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Court of Appeals
Division III
State of Washington

No. 95105-5

NO. 33673-5

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

STATE OF WASHINGTON,

Respondent,

v.

GARY B. FARNWORTH, II,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Gary Bruce Farnworth, II, unlawfully obtained over \$76,000 in worker's compensation benefits from the Department of Labor and Industries (L&I) by color or aid of deception. L&I pays monetary benefits to injured workers who are not working and not capable of working due to their industrial injury. Farnworth obtained monetary benefits by falsely certifying to L&I that he was not working, when in fact he was working at a used car dealership. Farnworth's fraud also involved medical doctors and a counselor who assessed Farnworth's ability to work and reported to L&I that Farnworth was not working and not capable of working because Farnworth never disclosed in any of his 43 meetings with medical doctors and a vocational counselor that he worked at a used car sales business.

Farnworth was fairly tried and convicted for his criminal conduct. The State disclosed all material evidence to Farnworth well in advance of trial. The trial court properly denied an untimely and unsupported motion to continue the trial. At trial, Farnworth had the opportunity to confront the State's witnesses, argue his theory of the case, and present his own evidence. Farnworth was only precluded from presenting irrelevant evidence and making legally unsupported arguments. The jury was properly instructed on all of essential elements of the charged crimes before retiring to deliberate. Farnworth's convictions were the product of a

fair trial and should be affirmed.

II. ISSUES PRESENTED

- A. Did Farnworth Enjoy His Constitutional Right to Present a Defense Where the Trial Court Excluded Irrelevant Evidence and Argument but Otherwise Allowed Him to Present His Theory of the Case?**
- B. Did the Trial Court Permissibly Deny an Untimely Motion to Continue Trial Where the State's Witnesses Were Disclosed Eight Months Prior to Trial; the Trial Was Pending for Nine Months; Farnworth Was Told There Would Be No More Continuances; and There Was No Prejudice?**
- C. Did the Trial Court Properly Admit State Business Records After They Were Authenticated by a Records Custodian?**
- D. Did the Trial Court Properly Allow the State to Aggregate the Value of a Series of Thefts Where Statute and Settled Case Law Permits the State to Do So?**
- E. Did the Trial Court Properly Deny a Motion for New Trial When the Record Did Not Support Farnworth's Claim That the State Withheld Material Evidence?**
- F. Did the Jury Instructions Include All Essential Elements of the Crime of Theft in the First Degree Where "Value" Was Included in Instructions #16-17 and Defined in a Separate Instruction as the Aggregate of the Value of Thefts That Are Part of a Common Scheme or Plan?**

III. STATEMENT OF THE CASE

A. Facts

Defendant Gary Farnworth defrauded the Washington State Department of Labor and Industries (L&I) during separate and distinct periods of time between 2010 and 2012. In order to obtain monetary benefits, Farnworth falsely reported to L&I that he was not working when in fact he was managing and working at a car dealership. Farnworth knew

that his medical doctors and counselor would report to L&I that Farnworth was working, which could make him ineligible for benefits. Farnworth accordingly deceived his medical doctors and the vocational counselor by withholding the fact of his employment from them.

Farnworth's worker's compensation claim began in 2007, when he sustained an injury while employed as an apprentice iron worker. RP 985, 1063. Farnworth submitted a worker's compensation claim to L&I seeking wage replacement benefits ("time loss benefits") for the wages he would lose due to his work injury. Farnworth waived the physician-patient privilege for examination and treatment of his work injury as part of his worker's compensation claim. RCW 51.36.060; CP 175. L&I accepted Farnworth's claim and began paying him time loss benefits. RP 1086.

In order to maintain time loss benefits, Farnworth was required to complete "worker verification forms" that verified to L&I that Farnworth was not working. RP 975. These forms certified to L&I that Farnworth was not performing any type of work during the time period on the form, to include paid work, unpaid work, volunteer work, or self-employment. RP 976-82, 985; Exs. P9-P17. L&I relied on these documents to continue paying time loss benefits during the periods of time for which Farnworth was convicted of theft in this case. RP 975.

Farnworth was also required to submit certifications through his

medical doctors that he was not able to return to work due to his work-related injury. RP 963, 966, 974-75, 1057-58. L&I also relied on these documents to continue paying time loss benefits. RP 975.

Farnworth began working for his good friend Terry Smith at a used car dealership, TCS Auto, in April of 2010. Ex. P80. Smith had owned TCS Auto for 30 years but due to medical issues he lived in Arizona nine months of the year. RP 576-77, 582. Department of Licensing (DOL) records and witness testimony showed that beginning in April 2010, Farnworth worked as the general manager and sole full-time employee for TCS Auto. RP 578, 584-85, 957-60; Ex. P80. TCS Auto's business hours were Monday through Saturday from 10:00 a.m. until 6:00 p.m. RP 578, 840.

Dr. Duncan Lahtinen and Dr. John Demakas treated Farnworth for his industrial injury from October 10, 2007, through October 3, 2012. During at least 37 office visits during the period of time when Farnworth was working at TCS Auto, Farnworth never informed Dr. Lahtinen or Dr. Demakas of his work activities at TCS Auto. RP 681-88, 697-704, 706-10, 878-80, 886-88. Farnworth misrepresented his ability to work by failing to disclose to the doctors that he *was* working. RP 718-21, 888-90. Unaware of Farnworth's work at TCS Auto, the two doctors repeatedly certified to L&I that Farnworth was not able to work during periods of

time when Farnworth was in fact actually working at TCS Auto. RP 681, 878. Neither medical doctor would have certified that Farnworth was unable to return to work had he known that Farnworth was working at TCS Auto. RP 718-21, 890-91. Farnworth would not have received time loss benefits during the charged periods of time had the doctors not certified Farnworth's inability to work. RP 963, 966, 974-75, 1057-58.

L&I also contracted with J.R. Wyatt, a vocational rehabilitation counselor, to develop return to work goals for Farnworth and to assess Farnworth's ability to return to any type of work. RP 610, 617. On January 13, 2011, Farnworth signed a professional disclosure document to acknowledge that Wyatt regularly reports to L&I due to L&I's requirements. RP 614-15; Ex. P91. Wyatt met with Farnworth on six occasions between January 13, 2011, and August 23, 2012, to discuss work history, skills, and potential retraining. RP 611-12, 616-17, 621; Ex. P91. Throughout these meetings, Farnworth withheld from Wyatt that he worked at TCS Auto and had acquired skills as a general manager and car salesman. RP 618-24.

On August 10, 2012, L&I received a tip that Farnworth was working while receiving time loss benefits and it began investigating. RP 517. From August 10, 2012, to October 3, 2012, L&I investigators observed, photographed and videotaped Farnworth working at TCS Auto

on numerous occasions and at all business hours during the same period of time that Farnworth was reporting to L&I, his doctors, and his vocational counselor that he was not working. RP 525-43, 660-778; Exs. P22-P26, P28-P33, P35-P36, and P21.

On August 15, 2012, an L&I investigator posed as a customer at TCS Auto. Farnworth showed the L&I investigator used cars for sale and intelligently spoke about prices, mileage, condition and other details of different cars on the lot. RP 517, 520-24; CP 3-16. Video footage from August 20, 2012, showed Farnworth drive up to TCS Auto in a brown pickup, unlock the gate, shove the gate open, use keys in his possession to move a pickup parked in front of the gate, pick up debris on the lot and turn on the "open" sign. RP 769-71.

L&I investigators took photographs and video recordings of Farnworth working at TCS Auto on August 23, 2012, August 27, 2012; August 28, 2012; September 11, 2012; September 13, 2012; September 17-18, 2012; September 29, 2012; and October 1-3, 2012. RP 782-804, 812-14, 816-19; Exs. P39-P40, P42, P44-P46, P48-P49, P51, P55, P57, P60-P62, P64, and P66-P68. On September 25, 2012, Farnworth was video-recorded knowingly showing L&I Investigator Matt McCord five vehicles for sale on the TCS Auto lot. RP 562-67, 805-12; Ex. P41.

L&I investigators obtained DOL auto dealership sales records for TCS Auto. Ex. P80. The DOL sales records confirmed that Farnworth worked as the general manager for TCS Auto in April of 2010, and continued to do so through October 2, 2012. Ex. P80. DOL records showed that Farnworth completed paperwork for sales, repossessions, title applications, odometer statements, powers of attorney, dealer temporary permits, and certificates of title. RP 505; Ex. P80. Farnworth signed each DOL document as “general manager” of TCS Auto. RP 505; Ex. P80.

On October 9, 2012, L&I confronted Farnworth with the fraud it had discovered. With his attorney present, Farnworth admitted to the L&I investigator that he worked at TCS Auto starting in April or May of 2010, working six days a week, Monday through Saturday. RP 823-25, 839-42. Farnworth admitted he was authorized to talk with potential car buyers, negotiate sale prices, accept loan payments, and occasionally change a car battery. RP 823-25, 839, 842. Farnworth acknowledged that when he completed sales contracts he used the title “General Manager.” RP 823-25, 839, 842. Farnworth admitted he signed a worker’s verification form indicating that he had not worked during the very period of time he described working at TCS Auto. RP 828-29; Ex. P8.

On October 31, 2012, again in the presence of his attorney, Farnworth admitted to his vocational counselor that for the past two and a

half years, since April or May 2010, he sold cars and handled the contract paperwork at TCS Auto. RP 626-27.

Farnworth received and cashed 46 warrants for payment from L&I during the two charged periods of time for which he was convicted between 2010 and 2012. Exs. P105B-P105CC, P106B-P106R; CP 14-16. Each warrant was accompanied by a payment order that set forth the pay rate and time period for which the warrant was issued. RP 988-89, 992-93; Exs. P104, P105A-P105CC, P106B-P106R; RP 1006, 1008, 1024-34, 1036-37, 1039-45, 1048. Each payment order admonished Farnworth, “**Do not cash this warrant if you . . . return to any type of work** during the period paid by this order of payment. Please return the warrant to Labor and Industries” RP 988 (emphasis added). Work was defined for Farnworth as “any type of work . . . to include paid work, unpaid work, volunteer work, or self-employment.” Ex. P-9-17.

From November 2, 2010, to January 14, 2012 (Count II), Farnworth cashed 28 checks totaling \$48,117.58. During this period of time, there were 108 DOL transactions at TCS Auto requiring a signature from a TCS Auto employee and 104 of them were signed by Farnworth. Exs. P80, P105B-P105CC.

From February 13, 2012, through October 5, 2012 (Count III), Farnworth cashed 17 checks totaling \$27,915.01. Exs. P106B-P106R.

During this period of time, there were 33 DOL transactions for TCS Auto requiring a signature from a TCS Auto employee and 23 of them were signed by Farnworth. Ex. P80.

L&I relied on Farnworth's false worker verification forms, doctors' certifications, and vocational counselor's reports in determining to pay time loss benefits. RP 986, 1057-60. L&I paid him time loss benefits because it was unaware that Farnworth was capable of working and *was* working during the charged periods of time. L&I would not have paid time loss benefits had it been aware of Farnworth's employment.¹

B. Procedural History

On January 29, 2014, the State filed an Information charging Farnworth with one count of theft in the first degree by means of color or aid of deception. CP 1-2. A First Amended Information was filed on August 19, 2014, charging Farnworth with three counts of theft in the first degree. CP 23-28. A Second Amended Information was filed on June 5, 2015, with the same charges but shortening the last charging period and

¹ Before, after, and between the periods of time charged in Counts I, II, and III, Farnworth was entitled to time loss benefits because he was injured and not working. Those periods of time were not charged and are not at issue in this case. Farnworth had surgeries on November 1, 2010, and January 9, 2012. RP 883, 886. DOL records showed that after the surgery on November 1, 2010, Farnworth did not return to work at TCS Auto until November 6, 2010. Ex. P80 at 328. After Farnworth's surgery on January 9, 2012, DOL records show that he did not return to work at TCS Auto until February 13, 2012. Ex. P80. The charged periods of time correspond to the times before and after the periods of time when Farnworth was recuperating from surgeries.

added that the victim relied upon the defendant's deception. RP 136; CP 462-65. Farnworth did not object to this amendment. RP 136-42, 755.

Trial was originally set for May 27, 2014, but upon Farnworth's motions, the trial was repeatedly continued to June 23, 2014, September 15, 2014; October 13, 2014; and finally to June 1, 2015. CP 2, 34; RP 60. The trial court told the parties that the last lengthy continuance of nearly nine months was the "last" continuance and the case would be tried on June 1, 2015. CP 37; RP 9/27/14 at 6.

On June 11, 2014—almost one year prior to trial—the State filed notice of its intent to offer certified business records as allowed by RCW 10.96.030. CP 21. Farnworth never responded. At a hearing on December 19, 2014—six months before trial—the trial court addressed the notice of intent to offer business records and gave defense over four more months, until May 1, 2015, to object to the records. CP 45; RP 12/14/14 at 4. Farnworth agreed to respond to the State's offer of certified business records by May 1st, but he never did. RP 12/14/14 at 11-12.

At a pretrial hearing on December 14, 2014, with input from the parties, the trial court ordered Farnworth to file a witness list by April 15, 2015; motions by May 1, 2015; an exhibit list by May 8, 2015; and jury instructions by May 26, 2015. CP 44-45; RP 12/14/15 at 3-12.

Six months later at a pretrial hearing on May 14, 2015, the trial

court admonished Farnworth for failure to comply with the court's orders, to include failure to file a witness list by April 15, 2015. RP 5/14/15. The trial court warned Farnworth that failure to comply with the court's orders could result in the exclusion of untimely disclosed witnesses. RP 5/14/15.

On May 15, 2015, one month after the court-ordered deadline for filing a witness list had passed, Farnworth filed a witness list that included a newly disclosed "expert" named Jerry Myron. CP 90-91; RP 8, 10. The State attempted to interview Myron, but he refused an interview. RP 8.

Two weeks after the deadline for motions had expired and two weeks before a relatively simple trial that had been pending for nine months, Farnworth filed a motion to dismiss on grounds of "prosecutorial misconduct,"² another motion to continue the trial, and a motion to suppress evidence. CP 92-125. On May 27, 2014, the trial court carefully considered the merits of each motion despite the untimeliness. CP 222-24; RP 5/27/15. The trial court denied the motions. CP 222-24; RP 5/27/15.

The State moved to exclude evidence that L&I could have paid time loss benefits to Farnworth if Farnworth had been honest about his employment. RP 62-66. The court granted the motion because whether

² Farnworth argued that the prosecutor committed "misconduct" by meeting with her own witnesses (defendant's medical provider and vocational counselor) prior to trial. The court denied the motion because the prosecutor could not have "ex parte contact" with her own witnesses, the physician-patient privilege was waived, and there was no physician-patient privilege for a vocational counselor. CP 160-77, 222-24. Farnworth does not assign error to any of these rulings.

L&I might have paid time loss benefits had Farnworth been honest was not relevant to the issue of whether L&I relied on Farnworth's deception in paying him time loss benefits. RP 62-66. The trial further excluded evidence that L&I paid time loss benefits to Farnworth after he stopped working—and after the charging periods at issue in this case concluded—because such evidence was not relevant to the criminal charges. RP 75-77.

Trial testimony began on June 3, 2015. RP 386. On the fifth day of the proceedings, while an L&I investigator was testifying for the third time in four days, Farnworth alleged that the State withheld potential impeachment evidence concerning the investigator. CP 469-73; RP 854. Farnworth told the trial court that he read a 20-year-old newspaper article that purportedly described the L&I investigator as having been “terminated from the Simi Valley Department because he was one of four or five officers that was involved in a fraud, and he was taken before the Grand Jury.” CP 573, 549; RP 854-56, 860, 858, 870. Farnworth told the trial court that the article related the investigator's alleged involvement in a pyramid scheme with other officers and the officers “resigned . . . after they asserted their Fifth Amendment rights before the Grand Jury.” Brief of Appellant at 37; CP 573, 549; RP 854-56, 860, 858, 870. Farnworth never produced the article and did not allege that the investigator was charged or convicted of a crime or ever made any false statements.

The L&I investigator's personnel file was reviewed and no material information was found. CP 577. The trial court denied Farnworth's motion to dismiss. RP 872-75.

The State called Dr. Duncan Lahtinen, a physician who treated Farnworth for his industrial injury. On cross-examination, Farnworth sought to elicit Dr. Lahtinen's opinion that Farnworth had real injuries at the time of the alleged theft that could impact his ability to work. RP 675-78. The trial court excluded such testimony on grounds that whether Farnworth was injured was irrelevant to whether he obtained time loss benefits by deceiving L&I about his work status. RP 676.

The State rested on June 9, 2015. RP 1108. Farnworth elected not to call any witnesses or offer any exhibits.³

The jury returned a verdict of not guilty for Count I, but "guilty" verdicts for Counts II and III. CP 527-32. The jury also found beyond a reasonable doubt that each crime was a major economic offense or series of offenses. CP 531-32.

Farnworth filed a motion for a new trial on June 17, 2015, alleging three of the same issues in this appeal: the alleged *Brady* issue, the claim

³ Farnworth frequently references exhibits D201-D212 as a factual basis for arguments in his appeal related to his claimed inability to present evidence. These exhibits were not offered at trial and were returned to Farnworth. Some of the information appears to be located in attachments to Attorney Smith's declaration at CP 99-125, 393-461. However, since the exhibits were not offered at trial, argument therefrom should not be considered.

of improper jury instructions and the motion to dismiss counts two and three. CP 544-55. The State filed a response to his motion on July 9, 2015, and the motion was denied on July 20, 2015. CP 572-83, 1253-54.

Judgment and Sentence and a restitution order were entered on August 14, 2015. CP 731-44. Farnworth was sentenced to two concurrent sentences of 12 months electronic home monitoring and restitution of \$76,092.59 to L&I for the base amount of wage replacement benefits he stole from the taxpayers during the charging periods. CP 731-44.

IV. ARGUMENT

A. Farnworth Enjoyed His Constitutional Right to Present a Defense Where the Trial Court Only Excluded Irrelevant Evidence and Argument but Otherwise Allowed Him to Present His Theory of the Case

A trial court's decision to exclude evidence will be reversed only for abuse of discretion. *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251, 1261 (2007). A trial court abuses its discretion when its exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

The Sixth Amendment guarantees the accused the right to a meaningful opportunity to present a defense, but the "constitutional right to present evidence is not unfettered. A defendant does not have a right to introduce irrelevant or inadmissible evidence." *State v. Stacy*, 181 Wn. App. 553, 566, 326 P.3d 136 (2014) (citing *State v. Rehak*, 67 Wn. App.

157, 162, 834 P.2d 651 (1992)). A defendant enjoys the right to present a defense if he has a fair opportunity to be heard, to include cross-examining prosecution witnesses and calling witnesses in his own defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576, 580 (2010).

A two-part test determines whether exclusion of evidence violates the right to present a defense. *State v. Jones*, 117 Wn. App. 221, 234 n.2, 70 P.3d 171 (2003). First, the court considers whether the evidence is relevant. ER 401; *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Second, if the evidence is relevant, the court considers whether a compelling interest for exclusion outweighs the defendant's interest in admitting the evidence. ER 403; *Hudlow*, 99 Wn.2d at 16.

Farnworth's claim that his right to present a defense was violated fails for three reasons. First, Farnworth was allowed to argue his theory that the evidence was insufficient to prove that L&I relied on Farnworth's alleged deception. Second, the trial court properly prohibited Farnworth from arguing a theory of the case that was not supported by the law. Third, the trial court properly excluded irrelevant and speculative evidence.

1. Farnworth was allowed to present evidence and argument supporting his theory that the State's evidence was insufficient to prove that L&I relied on Farnworth's deception

The State alleged a simple case against Farnworth: that Farnworth unlawfully obtained benefits from L&I by deceiving L&I into believing

that he was not working when in fact he *was* working. In defense, Farnworth argued that he “volunteered” at the auto dealership and did not “work” there; that L&I did not rely on his deception; and he had not intended to deceive L&I. RP 50, 64, 366, 1216.

The trial court did nothing to restrict Farnworth in making these arguments, even though the “volunteer” argument was contrary to the evidence and the law. The court permitted Farnworth wide latitude in motions, argument, and questioning of witnesses. Farnworth objected at least 130 times during the relatively short trial and cross-examined each of the State’s witnesses. Farnworth had the opportunity to call witnesses and offer evidence, but he declined to do so. RP 1105.

The only thing Farnworth was not permitted to do was present inadmissible evidence or make argument not supported by law. The record establishes that Farnworth enjoyed a meaningful opportunity to present a defense and his claim to the contrary fails.

2. The trial court properly prohibited evidence and argument not supported by fact or law

The proponent of evidence bears the burden of establishing its relevance and materiality. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). The determination of relevancy is ordinarily within the discretion of the trial court because it is in the best position to evaluate the

dynamics of a jury trial and the relevance or potential prejudicial effect of evidence. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

Farnworth mischaracterizes the exclusion of irrelevant evidence as a violation of the constitutional right to present a defense. *See* Br. Appellant at 15, 22. Farnworth's argument is consistent with a "trend that is troublesome - the 'constitutionalization' of most assignments of error in criminal cases." *State v. Turnipseed*, 162 Wn. App. 60, 72, 255 P.3d 843 (2011) (Sweeney, J., concurring).

Here, Farnworth attempted to cross-examine State's witnesses about whether L&I might have paid Farnworth had he been honest about his employment at TCS Auto. RP 1064-85. Farnworth also attempted to offer testimony from his own "expert" that L&I would have paid him had he been honest about his employment at TCS Auto. RP 740-44, 945. The trial court properly ruled the evidence was not relevant.

a. The trial court properly excluded evidence related to a good faith claim of title, which is not applicable to theft by deception

The ruling was correct because a good faith claim of title is not a defense where the means charged is theft by deception. *State v. Casey*, 81 Wn. App. 524, 527, 915 P.2d 587, 589 (1996). In theft by deception, the statute looks only to the value of the property obtained, not the net result of the exchange. *State v. George*, 161 Wn.2d 203, 206-07, 164 P.3d 506

(2007). The legislature did not intend “an inquiry into the thief’s net gain or the victim’s net loss.” *Id.* at 209.

Farnworth cites *Casey* and *Mehrabian*⁴ as authority for his argument that he should have been allowed to argue good faith claim of title. Br. Appellant at 17-18. Farnworth takes quotes from *Casey* and *Mehrabian* out of context in addition to relying on a lengthy argument about inapplicable L&I cases from the civil law. Br. Appellant at 17-18.

Farnworth quotes a passage from *Mehrabian* that states, “If the victim would have parted with the property even if the true facts were known, there is no theft.” *State v. Mehrabian*, 175 Wn. App. 678, 701, 308 P.3d 660 (2013). Farnworth omits important language that follows: “*On the other hand*, it is unnecessary that the deception be the sole reason that induced the victim to give up the property.” *Id.* (emphasis added). *Mehrabian* concluded that “[i]t is sufficient that the false representations were believed and relied on by the victim and in some measure operated to induce the victim to part with the property.” *Id.* Under *Mehrabian* and *Casey*, the defendant’s false representations need only contribute to the victim’s decision to part with the property; there is no requirement that the defendant’s deceit be the sole reason for the victim to part with its property. *Mehrabian*, 175 Wn. App. at 701; *Casey*, 81 Wn. App. at 529.

⁴ *State v. Mehrabian*, 175 Wn. App. 678, 308 P.3d 660 (2013).

Here, the State was not required to prove the amount of time loss compensation that Farnworth might have received had he been forthcoming with L&I. *George*, 161 Wn.2d at 203. The State was only required to prove that L&I paid time loss benefits to Farnworth in part because it relied on his deception. Whether L&I might have paid Farnworth if it knew he was working was not a defense and evidence supporting it was accordingly irrelevant.

b. The trial court properly excluded the testimony of Jerry Myron because his opinion was irrelevant

Myron would have testified to his opinion that L&I may have still paid time loss benefits to Farnworth even had it known of his deception. RP 934-38, 945. As noted, this was not a proper defense and evidence supporting it was irrelevant. Even if Farnworth elected to call Myron and his testimony was deemed relevant, Myron's testimony would have been excluded because he was not competent to testify and was an untimely endorsed witness. CP 45, 90-91; RP 6, 8, 10, 14, 38, 742.

Myron could not testify with competency to whether L&I would or would not have paid Farnworth even had it known that Farnworth was working. ER 602⁵, 702⁶. While Myron may have previously worked for

⁵ "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

L&I, he never worked as a compensation fraud adjudicator, never administered claims for L&I and never worked on Farnworth's claim. CP 360; RP 753-54, 767. Myron simply did not have the authority, qualifications, experience, or expertise to speak for L&I. ER 602.

While not allowed to present incompetent and irrelevant opinion testimony, Farnworth did have the opportunity to cross examine L&I's agent and challenge his testimony that L&I relied on Farnworth's alleged dishonesty in paying him time loss benefits. RP 1062, 1089. Farnworth was not prevented from defending himself and presenting competent evidence and his theory of the case.

c. The trial court properly excluded irrelevant evidence of events that occurred after the charging periods had concluded and medical opinion about his ability to work

The trial court properly excluded evidence that Farnworth did not defraud L&I after the crimes at issue in this case were completed and he stopped working. Farnworth offered evidence that after he stopped working, L&I resumed paying him time-loss benefits even though it knew of his past fraud. RP 393-450. This argument was irrelevant because Farnworth was not accused of accepting fraudulently obtained time loss

⁶ "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

benefits after he stopped working. L&I is statutorily bound to compensate injured workers who are not working because of industrial injury and L&I resumed doing so after Farnworth stopped working. The trial court properly limited evidence to the charging periods for Counts I-III (February 2010, through October 5, 2012), when Farnworth was working. RP 365, 99-100. Whether L&I paid Farnworth time loss benefits *after* the charged crimes were completed and *after* he stopped working was not relevant to whether Farnworth obtained benefits from L&I by misrepresenting his work status during the three charged periods of time when he worked at TCS Auto.

Farnworth also attempted to elicit evidence from Dr. Lahtinen and Dr. Demakas that Farnworth's ability to work during the charging periods was compromised by prescription medication. RP 722, 769-71. Farnworth argued that such testimony supported his defense that he "should have been paid anyway because he was not medically able to do that job because he couldn't safely drive an automobile." RP 769-71.

The court properly ruled that such testimony was not relevant to prove whether or not Farnworth was "working" while obtaining wage replacement benefits; and it further had the potential to prejudice the jury. RP 677-78. The court ruled that evidence of certain physical limitations and treatments would not assist the jury in determining any issue of

consequence in this case because there was no dispute that Farnworth was injured to some extent. RP 676. Even had evidence been introduced that Farnworth had physical limitations, it would not change the facts that Farnworth was working and the doctors would not have certified time loss had they known he was working. RP 718-21, 890-91. Without medical certification, L&I would not have paid time loss benefits. *Id.*

B. The Trial Court Permissibly Denied an Untimely Motion to Continue Trial Where the State's Witnesses Were Disclosed Eight Months Prior to Trial; the Trial Was Pending for Nine Months; Farnworth Was Told There Would Be No More Continuances; and There Was No Prejudice

A “decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The trial court may consider various factors in deciding a motion to continue including: diligence, due process, the need for an orderly procedure, the effect on the trial, and whether prior continuances were granted. *Id.*

Farnworth's claim that he needed a continuance to prepare for State's witness Alan Gruse is disingenuous. Gruse and the substance of his testimony were disclosed to Farnworth well in advance of trial. RP 5/27/15 at 6, RP 441; CP 31-32. The State filed and served a witness list endorsing Gruse by name and title in August of 2014, ten months before trial and eight months in advance of the April 2015 deadline for

disclosure of witnesses. RP 5/27/15 at 6; CP 31-32, 41-42, 46-56. Farnworth admitted he received the witness list that endorsed Gruse during a court hearing on December 15, 2014. RP 12/15/14 at 6. Farnworth's counsel⁷ even told the court that Farnworth "knows a number of the witnesses in this case and what they do at their particular job [at L&I]." RP 439.

Whether Gruse was labeled an "expert" or "lay" witness was immaterial to the motion to continue. RP 441. Regardless, the trial court correctly concluded that Gruse was a "fact" witness for the State because Gruse was the fraud adjudicator for Farnworth's case. RP 743, 746. Gruse also had the capacity to testify as a records custodian for L&I. RP 746.

Farnworth had already been granted four continuances, including a lengthy final continuance of eight months, at which time he was told that it was the "last continuance". RP 9/26/14 at 6; CP 2; RP 35-36, 60. The State would have been prejudiced by yet another continuance because its witnesses were traveling and scheduled to testify. RP 5/27/15 at 6-8, RP 28. The trial court exercised permissible discretion by denying Farnworth's motions to continue on May 21, 2015; May 27, 2015; and on the day of trial, June 1, 2015. CP 155-56, 220, 391-92.

⁷ Attorney Smith was Farnworth's attorney for his L&I claim and represented him throughout the entirety of the charging periods. RP 27; Exs. P104-P106R.

Farnworth also argues that his motion to continue should have been granted due to the unavailability of an unnamed rebuttal witness. Br. Appellant at 24. It is unclear why this unknown individual was not secured during the nine months that trial was pending. Farnworth further fails to articulate what this person would have testified to, much less establish any prejudice from allegedly losing this unknown person's testimony. It was not an abuse of discretion to deny a further continuance.

C. The Trial Court Properly Admitted State Business Records After They Were Authenticated by a Records Custodian

The Confrontation Clause of the Sixth Amendment generally prohibits the admission of *testimonial evidence* from a declarant who does not appear at trial. U.S. Const. amend. VI.; *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004).

However, not all statements give rise to the protections of the Confrontation Clause because not all speakers are acting as a "witness" against the accused as contemplated by the Sixth Amendment. *Crawford*, 541 U.S. at 51. Only those who "'bear testimony' against the accused are 'witnesses' within the meaning of the Sixth Amendment." *State v. Wilcoxon*, 185 Wn.2d 324, 325, 373 P.3d 224 (2016) (citing *Crawford*, 541 U.S. at 51).

"Business and public records are generally admissible absent confrontation . . . [because they were] created for the administration of an

entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). *State v. Jasper*, 174 Wn.2d 96,109, 271 P.3d 876 (2012).

Here, the trial court properly admitted business records from two state agencies: L&I and DOL. The trial court's rulings were proper under the business records exception to the hearsay rule and did not offend the Confrontation Clause.

1. The L&I business records were nontestimonial and properly authenticated by a records custodian

In Washington, business records are competent and admissible evidence under the business records exception to the hearsay rule. RCW 5.45.020.⁸ With business records, “[i]t is not necessary to examine the person who actually created the record.” *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990). The admission of business records under RCW 5.45.020 does not violate the right to confrontation. *State v. Monson*, 113 Wn.2d 833, 841, 784 P.2d 485, 489 (1989).

Reviewing courts broadly interpret “custodian” and “other qualified witness” for purposes of RCW 5.45.020. *State v. Quincy*, 122

⁸ RCW 5.45.020: “A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.”

Wn. App. 395, 399, 95 P.3d 353 (2004), *review denied*, 153 Wn.2d 1028, 110 P.3d 756 (2005). “[O]ne who has the custody of the record as a regular part of his work or has supervision of its creation” can provide sufficient in-court testimony to enter a business record into evidence. *Cantrill v. American Mail Line*, 42 Wn.2d 590, 608, 257 P.2d 179 (1953).

To be admissible under the business records exception to the hearsay rule, the business record must: (1) be in record form; (2) be of an act, condition, or event; (3) be made in the regular course of business; (4) be made at or near the time of the fact, condition, or event; and (5) the court must be satisfied that the sources of information, method, and time of preparation justify admitting the evidence. *State v. Fleming*, 155 Wn. App. 489, 499, 228 P.3d 804 (2010).

Courts tend to apply the business records exception to documents regularly filed for administrative purposes. *State v. Jackson*, 185 Wn. App. 1052 (2015), *review denied*, 183 Wn.2d 1010, 352 P.3d 187 (2015). (affirming admission of hospital records from a non-testifying social worker and nurse who entered their notes for treatment purposes, not to facilitate the defendant’s prosecution). Courts typically refuse to apply the business records exception to documented test results that require cross examination because, unlike administrative paperwork, lab testing requires

judgment, discretion, and manipulation. *See Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011).

Here, each L&I payment order the trial court admitted into evidence was a business record of the payment of benefits made to Farnworth via a check—or “warrant”—associated with each particular order. RP 992-93. Similarly, each worker verification form was a business record sent to Farnworth to fill out and then returned to L&I by Farnworth himself. RP 974; Exs. P9-P17. L&I kept all of these records in the ordinary course of business. RP 993, 1007, 1023, 1025, 1048.

L&I records custodian Alan Gruse testified to his knowledge and experience of L&I practices, as well as the method of preparation and digital storage of L&I records, to include the payment orders and worker verification forms. RP 963-67. Gruse authenticated each of the exhibits challenged by Farnworth. RP 993-94, 1005-06, 1023-45, 1048.

Each payment order and worker verification form was properly admitted as a business record because each (1) was in record form, (2) was the record of an act, (3) was prepared in the ordinary course of business, (4) was created near in time to the event, and (5) were otherwise admissible. *State v. Fleming*, 155 Wn. App. 489, 228 P.3d 804 (2010).

Further, the worker verification forms were filled out by Farnworth, the party opponent, and not subject to confrontation.

Farnworth's argument that the L&I records were similar to the records at issue in *Bullcoming* or *Melendez-Diaz* fails. In *Bullcoming* and *Melendez-Diaz* the records at issue were crime lab reports specifically prepared for purposes of criminal prosecution. Here, L&I prepared the records at issue in the normal course of its industrial insurance business well before the State contemplated prosecution of Farnworth. Like *Jackson*, L&I kept these documents for routine administrative purposes, not criminal prosecution. *Jackson*, 185 Wn. App. at 1052. Nor were the documents susceptible to easy manipulation like laboratory test results. *Id.*

The L&I records were non-testimonial and not subject to additional requirements for admissibility under the Confrontation Clause. The trial court properly admitted the documents as business records.

2. The DOL records were nontestimonial and properly authenticated by a records custodian

The DOL records admitted by the trial court were similarly admissible. Farnworth also waived objection to the admissibility of the DOL records. Further, most of the DOL records were filled out by Farnworth, the party opponent, and not subject to confrontation.

a. Farnworth waived objection to the admissibility of the business records

RCW 10.96.030 is titled "Authenticity of Records" and provides that "[f]ailure by a party to timely file a motion under subsection (4) of

this section shall constitute a waiver of objection to admission of the evidence.” RCW 10.96.030(4).

Here, the State filed notice of intent to offer business records on June 11, 2014. CP 21. Farnworth did not file a motion objecting to the admissibility of the records during the ensuing six months. At a hearing on December 19, 2014, the trial court again addressed the notice of intent to offer business records and gave Farnworth another four months, until May 1, 2015, to file an objection as required by RCW 10.96.030(4). CP 45; RP 12/14/14 at 4. No objection was timely filed.

Pursuant to RCW 10.96.030(4), any objection was waived and, as argued below, the issue is non-constitutional. This Court should not consider Farnworth’s claim of error. RAP 2.5(a).

b. DOL business records were properly admitted because foundation was verified by certification and testimony from the records custodian

A “clerk’s certificate authenticating an official record—or copy thereof—for use as evidence” is the exception to a document being considered testimonial. *Melendez-Diaz*, 557 U.S. at 322. Under this narrowly circumscribed exception, “[a] clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not . . . create a record for the sole purpose of providing evidence against a defendant.” *Id.* at 322-23.

Washington courts have consistently held that out-of-court statements offered for the limited purpose of authenticating a business record or public record are nontestimonial. *State v. Lee*, 159 Wn. App. 795, 815, 247 P.3d 470 (2011) (declaration from custodian of business records nontestimonial); *State v. Mares*, 160 Wn. App. 558, 248 P.3d 140 (2011) (certificate authenticating copy of DOL record nontestimonial).

Here, the first two pages of Plaintiff's Exhibit 80 satisfied this requirement. The DOL records challenged by Farnworth were nontestimonial and self-authenticating under the business records with certification exception. ER 902; RCW 5.45.020.

Although the DOL records could have been admitted as certified public records,⁹ a DOL records custodian testified and was subject to cross-examination. RP 86-87, 489. DOL records custodian Letteer testified that automobile sales records were kept in the ordinary course of DOL's business. RP 475. Letteer explained the record-keeping process for DOL, specifically that auto dealers send transaction reports to the record custodians, who then "images" and digitally stores them in a DOL database. RP 477. Letteer testified that a search for records was performed

⁹ Each transactional set of DOL sales records contained a certification cover letter, therefore not requiring corresponding testimony to be admissible as public records. RCW 5.44.040; ER 902(d); RP 485. A certified copy of a public record, like the certified copies of documents DOL produced and provided, is self-authenticating and may be admitted into evidence without the necessity of authentication by live testimony. ER 902; *State v. Monson*, 113 Wn.2d 833, 837, 784 P.2d 485 (1989); *See also* CR 44 (a)(1).

for dates between February 15, 2010, and November 20, 2012. RP 476.

The DOL records here were created for business purposes prior to trial and merely extracted for use at trial. RP 475, 486; *See Jasper*, 174 Wn.2d at 211; *State v. Mares*, 160 Wn. App. 558, 563, 248 P.3d 140, 143 (2011). This case is not like the cases presented by Farnworth, wherein a record of the non-existence of a DOL record was “created” for use at trial. *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).

Farnworth exaggerates and misconstrues *Jasper* when he argues that “[t]he *Jasper* court reasoned that DOL records fall within the ‘core class of testimonial statements’ described in *Crawford* and *Melendez-Diaz*.” Br. Appellant at 34. What the *Jasper* Court actually said was: “[t]he *certificates used in each case* before us are plainly affidavits, falling within the ‘core class of testimonial statements’ described in *Crawford* and *Melendez-Diaz*.” *Jasper*, 174 Wn.2d at 115 (emphasis added). The Court did not refer to DOL records kept in the normal course of business, but rather affidavits prepared specifically for trial and which summarized or interpreted the meaning of certain DOL records. *Jasper* at 118-19.

The DOL records were nontestimonial. The records were properly admitted pursuant to the business records exception to the hearsay rule.

D. The Trial Court Properly Allowed the State To Aggregate the Value of a Series of Thefts Because Statute and Settled Case Law Permit the State To Do So

A trial court's denial of a motion to dismiss is reviewed for manifest abuse of discretion. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Here, the trial court was well within its discretion to deny Farnworth's motion to dismiss because the prosecutor had broad discretion to charge multiple counts of theft and to aggregate the value of multiple thefts occurring within each charging period.¹⁰

A prosecutor has broad discretion in charging a suspect with a violation of the law and in choosing what charges to make. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Whether multiple instances of criminal conduct are charged in separate counts or charged as one count is a decision within the prosecutor's discretion. *Id.* A criminal statute limits the prosecutor's discretion only if it mandates that particular conduct must be charged as one count. *State v. Knutson*, 64 Wn. App. 76, 80, 823 P.2d 513 (1992). Whether a criminal statute permits multiple counts is a matter of statutory interpretation. *Id.*

Washington law allows aggregation of the value of a series of thefts to charge a higher degree of theft. RCW 9A.56.010(21)(c); *State v.*

¹⁰ Even if the State were incorrect regarding the unit of prosecution, the remedy at trial would be consolidation of counts, not dismissal. On appeal, the remedy would be remand to sentence on one count and, if double jeopardy was violated, then vacation of the multiplicitous conviction, not remand for a new trial. *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009); *State v. Jensen*, 164 Wn.2d 943, 195 P.3d. 512 (2008).

Barton, 28 Wn. App. 690, 694-95, 626 P.2d 509 (1981). The State is permitted to aggregate “*any series of transactions* which constitute theft.” *State v. Wright*, 183 Wn. App. 719, 734, 334 P.3d 22 (2014).

Aggregation of the value of multiple thefts is permitted so long as the series of thefts are (1) from the same owner, (2) the same place, (3) and result from a single criminal impulse pursuant to a general larcenous scheme. *Id.* at 472-73. However, if thefts are committed against the same owner, at the same place, and *at the same time*, the thefts must be charged as one count because the unit of prosecution for such conduct is one count. *State v. Carosa*, 83 Wn. App. 380, 382-83, 921 P.2d 593 (1996).

Here, the thefts at issue were against the same owner (L&I), from the same place (state treasury), were part of a general larcenous scheme against the owner, but occurred at different times. The State therefore had discretion to break up the thefts into specific time periods and aggregate the value of individual transactions from a particular time period. Case law supports the manner of charging in this case. *State v. Perkerewicz*, 4 Wn. App. 937, 938, 942, 486 P.2d 97 (1971). (Permissible for the State to aggregate numerous petit larcenies occurring over two months into two counts); *State v. Carosa*, 83 Wn. App. 380, 381, 921 P.2d 593 (1996). (Permissible for the State to aggregate the value stolen each day and to charge one separate count for each of the three days.)

Here, each separate payment from L&I to Farnworth during the enumerated charging periods was taken from the same owner (L&I), from the same place (the state treasury), but occurred at different times. The State had discretion to charge each theft separately, or identify distinct time periods and aggregate the value of the thefts that occurred within those time periods. The State elected the latter.

Intervening surgeries and corresponding recovery periods conveniently divided Farnworth's larcenous scheme into three separate and distinct periods of time. The State charged Farnworth with three counts of theft in the first degree for each of the separate and distinct periods of time when Farnworth was working at TCS Auto while collecting time loss benefits, which occurred before or between his surgeries. This was entirely within the prosecutor's discretion as set forth in *Carosa*, *Kinneman*, and *Perkerewicz*.

Farnworth's argument that only third degree thefts can be aggregated also fails. Washington's theft statutes are interpreted in light of the common law. *State v. Atterton*, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). At common law, aggregation of the value of individual transactions in order to meet the threshold value for a particular degree of theft is allowed. *Id.* Farnworth's motion to dismiss was properly denied.

E. The Trial Court Properly Denied the Motion for New Trial Because the Record Did Not Support Farnworth's Claim That the State Withheld Material Evidence

The State must “disclose to defendant’s counsel any material or information within the prosecuting attorney’s knowledge which tends to negate defendant’s guilt as to the offense charged” and which is “within the knowledge, possession or control of members of the prosecuting attorney’s staff.” CrR 4.7(a)(3)(4). *Brady v. Maryland* and its progeny additionally require that the prosecution “disclose all evidence in its possession that might be favorable to the defense,” to include any information that would cast doubt upon the credibility of the State’s witnesses. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). This includes evidence known to others acting on the government’s behalf, such as the police. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

However, the State “has no duty to volunteer information that it does not possess or of which it is unaware.” *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) (quoting *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir. 1985)). The State need not conduct independent investigations in “the hopes of bolstering potentially exculpatory defense theories.” *State v. Mullen*, 171 Wn.2d at 902.

In order for a lack of disclosure to qualify as a “*Brady* violation” three components must be established: (1) the evidence was favorable to the accused, (2) the evidence was suppressed by the state, and (3) the defendant was prejudiced by the suppression. *Mullen*, 171 Wn.2d at 895.

Where a defendant has enough information to be able to ascertain material evidence on his own, there is no suppression by the government. *Mullen*, 171 Wn.2d at 896. Farnworth’s argument here fails at the outset because the State could not “suppress” evidence that it did not possess and which Farnworth claimed to have found on his own.

The “evidence” was also not material. The allegedly “suppressed” evidence was defense counsel’s verbal description of a 20-year-old newspaper article, never produced, which supposedly named L&I Investigator Matt McCord as someone involved in a pyramid scheme while he was a police officer in another state. CP 577. Not only did he never produce the article, Farnworth presented no evidence of a conviction or even an administrative finding of misconduct. The trial court properly ruled that the evidence in question did not qualify as a *Brady* material and was inadmissible for lack of relevance.

Even assuming facts as Farnworth contends, the failure of the State to discover this evidence and disclose it to Farnworth does not satisfy the three prong test for a “*Brady* violation.” The first prong requires that

“[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching.” *Mullen*, 171 Wn.2d at 895 (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)).

The speculative evidence Farnworth described was not admissible and therefore not “favorable” to Farnworth. Under the rules of evidence, specific instances of conduct are admissible “in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness . . . concerning the witness’ character for truthfulness or untruthfulness.” ER 608(b)(1). The investigator’s alleged “involvement” in a pyramid scheme in 1995—even if proved, which it was not—is not probative of his truthfulness or untruthfulness and therefore does not qualify as impeaching.

The second prong states that the “evidence must have been suppressed by the State, either willfully or inadvertently.” *Mullen*, 171 Wn.2d at 895 (quoting *Strickler*, 527 U.S. at 281-82). As noted, the record fails to establish this prong because Farnworth possessed the evidence he claims was suppressed. Farnworth asserted that *Brady* information might be found in the personnel files maintained by the Department of Labor and Industries. However a review produced no *Brady* material. CP 577.

Similarly, the State did not suppress or possess, nor did it have a

burden to investigate 20-year-old employment information from another state. *See, e.g., Mullen*, 171 Wn.2d at 901; *U.S. v. Shryock*, 342 F.3d 948, 983-84 (9th Cir. 2003) (holding that federal prosecutors did not violate *Brady* by not disclosing records in possession of a state agency). There was no suppression of “*Brady*” evidence.

Finally, the third prong requires that “prejudice must have ensued.” *Mullen*, 171 Wn.2d at 895 (quoting *Strickler*, 527 U.S. at 281-82). Prejudice occurs “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). “Reasonable probability” is defined as “a probability sufficient to undermine confidence in the outcome.” *Id.* Evidence cannot affect the outcome if it is inadmissible. *Mullen*, 171 Wn.2d at 897.

As noted, Farnworth’s claim fails because the impeachment evidence he claims he could have used was in his possession at trial. Farnworth’s complaint is not really with the State’s failure to discover and disclose the evidence, but with the trial court’s decision to exclude it.

The trial court correctly concluded that the evidence was inadmissible. Character evidence of a witness is governed by ER 607, 608, and 609. *See* ER 404(a)(c). Extrinsic evidence of the conduct of a witness,

offered to attack the witness' credibility, is not allowed. ER 608(b). Inquiry into the subject matter may be allowed, in the discretion of the court, "if probative of truthfulness or untruthfulness." ER 609(b).

Here, Farnworth's offer of proof was that the witness was allegedly "involved" in a "pyramid scheme." No other details were offered. Involvement in a "pyramid scheme" does not by itself prove untruthful character and was not admissible for any purpose under the Rules of Evidence. The fact that the alleged act of untruthfulness occurred 20 years ago made its probative value extremely low, if not nonexistent.

Even if the State somehow had a duty to discover a 20-year-old newspaper article from another state and disclose it to the defense, Farnworth cannot establish that he was prejudiced by its exclusion.

F. Jury Instruction #16-17 Included All Essential Elements of the Crime of Theft in the First Degree Because "Value" Was Included in the Instruction and Defined in a Separate Instruction as the Aggregate of the Value of Thefts That Are Part of a Common Scheme or Plan

1. There was no error

A to-convict instruction "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (quoting *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). Inclusion of all of the essential elements of the

crime in the to-convict instruction ensures due process by preventing the jury from having to guess at what the State needs to prove beyond a reasonable doubt. *State v. Smith*, 131 Wn.2d at 263.

However, the fact that an essential element is subject to further definition does not elevate the definition to an essential element that must be included in the to-convict instruction. *E.g.*, *State v. Saunders*, 177 Wn. App. 259, 311 P.3d 601 (2013). If the Legislature intended a definition to be included in the to-convict instruction, it would include the definition in the statutory definition of the crime. *Saunders*, 177 Wn. App. at 259.

In *Saunders*, the defendant was tried for kidnapping, which crime includes the essential element of “abducted.” *Id.* at 264. “Abduct” is statutorily defined to require “restraint.” The trial court’s to-convict instruction required the State to prove beyond a reasonable doubt that the defendant “abducted” the victim, but did not require the jury to find “restraint” beyond a reasonable doubt. The trial court defined “abduct” and “restrain” in other instructions. Defendant complained the definitions were part of the essential element of the crime and were required to be in the to-convict instruction. The Court of Appeals disagreed, holding that definitions of essential elements are not required to be in the to-convict instruction. *Id.* at 267 (“Washington courts have long held they do not”).

Other Washington cases are in accord with *Saunders*. *See State v.*

Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004) (“sexual gratification” component of definition of essential element of “sexual contact” not required to be in to-convict instruction); *State v. Marko*, 107 Wn. App. 215, 219–20, 27 P.3d 228 (2001) (definition of threat does not create additional elements; it merely defines an element); *State v. Laico*, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (definition of “great bodily harm” did not add an element to the assault statute, rather it was intended to provide understanding); *State v. Strohm*, 75 Wn. App. 301, 308–09, 879 P.2d 962 (1994) (definitional terms do not add elements to the criminal statute).

A person is guilty of theft in the first degree if he “commits theft of property or services which exceeds five thousand dollars in value[.]” RCW 9A.56.030(1)(a). “Value” is defined as the “market value of the property or services at the time and in the approximate area of the criminal act.” RCW 9A.56.010(21)(a). The State may aggregate the value of any series of transactions constituting theft if the thefts are part of a “common scheme or plan.” RCW 9A.56.010(21)(c). Thus, a series of second and third degree thefts can be aggregated into a first degree theft. *State v. Barton*, 28 Wn. App. 690, 694-95, 626 P.2d 509 (1981); *State v. Wright*, 183 Wn. App. 719, 734, 334 P.3d 22 (2014).

Whether aggregation of thefts constitutes a “common scheme or plan” is a matter of fact for the jury. *State v. Janda*, 174 Wn. App. 229,

238, 298 P.3d 751 (2012) (citing *State v. Garman*, 100 Wn. App. 307, 315, 984 P.2d. 453 (1999)). However, “common scheme or plan” is not an element of theft in the first degree, and need not be defined for a jury. *State v. Reid*, 74 Wn. App. 281, 292, 872 P.2d 1135 (1994); *State v. Stanton*, 68 Wn. App. 855, 863, 845 P.2d 1365 (1993), *State v. Cross*, 156 Wn.2d 580, 617, 132 P.3d 80 (2006); *But see State v. Hassan, infra; State v. Rivas, infra.*

Farnworth contends that the trial court erred by failing to include “common scheme or plan” in the to-convict instructions (instructions numbered 15-17) as an essential element of first degree theft. Farnworth fails to appreciate that “common scheme or plan” is merely one component of the definition of the essential element of “value.”

Farnworth cites the comment to WPIC 70.02 as authority for his argument. Br. Appellant at 41-42. WPIC 70.02 in turn cites *State v. Garman* for the proposition that “common scheme or plan” must be included as an element in the to-convict instruction when value is aggregated. *Garman*, 100 Wn. App. 307, 314-15, 984 P.2d 453 (1999).

This court should hesitate to read *Garman* as did the commenters to WPIC 70.02. The defendants in *Garman* were each charged with multiple offenses: theft and conspiracy to commit theft. *Garman*, 100 Wn. App. at 309. The information charging the two counts included standard

CrR 4.3(a)(2)¹¹ joinder language that the two counts were “of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan.” *Id.* at 314. *Garman* noted that because the information alleged a “common scheme or plan,” “common scheme or plan” was an essential element that must be included in the to-convict instruction. *Id.* In deciding *Garman*, the court may have conflated language intended to join counts with the essential elements of the crime. *Id.* at 314. *Garman* is distinguished on this basis.

Garman is also distinguished because the issue in *Garman* was whether a unanimity instruction was necessary. *Id.* *Garman* is a unanimity case, not an essential elements case.

Division Two of this Court has specifically held that “common scheme or plan” is an essential element of “theft” that must be included in the to-convict instruction. *State v. Hassan*, 184 Wn. App. 140, 336 P.3d 99 (2014); *State v. Rivas*, 168 Wn. App. 882, 278 P.3d 686 (2012), *review denied*, 176 Wn.2d 1007 (2013). However, neither *Hassan* nor *Rivas* included meaningful discussion or explanation as to why “common

¹¹ **RULE 4.3 JOINDER OF OFFENSES AND DEFENDANTS**

(a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

...

(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

scheme or plan” should be elevated to an essential element of the crime when the State aggregates value.

Like *Garman*, *Rivas* merely cited the comment to the pattern instruction for malicious mischief (WPIC 85.12) to conclude “common scheme or plan” is an essential element of malicious mischief when value is aggregated. *Rivas*, 168 Wn. App. at 892. Similarly, *Hassan* merely cited *Rivas* for the same proposition, without any further analysis, in concluding that “common scheme or plan” was an essential element of theft when value was aggregated. *Hassan*, 184 Wn. App. at 145. Neither case meaningfully discussed why a part of the definition of “value” is an additional essential element of the crime of theft when value is aggregated.

This Court should not follow *Rivas*. *Rivas* cited *Hassan*, which simply cited a comment to a WPIC. Neither the pattern jury instructions nor their comments have any binding effect on Washington’s courts. *State v. Carson*, 184 Wn.2d 207, 224, 357 P.3d 1064 (2015).

Had the Legislature intended “common scheme or plan” to be an essential element of theft in the first degree, it would have included “common scheme or plan” in the definition for theft in the first degree. *State v. Saunders*, 177 Wn. App. at 759. It did not. RCW 9A.56.020(1)(b); RCW 9A.56.030. “Common scheme or plan” is simply a definition of the element of “value” when loss is aggregated in a theft case.

RCW 9A.56.010(21)(c). In *Lorenz*, the Supreme Court resolved a split amongst the divisions of the court of appeals and explained why a definition of an element does not become an element itself. *Lorenz*, 152 Wn.2d at 33-36. *Lorenz* found that by a plain reading of the statute the term “sexual gratification” was not an essential element of first degree child molestation because “[h]ad the legislature intended a term to serve as an element of the crime, it would have placed “for the purposes of sexual gratification” in [the statutory definition of the crime which is] RCW 9A.44.083.” *Id.* Rather in that case “the definition of “sexual contact” clarifies the meaning such that it excludes inadvertent touching or contact from being a crime.” *Id. citing State v. Gurrola*, 69 Wn. App. 152, 157, 848 P.2d 199 (1993); *State v. Brown*, 78 Wn. App. 891, 895, 899 P.2d 34 (1995). This Court should do the same and decline to follow *Rivas*.

The theft statute makes clear that “five thousand dollars in value” is the only essential element related to value for theft in the first degree. RCW 9A.56.030(1)(a). “Value” is given no additional definition in the theft statute. Notably absent in the statutory definition of theft in the first degree is the phrase “common scheme or plan.” RCW 9A.56.030(1).

Here, the jury was instructed for each count that the State was required to prove beyond a reasonable doubt that Farnworth unlawfully

obtained “five thousand dollars in value.” CP 504-06. A separate jury instruction defined “value,” to include that value of property stolen by Farnworth within a particular time period could be aggregated only as part of a “common scheme or plan.” CP 499 (instruction 10).¹²

Finally, the trial court instructed the jury that it “must consider the instructions as a whole.” CP 490 (instruction 1). “Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Jurors are presumed to follow a trial court’s instructions. *State v. Barajas*, 143 Wn. App. 24, 38, 177 P.3d 106 (2007).

The jury instructions as a whole required the jury to find value of \$5,000 and allowed the jury to aggregate multiple incidents only if part of a common scheme or plan. The jury was given “to convict” instructions (instructions 15-17) that were more encompassing than those in *Kuntz*. The instructions protected Farnworth’s right to a fair trial by requiring the jury to find “reliance” beyond a reasonable doubt, defining “value” (instruction 11), and requiring unanimity for specific acts within each charging period (instruction 13). CP 487-522.

¹² “Value means the market value of the property or services at the time and in the approximate area of the act. Whenever a series of transactions that constitutes theft is part of a common scheme or plan, then the sum of the value of all transactions shall be the value considered in determining the amount of value.” CP 499; RCW 9A.56.010(21)(a).

2. Any error was harmless

When a “to-convict instruction fails to contain all essential elements, the error is harmless if the reviewing court is convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error.” *State v. O’Donnell*, 142 Wn. App. 314, 322-23, 174 P.3d 1205 (2007) (internal quotations omitted).

Any error in this case was harmless. The evidence was overwhelming that the value of benefits Farnworth obtained from L&I during each charging period exceeded \$5,000. The evidence was unchallenged and undisputed that Farnworth cashed warrants exceeding the minimum \$5,000 in value for each of Count II and Count III.¹³ CP 529, 531. The trial court provided clear instructions requiring the jury to find each count unanimously and beyond a reasonable doubt. CP 488, 492, 502.¹⁴ The definitional instruction for “value” properly informed the jury it could aggregate loss for each charging period. At sentencing, the court found that the value of warrants cashed by Farnworth was

¹³ Count II encompassed dates of November 6, 2010 - January 14, 2012, and \$48,117.58 in benefits obtained; Count III encompassed dates of February 13, 2012 - October 5, 2012, and \$27,915.01 in benefits. Exs. P105B-P105CC, P106B-P106R; CP 462-65; RP 1103.

¹⁴ Jury Instruction 3 provided the “State is the plaintiff, and has the burden of proving each element of the crime beyond a reasonable doubt.” CP 492. Instruction 13 gave the unanimity requirement, “To convict the Farnworth on any count of theft, one particular act of theft occurring in the charging time period for that count must be proved beyond a reasonable doubt, and you must unanimously agree as to which act of theft has been proved.” CP 502, 514-16 (instruction 25 included additional “unanimity” language).

\$48,177.58 for Count II and \$27,915.01 for count III, far beyond \$5,000 in value for each count. CP 671, 590-91.

There was also overwhelming evidence of a common scheme or plan. The evidence was uncontroverted that Farnworth worked almost every day during the periods of time described in Counts II and III. RP 581-87, 958. The jury heard undisputed testimony from two physicians and a vocational counselor that Farnworth continuously misrepresented his employment at TCS Auto during 30+ office visits during these time periods. CP 729 (trial court's findings of facts at sentencing); RP 297-303, 615-27, 718-21, 888-90. The only plausible explanation for this was that Farnworth did not want L&I to know he was working because they would otherwise deny him worker's compensation benefits.

Given the overwhelming evidence of a common scheme or plan to defraud L&I, Farnworth was not prejudiced by the claimed deficiency in the to-convict instruction related to "value." The trial court's instructions as a whole made clear it was the State's burden to prove beyond a reasonable doubt the "value" of a series of transactions occurring within each charging period. CP 494, 499, 508-11, 529, 531.

3. If this Court finds reversible error in the to-convict instruction, the case should be remanded for resentencing

If the State improperly aggregated a series of thefts based on a

common scheme or plan, and the jury was required to aggregate multiple findings of guilt for a lesser-included degree of theft, then the lesser-included theft conviction will stand. *State v. Atterton*, 81 Wn. App. 470, 473, 915 P.2d 535 (1996) (if evidence is “sufficient to support conviction of a lesser degree crime, an appellate court may remand for entry of judgment and sentence on the lesser degree.”); *State v. Meyer*, 26 Wn. App. 119, 125, 613 P.2d 132 (1980).

In the present case, the trial court properly instructed the jury on the lesser-included offense of second degree theft, requiring a finding that the value met the minimum \$750 value but did not exceed \$5,000. RCW 9A.56.040; CP 507-11. Farnworth completed an act of second degree theft when he cashed each of the 46 warrants because the face value of each warrant exceeded \$750. Accordingly, each act in the series of transactions constituted second degree theft. RCW 9A.56.040. The jury also unanimously found each theft constituted a “major economic offense or series of offenses.”¹⁵ CP 518-21, 534-35.

The trial court gave an instruction on the lesser-included second degree theft but the jury convicted on first degree theft, which “must

¹⁵ “To find that a crime is a major economic offense, at least one of the following factor[s] must be proved beyond a reasonable doubt: (1) The crime involved multiple incidents per victim; or (2) The crime involved attempted or actual monetary loss substantially greater than typical for the crime; or (3) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time.” CP 521; RCW 9.94A.535(3)(d).

support an inference that the lesser crime was committed.” *State v. Riley*, 34 Wn. App. 529, 536, 663 P.2d 145 (1983). If the court finds prejudicial error in the to-conviction instructions, the case should be remanded with directions to resentence Farnworth for two counts of theft in the second degree.

V. CONCLUSION

Farnworth received a fair trial. The convictions should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of October, 2016.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to be 'R. Ferguson', written over a horizontal line.

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Assistant Attorney General

NO. 33673-5

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

STATE OF WASHINGTON,

Respondent,

v.

GARY BRUCE FARNWORTH,

Appellant.

DECLARATION OF
SERVICE

I, Nicole Symes, declare as follows:

On October 14, 2016, I deposited in the United States mail, postage prepaid, a true and correct copy of the Brief of Respondent, addressed as follows:

Douglas D. Phelps
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2903 N. Stout Rd.
Spokane, WA 99206-4373

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of October, 2016, at Seattle, Washington.


NICOLE SYMES