a 2007 Chevrolet Tahoe- available for an extra charge. V RP

29. The man agreed to the extra charges for the upgrade. *Id.* When she ran the man's credit card through the card reader, it would not read – as if it had been demagnetized. V RP 29. Ms. Hurley testified that she then keyed in the credit card number and received an authorization code for the charges. V RP 29. She gave the man the keys to the Tahoe, license number 922 BJW, and told him where it was located. She identified defendant as being the person to whom she rented the Tahoe. V RP 37-38, 53. A few days later someone called to extend the length of the contract on the Tahoe, when the agency ran the card number to add the additional charges, the card came back as being stolen. V RP 32-33. The agency sent out a demand letter for the return of the vehicle, which was worth more than \$1,500.00. V RP 38-39.

Kimberly Daniels testified that she is the owner of a Budget Rent a Car agency in the Medford, Oregon. VI RP 41-42. She identified documents kept in the regular course of her business that reflect a Hummer was rented to an individual named “Todd Cotton” of Puyallup, Washington, on August 31, 2007. VI RP 42-43. Ms. Daniels compared information on documents recovered from the metal briefcase in defendant's bedroom during the execution of the search warrant as matching the name on the rental agreement for the Hummer. III RP 78-79, VI RP 43-44. The Hummer was eventually reported as stolen and ultimately recovered in Gig Harbor, Washington. VI RP 51-52.

Scott Mutter testified that in September of 2007 he became aware that unauthorized charges were being made on his Bank of America Visa credit card account number 4426-2480-9931-5700. III RP 12. Between \$2,000 and \$3,000 worth of unauthorized charged were made before he closed the account. III RP 14-15. Mr. Mutter testified that he did not rent a vehicle in Oregon using this card in August or September of 2007 and that he never authorized anyone else to do so using his card or account number. *Id.*

Geri Conrad testified that she is a retired Weyerhaeuser employee and that she has several credit cards. V RP 13. She monitors these accounts by keeping the cards with her at all times and by going online to monitor the balances. V RP 13. She used one of her credit cards – account number 4465-0760-7467-6503 - to charge a \$13.00 haircut at a Great Clips store in Sumner, Washington in 2005. V RP 13-15. She identified the receipt as containing her signature. V RP 14; EX 52-C. Later, in 2007, she noticed that some unauthorized charges were being made on this account so she had the account closed. V RP 14-17. She testified that she did not give anyone in the courtroom permission to have that credit card number. *Id.*

Joseph Ryan testified that he is a retired businessman who used a credit card to pay for services at a Great Clips hair salon in Gig Harbor in 2005. V RP 17-19. He identified a receipt that had his signature and credit card number on it from this transaction. V RP 19; EX 52-E. He did

not give anyone -other than the Great Clips store- permission to have the credit card information contained on this receipt. V RP 20.

John Harlowe testified that in the summer of 2007 his car was broken into while it was parked at a bowling alley in Tukwila. V RP 23. Among the items taken from the car was a new, un-activated credit card and a cover letter from that bank that had accompanied the card. V RP 23-24; EX. 52-I (letter), EX 52-J (credit card). He had not given anyone permission to have this letter and credit card. V RP 24. He cancelled this credit card after unauthorized charges were made with it. V RP 25.

David Douglas testified that he was married with a wife and two daughters. IV RP 4. In 2005 he authorized his daughter Barbara to use his credit card at Great Clips. IV RP 4-5. He identified a receipt from Great Clips with his daughter's signature that reflected a purchase that was made with his authorization. *Id.* (EX 52-B). He further testified that he had never met the defendant before and had not given him permission to have his credit card receipt or the credit card information that it contained. *Id.*

Jane Boysen is a forensic scientist employed by the Washington State Patrol Crime Lab and is an expert in the analysis and identification of controlled substances. V RP 83-89. She analyzed the suspected controlled substances, found in defendant's bedroom (EX 39) and found that it contained methamphetamine. V RP 92-93.

Detective John Crawford is employed by the Pierce County Sheriff's department and specializes in the forensic examination of computers. V RP 60-81, 98-129. When he examined a hard drive seized from the defendant's residence, he found that the hard drive contained evidence consistent with the production of false identifications. V RP 134-138. Detective Crawford found a graphics file that appeared to be the back of a Washington State Driver's license. V RP 136-138. He also found templates with instructions on how to create a Washington State Driver's license. V RP 137-139. The computer also contained images that could be used to manufacture University of Michigan student identifications and a driver's licenses from Arizona and Connecticut. V RP 140-142. Detective Crawford found computer files where there were two different identification cards for the same name and birthdate, but with different addresses and physical descriptions. V RP 140 -141. He also found graphics of Washington Driver's Licenses with the photograph removed. V RP 142. The computer contained a document that had the name "Todd Cotton" listed several times, each time followed by what appeared to be a credit card number and an expiration date. While the name remained the same, the credit card number and expiration date changed with each line. VI RP 54-56. Todd Cotton was the name used on the two Oregon rental agreements for the Hummer and Chevy Tahoe. VI RP 56. Detective Crawford found images of the defendant posing against a blue background, similar to the background used in a Washington State

Driver's license, and also images of what appeared to be Washington State driver's licenses bearing a cropped version of this photograph of the defendant "issued" in the name of Justin Peterson, Carrie Lee Bacon, and Anthony Stone. VI RP 53-73, 6B RP 4-12. Detective Crawford also found images of photographed Visa Cards. IX RP 98-100, 108- 111. He found evidence of an August 10, 2007, online purchase by credit card of two airline tickets for two adults traveling on American Airlines from Seattle to Boise. IX RP 100-103. There was no indication on the computer of a return flight being booked. IX RP 103. There was also a graphics file of a computer generated casino ticket. RP 105-107

Benjamin Epstein testified that he has known defendant since the first grade. VII RP 28. Mr. Epstein has never known defendant to have a job. VII RP 35-36. He indicated that he has committed many crimes and that several of them were at the request of defendant. VII RP 29.

Mr. Epstein was in federal custody at the time of his testimony and was testifying pursuant to an agreement he had made with federal and state authorities. VII RP 27-28. A summary of Mr. Epstein's testimony, which is primarily relevant to the leading organized crime conviction, is set forth later in the brief. *See infra* at pp 23-26.

The defense presented the testimony of several witnesses who testified that Benny Epstein was the leader of any organized credit card fraud and that he was responsible for most of the evidence of criminal activity found in defendant's house. The defendant did not testify.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT THE LEADING ORGANIZED CRIME STATUTE PRECLUDES USE OF ACCOMPLICE LIABILITY.

The Washington Legislature defined the nature of accomplice liability in RCW 9A.08.020. Under RCW 9A.08.020, a “person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.” RCW 9A.08.020(1). “A person is legally accountable for the conduct of another person when he is the accomplice of such other person in the commission of a crime.” RCW 9A.08.020(2)(c). An individual is guilty as an accomplice if he or she “solicits, commands, encourages, or requests” another person to commit a crime or aids in its planning or commission, knowing that his or her act will promote or facilitate the commission of the crime. RCW 9A.08.020(3). Criminal liability attaches to anyone who participates in a crime and there is no difference between principle and accomplice liability. *State v. McDonald*, 138 Wn.2d 680, 688, 981 P.2d 443 (1999). The Washington Supreme Court has summarized the legislative intent behind RCW 9A.08.020(3) as:

The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. The elements of the crime remain the same.

State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974), *disapproved on other grounds by State v. Harris*, 102 Wn.2d 148, 153-54, 685 P.2d 584 (1984). Nothing in the text of RCW 9A.08.020 limits or restricts the use of accomplice liability principles to certain crimes or precludes its use when certain crimes are charged.

The Legislature has enacted certain criminal statutes where the express language of the statute reflects a legislative intent that traditional accomplice liability provisions are inapplicable to this crime. For example felony murder statutes, RCW 9A.32.030(1)(c) and 9A.32.050(1)(b), provide a basis for criminal liability for murder which is distinct from accomplice liability. *See State v. Roberts*, 142 Wn.2d 471, 511 n. 14, 14 P.3d 713 (2000); *see also State v. Montejano*, 147 Wn. App. 696, 196 P.3d 1083 (Div. 3 2008)(holding that a person could not be guilty of felony riot unless he was personally armed with a deadly weapon as the terms of the riot statute were specific and controlled rather than the more general accomplice liability statute); *State v. Pineda-Pineda*, 154 Wn. App. 653, 226 P.3d 164 (Div. 1 2010)(declining to reach whether under Washington law a person can be an accomplice to a conspiracy and noting that, while there is no Washington authority explicitly on point, other jurisdictions permit it).

Defendant contends that the court improperly instructed the jury on the crime of leading organized crime arguing that under the terms of that

statute, RCW 9A.82.060², a conviction may not be predicated upon accomplice liability.

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing, *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

At trial, defense counsel objected to the court's instruction on accomplice liability as it pertained to the leading organized crime³ allegation arguing that the accomplice liability statute was too broad to apply to leading organized crime. XII RP 7-17, 69-71. It is arguable whether this objection was sufficiently clear and particular.

Defense Counsel: For the record, Your Honor, I still have objection to No 11. I believe that as it comes to all the charges, except for the RICO Charge, that I think the Court's ruling is correct, in the general sense of it. But with all of the charges, including the RICO charge, I think

² See Appendix A, for full text of statute.

³ Defense counsel referred to this charge as the "RICO charge." RP 69-71.

the way this case has been positive [sic] by the State and those that the defense has had in terms of their theory to the case in my earlier argument was I think this case stands out as being an exception to the general rule.

In that respect, I think that there is a constitutional notice issue as well as – when it comes to the RICO charge, it becomes almost a conclusion as to how the accomplice works out that I think the State intends to argue. If somebody helps anybody in an organized crime syndicate, for instance, if they do anything for them that that somehow makes them liable as the person at the top of the realm.

It's a great theory and I think someone would like to use it, but I – the government would like to use it, but I think at this point it becomes overly broad and ineffective in the nature of making – creating an absolute result in reachability [sic] of the accomplice liability statute.

XII RP 69-70. He also objected to the “to convict” instruction for leading organized crime. XII RP 70-71. Defendant did not propose any instructions to the trial court or suggest how the “to convict” for leading organized crime should be worded. Moreover, defendant failed to propose any instructions that would clearly inform the trial court as to how the jury, in his view, should be properly instructed. Defendant acknowledged that the accomplice liability instruction was properly given for other charges before the jury. The trial court was required to give a “to convict” instruction of some sort on the charge of leading organized crime. While defendant objected to some of the court's instructions, he did not make a clear argument as to how the jury could be properly instructed under his

legal theory. Thus, defendant did not make his objections sufficiently clear to the trial court to preserve them for appellate review.

On appeal defendant asserts that the leading organized crime statute prohibits use of the general accomplice liability statute. To support his argument, defendant relies upon *State v. Johnson*, 124 Wn.2d 57, 873 P.2d 514 (1994).⁴

State v. Johnson concerned a gang member who was given an exceptional sentence for his convictions of assault in the first degree and assault in the second degree, both with deadly weapon enhancements. On appeal, Johnson contended that the trial court violated the real facts doctrine in making one of its findings to support the exceptional sentence and that if this finding were true he should have been charged with leading organized crime under RCW 9A.82.060(1). In rejecting what it called a “specious argument,” the court did make a few comments about the nature of the crime of leading organized crime:

[Johnson] ignores the legislative specification of the crime (“leading organized crime”) stated in subsection (1). It is clear that the statute is intended to apply to persons who “lead” organized crime, rather than to all persons in a group who commit crimes. There was no evidence that Petitioner was a “leader” in the BGDs.

⁴ At the bottom of page 12 in his opening brief, defendant has a sentence that is purportedly a quote from *Johnson*. The State has been unable to find this quote anywhere in the *Johnson* opinion.

Johnson, 124 Wn.2d at 71. While this dicta about the nature of the leading organized crime statute found in RCW 9A.82.060 is illustrative, it does not stand for the proposition that accomplice liability may not be employed in a prosecution of leading organized crime. It is entirely possible that a criminal organization may have more than one “leader.” In the above quote, the Supreme Court noted that there was no evidence that Johnson “was *a* ‘leader’ in the BGDs” as opposed to that he was “*the* leader of the BGDs” Where there are multiple leaders in a criminal organization then each is acting as an accomplice to the others in committing the crime of leading organized crime.

For example, three people might agree to organize a criminal “chop shop” where stolen vehicles are stripped for their parts which are resold on the black market, with the profit to be shared equally. One person in this enterprise is responsible for finding car thieves to supply the “chop shop” with the stolen vehicles. The second person might be responsible for running the “chop shop” including finding “mechanics” who will strip the stolen vehicles of their valuable parts. The third person is responsible for finding buyers for the stolen automobile parts and handling the finances. All three of these persons are principles in the organization and management of this criminal enterprise, but each is also an accomplice to the other two with respect to leading organized crime.

The relevant portion of RCW 9A.82.060 states:

A person commits the offense of leading organized crime by:

(a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity; ...

RCW 9A.82.060(1)(a). Defendant fails to identify what language in RCW 9A.82.060 precludes prosecution when there are multiple leaders of a criminal organization or precludes the use of accomplice liability statute in conducting such a prosecution. Defendant has failed to show that the trial court erred in allowing the jury to consider accomplice liability when deliberating on the charge of leading organized crime.

2. THE “TO CONVICT” INSTRUCTIONS SETTING FORTH ALTERNATIVE MEANS OF COMMITTING A PARTICULAR CRIME WERE SUPPORTED BY THE EVIDENCE.

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976), or when the State presents evidence of

several acts that could form the basis of one count charged. *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984).

“[W]here a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged [, ...but u]nanimity is not required ...as to the means by which the crime was committed so long as substantial evidence supports each alternative means.” *State v. Bland*, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993), quoting *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). Where the trial court instructs the jury that there are alternative means of committing the charged criminal act, and does not require a unanimous determination of which alternative is used, courts have required that there be substantial evidence of each alternative. See *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)(citing *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976)), modified on other grounds by *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). Consistent with that view, we have noted that “if the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.” *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994) (citing *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987); *State v. Franco*, 96 Wn.2d 816, 639 P.2d 1320 (1982); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Simon*, 64 Wn.App. 948, 831 P.2d 139 (1991), *aff'd in part*, 120 Wn.2d 196, 840 P.2d 172 (1992)). In this respect

the state constitution is more protective than the federal constitution.

Ortega-Martinez, 124 Wn.2d at 708.

Defendant asserts that the court instructed on alternative means that were unsupported by evidence on the crimes of leading organized crime, possession of a stolen vehicle, possession of stolen property. Each of these claims will be addressed below.

- a. There Was Sufficient Evidence To Support The Instruction On The Various Alternative Means Of Committing Leading Organized Crime.

The jury was instructed that in order to convict defendant of leading organized crime, as charged in Count XV, it had to find the following element beyond a reasonable doubt:

- 1) Than on or about the period of January 1, 2006 to September 11, 2007, the defendant, or an accomplice, intentionally organized, managed, directed, supervised or financed three or more persons in the commission of the crime of Identity Theft.

CP 97, Instruction No. 41. Defendant contends that there was a lack of evidence supporting each of these alternative means. The thrust of his argument, however, attacks the credibility and reliability of Benny Epstein's testimony. Credibility determinations are for the trier of fact and are not subject to appellate review. Epstein's testimony provided ample support for the various alternative means of committing leading organized crime.

Mr. Epstein testified that the defendant would provide him with a fraudulent identification and a stolen or altered credit card in order to commit credit card fraud. VII RP 30-31. He testified that the defendant would expect him to acquire what the defendant wanted first, then he could use the card for whatever he wanted. VII RP 31-34.

Mr. Epstein testified that he had rented a storage unit in Gig Harbor, then allowed defendant to use it. VII RP 36-38. Mr. Epstein testified that he arrived at his storage unit one day to find defendant and another man, “long hair Chris,” later identified as Chris Mallory, stealing bundles of paperwork from the adjacent storage unit. VII RP 37-39, 56.

Mr. Epstein testified that at one point defendant came up with the idea that they could go rent Harley Davidson motorcycles starting in Boise, then bring them back to Washington in a U-Haul to “resell” them. VII RP 40, 49. The plan was to get \$5,000 to \$6,000 per bike. VII RP 74. Mr. Epstein testified that he flew to Boise with the defendant and that when they realized they needed more help, defendant flew in a couple more people – someone named “Justin” or “Jeremy” and Tyrease Phillips - to help. VII RP 41, 75-77. Mr. Epstein testified that they ended up renting two different motorcycles; defendant tried to rent a motorcycle but his card wouldn’t verify so Mr. Epstein used a false identification and credit card that defendant had provided him. VII RP 41-42. The next day, Mr. Epstein went in and rented a second Harley. *Id.* Epstein testified that defendant used a credit card in the name of James Robertson and that he

used a credit card in the name of Justin Peterson. VII RP 42. The plan was that they would go to different dealerships on the drive home “renting” sets of bikes. VII RP 43. Defendant checked into the hotel using a false identification and credit card, and then Mr. Epstein checked in. VII RP 48-49. Defendant took one of the bikes and left with Jeremy in the U-haul; Mr. Epstein and Mr. Phillips ended up getting arrested in Boise for theft of televisions from the hotel. VII RP 44, 48. Epstein saw the other Harley back in Gig Harbor after he made bail, but lost track of what happened to it. VII RP 44-45. Dawn Fleming also testified to seeing the blue Harley Davidson at defendant’s house in August of 2007; defendant told her he got the bike in Idaho. IX RP 44-45. Mr. Epstein identified some of the State’s exhibits as being the false identifications that defendant had created for him- using Mr. Epstein’s photograph but other people’s names- for use on the Idaho trip. VII RP 83; EX 90. Jointly with the defendant, Mr. Epstein made false driver’s licenses in the names of Ronald Schuh, Vincent Coleman, and Justin Peterson. VII RP 83-84. Detective Crawford found evidence on defendant’s computer that he had purchased two airline tickets for travel on American Airlines from Seattle to Boise. IX RP 100-103. Ms. Fleming corroborated that defendant went to Idaho with Benny, Justin, and Tyrease. IX RP 47, 49-50.

Mr. Epstein further testified that defendant would arrange “shopping extravaganzas” for buying top of the line items with fraudulent

credit cards with the intent to resell the items. VII RP 50. Frequently these shopping trips were in Oregon, and defendant would go with a man and a female for whom he had made false identifications. VII RP 50-54. Mr. Epstein identified some the photographs used in the false identifications found on defendant's computer as being the people that had participated with defendant on these shopping trips. *Id.* Ms. Fleming testified that she has seen the defendant create false identifications and credit cards using his computer. IX RP 40-49. Mr. Epstein testified that he went on a shopping trip to Coeur d'Alene with defendant and "Dawn [Fleming]." VII RP 73. Mr. Epstein identified the names of several people, including Jason Johnson, Jason Jamieson, Kirsten Shields, Mike Price, Christopher Allen, as being people whom defendant would refer to as "his shoppers." VII RP 56, 58-59, 93. Mr. Epstein also testified that Mr. Allen tried unsuccessfully to cash a fraudulent casino debit card, such as are used in used in slot machines, that defendant had manufactured. VII RP 57-58, 86. Defendant had also shown up with a Hummer and asked Mr. Epstein if he knew anyone who wanted to buy it. VII RP 72. Dawn Fleming also testified that defendant would make false identifications for her use. IX RP 37-42. She testified that he made a false identification in the name of Dawn Marie Thomas and that she used this identification when she signed a receipt at the Davenport Hotel in Spokane in 2007. IX RP 41-42. Ms. Fleming testified that defendant also

make false identifications for Benny, Tyrease, Laura, and Crystal. IX RP 43.

The facts surrounding the Idaho trip, on its own, provide a basis for the alternative means contained in the “to convict” instruction for leading organized crime. The evidence shows that defendant conceived of a plan to use false identifications to fraudulently rent Harley Davidson motorcycles that could then be sold for profit. He got Benny Epstein involved in the plan and manufactured the necessary false identifications that the two of them would use in this endeavor. After defendant and Mr. Epstein flew to Boise they realized that they needed more people to execute defendant’s plan and defendant arranged for two more people to join them in Boise. All of this is evidence supporting the instructions that he “organized, managed, directed, [and] supervised” three or more persons in the commission of the crime of identity theft. The evidence found on defendant’s home computer showing the purchase of two plane tickets to Boise is evidence that the defendant “financed” this operation.

In addition to the Idaho trip, there is ample evidence that defendant has a team of more than three “shoppers” that he uses to go out on shopping sprees, using false identification to commit credit card fraud and to acquire goods that can then be resold for profit. The court’s instruction on the various alternative means were all supported by evidence. There was no error.

b. There Was Sufficient Evidence To Support The Instruction On The “Conceal” And “Dispose Of” Alternative Means Of Committing Possession Of A Stolen Vehicle.

The jury was instructed that in order to convict defendant of possessing a stolen motor vehicle, as charged in Count II and Count I,⁵ it had to find each of the following elements beyond a reasonable doubt:

(1) That on or about the 11th day of September, 2007, the defendant, or an accomplice, knowingly received, retained, possessed, concealed, or disposed of, a stolen motor vehicle; to wit [a 2007 Chevrolet Tahoe or a 2007 Hummer III];

(2) That the defendant acted with knowledge that the motor vehicle had been stolen;

(3) That the defendant, or an accomplice, withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;

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

CP 76, 98, Instruction Nos. 20 and 42. Defendant concedes that there was sufficient evidence to support the knowingly received, retained, or possessed alternative means, but challenges the evidence supporting the means of committing this crime by conceal[ing] or dispos[ing] of a stolen motor vehicle. Defendant further acknowledges that the dictionary definition of “conceal” includes the meaning “to place out of sight” or

⁵ There were two “Count Is” in this case as two cause numbers were consolidated for trial. This “Count I” was originally in cause No. 07-1-04771-1. CP 98.

“withdraw from being observed” and that “dispose” means “to transfer in to new hands or to the control of someone else.” *See* Appellant’s brief at pp 35-35.

The evidence at trial showed that on September 11, 2008, Deputy Larson made several trips to defendant’s residence in Gig Harbor to try to serve him with some papers. III RP 16-22. On one of his trips he noted a red Chevy Tahoe parked at defendant’s home that was a rental car from an Oregon car rental agency which turned out to be stolen. III RP 22. On most of his trips, Deputy Larson had contact with someone at the residence, but not the defendant. III RP 18-22. This Tahoe was not recovered parked at defendant’s residence however, but from the 2000 block of Ninth Avenue Southeast in Puyallup. XII RP 43-44. This is the same block where Justin Gilligan lived. XI RP 11-12; XII RP 43-44, CP 216-223 (see notation as to Exhibit 122). Mr. Gilligan was at defendant’s house on September 11, 2007. X RP 145-146. Thus the jury could reasonably infer that defendant, in order to conceal this stolen vehicle from the police who were dropping by his residence, disposed of it by giving it to Mr. Gilligan to drive to Puyallup.

As for the Hummer, there was evidence that Benny Epstein was driving this vehicle. X RP 143. This provides evidence that defendant transferred possession of the Hummer into Epstein’s hands at one point which is sufficient to show that he “disposed” of it. Defendant later received it back as defendant was arrested while driving this vehicle. III

RP 40-43. There was sufficient evidence to support instruction on these alternative means of committing the crime of possession of a stolen vehicle.

- c. The “to convict” instructions on the possessing stolen property counts did not allow the jury to convict defendant for concealing or disposing of stolen property; the jury had to find he possessed it.

Defendant also contends that there was insufficient evidence that he “concealed” or “disposed” of stolen property to instruct the jury on these alternative means of committing the crime of possessing stolen property in the second degree. The court did not include these alternative means in the “to convict” instructions for Counts IV, VI, VIII, X, XII, and XIII. The jury was instructed that in order to convict defendant of possessing stolen property in the second degree as charged in these counts, it had to find each of the following elements beyond a reasonable doubt:

- (1) That on or about the 11th day of September, 2007, the defendant, or an accomplice, knowingly possessed stolen property;
- (2) That the defendant acted with knowledge that the property had been stolen;
- (3) That the defendant, or an accomplice, withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;

(4) That the stolen property was an access device⁶ belonging to [name of victim which changed from count to count]; and

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

CP 81, 83, 85, 87, 89, 90. The only place where the alternative means are listed is in the instruction defining the crime of possessing stolen property in the second degree. CP 79. Generally, definitional instructions do not create alternative means of committing an offense. *State v. Linehan*, 147 Wn.2d 638, 646, 56 P.3d 542 (2002); *State v. Laico*, 97 Wn. App. 759, 763, 987 P.2d 638 (1999); *State v. Strohm*, 75 Wn. App. 301, 308, 879 P.2d 692 (1994). Here the jury was further instructed on the meaning of possession, including that it may be actual or constructive. CP 73. Under the “to convict” instructions for the six counts of possessing stolen property, the jury was instructed that it had to find the defendant “knowingly possessed stolen property” and not that he concealed or disposed of it. Defendant acknowledges that there was sufficient evidence that he possessed stolen property. *See* Appellant’s brief at p. 36. Defendant’s challenge to his six possessing stolen property convictions is without merit.

⁶ Instruction No. 34 was a slight variation of this wording reading “the stolen property was an access device consisting of various receipts, excluding those belonging to Scott Mutter, John Harlowe, Geri Conrad, David Douglas, Jeffrey Call and Vanessa Cable[.]” CP 90.

3. DEFENDANT HAS FAILED TO SHOW BASED UPON A REVIEW OF THE ENTIRE RECORD THAT HIS ATTORNEY'S PERFORMANCE WAS SO DEFICIENT AS TO DEPRIVE HIM OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she

was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the heavy burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case,

viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." ***Harris v. Dugger***, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant seeks to show ineffective assistance of his trial counsel for a single claimed deficiency; he asserts that his trial counsel was ineffective for failing to propose an instruction on the testimony of an accomplice, such as the pattern instruction in WPIC 6.05, which states:

Testimony of an accomplice, given on behalf of the [State], should be subjected to careful examination in light of the other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal § 6.05, at 184 (3d ed.2008). When the prosecution relies solely on the uncorroborated testimony of an accomplice, the trial court must give a cautionary instruction if one is requested by the defendant. *State v. Troiani*, 129 Wash. 228, 224 P. 388 (1924); *State v. Harris*, 102 Wn.2d 148, 154-55, 685 P.2d 584 (1984), overruled on other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989), and *State v. McKinsey*, 116 Wn.2d 911, 810 P.2d 907 (1991)). The court does not commit reversible error by failing to give the instruction if the accomplice testimony is substantially corroborated by independent evidence. *Harris*, 102 Wn.2d at 155, 685 P.2d 584. “[W]hether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of the corroboration.” *Harris*, 102 Wn.2d at 155. The Washington Supreme Court has held that it is always the better practice for a trial court to give the requested cautionary instruction whenever accomplice testimony has been introduced. *Id.* at 155.

In the case now before the court, defendant claims that his attorney should have requested this instruction regarding the testimony of Benny Epstein and, to a lesser extent, Dawn Fleming. While the State does not concede that the trial court would have committed reversible error in refusing the instruction, had it been requested, it seems clear that the court likely would have given the instruction – had it been asked to do so.

But defendant does not establish deficient performance simply by identifying an instruction that would have likely been given had it been requested. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001)(failure to seek a diminished capacity instruction when supported by evidence is not per se ineffective assistance of counsel, court must look to facts of individual case). In *Cienfuegos*, the court found that the *Strickland* standard for ineffective assistance was not met where defense counsel was able to argue his theory of the case to the jury under the given instructions on knowledge and intent despite counsel's failure to request a diminished capacity instruction. 144 Wn.2d at 230.

In this case the jury was instructed as to how it should assess credibility of witnesses:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any

personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 56, Instruction No. 1. The defense argued about Benny Epstein's lack of credibility extensively during closing arguments as well as arguing that Epstein was the real organizer of the criminal activity. 6/23/09 pm RP 5-18, 37. Thus, the defense was able to argue its theory of the case without the instruction on the testimony of an accomplice. Additionally, while Epstein's testimony was central to the charge of leading organized crime, the evidence on the other counts was supported by independent evidence found in the search of defendant's house and computer. Defendant cannot show a reasonable probability that the outcome on any count would have been different had the instruction been given. He has failed to meet his burden under *Strickland*.

But to focus on this single alleged complaint of deficient performance is to ignore the standard of assessing deficient performance set forth in *Strickland*, which requires the court to look at the entirety of the record. The entire record shows that defendant's trial counsel challenged the State's case throughout the trial and sought the best possible result for his client. He cross examined the State's witnesses. He presented numerous witnesses on defendant's behalf. He made numerous objections. He convinced the jury to acquit on one count. Defendant's

attorney convinced the prosecutor that his offenses should be treated as same criminal conduct. Looking at the record as a whole, as is required by *Strickland*, it cannot be said that defendant's counsel was so deficient so as to leave him essentially without representation. Defendant has failed to meet his burden under the *Strickland* standard and this claim should be dismissed.

4. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF IDENTITY THEFT AND POSSESSING STOLEN PROPERTY RELATING TO VICTIM JEFFREY CALL.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v.*

Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case, defendant challenges the sufficiency of evidence to support his conviction for identity theft in the second degree relating to Jeffrey Call, Count IX, and his conviction for possessing stolen property in the second degree relating to Jeffery Call, Count X.

a. Sufficient Evidence Supported The Jury's Guilty Verdict Of Identity Theft In The Second Degree In Count IX.

Under the instructions given to the jury, to prove the crime of identity theft in the second degree, the prosecution had to prove that on or about September 11, 2007 in the state of Washington, “the defendant or an accomplice knowingly obtained, possessed or transferred and mean of identification or financial information of Jeffrey Call” and that the “defendant acted with the intent to commit or aid or abet any crime.” CP 86, Instruction No. 30. This crime does not require proof of any actual loss. *Id.* The jury was further instructed that “financial information” was “information identifiable to the individual that concerns the amount and conditions of an individuals assests, liabilities or credit” including “account numbers and balances[,]” “transactional information concerning an account[,]” or “other information held for the purpose of account access or transaction initiation.” CP 69, Instruction No. 13.

The evidence showed that when the defendant’s house in Gig Harbor, Washington was searched on September 12, 2007, deputies found a metal brief case in defendant’s room that contained a large number of

credit card receipts that had been stolen from a storage unit where several Great Clips franchises kept their business records. III RP 69-76; 78-82; VI RP 10-20. Also present in defendant's room were tools and equipment used in the making of fraudulent credit cards and identifications. III RP 76-77; V RP 134-138. A forensic analysis of one of the seized computers revealed evidence that the defendant was making false identifications for himself and other people. V RP 140-141, VI RP 53-73. One of the stolen Great Clips receipts showed the full name, credit card number and expiration date of a credit card belonging to Jeffrey Call. III RP 79-82; EX 52A. This information constituted "financial information" of Jeffrey Call as it was the very information that Great Clips had used to legitimately obtain payment from Mr. Call from his credit card account. While the jury did not hear any testimony from Mr. Call, it did hear from other persons whose financial information appeared on other documents found in the same brief case. V RP 13-17; 23-25. These victims did report that there had been fraudulent use of their financial information resulting in unauthorized charges on a credit card. RP V RP 14-17, 25. The jury could use this evidence of fraudulent activity in conjunction with the evidence that defendant was creating fraudulent identifications and credit cards at his home, to infer that defendant possessed Mr. Call's financial information with the intent to use it to commit the crime of theft. The jury's verdict was supported by sufficient evidence and should be upheld.

b. Sufficient Evidence Supported The Jury's Guilty Verdict Of Possessing Stolen Property in the Second Degree In Count X.

Under the instructions given to the jury, to prove the crime of possessing stolen property in the second degree, the prosecution had to prove that on or about September 11, 2007 in the state of Washington, “the defendant or an accomplice knowingly possessed stolen property[,]” “that the stolen property was an access device belonging to Jeffrey Call[,]” “that the defendant acted with the knowledge that the property had been stolen[,]” and that “defendant or an accomplice withheld or appropriated the property to the use of someone other than a person entitled thereto.” CP 87, Instruction No. 31. The jury was further instructed that “[s]tolen means obtained by theft[,]” CP 75, Instruction No. 19, and that

Access device means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instruments.

CP 80, Instruction No. 24. The Great Clips receipt showing a credit card payment to the salon by Jeffrey Call on June 17, 2005, meets the definition of an access device as it contained the credit card account number by which Great Clips legitimately received payment for its services. EX 52 A. The evidence showed that this receipt/access device had been stolen along with many other such receipts/access devices from a

storage facility used by several Great Clips franchises for the storage of its business records. III RP 93-94; VI RP 10-20. The owner of these business records had not given anyone permission to take these receipts/access devices from the storage unit. VI RP 25. Thus there was sufficient evidence for the jury to find that the access device was stolen. The receipt/access device of Jeffrey Call, was found inside a metal briefcase which was found in the defendant's bedroom at his residence in Gig Harbor Washington, on September 11, 2007. III RP 69-76, 79-82. A guitar receipt belonging to the defendant was also found in the briefcase. XII RP 53. From the fact that the briefcase was found in the defendant's room and evidence that defendant was putting his own documents into the briefcase, the jury could reasonably infer that defendant knew what was in the briefcase and that he had possession of the stolen access device. There were over 800 such stolen access devices found in the same briefcase and there was no evidence that defendant had any legitimate basis for having the business records of several Great Clips salons. From this evidence the jury could reasonable infer that defendant knew these access devices, including Mr. Call's, had been stolen. The jury's verdict was supported by sufficient evidence and should be upheld.

5. THE JURY WAS PROPERLY INSTRUCTED ON
THE AGGRAVATING CIRCUMSTANCE
PERTAINING TO A MAJOR ECONOMIC
OFFENSE.

Generally under Washington law, penalty enhancement provisions must depend on the accused's own misconduct rather than an accomplice's because the complicity statute found in RCW 9A.08.020(1) is "limited to accountability for crimes." *State v. McKim*, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982).

The court in *McKim* determined that under accomplice liability an accomplice is "equally liable only for the substantive crime." *McKim*, at 117. The court's analysis was based on the fact that under RCW 9A.08.020, there is no strict liability for the conduct of another in regard to a sentence enhancement provision whereas the prior accomplice liability statute had imposed liability for punishment as well. Thus, in any given case, the question is whether the Legislature in enacting a penalty provision intended to impose strict liability for all participants of a crime.

Some sentencing enhancements specifically allow for punishment premised on accomplice liability. For instance, the firearm enhancement statute, RCW 9.94A.533, contains language demonstrating the legislature's intent to extend accomplice liability into the sentencing realm. RCW 9.94A.533(3) reads, "The following additional times shall be added to the standard sentence range for felony crimes committed after

July 23, 1995, if the offender *or an accomplice* was armed with a firearm as defined in RCW 9.41.010.” (Emphasis added).

Division I of the Court of Appeals was required to examine the nature of the aggravating circumstances in RCW 10.95.020 and determine how a jury should assess liability for these circumstances when there was more than one participant in the underlying premeditated murder. *See In re PRP of Howerton*, 109 Wn. App. 494, 36 P.3d 565 (2001). The court in *Howerton* phrased the issue in this manner: “[D]id the Legislature intend to hold accomplices to murder strictly liable for the existence of aggravating factors or must the State prove the applicability of the factors to the individual defendant?” *Howerton*, 109 Wn. App. at 500. Division I answered its question by holding that an aggravating factor must be applicable to the individual defendant.

Defendant now raises a similar claim to that in *Howerton* with respect to the aggravating circumstances contained in RCW 9.94A.535. He argues that because he was convicted of the substantive crime of leading organized crime upon instruction that allowed for consideration of accomplice liability, that he cannot be subject to an exceptional sentence unless the jury specifically found the aggravating circumstance solely based on his actions. Or, to rephrase the question raised in *Howerton* to the case at hand: Did the Legislature intend to hold accomplices to (or participants in) leading organized crime strictly liable for the existence of

aggravating circumstances in RCW 9.94A.535 or must the State prove the applicability of the circumstances to the individual defendant?

The State contends that the correct answer to this question (or the one posed in *Howerton*) cannot be answered with a “yes” or a “no.” The answer depends on which aggravating circumstance in RCW 9.94A.535 is being considered.

The aggravating circumstances set forth in 9.94A.535 cover a broad range of factors. Some of the circumstances focus on the defendant’s actions such as when the defendant manifests deliberate cruelty to the victim, RCW 9.94A.535(3)(a), or uses his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense, RCW 9.94A.535(3)(n). Other circumstances discuss what the defendant knew or should have known about his victim, such as being particularly vulnerable, RCW 9.94A.535(3)(b), or pregnant, RCW 9.94A.535(3)(c). Other circumstances do not focus on the defendant’s actions or what he knew, but on the impact of the crime, i.e. a rape of child resulting in the victim’s pregnancy, RCW 9.94A.535(3)(i), or the victim’s injuries substantially exceeding the level of bodily harm necessary for the element of crime, RCW 9.94A.535(3)(y). Some aggravating circumstances simply describe some aspect of the offense: it involved a high degree of sophistication or planning, RCW 9.94A.535(3)(m), or an invasion of the victim’s privacy, RCW 9.94A.535(3)(p).

Close examination of the varied wording of these aggravating circumstances indicates that the Legislature intended some of them to apply to any participant in the substantive crime while others must be attributable to a particular defendant. Generally, the Legislature's use of the phrase "the defendant" in setting forth an aggravating circumstance signals its intent that the circumstance be assessed against the individualized defendant while use of the term "the current offense" signals its intent that the aggravating circumstance can be applied to any participant in the crime.

At issue in this case is a portion of the aggravating circumstance found in RCW 9.94A.535(3)(d). That provision reads in its entirety:

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.535(3)(d). This provision focuses generally on the nature of the offense as only one of the factors brings into consideration a particular characteristic of the defendant. In the case at bar, defendant might have an argument were subsection (iv) at issue in his case, but it is not.

The jury was instructed that if it were to find defendant guilty of any offense⁷ that it must also determine whether the crime was a major economic offense. CP 101 Instruction No. 44. The jury was further 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 a high degree of sophistication or planning or occurred over a lengthy period of time.

...

CP 102, Instruction No. 45 (in part). This instruction as to an aggravating factor pertains to the nature of the offense committed. There is no reference at all to “the defendant” or even an indirect reference to the entity committing the crime. These factors do not change from one participant to the next. Once the jury finds the crime meets the criteria set forth in the aggravating circumstance, it is applicable to all the participants in the crime and need not be assessed on an individualized basis. Such an aggravating circumstance should apply equally to all participants in a

⁷ Other than the drug offense in Count XIV.

crime regardless of whether they are a minor or major participant.

Defendant has failed to show that the Legislature did not intend for the jury's determination that the leading organized crime offense was a major economic offense to be applicable to all participants in that crime. This claim must be dismissed.

6. THE TRIAL COURT, BASED UPON A CONCESSION BY THE PROSECUTOR, FOUND ALL THE CURRENT OFFENSES TO BE THE SAME CRIMINAL CONDUCT AS THE LEADING ORGANIZED CRIME; AS THE COURT DID NOT FIND THAT THE MULTIPLE CONVICTIONS VIOLATED DOUBLE JEOPARDY, ALL CONVICTIONS ARE PROPERLY LISTED ON THE JUDGMENT.

Article I, section 9 of the Washington State Constitution, and the Fifth Amendment to the federal constitution prohibit multiple punishments for the same offense. *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). But when a defendant's criminal acts violates more than one criminal statute, a trial court does not necessarily violate double jeopardy by imposing sentence for each crime. *See State v. Calle*, 125 Wn.2d 769, 776-77, 888 P.2d 155 (1995). The fundamental issue is whether the legislature intended to authorize multiple punishments for a criminal conduct that violates more than one statute. *See Calle*, 125 Wn.2d at 776.

Washington courts use a three-step analysis to determine whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one statute. *Calle*, 125 Wn.2d at 776.

First, the court looks to the statutory language to determine whether the legislature specifically authorized separate punishments such as in an anti-merger statute. *Calle*, 125 Wn.2d at 776. Second, if the statute is silent, the court applies the “same evidence” *Blockberger* test to determine whether each offense has an element not contained in the other. *State v. S.S.Y.* ___ 160 Wn.2d ___, ___ P.2d ___ (2010)(2010 WL 4244347 at p. 3) citing *Calle*, 125 Wn.2d at 777. Finally, if each offense contains a separate element, the court looks for evidence of a legislative intent to treat the crimes as one offense for double jeopardy purposes. *Calle*, 125 Wn.2d at 779. When court concludes that conviction on both offenses would violate double jeopardy, then the judgment can only reflect one conviction as “double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently.” *State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40, 47 (2007), citing *Calle*, 125 Wn.2d at 773. The standard of review for double jeopardy claims is de novo. *State v. Freeman*, 153 Wash.2d 765, 770, 108 P.3d 753 (2005).

Distinct from a double jeopardy analysis, the Sentencing Reform Act requires a sentencing court to determine whether two or more current offenses constitute the “same criminal conduct” in determining the offender score. See *State v. Tili*, 139 Wn.2d 107, 119-120, 985 P.2d 365 (1999). Under RCW 9.94A.589(1)(a), trial court counts all multiple current offenses separately unless “the court enters a finding that some or

all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” RCW 9.94A.589. Same criminal conduct means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). All three elements must be present for multiple offenses to encompass the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Because RCW 9.94A.589(1)(a) is construed narrowly, most multiple crimes do not constitute the same criminal conduct. *State v. Stockmyer*, 136 Wn. App. 212, 218, 148 P.3d 1077 (2006). If the court finds two offenses to constitute the “same criminal conduct” under the SRA, the court still lists both offenses on the judgment and imposes punishment on each, but does not use one crime to elevate the offender score on the other and then runs both sentences concurrently. RCW 9.94A.589(1)(a). A reviewing court defers to the trial court’s determination of same criminal conduct unless the court clearly abused its discretion or misapplied the law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990).

At the sentencing hearing in this case, the prosecutor stated the following:

The defendant comes to the Court prior to this activity with an offender score of seven, so the question then becomes, in the contest of leading organized crime, which, if any of these cases or cause numbers, merge or are to be considered the same course of conduct.

9/11/09 RP 6. The prosecutor then indicates that she has been persuaded by defendant's argument regarding RCW 9A.82.085, as set forth in his sentencing memorandum, that all of the offenses underlying the leading organized crime conviction had to be treated as the same criminal conduct. CP 207-212; 9/11/09 RP 6-7. The prosecutor, however, gave various recommendation as to how the offender score should be counted indicating a lack of clarity as to what, precisely, she was conceding. 9/11/09 RP 9-10.

It is not clear that the defendant's argument as to the impact of RCW 9A.82.085 on the determination of same criminal conduct is correct. RCW 9A.82.085 provides:

In a criminal prosecution alleging a violation of RCW 9A.82.060 or 9A.82.080, the state is barred from joining any offense other than the offenses alleged to be part of the pattern of criminal profiteering activity. When a defendant has been tried criminally for a violation of RCW 9A.82.060 or 9A.82.080, the state is barred from subsequently charging the defendant with an offense that was alleged to be part of the pattern of criminal profiteering activity for which he or she was tried.

RCW 9A.82.085. The statute is a mandatory joinder provision specific to charges of leading organized crime and criminal profiteering activity; it contemplates the prosecution of multiple crimes in a single prosecution and does not make any reference whether or not the court should impose multiple punishments upon the conviction of multiple offenses. The statute does not discuss double jeopardy ramifications with respect to

multiple punishments. Additionally, the statute does not reference any provisions of the Sentencing Reform Act or discuss punishment under Washington's sentencing scheme. Thus, it is unclear why this provision would have any impact on whether the court should impose sentence on multiple offenses or why the prosecutor was persuaded that this provision controlled the determination of same criminal conduct. There was no concession that defendant's multiple crimes violated double jeopardy. But as noted above, there was some sort of a concession by the prosecutor as to these offenses constituting the same criminal conduct and the court acted upon it. On page three of the judgment the court inserts the following: "All current offenses are one offense under Leading Organized Crime Count." CP 111-125. The court proceeded to sentence defendant on each count with an offender score of seven – which is reached based solely on his prior criminal history with no additional points for any current offense – and orders all counts to be served concurrently. *Id.* Under RCW 9.94A.589(1)(a), this would be the proper method of sentencing a defendant when the court found all of his current offenses to be the same criminal conduct.

Defendant contends that the trial court found the offense merged due to double jeopardy considerations and that, consequently, only the leading organized crime conviction could appear on the judgment under *Womac*. His argument appears to be based largely upon the fact that the court used the term "merge" when describing how it was going to treat the

multiple offenses. 9/11/09 RP 26-27. While use of the term “merge” is perhaps better left to discussions of double jeopardy issues, it is sometimes used in discussing “same criminal conduct” analysis. See *State v. Torngren*, 147 Wn. App. 556, 563-564, 196 P.3d 742 (2008)(noting that “merge” may also be used to refer to a “same criminal conduct” analysis for sentencing purposes rather than double jeopardy analysis). Here the record fails to show any use of the *Calle* three-step analysis that a court would employ to determine whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one statute. *Calle*, 125 Wn.2d at 776. The judgment entered below is inconsistent with a judicial determination that defendant’s multiple convictions violate double jeopardy, but it is wholly consistent with a determination that under the “same criminal conduct” analysis the offenses should be treated as one. Defendant has failed to show that the trial court’s judgment is improper

Defendant received the benefit of a questionable concession by the prosecutor as to whether his offenses constituted the same criminal conduct under the SRA. He has failed to show any violation of the prohibition against multiple punishments for the same offense.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgment and sentence entered below.

DATED: November 18, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Kathleen Proctor
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

FILED
COURT OF APPEALS
DIVISION II
10 NOV 18 PM 3:30
STATE OF WASHINGTON
BY DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/18/10 *[Signature]*
Date Signature

APPENDIX “A”

RCW 9A.82.060

Westlaw

West's RCWA 9A.82.060

Page 1

C

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

Chapter 9A.82. Criminal Profiteering Act (Refs & Annos)

→ **9A.82.060. Leading organized crime**

(1) A person commits the offense of leading organized crime by:

(a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity; or

(b) Intentionally inciting or inducing others to engage in violence or intimidation with the intent to further or promote the accomplishment of a pattern of criminal profiteering activity.

(2)(a) Leading organized crime as defined in subsection (1)(a) of this section is a class A felony.

(b) Leading organized crime as defined in subsection (1)(b) of this section is a class B felony.

CREDIT(S)

[2003 c 53 § 88, eff. July 1, 2004; 2001 c 222 § 9. Prior: 1985 c 455 § 7; 1984 c 270 § 6.]

Current with all 2010 Legislation

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