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Case #: 1043783

Supreme Court No. _____
Court of Appeals No. 39581-2-III

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CURTIS PACK,
Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

Curtis Pack was a semi-retired carpenter trying to make ends meet while struggling with a serious heart condition. He contracted with one client to build a woodshop, and with a second client to build a barn. He received down payments for each project and sought building permits.

However, in the following months, Mr. Pack became increasingly ill and was unable to work. With the down payments spent, he was also unable to provide refunds.

Mr. Pack was charged with two counts of theft in the first degree and convicted following a bench trial. But based on the trial court's factual findings, the State failed to prove Mr. Pack intended to commit theft. This Court should accept review to ensure that the sufficiency challenge is assessed under the appropriate appellate standard.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Curtis Pack, the petitioner, asks this Court to review the opinion of the Court of Appeals in *State v. Pack*, No. 39581-5-2-III (filed June 10, 2025) (“Op.”).

C. ISSUES PRESENTED FOR REVIEW

1. To sustain a conviction, the State must prove every essential element of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); U.S. Const. amend. XIV. In *State v. Homan*, 181 Wn.2d 102, 330 P.3d 182 (2014), this Court held that appellate review of a sufficiency claim following a bench trial “is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *Id.* at 105–106.

- a. Here, Division III declined to apply *Homan*, instead holding that “a court considering a challenge to the sufficiency of evidence is required to consider the entire record, in a light most favorable to the State, to

determine if any ‘rational trier of fact could have found guilt beyond a reasonable doubt.’” Op. at 10 (quoting *State v. Green*, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980) (citing *Jackson*)). Review is warranted because the Court of Appeals’ decision conflicts with this Court’s precedent in *Homan*.¹ RAP 13.4(b)(1).

- b. Even under the *Jackson/Green* standard, which requires a searching review of the entire record in the light most favorable to the State, the State did not prove several essential elements of theft in the first degree. Specifically, the State failed to prove Mr. Pack (1) had the intent to deprive others of their property or (2) that he committed theft by any of the charged alternative means. This Court should take

¹ This Court recently granted review on the issue of whether *Homan* remains good law. *State v. Roberts*, 4 Wn.3d 1009, 564 P.3d 547 (2025). The case was argued May 27, 2025.

review as the theft convictions violate Mr. Pack's

Fourteenth Amendment rights. RAP 13.4(b)(3).

2. Restitution must be based on easily ascertainable damages for injury to or loss of property and proved by a preponderance of the evidence. Here, the court ordered Mr. Pack to pay restitution without considering the \$12,000 one client received from Mr. Pack's bond company. The court also ordered Mr. Pack to pay another client an amount of restitution greater than his actual damages. To the extent counsel did not object to the amount of restitution, this was both ineffective and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); U.S. Const. amend. VI. Yet the Court of Appeals declined to address Mr. Pack's ineffective assistance of counsel claim, reasoning he had only provided "[p]assing treatment" of the issue. Op. at 20. Contrary to the Court of Appeals' conclusion, Mr. Pack fully briefed the issue, including assigning error to defense counsel's failure to object and providing the Court of Appeals with on-point authority, *State v.*

Hassan, 184 Wn. App. 140, 336 P.3d 99 (2014). Because the Court of Appeals refused to consider whether Mr. Pack's attorney was ineffective pursuant to *Hassan*, review is warranted. RAP 13.4(b)(2).

D. STATEMENT OF THE CASE

Curtis Pack is 68 years old and has no criminal history. CP 17. A semi-retired carpenter, he does small construction projects to make ends meet. CP 59. He also suffers from several serious health issues, including a heart condition. RP 46-47.

In December 2017, Mr. Pack agreed to build a woodshop for Mark Wescott. CP 226. He put together a contract for Mr. Wescott that included a project proposal. *Id.* Upon signing the contract, Mr. Wescott gave Mr. Pack two checks totaling \$16,155.88 as a down payment on the project. *Id.* at 192-194. The contract did not specify Mr. Pack was required to use any of these funds for specific materials or parts of the project. *Id.* at 195.

In February 2018, Mr. Pack agreed to build James Carroll² a pole barn on his property. *Id.* at 140-43. Mr. Pack and Mr. Carroll signed a contract that included a project proposal. *Id.* Mr. Carroll paid Mr. Pack \$25,933.95 as a down payment. *Id.* at 137. Again, the contract did not specify that Mr. Pack was required to use the down payment for a specific part of the project. *Id.* at 140-43.

Mr. Pack submitted building permit applications for both projects. *Id.* at 148. The permit for Mr. Wescott's project was approved in February 2018 and the permit for Mr. Carroll's project was approved in May 2018. *Id.* at 81, 206.

However, in Spring 2018, Mr. Pack became increasingly ill. *Id.* at 149, 270, 273; RP 46. He was unable to work. RP 47. He was initially misdiagnosed with bronchitis, but

² The record variously spells Mr. Carroll's last name "Carrol" and "Carroll." Although the former appears in the information, CP 1, the latter appears to be how Mr. Carroll actually spells his name.

ultimately diagnosed with a heart condition and underwent open heart surgery for three blocked arteries. *Id.*

When Mr. Wescott corresponded with Mr. Pack, he explained that he was very sick and unable to work. CP 301, 304. Mr. Wescott and Mr. Carroll eventually became impatient with the construction delays, and both men ultimately asked for a refund from Mr. Pack. *Id.*; *see also* CP 181; RP 42. Mr. Pack could not refund either man and ultimately stopped communicating with them. *Id.*

Mr. Wescott filed a bond claim with Mr. Pack's bond company, ultimately recovering \$12,000. CP 255–57. Mr. Carroll repeatedly contacted the Benton County Sheriff's Department, pushing for the filing of criminal charges against Mr. Pack. *Id.* at 188–92.

In October 2018, the State charged Mr. Pack with two counts of theft in the first degree. CP 1. The case languished on the docket for nearly four years. In 2022, Mr. Pack agreed to a stipulated continuance with the promise of dismissal in

exchange for making monthly payments towards restitution for Mr. Wescott and Mr. Carroll. CP 32–33. But he continued to struggle with health issues, and could only make partial payments. RP 18. The State moved to revoke the continuance, which the court granted. CP 7–10.

Following a stipulated bench trial, the trial court found Mr. Pack guilty of both counts of theft in the first degree. CP 11–15. The court imposed six months of incarceration, \$800 in legal financial obligations, and \$42,612.23 in restitution to Mr. Wescott and Mr. Carroll, with interest. CP 19–21. However, the jail ultimately deemed Mr. Pack too ill for incarceration, and he finished his sentence on electronic home monitoring. CP 31.

On appeal, the Court of Appeals rejected Mr. Pack’s argument that there was insufficient evidence to support the theft convictions. Op. at 2. The Court further declined to review Mr. Pack’s claim that his defense attorney was ineffective for failing to object to the amount of restitution. Op.

at 19–20. However, the Court did accept the State’s concession that the legal financial obligations should be stricken and that resentencing was warranted to reconsider the restitution interest. Op. at 20–21.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review is warranted as the Court of Appeals declined to apply this Court’s precedent concerning the scope of appellate review of a sufficiency claim following bench trial.

“The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). “Where sufficient evidence does not support a conviction, such a conviction ‘cannot constitutionally stand.’” *State v. Hummel*, 196 Wn. App. 329, 353–54, 383 P.3d 592 (2016) (quoting *Jackson v. Virginia*, 443 U.S. 307, 317–18, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)); *see also* U.S. Const. amend. XIV. Following a bench trial, appellate review of a sufficiency claim “is limited to determining whether substantial evidence

supports the findings of fact and, if so, whether the findings support the conclusions of law.” *State v. Homan*, 181 Wn.2d 102, 105–106, 330 P.3d 182 (2014).

Homan is Supreme Court authority and thus binding on the Court of Appeals. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Yet the Court of Appeals declined to apply *Homan*’s deferential standard, concluding it must instead view all the evidence “in a light most favorable to the State to determine if ‘any rational trier of fact could have found guilt beyond a reasonable doubt.’” Op. at 10 (quoting *Green*, 94 Wn.2d at 221–22); *see also State v. Roberts*, 32 Wn. App. 2d 571, 553 P.3d 1122 (2024), *rev. granted*, 4 Wn. 3d 1009, 564 P.3d 547 (2025) (noting the conflict between the *Homan* and *Green* standards).

Critically, *Homan*’s standard of review ensures an appropriate level of appellate deference to the trial court’s role as fact finder in a bench trial. In a jury trial, the jury’s deliberations are conducted in secret and the evidence the jury

relied upon to convict remains a mystery. Under these circumstances, a searching review of the record is appropriate when the sufficiency of the evidence is challenged on appeal. Conversely, the trial court's written findings of fact and conclusions of law following a bench trial detail exactly what evidence the court relied upon to convict. *Homan* thus correctly limits appellate review to the sufficiency of the trial court's actual factual findings.

Yet whether reviewing the trial court's findings of fact pursuant to *Homan* or the trial record as a whole under *Green*, this Court should conclude the State failed to prove its case against Mr. Pack beyond a reasonable doubt. Specifically, the State did not prove Mr. Pack acted with intent to deprive anyone of their property. In addition, the State did not prove, nor did the court find, that Mr. Pack committed any of the charged means of committing theft. This Court should accept review and reverse the theft convictions.

- a. The State must prove intent to deprive as well as at least one of three alternative means to sustain a theft conviction.

A person is guilty of theft in the first degree if they commit theft of property that exceeds \$5,000. RCW

9A.56.030(1)(a). “Theft” means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.020(1). Each of these statutory subsections are alternative means of committing the crime of theft. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). In order to sustain a theft conviction, the State must prove beyond a reasonable doubt one of these three alternative means as well as the intent

to deprive. *Id.*; *see also* Wash. Pattern Jury Inst. 70.02 (Dec. 2021).

Here, Mr. Pack was charged with committing theft in the first degree under the first two alternative means: “wrongfully obtain or exert unauthorized control” and “by color or aid of deception.” CP 1; RCW 9A.56.020(1)(a), (b); *see also State v. Linehan*, 147 Wn.2d 638, 647–51, 56 P.3d 542 (2002) (holding that “wrongfully obtain or exert unauthorized control over” is a single alternative means of committing theft). Each of these alternative means have explicit statutory definitions.

“Wrongfully obtains” and “exerts unauthorized control” mean:

(a) To take the property or services of another;

(b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any

person other than the true owner or person entitled thereto; or

(c) Having any property or services in one's possession, custody, or control as partner, to secrete, withhold, or appropriate the same to his or her use or to the use of any person other than the true owner or person entitled thereto, where the use is unauthorized by the partnership agreement.

RCW 9A.56.010(23).

“By color or aid of deception” means: “that the deception operated to bring about the obtaining of the property or services.” RCW 9A.56.010(4).³

Here, the State failed to prove Mr. Pack’s intent to deprive and either charged alternative means.

b. The State did not prove Mr. Pack intended to deprive others of their property.

The trial court concluded Mr. Pack committed both counts of theft “on or about” the dates that he signed contracts for proposed construction projects with Mr. Wescott and Mr.

³ The term “deception” is also statutorily defined, but this definition is not relevant to the legal analysis here. RCW 9A.56.010(5).

Carroll. CP 11–12. The court initially made no factual findings regarding Mr. Pack’s “intent to deprive” Mr. Wescott and Mr. Carroll of their property. *Id.* However, the court later added a paragraph regarding the element of “intent” to its findings, “since it was argued” by the parties. RP 53; CP 13–14. The court’s findings regarding intent were as follows:

The documents submitted included several incidents that supported the defendant had intent to deprive the owners of said property. This included the repeated promises of getting the work done, misrepresentations about obtaining the required paperwork, lack of communication with the parties once they requested a refund, and seeking out other work after failing to complete work promised. Additional parties who could be classified as victims chose not to pursue charges.

CP 14.

However, these factual findings do not amount to a finding that Mr. Pack had an “intent to deprive” at the time the contracts were signed, and therefore cannot support a legal conclusion of guilt. *Homan*, 181 Wn.2d at 105–106. Rather, these findings pertain exclusively to actions Mr. Pack took

several months *after* the contracts were signed. Rather than demonstrate criminal intent, these actions evince Mr. Pack's growing realization that he would not be able to either complete the work as promised or refund his clients.

To the extent this Court determines it must review the entire record in the light most favorable to the State to determine the sufficiency of the evidence, the State still fell short of its burden. A thorough review of the record indicates Mr. Pack *did* initially intend to complete both projects. For example, Mr. Pack submitted permit applications for both Mr. Wescott's and Mr. Carroll's projects, which were ultimately approved. CP 112, 179, 237. It makes little sense why Mr. Pack would jump through such administrative hoops if, pursuant to the State's theory, he simply intended to abscond with Mr. Wescott and Mr. Carroll's money from the outset.

Rather, the court's factual findings and the record both illustrate a common contractor dilemma: that Mr. Pack took on several projects at once, spent the advance payments, and then

became ill, leaving him with no ability to either complete the contracted projects or to refund his clients. Such circumstances may merit a civil breach of contract action or bond claim.⁴ But they do not demonstrate criminal intent beyond a reasonable doubt.

- c. The State did not prove Mr. Pack “wrongfully obtained” or “exerted unauthorized control over” the property of another.

The trial court made no explicit finding that Mr. Pack “wrongfully obtained or exerted unauthorized control over” the property of another. CP 13–15. “In the absence of a finding on a factual issue,” this Court “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).

Nor does the record support any finding that Mr. Pack “wrongfully obtained or exerted unauthorized control over” the

⁴ In fact, as explained *supra*, Mr. Wescott did successfully pursue a bond claim, receiving \$12,000.

property of another. *See* RCW 9A.56.010(23) (defining this alternative mean). None of the three statutory definitions apply to the circumstances presented. *See id.*

First, as the court correctly found, Mr. Wescott and Mr. Carroll voluntarily paid Mr. Pack via check for down payments on proposed construction projects. CP 13–14. Mr. Pack therefore did not “take” their property; they willingly handed it over. *See* RCW 9A.56.010(23)(a).

Second, the court made no finding that Mr. Wescott and Mr. Carroll entrusted funds to Mr. Pack for “a specific purpose,” *e.g.*, the purchase of certain materials. *See Joy*, 121 Wn.2d at 341. As this Court has held, owners relinquish any property interest in payments to a contractor unless there is a “particular agreement . . . restrict[ing] the use of the funds to a specific purpose.” *Id.* at 341. Here, the contracts at issue contain no such restrictions. Accordingly, Mr. Wescott and Mr. Carroll relinquished any property interest in the funds at the time they paid Mr. Pack. *Id.* Mr. Pack was then free to use

these funds in any way he saw fit, including paying himself.

Under these circumstances, Mr. Pack did not “secrete, withhold, or appropriate” Mr. Wescott’s and Mr. Carroll’s property. *Id.*; RCW 9A.56.010(23)(b).

Finally, the court did not find there was any partnership agreement between Mr. Pack and either Mr. Wescott or Mr. Carroll. RCW 9A.56.010(23)(c). Nor does the record indicate such a partnership existed.

Because none of the definitions of “wrongfully obtained or exerted unauthorized control over” is met by the lower court’s factual findings nor demonstrated in the record, the State did not prove this alternative.

- d. The State did not prove Mr. Pack obtained control over the property of others “by color or aid of deception.”

The trial court made no explicit finding that Mr. Pack “obtain[ed]” the property of Mr. Wescott and Mr. Carroll “by color or aid of deception.” CP 13–15; RCW 9A.56.020(1)(b); RCW 9A.56.010(4). This Court should therefore presume that

the State also failed to prove this alternative. *Armenta*, 134 Wn.2d at 14.

Nor can the court's factual findings support any inference that Mr. Pack used deception to obtain Mr. Wescott and Mr. Carroll's property. RCW 9A.56.010(4). The court did find that *after* obtaining the downpayments, Mr. Pack made "repeated promises of getting the work done, misrepresentations about obtaining the required paperwork, lack of communication with the parties once they requested a refund, and seeking out other work after failing to complete work promised." CP 14. However, none of these factual findings indicate Mr. Pack engaged in deceptive practices to *obtain* down payments from Mr. Wescott and Mr. Carroll. The court therefore made no findings that anything about the communications or the contracts prior to the downpayments was indicative of deception. Nor does the record support such a finding.

The State therefore failed to prove Mr. Pack obtained Mr. Wescott or Mr. Carroll's money by color or aid of deception.

- e. The State did not prove either count of theft in the first degree.

The State did not prove Mr. Pack's intent to deprive or any of the charged alternative means, which are essential elements of the crime of theft in the first degree. As a result, the theft convictions must be vacated due to insufficient evidence. *Byrd*, 125 Wn.2d at 713.

2. The restitution order does not reflect actual damages and the Court of Appeals erred in declining to assess whether counsel was ineffective for failing to object.

The amount of restitution ordered "shall be based on easily ascertainable damages for injury to or loss of property." RCW 9.94A.753(3). If the amount is disputed, the State has the burden to prove the amount by a preponderance standard. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The evidence must provide a "reasonable basis" for the claimed loss and must "not subject the trier of fact to mere speculation or conjecture." *State v. Deskins*, 180 Wn.2d 68, 82–83, 322 P.3d 780 (2014) (citation and quotation marks omitted).

Here, the court ordered Mr. Pack to pay \$16,155.88 in restitution to Mr. Wescott and \$26,656.35 to Mr. Carroll. CP 20. These numbers do not reflect the true damages of either party, requiring a new restitution hearing.⁵

Mr. Wescott did pay Mr. Pack \$16,155.58 via two checks amounting to \$11,717.28 and \$4,438.60. CP 13–14. However, Mr. Wescott ultimately filed a bond claim against Mr. Pack’s construction company, receiving \$12,000. CP 255–56. The bond company did not seek restitution. Accordingly, Mr. Wescott’s restitution award should be reduced by \$12,000 to reflect his actual damages. RCW 9.94A.753(3).

Mr. Carroll paid Mr. Pack \$25,933.95 via a single check. CP 14. However, the court ordered Mr. Pack to pay Mr. Carroll \$26,656.35, a difference of \$722.40. CP 20. Mr. Carroll’s

⁵ Although Mr. Pack initially agreed to pay these amounts as part of the stipulated continuance, CP 32–33, the court revoked the stipulated continuance, thus dissolving the agreement. CP 7–10.

restitution award should be similarly adjusted to reflect his actual damages. RCW 9.94A.753(3).

The restitution amounts should also be adjusted to reflect the amount Mr. Pack paid pursuant to the stipulated continuance, prior to its revocation. CP 10.

In sum, the restitution amounts are not supported by a preponderance of the evidence. Accordingly, counsel was deficient for failing to object to the amount of restitution, and this deficiency was prejudicial. *See State v. Hassan*, 184 Wn. App. 140, 151–53, 336 P.3d 99 (2014) (where State did not sustain its burden of proof, failure to object to the amount of restitution was ineffective assistance).

The Court of Appeals declined to address Mr. Pack’s ineffective assistance of counsel claim, erroneously concluding that Mr. Pack had only provided “[p]assing treatment of an issue or lack of reasoned argument.” Op. at 20 (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Although short, Mr. Pack’s ineffective assistance

of counsel claim was fully briefed. His opening brief assigned error on this ground, *see* App. Brief at 2, provided significant citations to the record to describe why the amount of restitution was unsupported, *id.* at 19–21, and cited to the most on-point authority, *Hassan*, 184 Wn. App. at 151–53. *Id.* at 21. This was sufficient for the Court of Appeals to assess whether counsel was ineffective for failing to object to the restitution amount. Review is warranted to encourage the Court of Appeals’ full consideration of the issues and to determine whether counsel was deficient pursuant to *Hassan*.

F. CONCLUSION

For the reasons stated above, this Court should accept review.

In compliance with RAP 18.17(b), counsel certifies that this brief contains 3,935 words (word count by Microsoft Word).

DATED this 10th day of July, 2025.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

| | | |
|----------------------|---|---------------------|
| STATE OF WASHINGTON, |) | |
| |) | No. 39581-2-III |
| Respondent, |) | |
| |) | |
| v. |) | |
| |) | |
| CURTIS RAY PACK, |) | UNPUBLISHED OPINION |
| |) | |
| Appellant. |) | |

STAAB, J. — Following a bench trial on stipulated facts, the trial court found Curtis Ray Pack guilty of two counts of first degree theft for taking down-payments on contracts to build outbuildings and then failing to begin work or return the deposits. On appeal, he raises numerous arguments, including a challenge to the sufficiency of the evidence used to convict him of first degree theft. In support of this challenge, he argues that our review is limited to the facts found by the trial court and whether the court’s findings are supported by substantial evidence.

We disagree and reaffirm that our review of a challenge to the sufficiency of evidence used to support a conviction following a bench trial is whether the evidence, when viewed in a light most favorable to the State, is sufficient for any rational finder of

fact to find the elements of the crime beyond a reasonable doubt. Under this standard, the evidence here was sufficient to support the conviction for first degree theft.

Otherwise, we affirm, declining to address Pack's unpreserved challenge to restitution, and remand for the limited purpose of reconsidering fees and interest on restitution.

BACKGROUND

After revoking a stipulated order of continuance (SOC), the trial court held a bench trial on stipulated facts. The following facts are taken from the stipulated evidence.

In December 2017, Mark Westcott contracted with Pack, doing business as Millennium Construction Group, to have a steel building constructed on his property for \$21,207.28. This price included an estimated \$595.00 to obtain the necessary permit from the City of Pasco Community and Economic Development Department (Department) and a down payment of \$11,717.28. Pack told Westcott when they signed the contract that he would begin work in January 2018 and that it would take approximately 30 days to complete the project. Westcott gave Pack a check for the required down payment the following week. In January, Westcott decided to increase the size of the building. Pack told him that additional funds were required to proceed, and Westcott gave Pack another check for \$4,438.60.

Over the next few months, Westcott repeatedly texted and emailed Pack to check on the status of the permit and the start date for the project. Pack consistently responded that he was waiting on the Department or sick and unable to work. Westcott eventually contacted the Department directly and received an email stating that the permit was approved but had not been paid or picked up. Westcott forwarded the email to Pack and inquired about why the permit had not been picked up. Pack responded that he was sick but that he or his wife would pick up the permit the following day. Westcott continued to inquire about the permit after several days. Pack continued to respond that he was sick but promised on several different occasions that the permit would be picked up.

Westcott continued to contact Pack and request that he start the contracted work or issue Westcott a full refund of his down payment. Pack continued to make promises that he would have more information at a later date. After sending a text stating he would set a time to meet with Westcott when he had more information about his illness, Pack stopped all communications.

Westcott drafted a demand letter and sent it to Pack twice by certified mail and once by email. Pack never responded. The permit was never picked up nor paid, no work was done on the contracted project, and Westcott's down payment was never returned.

Six months after the contract was signed, Westcott hired legal counsel and filed a complaint against Pack and Western Surety Co., Pack's surety bond company. In May

2018, Westcott obtained a default judgment for \$12,000.00 against Pack to reach Pack's bond proceeds only. Western Surety Co. paid Westcott the full amount and canceled Pack's surety bond.

In February 2018, two months after contracting with Westcott, Pack, entered into a contract with James Carroll to build a pole building for \$47,549.95. The price included an estimated \$600 to obtain a permit from the Department and a down payment of \$25,933.95. The next day, Carroll paid the required down payment with a check. That was the last time Carroll saw Pack.

For the next two months, Carroll texted Pack to check on the status of the required engineering and permit as well as the start date for the project. Pack responded with several different answers, first that he was waiting on the engineer, then the county, that he had gotten pneumonia in both lungs but was starting to feel better and it was nothing that affected Carroll's project schedule, and finally, that there was no news on the permit.

Carroll eventually contacted the Department to see why the permit had not been approved and was told that the proper paperwork was not submitted. Carroll then worked directly with the Department to get them the necessary paperwork, and the permit was finally approved in May 2018. Carroll immediately notified Pack, but he never responded. Carroll called and sent texts, emails, and letters to Pack requesting a refund of his down payment but never received any response.

Later that month, Carroll sent a letter to Pack's business address by certified mail demanding the immediate return of his down payment, but it came back undeliverable. Carroll attempted to call Pack on three occasions, but Pack never answered any calls. Aside from filing the permit application, which did not contain all the necessary information, Pack took no action to complete the contracted project. The permit was never paid or picked up, and no materials, cite preparation, or other contracted work was completed.

In June 2018, Carroll contacted the police and reported what he described as Pack's fraud and theft of his down payment to Officer Bradley Klippert. Carroll emailed Officer Klippert a copy of Westcott's affidavit filed in his civil suit against Pack, which included details about Pack's additional victims, including Lonnie Hill and Jeffrey Tucksen.

Based on this information, Officer Klippert contacted Lonnie Hill, who told him that he had been a victim of Pack's "schemes" but did not want to file a report, nor did he wish to pursue charges against Pack. Officer Klippert then spoke with Jeffrey Tucksen, who stated he was also a victim of Pack's schemes.

Officer Wakeman then contacted Tucksen at his residence for a more detailed statement. In November 2017, approximately one month before Westcott contracted with Pack, Tucksen entered into a contract with Pack, to construct a small building for

\$32,021.07, and required a down payment of \$17,483.94 due at acceptance. The following day, Tucksen issued two separate checks at Pack's request, each for \$7,893.50.

Pack hired the necessary subcontractors to begin work on Tucksen's contracted work but failed to pay the subcontractors in full. Pack also purchased lumber and had it delivered, but then Tucksen never heard from Pack again. He attempted to locate Pack and sent him several messages, but Pack never responded. He also tried to locate Pack through other contractors and suppliers but was unsuccessful. Tucksen stated that Pack took approximately \$7,000.00, which had not been used to complete the work.

Pack then sought other work after failing to complete the contracted work for Westcott, Carroll, and Tucksen. In November 2018, Pack was offering contractor work on Craigslist in the Tri-Cities area. The Washington Department of Labor and Industries issued him an infraction and a \$1,000 penalty for advertising when not registered as a contractor, as required. In April 2019, Pack was issued another infraction and a \$5,000 penalty for posting on Craigslist advertising that he was a "Contractor for Hire" in Spokane when he was not registered as a contractor, as required.

The State charged Pack with two counts of theft in the first degree. The parties eventually agreed to resolve the case by way of an SOC. The stipulated order continued the case for 36 months. As part of the agreement, Pack waived most of his trial rights and agreed to pay restitution by monthly installments of \$1,189.23. The SOC provided that if Pack complied with the terms the charges would be dismissed, but if he violated

the terms the court would revoke the order and hold a bench trial based on the evidence submitted by the State. In addition, Pack stipulated to the following facts:

Defendant took \$16,155.88 from Harold Westcott and did not perform any work and did not return his money, then three months later, took \$26,656.35 from James and Dianna Carroll and did not perform any work and did not return their money.

Clerk's Papers (CP) at 33.

Over the next several months, Pack made only one partial restitution payment of \$500. Eventually, the trial court found that Pack had breached the SOC by failing to make the monthly restitution payments, revoked the stipulated order, and set the matter for a stipulated facts trial. Based on the stipulated facts, the trial court found Pack guilty on both counts. The court explained that it "did carefully look at the intent portion, and unfortunately because of the lack of communication or the communications that there were between the parties," it found that the State met its burden of proof on the intent element. Rep. of Proc. (RP) at 39.

The trial court's amended findings of fact provide:

1. The Court adopts the previously filed stipulation to the police reports filed with the Court by the parties, which included 280 pages of reports, emails, purchase orders, checks, and Department of Labor and Industry documents.
2. In summary of that stipulation, Defendant was doing business as Millennium Construction, based out of Kennewick, and signed a contract with Harold Westcott to build a post frame building on Mr. Westcott's property. On December 29, 2017, Mr. Westcott paid Defendant by check a down payment of \$11,717.28, which was cashed that day at Numerica Credit Union. Subsequently, on January 16, 2018,

Mr. Westcott provided Defendant an additional check for \$4438.60, which was cashed on January 18, 2018, at 4:47 PM at Numerica Credit Union. After cashing the checks, Defendant never began work on the project, never picked up or completed payment for the building permit, and eventually dropped all communication with Mr. Westcott. Nothing was built by Defendant and he never returned the deposited funds. While having not completed any work for Mr. Westcott, on February 22, 2018, James Carroll signed a contract with Defendant to build a pole barn on Mr. Carroll's property over the next six weeks. James and Dianna Carroll provided Defendant a check for the down payment of \$25,933.95, which was deposited by Defendant at 5:20 PM that day at Numerica Credit Union. No building was ever built, Defendant has not returned the down payment, and dropped all communication with Mr. Carroll.

3. The documents submitted included several incidents that supported the defendant had intent to deprive the owners of said property. This included the repeated promises of getting the work done, misrepresentations about obtaining the required paperwork, lack of communication with the parties once they requested a refund, and seeking out other work after failing to complete work promised. Additional parties who could be classified as victims chose not to pursue charges.

CP at 14.

At sentencing, defense counsel argued that Pack was found indigent by the court in November 2018, and that he remained indigent. Pack also personally stated that he was indigent. In reference to Carroll and Westcott's money, the court noted, "I just don't see that they're going to get any of it back." RP at 64. When discussing Pack's report to jail date, the court also stated, "I don't believe that [Pack] has the ability to work right now." RP at 64. However, the trial court made no explicit finding that Pack was indigent.

The court then declared it was going to strike the non-mandatory fees. However, the court imposed the \$500 victim penalty assessment (VPA), \$200 criminal filing fee, \$100 DNA collection fee, and restitution. At the end of the hearing, the court found Pack indigent for purposes of appeal.

Pack timely appealed.

ANALYSIS

1. SUFFICIENCY OF THE EVIDENCE

Pack contends the evidence was insufficient to support his conviction for first degree theft. As part of this challenge, he assigns error to the trial court's finding that Pack acted with intent to deprive his customers of their property. He also contends that the State failed to prove that Pack obtained unauthorized control over the property of another or did so by color or aid of deception. The State argues that the evidence was sufficient for the trial court to conclude that each element of the crimes was proved.

As an initial matter, the parties disagree on the standard of review for this issue. Pack contends that "following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). The State argues that when determining whether sufficient evidence supports a conviction, the evidence is viewed in the light most favorable to the State to determine whether any rational fact finder could have found the elements of the crime beyond a

reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Pack replies, arguing that *Homan* is subsequent binding authority. We conclude that the proper standard was articulated in *Green*.

In *Green*, our Supreme Court adopted the standard for reviewing sufficiency of the evidence set by *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *Green*, 94 Wn.2d at 220 n.2. Under this test, a court considering a challenge to the sufficiency of evidence is required to consider the entire record, in a light most favorable to the State, to determine if any “rational trier of fact could have found guilt beyond a reasonable doubt.” *Id.* This standard was later affirmed in *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009), and applied to challenges of evidence sufficiency following a bench trial in *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In *Homan* the court considered a challenge to the sufficiency of the evidence to support a conviction following a bench trial. 181 Wn.2d at 105. Citing *Engel*, the court held that it was required to “view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *Id.* However, in the next sentence, the court provides: “Specifically, following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *Id.* at 105-06. The court goes on to define “[s]ubstantial evidence” as “evidence sufficient to persuade a fair-minded person of the

truth of the asserted premise.” *Id.* at 106. *Homan*’s “substantial evidence” test has been applied in several subsequent cases.¹

In *State v. Stewart*, 12 Wn. App. 2d 236, 246, 457 P.3d 1213 (2020) (Dwyer, J., concurring), Judge Dwyer pointed out numerous reasons why the “substantial evidence” test adopted in *Homan* is “inconsistent with the standard set forth in *Jackson*.” In *State v. Roberts*, the court recognized that the proper scope and standard of reviewing the sufficiency of evidence following a bench trial is unclear. 32 Wn. App. 2d 571, 588, 553 P.3d 1122 (2024). After quoting Judge Dwyer’s lengthy and persuasive concurring opinion on why *Green* is the correct standard, the court went on to find the evidence sufficient under either standard. *Id.* at 586-87, 589.

Here, Pack argues that we are bound by *Homan*, and our review is limited to the court’s findings and whether “substantial evidence” supports those findings. It is true that under “vertical stare decisis” we are bound by a higher court’s ruling. *Presbytery of Seattle v. Schulz*, 10 Wn. App. 2d 696, 708, 449 P.3d 1077 (2019). But *Homan* is not the last word on the correct standard. Instead, in *State v. Bergstrom*, the Supreme Court reaffirmed that the correct standard for reviewing sufficiency of the evidence following a

¹ See, e.g., *State v. Hankel*, No. 38573-6-III, slip op. at 3 (Wash. Ct. App. Dec. 6, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/385736_unp.pdf; *State v. Hovey*, No. 38534-5-111, slip op. at 2 (Wash. Ct. App. June 8, 2023) (unpublished), https://www.courts.wa.gov/opinions/pdf/385345_unp.pdf; *State v. Smith*, 185 Wn. App. 945, 956-57, 344 P.3d 1244 (2015).

bench trial is set forth in *Jackson* and *Green*. 199 Wn.2d 23, 41 n.14, 502 P.3d 837 (2022).

In this case, we apply the standard established in *Green* and affirmed by *Bergstrom*. When considering a challenge to the sufficiency of evidence, we review all of the evidence in a light most favorable to the State to determine if any rational trier of fact “‘could find the essential elements of the charged crime beyond a reasonable doubt.’” *Bergstrom*, 199 Wn.2d at 41.² To the extent our earlier decisions have applied the “substantial evidence” standard, we disagree with those decisions. *See Presbytery of Seattle*, 10 Wn. App. 2d at 707 (“Under ‘horizontal stare decisis,’ a court is not required to follow its own prior decisions.”).

Pack contends that the State failed to produce sufficient evidence to prove two elements of theft the means of committing the crime and Pack’s intent. As charged, the State had to prove that Pack was guilty of two counts of first degree theft by either “wrongfully obtain[ing] or exert[ing] unauthorized control over the property or services of another,” or by using the “color or aid of deception to obtain control over the property or services of another.” RCW 9A.56.020(1)(a), (b). Under either means the State was also required to prove Pack obtained control of the property or services “with the intent to

² Review for sufficiency of the evidence should be distinguished from challenges to the trial court’s findings of fact and conclusions of law. *See State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998) (The court’s “failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand.”).

deprive [the person] of [their] property or services.” *Id.* Finally, the State must prove the property or services taken were valued at \$5,000 or more. RCW 9A.56.030(1)(a).

With respect to the element of intent, the trial court found:

The documents submitted included several incidents that supported the defendant had intent to deprive the owners of said property. This included the repeated promises of getting the work done, misrepresentations about obtaining the required paperwork, lack of communication with the parties once they requested a refund, and seeking out other work after failing to complete work promised. Additional parties who could be classified as victims chose not to pursue charges.

CP at 14.

Pack challenges this finding and argues that all of the events cited by the court in support of this finding occurred after the exchange of money. Thus, he contends the court’s findings fail to support the conclusion that Pack formed an intent at the time he accepted money from Westcott and Carroll to deprive them of their money.

Pack’s argument rests on the premise that our review for sufficiency of the evidence is limited to the evidence identified in the trial court’s findings. This argument fails for two reasons. First, in its findings the court adopted the parties’ stipulation as well as the 280 pages of evidence. In addition, as noted above, in reviewing a challenge to the sufficiency of the evidence in a criminal case, we consider all of the evidence, viewed in a light most favorable to the State, to determine if “any” rational trier of fact could find the element proved beyond a reasonable doubt. *Jackson*, 443 U.S. at 319.

This is an objective standard. *See Stewart*, 12 Wn. App. 2d at 247 (Dwyer, J. concurring). When reviewing evidence for sufficiency, we consider circumstantial evidence as probative as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

Pack also contends that the trial court failed to make explicit findings that the State proved either of the alternative means of theft.³ Specifically, Pack contends that there is no evidence that he exerted unauthorized control over his customers' money, noting that the customers freely handed over their money under contracts that did not include any limitations or reservations on how the money could be spent. Similarly, he also argues there was no evidence of deception at the time the contracts were entered, pointing out that the events relied upon by the trial court to find deception occurred after the money was exchanged and merely demonstrate a contractor who unintentionally fell behind after getting sick.

The State responds that the evidence was sufficient to prove both alternatives.

We conclude that the circumstantial evidence was sufficient to prove that Pack used the color or aid of deception to convince Westcott and Carroll to make substantial

³ We disagree with Pack's argument that in the absence of a specific finding, we must presume the State failed to sustain its burden, citing *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). In *Armenta*, the court was reviewing a trial court's finding on a motion to suppress. *Id.* at 13. Here we are reviewing the entire record for sufficiency of the evidence.

down payments on projects when Pack had no intention of providing the services promised.⁴

The term “[b]y color or aid of deception” requires the State to prove “that the deception operated to bring about the obtaining of the property or services.” RCW 9A.56.010(4). “Deception” occurs when a defendant knowingly “[c]reates or confirms another’s false impression which the actor knows to be false” or “fails to correct another’s impression which the actor previously has created or confirmed.” RCW 9A.56.010(5)(a), (b). Deception does not require an express misrepresentation; instead, the statute focuses on the creation of false impressions. *State v. Briejer*, 172 Wn. App. 209, 218, 289 P.3d 698 (2012). “‘Deception’ includes a broad spectrum of conduct, including ‘not only representations about past or existing facts, but also representations about future facts, inducement achieved by means other than conduct or words, and inducement achieved by creating a false impression even though particular statements or acts might not be false.’” *Id.* (quoting *State v. Casey*, 81 Wn. App. 524, 528, 915 P.2d 587 (1996)). “[I]t is not necessary that deception be the sole means of obtaining the property or services.” *Id.*

⁴ Because we determine the evidence was sufficient to show an intent to obtain the money through color or aid of deception, we need not address the other alternative means charged in this case. See *State v. Braun*, 20 Wn. App. 2d 756, 782, 502 P.3d 884 (2022) (“Following a bench trial, when a single offense can be committed by alternative methods, a conviction may rest on proof that the crime was committed by any one of the means charged.”).

Intent may be inferred from conduct of the accused that “plainly indicates such intent as a matter of logical probability.” *Id.* at 217.

The trial court found, and the evidence shows, that at the time Pack accepted money from both Westcott and Carroll he was already behind on other projects and had stopped working and communicating with those customers. One month before accepting money from Westcott, Pack had accepted money from Jeffrey Tucksen on the promise to build Tucksen a shed. Although Pack made a partial payment to a subcontractor and had lumber delivered to the site on credit, Tucksen never heard from Pack again. Despite Pack’s failing commitment to Tucksen, Pack entered into a new contract with Westcott, promising to complete Westcott’s project by the end of January and accepting a large down payment. Two months later, after falling further behind on Tucksen’s project, and failing to complete any work on Westcott’s project, Pack entered into a new contract with Carroll, and accepted another large down payment after assuring Carroll he could complete the project in six weeks. He failed to perform any work on this project as well and stopped communicating with Carroll.⁵

⁵ On appeal, Pack disputes the finding that he did not do any work, pointing out that he applied for a permit, suggesting that this act required additional preliminary work. But this argument is foreclosed by Pack’s stipulation in the SOC that Pack “took \$26,656.35 from James and Dianna Carroll and *did not perform any work* and did not return their money.” CP at 33 (emphasis added).

This evidence supports an inference that Pack made promises to induce Westcott and Carroll to hand over large down payments at a time when Pack did not have the ability or the intent to follow through on his promises. In each case he gave the false impression that he would be able to complete the projects within a particular time period. In both cases, he failed to start the projects other than to submit incomplete applications for permits before ceasing to communicate with the customers and failing to return the down payments. While Pack contends that the evidence suggests a contractor who came to realize his inability to complete these projects only after signing the contracts, we disagree that this is the only reasonable interpretation of the evidence.

Viewing all of the evidence in a light most favorable to the State, we conclude that any rational trier of fact could find that the State proved the elements of first degree theft by color or aid of deception beyond a reasonable doubt in support of both convictions.

2. RESTITUTION

Pack contends that the restitution order does not reflect the parties' actual damages and that the amount is not supported by a preponderance of the evidence. Alternatively, Pack contends that to the extent defense counsel was required to argue that the State did not meet its burden to prove the actual damages, counsel was deficient for failing to do so and the deficiency was prejudicial. The State argues that Pack not only failed to object and should not be allowed to raise the issue for the first time on appeal, but that he also explicitly agreed to the amounts and signed the SOC agreeing the amounts were proper.

A. Restitution Amount–Error Preservation

Generally, this court will “refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). Requiring error preservation through timely objections “serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials.” *State v. Lazcano*, 188 Wn. App. 338, 356, 354 P.3d 233 (2015).

Pack failed to preserve any objection to the restitution amount. Pack signed the SOC, explicitly agreeing to the restitution amounts. The SOC stated “the defendant shall make full payment of \$42,812.23 restitution.” CP at 32. It also stated that Pack stipulated to the following facts at trial:

Defendant took \$16,155.88 from Harold Westcott and did not perform any work and did not return his money, then three months later, took \$26,656.35 from James and Dianna Carroll and did not perform any work and did not return their money.

CP at 33. Defense counsel stated on the record that the parties agreed with the terms set forth in the stipulated order of continuance and that he reviewed them with Pack and believed he understood the terms and conditions. When asked by the court if he had any questions about the SOC, Pack stated, “No, I don’t. . . . I understood, and we went over ‘em really well actually.” RP at 4.

At the sentencing hearing on March 10, 2023, the court inquired about the dollar figure at the bottom of the judgment and sentence form, to which the State explained that it was the total of the two restitution amounts, plus other fees. And still, Pack made no objection. Finally, Pack signed the judgment and sentence on March 10, 2023, again explicitly agreeing to the restitution amounts of \$16,155.88 to Westcott and \$26,656.35 to Carroll. No objections regarding the restitution amounts were ever made.

The State contends that had Pack objected to the restitution amount at sentencing, the State would have been able to supplement the record with additional evidence.

Because Pack failed to object to the restitution amounts, this alleged error is unpreserved. Moreover, Pack does not argue that an exception to RAP 2.5(a) applies. Thus, we decline to review the restitution issue.

B. Ineffective Assistance of Counsel

Alternatively, Pack contends, in one sentence, that defense counsel was deficient for failing to raise the issue and that the deficiency was prejudicial:

To the extent defense counsel was required to argue the State did not meet its burden, this Court should find counsel was deficient for failing to do so, and that this deficiency was prejudicial. *See State v. Hassan*, 184 Wn. App. 140, 151-53, 336 P.3d 99 (2014) (where State did not sustain its burden of proof, failure to object to the amount of restitution was ineffective assistance).

Br. of Appellant at 21. The State makes no arguments in response.

We decline to address this argument as well. An appellant must provide an “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6). “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

3. LEGAL FINANCIAL OBLIGATIONS

Pack contends the VPA, criminal filing fee, and DNA collection fee must be struck from his judgment and sentence due to recent changes in the law and because he is indigent. He also argues that this court should remand the case for the sentencing court to consider whether restitution interest is appropriate due to his indigency. The State concedes that the fees should be struck and agrees that remand is necessary for the trial court to determine restitution in light of RCW 10.82.090(2). We accept the State’s concession.

Because the determination of whether and to what extent interest should be applied to the order on restitution is discretionary, we remand for a limited sentencing hearing to address the legal financial obligations imposed in the judgment and sentence. *See* RCW 10.82.090(2) (The court has discretion on whether “to impose interest on any restitution the court orders.”).

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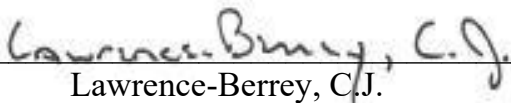
We affirm Pack's convictions, but remand for the limited purposes of reconsidering the legal financial obligations including the discretion to impose interest on the order of restitution.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

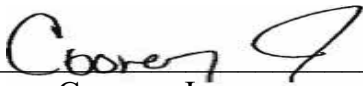


Staab, J.

WE CONCUR:



Lawrence-Berrey, C.J.



Cooney, J.

WASHINGTON APPELLATE PROJECT

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