

NO. 45827-6

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

STATE OF WASHINGTON, RESPONDENT

v.

AMBER DIANE ROBBINS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff, Judge

No. 13-1-01314-4

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

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

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Whether there was sufficient evidence to prove that Defendant possessed items of identification and financial information with criminal intent where Defendant attempted to conceal twenty-two items belonging to eight different people in her purse, and made contradictory statements concerning the items? 1

 2. Although the issue was not properly preserved at trial, was not a manifest error affecting a constitutional right, and was invited by Defendant, did Defendant fail to show the trial court's instructions to the jury constituted an improper judicial comment on the evidence where the instructions correctly stated the law, did not convey the trial court's personal opinion, and did not relieve the State of the burden of proof? 1

B. STATEMENT OF THE CASE. 1

 1. Procedure 1

 2. Facts..... 2

C. ARGUMENT..... 5

 1. THERE WAS SUFFICIENT EVIDENCE THAT DEFENDANT POSSESSED THE IDENTIFICATION AND FINANCIAL INFORMATION WITH THE INTENT TO COMMIT A CRIME 5

2. THIS COURT SHOULD REJECT DEFENDANT'S CLAIM THE TRIAL COURT'S INSTRUCTIONS TO THE JURY CONSTITUTE AN IMPROPER COMMENT ON THE EVIDENCE BECAUSE IT WAS NOT PRESERVED FOR APPEAL, DID NOT CONSTITUTE A MANIFEST CONSTITUTIONAL ERROR, WAS INVITED BY DEFENDANT, AND WAS HARMLESS.....12

D. CONCLUSION.30

Table of Authorities

State Cases

<i>In re Detention of R.W.</i> , 98 Wn. App. 140, 988 P.2d 1034 (1999).....	19
<i>Olson v. Seattle</i> , 54 Wn.2d 387, 341 P.2d 153 (1959).....	18
<i>Seattle v. Bockman Land Corp.</i> , 8 Wn. App. 214, 217, 505 P.2d 168 (1973)	20
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	5
<i>State v. Allen</i> , 161 Wn. App 727, 255 P.3d 784 (2011).....	19
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <i>review denied</i> , 111 Wn.2d 1033 (1988)	5
<i>State v. Beck</i> , 4 Wn. App. 306, 480 P.2d 803 (1971)	9
<i>State v. Bergeron</i> , 105 Wn.2d at 4, 711 P.2d 1000 (1985)	9
<i>State v. Berry</i> , 129 Wn. App. 59, 70, 117 P.3d 1162 (2005)	8
<i>State v. Besabe</i> , Wn. App 872, 271 P.3d 387 (2012).....	18
<i>State v. Boss</i> , 167 Wn.2d 710, 223 P.3d 506 (2009).....	22
<i>State v. Brown</i> , 147 Wn.2d 330, 344, 58 P.3d 889 (2002)	29
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	6
<i>State v. Carothers</i> , 84 Wn.2d 256, 262, 525 P.2d 731 (1974).....	23
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987).....	6
<i>State v. Colwash</i> , 88 Wn.2d 468, 564 P.2d 781 (1977)	15
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	6
<i>State v. Douglas</i> , 71 Wn.2d 303, 428 P.2d 535 (1967).....	9
<i>State v. Ellison</i> , 172 Wn. App. 710, 291 P.3d 921, 924 (2013).....	26

<i>State v. Esquivel</i> , 71 Wn. App. 868, 870, 863 P.2d 113 (1993)	9
<i>State v. Fedorov</i> , __ Wn. App. __, 324 P.3d 784 (2014).....	8
<i>State v. Fields</i> , 87 Wn. App. 57, 940 P.2d 665 (1007)	26, 27
<i>State v. Fisher</i> , 139 Wn. App. 578, 161 P.3d 1054 (2007).....	8
<i>State v. Foster</i> , 91 Wash.2d 466, 589 P.2d 789 (1979).....	21
<i>State v. Fowler</i> , 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990)	24
<i>State v. Galbreath</i> , 69 Wn.2d 664, 419 P.2d 800 (1966).....	18
<i>State v. Gordon</i> , 172 Wn.2d 671, 676, 260 P.3d 884 (2011).....	16, 17, 29
<i>State v. Hatch</i> , 4 Wn. App. 691, 483 P.2d 864 (1971)	9
<i>State v. Henderson</i> , 114 Wn.2d 867, 868, 792 P.2d 514 (1990)	26
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	5
<i>State v. Jackman</i> , 156 Wn.2d 736, 132 P.3d 136 (2006)	19, 21
<i>State v. Jacobsen</i> , 78 Wn.2d 491, 477 P.2d 1 (1970)	18
<i>State v. Johnson</i> , 100 Wn.2d 607, 623, 674 P.2d 145 (1983), <i>overruled on</i> <i>other grounds by State v. Bergeron</i> , 105 Wn.2d 1, 711 P.2d 1000 (1985)	23
<i>State v. Johnson</i> , 29 Wn. App. 807, 631 P.2d 413 (1981)	18
<i>State v. Johnson</i> , 7 Wn. App. 527, 500 P.2d 788 (1972), adopted 82 Wn.2d 156, 508 P.2d 1028 (1973).....	21
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	5
<i>State v. Kirkman</i> , 159 Wn.2d 918, 927, 155 P.3d 125 (2007).....	28
<i>State v. Kwan Fai Mak</i> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	23
<i>State v. Ladely</i> , 82 Wn.2d 172, 175, 509 P.2d 658 (1973)	9
<i>State v. Lewis</i> , 69 Wn.2d 120, 124, 417 P.2d 618 (1966).....	9

<i>State v. Lindsey</i> , 177 Wn. App. 233, 311 P.3d 61 (2013).....	17
<i>State v. Lord</i> , 117 Wn.2d 829, 880, 822 P.2d 177 (1991).....	24
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	5
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	5, 23
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....	17, 28
<i>State v. McHenry</i> , 88 Wn.2d 211, 214, 558 P.2d 188 (1977).....	23
<i>State v. Neher</i> , 112 Wn.2d 347, 352-3, 771 P.2d 330 (1989).....	26
<i>State v. Ng</i> , 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988)	24
<i>State v. O'Hara</i> , 167 Wn.2d 91, 98, 217 P.3d 756 (2009).....	17
<i>State v. Pam</i> , 101 Wn.2d 507, 511, 680 P.2d 762 (1984).....	26
<i>State v. Peterson</i> , 73 Wn.2d 303, 306, 438 P.2d 183 (1968).....	23
<i>State v. Reano</i> , 67 Wn.2d 768, 409 P.2d 853 (1966).....	16
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	6
<i>State v. Schimmelpfennig</i> , 92 Wn.2d 95, 594 P.2d 442 (1979)	21
<i>State v. Scott</i> , 110 Wn.2d 682, 685, 757 P.2d 492 (1988)	16, 24
<i>State v. Sells</i> , 166 Wn. App. 918, 271 P.3d 952 (2012), review denied 176 Wn.2d 1001, 297 P.3d 67 (2013)	8
<i>State v. Stearns</i> , 119 Wn.2d 247, 250, 830 P.2d 355 (1992).....	24
<i>State v. Steen</i> , 155 Wn. App. 243, 228 P.3d 1285 (2010).....	18
<i>State v. Sublett</i> , 176 Wn.2d 58, 76, 292 P.3d 715 (2012).....	15
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990)	18
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	6
<i>State v. Vasquez</i> , 178 Wn.2d 1, 309 P.3d 318 (2013).....	9, 20

Federal and Other Jurisdictions

Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824,
17 L. Ed. 2d 705 (1967).....29

Constitutional Provisions

Article IV § 16 of the Washington State constitution 17

Statutes

RCW 9.25.020(1)13
RCW 9.35.001 12
RCW 9.35.020(1)8
RCW 9.35.020(1), (3).....25

Rules and Regulations

CrR 6.15(c) 15
RAP 2.5(a).....16, 23
RAP 2.5(a)(3)16, 17

Other Authorities

WPIC 131.0625

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

1. Whether there was sufficient evidence to prove that Defendant possessed items of identification and financial information with criminal intent where Defendant attempted to conceal twenty-two items belonging to eight different people in her purse, and made contradictory statements concerning the items?

2. Although the issue was not properly preserved at trial, was not a manifest error affecting a constitutional right, and was invited by Defendant, did Defendant fail to show the trial court's instructions to the jury constituted an improper judicial comment on the evidence where the instructions correctly stated the law, did not convey the trial court's personal opinion, and did not relieve the State of the burden of proof?

B. STATEMENT OF THE CASE.

1. Procedure

On April 1, 2013, Amber Diane Robbins ("Defendant"), was charged by information with one count of unlawful possession of a controlled substance (Count I), and one count of identity theft in the second degree (Count II). CP 1-2. On October 11, 2013, the State amended the information to charge Defendant with three additional counts

of identity theft in the second degree, to total four counts of identity theft in the second degree (Counts II-V). CP 4-6.

On January 9, 2013, the case proceeded to a jury trial before the Honorable Bryan E. Chushcoff. 2 RP 122.¹ The Court conducted a CrR 3.5 hearing, determining the statements made by Defendant to Tacoma Police Officers before her arrest would be admissible at trial. 1 RP 86, 89; 2 RP 109. After the State rested, Defendant made a motion to dismiss Counts II through V, which the Court denied. 3 RP 217, 233.

The jury convicted Defendant on all counts. 4 RP 304-05; CP 63 (Count I); CP 64 (Count II); CP 65 (Count III); CP 66 (Count IV); CP 67 (Count V).

On January 24, 2013, the Court sentenced Defendant to standard range sentences of 12 months and 1 day on Count I, and 12 months and one day on Counts I-V, to be served concurrently. 5 RP 323. CP 71-85.

Defendant timely filed her notice of appeal on January 24, 2014. CP 86.

2. Facts

On March 28, 2013, Sergeant Joseph Pihl and Officer Dylan Rice of the Tacoma Police Department noticed Defendant pumping gas at a Chevron gas station as they cleared a traffic stop. 2 RP 126-27, 163.

¹The verbatim report of proceedings contains five sequentially paginated volumes of transcript. The State will refer to these proceedings by listing the volume number followed by RP.

Defendant was acting very nervous, was fidgeting back and forth, and appeared startled to see the patrol car. 2 RP 127-28, 163. Sergeant Pihl ran the license plate number through law enforcement records and discovered the registered owner was Cynthia Robbins, who had a possible warrant. 2 RP 128-29.

The officers approached Defendant's car and asked Defendant if she was Cynthia Robbins, to which Defendant responded that Cynthia Robbins was her mother. 2 RP 129-30. Sergeant Pihl asked Defendant to provide identification. 2 RP 130. Defendant first responded she did not have identification, then reached into the back seat, grabbed a purse, and looked through it. 2 RP 130, 165. She finally found identification in her rear pocket, identifying her as Amber Robbins. 2 RP 131. After Officer Pihl wrote down Defendant's information, she stated that she knew she also had a warrant. 2 RP 132-33.

Dispatch ran Defendant's name through Washington State records and discovered there was a warrant out for her arrest. 2 RP 133. She consented to a search of her vehicle by reading and signing the Puyallup Police Department consent-to-search card. 2 RP 135-36. Officer Rice searched the vehicle while Sergeant Pihl stood at the back of the vehicle with Defendant. 2 RP 136.

When Officer Rice removed the purse from the vehicle and began to look inside, Defendant became upset, bent over in front at the waist, and began crying. 2 RP 136. She told Sergeant Pihl she had something to tell

him. *Id.* After Sergeant Pihl read Defendant her *Miranda* rights, she said there was a small amount of drugs inside her purse. 2 RP 137, 139. When Officer Rice could not locate the drugs, Defendant pulled out a small plastic container from her purse that contained a small amount of heroin and methamphetamine. 2 RP 124, 139, 154. She denied the drugs belonged to her, and said they belonged to a friend. 2 RP 158, 170.

Officer Rice located twenty-two pieces of identification and financial information in Defendant's purse, including a credit card, Washington State driver's licenses, checks, and deposit slips belonging to eight individuals. 2 RP 171-175. Defendant told Officer Rice she found the items in a dumpster behind a residence, but was unable to provide any further information about the residence. 2 RP 176. She stated that she did not know any of the people the property belonged to. *Id.*

Mistry Buttry, Mary Foreman, Mary Pratt, and Victoria Roberts testified their personal items had been stolen from their person or from their homes between August 2012, and January 2013. 3 RP 191-92, 194-95, 199-201, 214-215. Mary Pratt stated that she had met defendant one time at her father-in-law's mobile home, where her personal items were later burglarized. 3 RP 201.

At trial, Defendant alleged the purse located in the vehicle belonged to her friend Sarina. 3 RP 248-249. She testified that she informed the officers there may be drugs in the purse because her friend uses drugs, but denied helping the officers locate the drugs in the purse. 3

RP 253-54. She denied that she looked in the purse for identification, told Officer Rice that she located the items in a dumpster, or had any knowledge of the stolen items in the purse. 3 RP 249, 254-55.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE THAT DEFENDANT POSSESSED THE IDENTIFICATION AND FINANCIAL INFORMATION WITH THE INTENT TO COMMIT A CRIME.

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 State, 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 appellant.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *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 jury was instructed that in order to convict Defendant of identity theft in the second degree, the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 28th day of March, 2013, the defendant knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, living or dead;
- (2) That the defendant acted with the intent to commit any crime;
- (3) That the defendant obtained credit, money, goods, services or anything else that is \$1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods, services or other items of value; and
- (4) That any of these acts occurred in the State of Washington.

CP 54-57 (Instruction #17-20).

The jury was further instructed that "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. CP 52 (Instruction #15).

On appeal, Defendant claims there was insufficient evidence to prove she acted with the intent to commit a crime.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence presented at trial for the jury to find Defendant possessed the items with criminal intent. After discovering there was a warrant out for defendant's arrest, Sergeant Pihl and Officer Rice obtained her consent to search the vehicle. 2 RP 135-36. Officer Rice removed her purse from the vehicle and searched its contents. 2 RP 171. Sergeant Pihl and Officer Rice testified Defendant stated the purse belonged to her and that she referred to it as "my purse." 2 RP 156, 168.

Inside the purse, Officer Rice located the following items: a Washington State driver's license and social security card with the name of Misty Buttry; two Washington driver's licenses and a Sears card with the name of Mary Foreman; a Washington driver's license and social security card with the name of Victoria Roberts; three Washington driver's licenses with the name of Mary Pratt; a social security card with the name of Amanda; a driver's license with the name of Cynthia Bertolet; checks and deposit slips with the name Megan Westergren; and a social security card with the name Cameron Lawrence. 2 RP 171-175.

At trial, Mary Foreman, Mary Pratt, and Victoria Roberts testified their items went missing after their residences were burglarized between December 2012 and January 2013. 3 RP 195, 201, 214. Misty Buttry testified her wallet, containing her driver's license and social security card, was stolen at a restaurant in November 2012. 3 RP 192. All four witnesses testified Defendant did not have permission to possess their items. 3 RP 192, 195-96, 201, 215.

The identity theft statute states that "no person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). The State is not required to prove the specific crime defendant had intent to commit in order to secure an identity theft conviction. *State v. Fedorov*, __ Wn. App. __, 324 P.3d 784 (2014).

Actual use of another's means of identification is not required for a conviction of identity theft. *State v. Berry*, 129 Wn. App. 59, 70, 117 P.3d 1162 (2005); *State v. Sells*, 166 Wn. App. 918, 271 P.3d 952 (2012), *review denied* 176 Wn.2d 1001, 297 P.3d 67 (2013); *State v. Fisher*, 139 Wn. App. 578, 161 P.3d 1054 (2007) (unit of prosecution for identity theft was defendant's possession, with requisite intent, of single victim's means of identification or financial information, applying the 2001 statute).

The intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an

intent as a matter of logical probability. *State v. Bergeron*, 105 Wn.2d at 4, 711 P.2d 1000 (1985). Intent may not be inferred from conduct that is patently equivocal. *Bergeron*, 105 Wn.2d 19 citing *State v. Lewis*, 69 Wn.2d 120, 124, 417 P.2d 618 (1966). In context of forgery and grand larceny, possession alone is not sufficient to infer intent to injure, but must be supported with “slight corroborating evidence.” *State v. Vasquez*, 178 Wn.2d 1, 309 P.3d 318 (2013); *State v. Esquivel*, 71 Wn. App. 868, 870, 863 P.2d 113 (1993); see also *State v. Ladely*, 82 Wn.2d 172, 175, 509 P.2d 658 (1973) (sufficient evidence of grand larceny by possession found where the state showed possession of the item combined with slight corroborative evidence of other inculpatory circumstances tending to show guilt). For example, the giving of a false explanation or one that is improbable or is difficult to verify in addition to the possession is sufficient. *State v. Ladley*, 82 Wn. 2d 172, 509 P.2d 658 (1973) (citing *State v. Beck*, 4 Wn. App. 306, 480 P.2d 803 (1971); *State v. Hatch*, 4 Wn. App. 691, 483 P.2d 864 (1971); *State v. Douglas*, 71 Wn.2d 303, 428 P.2d 535 (1967)).

There was sufficient evidence that Defendant possessed the items with criminal intent. Considering the evidence in the light most favorable to the State, a reasonable jury could have inferred the requisite intent from Defendant's conduct and the surrounding circumstances.

Defendant's conduct and the surrounding facts indicate the intent to commit a crime. Officer Rice located twenty-two pieces of identification

and financial information belonging to eight different people in defendant's purse. A reasonable jury could infer criminal intent from the sheer number of items Defendant possessed. It is a logical probability Defendant intended to commit a crime with those items.

The evidence indicates Defendant knowingly possessed the items because she was aware of the contents of her purse. The record shows that the purse belonged to Defendant. When asked by the officers to provide identification, she grabbed the purse from the backseat of the car and looked inside of it. Later, Defendant told Sergeant Pihl that her purse contained drugs, and helped the officers locate the canister containing the drugs. A reasonable jury could determine the purse indeed belonged to Defendant and that she knew it contained the stolen items.

In addition, a reasonable jury could conclude Defendant's contradictory statements concerning the stolen items were evidence of criminal intent. On the day of her arrest, defendant told Officer Rice that the purse belonged to her and that she found the items in a dumpster behind a residence. The officers were unable to verify the truth of this explanation because Defendant could not provide a location or description of the residence where the dumpster was located. At trial, Defendant alleged the purse belonged to her friend and she had no knowledge of the stolen items. The jury, as the finder of fact, determines the credibility of

the witnesses. Thus, the jury may have been reasonably persuaded that the contradicting statements made by Defendant to the officers and at trial were false or improbable, and therefore evidence of criminal intent.

Finally, Defendant attempted to conceal her possession of the stolen items. As the State argued at trial, there is no evidence that Defendant intended to turn over the items to law enforcement. On the contrary, Defendant appeared nervous and fidgety when she saw the patrol car at the Chevron station, and did not inform either officer that she had the stolen items in her purse. It was only after Officer Rice discovered the items that Defendant stated she had found them in a dumpster. A reasonable jury could logically infer criminal intent from her suspicious conduct and failure to inform the officers she possessed the stolen items.

Defendant argues that the State's evidence was equivocal and amounted to nothing more than bare possession. Br.App. 16. Yet, Defendant's conduct, suspicious behavior, and the sheer amount of stolen items possessed demonstrate unambiguous criminal intent. The State was not required to prove Defendant stole the items or used the items to obtain credit, services, or other things of value.

Furthermore, the legislative intent of the identity theft statute demonstrates the legislature's recognition of the harm caused by merely possessing another person's information, before actually using it:

The legislature finds that means of identification and financial information are personal and sensitive information such that if unlawfully obtained, possessed, used, or

transferred by others may result in significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain, possess, use, and transfer another person's means of identification or financial information.

RCW 9.35.001. The circumstances of the present case indicate Defendant possessed the items of eight different people with criminal intent, which is the exact harm the legislature aimed to remedy.

The totality of the circumstances demonstrate Defendant possessed the identification and financial information with the intent to commit a crime. Viewing the evidence in the light most favorable to the State, a reasonable jury could logically conclude that the State proved the element of intent beyond a reasonable doubt. Therefore, Defendant's convictions should be affirmed.

2. THIS COURT SHOULD REJECT DEFENDANT'S CLAIM THE TRIAL COURT'S INSTRUCTIONS TO THE JURY CONSTITUTE AN IMPROPER COMMENT ON THE EVIDENCE BECAUSE IT WAS NOT PRESERVED FOR APPEAL, DID NOT CONSTITUTE A MANIFEST CONSTITUTIONAL ERROR, WAS INVITED BY DEFENDANT, AND WAS HARMLESS.

On appeal, Defendant claims Instruction 14 and 16 constitute an improper comment on the evidence and a misstatement of the law.

At trial, the judge proposed two definitional jury instructions and discussed them with counsel. 3 RP 233. The same instructions were later provided to the jury:

INSTRUCTION NO. 14

A person commits the crime of identity theft in the second degree when, with intent to commit any crime, *such as theft*, he or she knowingly obtains, possesses, uses, or transfers a means of identification or financial information of another person, living or dead, and obtains credit, money, goods, services or anything else that is \$1500 or less in value or does not obtain anything of value.

CP 51 (Instruction # 14) (emphasis added).

INSTRUCTION NO. 16

Theft means:

- to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services; or
- To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive that person of such property or services.

CP 53 (Instruction #16).

The identity theft statute states, "no person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.25.020(1). Instruction 14 added the phrase "such as theft" to the definition of identity theft.

The State objected to Instruction 14 because it would heighten its burden, and require it to prove which specific crime Defendant intended to commit. 3 RP 234-35. The State later agreed to include the phrase as long as it was in the definitional instruction and not the "to-convict" instruction. 3 RP 242.

The defense objected to Instruction 14 on the grounds it had not prepared a defense to rebut the theory that Defendant intended to commit theft. 3 RP 237. Later, the defense objected to Instruction 16 because it could potentially confuse the jury as to what the law is regarding identity theft. 3 RP 266.

The judge explained his reasoning for proposing the jury instructions:

There is no reason to know that she was going to actually use it to defraud somebody, if you will, of their money through any means at all, but merely having these items that could be sold to somebody else might well do that same thing.

While you can't necessarily say that her intent was to do those things, and I think that's kind of what Vasquez is all about in the forgery circumstance. Here, it's different because the documents themselves have intrinsic value and are also intrinsically not hers. On their face, they are owned by somebody else.

. . . As I saw evidence of when this stuff went missing, there is certainly evidence, as I say, that is there, that it wasn't located at the Chevron, just a few moments before. She had it for some period of time. When the police arrived, the first thing that she said -- she didn't say to them was like, gosh, I'm glad to see you because I'm having this stuff that I want to return to their rightful owners, and you can help me out with that.

I don't hear anything else from the State, and I think it is important given the Vasquez case that the State and the jury not be

allowed to speculate as to what those things are. The evidence only supports theft, I think, in terms of the circumstantial evidence and the direct evidence and what it implies.

Unless there is some other crime that I haven't thought about, I'm certainly open to that. It seems to me that the State is limited to theft or we get into the problems that Vasquez is worried about.

3 RP 239-40.

The trial court allowed the defense to reopen its case in order to address the theory of theft, and present Defendant's testimony. 3 RP 245-247.

- a. This issue is not preserved for review because Defendant failed to object to the instructions at trial on the same grounds argued on appeal.

Before instructing the jury, the judge must give counsel the opportunity to object to the proposed jury instructions in the absence of the jury. CrR 6.15(c). "The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused." CrR 6.15(c).

These procedures are intended to afford the trial court the opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 564 P.2d 781 (1977). Any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review. *State v. Sublett*, 176 Wn.2d 58, 76, 292 P.3d 715 (2012). The precise point on which appellant relies for reversal must have been brought to

attention of trial court and passed upon. *State v. Reano*, 67 Wn.2d 768, 409 P.2d 853 (1966).

At trial, the defense had the opportunity to object to the instructions before they were given to the jury, and objected on the grounds that it had not prepared a defense rebutting the theory that Defendant intended to commit theft. The trial court allowed the defense to reopen its case and present such a defense. Later, the defense renewed its objection to Instruction 16, arguing that it would be confusing for the jury. At no point did the defense object to Instructions 14 and 16 on the grounds they constituted a judicial comment on the evidence, misstated the law, or would prejudice Defendant.

As Defendant did not object to Instruction 14 and 16 on the grounds argued in her brief, the issue is not preserved for appeal.

- b. Defendant fails to show that the jury instructions constitute a manifest constitutional error that may be raised for the first time on appeal.

An appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). A claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). An appellant must demonstrate that the error is manifest and that

the error is truly of constitutional dimension. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An error is “manifest” if it is “so obvious on the record that the error warrants appellate review.” *O'Hara*, 167 Wn.2d at 99–100. The appellant must also show “actual prejudice, meaning there must be a ‘plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.’” *Gordon*, 172 Wn.2d at 676 (alteration in original) (internal quotation marks omitted) (quoting *O'Hara*, 167 Wn.2d at 99).

RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). When the record does not contain the facts necessary to adjudicate a claimed error, “no actual prejudice is shown and the error is not manifest.” *Id.* This rule encourages the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *State v. Lindsey*, 177 Wn. App. 233, 311 P.3d 61 (2013).

Defendant incorrectly characterizes the disputed phrase in the jury instructions as a judicial comment on the evidence in order to claim it as a manifest error affecting a constitutional right.

Article IV § 16 of the Washington State constitution states, “[j]udges shall not charge juries with respect to matters of fact, nor

comment thereon, but shall declare the law. Washington Const. Art. 4, § 16. This provision prohibits a judge from conveying to the jury his personal attitudes towards the merits of a case. *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990). An instruction constitutes a comment on the evidence where it conveys or indicates to jury personal opinion or view of trial judge regarding credibility, weight, or sufficiency of some evidence introduced at trial. *State v. Jacobsen*, 78 Wn.2d 491, 477 P.2d 1 (1970); *State v. Galbreath*, 69 Wn.2d 664, 419 P.2d 800 (1966). Assignment of error directed to alleged comment on evidence by trial court will not be considered, where record does not show that appellant's objection was ever brought to attention of trial court. *Olson v. Seattle*, 54 Wn.2d 387, 341 P.2d 153 (1959).

Courts have found that the trial court did not make constitutionally prohibited comments where the instruction neither contained facts nor conveyed trial court's belief or disbelief in any testimony, *State v. Steen*, 155 Wn. App. 243, 228 P.3d 1285 (2010), and where the instruction states law correctly and concisely and is pertinent to issues raised in case. *State v. Johnson*, 29 Wn. App. 807, 631 P.2d 413 (1981).

Courts have found judicial comments to be impermissible in the following situations: where the trial court has suggested the jury need not consider an element of the offense, *State v. Besabe*, Wn. App 872, 271 P.3d 387 (2012); where the instruction could lead the jury to infer that the trial court believed or disbelieved a witness, *State v. Allen*, 161 Wn. App

727, 255 P.3d 784 (2011); where the trial court has instructed a jury that matters of fact have been established as a matter of law, *State v. Jackman*, 156 Wn.2d 736, 132 P.3d 136 (2006); where the trial court has instructed the jury as to the weight that should be given to certain evidence, *In re Detention of R.W.*, 98 Wn. App. 140, 988 P.2d 1034 (1999).

In this case, Instruction 14 does not constitute an impermissible judicial comment because it does not convey the trial judge's personal opinion regarding the credibility, weight, or sufficiency of the evidence introduced at trial.

The phrase "such as theft" provides the jury with an example of the crimes it could consider when determining whether Defendant committed identity theft. As definitional instructions, Instructions 14 and 16 provide the jury with the legal framework in which to make its decision. The instruction is a correct statement of the law because theft is a valid example of the potential crime Defendant had the intent to commit.

The instruction did not indicate to the jury that theft is the only possible crime Defendant could have intended to commit, nor did it instruct the jury to disregard the element of intent, give weight to certain evidence, or comment on the credibility of the witnesses. On the contrary, the instruction makes no reference to evidence presented at trial. A plain reading of the instructions does not indicate the existence or the absence of the evidence necessary to prove a conviction.

The trial judge's statements outside the presence of the jury do not indicate his personal opinion regarding the strength of the State's case. The judge stated "the evidence only supports theft, I think, in terms of circumstantial evidence and the direct evidence and what it implies." 3 RP 240. This is not a comment on the credibility or sufficiency of the evidence presented by the State. Indeed, the judge discussed the evidence presented at trial. This occurred within the context of discussing jury instructions and determining the law of the case. In light of *Vasquez*, the judge wanted to ensure that the jury correctly deliberated on the element of intent and considered all the circumstantial and direct evidence, instead of speculating. At no point did he suggest whether the jury should or would be able to convict the defendant, nor that Defendant's case lacked merit. As the judge appropriately discussed the facts and law of the case, neither his statements outside the presence of the jury nor the instructions themselves constitute an impermissible judicial comment on the evidence.

A trial judge may exercise discretion in determining whether words used in instructing the jury require definition. *Seattle v. Bockman Land Corp.*, 8 Wn. App. 214, 217, 505 P.2d 168 (1973). A court may supplement statutory language by an explanatory instruction, but such an instruction is unnecessary if the statutory language is reasonably clear and not misleading to persons of ordinary intelligence. *State v. Johnson*, 7 Wn. App. 527, 500 P.2d 788 (1972), adopted 82 Wn.2d 156, 508 P.2d

1028 (1973). An instruction containing an overbroad definition of a statutory term is not prejudicial to the defendant if the jury could not be misled under the evidence in the particular case. *State v. Schimmelfennig*, 92 Wn.2d 95, 594 P.2d 442 (1979) (holding that while the court's instructions defining the terms "communicate" and "immoral purposes" could have been more narrowly stated, the jury was not misled as to its meaning). The instructions must be read as a whole and the error, if any, in an instruction ordinarily is not prejudicial if the defendant's theory can be argued under other instructions. *State v. Foster*, 91 Wash.2d 466, 589 P.2d 789 (1979).

In this case, the judge acted within his discretion to provide a definition of "identity theft." After considering the facts presented at trial and the applicable law, he supplemented the statutory definition with an example for the jury. The instructions did not preclude Defendant from arguing her theory.

Even if the Court finds that Instruction 14 constitutes an impermissible judicial comment on the evidence, the comment was not prejudicial.

A judicial comment on the evidence in a jury instruction is presumed prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). The State makes this showing when, without the

erroneous comment, no one could realistically conclude that the element was not met. *State v. Boss*, 167 Wn.2d 710, 223 P.3d 506 (2009).

The phrase "such as theft" in Instruction 14 had little or no effect on the outcome of this case. It served to provide the jury with a definition of the crime of identity theft. Whether the instruction included or omitted the phrase did not affect the requirement that Defendant have the intent to commit a further, illegal action. Without the phrase, the jury would have been left to speculate as to what crime Defendant intended to commit and would have likely considered theft as a possibility. The jury would have considered the same evidence that the State and the defense presented at trial to ascertain Defendant's intent. The phrase "such as theft" did not provide the State with more convincing evidence to support its theory of identity theft. On the contrary, the evidence itself demonstrated Defendant possessed the identification and financial information with criminal intent.

Neither did the phrase "such as theft" preclude the jury from considering another potential crime. If the jury determined Defendant did not have the intent to commit theft, it could have then considered another, distinct crime. It is improper to conclude that because the jury was provided with an example of "any crime," that the jury failed to deliberate on the element of intent.

Defendant claims that "any suggestion to the jury that the judge believed that the State's evidence proved that she did intend to commit another crime is highly prejudicial." Br.App. 11. Yet, Defendant fails to

explain how providing an example of "any crime" demonstrates the trial court believed that the State's evidence proved her intent.

Without the potentially erroneous comment, the jury would have likely arrived at the same verdict. Therefore, the definition of identity theft in Instruction 14 did not prejudice Defendant.

As Instruction 14 does not constitute an impermissible judicial comment on the evidence, Defendant's claim is merely an issue of jury instructional error. Yet, Defendant fails to show that the instructions constituted a manifest error affecting a constitutional right, meaning that they had practical and identifiable consequences at trial.

The Supreme Court has held that the following jury instructional errors constituted manifest constitutional error: directing a verdict, *State v. Peterson*, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); shifting the burden of proof to the defendant, *State v. McCullum*, 98 Wn.2d 484, 487–88, 656 P.2d 1064 (1983); failing to define the “beyond a reasonable doubt” standard, *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); failing to require a unanimous verdict, *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974); and omitting an element of the crime charged, *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds by State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985). In contrast, instructional errors not falling within the scope of RAP 2.5(a) include: the failure to instruct on a lesser included offense, *State v. Kwan Fai Mak*, 105 Wn.2d 692, 745–49, 718 P.2d 407 (1986); and the failure to

define individual terms, *State v. Scott*, 110 Wn.2d 682, 690–91, 757 P.2d 492 (1988).

Including the phrase "such as theft" in Instruction 14 is not an issue of sufficient constitutional dimension to merit review. As a definitional instruction, it did not relieve the State of the burden of proof or omit an element of the crime charged. Instruction 14 merely provided the jury with an example of a crime it could consider while deliberating.

Defendant does not assign error to the to-convict instructions, which do not include the phrase "such as theft," and only challenges definitional instructions.

The requirements of due process usually are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt, the defendant must be acquitted. *State v. Scott*, 110 Wn.2d at 690, 757 P.2d 492. As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude. *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992) citing *State v. Lord*, 117 Wn.2d 829, 880, 822 P.2d 177 (1991); *State v. Fowler*, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990); *Scott*, 110 Wn.2d at 689-91, 757 P.2d 492; *State v. Ng*, 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988).

In the case, the trial court provided identical to-convict instructions for the four counts of identity theft in the second degree. The jury was

instructed that in order to convict Defendant, the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 28th day of March, 2013, the defendant knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, living or dead;
- (2) That the defendant acted with the intent to commit any crime;
- (3) That the defendant obtained credit, money, goods, services or anything else that is \$1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods, services or other items of value; and
- (4) That any of these acts occurred in the State of Washington.

CP 54-57 (Instruction #17-20).

The to-convict instructions outlined the elements of identity theft as enumerated in the statute, without added or omitted elements. RCW 9.35.020(1), (3). It is modeled after the Washington pattern jury instruction on second degree theft. WPIC 131.06. The jury was properly instructed that in order to convict Defendant of identity theft, all of the elements must be proved beyond a reasonable doubt. The instructions, read as a whole, do not relieve the State of its burden to prove all of the statutory elements of identity theft.

Defendant assigns error to Instruction 14, which defines identity theft provides an example of one of the statutory elements, and Instruction #16, which defines theft. Any error in the instruction is not an error of constitutional dimension.

- c. If the instructions did constitute an error, it was invited by Defendant.

"The invited error doctrine 'prohibits a party from setting up an error at trial and then complaining of it on appeal.'" *State v. Ellison*, 172 Wn. App. 710, 291 P.3d 921, 924 (2013) (quoting *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). A defendant may not challenge an instruction on appeal when he or she requested the instruction at trial. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). The doctrine of invited error precludes the appeal even when the instructional error is of constitutional magnitude. *Henderson*, 114 Wn.2d at 871. A defendant waives any claim of error regarding the trial court's instruction when the defendant proposes an instruction containing the same alleged error. *State v. Neher*, 112 Wn.2d 347, 352-3, 771 P.2d 330 (1989).

In *State v. Fields*, 87 Wn. App. 57, 940 P.2d 665 (1007), Division I held that the invited error doctrine did not bar review of an instructional error, even though the proposed instruction contained the same error as the trial court's instruction, where the error would have been eliminated by another proposed instruction that was rejected by the trial court. While Fields proposed the same fatally ambiguous self-defense instruction as the trial court, he also proposed an instruction which would have cured the ambiguity and clarified that actual danger is not an element of self-defense. The trial court followed the State's recommendation not to give

the second instruction, and Fields appealed. Division I noted that, read in isolation, the instruction proposed by the trial court and the instruction proposed by Fields could mislead a jury. Yet, because the two instructions proposed by Fields, read together, would have clarified the statutory requirements of self-defense, Fields did not invite the error.

The present case is distinguishable from *Fields* because Defendant's proposed instruction did not eliminate the alleged error that would be caused by including the language "such as theft." Defendant objected to Instruction 14 for the second time at trial on the basis that it could potentially confuse the jury as to what the law is in regards to identity theft. 3 RP 266. Defendant suggested:

"the cure for it may be to say something as simple as 'the person commits the crime of Identity Theft in the Second Degree when with the intent to commit any *separate* crime, such as theft . . .'
. . . As to '16,' if '*separate*' is added to '14,' I think that I will withdraw my objection at least to this point to '16' since that is the court's proposed instruction, and I understand why the court is proposing that.

3 RP 270 (emphasis added). The trial court rejected Defendant's proposed change on the grounds that it may create a different standard of proof and didn't necessarily clarify the definitional instruction. 3 RP 271.

Regarding Instruction 16, Defendant was concerned that the jury would

apply the definition of 'theft' to the crime of 'identity theft' because it contained the same word. *Id.*²

Defendant's proposed instruction did not clarify the alleged confusion caused by the phrase "such as theft." Rather, it specified "any crime" as "any *separate* crime." (Emphasis added). The proposal did not distinguish the crimes of "theft" and "identity theft." Nor did it address the issue raised on appeal that the instruction constituted an impermissible judicial comment on the evidence.

As Defendant's proposed change to Instruction 14 contained the same error as the trial court's instruction, the error was invited. Defendant waived the right to challenge on appeal any error which might have otherwise existed.

- d. Even if the court determines that there was a manifest error affecting a constitutional right, the error is harmless.

If a court determines the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. McFarland*, 127 Wn. 2d 322, 333, 899 P.2d 1251 (1995). The State bears the burden

² Defense stated, "I still have considerable concerns about the confusion that [Instruction 16] can create because 'theft,' again, is a word that is actually using the word 'identity theft.' I don't know that this definition necessarily applies to the first portion of 'identity theft'..."

of showing a constitutional error is harmless beyond a reasonable doubt. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011); *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (establishing State's burden to show harmless error beyond a reasonable doubt). To find an error harmless beyond a reasonable doubt, an appellate court must find that the alleged instructional error did not contribute to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002).

The presence of the phrase "such as theft" did not contribute to the guilty verdict obtained in this case. As discussed above, if Instruction 14 had not contained the phrase, the jury would have considered the same evidence presented at trial. As given to the jury, the instruction did not in any way strengthen the State's evidence. Regardless of its inclusion, the jury would have been required to find the requisite intent beyond a reasonable doubt.

D. CONCLUSION.

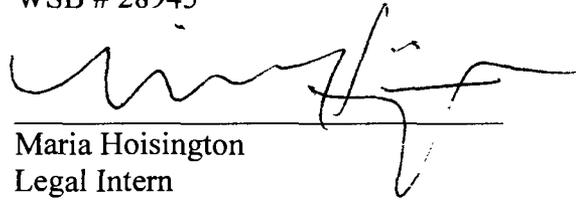
For the reasons stated above, the State respectfully requests this Court to affirm Defendant's conviction and sentence.

DATED: September 3, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945



Maria Hoisington
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~air~~ 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.

9/8/14 
Date Signature

PIERCE COUNTY PROSECUTOR

September 08, 2014 - 2:49 PM

Transmittal Letter

Document Uploaded: 458276-Respondent's Brief.pdf

Case Name: St. v. Robbins

Court of Appeals Case Number: 45827-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

SCCAAttorney@yahoo.com