

NO. 44054-7-II
Cowlitz Co. Cause NO. 11-1-01331-3

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DENETTE LYNN GOE,

Appellant.

BRIEF OF RESPONDENT

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Goe's convictions should be affirmed because:

- (1) Taken in the light most favorable to the State there was sufficient evidence for the jury to find Goe guilty of both her forgery convictions;
- (2) When a person steals over \$5,000 from the same victim over an 8-day period the State may aggregate amounts greater than \$750 into a single charge of theft in the first degree;
- (3) The information was not deficient when money was wrongfully deposited into Goe's account totaling more than \$5,000 during the date range the State alleged;
- (4) Goe may not challenge jury instructions for the first time on direct appeal;
- (5) The "to convict" instruction for theft in the first degree stated all essential elements of the crime and the jury was not wrongfully instructed that it was permitted to consider all amounts wrongfully obtained; and
- (6) The Court of Appeals did not err by upholding the constitutionality of Washington's accomplice liability statute

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

- A. Taken in the light most favorable to the State, was there sufficient evidence for the jury to find Goe guilty of forging the money order and the check for \$2,800?
- B. When a person steals over \$5,000 from the same victim over an 8-day period, may the State charge theft in the first degree by aggregating amounts greater than \$750?

- C. **Must the information specifically state “common scheme or plan” when a person steals over \$5,000 from the same victim over an 8-day period?**
- D. **May Goe challenge jury instructions for the first time on direct appeal, when she did not object to them at trial?**
- E. **Were the jury instructions deficient when the “to convict” instruction stated all essential elements of the theft in the first degree and the jury was instructed that they could aggregate Goe’s multiple acts of wrongfully obtaining money regardless of their dollar amount?**
- F. **Did the Court of Appeals err when it held that Washington’s accomplice liability statute was constitutional?**

III. STATEMENT OF THE CASE

Denette Goe was married to Brook Morehouse. RP at 179, 190. On February 1, 2011, Goe provided Morehouse with a check for \$2,500, and he deposited it into her account through an automated teller machine (“ATM”) at a U.S. Bank branch located on Hudson Street in Longview. RP at 59-60, 94-95, 134-35. The next day, Goe and Morehouse withdrew over \$2,000 from the account. RP at 65.

On February 5, 2011, Goe entered the bank branch holding a baby. RP at 20-21. Goe presented the teller, Sandra Singleton, with a money order for \$970. RP at 21. Goe told Singleton that her husband was in the military in Iraq, that his family allotment had not been set up yet, and that

he had sent her the money order to pay rent. RP at 22. The money order purported to be from a person with the last name "Williamson." RP at 23-24; Exhibit 15. Singleton asked Goe if she wished to deposit the money into her account. RP at 22. Goe told Singleton she wanted the money in cash to pay rent. RP at 22. Singleton cashed the money order for Goe. RP at 23.

On February 8, 2011, Goe provided Morehouse with a check for \$2,800, and he deposited it into her account through the branch ATM again. RP at 98-99, 134-35. On February 9, 2011, a teller withdrawal of \$1,200 and an ATM withdrawal of \$500 were made from Goe's account. RP at 99.

Both checks and the money order were returned to the bank with payment refused. RP at 66, 73, 89-90. The \$2,500 check was returned to the bank marked "refer to maker," indicating the check was worthless. RP at 66, 69-70. The \$2,800 check was also returned to the bank as worthless. RP at 90. The \$2,800 check listed the same address for both that the account holder and the bank. RP at 91. The dual listing of the same address was indicative of a mistake by a counterfeiter. RP at 91. The font used on both checks was identical. RP at 93. The money order bore a false serial number, purported to have been purchased in Fort Worth, Texas, while bearing a zip code for a post office in Detroit,

Michigan, and lacked magnetic ink that is required on all instruments deposited in the bank. RP at 118-19, 76.

Goe was contacted and asked to come to the bank, where she met with the branch manager, Joseph Yake. RP at 124-25. Goe told Yake she had gotten both the money order and the checks from a job advertisement online. RP at 125. Goe said she was supposed to keep part of the money and wire the rest back to the company. RP at 125. However, Goe told Yake that she had kept all of the money for herself. RP at 126. Yake told Goe she was responsible to pay the bank back. RP at 126. Goe never paid any money back to the bank. RP at 126-27.

Detective Kyle Sahim of the Longview Police Department was contacted by the bank's fraud investigator, Frank Najjar. RP at 130. Detective Sahim contacted Goe by telephone. RP at 138. Goe told Detective Sahim that she cashed the money order, and then also said she had personally deposited both of the checks herself. RP at 140-41. Detective Sahim informed Goe that surveillance showed Morehouse depositing checks. RP at 141. At this point, Goe changed her story to say that she had given Morehouse the checks to deposit into her account, but that Morehouse "had nothing to do with it." RP at 141-42. At a later time, Goe provided Detective Sahim a copy of an email from a company she said she had gotten the checks and money order from. RP at 146. The

subject for this email said “LEGIT EMPLOYMENT!” RP at 149-150. The email itself contained grammatical errors and purported to be a job offer of “account rep and in bookkeeping.” RP at 147, 150. The instructions told the supposed employee that she was entitled to cash checks sent to her at her bank, keep 10%, and then send the rest of the money back to the employer. RP at 151-52.

Goe was charged with three counts of forgery and one count of theft in the first degree. A jury trial was held. The court dismissed one of the forgery counts after the State rested. The jury found Goe guilty of theft in the first degree and the remaining two forgery counts.

IV. ARGUMENT

A. Taken in the light most favorable to the State there was sufficient evidence for the jury to find Goe guilty of both counts of forgery.

There was sufficient evidence for the jury to find Goe guilty of both forgery counts. “When the sufficiency of the evidence is challenged in a criminal case, 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) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25

Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Because the evidence permitted the reasonable inference that Goe knew both the check and money order were forged and had intent to injure or defraud, there was sufficient evidence to support both of these convictions.

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn.App. 703, 708, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *Jones*, 63 Wn.App. at 707-08. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). All

reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

Here, taken in the light most favorable to the State, there was sufficient evidence for the jury to find Goe guilty of both forgery charges. The \$970 money order bore a false serial number, purported to have been purchased in Fort Worth, Texas, while bearing a zip code for a post office in Detroit, Michigan, and it also lacked magnetic ink that is required on all instruments deposited in the bank. Additionally, Goe lied to the bank teller about the money order on February 5, 2011, when she told her that the money order was from her husband who was deployed to Iraq. Her actual husband was Brook Morehouse, who was present in Longview on both February 1, 2011, and February 8, 2011, when he deposited checks into Goe's account.

The \$2,800 check was returned to the bank as worthless. The check itself listed the same address for both the account holder and the bank. The dual listing of the same address demonstrated that the check was counterfeit. Further, Goe admitted that after receiving the money she kept all of it, rather than returning 90% as the email she provided Detective Sahim instructed her to do. This demonstrated that Goe did not believe this was truly a job, but rather was just using the check to defraud

the bank. For these reasons, there was sufficient evidence for the jury to find Goe guilty of the forgeries.

B. Goe's theft in the first degree conviction should be affirmed because: (1) the statute does not prohibit the aggregation of theft amounts greater than \$750, (2) the charging information was not deficient, (3) Goe failed to object to the jury instructions at trial, and (4) the jury was properly instructed on theft in the first degree.

Goe's conviction for theft in the first degree should be affirmed. "[A]n issue, theory, or argument not presented at trial will not be considered on appeal." *State v. Jamison*, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). Goe's attacks on her theft in the first degree conviction are without merit. First, the statutory language regarding the aggregation of misdemeanor amounts to a felony theft amount does not abrogate the common law principle allowing the State to aggregate felony theft amounts into a charge of theft in the first degree. Second, the charging information was not deficient. Third, because Goe did not object to the jury instructions at trial, she waived her right to raise this issue for the first time on appeal. Fourth, the jury was properly instructed on the crime of theft in the first degree.

1. Because RCW 9A.56.010 does not prohibit the aggregation of amounts exceeding \$750 to support a charge of theft in the first degree,

there was sufficient evidence to support Goe's theft in the first degree conviction.

Because Goe stole from the same victim, in the same place, over roughly a week's time, she demonstrated a single, continuing criminal impulse; therefore her actions constituted a singular act of theft. In Washington it is well-established that when "successive takings are the result of a single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking." *State v. Vining*, 2 Wn.App. 802, 808-09, 427 P.2d 564 (1970). In defining "value," RCW 9A.56.010(21)(c) provides that a series of transactions, that individually constitute theft in the third degree, may be aggregated into single count to determine value for purposes of determining the degree of a theft. However, nothing in this statute prohibits the aggregation of transactions that are individually in excess of \$750.

This issue was directly addressed in *State v. Barton*, 28 Wn.App. 690, 626 P.2d 509 (1981). On appeal, Barton argued that his five acts of theft in the second degree were improperly aggregated into a single count of theft in the first degree. *Id.* at 694. To support this argument, Barton argued that because RCW 9A.56.010 only addressed the aggregation of

acts of theft in the third degree, the State was not permitted to aggregate acts of theft in the second degree to charge theft in the first degree. *Id.* The Court of Appeals disagreed with Barton's argument, explaining that Barton has been charged with theft in the first degree under RCW 9A.56.030 rather than with the aggregation statute, RCW 9A.56.010. *Id.* The court then stated:

The State was permitted to charge theft in the first degree for the five transactions under the well-established common law rule that property stolen from the same owner and from the same place by a series of acts constitutes one crime if each taking is the result of a single continuing criminal impulse or intent pursuant to a general larcenous scheme or plan.

Id. (citing *Vining*, 2 Wn.App at 808). The Court of Appeals then explained that the aggregation statute "does not purport to abrogate the common law principle ... allowing the State to charge a series of related thefts as one crime." *Id.* at 694-95. Thus, the court found that there was a common law basis for the charge and that this was consistent with the aggregation statute. *Id.* at 695.

Here, there is no question that Goe stole "from the same owner and from the same place by a series of acts."¹ Her method of wrongfully

¹ Contrary to Goe's position that numerous individual thefts only occurred when the money was withdrawn, she wrongfully obtained the money as soon as it entered her account. With the prevalent use of debit cards and other forms of immediate electronic transfer, there is not a meaningful distinction between having money in one's bank account and having cash in one's pocket.

obtaining this money involved presenting three fictitious payment instruments over an 8-day period, and this demonstrated “a single continuing criminal impulse or intent pursuant to a general larcenous scheme or plan.” Taken in the light most favorable to the State, there was sufficient evidence for the jury to find that Goe wrongfully obtained or exerted unauthorized control over property with a value exceeding \$5,000, as more than \$5,000 was deposited, withdrawn, and spent from her account as a result of her use of the fictitious instruments. And, as explained in *Barton*, the fact that RCW 9A.56.010 allows individual acts of theft in the third degree to be aggregated into a felony theft charge does not prohibit the aggregation of individual acts of theft in the second degree to be aggregated into a charge of theft in the first degree.

2. **The State is not required to allege that multiple transactions are part of a common scheme or plan in the charging information when theft of over \$5,000 is committed within the range of dates alleged.**

Because Goe was charged according to the precise language of RCW 9A.56.030, it can be fairly implied from the charging document that the date range in the charging information provided sufficient notice to Goe that her theft in the first degree charge was for the sum of the transactions taking place during this time period. “The primary goal of the ‘essential elements’ rule is to give notice to an accused of the nature of the

crime that he or she must be prepared to defend against.” *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). Goe challenges the charging document for the first time on appeal. Because Goe was charged according to the precise language of the statute this claim fails. Further, even if there was a requirement to charge in the manner that Goe now claims is required, the elements can be fairly implied from the charging document, and she did not suffer any prejudice.

“Generally, a charging document must contain ‘[a]ll essential elements of a crime’ so as to give the defendant notice of the charges and allow the defendant to prepare a defense.” *State v. Tresenriter*, 101 Wn.App. 486, 491, 4 P.3d 145 (2000) (quoting *State v. Kjorsvik*, 117 Wn.2d at 97). The standard of review depends on when the charging document is challenged. *Id.* When the defendant challenges the charging document for the first time on appeal, a reviewing court will construe the document in favor of validity.² *State v. Winings*, 126 Wn.App. 75, 84, 107 P.3d 141 (2005) (citing *Tresenriter*, 101 Wn.App. at 491). “Under the liberal construction rule, if an apparently missing element may be fairly implied from the charging language within the charging document, we will uphold the charging document on appeal.” *Id.* Under this rule, the

² The courts apply this liberal construction rule to discourage “sandbagging” where the defendant recognizes a defect in the charging document but forgoes raising it before trial when a successful objection would usually result only in amending the information. *Kjorsvik*, 117 Wn.2d at 103.

courts apply the following two-part test: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused lack of notice?” *Kjorsvik*, 117 Wn.2d at 105-06.

The statute defining theft in the first degree for theft of property over \$5,000 states:

- (1) A person is guilty of theft in the first degree if he or she commits theft of:
 - (a) Property or services which exceed(s) five thousand dollars in value other than a firearm as defined in RCW 9.41.010[.]

RCW 9A.56.030(1)(a). Thus, the elements in the statute do not include the phrase “common scheme or plan.” If the statute provides sufficient notice of the crime, then it stands to reason that so would an information that charges a person using the precise language of the statute. Further, as explained in *Barton*, it has been understood under the common law that “property stolen from the same owner and from the same place by a series of acts constitutes one crime if each taking is the result of a single continuing criminal impulse or intent pursuant to a general larcenous scheme or plan.” 28 Wn.App. at 694.

Here, the State charged Goe under RCW 9A.56.030(1)(a), and omitted none of the required statutory language. CP at 2. As a result, the State does not concede that the information was deficient, and Goe does not cite any case that states a requirement for the state to allege “multiple transactions as part of a common scheme or plan” when charging theft in the first degree based on a series of transactions against the same victim.³ However, even if this were a requirement, Goe’s argument still fails.

It can be fairly implied from the charging document that the charge of theft in the first degree was for wrongfully obtaining money from the same victim over the period of February 1-8, 2011. The information included three counts of forgery on individual dates against the same victim. CP at 1-3. The charge of theft in the first degree was for a date range that covered the three dates listed in each of the forgeries, also against the same victim. The most reasonable interpretation of the information is that the crime of theft in the first degree was for the money wrongfully obtained from all of these forgeries. Thus, a fair construction

³ *State v. Rivas*, 168 Wn.App. 882, 278 P.3d 686 (2012) requires that common scheme or plan be included in the charging information for malicious mischief in the second when value is derived from aggregating a series of acts of malicious mischief in the third degree. However, there is a significant distinction here, because as with misdemeanor amounts for theft, aggregation of misdemeanor malicious mischief amounts is specifically addressed by statute. See RCW 9A.48.100(2); RCW 9A.56.010(21). No such statutory provision exists for the aggregation of theft in the second degree amounts. The authority to aggregate these amounts comes from the common law rather than the statute. See *Barton*, 28 Wn.App. at 694.

of the language in the charging document demonstrates that there was notice as to the necessary facts at issue.

Goe suffered no prejudice. There was never a question at trial that the fictitious instruments had been deposited into her account. She even testified to withdrawing and spending the money acquired as result of these deposits. RP at 199. Her claim was simply that she did not have knowledge that these instruments were fraudulent. Because the issue of whether there was a common scheme or plan was not even argued at trial, Goe suffered no prejudice. Thus, the elements can be fairly implied from the charging document, and Goe has not demonstrated that she suffered any prejudice.

3. Goe did not object to the jury instructions at trial; therefore she may not challenge them on direct appeal.

Because Goe did not object to the jury instructions given at trial, she waived the right to challenged them on appeal.⁴ “Generally, an

⁴ Often when cases involve a faulty jury instruction, the invited error doctrine will apply: “[E]ven where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording.” *State v. Winings*, 126 Wn.App. 75, 89, 107 P.3d 141 (2005). Because Goe did not propose the jury instruction at issue, the invited error doctrine does not apply. See *State v. Corn*, 95 Wn.App. 41, 56, 975 P.2d 520 (1999). However, when the court addressed the jury instructions with the parties, Goe neither objected nor took exception to the instructions she now claims to be in error. RP at 207-08. By permitting the jury instructions to go forward, Goe achieved exactly what the invited error doctrine is intended to prevent: She did not raise the issue when given the opportunity at trial, then after being convicted she raises the issue for the first time on appeal, denying the trial

appellant cannot raise an issue relating to alleged jury instruction errors for the first time on appeal unless it is a ‘manifest error affecting a constitutional right.’” *State v. Embry*, 171 Wn.App. 714, 756, 287 P.3d 648 (2012) (citing RAP 2.5(a)). Under RAP 2.5(a), an appellate court “may refuse to review any claim of error which was not raised in the trial court.” This rule requires parties to bring purported errors to the trial court’s attention, thus allowing the trial court to correct them.⁵ *See State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

Although an argument must be raised at trial to be preserved for review, in certain, limited circumstances, appellate courts will consider arguments raised for the first time on appeal, but only where the legal standard for consideration had been satisfied. “The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’” *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). Under RAP 2.5(a), an error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to

court the opportunity to correct the error at the appropriate time. *See State v. Schaler*, 169 Wn.2d 274, 303, 236 P.3d 858 (2010) (J.M. Johnson, J., *dissenting*).

⁵ Requiring parties to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error.

establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right.

In *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992), the Court of Appeals explained that the parameters of a “manifest error affecting a constitutional right” are not unlimited stating:

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.

An appellate court must first satisfy itself that the alleged error is of constitutional magnitude before considering claims raised for the first time on appeal. *Id.* at 343. But this does not mean that any claim of constitutional error is appropriate for review. For a reviewing court to consider such a claim, it must be “manifest,” otherwise the word “manifest” could be removed from the rule. *Id.* The court explained: “[P]ermitt[ing] every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders, and courts.” *Id.* at 344 (emphasis in original).

The court then provided the proper approach for analyzing whether an alleged constitutional error may be reviewed on appeal under RAP

2.5(a). *Id.* at 345. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. *Id.* Second, the court must determine whether the alleged error is “manifest”; an essential part of this determination requires a plausible showing that the alleged error had practical and identifiable consequences in the trial. *Id.* The term “manifest” means “unmistakable, evident or indisputable as distinct from obscure, hidden or concealed.” *Id.* An error that is abstract and theoretical, does meet this definition. *Id.* at 346. Third, if the court finds the alleged error is manifest, then the court must address the merits of the constitutional issue. *Id.* at 345. Fourth, if the court determines an error was of constitutional import, it must then undertake a harmless error analysis. *Id.*

Here, when the four-part analysis is applied, it is difficult to conclude that manifest error affecting a constitutional right occurred. Because the jury is permitted to aggregate amounts greater than \$750, the aggregation instruction does not even suggest a constitutional error. On the other hand, if the “two convict” instruction omitted an essential element of the crime, then this would suggest a constitutional error.⁶ *See State v. Chino*, 117 Wn.App. 531, 538, 72 P.3d 256 (2003). However, this is only the first step in the analysis. Next the court must determine

⁶ For reasons stated in B-4, the State does not concede this issue. *See infra* B-4.

whether there is a plausible showing that the alleged error had practical and identifiable consequences in the trial. An abstract, theoretical error fails to meet this definition. Whether the fictitious instruments had been presented to the bank was not at issue in the case. Goe testified that she had received all three instruments from a company that she believed to be her employer. RP at 184-85. Goe admitted that all three instruments were deposited into her account. RP at 199. The only issue at trial was whether or not Goe intended to deprive the rightful owner of these funds. While she claimed to lack knowledge that the instruments were fictitious, she freely admitted to having received all three from the same source, to having them deposited into her account, to withdrawing the money, and to spending it. Because the jury would not have been able to reach \$5,000 without aggregating these amounts of the individual deposits, it effectively found that they were deposited as part of a common scheme or plan regardless of whether or not this language was contained in the “to convict” instruction. The only issue was Goe’s knowledge, and the jury did not find Goe credible when she feigned ignorance. Thus, in light of Goe’s all-or-nothing defense, had the “to convict” instruction included the common scheme or plan language this would not have had practical and identifiable consequences on the trial.

Moreover, even if this theoretical error is constitutional, its impact on the case obviously amounted to harmless error. “[E]rror is not prejudicial unless within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (citing *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980)). Constitutional error is harmless when the conviction is supported by overwhelming evidence. *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). On these facts, even if the common scheme or plan language had been made part of the “to convict” instruction, there is no reasonable probability that the outcome of the trial would have been affected. Goe’s singular defense was that she did not know the instruments were fictitious, therefore she did not have an intent to deprive. The jury’s verdict of guilty on the theft in the first degree charge lends itself to two conclusions: First, the jury did not believe Goe as to her lack of knowledge. Second, because all three transactions were less than the amount required for theft in the first degree, the jury was required to combine the money received from all three to find her guilty of theft in the first degree. Therefore, had common scheme or plan be included in the “to convict” instruction, the jury would have found her guilty regardless, and the error she now asserts had no impact on the outcome of the trial

4. The jury was properly instructed on the crime of theft in the first degree.

The court did not err when it instructed the jury on aggregation of theft amounts or the elements of theft in the first degree. “Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.” *State v. Clausing*, 147 Wash.2d 620, 626, 56 P.3d 550 (2002) (citing *State v. Riley*, 137 Wash.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999)). Goe challenges two of the jury instructions given. The first challenge is to the court instructing the jury that it could aggregate a series of transactions when each of these thefts individually would have constituted felony theft amounts. As explained in Part B-1, the existence of the statutory aggregation clause in RCW 9A.56.010(21)(c), which permits the aggregation of theft in the third degree amounts into a single felony theft charge, does not prohibit the State from aggregating multiple felony theft amounts into a single felony charge. *See supra* Part B-1; *Barton*, 28 Wn.App. at 694-95. For this reason, the court did not err in giving this instruction. Goe’s lone remaining argument is that that the “to convict” instruction for theft in the first degree was in error because it did not include an element requiring

the State to prove that multiple incidents of theft were part of a common scheme or plan. This argument also fails.

Because common scheme or plan is not an element of theft in the first degree, it was not necessary for the court to include it as an element in the “to convict” instruction for theft in the first degree. “Common scheme or plan is not an element of first degree theft, and need not be defined for the jury.” *State v. Reid*, 74 Wn.App. 281, 292, 872 P.2d 1135 (1994) (citing *State v. Stanton*, 68 Wn.App. 855, 863, 845 P.2d 1365 (1993); *State v. Tyler*, 47 Wn.App. 648, 650, 736 P.2d 1090 (1987) (jury must be instructed on each element of the crime) *overruled on other grounds in State v. Delcambre*, 116 Wn.2d 444, 805 P.2d 233 (1991)). In *Stanton*, the court held that common scheme or plan was not an element of first degree theft or unlawful issuance of a bank check (“UIBC”). 68 Wn.App. at 863. The court noted the distinction between the statutes defining first degree theft, RCW 9A.56.030(1) and RCW 9A.56.020(1), which do not include a series of transactions as part of a common scheme or plan as elements of the crime, and the statute defining UIBC, RCW 9A.56.060(3), which does. *Id.* n.5. Thus, because unlike UIBC, the theft statute does not include common scheme or plan as an element of theft in the first degree, it need not appear in the “to convict” instruction.

Here, Goe was found guilty of theft in the first degree based on amounts deposited into her account from three fictitious instruments. Each of these amounts was greater than \$750, but less than \$5,000. Together, they totaled an amount greater than \$5,000. Unlike felony UIBC, which includes a statutory provision for aggregation of misdemeanor UIBC amounts and a felony theft which includes a statutory provision for aggregation of misdemeanor theft amounts, there is no statutory provision regarding the aggregation of felony theft amounts to charge theft in the first degree. The jury was required to determine whether she wrongfully obtained or exerted unauthorized control over an amount greater than \$5,000 with intent to deprive the owner, on, about, or between February 1, 2011 and February 8, 2011. The jury found from the evidence that this occurred. And, the “to convict” instruction given for theft in the first degree correctly defined the law as set forth in RCW 9A.56.020(1)(a) and RCW 9A.56.030(1)(a).

C. The Court of Appeals did not err when it upheld the constitutionality of the accomplice liability statute.

Because the sweep of RCW 9A.08.020 avoids protected speech activities that are not performed in aid of a crime and that only consequentially further a crime, it is not overbroad; therefore, the trial court did not err when it instructed the jury on the definition of an

accomplice. In 2011, the Court of Appeals held: “Agreeing with and adopting Division One’s rationale in *Coleman*, we also hold that the accomplice liability statute is not unconstitutionally overbroad.” *State v. Ferguson*, 164 Wn.App. 370, 376, 264 P.3d 575 (2011) (referencing *State v. Coleman*, 115 Wn.App. 951, 960-61, 231 P.3d 212 (2010)). Goe argues that in *Coleman*, the Court of Appeals erred by failing to apply the legal standard set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), requiring the statute not forbid advocacy of a law violation “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action.” However, Goe appears to ignore entirely that in *Ferguson*, the Court of Appeals directly addressed this language from *Brandenburg*.

Just as Goe does here, in *Ferguson*, the defendant challenged the accomplice liability statute as being overbroad, claiming it criminalized constitutionally protected speech under the First and Fourteenth Amendments of the U.S. Constitution. 164 Wn.App. at 375. The Court of Appeals explained that under RCW 9A.08.020(3)(a) a person can be found guilty as an accomplice if “with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests another person to commit the crime or aids or agrees to aid such person in the planning or committing the crime.” *Id.* The court

acknowledged that a statute is overbroad when it prohibits protected speech, then provided the rule for evaluating whether such a statute is overbroad: “A statute that regulates behavior, not pure speech, will not be overturned ‘unless the overbreadth is both real and substantial in relation to the ordinance’s plainly legitimate sweep.’” *Id.* (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 31, 759 P.2d 572 (1989)).

The court then quoted *Brandenburg*: “The constitutional guarantee of free speech does not allow a State to forbid the advocacy of a law violation ‘except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’” *Id.* (quoting *Brandenburg*, 395 U.S. at 447). After doing so, the *Ferguson* Court agreed with the *Coleman* Court’s holding that the statute was not overbroad because it requires a criminal mens rea to aid in the commission of the crime with knowledge that the aid will further the crime. *Id.* at 376 (quoting *Coleman*, 155 Wn.App. at 960-61). Finally, the Court then stated: “Because the statute’s language forbids advocacy directed at and likely to incite or produce imminent lawless action, it does not forbid the mere advocacy of law violation that is protected under the holding of *Brandenburg*.” *Id.* Thus, not only did the *Ferguson* Court hold that the accomplice liability statute was constitutional, but it explained how the statute directly addressed the concerns raised *Brandenburg*. Accordingly,

Goe's claim that the statute is overbroad based on the holding in *Brandenburg* fails.

V. **CONCLUSION**

For the above stated reasons, Goe's convictions for forgery and theft in the first degree should be affirmed.

Respectfully submitted this 20th day of June, 2013.

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CERTIFICATE OF SERVICE

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 20th, 2013.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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