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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEPHANE ALEXANDRE B PERRY, Appellant.	No. 46866-2-II UNPUBLISHED OPINION

LEE, J. — Stephane Alexandre B Perry was found guilty of first degree criminal trespass (count I), second degree identity theft (count II), possession of a stolen vehicle (count III), two counts of third degree possession of stolen property (counts IV and V), and use of drug paraphernalia (count VI). On appeal, Perry argues that (1) the charging document omitted essential elements for the crimes of possession of a stolen vehicle (count III) and the latter third degree possession of stolen property (count V); (2) the two convictions for third degree possession of stolen property (counts IV and V) violate the prohibition against double jeopardy; (3) the convictions for first degree criminal trespass (count I) and second degree identity theft (count II) are alternative means crimes that the State failed to sufficiently prove; (4) his attorney was ineffective for failing to request a jury instruction on accomplice testimony; (5) the sentencing court erred in ordering a forfeiture of property as a sentencing condition; and (6) the sentencing

court erred in failing to inquire about Perry's ability to pay before imposing legal financial obligations (LFOs).[1] In a statement of additional grounds (SAG), Perry argues (1) the trial court erred in failing to suppress evidence as the fruit of an unlawful search; (2) the prosecution failed to turn over exculpatory and impeachment evidence to the defense; and (3) a phone call from the jail violated his right to confrontation.

We hold that (1) the charging document was sufficient as to possession of a stolen vehicle (count III) and third degree possession of stolen property (count V); (2) Perry's two convictions for possession of stolen property (counts IV and V) subject him to double jeopardy; (3) a criminal trespass (count I) jury instruction requiring the State to prove that the defendant knowingly "entered or remained" unlawfully does not raise unanimity concerns and Perry fails to establish that the crime of identity theft (count II) is an alternative means crime that required a unanimity jury instruction; (4) Perry fails to show that the trial court would have given an accomplice liability jury instruction had his attorney made the request, and thereby fails to establish that he was prejudiced; (5) the sentencing court erred in ordering a forfeiture of property; (6) the sentencing court erred in failing to inquire into Perry's current and future ability to pay discretionary LFOs; and (7) the arguments raised in Perry's SAG fail. Accordingly, we dismiss with prejudice Perry's third degree possession of stolen property conviction (count V). Perry's convictions for first degree criminal trespass (count I), second degree identity theft (count II), possession of a stolen

[1] Perry also argues there was insufficient evidence to convict him of second degree possession of stolen property as charged in count IV. However, Perry was not convicted of second degree possession of stolen property. Rather, Perry was convicted of the lesser degree crime of third degree possession of stolen property. Therefore, we do not address this argument.

vehicle (count III); third degree possession of stolen property (lesser-included offense of count IV), and use of drug paraphernalia (count VI) are affirmed. Also, we reverse the sentencing conditions requiring forfeiture of Perry's property and the imposition of discretionary LFOs, and remand for further proceedings consistent with this opinion.

FACTS

On August 14, 2013, at approximately 1:48 p.m., Shenelle Williams, a front desk manager at the Holiday Inn Express hotel, called police asking to have Perry removed from the hotel. The reservation for the room Perry was occupying had a checkout time of noon on August 14. Williams had contacted Perry after noon and informed him that he needed to leave or pay for another night. Williams told Perry three to four times between noon and 1:48 p.m. that he needed to leave. Also, during that time frame, Williams received a phone call at the front desk from a woman claiming someone had used her credit card to book a room under the name Matthew Lane. The room Perry was occupying had been reserved under the name Matthew Lane.

Tacoma Police Officers Graham and Kieszling responded to the hotel. The officers contacted Williams at the front desk, and she identified the occupant of the room that had been reserved under Matthew Lane as the person needing to be removed from the hotel. The officers proceeded to the specified room, knocked, and identified themselves as police. They were told to wait "just a minute," and heard rustling in the room, before Perry opened the door. 2 Verbatim Transcript of Proceedings (VTP) at 288.

Perry initially identified himself as Matthew Lane and consented to the officers entering the room. Once inside, the officers observed the room was in disarray with hypodermic needles strewn about, capped and uncapped. A woman came out of the bathroom, and she and Perry were detained with wrist restraints. Perry was read his *Miranda*[2] rights.

Perry told the officers that a friend had booked the room for him, but he had no way of contacting the friend. Perry also told the officers that he had arrived at the hotel in a borrowed vehicle. He acknowledged that the hotel employees had asked him to leave. Perry later admitted to the officers that he and the woman had done heroin in the room together and that the syringe with brown liquid in it was his.

Perry gave Officer Graham permission to retrieve a wallet from his back pocket, which Perry said contained his ID. In the wallet, Officer Graham found Perry's Washington ID card, identifying him as Stephane Perry, not Matthew Lane. Officer Graham also found a social security card for Matthew Donald Lane. A records check revealed that Perry had an outstanding warrant and that Matthew Donald Lane was someone else.

Also in the room, the officers found a United States passport containing the name of Matthew Donald Lane, a metal spoon in a cloth case, a small portable safe, and keys under the bed on a key ring. This particular metal spoon had brown residue on it. The keys included a car key for a blue Subaru in the hotel parking lot and a key to the safe.

Perry told the officers that he borrowed the Subaru from a friend. Upon further investigation, the officers discovered that the license plates on the Subaru were not associated its

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

vehicle identification number (VIN). By researching the Subaru's VIN, Officer Graham determined that the Subaru belonged to Matthew Lane.

The Subaru was impounded and a forensics team was called to examine it. The forensic team lifted six fingerprints and palm impressions from the rearview mirror and interior of the driver's side window. The fingerprints and palm impressions were matched to Perry.

Officer Kieszling contacted Matthew Lane. Lane accurately described the keys and safe recovered from the room. Lane confirmed that his blue Subaru Legacy had been stolen, along with his safe. Lane gave Officer Kieszling permission to open the safe. In the safe, Officer Kieszling found many of the documents Lane had also described as missing, including social security cards, passports, savings bonds, and his children's birth certificates.

Perry was charged with first degree criminal trespass (count I), second degree identity theft (count II), possession of a stolen vehicle (count III), second degree possession of stolen property (count IV), third degree possession of stolen property (count V), and use of drug paraphernalia (count VI).

Before trial, Perry moved to suppress identification of documents and other items found in his wallet and in the hotel room at the time of his arrest. A suppression hearing under CrR 3.5 and CrR 3.6 was held on July 14 and 15, 2014. At the hearing, Williams, Officer Kieszling, and Officer Graham testified. Williams, Officer Kieszling, and Officer Graham provided testimony substantially similar to that which they later provided at trial.

Before Officer Graham took the stand on the second morning of the suppression hearing, the State revealed to the court and defense that it had learned earlier that morning that Officer Graham had been charged with driving under the influence and had been placed on administrative

leave the day before. The State relayed that it had been informed that Officer Graham's case was pending before the county district court and that there were no *Brady*[3] concerns. On the stand, Officer Graham confirmed he had been charged with driving under the influence, stated that the incident occurred on his day off while he was driving his personal vehicle, believed that his trial was set for August 18, and understood he would be remaining on administrative leave until the case was resolved.

When Officer Graham had been excused, the trial court observed that Officer Graham's driving under the influence charge was "pretty much irrelevant to any issue here." Report of Proceedings (RP) (July 14-15, 2014) at 150. Perry agreed. The State provided Perry with a copy of the arrest report, in accord with the trial court's direction.

After the hearing, the trial court concluded, in part, that law enforcement (1) lawfully entered the hotel room when Perry consented to their entry; (2) were not required to give *Ferrier*[4] warnings because they entered the room to discuss Perry's failure to leave the hotel, not look for evidence; (3) retrieved Perry's ID from his wallet with his consent; (4) lawfully arrested Perry on an outstanding warrant; and (5) performed a lawful inventory search of Perry's wallet and the room for safekeeping, during which it was reasonable to open the passport to further identify Perry. Accordingly, the trial court found "that the evidence obtained from the inventory search in this

[3] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[4] *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

case is admissible and the motion to suppress is denied." Clerk's Papers (CP) at 106. The findings of fact and conclusions of law were filed on August 1.[5]

At trial, a phone call from jail was introduced and transcribed into the record. The State laid the foundation for the phone call's admission through the testimony of a safety deputy at the jail, Don Carn. Carn testified that each inmate has a unique personal identification number (PIN) that must be used to make telephone calls. The PIN used to make the phone call in question was assigned to Perry, and the call was made from the jail location in which Perry was housed. Carn added that the PIN associated with Perry called this particular telephone number 31 times from the jail location in which Perry was housed. Finally, Carn noted that when a call is initiated but before the two parties are connected, the parties are "admonish[ed] that all calls are being recorded and subject to being monitored." 3 Verbatim Transcript of Proceedings (VTP) at 401.

Madison Morton, the woman in the hotel room with Perry when the officers arrived, testified that Perry had picked her up from work in the Subaru, and then she drove the two of them to the hotel. Morton also testified that Perry told her that his mother had left him money and that

[5] Perry moved for reconsideration on August 14, citing "a copy of a Holiday Inn Express room reservation" (reservation card) that the State disclosed for the first time on July 18. Clerk's Papers (CP) at 109. The State received the registration card on July 18, disclosed it to the defense on the same day, and disclosed it to the defense a second time on July 25. Perry argued that the document contradicted Williams's testimony because it listed the reservation as going from August 13, 2013 through August 19, 2013, whereas Williams testified that Perry had been required to check out by noon on August 14, 2013. Perry also requested reconsideration because the defense learned for the first time before Officer Graham's testimony at the hearing that Officer Graham had been arrested for driving under the influence and the defense had since learned that Officer Graham had been charged by the same prosecutor's office that was prosecuting Perry. The record before this court does not contain a disposition of Perry's motion to reconsider.

he had purchased the Subaru at a car lot. Perry also told her he booked the room under a different name because he had an outstanding warrant.

Thomas Thompson testified that on August 13, 2013, someone had opened his garage door and stolen several items. Some of the items recovered from the hotel room were items stolen from Thompson.

At the conclusion of Perry's trial, the jury found him guilty of first degree criminal trespass (count I), second degree identity theft (count II), possession of a stolen vehicle (count III), third degree possession of stolen property (count V), and use of drug paraphernalia (count VI). On count IV, the jury found him guilty of the lesser included offense of third degree possession of stolen property.

Perry's judgment and sentence required him to pay $500 for a crime victim assessment, $100 for a DNA database fee, $1,500 for a court-appointed attorney fee, and $200 for a filing fee. No inquiry into Perry's ability to pay was made on the record. The judgment and sentence also included a boilerplate provision that stated:

> Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

CP at 262. Following this boilerplate language was a handwritten notation that said, "forfeit items in property," and a checked box next to printed text that said, "All property hereby forfeited." CP at 262-63. The sentencing court did not provide any statutory authority for its forfeiture orders.

Perry appeals.

ANALYSIS

A. INSUFFICIENT CHARGING DOCUMENT

Perry argues for the first time on appeal that the charging document was insufficient with respect to count III, possession of a stolen vehicle, and count V, third degree possession of stolen property. Specifically, Perry argues the charging document was insufficient with respect to these two charges because neither charge alleged that Perry "with[e]ld or appropriate[d]" the vehicle. Br. of Appellant at 35. Pursuant to our Supreme Court's decision in *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016), we hold the charging document was sufficient with respect to count III and count V.

1. Legal Principles

We review a charging document's sufficiency de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). A constitutionally sound charging document includes all essential elements of a crime, statutory or otherwise, so as to provide notice to the accused of the nature and cause of the accusation against him or her. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). "'An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.'" *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014) (quoting *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013)). Mere citations to the criminal code section and title of the offense do not satisfy the essential element requirement. *Zillyette*, 178 Wn.2d at 162.

When the defendant challenges the charging document's sufficiency for the first time on appeal, we construe the document liberally in favor of validity. *Porter*, 186 Wn.2d at 89. The test for the liberal interpretation of the document asks two questions:

> (1) [D]o the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wn.2d at 105-06.

2. Possession of a Stolen Vehicle (Count III)

Perry argues that the omission of to "withhold or appropriate" from the State's charge against him for possession of a stolen vehicle renders the charge insufficient and requires reversal.[6] Br. of Appellant at 35. In *Porter*, our Supreme Court rejected the same argument Perry now makes when addressing language in Porter's charging document that is identical to that used in Perry's charging document. 186 Wn.2d at 87. The court held that the charging document included all essential elements of the crime of possession of a stolen motor vehicle and that the definitional element of "possess" was not required to be included in the charging document. *Id.* Accordingly, we follow *Porter* and hold that Perry's charging document included all essential elements of the crime of possession of a stolen motor vehicle.

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[6] Perry's charging document for the crime of possession of a stolen vehicle (count III) stated, in relevant part:

> That STEPHANE ALEXANDRE B PERRY, in the State of Washington, on or about the 14th day of August, 2013, did unlawfully and feloniously possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

CP at 134.

3. Third Degree Possession of Stolen Property (Count V)

Perry argues that the omission of to "withhold or appropriate" from the State's charge against him for third degree possession of stolen property renders the charge insufficient and requires reversal.[7] Br. of Appellant at 35. We disagree.

Our Supreme Court in *Porter* made clear that in a charge for possession of a stolen vehicle, "the State was not required to include the definition of 'possess,'" which includes the "to withhold or appropriate" language that Perry now argues was omitted in error, because "the definition of 'possess' defines and limits the scope of the essential elements of the crime" but is not itself an essential element. 186 Wn.2d at 91. But the law would be inequitable if "to withhold or appropriate" is an essential element of possessing stolen property, yet when the stolen property is a motor vehicle, then "to withhold or appropriate" would cease to be essential to the charged crime. Accordingly, we hold that the definition of "possess" in the crime of "possessing stolen property," which includes the language "to withhold or appropriate," is not an essential element of the crime of possession of stolen property and that Perry's charging document sufficiently articulated the essential elements of that crime in count V. *Id.*

[7] Perry's charging document for the crime of possession of stolen in the third degree (count V) stated, in relevant part:

> That STEPHANE ALEXANDRE B PERRY, in the State of Washington, on or about the 14th day of August, 2013, did unlawfully and knowingly receive, retain, possess, conceal, or dispose of stolen property other than a firearm or a motor vehicle, belonging to another, of a value that does not exceed $750. . . , contrary to RCW 9A.56.140(1) and 9A.56.170(1)(2), and against the peace and dignity of the State of Washington.

CP at 135.

B. DOUBLE JEOPARDY

Perry argues that his two convictions for third degree possession of stolen property violate his right against double jeopardy.[8] He did not raise this issue at trial, but a constitutional challenge may be raised for the first time on appeal. *State v. Adel*, 136 Wn.2d 629, 631–32, 965 P.2d 1072 (1998). Our review is de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The double jeopardy clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Washington State Constitution provides that "[n]o person shall be . . . twice put in jeopardy for the same offense." CONST. art. I, § 9. The two clauses provide the same protection. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000). Thus, the "'double jeopardy doctrine protects a criminal defendant from being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense.'" *State v. Fuller*, 185 Wn.2d 30, 33-34, 367 P.3d 1057 (2016) (quoting *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)).

Perry contends that his convictions for possession of stolen property must be dismissed because they constitute the same offense for double jeopardy purposes. Relying primarily on *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003), Perry points out that simultaneous possession of various items of property stolen from multiple owners constitutes one unit of prosecution of the crime. *Id.* at 340. The State concedes that *McReynolds* is controlling.

[8] Perry actually argues that he was convicted of one count of second degree possession of stolen property (count IV) and one count of third degree possession of stolen property (count V), which is not accurate. However, his confusion is irrelevant to our analysis.

In *McReynolds*, the defendants were convicted of multiple counts of possessing stolen property based on their possession of various items of stolen property from different owners over a period of 15 days. 117 Wn. App. at 332-34. Division Three of this court held that these multiple convictions subjected the defendants to double jeopardy. *Id.* at 340. The court reasoned that the identity of the property's owner, the property's location, or its connection to a specific theft or burglary were not elements of the crime of possession of stolen property. *Id.* Division Three ultimately held that the simultaneous possession of articles stolen at different times and from different persons constitutes one offense. *Id.* at 339-40.

Here, we conclude that Perry's two convictions for possessing stolen property belonging to Lane and Thompson and found in the hotel room violate double jeopardy. The prosecutor cited Lane's safe, financial documents in the safe, social security card, passport, and car keys as the stolen property to convict on count IV. The prosecutor stated that count V was based on the stolen property belonging to both Lane and Thompson, but specifically cited only Thompson's bag and headset. Pursuant to *McReynolds*, the identity of the property's owner, its location, and its connection to a specific theft or burglary, do not allow independent convictions for possession of stolen property, and Perry's simultaneous possession of stolen property belonging to Lane and Thompson constitutes one offense. 117 Wn. App. at 339-40. Accordingly, Perry can only be convicted of one count of possession of stolen property, and the second count must be dismissed with prejudice.

C. ALTERNATIVE MEANS AND SUFFICIENCY OF THE EVIDENCE

Perry argues that his convictions for first degree criminal trespass (count I) and second degree identity theft (count II), must be reversed because they were charged as alternative means

crimes, no unanimity instruction was given, and the State failed to present substantial evidence to prove each of the alternative means. We disagree because a unanimity instruction was not required for the criminal trespass charge and identity theft is not an alternative means crime.

In a criminal trial, defendants have the right to a unanimous jury verdict under article I, section 21 of the Washington Constitution. *State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87 (2015). "This right may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime." *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014) (emphasis omitted). However, where there is sufficient evidence to support each of the alternative means presented, an expression of jury unanimity as to which means is not required. *Sandholm*, 184 Wn.2d at 732.

The first step in our review requires a determination of whether the statute in question creates an alternative means crime. *Id.* We make this determination by analyzing the language of the criminal statute in question. *Id.* The statutory analysis focuses on whether each of the alleged alternatives describes "'*distinct acts* that amount to the same crime.'" *Id.* at 734 (quoting *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010)). "Only if the statute creates an alternative means do we then proceed to analyze an alleged unanimity issue." *Id.* at 732.

1. First Degree Criminal Trespass (Count I)

Perry argues that first degree criminal trespass (count I) is an alternative means crime requiring jury unanimity to convict. Specifically, Perry argues that the State violated his right to

jury unanimity because "there was not proof beyond a reasonable doubt that [he] 'entered' unlawfully." Br. of Appellant at 31-32. We disagree.

"A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1). "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." Former RCW 9A.52.010(3) LAWS OF 2011, c. 336, § 369.

In *State v. Allen*, Division One of this court considered whether a defendant's right to jury unanimity was violated by the State's failure "to establish both the 'entered unlawfully' and 'remained unlawfully' means of committing burglary." 127 Wn. App. 125, 127, 110 P.3d 849 (2005). The court held, "a jury instruction requiring the State to prove the defendant entered *or* remained unlawfully in a building raises no unanimity concerns, even if there is no evidence to support one of the alternative means." *Id.*

Here, Perry was charged with and convicted of first degree criminal trespass. The "to convict" jury instruction on the criminal trespass charge required the State to prove that Perry "knowingly entered *or* remained in a building" and that Perry "knew that the entry *or* remaining was unlawful." CP at 212 (emphasis added).[9]

[9] The "to convict" jury instruction said:

> To convict the defendant of the crime of criminal trespass in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 14th day of August, 2013, the defendant knowingly entered or remained in a building;
>
> (2) That the defendant knew that the entry or remaining was unlawful; and

Perry does not argue that the jury lacked sufficient evidence to find him guilty for unlawfully remaining in the hotel. Rather, Perry contends that his right to jury unanimity was violated because "there was not proof beyond a reasonable doubt that [he] 'entered' unlawfully." Br. of Appellant at 31-32. Perry's argument fails because unanimity concerns are not implicated. The *Allen* court held that, as it relates to a burglary conviction, jury instructions that require the State "to prove the defendant entered *or* remained unlawfully in a building raises no unanimity concerns, even if there is no evidence to support one of the alternative means." 127 Wn. App. at 127. The holding in *Allen* applies equally to criminal trespass convictions because criminal trespass is a lesser included offense of burglary. *State v. Sutherland*, 109 Wn.2d 389, 390, 745 P.2d 33 (1987). Therefore, we hold that Perry's conviction for first degree criminal trespass (count I) did not violate his right to jury unanimity.

> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 212; *accord* RCW 9A.52.070(1). A second jury instruction stated, "A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." CP at 214; *accord* former RCW 9A.52.010(3).

2. Second Degree Identity Theft (Count II)

Perry argues that second degree identity theft is an alternative means crime requiring jury unanimity to convict. Specifically, Perry argues that the State violated his right to jury unanimity because the State needed to prove each of the four verbs in the "to-convict" instruction—"obtained, possessed, used or transferred"—described Perry's conduct. Br. of Appellant at 30. We disagree.

We considered the same issue Perry now raises on appeal in *State v. Butler*, 194 Wn. App. 525, 374 P.3d 1232 (2016). There, Butler argued that the use of the four different verbs in RCW 9.35.020(1)—"obtain, possess, transfer, and use—establish that the crime is committable in more than one way, and is therefore an alternative means crime." *Id. at* 529. Relying on our Supreme Court's reasoning in *Owens*, 180 Wn.2d 96–97, we held in *Butler* that the verbs "are not distinct means by which to commit identity theft, but rather are multiple facets of a single means." 194 Wn. App. at 530. We reasoned that "it would be hard to imagine the crime of identity theft being committed by a single act of 'using' a check that did not also involve 'obtaining" and 'possessing' the check. Likewise, one could not 'transfer' financial information without also 'obtaining' and 'possessing' that information," but that "not every verb must overlap in order to constitute a single means." *Id.* at 530. Accordingly, "[b]ecause no single action in the statute could be completed without simultaneously completing at least one other action, the various acts are too similar to constitute distinct alternative means," and therefore, "identity theft is not an alternative means crime." *Id.*

Here, Perry challenges the portion of the "to convict" instruction that reads, "[t]hat on or about August 14th, 2013, the defendant knowingly obtained, possessed, or transferred or used as a means of identification or financial information of another person, living or dead." CP at 217.[10] As in *Butler*, it is hard to imagine the crime of identity theft being committed by a single act of using a credit card or social security card that did not also involve obtaining and possessing the cards. It does not matter which of the four verbs most accurately describes the way Perry involved himself with Matthew Lane's credit card and social security card. What matters is that the jury unanimously found he did so knowingly and with the intent to commit a crime. Therefore, we

[10] The "to convict" jury instruction said:

> To convict the defendant of identity theft in the second degree, the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about August 14th, 2013, the defendant knowingly obtained, possessed, or transferred or used a means of identification or financial information of another person, living or dead;
>
> (2) That the defendant acted with the intent to commit any crime;
>
> (3) That the defendant obtained credit, money, goods, services or anything else that is $1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods, services or other items of value; and
>
> (4) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 217; *accord* RCW 9.35.020.

hold that Perry fails to establish that the crime of identity theft is an alternative means crime that required a unanimity jury instruction.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Perry argues he was deprived of effective assistance of counsel when counsel failed to request a cautionary jury instruction. Specifically, Perry argues his trial counsel was deficient in failing to request 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 6.05, at 184 (3d ed. 2008) (WPIC), which concerns the testimony of accomplices, and he was prejudiced because his "entire defense" was built on trying to discredit Morton's testimony. Br. of Appellant at 27 (emphasis omitted). We disagree.

We review an ineffective assistance claim de novo, beginning with a strong presumption that trial counsel's performance was adequate and reasonable. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice; failure to show either defeats an ineffective assistance of counsel claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish deficient performance, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* Prejudice is established when the defendant demonstrates that there is a reasonable probability that, but for counsel's deficient performance, "the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322,

335, 899 P.2d 1251 (1995). If the defendant fails to satisfy either prong, the court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Perry claims he was denied access to effective counsel because his attorney did not ask the court to give the following standard cautionary instruction concerning accomplice testimony:

> Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

See WPIC 6.05, at 184.

WPIC 6.05 is mandatory only when the State's case-in-chief rests solely upon uncorroborated accomplice testimony. WPIC 6.05, cmt. at 184 (citing *State v. Willoughby*, 29 Wn. App. 828, 630 P.2d 1387, *review denied*, 96 Wn.2d 1018 (1981)). "[W]hether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration." *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), *overruled on other grounds by State v. McKinsey*, 116 Wn.2d 911, 914, 810 P.2d 907 (1991). "[F]ailure to give this instruction is always reversible error when the prosecution relies *solely* on accomplice testimony." *Harris*, 102 Wn.2d at 155.

Here, the State's case in chief relied minimally on Morton's testimony, and Morton's testimony was corroborated by independent evidence; thus, the instruction was not mandatory. Morton's testimony established that she was in the hotel when the officers arrived; that she drove the Subaru Perry told her he had purchased; that Perry told her he used a different name because of an outstanding warrant; and that they went to the hotel to do drugs because Perry owed her money. At trial, Officers Graham and Kieszling testified that Morton was in the hotel when they

arrived; that Perry claimed the keys to the Subaru as his own; that the Subaru was stolen and belonged to Matthew Lane; that Perry had claimed to be Matthew Lane; that Perry had Matthew Lane's social security card in his wallet; that Matthew Lane's passport was in the room; that there was drug paraphernalia in the room; and that Perry had admitted to using drugs in the room. The hotel front desk manager, Williams, testified that the room Perry was staying in was registered to Matthew Lane; that she had told Perry on more than one occasion after noon on August 14 that he was no longer allowed to be at the hotel because his checkout time was at noon and he had not paid for an additional night. Finally, police found Perry's fingerprints and palm impressions on the stolen Subaru.

The record demonstrates that the State's case-in-chief did not rely solely on the uncorroborated testimony of Morton as an accomplice. Instead, the majority of the State's case-in-chief was established by evidence other than Morton's testimony, and Morton's testimony was corroborated by independent evidence at trial. Therefore, the accomplice testimony instruction was not mandatory. Because Perry fails to show that the trial court would have exercised its discretion and given the instruction had his attorney made the request, he fails to show prejudice. Absent such showing, Perry's argument that he received ineffective assistance of counsel fails.

E. SENTENCING CONDITIONS

Perry argues that the sentencing court erred in imposing a sentencing condition that required him to "forfeit items in property" and that "[a]ll property is hereby forfeited." CP at 262-63. The State concedes that this was error and that *State v. Roberts*, 185 Wn. App. 94, 339 P.3d 995 (2014), controls. We accept the State's concession and remand to strike the sentencing condition requiring forfeiture of items in property from Perry's judgment and sentence.

A sentencing court is required to provide statutory authority for its forfeiture orders. *Id*. at 96. Here, the sentencing court provided the following boilerplate language:

> Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

CP at 262. Below this, the trial court wrote in: "forfeit items in property," and checked a box denoting, "All property is hereby forfeited." CP at 262-63. The sentencing court did not provide any statutory authority for its forfeiture orders. Therefore, we accept the State's concession and remand for the sentencing court to strike the condition requiring forfeiture of property from Perry's judgment and sentence.

F. LEGAL FINANCIAL OBLIGATIONS

Perry argues that the sentencing court erred in imposing LFOs without inquiring into Perry's present and future ability to pay on the record. The State concedes that the sentencing court erred in failing to conduct such an inquiry. We accept the State's concession.

In *State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015), our Supreme Court held that "in order to impose discretionary LFOs under RCW 10.01.160(3), the sentencing judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay," and "the record must reflect this inquiry." Here, the sentencing court failed to conduct an individualized inquiry into Perry's present and future ability to pay the discretionary LFOs imposed. Therefore, we accept the State's concession and remand to the sentencing court to consider Perry's current and future ability to pay before imposing discretionary LFOs.

G. STATEMENT OF ADDITIONAL GROUNDS

1. Search and Seizure

Perry argues that the trial court erred in failing to suppress the social security card, the passport, and the safe. Specifically, Perry assigns error to the trial court's conclusion that the officers' search did not exceed the scope of an inventory search. We hold the trial court did not err.

We review the denial of a suppression motion to determine whether substantial evidence supports the challenged findings and whether these findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

> Officers may conduct a warrantless inventory search without violating section I, article 7 or the Fourth Amendment. Unlike a probable cause search and search incident to arrest, officers conducting an inventory search perform an administrative or caretaking function.
>
> Officers may conduct a warrantless inventory search (1) to protect the arrestee's property, (2) to protect the government from false claims of theft, and (3) to protect police officers and the public from potential danger.

State v. VanNess, 186 Wn. App. 148, 162, 344 P.3d 713 (2015) (footnotes omitted).

Here, substantial evidence supports the trial court's findings, and the findings supported the trial court's conclusions. The officers received consent from Perry to enter the hotel room; Perry gave the officers permission to retrieve Perry's wallet and look for his ID; Perry was then validly arrested on an outstanding warrant; and Morton was allowed to gather her belongings and leave. Once Perry had been placed under arrest, it was proper for the officers to inventory the contents of Perry's wallet to protect Perry's property contained within and to protect the

government from potential false claims of theft. *Id.* at 162. For the same reasons, once Perry had been arrested and Morton had left with her things, it was proper for the officers to collect the passport and safe as part of the inventory search. *Id.* Opening the passport was proper to identify to whom it belonged, and the safe was not opened until it was determined that Perry did not own the safe and the officers were given permission to open it by its true owner. Therefore, we hold that the trial court did not err in not suppressing the social security card, the passport, and the safe.

2. Exculpatory and Impeachment Evidence

Perry argues that the prosecution failed to turn over exculpatory and impeachment evidence to the defense. Perry specifically argues that a registration card that showed the length of stay was six nights would have contradicted Williams's testimony at the CrR 3.6 hearing about the duration of Perry's reservation and should have been turned over to the defense. Perry also argues that the defense should have received a more full disclosure regarding Officer Graham's arrest for driving under the influence. We hold Perry's arguments fail.

a. Registration Card

Perry contends that because the registration card "was . . . available to the prosecution for over a year . . . keeping it from the [CrR] 3.6 hearing and springing it after an unfavorable ruling was unfair and prejudicial." SAG at 3 (emphasis omitted). Perry requests that this court "overturn the ruling of the [CrR] 3.6 hearing and suppress all evidence as fruit of the [poisonous] tree." SAG at 3. We decline Perry's request.

The record shows that the State did not have the registration card until July 18, which was after the CrR 3.6 hearing. The record also shows that the State disclosed the registration card to the defense on the same day it was received and again the following week. Moreover, the record

does not indicate any reason the defense would not have been able to acquire the registration card from the hotel on its own through a subpoena.

Finally, Williams testified extensively about the registration card during the State's direct-examination and Perry's cross-examination at trial. Perry's cross-examination of Williams at trial began with the same alleged inconsistencies that Perry now raises in his SAG. Accordingly, we hold that Perry fails to identify how he was prejudiced when he took advantage of the ample opportunity to cross-examine Williams on the inconsistencies he now alleges. Perry's challenge fails.

b. Officer Graham's Criminal Charge

Perry contends that "the defense should have received full disclosure on" Officer Graham's driving under the influence charge and that the trial court erred in determining that it was not relevant to Perry's case. SAG at 4. Instead, Perry asserts that this was a *Brady* violation that requires his convictions be overturned. We disagree.

We review alleged *Brady* violations de novo. *State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). Under *Brady*, the State violates a criminal defendant's due process right if (1) it suppresses evidence that is (2) favorable to the defense and (3) material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *see Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

The State suppresses evidence by failing to disclose it, regardless of whether the defense requests the evidence. *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Evidence is favorable to the defense if it is exculpatory or impeaching. *United States v. Bagley*,

473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Evidence is material to guilt or punishment "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 433-34 (quoting *Bagley*, 473 U.S. at 682). A reasonable probability of a different result exists where the State's nondisclosure "'undermines confidence in the outcome of the trial.'" *Id.* at 434 (quoting *Bagley*, 473 U.S. at 678). Materiality requires evaluating the State's nondisclosure "in the context of the entire record." *Agurs*, 427 U.S. at 112. Thus, impeachment evidence "may not be material if the . . . other evidence is strong enough to sustain confidence in the verdict." *Smith v. Cain*, ___ U.S. ___, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571 (2012).

Here, there is no exculpatory value to the evidence of Officer Graham's charge for driving under the influence, and Perry does not specify what impeachment value the evidence would have. Driving under the influence is not inherently a crime involving dishonesty, and the record does not contain any information regarding Officer Graham's honesty about the charge. The record does, however, show that the State was not aware of Officer Graham's arrest and charge until the morning of the second day of the hearing. The State informed Perry before the morning's proceedings began and informed the trial court as soon as the proceedings began. The State asserted that it did not believe the charge against Officer Graham to be a *Brady* issue, and the trial court and Perry's counsel agreed. Also, the trial court ordered the State to provide the arrest report of Officer Graham's driving under influence charge, and the State complied. The trial court did not order the State to provide any further documentation to the defense. Given the absence of information in the record, and in Perry's SAG, to suggest how confidence in the outcome of Perry's

trial is undermined by the extent of the State's disclosures regarding Officer Graham's charge for driving under the influence, Perry's assertion of a *Brady* violation fails.

3. Confrontation Clause

Finally, Perry argues that the trial court erred in admitting the phone call from the jail because it violated Perry's right to confront the witnesses against him. We hold that the statements made in the phone call were nontestimonial, and therefore, the confrontation clause does not apply.[11]

Our Supreme Court recently addressed the confrontation clause as it relates to statements made outside of the courtroom and presented at trial in *State v. Wilcoxon*, 185 Wn.2d 324, 329-30, 373 P.3d 224 (2016). In *Wilcoxon*, our Supreme Court stated:

> [W]e first determine whether the out-of-court statements were testimonial. If they *were*, we proceed to a confrontation clause analysis. If not, the confrontation clause does not apply. As the United States Supreme Court has explained, a statement is "testimonial" if it is the functional equivalent of in-court testimony. *See Crawford* [*v. Washington*, 541 U.S. [36] at 51–52[, 124 S. Ct. 1354, 158 L. Ed 2d 177 (2004)]. A testimonial statement is designed to establish or prove some past fact, or is essentially a weaker substitute for live testimony at trial. *Davis [v. Washington*,] 547 U.S. [813,] at 827–28[, 126 S. Ct. 2266, 165 L. Ed 2d 224 (2006)]. Where the statement is effectively a substitute for live trial testimony, the statement is testimonial. *Id.* at 828. *Crawford* listed some examples such as "'*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'" 541 U.S. at 51. "Statements taken by police officers in the course of interrogations," which was the case in *Crawford*, are also testimonial. *Id.* at 52. However, a "casual remark to an acquaintance" is not testimonial. *Id.* at 51.

[11] The State argues that Perry waived this argument by failing to object to its admission on confrontation clause grounds below. However, the record shows that Perry did object on confrontation clause grounds several times below. *See, e.g.*, VRP (Sept. 15, 2014) at 74 ("[I]f the State intends on introducing any statements that were made by anyone other than the inmate, then the defense has some serious confrontation clause concerns.").

Id. at 334-35.

Wilcoxon considered a co-defendant's statements made to a third party at the third party's home. *Id.* at 327. Our Supreme Court held that the co-defendant's statements to the third party were nontestimonial, and therefore, the confrontation clause was not implicated. *Id.* at 335. The court reasoned:

> [The co-defendant's] statements were that he and a friend had discussed burgling Lancer Lanes and that his friend had called him while burgling Lancer Lanes. The statements were not designed to establish or prove some past fact, nor were they a weaker substitute for live testimony at trial; rather, [the co-defendant] was casually confiding in a friend. [The co-defendant] would not have reasonably expected that statement to his friend to be used prosecutorially. Those statements were merely "casual remark[s] to an acquaintance." Therefore, the statements were nontestimonial. Since they were nontestimonial, they were outside the scope of the confrontation clause. Therefore, Wilcoxon suffered no confrontation violation.

Id. (last alteration in original) (citations omitted).

Here, the same reasoning leads to the same conclusion. The phone call from jail presents a conversation between an inmate alleged to be Perry and unidentified male and female voices. None of the statements made by the unidentified voices were designed to establish or prove a fact nor were they a weaker substitute for trial testimony. Instead, the conversation is one of friends lamenting over the fact that Perry had been arrested and the evidence Perry believed the State had against him. These statements were merely "casual remark[s] to . . . acquaintance[s]." *Id.* (quoting *Crawford*, 541 U.S. at 51) (first alteration in original). Therefore, the statements made in the phone call from the jail were nontestimonial, and Perry suffered no confrontation clause violation.

CONCLUSION

We dismiss with prejudice Perry's third degree possession of stolen property conviction (count V). Perry's convictions for first degree criminal trespass (count I), second degree identity theft (count II), possession of a stolen vehicle (count III); third degree possession of stolen property (lesser-included offense of count IV), and use of drug paraphernalia (count VI) are affirmed. Also, we reverse the sentencing conditions requiring forfeiture of Perry's property and the imposition of discretionary LFOs, and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, J.

Bjorgen, C.J.