IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION [NUMBER]

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **[CLIENT NAME],** Defendant and Appellant.	**A######** ([County] County Superior Court No. ########)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the
Superior Court of the State of California
for [County] County

Honorable [Judge's Name], Judge

[ATTORNEY NAME
(Bar No. #######)
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STATEMENT OF APPEALABILITY

This appeal from a jury trial is authorized by Penal Code section 1237, subdivision (a)[1] and rule 8.304(a)(1) of the California Rules of Court.

STATEMENT OF THE CASE

On May 4, 2018, the [County] County District Attorney charged appellant [Client Name] by information with fraudulent possession of personal identifying information with a prior (§ 530.5, subd. (c)(2)), and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a). (1CT 37-38.) The information

[1] Unless otherwise noted, all subsequent statutory references are to the Penal Code.

alleged that in 2010, [Client] was convicted of violating section 530.5. (1CT 37.)

On March 20, 2019, a jury found [Client] guilty of both counts. (1CT 181-182.)

On April 25, 2019, the court granted [Client]'s section 1170.18 petition to reduce her 2010 conviction for violating section 530.5 to a misdemeanor. (21RT 2308.) On May 30, 2019, the court indicated it "reclassified that [2010 conviction] as a 590.2 [sic]." (23RT 2606.) Noting that [Client] no longer had a prior conviction for violating section 530.5, the court redesignated [Client]'s conviction in this case as a misdemeanor, from a violation of section 530.5, subdivision (c)(2), to a violation of section 530.5, subdivision (c)(1). (23RT 2614.)

On June 20, 2019, the court sentenced [Client] to eight days in jail, consecutive to a two-year sentence imposed for violating probation in a separate case. (24RT 2686-2689.) [Client] received credit for 304 days (152 actual days, plus 152 days under section 4019). (24RT 2690.)

[Client] timely filed a notice of appeal on June 25, 2019. (2CT 324.)

STATEMENT OF FACTS

[Witness]'s 2012 Ford Focus was stolen at some point in the last five years. (17RT 1343-1344.) [Witness] could not remember when her car was stolen. (17RT 1345.) [Witness] testified that her car may have been stolen "[b]etween May and June," and that it may have been stolen in 2017 or 2018. (17RT 1345.) When

[Witness]'s car was stolen, her California identification card was inside. (17RT 1344.) [Witness] never recovered her car or identification card. (17RT 1344, 1348.) She did not know appellant. (17RT 1345-1346.) [Witness] did not give anyone permission to have her identification card. (17RT 1346.)

On January 14, 2018 at about 12:42 p.m., [Officer] noticed a silver 2001 Nissan parked illegally. (17RT 1378-1379, 1392.) The Nissan had no front or rear license plate, but had a temporary DMV tag on its front windshield. (17RT 1379, 1393.) The hood of the Nissan was warm. (17RT 1379.) [Officer] saw [Client] and [Friend] walking together, and he saw [Client] put a clear plastic bag into her pants. (17RT 1381.) [Officer] contacted [Client] and [Friend] near the Nissan. (17RT 1384-1385.)

[Client] confirmed that the Nissan was hers, and that she had purchased the car in San Francisco eleven days earlier, on January 3, 2018. (1CT 90, 1CT 162, 18RT 1643.) She gave the plastic bag to [Officer]. (17RT 1397.) The plastic bag contained 5.158 grams of methamphetamine. (18RT 1616.) [Officer] opened the gas tank door. (17RT 1357.) The gas tank door was not locked. (17RT 1359.) [Officer] found a dry paper towel wrapped around a dry sponge; against the sponge, he found [Witness]'s California identification card. (17RT 1356.) [Officer] could not remember if there was a cap on the gas tank. (17RT 1357.)

When asked about [Witness]'s California identification card, [Client] said: "ID?" (18RT 1642, 1CT 171.) When [Officer] told her that they found the card in the Nissan's gas tank,

[Client] said: "I don't know nothing about it." (18RT 1642, 1CT 171.) [Client] told [Officer] that she "bought the car, um, probably a week ago." (1CT 171, 18RT 1642.) [Officer] asked [Client] if she had ever put gas in the Nissan; [Client] said that she had not. (18RT 1643, 1CT 171.) [Officer] did not determine how much gas remained in the tank of the Nissan. (18RT 1648.) [Client] told [Officer] that she bought the Nissan in San Francisco and had it towed to Vallejo. (18RT 1643, 1CT 171-172.) [Client] said that she was in the process of getting the Nissan registered in her name. (18RT 1643.) [Client]'s statement was corroborated: the Nissan's registration had expired, but "there was a registration in progress, or in process," to [Client]. (17RT 1379.)

[Witness] was not aware of any fraudulent activity that happened under her name, nor was she aware whether any of her personal information had been used for a fraudulent purpose. (17RT 1346, 17RT 1351.) The investigating officer found no indication that [Witness]'s identification card had been used for a fraudulent purpose. (17RT 1309, 1401-1402.)

[Client] stipulated that she was convicted in 2010 of violating section 530.5, subdivision (a). (17RT 1320.)

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT [CLIENT]'S CONVICTION FOR IDENTITY THEFT.

[Client] bought a car in San Francisco on January 3, 2018. Eleven days later, police found a paper towel, sponge, and [Witness]'s California identification card in the gas tank compartment of the car. Since there was no evidence from which the jury could conclude that [Client] knew about the identification card, or that [Client] intended to use that card for a fraudulent purpose, [Client]'s conviction for identity theft must be reversed.

A. Standard of Review.

The due process clauses of the Fifth and Fourteenth Amendments safeguard appellant from criminal liability "except upon evidence that is sufficient fairly to support a conclusion that every element . . . has been established beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-314; see also Cal. Const. Art. I § 15.) A finding based on conjecture or surmise cannot be affirmed. (*People v. Memro* (1985) 38 Cal.3d 658, 695.) This is because suspicion is not evidence; it only raises a possibility, which will not support an inference of fact. Even a strong suspicion is insufficient to support a conviction. (*People v. Thompson* (1980) 27 Cal.3d 303, 324.)

When assessing sufficiency of the evidence, a reviewing court "must review the whole record in the light most favorable to

the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "While substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

B. The Jury Could Not Reasonably Infer That [Client] Acquired, Retained, or Knew About the Presence of the Identification Card.

For a conviction under section 530.5, subdivision (c)(2), the prosecution must prove that the defendant "with the intent to defraud, acquire[d] or retain[ed] possession of the personal identifying information . . . of another person." Here, the record does not contain substantial evidence that [Client] acquired, retained, or even knew about the presence of the identification card.

[Witness]'s 2012 Ford Focus was stolen at some point in the last five years. (17RT 1343-1345.) [Witness]'s California identification card was in her car when it was stolen. (17RT 1344.) The car ended up in a tow yard in San Francisco. (17RT 1348-1349.) [Client] purchased a 2001 Nissan Maxima from a tow yard in San Francisco on January 3, 2018. (1CT 90, 162; 17RT

1392, 18RT 1643-1644.) Eleven days later, [Officer] found [Witness]'s card in the gas tank compartment of [Client]'s car, next to a sponge and wrapped in a paper towel. (17RT 1357.) There was no evidence that [Client] put fuel in the gas tank, or even accessed the gas tank. (18RT 1643; 1CT 171.) There was no evidence about the amount of gasoline in the gas tank. (17RT 1360.) There was no evidence that the card was used for any purpose. (17RT 1401-1402.) Thus, the jury's finding that [Client] knew about the card's presence was not an inference, but "the result of mere speculation or conjecture." (*Kuhn v. Department of General Services, supra*, 22 Cal.App.4th at p. 1633.)

Two cases support [Client]'s position that the jury lacked sufficient evidence to infer that she knew about the presence of the identification card. First, in *People v. Van Syoc* (1969) 269 Cal.App.2d 370, police stopped the defendant and his two juvenile companions as they approached a parked car. (*Id*. at p. 371.) The defendant told police that the car was his, that no narcotics were in the car, and that they could search the car. (*Ibid*.) The car was evidently unlocked. (*Id*. at p. 372.) Police found marijuana in a cigarette package on the dashboard. (*Id.* at p. 371.) The Court of Appeal reversed the defendant's conviction for possession of marijuana, agreeing that "the judgment is unsupported by substantial evidence he knew the marijuana was in his car." (*Id*. at pp. 372-373.) The court explained that it could not infer from "mere ownership of an unlocked car parked in a public area in which marijuana is found and to which the owner has non-

exclusive access" that the defendant knew about the marijuana. (*Id*. at p. 373.) "Whatever inference might be drawn from the record's silence . . . would rest on sheer speculation. Speculation cannot substantially support an incriminating inference." (*Ibid*.)

Here, as in *Van Syoc*, police stopped [Client] and her companion as the two approached a parked car. (17RT 1384-1385.) [Client] told police that the car was hers. (17RT 1385.) Police searched the unlocked gas tank compartment, and found a California identification card. (17RT 1357-1359.) As in *Van Syoc*, [Client]'s car was parked in a public area. (17RT 1378.) As in *Van Syoc*, [Client] had non-exclusive access to the unlocked gas tank compartment of her car. (17RT 1358-1359.) Thus, the finding that [Client] knew about the identification card, like the finding that the defendant in *Van Syoc* knew about the marijuana, "rest[ed] on sheer speculation." (*Van Syoc, supra,* 269 Cal.App.2d at p. 373.)

Second, in *People v. Bledsoe* (1946) 75 Cal.App.2d 862, the defendant was seated in his car with a friend. (*Id*. at p. 863.) Police approached, told the defendant that his car may have been involved in a robbery the night before, searched the car, and found marijuana in the passenger compartment. (*Ibid*.) The defendant denied knowing about the marijuana. (*Ibid*.) The Attorney General argued that the defendant's conviction for possession of marijuana should be affirmed "because the appellant had in his possession the key to the car, [so] he must have had 'possession' of the narcotic." (*Id.* at p. 864.) Noting that

"others beside appellant had occupied the car[,]" the Court of Appeal found no "evidence from which the inference could be 'fairly' drawn that the defendant had knowledge of the 'existence' of the drug at the place where it was found." (*Id.* at pp. 864-865.) The reviewing court concluded that the prosecutor failed "to prove the essential elements of the crime." (*Id.* at p. 864.)

Here, [Client] had the key to her car, just as the defendant in *Bledsoe* had the key to his car. (18RT 1649.) [Client] denied knowing anything about the identification card found in her car, just as the defendant in Bledsoe denied knowing anything about the marijuana found in his car. (18RT 1642, 1CT 171.) And here, as in *Bledsoe*, others beside [Client] had occupied her car: she bought it used eleven days prior. (1CT 90, 1CT 162, 18RT 1643.) In short, the finding that [Client] knew about the identification card in her car, like the finding that the defendant in *Bledsoe* knew about the marijuana in his car, was not supported by substantial evidence. "[T]hough the suspicion may be great, the evidence fails to prove the essential element of knowledge[.]" (*Bledsoe, supra*, 75 Cal.App.2d at p. 864.) Thus, without evidence from which the jury could conclude that [Client] knew about the identification card, her conviction for identity theft must be reversed for insufficient evidence.

C. The Jury Could Not Reasonably Infer That [Client] Intended To Use the Identification Card for a Fraudulent Purpose.

Even if this Court concludes that there was substantial evidence that [Client] possessed the identification card, the jury had no basis to infer that [Client] intended to use the card for a fraudulent purpose.

"[P]ossession alone does not establish an intent to defraud." (*People v. Truong* (2017) 10 Cal.App.5th 551, 558.) "An intent to defraud is an intent to deceive another person for the purpose of gaining a material advantage over that person or to induce that person to part with property or alter that person's position by some false statement or false representation of fact, wrongful concealment or suppression of the truth or by any artifice or act designed to deceive. [Citation.]" (*People v. Pugh* (2002) 104 Cal.App.4th 66, 72.)

For a jury to reasonably infer intent to defraud, there must be evidence in addition to possession. (*Truong, supra,* 10 Cal.App.5th at p. 558.) In *Truong*, police found unwrapped credit cards—replacement cards mailed to the defendant's neighbor—in the defendant's bedroom, months after the neighbor reported the cards missing. (*Ibid*.) The defendant returned other misdelivered mail to her neighbor, but provided "unclear and contradictory statements about how she came into possession of the cards[.]" (*Ibid*.) The Court of Appeal concluded that the evidence, in addition to possession, "supported an inference she intended to defraud." (*Ibid*.)

Here, by contrast, the jury had no evidence from which it could infer that [Client] intended to use the card for a fraudulent purpose. "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (b).) "However, '[a] reasonable inference . . . may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. ¶ . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'" (*People v. Davis* (2013) 57 Cal.4th 353, 360, quoting *People v. Morris* (1988) 46 Cal.3d 1, 21.)

The jury's factual finding that [Client] intended to defraud [Witness] was not a "reasonable inference" based on the evidence. (*Davis, supra*, 57 Cal.4th at p. 360.) [Officer]'s testimony perfectly captured the absence of evidence regarding [Client]'s intent: "my only guess is somebody put it there so people wouldn't find it, like the police." (17RT 1362.) The jury embraced [Officer]'s guess and, based on "suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work," found that [Client] intended to defraud [Witness]. (*Davis, supra*, 57 Cal.4th at p. 360.) Since the jury's factual finding was based on "sheer speculation," [Client]'s conviction must be reversed for insufficient evidence of intent. (*Van Syoc, supra*, 269 Cal.App.2d at p. 373.)

II. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TRIAL BY JURY BY FAILING TO SUA SPONTE INSTRUCT JURORS THAT [CLIENT] MUST HAVE HAD KNOWLEDGE ABOUT THE PRESENCE OF THE ID CARD.

The case came down to whether [Client] knew about the presence of the identification card in the gas tank such that she could be said to have possessed it. To violate section 530.5, the prosecution must prove the defendant "acquir[ed]" or "retain[ed] possession" of the personal identifying information. (§ 530.5, subd. (c)(1).) Where possession is an element of the offense, the trial court has a duty to instruct the jury that the defendant must have knowledge of the object's presence. (*People v. Reynolds* (1988) 205 Cal.App.3d 776, 780, overruled on a different ground, *People v. Patterson* (1951) 102 Cal.App.2d 675, 678.)

Here, the trial court delivered CALCRIM No. 2041, the pattern jury instruction for identity theft. But that instruction does not mention possession at all, stating only that the prosecution must prove the defendant "acquired or kept" the personal identifying information. (1CT 215.)[2] The instruction

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[2] As given, CALCRIM No. 2041 provided in relevant part:

"The defendant is charged in Count One with the fraudulent possession of personal identifying information under Penal Code Section 530.5 in violation of Penal Code section 530.5 (c)(2). To prove the defendant guilty of this crime, the People must prove that: 1. The defendant acquired or kept the personal identifying information of another person; AND 2. The defendant did so with the intent to defraud another person. A person intends to defraud

makes no reference that possession must be "knowing." Given that [Client]'s knowledge of the item's presence was the critical issue in the case, the court had a sua sponte duty to instruct about the knowing possession element. Failure to do so was error.

A. Standard of Review.

Claims of instructional error are subject to independent review. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584.)

B. The Error Is Cognizable on Appeal.

A trial court has a duty to instruct sua sponte on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The duty extends to defenses when it appears that the defendant is relying on such a defense, or when there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

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if he or she intends to deceive another person in order to cause a loss of something of value, or to cause damage to a legal, financial, or property right."

The instruction then provides a definition of personal identifying information. It does not define or otherwise reference the term "possession." (1CT 215.)

Here, the trial court was on clear notice that the defense was relying on the lack of evidence that [Client] knew of the presence of the identification card, and that this was a material issue presented by the evidence. At the close of the prosecution's evidence, counsel moved to dismiss the identity theft count pursuant to section 1181.1, arguing there was insufficient evidence that [Client] knew of the presence of the ID card. (18RT 1651-1657.) As counsel argued regarding the "acquired or kept" element: "And if you read it just kind of in a vacuum, it doesn't kind of lead one to have additional intent element. But if you read it in conjunction with the second element and in conjunction with the union of act or intent, she had to intentionally and willfully, *knowingly* obtain the ID card." (18RT 1651, emphasis added.)

After denying the defense motion, the court and the parties turned to the jury instructions. During the instructions conference, defense counsel requested that the court modify CALCRIM No. 2041. (18RT 1665.) The following exchange occurred:

> Defense counsel: With respect to element one, your Honor, I would ask to insert the word "intentional" between – you know, so it would read the defendant intentionally acquired or kept, because –
>
> The Court: Well, we're not going to add to the jury instruction unless it gives me that option to, and I don't believe that it does. I'm turning to that right now. And it does not, so I will not add "intentional."

(18RT 1666.)

Counsel did not thereafter request that the instruction be modified to include a reference to knowing possession. But CALCRIM No. 2041 does not provide an option to insert the element of knowing possession, just as it does not provide an option to insert the word "intentional." [3] Thus, given the court's stated position it would not make modifications not specifically referenced by the pattern instruction, it would have been futile for counsel to make such a request. (*People v. McCarrick* (2016) 6 Cal.App.5th 227, 243; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1 [failure to make argument is not waiver when it would have been futile].) Accordingly, no further action was required to preserve the issue for review.

[Client] is cognizant of the general rule that a claim of instructional error may not be cognizable on appeal if the instruction is correct in law and the defendant fails to request a

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[3] By contrast, the use note to CALJIC No. 16.540, the analogous instruction to CALCRIM 2041, explicitly references the separate instruction defining possession, CALJIC 1.24. That instruction provides: "There are two kinds of possession: actual possession and constructive possession. Actual possession requires that a person knowingly exercise direct physical control over a thing. Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons. One person may have possession alone, or two or more persons together may share actual or constructive possession." (CALJIC 1.24.)

CALCRIM No. 2041 contains no such reference or definition.

clarification instruction. (See e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 149.) That rule does not apply here, however, because the asserted error consists of a failure to instruct on an essential element of the offense and thus affects [Client]'s substantial rights. (*People v. Flood* (1998) 18 Cal.4th 470, 482; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 139; see § 1259.)

To the extent this Court finds the issue forfeited by counsel's failure to make a more specific request for modification, then [Client] contends her counsel was constitutionally ineffective as set forth in subsection D below. For all of these reasons, the issue may be reached on appeal.

C. The Trial Court Had A Duty To Fully Instruct The Jury On Every Element of the Offense.

Trial courts have a sua sponte duty to completely and correctly instruct the jury on the elements of the charged offenses. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) "The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citation.]" (*Breverman, supra,* 19 Cal.4th at p. 154.)

Instructions that effectively remove an element of the offense from the jury's consideration, and thereby relieve the prosecution of its burden to prove every element beyond a reasonable doubt, violate the federal constitutional rights to due process and trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15; *Neder v. United States* (1999) 527 U.S. 1,

10-12; *Middleton v. McNeil* (2004) 541 U.S. 433, 437; *Cummings, supra*, 4 Cal.4th at pp. 1313-1314.)

"Where possession is an element of the offense, the trial court has a duty to submit to the jury, with proper instructions, the question of whether the defendant had knowledge of the object's presence." (*Reynolds, supra,* 205 Cal.App.3d at p. 780; see *People v. Pope* (1959) 168 Cal.App.2d 666, 668; *People v. Wells* (1968) 261 Cal.App.2d 468, 479; cf. *People v. Gory* (1946) 28 Cal.2d 450, 455–456 [defendant need not know possession of object unlawful but essential that he knew object present]; *People v. Redrick* (1961) 55 Cal.2d 282, 285 [mere proof of opportunity of access to place where found insufficient].)

Here, the trial court failed to modify CALCRIM No. 2041 to ensure jurors were properly and fully instructed that not only must [Client] have *possessed* the identifying information, she must have *knowingly* done so. As instructed, jurors were told only that she must have "acquired" or "kept" the information. But neither of these terms, as commonly defined or understood, encompass a knowledge element. Merriam-Webster defines "acquire" as "to come into possession or control of often by unspecified means."[4] That dictionary defines the term "keep," the past tense of "kept," as "to retain in one's possession or power." Like the term "possession" itself, neither the acquiring or keeping

[4] Available as of January 7, 2020 at: https://www.merriam-webster.com/dictionary/acquire; https://www.merriam-webster.com/dictionary/keep.

of an item conveys that a person must also know of the item's presence.

While it is settled that a trial court "has no sua sponte duty to revise or improve upon an *accurate* statement of law," (*People v. Jackson* (2016) 1 Cal.5th 269, 336), the instruction as given was *not* accurate because it failed to set forth the knowledge element. The court's omission was particularly egregious because it went the heart of [Client]'s theory of the case: that she did not know of the presence of the ID card in the gas tank. Thus, she had a due process right to an instruction that knowledge was relevant when determining the issue of possession. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690 ["the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'"]; see also *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739-740 [it is "well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case"].)

Here, it should have been readily apparent to the court that [Client]'s defense was based on lack of knowledge of the ID card's presence. In moving to dismiss pursuant to section 1118.1, defense counsel argued that the evidence was insufficient to establish this element. (18RT 1652, 1657-1658.) Thus, the Court was on notice about [Client]'s defense, and under a duty to ensure the jury was fully and correctly instructed. Accordingly, the trial court erred by failing to instruct jurors about knowing possession.

D. The Failure To Correctly Instruct The Jury On The Element of Knowing Possession Was Prejudicial.

As explained, the incomplete instruction omitted an element of the offense, thereby violating the Sixth and Fourteenth Amendments. The claim is thus subject to the *Chapman* standard for federal constitutional errors, which mandates reversal unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Nguyen* (2000) 24 Cal.4th 756, 765 [instruction that omitted the element of possession or right to control was prejudicial under *Chapman*].) "[F]or error under the United States Constitution . . . prejudice . . . is presumed unless the government shows that the defect was harmless beyond a reasonable doubt." (*People v. Roybal* (1998) 19 Cal.4th 481, 520.) It is the state's burden to show that the error made "no difference in reaching the verdict obtained." (*Yates v. Evatt* (1991) 500 U.S. 391, 407.)

A special application of the *Chapman* standard is required where, as here, the instructional error removed a question from the jury's consideration. (*Neder, supra*, 527 U.S. at p. 19; see *People v. Merritt* (2017) 2 Cal.5th 819, 831.) [W]here the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- [the reviewing court] should not find the error harmless." (*Ibid.*) This means that removal of a question from the jury is necessarily prejudicial if the evidence on that element is in conflict or susceptible to

conflicting inferences. (*People v. Mil* (2012) 53 Cal.4th 400, 417-419.) This is the converse of the substantial evidence test. The question is not whether there was sufficient evidence to support the omitted element, but "whether any rational fact finder could have come to the *opposite* conclusion." (*Id.* at p. 418, emphasis in original.)

Here, [Client] contested the omitted element (her knowing possession of the ID card) and the record raised sufficient evidence to support a contrary finding, most notably her recent purchase of the car and statement to police that she had not yet needed to fill it with gas. Thus, removal of the question from the jury of whether she knowingly possessed the ID card was necessarily prejudicial. Properly instructed, a rational fact finder could have concluded that she did not know of its presence. (*Mil, supra*, 53 Cal.4th at pp. 418.)

Moreover, even if the error is measured under the less stringent *Watson* standard, reversal is required because there is a reasonable probability that at least one juror, if properly instructed, would have found [Client] did not knowingly possess the ID card. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; *People v. Watson* (1956) 46 Cal.2d 818.) The reasonable-probability standard does not require that it is more likely than not that the error affected the outcome. (*Woodford v. Visciotti* (2002) 537 U.S. 19, 22.) Rather, there need only be "'a reasonable chance, more than an abstract possibility.' [Citation.]"

(*People v. Wilkins* (2013) 56 Cal.4th 333, 351.) Here, such a reasonable chance exists for several reasons.

First, the parties' arguments failed to render the error harmless. (See *Merritt*, *supra*, 2 Cal.5th at p. 831 [failure to instruct on an element may be harmless where "both parties accurately described" the missing element].) Here, nothing in the parties' arguments conveyed to the jury that [Client] must have knowingly possessed the ID card. The prosecutor did not mention knowledge at all, arguing that the first element requires only "that a person acquires or simply keeps the personal identifying information of another person." (18RT 1686.) Counsel argued it was "obvious" the element had been met: "It's in her car. She said she had bought [the car] about a week ago." (18RT 1687.) Although the prosecutor questioned the credibility of [Client]'s claim that she never opened the gas tank, the prosecutor did not take the argument a step further by explaining to jurors that she must have had knowledge of the ID's presence. (18RT 1687-1688.)

Defense counsel's argument failed to clarify the need for knowing possession, and in fact confused matters further. He argued that the terms "acquired or kept" were "somewhat vague in the sense that it doesn't account for what happens if you acquire something accidentally." (18RT 1695.) While he argued [Client] "had to know" the ID was in the gas tank, he confusingly referred jurors to CALCRIM No. 251, defining the union of act and intent. (18RT 1694-1695.) But that instruction did nothing to clarify the knowing possession element, and made no mention of

knowledge in defining the specific intent required for the identity theft count. Rather, the instruction merely told jurors that the specific intent for that crime "is that the defendant possessed the personal identifying information with the intent to defraud the victim," again omitting any reference to knowledge. (1CT 205.)

Importantly, jurors were instructed that nothing defense counsel said in closing argument was evidence and that they could not consider his statements about the law unless they were supported by the court's instructions. (1CT 195, see CALCRIM No. 200 ["If you believe the attorneys' comments on the law conflict with my instructions, you must follow my instructions"].) Here, jurors would not have understood that the prosecution was required to prove [Client]'s knowing possession of the ID card, where CALCRIM No. 2041 wholly omitted this element, and CALCRIM No. 251 told them that she must have knowledge of the presence of one type of contraband (narcotics), but not of another (the ID card.) A reasonable juror attempting to harmonize the instructions would have concluded that, while knowing possession was required for the drug possession count, it was not required for identity theft. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1028 [this court "must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given"].)

Finally, a failure to correctly instruct on an element of the offense may be harmless where overwhelming evidence was presented to prove the element. (*Neder, supra*, 527 U.S. at p. 17;

Merritt, supra, 2 Cal.5th at p. 832.) There was no such evidence here. To the contrary, there was a legitimate question as to whether [Client] knew about the presence of the ID card, secreted away in the gas tank of a car she had purchased just eleven days earlier. Her statement to police that she had the car towed from San Francisco and that she had not driven it much provided a reasonable explanation for why she had no reason to open the gas tank. There was no evidence presented about how much gas remained in the tank, or how much gas was in the car at the time of purchase. (17RT 1360.) The gas tank was unlocked and accessible to anyone outside the car. (17RT 1357-1359.) The identification card was last seen in [Witness]'s 2012 Ford Focus, which was stolen at some point in the last five years. There was no evidence or even a suggestion that [Client] was involved in that earlier theft. The Ford – and presumably the ID card – eventually ended up in a tow yard in San Francisco, and [Client] purchased the Maxima from a tow yard in San Francisco on January 3, 2018. (17RT 1348-1349, 1392.) Officers confirmed that she was in the process of registering the vehicle at the time of her arrest. (17RT 1379.)

Without more, any inference that [Client] knew of the ID card's presence was supported by nothing more than conjecture and speculation. There is thus a reasonable chance that at least one juror would have found insufficient evidence of knowing possession if properly instructed on this element. (*College Hospital, Inc., supra,* 8 Cal.4th at p. 715.) Accordingly, [Client]

was prejudiced by the instructional error and reversal is required.

E. To The Extent This Court Finds The Issue Forfeited, Counsel Rendered Ineffective Assistance.

If this Court finds the error forfeited by counsel's failure to object or to request a more specific modification of the instruction, [Client] submits she was prejudiced by counsel's ineffective assistance under the Sixth Amendment. To demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.)

Second, the defendant must show prejudice flowing from counsel's performance or lack thereof. (*Strickland, supra*, 466 U.S. at pp. at 691-692.) Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 698; see also *In re Avena* (1996) 12 Cal.4th 694, 721.)

While ineffective assistance claims are often resolved in a habeas corpus proceeding, a conviction will be reversed for ineffective assistance on direct appeal if: (1) the record affirmatively discloses counsel had no rational tactical purpose

for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. (*People v. Vines* (2011) 51 Cal.4th 830, 875–876; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

Under this standard, it is clear that the failure to object to or request a modification of CALCRIM No. 2041 fell below an objective standard of reasonableness for the reasons outlined above. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 668.) Further, there simply can be no satisfactory explanation for the inaction of counsel given that the entirety of the defense was based on whether [Client] knew about the presence of the ID card in the gas tank. Thus, had counsel objected and cited the applicable law, the instruction should have been modified to include the missing element. At a minimum, an objection would have preserved the issue for appeal. Thus, it is at least reasonably likely that [Client] would have obtained a more favorable outcome. Accordingly, there could have been no tactical reason for counsel's inaction and the issue may be reached on appeal.

CONCLUSION

For the reasons set forth above, [Client]'s identity theft conviction should be reversed.

Dated: [Date]

Respectfully submitted,

/s/ [Attorney Name]
[Attorney Name]

Attorney for Appellant

CERTIFICATE OF WORD COUNT

Counsel for [Client Name] hereby certifies that this brief consists of #### words (excluding cover page information, tables, proof of service, signature blocks, and this certificate), according to the word count of the computer word-processing program. (Cal. Rules of Court, rule 8.360(b)(1).)

Dated: [Date]

/s/ [Attorney Name]
[Attorney Name]

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Re: *People v. [Client Name]* **Case No.: A######**

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of [County], State of California. My business address is [Address]. My electronic service address is [Email address]. On [Date], I served a true copy of the attached Appellant's Opening Brief on each of the following, by placing same in an envelope(s) addressed as follows:

[County] County Superior Court
[Address]

[County] County Public Defender
[Address]

[Client Name]
(Appellant)

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in [City], California, on that same day in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on [Date], at [City], California.

/s/ [Attorney signature]
[Attorney Name]