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Court of Appeals
Division I
State of Washington

COA NO. 74469-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DIANA MERRITT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jeffrey Ramsdell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information is defective in failing to state an offense because it does not show the crime of mortgage fraud was committed within the statute of limitations.

2. The State failed to prove it filed the mortgage fraud charges within the statute of limitations.

3. The evidence is insufficient to convict appellant of mortgage fraud.

4. The court erred in entering the following findings of fact:

a. "Darazs did not know that the appraisal report submitted to the lender by Merritt was not in fact prepared by Reed, but rather by White." CP 466 (FF. C);

b. "There is no indication anywhere on the appraisal reports that White was involved in the preparation of the appraisal or the report, irrespective of whether White had a certified residential appraisal license." CP 468 (FF. L);

c. "Based on her knowledge of the mortgage lending process, Merritt knew the appraisals purportedly signed by Reed would be relied upon by the mortgage lender, the borrower and others in the lending process. By intentionally providing these invalid appraisals to others involved in the mortgage lending process, Merritt employed an artifice, scheme, or device

to materially mislead borrowers and lenders alike, knowing full well that the lenders, borrowers and others would rely upon these misrepresentations." CP 468 (FF. N);

d. "Merritt received monetary payment upon the closing of each of these loans with the knowledge that these residential mortgages had been obtained as a result of mortgage fraud, in violation of RCW 19.144.080(1)(a) and (b), (2) and (3) and RCW 19.144.090." CP 468 (FF O.).

5. The court erred in entering the conclusions of law under heading "II," including 1, 2, 3, 4. CP 469.

Issues Pertaining to Assignments of Error

1. Whether the charging document is insufficient to charge the crime of mortgage fraud because it does not, on its face, show the offenses were committed within the statute of limitations, a necessary predicate for the court to exercise its authority over the case?

2. Whether the statute of limitations bars conviction because the information was not filed within five years of the commission of the offenses and the State did not otherwise prove it was filed within three years of actual discovery of the offenses, as it did not exercise due diligence in discovering the mortgage fraud?

3. Whether the evidence is insufficient to convict appellant of mortgage fraud because the State did not prove she (1) knowingly misled any borrower or lender on a material fact; (2) knowingly made any misrepresentation knowing it may be relied on; (3) knowingly used any misrepresentation with the intention it be relied on; (4) received anything of value in connection with a knowing violation of RCW 19.144.080?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Doug White with 55 counts involving mortgage fraud and identity theft. CP 48-77. The original information charged Diana Merritt with five counts of second degree identity theft, alleging she committed these offenses with White. CP 1-3. By amended information, the State added four counts of identity theft and 11 counts of mortgage fraud against Merritt and White. CP 48-51, 68-77.

White pled guilty to the charged offenses. 2RP¹ 101. Merritt's case proceeded to a bench trial. 2RP 3-4. Count 54 was dismissed on the State's motion. 2RP 89. The trial court acquitted Merritt of the identity theft counts because the State did not prove Merritt intended to commit a

¹ The verbatim report of proceedings is referenced as follows: 1RP - five consecutively paginated volumes consisting of 8/18/15, 9/24/15, 10/30/15, 12/3/15, 1/22/16; 2RP - 8/19/15, 9/2/15, 9/8/15, 9/9/15, 9/10/15, 9/14/15, 9/15/15, 9/16/15, 9/17/15, 9/21/15; 3RP - 8/24/15.

crime. 1RP 33-36. The court found her guilty on the mortgage fraud counts, but did not find an aggravator. CP 469-70; 1RP 36-40.

Before entry of written findings, Merritt retained substitute counsel. 1RP 55-57, 76-77. New counsel argued the evidence was insufficient to convict Merritt of mortgage fraud, the State did not prove the offenses occurred within the statute of limitations, and the information was defective because it did not show the offenses were committed within the statute of limitations. CP 296-99, 314-427, 428-35, 438-50. The State opposed these arguments. CP 521-36. The parties presented their respective positions at a hearing. 1RP 89-160. The court rejected the defense arguments. 1RP 144-46, 160-61, 165-67.

The court imposed a first-time offender sentence of 90 days in jail. CP 454. It did not impose restitution because no borrower suffered any losses and Tom Reed, the person identified as the victim of identity theft in the information, was not a victim of the mortgage fraud offenses for which Merritt was convicted. 1RP 286-89; CP 501. The court stayed judgment pending appeal. CP 500. Merritt appeals. CP 479-96.

2. Trial Evidence

a. Background

White and Merritt met in 2005 and developed a romantic relationship in 2006. 2RP 1023, 1026. At the time, Merritt worked for

Pacific Northwest Mortgage Services as a loan originator. 2RP 1020, 1023. White told her that he was a real estate agent and appraiser, and held himself out as such. 2RP 1028. Merritt assumed he was licensed. 2RP 1028. Merritt testified to her understanding that White was a partner with Tom Reed in the appraisal business and that he worked for Preview Properties as a real estate agent. 2RP 1028.

Reed was a residential real estate appraiser. 2RP 103. His company was called Washington Appraisal Reviews, Inc. RP 172. In 2004, Reed took White on as an appraiser trainee. 2RP 139. White told Reed he was a licensed real estate agent, and Reed had no reason to doubt it. 2RP 140, 333. Reed used password-protected appraisal software, which generated an electronic signature on his written appraisal reports. 2RP 119, 128-30. Reed explained a trainee cannot sign the report himself. 2RP 141. After gaining experience, White was the one who actually wrote the reports. 2RP 142. After reviewing them, Reed signed these reports with his electronic signature. 2RP 142-43. Reed's contact information and business phone number were included in every report. 2RP 161.

Reed never met or talked with Merritt. 2RP 163-64, 337. White told him that Merritt was his girlfriend and that she would like to send work to Reed's company. 2RP 162, 164. White asked if he could do the work on appraisals referred by Merritt. 2RP 164. Reed was fine with that.

2RP 164. Overall, White did acceptable work. 2RP 147. In 2008, White told Reed that he failed the licensing test for appraisers. 2RP 166. In June 2008, Reed laid White off due to lack of work. 2RP 139.

b. Reed's Realization That Someone Was Submitting Appraisal Reports In His Name.

In April 2010, Seabrook Schilt needed an updated appraisal report for Betty Leeper's Puyallup property and searched online for Reed, the appraiser listed as doing Leeper's previous appraisal. 2RP 185. He sent an email to washingtonrealestate@hotmail.com after finding this email associated with Reed's name. 2RP 185-87; Ex. 284. A person identifying himself as Reed responded, saying he could do the updated report. 2RP 188. The author listed a phone number: 206-550-5672. Ex. 284.

In the meantime, Schilt also sent an email to the real Tom Reed's email address, seeking the updated appraisal. 2RP 150, 192. And so it was that in May 2010, Reed learned that someone was using his name to conduct appraisals. 2RP 168-69, 185. Schilt called Reed about the Leeper appraisal. 2RP 168. Reed knew he had never done an appraisal in Puyallup, and had Schilt email the original appraisal report done for Leeper. 2RP 168-69, 171; Ex. 26. The report had Reed's electronic signature on it, but listed "Washington Real Estate Services Inc." as the business in the header of the report. 2RP 171-72; Ex. 26. Reed's business

was "Washington Appraisals Review, Inc." 2RP 172. The report also listed the business address as 16541 Redmond Way, No. 415, Redmond, WA. 2RP 171-72; Ex. 26. Reed's business address was 7700 76th Place NE, Marysville, WA 98270.² 2RP 109, 150. The Leeper report also listed an email address —washingtonrealestate@hotmail.com — which was not Reed's. 2RP 150, 171-72; Ex. 26. Reed was sure he had never worked with the lender listed in the report, Stay At Home Mortgage. 2RP 172.

Reed called the Marysville Police Department, but received no response. 2RP 169, 294. He contacted the Department of Licensing, but received no help. 2RP 170, 294. So he submitted a mortgage fraud claim on the federal government website. 2RP 169-70.

c. Investigation

Special agent Bozena Schrank of the United States Department of Housing and Urban Development received Reed's hotline complaint in May 2010. 2RP 760-61, 765, 776, 975-76. Schrank was assigned as the primary investigator. 2RP 766. She received a copy of the Leeper report. 2RP 778. Schrank and another agent met with Reed in July 2010. 2RP 776, 781, 976. Reed pointed out the discrepancies in the business name and email address. 2RP 787-88, 800-01; Ex. 26. Reed told Schrank he

² Before 2007, Reed's business address was 1840 128th Ave NE, Bellevue, WA. 2RP 109, 150.

did not do the Leeper report and never did an appraisal in connection with Stay At Home Mortgage. 2RP 782-83. Schrank brought a list of appraised properties done under Reed's name to their meeting, and the two of them went through the list of lenders Reed had worked with to narrow down appraisals he had not done. 2RP 778-83.

Reed gave Schrank the names of the only two people who had access to his electronic signature: Doug White and Reed's former business partner³. 2RP 783, 977. Schrank made no effort to contact White in July 2010 because she wanted to gather what she called "some preliminary information" and wait "until we had a little bit more of an idea that he was a potential suspect." 2RP 977. She admitted elsewhere in her testimony that White was on the radar as a suspect from the start. 2RP 979-80.

After meeting with Reed, Schrank ran Google and Accurant searches.⁴ 2RP 977-79. Schrank ordered copies of Stay at Home Mortgage files from a government agency that keeps loan files on record. 2RP 789. It generally takes several weeks to several months to get such files. 2RP 790-91, 978. Schrank did not testify as to when she ordered these files. Sometime in 2011, she obtained them. 2RP 791, 980. All of the reports had Reed's electronic signature on them. 2RP 792. As with

³ Reed's former partner had been a partner for only six months, after which time Reed bought him out of the business. 2RP 783, 979.

⁴ Accurant is a law enforcement database. 2RP 798.

the Leeper report, the header in these reports did not match Reed's business address, instead listing Washington Real Estate Services. 2RP 792. Schrank testified it was at this point she focused on White as the suspect. 2RP 980.

As a next step, Schrank had a "heart to heart" case strategy meeting with King County prosecutor David Seaver, who had obtained files related to Stay At Home Mortgage. 2RP 792-93. This happened sometime within a year of Schrank's meeting with Reed, i.e., sometime before July 2011. 2RP 793.

Schrank then started to "verify" information in the Leeper report. 2RP 794. She wanted to check on the Redmond business address listed in the report, to see whether it belonged to a storefront operation. 2RP 794-95. It was not until June 2012 that Schrank visited Redmond to verify the address. 2RP 796. The business there was called Redmond Pony Express. 2RP 796. It rented mailboxes. 2RP 796, 984. The suite address listed in the Leeper report as the appraiser's address corresponded to a specific mailbox at Pony Express. 2RP 796. The Pony Express owner turned over documents to agent Schrank upon request. 2RP 796-97; Ex. 10. The documents showed the mailbox was rented to Doug White. 2RP 797. White's address was listed as 10280 SE 6th, Suite 4, Bellevue. 2RP 797. White's phone number was listed as 206-550-5672. 2RP 797.

None of this was new information to Schrank. 2RP 797. After she had spoken to Reed in 2010 and learned about White, she ran an Accurant check on White, which revealed White's social security number, address and phone number. 2RP 797-98. Schrank had White's driver's license before she went to Pony Express. 2RP 798; Ex. 6. The copy of White's driver's license provided by Pony Express matched what Schrank already had. 2RP 798; Ex. 10. The Pony Express documents listed White's business as "Washington Real Estate Services, Inc." with an address of 505 106th Ave. NE. 2RP 798-99; Ex. 10. Agent Schrank already knew this address based on the Accurant check. 2RP 799.

As the next step in the investigation, according to Schrank, "We ended up simply Googling him." 2RP 800. A Coldwell Banker website listed him as a real estate agent, with a phone number of 206-650-5672 and an email address of drwhite152@msn.com. 2RP 800; Ex. 276.

Based on the information gathered up to that time, Schrank got a search warrant for subscriber information related to the two emails associated with White. 2RP 801. In September 2013, Schrank received business records from Microsoft for White's email information. 2RP 801-02. The washingtonrealestate@hotmail.com email address was registered to "Washington Real Estate" with a registration date of June 26, 2008.

2RP 802. The drwhite152@msn.com email address was registered to Doug White with a registration date of January 15, 2003. 2RP 802-03.

Agent Schrank also reviewed records subpoenaed from Verizon Wireless regarding the 206-550-5672 phone number. 2RP 803; Ex 8. The phone records were received in October 2013. 2RP 803. The name associated with the account is Washington Real Estate Service with an address of 2280 SE 6th St., Apt. 4, Bellevue 10280. 2RP 804. This is the same address listed in the Pony Express documents. 2RP 804. The customer name associated with the account is Doug White. 2RP 804.

Schrank also reviewed records from the Secretary of State Office regarding Washington Real Estate Services, Inc. 2RP 804-05; Ex. 1. The records show an address of 16541 Redmond Way, No. 415, Redmond. 2RP 805. The incorporation date for the business is July 9, 2004. 2RP 805. Doug White is listed as the director and officer, with a phone number of 206-550-5272. 2RP 805-06.

Schrank spoke to one of the owners of Stay At Home Mortgage. 2RP 806. Schrank learned Doug White of Washington Real Estate Services, Inc. was on the list of appraisers used by the company. 2RP 807. Although she had earlier testified that Schrank focused on White as the suspect much earlier in the investigative process (2RP 980), she now

testified it was at this point that she considered White to be her primary suspect. 2RP 808.

Schrank decided to locate White. 2RP 808. Sometime in 2012, federal agents had done surveillance of the Bellevue address associated with White and determined he did not live there any longer. 2RP 809. White's driver's license, issued in March 2010, listed an address of 3450 Eastlake Sammamish Parkway. 2RP 808, 982-83. So Schrank "obviously" looked into that address and who owned the property. 2RP 808. According to Schrank, that is "how we discovered a Diana Merritt." 2RP 808. Yet Schrank also testified that she had earlier checked publicly available property records to see Merritt was the owner of the property. 2RP 810. When asked if she did this in 2012 or later in the investigation, Schrank answered it was "pretty early on." 2RP 810.

Meanwhile, in September 2012, Reed informed Schrank of another suspect appraisal report that contained his electronic signature. 2RP 810, 981. The lender involved in the loan was Reliance Mortgage. 2RP 810. Up to that point, Reliance Mortgage was not associated with any of the suspect appraisals. 2RP 810-11. In October 2012, Schrank talked with an accountant at Reliance Mortgage. 2RP 981, 987-88. Upon being shown driver's license photos of White and Reed, the accountant picked White as the person who did the appraisal. 2RP 989-90.

In late 2013 or 2014, Schrank reviewed subpoenaed bank records from Wells Fargo pertaining to White's accounts and his business, Washington Real Estate Services, Inc. 2RP 811. Schrank noticed some checks written to either White or Washington Real Estate Services, Inc. 2RP 811. Orla Nery was one of the check writers. 2RP 811. Nery told Schrank that her realtor, Tena Long, referred White to her as an appraiser. 2RP 812. Long worked for Coldwell Banker in Redmond. 2RP 812.⁵

Upon reviewing White's bank records, Schrank also noticed Merritt wrote some checks to White. 2RP 812. Schrank did a Google search on Merritt and learned Merritt had earlier worked at Landover Mortgage, which is located at the same address as Tena Long at Coldwell Banker. 2RP 812. As described by Schrank, "so we had a connection there as far as her potential involvement." 2RP 812.

Schrank looked Merritt up on Northwest Multiple Listing Service, which is a registry for all loan officers, lenders and real estate professionals. 2RP 813. From this, Schrank determined Merritt was a licensed loan originator. 2RP 813. The registry information showed Merritt had owned her own loan broker business under the name Merit

⁵ Long testified she recommended White as an appraiser for Nery. 2RP 419-20, 423. She had no reason to think White was not a certified appraiser. 2RP 425.

Home Finance, so Schrank obtained those business records. 2RP 813-14. Schrank also did an Accurant check on Merritt, which provided Merritt's addresses and employment history. 2RP 982-83. Schrank reviewed records from the Secretary of State Office regarding Merritt and Merit Home Finance, which listed her address as 3450 Eastlake Sammamish Parkway NE in Sammamish. 2RP 814-15; Ex. 2. Schrank subpoenaed and reviewed more loan files associated with Merritt. 2RP 814-15.

Schrank next decided to get a search warrant for the Sammamish address. 2RP 815-16. She did so because Merit Home Finance was listed at that address, Merritt and White resided at that address, and appraisers are usually self-employed and work on computers at home, so business records were expected to be located there. 2RP 816. Merritt was no longer self-employed at this point but loan officers (and appraisers) are required by law to keep their business records. 2RP 816-17.

On June 11, 2014, federal and state agents searched the residence shared by Merritt and White. 2RP 490. Upon being taken into custody, Merritt said she did not know what this was about, she hoped Doug had not done anything stupid, and that "he does a lot more things that are gray than she does." 2RP 493-95, 827. Evidence consisting mainly of business records and emails extracted from a computer formed the basis for the charged counts against Merritt. 2RP 842-43, 897-912, 963-64; Ex. 15.

An envelope was recovered containing two copies of Reed's license. 2RP 963-64. A 2007 email and a 2009 email sent from White to Merritt contain the subject line "Tom's license" along with an attached copy of Reed's license. 2RP 175-81. Reed did not authorize White to send a copy of his license to Merritt. 2RP 176.

d. Additional Testimony

According to the Department of Licensing, White was not a licensed appraiser. 2RP 527. Reed testified none of the appraisal reports that formed the basis for the charges were his. 2RP 266-92.

Reed explained the lender uses the appraisal to determine the loan amount on the house to give to the borrower. 2RP 137. The appraisal also acts to ensure the borrower is not overpaying for the house. 2RP 137. A Department of Licensing investigator testified lenders use the appraisal as a tool to assess whether a mortgage loan should be given. 2RP 705.

Loan processor Katherine Logsdon testified that she reviewed appraisal reports as part of her work with Merritt, and her concerns had nothing to do with the identity of the appraiser. 2RP 729, 732. She knew the appraiser Merritt used was her boyfriend. 2RP 736. Logsdon was not responsible for checking whether the appraiser had a license. 2RP 733.

Laura Keil, a loan officer at Mortgage Broker Services, testified the mortgage broker, or loan originator, has a fiduciary duty to the

borrower. 2RP 852. The broker reviews the appraisal before submitting the loan package. 2RP 865. The lender contacts the broker if the appraisal needs correction. 2RP 965-66. Most often there is a contract between the broker and lender in which the broker represents no fraud is involved. 2RP 868-69. If fraud is uncovered, the lender would look to purchase the loan back. 2RP 869-70. The underwriter and the lender would be expected to notice if an appraisal was submitted showing mismatched company information. 2RP 876-77. Two different companies listed on an appraisal would be unusual. 2RP 864. Keil would be concerned if an appraisal were ordered from one person but signed by another. 2RP 878. The person who signs the report needs to be the person who inspected the property. 2RP 879.

According to Keil, the underwriter and the lender would also be expected to notice if an appraisal was submitted without a copy of the appraiser's license. 2RP 876. But Reed testified only some lenders require the appraiser's license be appended to the report, while others do not. 2RP 173. Reed said requiring a license be appended to the report is less common nowadays because it's so easy to forge. 2RP 174-75.

e. Merritt's Testimony

Merritt testified she never had reason to question whether White was a licensed appraiser. 2RP 1042. She trusted him. 2RP 1078. Her

understanding was that White and Reed were business partners for the period of 2006-2008. 2RP 1042. She thought Reed was the managing appraiser or administrator. 2RP 1032. White told her that he was working with Reed under two business names: Washington Appraisal Reviews and Washington Real Estate Services 2RP 1059. She believed White and Reed co-owned these two appraisal businesses. 2RP 1060, 1091.

Merritt started her own loan originator business, Merit Home Finance, in 2007 2RP 1033. White moved into her residence that same year. 2RP 1029-30. Merritt used White as an appraiser. 2RP 1036. She thought he was a licensed appraiser and had no reason to think otherwise, just as she had no reason to question whether he was a licensed real estate agent. 2RP 1036-37. She used White as an appraiser because he had experience both as a real estate agent and an appraiser. 2RP 1037-38.

She noticed Reed's electronic signature appeared on appraisals ordered from White. 2RP 1075. Merritt understood Reed's electronic signature was on the appraisal reports generated by White because Reed was the administrator and the signature was embedded in the appraisal software. 2RP 1032, 1042-43. Based on what White told her, this was a standard business practice and she did not question it because it was not unusual in other industries. 2RP 1032, 1042-43. She knew or assumed these reports were actually prepared by White. 2RP 1076-77. She

believed White was authorized to submit the appraisals in Reed's name. 2RP 1077. She denied knowingly submitting documentation related to Reed's signature for purpose of committing mortgage fraud. 2RP 1053.

White eventually told her Reed was going to retire and that White would buy him out and carry on with the business. 2RP 1032, 1042. She thought the entity called Washington Real Estate Services, Inc. was the business that White was buying Reed out of. 2RP 1049-50.

In 2009, Merritt dissolved her Merit Home Finance business and became employed at Landover. 2RP 1040-42. At that point she could not use White as an appraiser because he was not on Landover's list of appraisers that it used. 2RP 1041-42.

Merritt loved and trusted White. 2RP 1060. They became engaged in 2012. 2RP 1068. She broke off her engagement with him after the arrest. 2RP 1050-51.

f. Trial Court Findings

For each of the mortgage fraud counts, the trial court found the borrower obtained a residential mortgage through Merritt's mortgage brokerage company, Merit Home Finance. CP 466-68. Merritt was the loan originator and ordered the appraisal from White. *Id.* The appraisal report White provided to Merritt states that it was prepared by Tom Reed, a licensed certified residential appraiser, and contained Reed's electronic

signature. Id. Merritt provided the appraisal report to the lender as the basis for the value of the residential property. Id. At the closing of the loan, Merritt received payment for brokering the mortgage in the form of an origination fee. Id.

The court found the following borrowers were unaware the appraisal report submitted to the lender by Merritt was not in fact prepared by Reed, but rather by White: Lakey (count 45), Pain (count 46), Darazs (count 47), Tricker (count 48), Barber (count 50), Crider (count 52), Nelson (count 55). CP 465-68 9 (FF A, B, C, D, F, H, J).

Lakey (count 45) testified Merritt, who he had known since junior high school, helped with refinancing. 2RP 433-34. In an email, Merritt told Lakey she would pass on information to the appraiser, identified as her boyfriend. 2RP 436-37. Merritt mentioned in email exchanges that her boyfriend was Doug. 2RP 443. In an email, Merritt referenced Doug and his assessment of the home value. 2RP 437-38. Lakey knew Doug as somebody involved in the process. 2RP 437-38. Merritt told Lakey the name of the appraiser, but he could not remember the name she gave him. 2RP 441. The name meant nothing to him. 2RP 441. The name of Tom Reed meant nothing to him either; he just knew Reed's name was on the appraisal. 2RP 441. Lakey agreed with the prosecutor that at the time the

appraisal was done, he had no reason to think that the person who came was not Tom Reed. 2RP 442.

Pain (count 46) testified that Merritt helped to refinance. 2RP 447. She remembered an appraiser came to her house. 2RP 452. She did not remember his name. 2RP 451-52. Nothing stood out to her about the appraisal. 2RP 453. She was not told that the person who did the appraisal would not be the person signing the appraisal report. 2RP 453.

Darazs (count 47) used Merritt as his mortgage broker after being referred by a friend. 2RP 674-75. He knew Merritt and White were a couple. 2RP 674. He had hired White as a real estate agent before. 2RP 674-75. He had no recollection of reviewing the appraisal report. 2RP 682. He did not remember paying an appraisal fee; it was all just paperwork to him. 2RP 680. The name of Tom Reed on the appraisal report did not ring a bell. 2RP 681.

Tricker (count 48) used Merritt for refinancing. 2RP 464. She did not know anyone by the name of Doug White or Tom Reed. 2RP 464, 468-69. She paid an appraisal fee by check to Washington Real Estate Services, Inc., but the name did not sound familiar to her. 2RP 467-68. She did not remember an appraiser coming to her house. 2RP 468. She was not told at the time that the person doing the appraisal was not

certified. 2RP 470. She was not informed that the person doing the appraisal was not going to be the person signing the appraisal. 2RP 470.

Barber (count 50) testified that Merritt was an acquaintance of 20 years and helped her refinance. 2RP 552-53. Barber met White a couple of times, and knew him as Merritt's boyfriend. 2RP 552-53. White may have done the appraisal, though he was not certain and had no independent recollection. 2RP 557. He did not know anyone by the name of Tom Reed and the name did not ring a bell. 2RP 557-58. He could not recall whether he was told the person doing the appraisal was not certified. 2RP 558-59. He was not informed the person signing the report would be different than person doing the report. 2RP 559.

Crider (count 52) used Merritt to help with refinancing after a family member in the real estate business recommended her. 2RP 408-09. Crider had no recollection of what she was told about who would do the appraisal. 2RP 411-12. She could not recall the name of the appraiser. 2RP 414. Washington Real Estate Services, Inc., which she paid for the appraisal report, was unfamiliar to her. 2RP 412-13. The name Tom Reed was not familiar to her. 2RP 413. She did not recall being told that the person doing the appraisal was not certified. 2RP 414. Crider agreed with the prosecutor that she had no reason to think that the person who came to her house was not Tom Reed. 2RP 414.

Nelson (count 55) met Merritt at a business breakfast and later used her to help with refinancing. 2RP 455-56. He did not remember the name of the appraiser, and the name of Doug White did not ring a bell. 2RP 460. Washington Real Estate Services, Inc., which was paid for the appraisal report, was unfamiliar to him. 2RP 460. Tom Reed's name was unfamiliar as well. 2RP 460-61. He did not remember an appraiser coming to his house, and had no recollection of discussion he might have had with Merritt about the appraisal. 2RP 461-62. He was not told the person who did the appraisal was uncertified and was not told the person who did the appraisal was not same person who signed it. 2RP 462.

The court found Morehouse (count 49) knew Reed had not prepared the appraisal report, but was told that sometimes Reed signed the reports for White, who Morehouse believed to be a licensed appraiser based on representations made to her. CP 466-67 (FF E.). Morehouse, a former appraiser, was Merritt's friend. 2RP 302-03. White introduced himself as an appraiser and realtor upon meeting Morehouse in 2006. 2RP 304. Afterwards, White helped Morehouse study for appraisal school. 2RP 304, 317-18. Morehouse used Merritt as the broker for refinancing on her home and she wanted White to do the appraisal. 2RP 304-05, 308. Merritt and White came to her house, and Merritt visited with Morehouse while White did appraisal. 2RP 308. White told Morehouse he owned a

real estate appraisal company with a partner. 2RP 312, 323. She assumed Tom Reed was his partner. 2RP 312. When she asked why Reed would sign for White, Merritt told her Reed signed for White when the latter was busy. 2RP 312-13. Morehouse thought nothing of it. 2RP 320.

The court found borrowers Holm (count 51) and Bergman (count 53) "did not know that the appraisal report submitted to the lender by Merritt stated that it was prepared by Reed, rather White, who she believed had completed the appraisal." CP 467-68 (FF. G, I).

Holm testified she grew up with Merritt and knew White through her. 2RP 395-96. Merritt helped her with a refinancing. 2RP 397. Holm knew White did the appraisal. 2RP 399-400. He came to her house to do it. 2RP 400. She thought White was Reed's apprentice based on what he told her. 2RP 403. She did not notice White did not sign the appraisal form. 2RP 404.

Bergman was friends with Merritt and used for refinancing. 2RP 684, 686. She met White through Merritt as part of a refinancing process. 2RP 685. Merritt referred White to Bergman as the appraiser. 2RP 693-94. Merritt told Bergman that White's company was going to do the appraisal. 2RP 697. The name Tom Reed did not ring a bell; she just remembered signing papers. 2RP 693-94.

C. ARGUMENT

1. THE CHARGING DOCUMENT IS DEFECTIVE BECAUSE IT FAILS TO ALLEGE FACTS SHOWING THE OFFENSES WERE COMMITTED WITHIN THE STATUTE OF LIMITATIONS.

The information alleging Merritt committed mortgage fraud fails to state an offense because it fails to show the charges were brought within the statute of limitations period. As the information was never amended to show the charges were brought within the limitation period, the convictions must be reversed.

a. The charge at issue and governing law.

The amended information alleges Merritt committed the crime of mortgage fraud in counts 45 through 55. CP 70-77. All counts are identically worded, except for the name of the borrower and the alleged date of the criminal occurrence, specified in each count. Count 45 will be used as an example. It states:

That the defendants Douglas Ross White and Diana Joline Merritt and each of them in King County, Washington, between June 12, 2008 and August 6, 2008, in connection with making, brokering, obtaining, or modifying a residential mortgage loan, did directly or indirectly: (1)(a) knowingly employ any scheme, device, or artifice to defraud or materially mislead a borrower, to-wit: Kirk Lakey, during the lending process; and (b) knowingly defraud or knowingly materially mislead a lender, or any person, to wit: Kirk Lakey, in the lending process, or knowingly engage in any unfair or deceptive practice toward any person, to-wit: Kirk Lakey, in the lending

process; and (c) knowingly obtain property by fraud or material misrepresentation in the lending process; and (2) knowingly make any misstatement, misrepresentation, or omission during the mortgage lending process knowing that it might be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process, to-wit: Kirk Lakey; and (3) knowingly use or facilitate the use of any misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process, to-wit: Kirk Lakey; and (4) knowingly receive any proceeds or anything of value in connection with a residential mortgage closing that the defendant knew resulted from a violation of RCW 19.144.080; Contrary to RCW 19.144.080 and 19.144.090, and against the peace and dignity of the State of Washington. And further do allege the crime was a major economic offense or series of offenses, so identified by consideration of the following: multiple incidents per victim, monetary loss substantially greater than typical for the offense, occurred over a long period of time, and the defendants used their position of trust to facilitate the commission of the current offense, under the authority of RCW 9.94A.535(3)(d). CP 70.

Count 45, with an alleged offense date of June 12, 2008 to August 6, 2008, is the earliest alleged crime. Among the 10 charged counts, the latest offense date is for count 55, with a period of May 7, 2009 to June 10, 2009. CP 77. The amended information was filed on February 20, 2015, more than five years since the last alleged offense date. CP 48.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418

U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. Essential elements are those facts that must be proved to convict a defendant of the charged crime. State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). "More than merely listing the elements, the information must allege the particular facts supporting them." State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010).

The charging document must contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993) (quoting CrR 2.1(b)). "An information is sufficient if *inter alia* it imparts that the crime was committed before the information was filed and within the statute of limitation." Cozza, 71 Wn. App. at 255. That an offense was committed within the statute of limitation is a necessary fact that the State must prove to sustain a conviction. State v. Dash, 163 Wn. App. 63, 69-71, 259 P.3d 319 (2011), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014).

"When an information omits a statutory element of a charged crime, it is constitutionally insufficient because it fails to state an offense." State v. Greathouse, 113 Wn. App. 889, 899, 56 P.3d 569 (2002), review denied, 149 Wn.2d 1014, 69 P.3d 875 (2003). "An information omitting essential elements charges no crime at all." State v. Sutherland, 104 Wn.

App. 122, 130, 15 P.3d 1051 (2001). Likewise, "[a]n indictment or information which indicates that the offense is barred by the statute of limitations fails to state a public offense." State v. Glover, 25 Wn. App. 58, 61-62, 604 P.2d 1015 (1979) (citing People v. Hawkins, 34 Ill.App.3d 556, 340 N.E.2d 223 (1975)), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014).

- b. The information, in failing to show the charges were brought within the statute of limitations period, does not state an offense for which Merritt can be convicted.**

RCW 10.37.050(5) provides "The indictment or information is sufficient if it can be understood therefrom-- . . . That the crime was committed at some time previous to the finding of the indictment or filing of the information, and within the time limited by law for the commencement of an action therefor." The information in Merritt's case is insufficient because it does not impart "that the crime was committed before the information was filed and within the statute of limitation." Cozza, 71 Wn. App. at 255.

The statute of limitations for mortgage fraud is found at RCW 19.144.090(2), which provides "No information may be returned more than (a) five years after the violation, or (b) three years after the actual discovery of the violation, whichever date of limitation is later." The State argued below that a charging document challenged after the verdict must

be liberally construed. 1RP 112. But even so construed, the dates alleged in the information for the commission of the crimes are obviously not within five years of the filing of the information. Cf. State v. Bixby, 27 Wn.2d 144, 153-54, 177 P.2d 689 (1947) (information sufficient where it charged date within statute of limitations under RCW 10.37.050(5)). Nor does the information allege any facts whatsoever regarding when the violation was discovered. The information therefore fails to state a mortgage fraud offense for which Merritt can be convicted. Glover, 25 Wn. App. at 61-62. An information that appears on its face to be barred by the statute of limitation is subject to being set aside if not amended. State v. Fischer, 40 Wn. App. 506, 510, 699 P.2d 249, review denied, 104 Wn.2d 1004 (1985), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014). The information in Merritt's case was never amended. The convictions must be reversed.

The error is preserved for review. Following the court's oral verdict but before entry of its written findings and judgment, Merritt challenged the sufficiency of the information below for failing to comply with the statute of limitations. 1RP 89, 137. Even so, "[a] challenge to the sufficiency of a charging document is of constitutional magnitude and may be raised for the first time on appeal." Cozza, 71 Wn. App. at 255. "[T]he law of this state has long been that a criminal defendant can raise

objections to an information which completely fails to state an offense at *any* time." State v. Holt, 104 Wn.2d 315, 321, 704 P.2d 1189 (1985).

Further, the general rule that issues not presented to the trial court are barred from being raised on appeal "does not apply when the question raised affects the right to maintain the action." Jones v. Stebbins, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993) (quoting New Meadows Holding Co. v. Washington Water Power Co., 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). A challenge that the statute of limitations bars prosecution for criminal charges affects the right of the State to maintain its action against the accused. See Morales v. Westinghouse Hanford Co., 73 Wn. App. 367, 370, 869 P.2d 120 (1994) (argument that statute of limitations was tolled could be raised first time on appeal because it implicated "right to maintain the action").

Criminal charges are beyond the statutory authority of the court when they are outside the statute of limitations. State v. Peltier, 181 Wn.2d 290, 297, 332 P.3d 457 (2014). "[T]he statute of limitations bars prosecution of charges commenced after the period prescribed in the statute." In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000). With one exception not applicable here, "once the statute of limitations expires for a crime, the State lacks the authority to charge a defendant." In re Pers. Restraint of Swagerty, ___ Wn.2d ___, ___ P.3d ___,

2016 WL 6330473 (slip op. filed Oct. 27, 2016). From this, it follows Merritt's challenge to the information, made before formal entry of judgment, is an issue that can be raised on appeal.

2. THE STATE FAILED TO PROVE THE OFFENSES WERE COMMITTED WITHIN THE STATUTE OF LIMITATIONS.

The statute of limitations for mortgage fraud is five years after the violation or three years after the actual discovery of the violation, whichever is later. RCW 19.144.090(2). The State did not prove the charges were timely. The convictions must be reversed.

a. The statute of limitations issue is preserved for review.

The trial court rejected defense counsel's post-verdict challenge that the State failed to prove the mortgage fraud offenses were committed within the statute of limitations period. As argued in section C.1,b., supra, issues involving the right to maintain an action can be raised for the first time on appeal under RAP 2.5(a), and whether the statute of limitations bars an action is one such issue. Jones, 122 Wn.2d at 479; Morales, 73 Wn. App. at 370. Criminal charges brought outside the statute of limitations cannot be prosecuted and are beyond the statutory authority of the court. Peltier, 181 Wn.2d at 297; Stoudmire, 141 Wn.2d at 355. That bar is not absolute because the statute of limitations is not jurisdictional. Peltier, 181 Wn.2d at 296-97. But any waiver of the statute of limitations

must be express. Peltier, 181 Wn.2d at 297. Merritt's post-verdict statute of limitations challenge preserves the issue for appeal because the question raised affects the State's right to maintain the action against her. Morales, 73 Wn. App. at 370; Peltier, 181 Wn.2d at 297. If such an issue can be raised for the first time on appeal, it can necessarily be raised on appeal following an unsuccessful post-verdict challenge.

- b. The statute of limitations for mortgage fraud should be interpreted in light of the discovery rule, in which actual discovery of the violation is inferred if the aggrieved party, by the exercise of due diligence, could have discovered it.**

"The general rule is that '[a] cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief.'" Shepard v. Holmes, 185 Wn. App. 730, 739, 345 P.3d 786 (2014) (quoting O'Neil v. Estate of Murtha, 89 Wn. App. 67, 69-70, 947 P.2d 1252 (1997)). For most criminal offenses, the statute of limitations begins to run from the date of the commission of the offense. RCW 9A.04.080. But as noted, there is a special statute of limitations for mortgage fraud: "No information may be returned more than (a) five years after the violation, or (b) three years after the actual discovery of the violation, whichever date of limitation is later." RCW 19.144.090(2).

The amended information, which added all of the mortgage fraud counts against Merritt, was filed on February 20, 2015. CP 48-77. The

charging dates range from June 12, 2008 at the earliest (count 45) to June 10, 2009 at the latest (count 55). CP 70-77. There is no dispute the information charging the mortgage fraud counts was filed more than five years after the commission of each of the alleged violations. The dispute is whether the information was filed within "three years after the actual discovery" of the violations. RCW 19.144.090(2). To resolve the dispute, the meaning of "actual discovery" must be determined.

The question of when a statute of limitations begins to run is a question of statutory construction reviewed de novo. Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc., 143 Wn. App. 345, 352, 177 P.3d 755 (2008). In ascertaining legislative intent, courts first look to the plain meaning of words used in a statute. State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). Under the plain language rule, courts may look to related statutes. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

The mortgage fraud statute does not define the phrase "actual discovery." There is no case law interpreting the statute of limitations under RCW 19.144.090(2). There is, however, a long-standing antecedent that we can look to for guidance. RCW 4.16.080(4), the statute of limitations for fraud, provides that an action for relief upon the ground of

fraud is "not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

As mortgage fraud is a species of fraud, it makes sense to construe the former in light of the latter. The discovery rule "has been applied by Washington courts to claims where 'injured parties do not, or cannot, know they have been injured.'" Shepard, 185 Wn. App. at 739 (quoting In re Estates of Hibbard, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992)). Fraud, in whatever form it may take, is a classic example of this phenomenon. On its face, the phrase used in the statute of limitations for fraud — "discovery by the aggrieved party of the facts constituting the fraud" — conveys the same meaning as the phrase "actual discovery" used in the statute of limitations for mortgage fraud. When a person discovers the facts constituting the fraud, that person has in ordinary language actually discovered the fraud.

The statute of limitations for fraud, RCW 4.16.080(4), "effectively codifies the discovery rule as the basis on which a claim for fraud or misrepresentation accrues." Shepard, 185 Wn. App. at 739. The discovery rule is rooted in common law. Funkhouser v. Wilson, 89 Wn. App. 644, 666, 950 P.2d 501 (1998), aff'd in part and remanded sub nom. C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 985 P.2d 262 (1999). Under the discovery rule, "actual knowledge of fraud will be

inferred for purposes of the statute if the aggrieved party, by the exercise of due diligence, could have discovered it." Shepard, 185 Wn. App. at 739-40. The statute of limitations begins to run from that point in time. First Maryland Leasecorp v. Rothstein, 72 Wn. App. 278, 282, 864 P.2d 17 (1993).

"The legislature is presumed to know the law in the area in which it is legislating, and statutes will not be construed in derogation of common law absent express legislative intent to change the law." State v. Torres, 151 Wn. App. 378, 385, 212 P.3d 573 (2009). In enacting the statute of limitations for mortgage fraud, the legislature gave no clear signal that it was to be interpreted in derogation of the common law discovery rule.

The statute of limitations for mortgage fraud must also be assessed in light of the general policy behind criminal limitations on prosecution. "The policy behind statutes of limitations is to protect defendants from unfair decisions caused by stale evidence and to encourage law enforcement officials to promptly investigate crimes." State v. N.S., 98 Wn. App. 910, 912-13, 991 P.2d 133 (2000), abrogated on other grounds by State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014). The statute of limitations is the defendant's primary protection against oppressive delay. State v. Boseck, 45 Wn. App. 62, 66, 723 P.2d 1182 (1986) (citing United

States v. Lovasco, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)). For such reasons, "criminal limitations statutes are 'to be liberally interpreted in favor of repose.'" Toussie v. United States, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970) (quoting United States v. Scharton, 285 U.S. 518, 522, 52 S. Ct. 416, 76 L. Ed. 917 (1932)). Consistent with the rule of lenity, the discovery rule should be applied for the purpose of commencing the statute of limitations in a criminal case where the government could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation. United States v. Gomez, 38 F.3d 1031, 1037-38 (8th Cir. 1994).⁶

The State argued below that "actual discovery" of the violation under RCW 19.144.090(2) did not occur until law enforcement agents searched the residence shared by White and Merritt in June 2014. CP 535. According to the State, the statute of limitations did not begin to run until the government in fact discovered the mortgage fraud violation, regardless of whether the government was diligent in learning the facts that would

⁶ Gomez addressed the five-year statute of limitations for violation of 8 U.S.C. § 1326(b)(2), which criminalizes being found in the United States after having been deported. Gomez, 38 F.3d at 1033. The statute of limitations for the violation begins running when immigration authorities could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation. Id. at 1037-38.

allow them to charge the mortgage fraud crimes earlier. That interpretation of the statute should be rejected.

The policies behind the criminal statute of limitations would be undermined if the discovery rule were not applied to the statute of limitations under RCW 19.144.090(2). This provision should be interpreted to mean actual knowledge of mortgage fraud will be inferred where the exercise of due diligence could have discovered it. To interpret the statute otherwise would "essentially strike the statute of limitations" from the law. Gomez, 38 F.3d at 1037. Application of the discovery rule is the bulwark against oppressive delay in the criminal charging process. Removing the discovery rule from the statute of limitations for mortgage fraud would provide disincentive for prosecuting entities to promptly investigate crimes. It would set the stage for unfair decisions caused by stale evidence. If the discovery rule were not applied, a prosecuting agency could negligently or deliberately refrain from investigating a crime for years or even decades, safe in the knowledge that the crime could be charged once the government got around to doing the needed investigation.

Courts "avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences." State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). The courts employ this "stopgap principle" because it is presumed the legislature does not intend such

results. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). It would be a curious statute of limitation that allowed the government to dictate with impunity when it runs out. Statutes of limitations cannot be controlled by the whim of the government investigator. Without the discovery rule, the Sword of Damocles is left solely in the hands of the prosecuting agency, to be wielded in perpetuity. That is an absurd or strained result that must be avoided in interpreting the statute of limitations provision.

c. The convictions must be reversed because the State failed in its burden to prove the amended information was filed before the statute of limitations ran out.

The court ruled the mortgage fraud charges against Merritt were filed within the statute of limitations because the State did not discover the criminal violations until June 2014, when the search warrant on the residence was executed. 1RP 145-46. The court erred because, as explained above, the pivotal question is when the government, through the exercise of due diligence, could have discovered the facts to support charging mortgage fraud. The factual record establishes the government could have discovered the evidence it relied on to charge Merritt with mortgage fraud much earlier if it had been diligent in its investigation.

The State bears the burden of establishing that it charged Merritt within the applicable limitations period. State v. Reeder, 181 Wn. App.

897, 921, 330 P.3d 786 (2014), aff'd, 184 Wn.2d 805, 365 P.3d 1243 (2015). Application of the discovery rule generally presents questions of fact, but can be decided as a matter of law when the facts lead to only one reasonable conclusion. Richardson v. Denend, 59 Wn. App. 92, 95, 795 P.2d 1192 (1990); Dash, 163 Wn. App. at 69 (citing Goodman v. Goodman, 128 Wn.2d 366, 373, 907 P.2d 290 (1995)).

The court did not find the State made a diligent inquiry under the discovery rule standard. "In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). That rule applies to statute of limitations challenges. Sherbeck v. Lyman's Estate, 15 Wn. App. 866, 870, 552 P.2d 1076 (1976).

Even if the trial court had found the State made a diligent inquiry sufficient to beat the statute of limitations, such a finding would not be supported by substantial evidence in the record. The information that ultimately led to the search of Merritt's and White's residence in June 2014 could have been discovered, through a diligent investigation, much earlier. This means the search itself, which uncovered the evidence that formed the basis for the mortgage fraud counts against White and Merritt, would have occurred much earlier had that diligent investigation been done.

The salient question under the discovery rule is whether the plaintiff had "the means and resources to detect wrongs within the applicable limitation period," in other words, whether it "could have" known of that information. Funkhouser, 89 Wn. App. at 667 (quoting Hibbard, 118 Wn.2d at 749-50). In Douglass v. Stanger, 101 Wn. App. 243, 255, 257, 2 P.3d 998 (2000), for example, the plaintiff's action for securities and fraud was time-barred because the fraud was discoverable from public records more than three years before the lawsuit, and the plaintiff, in failing to examine the records, failed to exercise due diligence.

Evidence showing the crime of mortgage fraud occurred was present from the inception of the investigation in 2010. In May 2010, Reed notified the federal government that his name was being fraudulently used in appraisal reports. 2RP 765, 776, 975-76. In July 2010, agent Schrank, the primary investigator, met with Reed. 2RP 766, 776. Reed told Schrank that someone under the business name of "Washington Appraisal Services" did a mortgage appraisal using his name and electronic signature. 2RP 782-83. Reed and Schrank reviewed the Leeper report, which contained that suspect business name and email address. 2RP 787-88, 800-01.

Reed immediately fingered White as a suspect. 2RP 783, 977. Schrank admitted White was always a suspect. 2RP 979-80. After

meeting with Reed, Schrank did an Accurant check on White. 2RP 797-99. From this, Schrank knew White's listed Bellevue address and phone number — the same information listed in the Leeper report. Id. Schrank checked on the Washington Appraisals Services business through the Secretary of State office, which showed the business was registered to White and his phone number, which was the same on the Leeper report. 2RP 804-05. Schrank did not specify when she checked these records, but nothing stopped her from doing so at the inception of the investigation.

Schrank got White's driver's license, which listed the Sammamish address that ended up being searched. 2RP 798. Schrank did not specify when she got this license, but nothing stopped her from getting it at the inception of the investigation and thus knowing White's current address. Schrank also knew early on in the investigation that Merritt owned the property located at that address from a check of publicly available records. 2RP 810. Sometime within a year of meeting with Reed, Schrank and a prosecutor in the King County office had a case strategy meeting. 2RP 792-93. So this case was on the State's radar in 2011 at the latest.

In August 2012, Seabrook Schilt forwarded the email he received from "Tom Reed" to Schrank. 2RP 187; Ex. 284. That email contained White's phone number and his email address. Ex. 284. Schrank never

explained why she did not immediately obtain this email from Schilt instead of waiting over two years.

White's Pony Express address in Redmond was listed on the Leeper appraisal report given to Schrank in July 2010. Ex. 26. It was not until June 2012 that Schrank actually went to Redmond to verify that information. 2RP 796. No explanation was given for why Schrank waited two years to do that. And when she finally did do it, the information obtained from Pony Express was simply a rehash of what she already knew: White's Bellevue address and his phone number. 2RP 797.

After going to Pony Express, Schrank did a Google search of White, which turned up a website listing another email address from him. 2RP 800. Why it took two years to run this Google search is not explained. Nor is it explained why Schrank waited until 2013 to review White's email subscriber and phone records. 2RP 801-03.

It was not until late 2013 or 2014 that Schrank subpoenaed White's bank account records, more than three years after the investigation began. 2RP 811. These records showed Merritt wrote checks to White. 2RP 812. All of the information showing the crime of mortgage fraud occurred and pointing to White as the perpetrator was available in 2010. There is no sound reason why it took so long for Schrank to check White's bank accounts. Schrank also looked up Merritt on the Multiple Listing Service

and learned she was mortgage broker. 2RP 813. Schrank did an Accurant check on Merritt, showing her addresses and business history. 2RP 982-83. These databases were always available to be checked. Early in the investigation, Schrank knew Merritt was at the Sammamish address that was ultimately searched. 2RP 810.

The link between White and Merritt was there from the start for a reasonable, diligent investigator to follow up on: they shared the residence, Merritt owned the house at that address, White did appraisals, Merritt was a mortgage broker, Merritt cut checks to White in connection with the suspect appraisals. Reed and Schrank went over the reports he did and those he didn't at the very start of the investigation in 2010. 2RP 778-83. From this, Schrank knew which appraisal reports with which lenders were suspect, and so had a basis for learning through a review of loan records that Merritt was involved in some of them.

The trial court, in ruling the charges were filed within the statute of limitations, noted there was evidence showing White's involvement early on, which is why agent Schrank "was pursuing leads pertaining to him." 1RP 145. According to the court, Merritt "only came into the picture, really, at the time of the search warrant." 1RP 145. The court thought it significant that Merritt's original attorney made a good faith CrR 3.6 argument that there was no probable cause to search for materials in the

house pertaining to Merritt. IRP 145. The search provided the "benchmark" for Merritt's culpability. IRP 146. The limitation period began to run for Merritt in 2014 "at the latest," which was "within three years of actual discovery as to her culpability. Perhaps not to Mr. White's culpability, but I don't think you can require the State to find the other culpable parties based on what -- the speed with which they investigated the first person." IRP 145-46.

The court's ruling is flawed in several respects. First, its reliance on counsel challenging probable cause to search the residence for evidence on Merritt makes no sense. The court ruled there was probable cause, so counsel was wrong under the court's own ruling. That counsel made a losing but good faith argument to the contrary means nothing in relation to the statute of limitations issue. In challenging the search warrant, the burden was on the defense to show lack of probable cause. State v. Anderson, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001). Conversely, it is the State's burden to prove the information was filed within the statute of limitations period. Reeder, 181 Wn. App. at 921. Further, whether there is probable cause to search for evidence, or even probable cause to charge the person with a crime, is not the benchmark for determining whether a statute of limitations has run under the discovery rule. The dispositive question is when the evidence forming the basis for the charge could have

been discovered through the exercise of due diligence: "Actual knowledge of the fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it." Strong v. Clark, 56 Wn.2d 230, 232, 352 P.2d 183 (1960). The State needed to prove that it could not through due diligence have discovered Merritt's alleged criminal involvement in the charged mortgage fraud counts no sooner than within three years of filing the information charging those counts.

The court thought White and Merritt should be viewed differently because Merritt "only came into the picture . . . at the time of the search warrant" and State could not be required to "find the other culpable parties" based on the speed with which they investigated the original culpable party. 1RP 145-46. But Merritt could have come into the picture much earlier had a reasonably diligent investigation into White taken place. "A person who has notice of facts that are sufficient to put him or her upon inquiry notice is deemed to have notice of all facts that reasonable inquiry would disclose." 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 581, 146 P.3d 423 (2006). A diligent investigation into White's fraud would have uncovered Merritt's culpability sooner. Under the discovery rule, if the exercise of due diligence could have discovered the fraud related to one party in the course of investigating the fraud of another party, then the statute of limitations operates as a bar against both.

Sherbeck, 15 Wn. App. at 870. There is no sound reason why that principle should not apply here. The State charged Merritt and White with committing the same mortgage fraud crimes at issue here. There is no way to untether one from the other with respect to when the crimes would have been discovered through due diligence.

Further, the statute of limitations is not triggered by discovery of *the perpetrator* of the violation. Rather, the trigger is discovery of *the violation*. RCW 19.144.090(2). Applying the discovery rule, the question is when *the crime* could have been discovered through due diligence. A diligent investigation of the fraud connected to White beginning in 2010 could have discovered the fraud connected to White and Merritt in 2011 at the latest. The fraud detected in 2010 by Reed and passed on to Schrank formed a continuum with the mortgage fraud counts ultimately charged. Applying the discovery rule, the statute of limitations began to run more than three years before the State filed the amended information. The prosecution is time-barred. The convictions must be vacated.

3. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE MORTGAGE FRAUD CONVICTIONS BECAUSE THE CLAIMED VIOLATION DOES NOT RISE TO THE LEVEL OF A CRIMINAL ACT UNDER THE STATUTE.

The court found Merritt did not know White was an unlicensed appraiser and acquitted her of the identity theft charges. The court

nonetheless found Merritt guilty of mortgage fraud because she knew the written appraisal reports bore the name of Tom Reed when White was the actual appraiser. Misrepresentation of the identity of the appraiser is not a material fact. Nor did the State prove Merritt knew or intended for anyone to rely on the identity of the appraiser as the basis for securing a loan. The convictions must be reversed due to insufficient evidence.

a. Overview of the relevant law.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). To sustain a conviction following a bench trial, this Court must determine whether (1) the evidence supports the findings of fact; (2) the findings of fact support the conclusions of law; and (3) the conclusions of law support the judgment. State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008). Substantial evidence must support the findings of fact. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Conclusions of law are reviewed de novo. Stevenson, 128 Wn. App. at 193. Further, the sufficiency of the evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

b. Challenged findings of fact.

"Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The court found seven of the borrowers at issue "did not know that the appraisal report submitted to the lender by Merritt was not in fact prepared by Reed, but rather by White." CP 465-68 9 (FF A, B, C, D, F, H, J). Merritt challenges this finding as it relates to borrower Darazs. CP 466 (FF. C). Darazs testified that he had no recollection of reviewing the appraisal report and the name of Tom Reed on the appraisal report did not ring a bell. 2RP 681-82. Unlike the other borrowers at issue, Darazs did not testify to being unaware that the appraisal report submitted to the lender by Merritt was not in fact prepared by Reed, but rather by White. The prosecutor never posed the question, likely because Darazs' memory on

the subject was so poor. There is no evidentiary basis for the finding related to Darazs' knowledge.

The trial court also found "there is no indication anywhere on the appraisal reports that White was involved in the preparation of the appraisal or the report." CP 468 (FF L). Evidence showed the reports listed White's company — Washington Real Estate Services, Inc. — as the business, and included his email address and phone number. Ex. 147, 159, 174, 185, 197, 207, 219, 231, 244, 257. In this respect, there was an indication on the appraisal reports that White was involved in the preparation of the appraisal. Additional findings are challenged in the context of the argument presented below.

c. The evidence is insufficient to support conviction under RCW 19.144.080(1)(a) of the mortgage fraud statute because the State failed to prove Merritt misrepresented a material fact.

Merritt was convicted of violating RCW 19.144.080(1)(a)(i), (1)(a)(ii), (1)(b), (1)(c), and (1)(d). CP 469. RCW 19.144.080 provides in relevant part:

- (1) It is unlawful for any person in connection with the mortgage lending process to directly or indirectly:
 - (a)(i) Employ any scheme, device, or artifice to defraud or materially mislead any borrower during the lending process;
 - (ii) defraud or materially mislead any lender, defraud or materially mislead any person, or engage in any

unfair or deceptive practice toward any person related to the mortgage lending process; . . .

(b) Knowingly make any misstatement, misrepresentation, or omission related to the mortgage lending process knowing that it may be relied on by a mortgage lender, borrower, or any other party related to the mortgage lending process;

(c) Use or facilitate the use of any misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, related to the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party related to the mortgage lending process;

(d) Receive any proceeds or anything of value in connection with a residential mortgage closing that such person knew resulted from a violation of subsection (1), (2), or (3) of this section [(a), (b), or (c) of this subsection]

Criminal liability does not attach unless the State proves the defendant "knowingly violates RCW 19.144.080." RCW 19.144.090(1).

For starters, the State did not prove Merritt defrauded anyone. In the absence of a statutory definition, the words "defraud" must be given its common and ordinary meaning. State v. Simmons, 113 Wn. App. 29, 32, 51 P.3d 828 (2002). "Defraud" means "[t]o cause injury or loss to . . . by deceit." Simmons, 113 Wn. App. at 32 (citing Black's Law Dictionary, 434 (7th ed. 1999)). Even assuming what Merritt did qualifies as deceit, there is no evidence that the deceit caused anyone to suffer an injury or loss. The loans went through. The borrowers and the lenders got what they wanted out of the transaction.

The question then becomes whether Merritt materially misled anyone. There are no cases interpreting the mortgage fraud statute. However, the language of subsection (1) of RCW 19.144.080 is similar to that found in the securities fraud statute of the Washington State Securities Act (WSSA).⁷ For this reason, the securities fraud cases provide guidance to interpreting the meaning of subsection (1) of the mortgage fraud statute. See Spokane Cty. Health Dist. v. Brockett, 120 Wn.2d 140, 150, 839 P.2d 324 (1992) ("Similar interpretation should result where the language and subject matter of two statutes are similar.").

"To establish liability under the WSSA, the purchaser of a security must prove that the seller and/or others made material misrepresentations or omissions about the security." Stewart v. Estate of Steiner, 122 Wn. App. 258, 264, 93 P.3d 919 (2004). "A material fact is one that not only influences and affects the transaction, but also goes to its very essence and substance." 16A Wash. Prac., Tort Law And Practice § 19:3 (4th ed.). Stated another way, "[a] 'material fact' is one 'to which a reasonable

⁷ The securities fraud statute, RCW 21.20.010, provides: "It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly: (1) To employ any device, scheme, or artifice to defraud; (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

[person] would attach importance in determining his or her choice of action in the transaction in question." Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 114, 86 P.3d 1175 (2004) (quoting Aspelund v. Olerich, 56 Wn. App. 477, 481-82, 784 P.2d 179 (1990)). "A fact is also material if the maker of the representation knows or has reason to know that its recipient regards the matter as important in determining a choice of action, although a reasonable person would not regard it that way." 16A Wash. Prac., Tort Law And Practice § 19:3 (citing Restatement Second, Torts § 538(2)(b)). "Representations or nondisclosure as to matters that are merely collateral to the subject transaction are insufficient to support a claim for fraud." Id. This makes sense. It would be absurd for criminal liability to attach to immaterial misrepresentations of fact.

The identity of the appraiser was not a material fact of the mortgage transactions at issue. The provisions of RCW 19.144.020 give insight into what the legislature intended to be material terms of a residential mortgage loan. RCW 19.144.020(1) provides: "In addition to any other requirements under federal or state law, a residential mortgage loan may not be made unless *a disclosure summary of all material terms*, as adopted by the department in subsection (2) of this section, is placed on a separate sheet of paper and has been provided by a financial institution

to the borrower within three business days following receipt of a loan application." (emphasis added).

RCW 19.144.020(2) directs the Department of Financial Institutions to "adopt, by rule, a disclosure summary form with a content and format containing simple, plain-language terms that are reasonably understandable to the average person without the aid of third-party resources and shall include, but not be limited to, the following items: Fees and discount points on the loan; interest rates of the loan; broker fees; the broker's yield spread premium as a dollar amount; whether the loan contains prepayment penalties; whether the loan contains a balloon payment; whether the property taxes and property insurance are escrowed; whether the loan payments will adjust at the fully indexed rates; and whether there is a price added or premium charged because the loan is based on reduced documentation."⁸

⁸ The Department rule listing the material terms of a mortgage loan is found at WAC 208-600-200. WAC 208-600-200(4) provides: "The disclosure summary must provide at a minimum the following material terms: (a) Loan fees that are charged and retained by the broker or lender (for example, processing, underwriting, or document preparation fees). These fees go on the form under "Other Fees." (b) Discount points the borrower will pay to reduce the interest rate. (c) Interest rates (initial, fully indexed, maximum). (d) Broker fee or lender's origination fee. (e) Broker yield spread premium, expressed as a dollar amount. (f) Whether the loan contains a prepayment penalty. (g) Whether the loan contains a balloon payment. (h) Whether the property taxes and property insurance are included (escrowed) in the loan payment. (i) Amount of the initial loan

The identity of the person who did the appraisal, or who signs an appraisal report, is not among the listed material terms of a mortgage loan. While the material terms listed in the statute and regulation do not purport to be exclusive, it is a basic principle of statutory interpretation that "general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or 'comparable to' the specific terms." State v. Larson, 184 Wn.2d 843, 849, 365 P.3d 740 (2015) (quoting Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 151, 3 P.3d 741 (2000)). Looking at the list of those things that are material terms, it is clear the legislature intended to protect borrowers from deceptive fees, costs and payments. The "fraud" found by the trial court, consisting of a misrepresentation that Reed, not White, did the appraisal report, does not compare.

WAC 208-660-500(3), meanwhile, contains a long list of prohibited business practices along the same lines as those presented in RCW 19.144.020(2). Knowing one person did the appraisal but knowing another person's signature appears on the appraisal report does not make the list and does not bear a family resemblance to the prohibited practices.

payment. (j) Amount of the fully indexed loan payment. (k) Amount of the maximum loan payment. (l) Whether the loan cost or rate is based on reduced documentation. (m) Principal amount of the loan. (n) The date the loan resets to a higher interest rate. (o) Whether the interest rate is locked."

The legislative purpose in enacting the mortgage fraud laws can be taken into account in determining what constitutes a material term of the transaction, and what type of information may be relied on as part of the transaction. In its statement of intent, the legislature found "responsible mortgage lending and homeownership are important to the citizens of the state of Washington. The legislature declares that protecting our residents and our economy from the threat of widespread foreclosures and providing homeowners with access to residential mortgage loans on fair and equitable terms is in the public interest. The legislature further finds that chapter 108, Laws of 2008 is necessary to encourage responsible lending, protect borrowers, and preserve access to credit in the residential real estate lending market." RCW 19.144.005.

This statement of intent confirms Merritt's argument that the kind of misrepresentation found by the trial court does not constitute fraud under the statute. Representing that one appraiser did the appraisal in the report when someone else actually did the appraisal has nothing to do with protecting residents and the economy from foreclosures. The kind of misrepresentation at issue does not impair homeowner access to residential mortgage loans on fair and equitable terms. The identity of the appraiser has no relationship to a borrower obtaining a mortgage loan on fair and equitable terms. The appraisal must be accurate in terms of

assessing home value. 2RP 137, 865. The assessed value cannot be lowballed or inflated because that can have deleterious consequences for the borrower and lender down the road. That's what counts. The identity of the particular individual who did the appraisal doesn't. Appraisers are fungible. Each and every one of them performs the same task with the same goal: providing an accurate appraisal of the value of the property.

The trial court found the presence of a "facially valid" appraisal is material to the granting of a residential mortgage. CP 468 (FF M). As a general matter, this statement is accurate. The value assigned to the property is indisputably a material term because that number affects the loan amount and terms. But the State presented no evidence, and the trial court did not find, that the appraisal values in the reports done by White that are the subject of the mortgage fraud charges against Merritt were in any way inaccurate.

It cannot be plausibly maintained that *every* misstatement in an appraisal report is a material term of a residential mortgage loan. As argued by defense counsel, suppose the phone number or address of the appraiser is listed incorrectly in the report, and the mortgage broker knew it. 1RP 149-50, 159. That is a technical inaccuracy, but no one would claim such an inaccuracy subjected the loan originator to criminal liability. The point is that some inaccuracies do not rise to the level of a criminal

violation. There must be a division between some misrepresentations that trigger criminal liability and others that don't. See United States v. Beer, 518 F.2d 168, 170-71 (5th Cir. 1975) (reading materiality requirement into second clause of 18 U.S.C. § 1001 (knowingly and wilfully making a false statement to FDIC) in order to exclude "trivial" falsehoods from the purview of the statute).

Defense counsel acknowledged the licensed status of an appraiser is a material fact. 1RP 148; CP 297-98. But the trial court did not find Merritt knew White was unlicensed. 1RP 35-36. The State did not prove Merritt knowingly used an appraisal report that was done by an unlicensed appraiser.

The only knowing misrepresentation is that Merritt knew White did the appraisals but that the appraisal report listed Tom Reed as the appraiser. The specific identity of the appraiser, however, is not material, at least in the absence of evidence that the borrower or lender attached particular significance to the appraiser's identity. The State did not prove the borrowers or lenders knew who Tom Reed was or attached significance to the fact that his name was on the appraisals rather than White's. Nor is there any evidence that Merritt had special reason to know any borrower or lender may rely on this information, despite it not otherwise being a material term of the lending process. The State did not

establish that any borrower or lender would have made a different decision on the loan transaction if they had known White, rather than Reed, did the appraisal. Under the circumstances of this case, the identity of the appraiser is not a fact "to which a reasonable [person] would attach importance in determining his or her choice of action in the transaction in question." Guarino, 122 Wn. App. at 114.

In fact, borrowers Morehouse, Holm and Bergman knew White did the appraisals, so they were never misled as to the identity of the actual appraiser. 2RP 308, 399-400, 697. More than that, the State elicited no testimony from any borrower that they cared about who did the report and whether any distinction between White and Reed made any difference to them. There is no evidence that any lender or borrower made a different decision, or even would have made a different decision, if they had known in fact that the appraisal was done by another appraiser.

For much the same reason, the State did not prove Merritt knew the name of the appraiser was material. For criminal liability to attach, the State must prove a knowing violation, and so must prove Merritt knew she was materially misleading another. RCW 19.144.090(1); cf. State v. Ou, 156 Wn. App. 899, 904 n.4, 234 P.3d 1186 (2010) (to prove making a false statement in violation of RCW 9A.76.175, the State must prove "the defendant knew both that the statement was material and that it was false

or misleading."). The State did not prove Merritt knew White was unlicensed. And absent that finding, all that's left is that Merritt knew Reed's name was on the report when White in fact did them. There is no evidence the appraisals done by White in Reed's name were inaccurate in terms of assigning a value to a given property. No evidence was presented that anyone involved in the lending process attached significance to the identity of the appraiser. Under these circumstances, the evidence is insufficient to prove Merritt knew the misrepresentation was material. The court found "Merritt knew that the appraisals purportedly signed by Reed would be relied on by the mortgage lender, the borrower and others in the lending process." CP 468 (FF N). To the extent this finding is read to mean Merritt knew anyone involved in the lending process would treat the identity of the appraiser as a material fact, the finding is unsupported by substantial evidence for the reasons set forth above.

Even if the State proved the misrepresentation was material and Merritt knew it was material, there is still insufficient evidence to convict under RCW 19.144.080(1)(a) because the State did not prove reliance on the misrepresentation. Again, comparison to the securities fraud statute sheds light on the matter. The language used in subsection (1)(a) of the mortgage fraud statute is similar to that used in the securities fraud provision codified at RCW 21.20.010 and so should be interpreted

similarly. The securities fraud provision has been interpreted to require reliance upon the misrepresentation. Guarino, 122 Wn. App. at 109. Based on similar language in the mortgage fraud statute, (1)(a) should be interpreted to require reliance as well.

Reasonable inferences from the evidence show the borrowers and lenders relied on the presence of an appraisal report as part of the lending process. This only makes sense because an appraisal is a necessary part of the process. But the evidence does not show anyone involved in the lending process actually relied on the fact that Tom Reed's name appeared on the appraisal reports. The State did not call as a witness any lender involved in the mortgage fraud counts, so there is no testimony from the lenders that they actually relied on the representation that Tom Reed did the appraisal as a basis for giving a loan. Further, there is no showing that any borrower relied on the misrepresented fact that Tom Reed did the appraisal as a basis for securing a loan. The borrowers' testimony makes clear that the identity of the appraiser did not matter to them. No one testified that it did. To the extent the court's finding of fact "N" (CP 468) is read to mean anyone in the lending process actually relied on the misrepresentation at issue, the finding is unsupported by substantial evidence for the reasons set forth above.

- d. The evidence is insufficient to support conviction under RCW 19.144.080(1)(b) of the mortgage fraud statute because the State failed to prove Merritt made a misrepresentation as to a material fact.**

Subsection (1)(b) makes it unlawful to "Knowingly *make* any misstatement, misrepresentation, or omission related to the mortgage lending process knowing that it may be relied on by a mortgage lender, borrower, or any other party related to the mortgage lending process." RCW 19.144.080(1)(b) (emphasis added). There is insufficient evidence to find Merritt guilty under this subsection because she did not *make* the misstatement at issue. White made the misstatement. White prepared the appraisal reports with Tom Reed's name and signature on them, which constitutes the misstatement. Merritt didn't prepare the appraisal reports. At most, she used the appraisals in the sense of submitting them as part of the loan process. But she didn't make the misstatement herself. Making a misstatement and using a misstatement are two different things under the statute and carry different mens rea requirements.

Comparison between subsection (1)(b) and (1)(c) makes the distinction between making a misstatement and using a misstatement readily apparent. Unlike (1)(b), (1)(c) makes it unlawful to "*Use or facilitate the use* of any misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or

omission, related to the mortgage lending process *with the intention that it be relied on* by a mortgage lender, borrower, or any other party related to the mortgage lending process." RCW 19.144.080(1)(c). When a person merely uses or facilitates the misstatement, a higher burden of proof for the requisite mens rea applies. Instead of merely proving that the person *knew* the misstatement may be relied on, as in (1)(b), the State under (1)(c) must prove the person *intended* that the misstatement be relied on.

The court found Merritt knew the appraisals purportedly signed by Reed would be relied on by those in the lending process and that she intentionally "provided" these invalid appraisals to others. CP 468 (FF N). This finding implicates the "use" provision of (1)(c), not (1)(b). The court did not find Merritt made any misrepresentation, but rather provided one. Because she did not *make* the misrepresentation, the evidence is insufficient to convict under RCW 19.144.080(1)(b).

- e. The evidence is insufficient to support conviction under RCW 19.144.080(1)(c) of the mortgage fraud statute because the State failed to prove Merritt intended for others to rely on the misrepresentation.**

Subsection (1)(c) makes it unlawful to "[u]se or facilitate the use of any misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, related to the mortgage lending process *with the intention that it be relied on* by a

mortgage lender, borrower, or any other party related to the mortgage lending process." RCW 19.144.080(1)(b) (emphasis added).

The trial court made no factual finding to support a conclusion of law that Merritt intended that the misrepresentation — consisting of the discrepancy between who did the appraisal and who signed the appraisal — be relied on by any party related to the mortgage lending process. The court entered a boilerplate conclusion of law to that effect. CP 469 (CL II-3). But in order for that conclusion of law to stand on appeal, there must be a factual finding to support it. Enlow, 143 Wn. App. at 467. The court found Merritt *knew* the appraisals purportedly signed by Reed would be relied on by the lender, the borrower and others in the lending process. CP 468 (FF N). The court did not find that Merritt *intended* the appraisals purportedly signed by Reed would be relied on by the lender, the borrower and others in the lending process. For that reason, the factual findings do not support the trial court's conclusion of law that Merritt violated RCW 19.144.080(1)(c). This conclusion naturally follows from the court's acquittal on the identity theft charges, finding that the State did not prove Merritt intended to commit a crime. 1RP 33, 35-36.

Even if the court had found intent, such a finding would be unsupported by the evidence. Merritt testified that she thought White and Reed were partners in the appraisal business, they co-owned two

businesses under two monikers, and that Reed was the administrator. 2RP 1032, 1042, 1059-60, 1091. This is why she did not question the use of Reed's name and signature on the appraisal reports done by White. 2RP 1032, 1042-43. She thought Reed was authorized to sign on White's behalf. 2RP 1077. Her testimony does not show that she intended for any borrower or lender to rely on the misrepresentation as to who actually did the appraisal versus whose name appears on the appraisal.

The court was not bound to credit Merritt's testimony on this point. But the fact that the Court found she did not intend to commit a crime in relation to the identity theft counts strongly suggests the court did just that. Even if the court did not credit Merritt's testimony, the evidence, when looked at in the light most favorable to the State, still fails to meet the legal requirement. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Further, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Rich, 184 Wn.2d at 903 (quoting State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)). Criminal intent cannot be inferred "from evidence that is patently equivocal." Vasquez, 178 Wn.2d at 14. "Rather, inferences of intent may be drawn only 'from conduct that plainly indicates such intent as a matter of logical

probability.'" Id. (quoting State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985)). The evidence surrounding the question of intent in Merritt's case is equivocal because of the limited nature of the misrepresentation at issue. Even setting aside her testimony on the matter, the circumstantial evidence is such that any conclusion that she intended anyone in the lending process to rely on the name of the appraiser amounts to speculation. No one involved in the lending process testified that the name of the appraiser meant anything to them.

f. The evidence is insufficient to support conviction under RCW 19.144.080(1)(b) and (c) of the mortgage fraud statute because the State failed to prove the misrepresentation known to be relied on or intended to be relied on was material to the transaction.

Unlike subsection (1)(a), subsections (1)(b) and (c) of RCW 19.144.080 do not refer to schemes, devices or artifices that "materially mislead." The State argued below that the difference in language shows Merritt could be convicted under subsections (1)(b) and (c) even if the misrepresentation she know may have been relied on or intended be relied on was immaterial to the transaction. CP 525-28. The scheme is more nuanced than the State appreciates. While subsection (b) and (c) do not use the word "material," the concept of reliance is bound to materiality.

Once again, comparison to the securities fraud statute sheds light on the matter. As pointed out, the language used in subsection (1)(a) and

(b) of the mortgage fraud statute is similar to that used in the securities fraud provision codified at RCW 21.20.010. The securities fraud provision has been interpreted to require reliance upon the misrepresentations or omissions. Guarino, 122 Wn. App. at 109. Under RCW 21.20.010, "a plaintiff need neither plead nor prove that defendant intended to deceive him by the misrepresentation or omission. It is sufficient that the plaintiff relied upon the misrepresentation or omission of a material fact." Shermer v. Baker, 2 Wn. App. 845, 857-58, 472 P.2d 589, 597 (1970). Reliance on a material misrepresentation is measured under an objective "reasonable person" standard. Stewart, 122 Wn. App. at 265 n.9.

Sections (1)(b) and (c) of the mortgage fraud provision part ways with the securities fraud statute in some respects. Unlike the securities fraud statute, subsections (1)(b) and (c) of the mortgage fraud statute do not require actual reliance on the misrepresentation. (1)(b) requires the person make a misrepresentation "knowing that it may be relied on." RCW 19.144.080(1)(b). Similarly, (1)(c) requires the person use a misrepresentation "with the intention that it be relied on." The focus in subsections (b) and (c) is on the state of mind of the person making or using the misrepresentation, not whether the target of the misrepresentation actually relied on it. In terms of reliance, the securities

fraud statute does not require any mental state on the part of the person making the misrepresentation. Shermer, 2 Wn. App. at 857-58. The mortgage fraud statute does.

"Under rules of statutory construction each provision of a statute should be read together (*in pari materia*) with other provisions in order to determine the legislative intent underlying the entire statutory scheme." State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (2000). "The purpose of interpreting statutory provisions together with related provisions is to achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes." Chapman, 140 Wn.2d at 448. With that principle in mind, it is apparent the legislature intended for subsection (a) of the mortgage fraud statute to require a showing of actual reliance on the misrepresentation. Subsections (b) and (c), on the other hand, do not require actual reliance. Instead, a defendant's subjective knowledge that the misrepresentation may be relied on or intention that it be relied on is enough for liability to attach.

But subsections (b) and (c) legislature still require that the misrepresentation be connected to a material issue. Reliance presupposes a reason to rely. It would be absurd if a defendant could be convicted of a class B felony if she knew or intended that someone rely on an immaterial misrepresentation — a misrepresentation that did not affect the transaction

and for which a reasonable person would not attach importance in determining her course of action. We presume the legislature does not intend absurd results. J.P., 149 Wn.2d at 450. Misrepresentation on a collateral matter that does not affect and would not affect a person's decision-making process in entering a transaction does not encompass an evil to be guarded against under the mortgage fraud scheme. This conclusion is also in accord with the principle that "criminal statutes are to be strictly construed with doubts as to whether conduct was criminal resolved in favor of the defendant." State v. Russell, 84 Wn. App. 1, 4, 925 P.2d 633 (1996). The legislature did not intend for immaterial misrepresentations to be criminalized. As argued, the misrepresentation at issue was not material to the loan transaction. For this reason, the State failed to prove the misrepresentation known to be relied on or intended to be relied on was material to the transaction.

g. The evidence is insufficient to support conviction under RCW 19.144.080(1)(d) of the mortgage fraud statute because the State failed to prove a violation of subsections (1)(a), (b) or (c).

RCW 19.144.080(1)(d) makes it unlawful to "[r]eceive any proceeds or anything of value in connection with a residential mortgage closing that such person knew resulted from a violation of subsection (1), (2), or (3) of this section [(a), (b), or (c) of this subsection]." The trial

court found Merritt received payment in the form of an origination fee at the closing of the loans. CP 468 (FF O). But as argued above, the State did not prove Merritt violated (a), (b) or (c) of RCW 19.144.080(1). As a result, the State necessarily failed to prove that Merritt received proceeds or anything of value that she knew resulted from a violation of the statute. There was no violation of the statute. The court therefore erred in convicting Merritt under this means and in finding Merritt received payment knowing that the residential mortgages had been obtained as a result of mortgage fraud. CP 468-69 (FF O, CL II-4).

h. The remedy is dismissal.

Where insufficient evidence supports conviction, the charges must be dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). That is Merritt's remedy.

D. CONCLUSION

For the reasons set forth, Merritt requests reversal of the convictions.

DATED this 31st day of October 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS WSBA No. 37301

Office ID No. 91051

Attorneys for Appellant

APPENDIX A

FILED
KING COUNTY, WASHINGTON

DEC 03 2015

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DIANA JOLINE MERRITT,

Defendant.

No. 14-C-02955-8 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d)

THE ABOVE-ENTITLED CAUSE having come on for trial from August 18 through September before the undersigned judge in the above-entitled court; the State of Washington having been represented by Deputy Prosecuting Attorneys Jennifer Atchison, Hugo Torres and T. MacKenzie Brown; the defendant appearing in person and having been represented by her attorney, William Fligeltaub; the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

The following events took place within King County, Washington:

- A. [Count 45] Between June 12, 2008 and August 6, 2008, Kirk Lakey applied for and obtained a residential mortgage through Defendant Diana Merritt's mortgage brokerage company, Merit Home Finance. Merritt was the loan originator and ordered the appraisal from the co-defendant, Douglas White. The appraisal report provided to Merritt by White (Ex. 147) stated that it was prepared by Tom Reed, a licensed certified residential appraiser and contained his electronic signature. Merritt provided the appraisal report to the lender as the basis for the value of the residential property. Lakey did not know that the appraisal report submitted to the lender by Merritt was not in fact prepared by Reed,

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 1

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110

1 but rather by White. At the closing of the loan, Merritt received payment for brokering
2 the mortgage in the form of an origination fee.

3 B. [Count 46] Between June 21, 2008 and July 7, 2008, Karen Pain applied for and obtained
4 a residential mortgage through Defendant Diana Merritt's mortgage brokerage company,
5 Merit Home Finance. Merritt was the loan originator and ordered the appraisal from the
6 co-defendant, Douglas White. The appraisal report provided to Merritt by White (Ex.
7 160) stated that it was prepared by Tom Reed, a licensed certified residential appraiser
and contained his electronic signature. Merritt provided the appraisal report to the lender
as the basis for the value of the residential property. Pain did not know that the appraisal
report submitted to the lender by Merritt was not in fact prepared by Reed, but rather by
White. At the closing of the loan, Merritt received payment for brokering the mortgage
in the form of an origination fee.

8 C. [Count 47] Between September 7, 2008 and October 6, 2008, Andaras Darazs applied for
9 and obtained a residential mortgage through Defendant Diana Merritt's mortgage
10 brokerage company, Merit Home Finance. Merritt was the loan originator and ordered
11 the appraisal from the co-defendant, Douglas White. The appraisal report provided to
12 Merritt by White (Ex. 174) stated that it was prepared by Tom Reed, a licensed certified
13 residential appraiser and contained his electronic signature. Merritt provided the
14 appraisal report to the lender as the basis for the value of the residential property. Darazs
15 did not know that the appraisal report submitted to the lender by Merritt was not in fact
16 prepared by Reed, but rather by White. At the closing of the loan, Merritt received
17 payment for brokering the mortgage in the form of an origination fee.

18 D. [Count 48] Between September 8, 2008 and September 30, 2008, Linda and Michael
19 Tricker applied for and obtained a residential mortgage through Defendant Diana
20 Merritt's mortgage brokerage company, Merit Home Finance. Merritt was the loan
21 originator and ordered the appraisal from the co-defendant, Douglas White. The
22 appraisal report provided to Merritt by White (Ex. 185) stated that it was prepared by
23 Tom Reed, a licensed certified residential appraiser and contained his electronic
24 signature. Merritt provided the appraisal report to the lender as the basis for the value of
the residential property. Linda Tricker did not know that the appraisal report submitted
to the lender by Merritt was not in fact prepared by Reed, but rather by White. At the
closing of the loan, Merritt received payment for brokering the mortgage in the form of
an origination fee.

E. [Count 49] Between September 9, 2008 and September 24, 2008, David Sorlie and
Madeline Morehouse applied for and obtained a residential mortgage through Defendant
Diana Merritt's mortgage brokerage company, Merit Home Finance. Merritt was the
loan originator and ordered the appraisal from the co-defendant, Douglas White. The
appraisal report provided to Merritt by White (Ex. 197) stated that it was prepared by
Tom Reed, a licensed certified residential appraiser and contained his electronic
signature. Merritt provided the appraisal report to the lender as the basis for the value of
the residential property. Morehouse knew that Reed had not in fact prepared the
appraisal report, but was told that sometimes Reed signed the reports for White, who

1 Morehouse believed to be a licensed appraiser based on representations made to her. At
2 the closing of the loan, Merritt received payment for brokering the mortgage in the form
of an origination fee.

3 F. [Count 50] Between September 12, 2008 and October 8, 2008, Kelly Barber applied for
4 and obtained a residential mortgage through Defendant Diana Merritt's mortgage
brokerage company, Merit Home Finance. Merritt was the loan originator and ordered
5 the appraisal from the co-defendant, Douglas White. The appraisal report provided to
Merritt by White (Ex. 207) stated that it was prepared by Tom Reed, a licensed certified
6 residential appraiser and contained his electronic signature. Merritt provided the
appraisal report to the lender as the basis for the value of the residential property. Barber
7 did not know that the appraisal report submitted to the lender by Merritt was not in fact
prepared by Reed, but rather by White. At the closing of the loan, Merritt received
8 payment for brokering the mortgage in the form of an origination fee.

9 G. [Count 51] Between December 26, 2008 and January 29, 2009, Kevin and Susan Holm
applied for and obtained a residential mortgage through Defendant Diana Merritt's
10 mortgage brokerage company, Merit Home Finance. Merritt was the loan originator and
ordered the appraisal from the co-defendant, Douglas White. The appraisal report
11 provided to Merritt by White (Ex. 219) stated that it was prepared by Tom Reed, a
licensed certified residential appraiser and contained his electronic signature. Merritt
12 provided the appraisal report to the lender as the basis for the value of the residential
property. Susan Holm did not know that the appraisal report submitted to the lender by
13 Merritt stated that it was prepared by Reed, rather White, who she believed had
completed the appraisal. At the closing of the loan, Merritt received payment for
14 brokering the mortgage in the form of an origination fee.

15 H. [Count 52] Between December 8, 2008 and January 5, 2009, Antoinette Crider applied
for and obtained a residential mortgage through Defendant Diana Merritt's mortgage
16 brokerage company, Merit Home Finance. Merritt was the loan originator and ordered
the appraisal from the co-defendant, Douglas White. The appraisal report provided to
17 Merritt by White (Ex. 231) stated that it was prepared by Tom Reed, a licensed certified
residential appraiser and contained his electronic signature. Merritt provided the
18 appraisal report to the lender as the basis for the value of the residential property. Crider
did not know that the appraisal report submitted to the lender by Merritt was not in fact
19 prepared by Reed, but rather by White. At the closing of the loan, Merritt received
payment for brokering the mortgage in the form of an origination fee.

20 I. [Count 53] Between December 19, 2008 and February 3, 2009, Danial and Shelly
Bergman applied for and obtained a residential mortgage through Defendant Diana
21 Merritt's mortgage brokerage company, Merit Home Finance. Merritt was the loan
originator and ordered the appraisal from the co-defendant, Douglas White. The
22 appraisal report provided to Merritt by White (Ex. 244) stated that it was prepared by
Tom Reed, a licensed certified residential appraiser and contained his electronic
23 signature. Merritt provided the appraisal report to the lender as the basis for the value of
the residential property. Shelly Bergman did not know that the appraisal report submitted
24

1 to the lender by Merritt stated that it was prepared by Reed, rather White, who she
2 believed had completed the appraisal. At the closing of the loan, Merritt received
3 payment for brokering the mortgage in the form of an origination fee.

4 J. [Count 55] Between May 7, 2009 and June 10, 2009, Debbie and Jon Nelson applied for
5 and obtained a residential mortgage through Defendant Diana Merritt's mortgage
6 brokerage company, Merit Home Finance. Merritt was the loan originator and ordered
7 the appraisal from the co-defendant, Douglas White. The appraisal report provided to
8 Merritt by White (Ex. 257) stated that it was prepared by Tom Reed, a licensed certified
9 residential appraiser and contained his electronic signature. Merritt provided the
10 appraisal report to the lender as the basis for the value of the residential property. Jon
11 Nelson did not know that the appraisal report submitted to the lender by Merritt was not
12 in fact prepared by Reed, but rather by White. At the closing of the loan, Merritt received
13 payment for brokering the mortgage in the form of an origination fee.

14 K. As to each count, Merritt was acting in connection with the making, brokering, obtaining
15 or modifying of a residential mortgage loan.

16 L. As to each count, Merritt knew that the respective appraisal listed Tom Reed as the
17 appraiser and bore his electronic signature. Merritt also knew that Reed did not do the
18 appraisals; in fact, she hired Douglas White, the co-defendant, to do them. There is no
19 indication anywhere on the appraisal reports that White was involved in the preparation
20 of the appraisal or the report, irrespective of whether White had a certified residential
21 appraiser license.

22 M. The appraisal reports contained repeated assertions and certifications on behalf of the
23 listed appraiser regarding his opinions, qualifications and the work done. Anyone
24 reading these appraisals would reasonably conclude that the appraisal reports were
completed by a licensed certified residential appraiser named Tom Reed. An appraisal is
an essential element of the lending process. Without a valid appraisal by a licensed
certified residential appraiser, a loan will not be forthcoming. Therefore, a facially valid
appraisal is a material aspect of the mortgage lending process.

N. Based on her knowledge of the mortgage lending process, Merritt knew that the
appraisals purportedly signed by Reed would be relied upon by the mortgage lender, the
borrower and others in the lending process. By intentionally providing these invalid
appraisals to others involved in the mortgage lending process, Merritt employed an
artifice, scheme, or device to materially mislead borrowers and lenders alike, knowing
full well that the lenders, borrowers and others would rely upon these misrepresentations.

O. Merritt received monetary payment upon the closing of each of these loans with the
knowledge that these residential mortgages had been obtained as a result of mortgage
fraud, in violation of RCW 19.144.080 (1)(a) and (b), (2), and (3) and RCW 19.144.090.

II.

And having made those Findings of Fact, the Court also now enters the following:

CONCLUSIONS OF LAW

I.

The above-entitled court has jurisdiction of the subject matter and of the defendant Diana Joline Merritt in the above-entitled cause.

II.

The following elements of the crimes charged have been proven by the State beyond a reasonable doubt:

On the date or dates specified for each count described in the Findings of Fact, in conjunction with making, brokering, obtaining, or modifying a residential mortgage the defendant directly or indirectly knowingly:

(1)(a) Employed any scheme, device or artifice to defraud or materially mislead any borrower during the lending process; (b) defrauded or materially misled any lender or person, or engaged in any unfair or deceptive practice toward any person in the lending process; and

(2) Made any misstatement, misrepresentation or omission during the mortgage lending process knowing that it may be relied upon by a mortgage lender, borrower or any other party to the mortgage process; and

(3) Used or facilitated the use of any misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower or any other party to the mortgage lending process; and

(4) Received any proceeds or anything of value in connection with the residential mortgage closing that such person knew resulted from a violation of subsection (1), (2) or (3) of this section; and

(5) Any of these acts occurred in the State of Washington

III.

The defendant is guilty of the crime of Mortgage Fraud as charged in Counts 45-53 and Count 55 of the Amended Information.¹ In addition to the writing findings and conclusions, the Court incorporates by reference its oral Findings of Fact and Conclusions of Law. Ms. Merritt is acquitted of all other counts charged in the information. Count 54 was dismissed on IV. motion by the State. ~~Part of information.~~

Jmr
2/3/15

Judgment should be entered in accordance with Conclusion of Law III.

DONE IN OPEN COURT this 3rd day of Dec., 2015.

Jeffrey Ramsdell

JUDGE *Jeffrey W. Ramsdell*

JEFFREY RAMSDELL

PRESENTED BY:

DANIEL T. SATTERBERG
KING COUNTY PROSECUTING ATTORNEY

Jennifer S. Atchison

JENNIFER S. ATCHISON, WSBA #33263
DEPUTY PROSECUTING ATTORNEY

TIMOTHY K. FORD, WSBA #5986
ATTORNEY FOR DEFENDANT

¹ Count 54 was dismissed by the State prior to opening statements.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 6

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