Nos. 14-24-00645-CR & 14-24-00646-CR

In the Fourteenth Court of Appeals
Houston, Texas

OJONIMI ADAJI,
APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE.

On Appeal from the 185th Judicial District Court
Harris County, Texas
Belinda Hill, Judge Presiding by Assignment
In Cause Nos. 1793508 & 1793510

APPELLANT'S OPENING BRIEF

Counsel of Record:

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IDENTITY OF PARTIES AND COUNSEL

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Appellee: The State of Texas

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Kim Ogg, *Former Harris County District Attorney*
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Trial Judge:
Belinda Hill, Presiding by Assignment
185th Judicial District Court
Harris County, Texas

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To the Honorable Court of Appeals:

This case is about what happens when the State gets the fundamental facts of its case wrong, charging one thing but proving something else entirely.

Perhaps the State was so focused on Ojonimi Adaji's relationship with Shareka Wallace—which formed the basis of the charge for which Adaji was acquitted—that it didn't pay enough attention to the rest of its evidence. Perhaps Detective Evans—whose expert qualifications were not challenged by trial counsel—did not fully understand the evidence he presented.

Whatever the reason, after three days of trial, the State failed to prove what it had charged. The trial court recognized this for one of the charges and granted a directed verdict. This Court should recognize the same for the other two charges, reverse Adaji's convictions, and render judgments of acquittal.

STATEMENT OF THE CASE

Adaji was indicted for three state jail felonies:

1) Fraudulent Securing of Document Execution, Tex. Penal Code § 32.46(a)(1), (b)(4);
2) Fraudulent Use or Possession of Identifying Information, Tex. Penal Code § 32.51(b)(1), (c)(1); and
3) Theft of Property valued $2,500 or more but less than $30,000, Tex. Penal Code § 31.03(a), (e)(4).[1]

He pleaded not guilty to each.[2]

At the end of the State's case in chief, the trial court granted a directed verdict of acquittal on the fraudulent-securing-of-document-execution charge.[3] The jury, however, convicted Adaji of the other two offenses.[4] The jury assessed punishment for each offense at one year confinement in State Jail and a $5,000 fine, and the trial court pronounced sentence accordingly, ordering that the sentences run concurrently.[5] This appeal follows.

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[1] Clerk's Record in cause no. 1793508 (CR508):59; Clerk's Record in cause no. 1793510 (CR510):72; Reporter's Record volume (RR) 3:6–8.

[2] RR3:6–8.

[3] RR4:177–82.

[4] CR508:148; CR510:244; RR5:36.

[5] CR508:154, 157; CR510:250, 254; RR6:39–40, 43.

Issues Presented

1. **Sufficiency of the Evidence—Unlawful Use or Possession of Identifying Information.** The specific item of identifying information alleged in the indictment is part of the hypothetically correct jury charge for fraudulent use or possession of identifying information. Here, the State alleged that the identifying information was "financial institution account information of Esther Noh," but it proved that the identifying information was the bank account number of The Law Firm of Esther S. Noh, PLLC—a different person. Is the evidence legally insufficient to support Adaji's conviction for fraudulent use or possession of identifying information?

2. **Sufficiency of the Evidence—Theft of Property.** The specific description of property in the indictment is part of the hypothetically correct jury charge for theft of property. Here, the State alleged that the property was "money," but it proved only electronic transfers of funds between accounts. Is the evidence legally insufficient to support Adaji's conviction for theft of property?

3. **Judgments—Offenses and Cost-and-Fee Assessments.** The judgments contain errors in their statements of the offenses, and in the assessments of costs and fees. Should this Court modify the judgments to correct each error?

4. **Bill of Costs—Fine and Cost-and-Fee Assessments.** The bill of costs in each case contains both the fine and improperly assessed costs and fees. Should this Court delete those from the bills of costs?

Statement of Facts

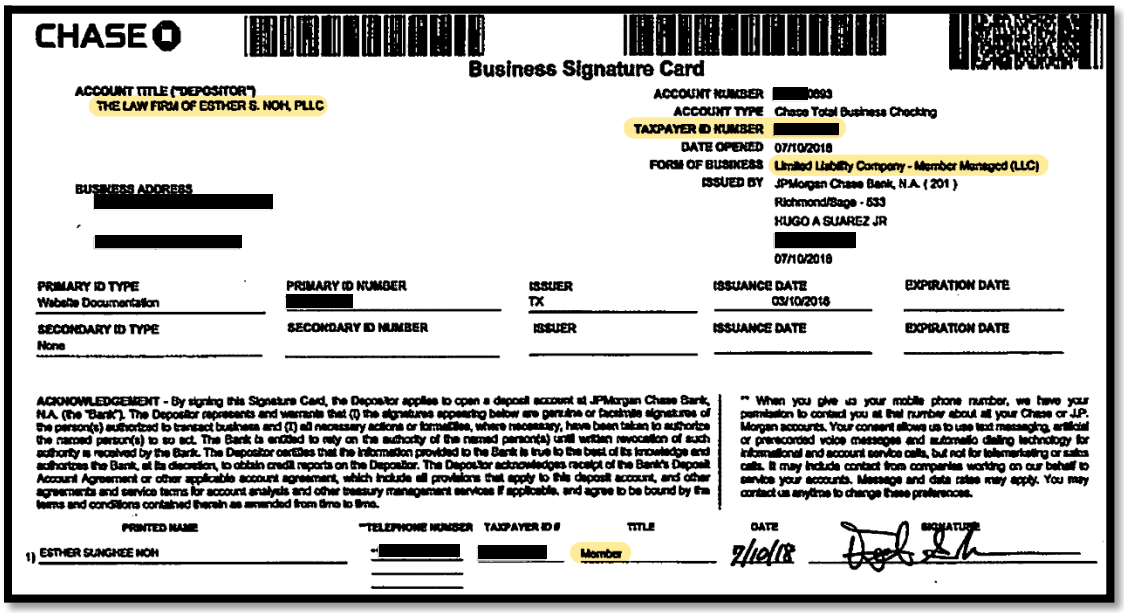
Esther Noh's law firm is The Law Firm of Esther S. Noh, PLLC. Esther Noh is an immigration attorney in Houston, Texas.[6] Her law firm is The Law Firm of Esther S. Noh, PLLC.[7] The firm's attorney–client contract identifies Ms. Noh as "Attorney at The Law Firm of Esther S. Noh."[8]

THIS AGREEMENT IS NOT EFFECTIVE UNLES
THE LAW FIRM OF ESTHER S. NOH, PLLC;

BY: Esther S. Noh
Attorney at The Law Firm of Esther S. Noh
777 S. Post Oak Ln.,
STE 1700
Houston, TX 77056
(832)461-0157
esther@esnlawfirm.com

State's Exhibit 14 (detail)

According to records introduced at trial, The Law Firm of Esther S. Noh, PLLC, is a member-managed limited liability company, organized in Texas, with its own taxpayer identification number.[9]



CHASE

Business Signature Card

ACCOUNT TITLE ("DEPOSITOR")
THE LAW FIRM OF ESTHER S. NOH, PLLC

ACCOUNT NUMBER [redacted]0693
ACCOUNT TYPE Chase Total Business Checking
TAXPAYER ID NUMBER [redacted]
DATE OPENED 07/10/2018
FORM OF BUSINESS Limited Liability Company - Member Managed (LLC)
ISSUED BY JPMorgan Chase Bank, N.A. (201)
Richmond/Sage - 533
HUGO A SUAREZ JR
[redacted]
07/10/2018

BUSINESS ADDRESS [redacted]

PRIMARY ID TYPE	PRIMARY ID NUMBER	ISSUER	ISSUANCE DATE	EXPIRATION DATE
Website Documentation	[redacted]	TX	03/10/2018	
SECONDARY ID TYPE	SECONDARY ID NUMBER	ISSUER	ISSUANCE DATE	EXPIRATION DATE
None				

ACKNOWLEDGEMENT - By signing this Signature Card, the Depositor applies to open a deposit account at JPMorgan Chase Bank, N.A. (the "Bank"). The Depositor represents and warrants that (i) the signatures appearing below are genuine or facsimile signatures of the person(s) authorized to transact business and (ii) all necessary actions or formalities, where necessary, have been taken to authorize the named person(s) to so act. The Bank is entitled to rely on the authority of the named person(s) until written revocation of such authority is received by the Bank. The Depositor certifies that the information provided to the Bank is true to the best of its knowledge and authorizes the Bank, at its discretion, to obtain credit reports on the Depositor. The Depositor acknowledges receipt of the Bank's Deposit Account Agreement or other applicable account agreement, which include all provisions that apply to this deposit account, and other agreements and service terms for account analysis and other treasury management services if applicable, and agree to be bound by the terms and conditions contained therein as amended from time to time.

** When you give us your mobile phone number, we have your permission to contact you at that number about all your Chase or J.P. Morgan accounts. Your consent allows us to use text messaging, artificial or prerecorded voice messages and automatic dialing technology for informational and account service calls, but not for telemarketing or sales calls. It may include contact from companies working on our behalf to service your accounts. Message and data rates may apply. You may contact us anytime to change these preferences.

PRINTED NAME	**TELEPHONE NUMBER	TAXPAYER ID #	TITLE	DATE	SIGNATURE
1) ESTHER SUNGHEE NOH	[redacted]	[redacted]	Member	7/10/18	

State's Exhibit 16 (detail)

[6] RR4:81, 94.

[7] RR7:373 (SE14), 559 (SE16).

[8] RR7:375 (SE14).

[9] RR7:559–64, 614 (SE16).

Ms. Noh is a member.[10] The firm opened a Chase Business checking account in 2018, with Ms. Noh listed as an "Authorized Person."[11]

BUSINESS DEPOSITORY CERTIFICATE (Limited Liability Company) CHASE

__X__NEW _____CHANGE

ACCOUNT NO. [redacted]893
ACCOUNT TITLE
THE LAW FIRM OF ESTHER S. NOH, PLLC

BANK NAME/NUMBER
JPMorgan Chase Bank, N.A. (201)
BRANCH NAME AND NO.
Richmond Sage - 533
DATE
07/10/2018
PREPARED BY
HUGO A SUAREZ JR
PHONE NO. [redacted]

BUSINESS ADDRESS [redacted]

TAXPAYER ID NO. [redacted]
PRODUCT TYPE
Chase Total Business Checking

Legal Name of Organization: THE LAW FIRM OF ESTHER S. NOH, PLLC (the "Organization")

State of Organization: TX

Type of Organization (check one):
[X] Limited liability company managed by its members
[ ] Limited liability company managed by one or more managers

The individuals signing this Certificate certify to JPMorgan Chase Bank, N.A. (the "Bank") as follows:
- the Organization is a limited liability company, duly organized under the laws of the state of organization listed above;
- the individuals signing this Certificate are, or are authorized representatives of, all of the members (if managed by its members) ("Members") or managers (if managed by managers) ("Managers") of the Organization; and
- the Organization has authorized all actions and agreements described in this Certificate in accordance with all requirements of law and of Organization's organizational documents and bylaws, if any, and the authorizations are now in full force and effect.

Account Opening and Contractual Authorization
Any of the people listed below ("Authorized Persons"), acting alone, may:
- Open or close one or more accounts with the Bank at any time, subject to the Bank's deposit account agreement;
- Act on behalf of the Organization in any matter involving any of the Organization's depository accounts at the Bank;
- Sign all agreements or other documents relating to any depository accounts or other business of the Organization. These agreements & other documents include but are not limited to funds transfer agreements, agreements for automated clearinghouse services, agreements for online services, and safe deposit agreements.

Deposit and Withdrawal Authorization
Each Authorized Person may deposit or withdraw the Organization's funds. Each Authorized Person may sign any and all checks, drafts, and orders drawn against any account of the Organization at the Bank, and may give instructions for account transactions without a signature, such as those initiated via electronic debit, payment, wire transfer, or other withdrawal of funds by computer, electronic or other means. The Bank is authorized to pay any checks or other transactions authorized by the Organization, even if doing so causes or increases an overdraft. Each Authorized Person may endorse for cash, collection, deposit, or negotiation any checks, drafts, notes, bills of exchange, or certificates of deposit, and order the payment or transfer of money between accounts at the Bank and other banks. Endorsements "for deposit" may be written or stamped. The Bank may accept any instrument for deposit to any depository account of the Organization without endorsement or may supply the endorsement of the Organization. The Bank is authorized to pay all checks, drafts, and orders when signed, endorsed, or authorized by any Authorized Person without inquiry as to the circumstances of issue or disposition of the proceeds and regardless of to whom such instruments are payable or endorsed, including those payable to or endorsed to the Authorized Person.

Print Name	Title	Facsimile Signatures
ESTHER SUNGHEE NOH	Member	

State's Exhibit 16 (detail)

[10] RR7:559–64 (SE16).

[11] RR4:88; RR7:559–64, 614 (SE16). Ms. Noh—and later, Det. Evans—testified that she was the "account holder of this account" and further that she was, in fact, "the only account holder on this account." RR4:90, 116. That testimony, from both witnesses, is false. The bank records that the State introduced into evidence show that the account holder was the business organization named The Law Firm of Esther S. Noh, PLLC; Ms. Noh was merely a member who was authorized to conduct business on behalf of that organization. RR7:559–64 (SE 16).

Shareka Wallace and Ojonimi Adaji meet and get married.

Ojonimi Adaji is from Nigeria.[12] He has a young son, O.D.A., who was also born in Nigeria.[13] Adaji came to the United States in August 2021 on a student visa to study at Western Illinois University.[14]

Shareka Wallace is from Mississippi, but she and her family moved to Baytown when she was in the second grade.[15] She lived there until seven years ago when she moved to the Houston area.[16] She moved Atascocita and then to Spring.[17]

In December 2021, Shareka and Adaji met online through a Christian dating app.[18] At the time, Adaji lived in Macomb, Illinois, and Shareka was in Spring.[19] They both travelled to Dallas and met in person around New Year's Day.[20] They got married the following week, on January 6, 2022, at the Harris County Courthouse in Houston.[21]

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[12] RR3:29; RR4:193.

[13] RR3:88; RR4:195–96; RR7:71–72 (SE12).

[14] RR3:21, 25; 4:10–11, 194–95, 222–23.

[15] RR3:14, 16; RR4:7.

[16] RR4:7.

[17] RR3:14, 16; RR4:9, 61.

[18] RR3:19–20; RR4:6, 198, 226.

[19] RR3:21.

[20] RR3:21; RR4:7, 198–99.

[21] RR3:17, 28; RR4:17–20, 200.

Shareka began having second thoughts almost immediately. Two days after the wedding, she noticed that "a lot of his beliefs were not … aligned" with hers, and she noticed that "his finances were not aligned as well."[22] After a couple of weeks, Adaji flew back to Illinois, while Shareka stayed in Houston.[23] They discussed her moving to Illinois, and Shareka "even found a job" up there—but she also wanted Adaji to move to Houston and transfer to the University of Houston.[24]

Shareka supported Adaji financially, working two jobs while he was in school.[25] They opened a joint checking account, but they did not merge all of their finances.[26] Shareka sent Adaji money "via Cash App" for "food," "rent," and "car issues."[27] Adaji testified that he shared his login and password information for his social media and financial accounts with Shareka.[28] Shareka claimed, on the other

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[22] RR3:32.

[23] RR3:34; RR4:33.

[24] RR3:34–35; RR4:21, 47–48, 202–03.

[25] RR3:36–37.

[26] RR3:38–39; RR4:37.

[27] RR4:36. Adaji's Cash App records show that Shareka sent him money 23 times from two bank accounts. SE22 (Excel Spreadsheet, lines 169, 185–86, 198, 206–07, 222, 233, 239, 258–60, 262, 263 265–67, 269–72, 275–76). Most payments were under $100; the largest payment was $461. *Id.*

[28] RR4:214.

hand, that all of his electronic devices were password protected, and that she did not have access to them or to his financial accounts.[29]

In January 2022, Adaji began noticing unfamiliar charges on several of his accounts.[30] The first was on a savings account at United Bank for Africa.[31] Others were on an account at United Community Bank; Adaji had to close out that account in March.[32]

Then he discovered that his Discover credit card "was attached to Amazon."[33] He disputed several Amazon purchases that were made with his Discover card.[34] He noticed "a lot" of other fraudulent

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[29] RR3:69; RR4:39, 64, 214.

[30] RR4:206.

[31] RR4:206–07.

[32] RR4:207–08. Adaji had several accounts at United Community Bank, at least two of which were still active in June 2022. *See* RR7:43–47 (SE12), 709 (SE18); SE22 (Spreadsheet, lines 55, 57, 65, 66).

[33] RR4:215.

[34] RR4:215. Adaji disputed other transactions in July 2022, including some connected to earlier purchases. RR7:727–53 (SE23). Discover resolved some of these in his favor and some against him. *Id.*

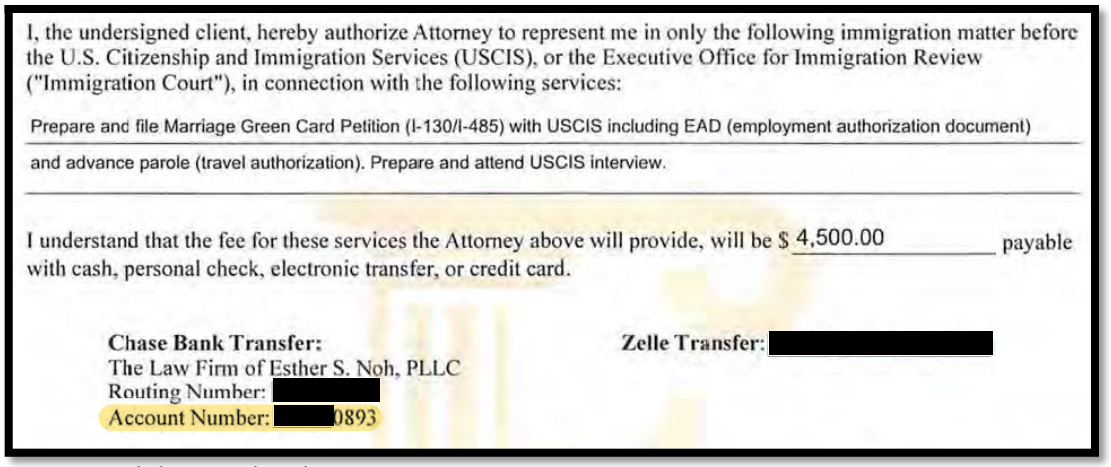
The State brought these up on cross-examination. RR4:268–72. One disputed charge, from December 11, 2021, involved a $156.54 purchase that was shipped to a "Glory Garuba" in Chicago. RR7:739 (SE23). This corresponded to a Cash App transaction on the same day, in which a "Glory Garuba" paid Adaji $156. SE22 (Spreadsheet, line 289). The State mischaracterized this transaction as Adaji *sending* $156, but the Cash App record shows that he *received* it. RR4:273–74. Adaji denied knowing anyone named Glory Garuba. RR4:272. Mysteriously, the purchased item did not ship until May 2022. RR7:740 (SE23).

The State did not cross-examine Adaji about any earlier disputes that he filed—nor could it, for it had subpoenaed only records from June 2022 forward. RR7:719 (SE23).

charges on his Discover card, and he reported those to the Macomb Police Department in Illinois.[35]

Shareka retains Esther Noh and receives all the billing information.

In January 2022, Shareka retained Esther Noh to prepare and file a marriage green card petition on Adaji's behalf.[36] Ms. Noh's firm charged a flat fee of $4,500 for this service, to be paid in four monthly installments of $1,125 each.[37] To facilitate payment by electronic transfer, the attorney–client contract provided the firm's Chase Bank routing and account numbers.[38] The same numbers also appeared on the firm's invoices.[39]



I, the undersigned client, hereby authorize Attorney to represent me in only the following immigration matter before the U.S. Citizenship and Immigration Services (USCIS), or the Executive Office for Immigration Review ("Immigration Court"), in connection with the following services:

Prepare and file Marriage Green Card Petition (I-130/I-485) with USCIS including EAD (employment authorization document) and advance parole (travel authorization). Prepare and attend USCIS interview.

I understand that the fee for these services the Attorney above will provide, will be $ 4,500.00 payable with cash, personal check, electronic transfer, or credit card.

Chase Bank Transfer:
The Law Firm of Esther S. Noh, PLLC
Routing Number: [redacted]
Account Number: [redacted]0893

Zelle Transfer: [redacted]

State's Exhibit 14 (detail)

[35] RR4:215.

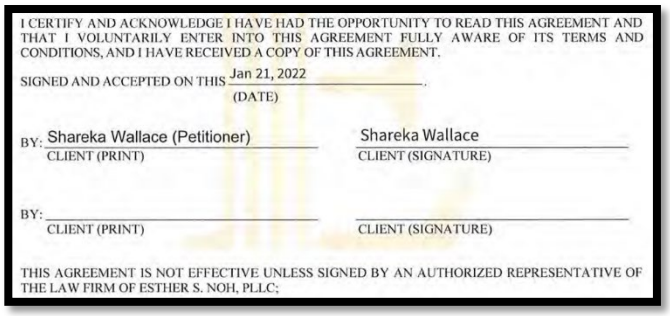
[36] RR3:40–41, 100; RR4:82–85, 89, 204; RR7:373–77 (SE14).

[37] RR3:99; RR4:85, 86; RR7:373, 375, 381 (SE14).

[38] RR4:85; RR7:373 (SE14), RR7:559 (SE16).

[39] RR4:86–87; SE7:381 (SE14).

Shareka signed the contract; Adaji did not.[40] According to the firm's records, the contract was emailed only to Shareka.[41]



I CERTIFY AND ACKNOWLEDGE I HAVE HAD THE OPPORTUNITY TO READ THIS AGREEMENT AND THAT I VOLUNTARILY ENTER INTO THIS AGREEMENT FULLY AWARE OF ITS TERMS AND CONDITIONS, AND I HAVE RECEIVED A COPY OF THIS AGREEMENT.

SIGNED AND ACCEPTED ON THIS Jan 21, 2022 (DATE).

BY: Shareka Wallace (Petitioner) — CLIENT (PRINT)

Shareka Wallace — CLIENT (SIGNATURE)

BY: _____ — CLIENT (PRINT)

_____ — CLIENT (SIGNATURE)

THIS AGREEMENT IS NOT EFFECTIVE UNLESS SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE LAW FIRM OF ESTHER S. NOH, PLLC;

"Attorney Client Contract" History

Document created by Esther Noh ([redacted])
2022-01-14 - 9:58:36 PM GMT- IP address: 68.76.149.207

Document emailed to Shareka Wallace ([redacted]) for signature
2022-01-14 - 9:59:18 PM GMT

Email viewed by Shareka Wallace ([redacted])
2022-01-18 - 3:35:37 AM GMT- IP address: 172.225.15.237

Email viewed by Shareka Wallace ([redacted])
2022-01-20 - 5:14:16 PM GMT- IP address: 104.28.50.188

Email viewed by Shareka Wallace ([redacted])
2022-01-21 - 8:42:16 PM GMT- IP address: 172.225.19.9

Document e-signed by Shareka Wallace ([redacted])
Signature Date: 2022-01-21 - 8:43:48 PM GMT - Time Source: server- IP address: 12.158.173.194

Agreement completed.
2022-01-21 - 8:43:48 PM GMT

State's Exhibit 14 (details)

Ms. Noh testified that the contracts "are designed" so that "only … the U.S. petitioner" signs, and that an "automatic payment request" is "sent to the petitioner … only."[42] Adaji confirmed that he "never had access to the contract."[43]

Shareka made all the payments.[44] Ms. Noh testified that Shareka made each payment every 30 days by credit card, while Shareka testified that she paid online each month through a draft from her bank account after making an initial down payment of $1,000.[45]

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[40] RR4:86; RR7:375–76 (SE14).

[41] RR3:101; RR7:377 (SE14).

[42] RR4:86, 95–96.

[43] RR4:206.

[44] RR3:42, 100.

[45] RR3:99–100; RR4:39–40, 97–98. The State did not introduce any bank or credit card records that showed any of these payments.

According to Ms. Noh, both Shareka and Adaji were "notified" of the monthly invoices, and Adaji was "CC'd on all of the e-mails containing the information about the invoice payment" each month.[46] Meanwhile, the only invoice in the firm's records—which is labeled "Invoice #1" yet reflects payment "3 of 4"—does not show to whom it was sent.[47] The firm's records contain no emails in which an invoice was sent to Adaji.[48] Adaji confirmed that he never had access to the firm's account information.[49]


The Law Firm of Esther S. Noh PLLC
[redacted]
Invoice
Invoice for
Shareka Marshae Wallace/Ojonimi Adaji
[redacted]
Spring TX [redacted]
Payable to
The Law Firm of Esther S. Noh
Invoice #
1
Case
Shareka Marshae Wallace/Ojonimi Adaji
Marriage Green Card Case PP
Due date
Upon Receipt
Date | Description | Hours | Rate | Total price
05/26/22 | Marriage Green Card Case 3 of 4 payment schedule | 0 | $1,125.00 | $1,125.00
Notes:
Zelle: [redacted]
Subtotal $1,125.00
Adjustments $0.00
$1,125.00
Chase Bank Routing Information:
Routing Number [redacted]
Account Number [redacted]893
Account Name: The Law Firm of Esther S. Noh
State's Exhibit 14 (detail)

Esther Noh prepares and files the green card application, but USCIS rejects it.

By early April, Esther Noh and her staff had prepared the green card application; they emailed a copy to Shareka and Adaji along with copies of the individual pages that needed signatures.[50] Adaji signed

[46] RR4:86, 96, 105.

[47] RR7:381 (SE14).

[48] RR7:371–545 (SE14). The firm's records, introduced as State's Exhibit 14, were produced in response to a subpoena duces tecum that commanded production of the firm's "entire file." CR510:94.

[49] RR4:205–06.

[50] RR7:525–26 (SE14) (April 6, 2022, email from Luisa Silvestre).

the individual pages that needed his signature and emailed them back.[51]

In mid-April, a staff member emailed that the petition was ready to file; the firm just needed passport-type pictures of both Shareka and Adaji, as well as the filing fees.[52] Then Ms. Noh emailed them that, before she could file the application, the firm needed the photos and "the rest of your legal fee"—specifically, $2,250, the final two installments.[53]

Twelve days later, Ms. Noh emailed them that she was "ready to submit" the application once the firm received the filing fee; she added that, pursuant to a call with Shareka, the final payment of the legal fee could be made in May.[54] But the next day, she emailed just Adaji and told him that she was still waiting on copies of a tax return, a lease, and a driver license.[55]

On May 12, Ms. Noh emailed Shareka and Adaji and told them that she was ready to file the application.[56] She submitted the

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[51] RR4:205; RR7:526 (SE14) (April 11, 2022, email from Luisa Silvestre acknowledging receipt of Adaji's signed forms).

[52] RR7:528 (SE14) (April 12, 2022, email from Luisa Silvestre).

[53] RR4:246–46; RR7:530 (SE14) (April 18, 2022, email from Esther Noh). Ms. Noh did not explain why there would be an outstanding balance of $2,250 on April 18 if Shareka had paid $1,125 every 30 days starting in January.

[54] RR7:531 (SE 14) (April 28, 2022, email from Esther Noh).

[55] RR7:533 (SE14) (April 29, 2022, email from Esther Noh).

[56] RR7:545 (SE14) (May 12, 2022, email from Esther Noh).

application packet a week later, on May 19, 2022.[57] U.S. Citizenship and Immigration Services (USCIS) received the packet on June 3, 2022, and rejected it three days later.[58] USCIS rejected the packet because the I-485 form was not properly signed.[59]

Sharika and Adaji break it off.

According to Shareka, Adaji never told her that he had a son; instead, she said, he mentioned a "nephew" in Africa and suggested that they adopt him.[60] Adaji disputed this; he testified that he had told her that O.D.A. was his son.[61]

In May, after they had started the green-card process, Adaji flew to Africa for his grandmother's funeral.[62] He told Shareka that he was bringing O.D.A. to the United States to live with them.[63] When Shareka met them at the airport in Houston, she noticed how similar

[57] RR7:378 (SE14) (dated application packet).

[58] RR7:418–20 (SE14).

[59] RR7:418, 419 (SE14). Contrary to the USCIS notice, Ms. Noh testified at trial that the filing was rejected because Adaji's signature "was not clear", and that she had emailed Adaji and Shareka to tell them that. RR4:102. No such email appears in the record. RR7:371–545 (SE14).

[60] RR3:43–44.

[61] RR4:280.

[62] RR3:45; RR4:45, 210.

[63] RR3:45; RR4:210.

the two looked.[64] Then she saw his birth certificate.[65] It finally dawned on her that O.D.A. was Adaji's son.[66] She claimed that Adaji refused to talk about this or even acknowledge it.[67]

Then, one night, Shareka got on Adaji's laptop and looked at his WhatsApp messages.[68] She saw a message come through to Adaji that said, "You're my husband."[69] Concluding that Adaji had lied to her, she confronted him, and he responded sarcastically, "I have six wives."[70]

"After that," Shareka said, "things started to wrap up with him."[71] Adaji and O.D.A. flew to Illinois a few days later, about the time Ms. Noh told them that their "paperwork went through."[72] Shareka regretted filing the application; she called Ms. Noh and expressed her concerns.[73] Ms. Noh told her that, in fact, there had been "an issue

[64] RR3:47; RR4:44.

[65] RR3:48; RR4:48.

[66] RR3:48.

[67] RR3:50–51.

[68] RR3:52–53.

[69] RR3:54.

[70] RR3:54–56; RR4:53.

[71] RR3:58.

[72] RR3:58–61.

[73] RR3:60, 63.

with the paperwork," and USCIS had rejected it.[74] Shareka told Ms. Noh to "no longer continue" working on the application.[75]

When Shareka told Adaji that the application had been rejected, he was upset.[76] He told her he wanted a divorce, and that he would file for divorce.[77] He never did, so Shareka eventually filed herself.[78] Their divorce became final in February 2024.[79]

Esther Noh notices two unauthorized withdrawals from the firm's account.

In June 2022, after Ms. Noh stopped representing Shareka, she "noticed two charges that I did not recognize or authorize" on the firm's bank account.[80] The first was a withdrawal of $3,939.32 that was dated June 22, 2022; the second was a withdrawal of $7,236.41, dated six days later, on June 28.[81]

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[74] RR3:65; RR4:55.

[75] RR3:66.

[76] RR3:67.

[77] RR3:67.

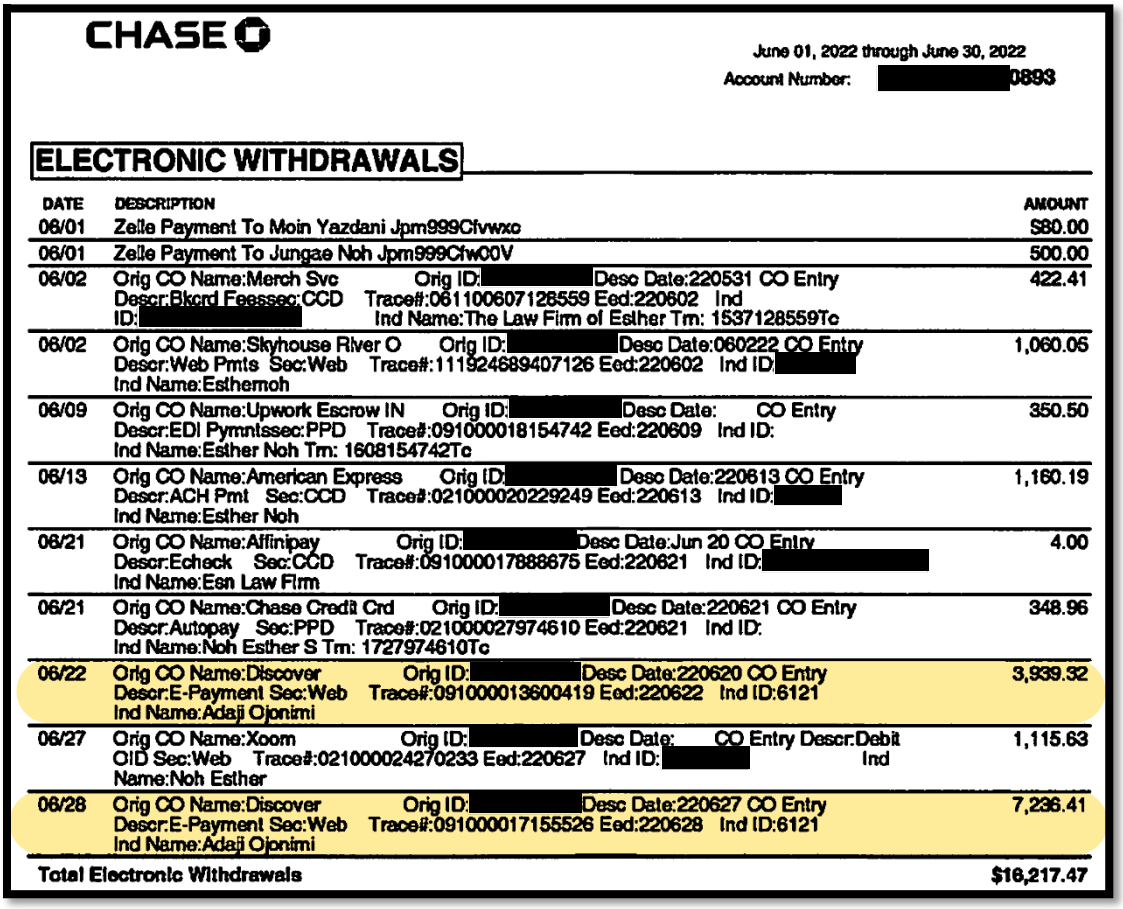
[78] RR3:67, 105; RR4:69.

[79] RR3:106; RR4:70; RR7:547–553 (SE15). The Reporter's Record says that State's Exhibit 15 was not admitted, but the record reflects that it was admitted without objection. RR4:74. The State had previously offered a different Exhibit 15, which it withdrew after defense counsel objected. RR3:104–06.

[80] RR4:54, 90–91.

[81] RR4:91–92; RR7:592 (SE16).

Both were electronic payments to a Discover credit card account under the name "Adaji Ojonimi."[82] Ms. Noh did not authorize either transaction.[83] She filed a police report.[84]



CHASE

June 01, 2022 through June 30, 2022
Account Number: [redacted]0893

ELECTRONIC WITHDRAWALS

DATE	DESCRIPTION	AMOUNT
06/01	Zelle Payment To Moin Yazdani Jpm999Cfvwxc	$80.00
06/01	Zelle Payment To Jungae Noh Jpm999Cfw00V	500.00
06/02	Orig CO Name:Merch Svc Orig ID:[redacted] Desc Date:220531 CO Entry Descr:Bkcrd Feessec:CCD Trace#:061100607126559 Eed:220602 Ind ID:[redacted] Ind Name:The Law Firm of Esther Tm: 1537128559Tc	422.41
06/02	Orig CO Name:Skyhouse River O Orig ID:[redacted] Desc Date:060222 CO Entry Descr:Web Pmts Sec:Web Trace#:111924689407126 Eed:220602 Ind ID:[redacted] Ind Name:Esthernoh	1,060.05
06/09	Orig CO Name:Upwork Escrow IN Orig ID:[redacted] Desc Date: CO Entry Descr:EDI Pymntssec:PPD Trace#:091000018154742 Eed:220609 Ind ID: Ind Name:Esther Noh Tm: 1608154742Tc	350.50
06/13	Orig CO Name:American Express Orig ID:[redacted] Desc Date:220613 CO Entry Descr:ACH Pmt Sec:CCD Trace#:021000020229249 Eed:220613 Ind ID:[redacted] Ind Name:Esther Noh	1,160.19
06/21	Orig CO Name:Affinipay Orig ID:[redacted] Desc Date:Jun 20 CO Entry Descr:Echeck Sec:CCD Trace#:091000017888675 Eed:220621 Ind ID:[redacted] Ind Name:Esn Law Firm	4.00
06/21	Orig CO Name:Chase Credit Crd Orig ID:[redacted] Desc Date:220621 CO Entry Descr:Autopay Sec:PPD Trace#:021000027974610 Eed:220621 Ind ID: Ind Name:Noh Esther S Tm: 1727974610Tc	348.96
06/22	Orig CO Name:Discover Orig ID:[redacted] Desc Date:220620 CO Entry Descr:E-Payment Sec:Web Trace#:091000013600419 Eed:220622 Ind ID:6121 Ind Name:Adaji Ojonimi	3,939.32
06/27	Orig CO Name:Xoom Orig ID:[redacted] Desc Date: CO Entry Descr:Debit OID Sec:Web Trace#:021000024270233 Eed:220627 Ind ID:[redacted] Ind Name:Noh Esther	1,115.63
06/28	Orig CO Name:Discover Orig ID:[redacted] Desc Date:220627 CO Entry Descr:E-Payment Sec:Web Trace#:091000017155526 Eed:220628 Ind ID:6121 Ind Name:Adaji Ojonimi	7,236.41
Total Electronic Withdrawals		**$16,217.47**

State's Exhibit 16 (detail)

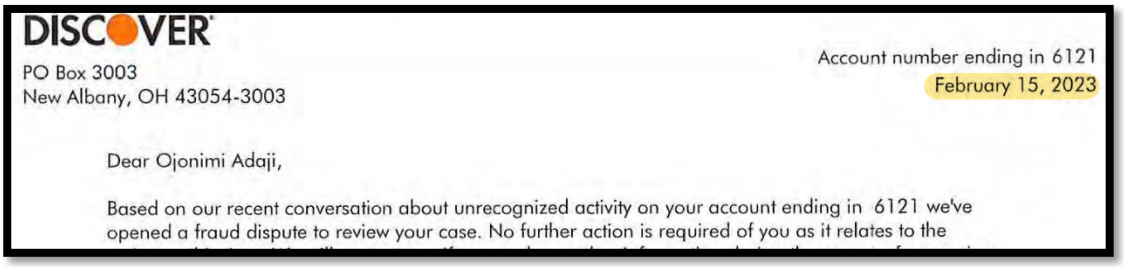
Adaji testified that he did not make these transfers, and that he didn't even know about them until he got out of jail in January

[82] RR4:91–92, 116–18; RR7:592 (SE16).

[83] RR4:92.

[84] RR4:92.

2023.[85] His Discover card records show that he disputed both transactions in early 2023.[86]



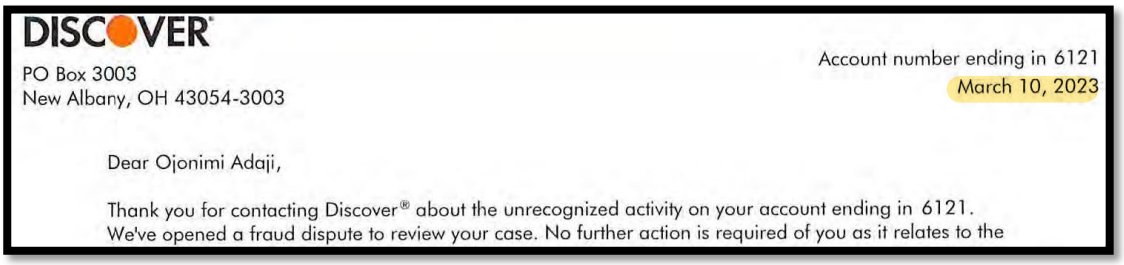
DISCOVER

PO Box 3003
New Albany, OH 43054-3003

Account number ending in 6121
February 15, 2023

Dear Ojonimi Adaji,

Based on our recent conversation about unrecognized activity on your account ending in 6121 we've opened a fraud dispute to review your case. No further action is required of you as it relates to the



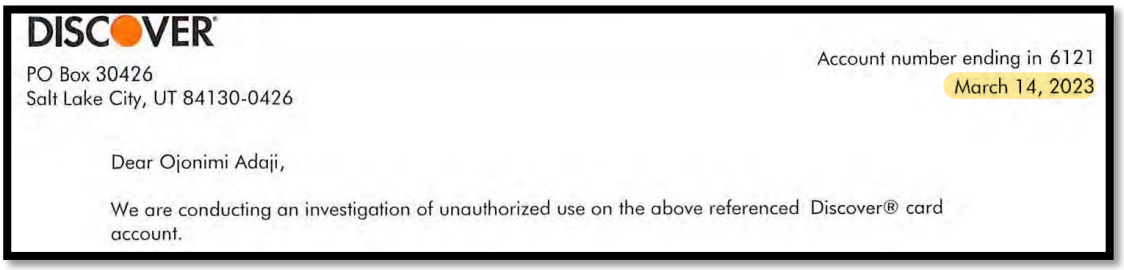
DISCOVER

PO Box 3003
New Albany, OH 43054-3003

Account number ending in 6121
March 10, 2023

Dear Ojonimi Adaji,

Thank you for contacting Discover® about the unrecognized activity on your account ending in 6121. We've opened a fraud dispute to review your case. No further action is required of you as it relates to the



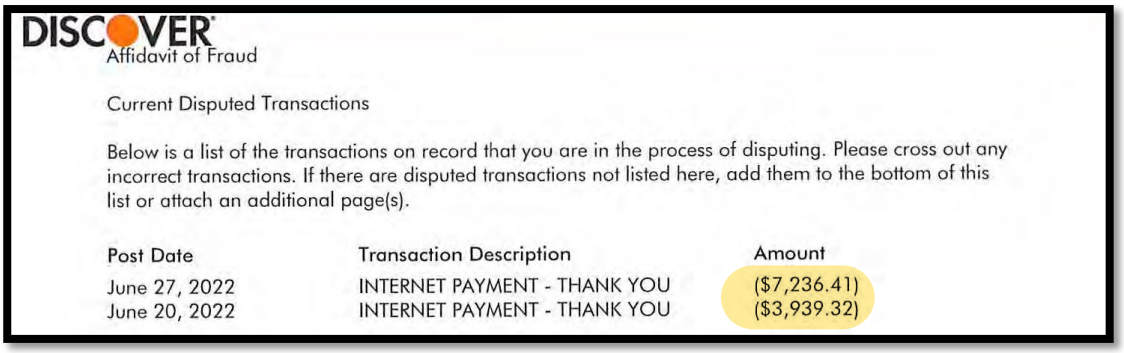
DISCOVER

PO Box 30426
Salt Lake City, UT 84130-0426

Account number ending in 6121
March 14, 2023

Dear Ojonimi Adaji,

We are conducting an investigation of unauthorized use on the above referenced Discover® card account.



DISCOVER
Affidavit of Fraud

Current Disputed Transactions

Below is a list of the transactions on record that you are in the process of disputing. Please cross out any incorrect transactions. If there are disputed transactions not listed here, add them to the bottom of this list or attach an additional page(s).

Post Date	Transaction Description	Amount
June 27, 2022	INTERNET PAYMENT - THANK YOU	($7,236.41)
June 20, 2022	INTERNET PAYMENT - THANK YOU	($3,939.32)

State's Exhibit 23 (details)

[85] RR4:216, 217, 276.

[86] RR7:755–64 (SE23).

The paper trail raises as many questions as it answers.

Connor Evans, a detective in the Houston Police Department's Financial Crimes Unit, examined numerous records, including the firm's bank account records, Adaji's Discover and Cash App records, and certain internet-provider records.[87] His job, as he viewed it, was to "follow the money."[88] He first reviewed the firm's June 2022 bank statement, which showed the two transactions that Ms. Noh had noticed and that he described as "electronic withdrawal[s]."[89]

—The IP addresses are inconclusive.

Detective Evans then compared the dates of the transactions to Adaji's Discover records, and identified several IP addresses from which the transactions might have originated.[90]

ACCT_NBR	SIGN_ON_TIMES_EST	IP_ADDRESS
6121	2022-06-20T01:28:18.373126Z	98.194.43.39
6121	2022-06-20T01:28:51.968229Z	98.194.43.39
6121	2022-06-20T01:33:39.249258Z	174.209.40.188
6121	2022-06-20T01:38:26.135235Z	174.209.40.188
6121	2022-06-20T07:23:54.890631Z	73.45.177.240
6121	2022-06-20T10:07:05.687742Z	73.45.177.240

State's Exhibit 18 (details)

[87] RR4:108–09, 115, 120, 122, 126, 131, 138, 140, 142, 144, 150.

[88] RR4:113, 150.

[89] RR4:116–18.

[90] RR4:118–22; RR7:701–02 (SE18).

Two of the IP addresses (98.194.43.39 and 73.45.177.240) belonged to Comcast.[91] In response to a subpoena from the District Attorney's Office, Comcast responded that it could not identify a subscriber account associated with those IP addresses.[92] Detective Evans shrugged it off: "sometimes that does happen."[93]

Another IP address (174.209.40.188) belonged to Verizon, according to the American Registry for Internet Numbers (ARIN).[94] Detective Evans testified that specific cell-phone users cannot be identified from Verizon IP addresses because "they kind of share it."[95] Accordingly, he said, a subpoena to Verizon would not yield any "information on the account."[96]

All in all, Detective Evans said, he could determine neither location nor identity from the IP addresses.[97] He was unaware, however, that another Internet Protocol locator placed the Comcast IP address in Spring, Texas.[98]

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[91] RR4:122, 123.

[92] RR4:122–23; RR7:712 (SE19); CR510:182.

[93] RR4:123.

[94] RR4:124, 125–29; RR7:714 (SE21).

[95] RR4:124, 129, 151.

[96] RR4:129.

[97] RR4:130, 175.

[98] RR4:156–58.

Detective Evans looked only at IP addresses from the dates of the transactions in question—he "just ran the numbers that had popped up … for that day."[99] He did not investigate any other IP addresses connected to the Discover card.[100] He was unaware that another IP address connected to the account was located in the Dallas area.[101] He did not know where Adaji was, physically, on June 20, 21, 22, or 27, 2022.[102]

—The credit card statements show payments corresponding to the bank withdrawals, but they also show other transactions that undercut the Detective's theory.

Detective Evans next turned to Adaji's Discover statements.[103] He identified Adaji as the account holder for the Discover card.[104] The card account number, ending in -6121, matched the number that was paid from the firm's bank account.[105] Detective Evans speculated that Adaji was engaged in "credit cycling," a practice in which a

[99] RR4:153–54.

[100] RR4:151–52, 158, 172, 174.

[101] RR4:159.

[102] RR4:161.

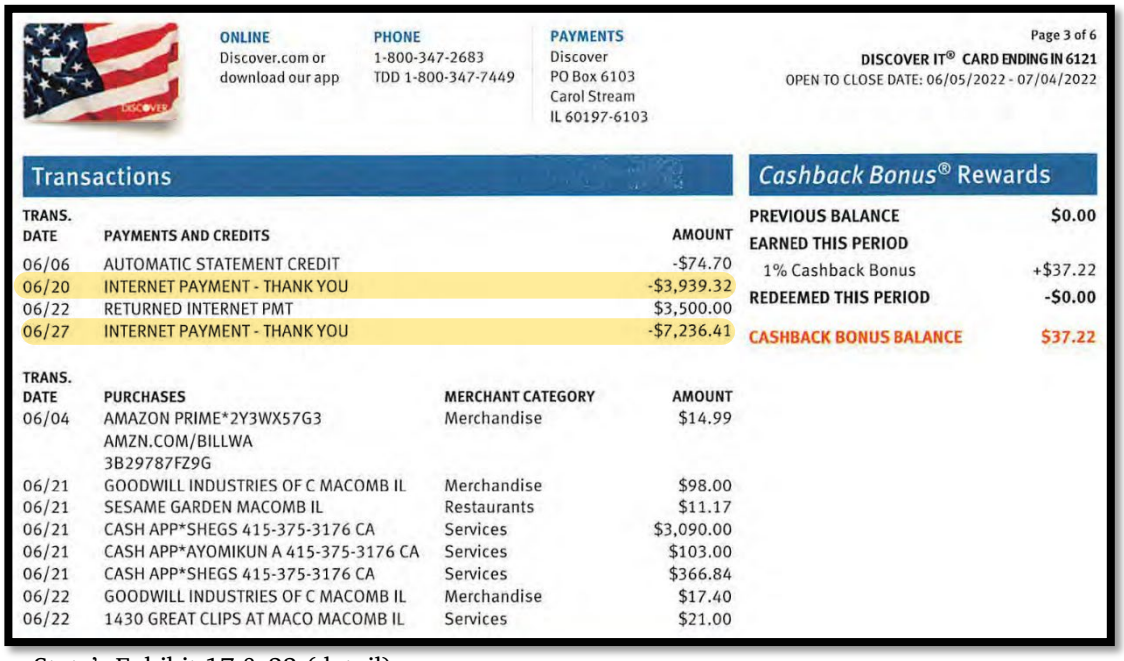
[103] RR4:130–31; RR7:617–86 (SE17).

[104] RR4:135.

[105] RR4:141.

credit card user will reach their credit limit and pay it off multiple times in a single month in order to "extend your credit limit."[106]

He then identified two payments made to the card in June—$3,939.32 on June 20, and $7,236.41 on June 27—that "matched up" with the withdrawals on the firm's bank statement.[107]



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Page 3 of 6
DISCOVER IT® CARD ENDING IN 6121
OPEN TO CLOSE DATE: 06/05/2022 - 07/04/2022

Transactions

TRANS. DATE	PAYMENTS AND CREDITS	AMOUNT
06/06	AUTOMATIC STATEMENT CREDIT	-$74.70
06/20	INTERNET PAYMENT - THANK YOU	-$3,939.32
06/22	RETURNED INTERNET PMT	$3,500.00
06/27	INTERNET PAYMENT - THANK YOU	-$7,236.41

TRANS. DATE	PURCHASES	MERCHANT CATEGORY	AMOUNT
06/04	AMAZON PRIME*2Y3WX57G3 AMZN.COM/BILLWA 3B29787FZ9G	Merchandise	$14.99
06/21	GOODWILL INDUSTRIES OF C MACOMB IL	Merchandise	$98.00
06/21	SESAME GARDEN MACOMB IL	Restaurants	$11.17
06/21	CASH APP*SHEGS 415-375-3176 CA	Services	$3,090.00
06/21	CASH APP*AYOMIKUN A 415-375-3176 CA	Services	$103.00
06/21	CASH APP*SHEGS 415-375-3176 CA	Services	$366.84
06/22	GOODWILL INDUSTRIES OF C MACOMB IL	Merchandise	$17.40
06/22	1430 GREAT CLIPS AT MACO MACOMB IL	Services	$21.00

Cashback Bonus® Rewards

PREVIOUS BALANCE	$0.00
EARNED THIS PERIOD	
1% Cashback Bonus	+$37.22
REDEEMED THIS PERIOD	-$0.00
CASHBACK BONUS BALANCE	$37.22

State's Exhibit 17 & 22 (detail)

He explained that the discrepancy between the withdrawal dates on the firm's bank statement (June 22 and 28), and the payment dates on Adaji's Discover statement (June 20 and 27), was merely a difference in when the transaction posted to each account.[108] He noted that the bank statement also recorded that the transactions

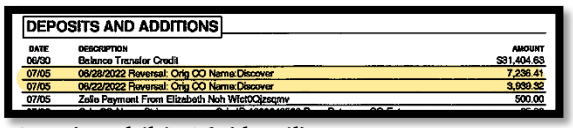
[106] RR4:131–33, 161.

[107] RR4:133, 150; RR7:665 (SE17); SE22 (Response Packet p. 49).

[108] RR4:134.

were "initiated" on June 20 and 27, which corresponded to the Discover statement.[109]

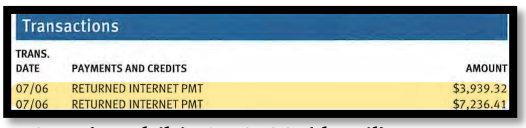
Detective Evans next testified that the bank statement and Discover statement both showed that these transactions were quickly reversed.[110] The bank statement showed that the withdrawals were reversed on July 5, and the Discover statement showed that the payments were returned July 6.[111]



DEPOSITS AND ADDITIONS

DATE	DESCRIPTION	AMOUNT
06/30	Balance Transfer Credit	$31,404.63
07/05	06/28/2022 Reversal: Orig CO Name:Discover	7,236.41
07/05	06/22/2022 Reversal: Orig CO Name:Discover	3,939.32
07/05	Zelle Payment From Elizabeth Noh Wfct0Qjzsqmv	500.00

State's Exhibit 16 (detail)

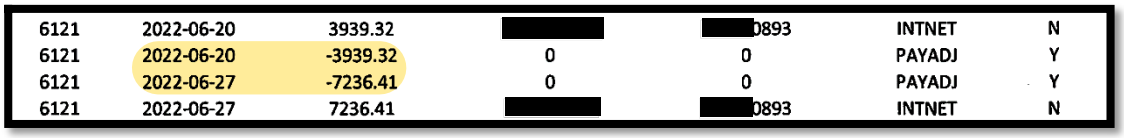


Transactions

TRANS. DATE	PAYMENTS AND CREDITS	AMOUNT
07/06	RETURNED INTERNET PMT	$3,939.32
07/06	RETURNED INTERNET PMT	$7,236.41

State's Exhibit 17 & 22 (detail)

Curiously, other records from Discover showed that each payment was returned *the very same day*; Detective Evans did not explain that discrepancy.[112]



6121	2022-06-20	3939.32	[redacted]	[redacted]0893	INTNET	N
6121	2022-06-20	-3939.32	0	0	PAYADJ	Y
6121	2022-06-27	-7236.41	0	0	PAYADJ	Y
6121	2022-06-27	7236.41	[redacted]	[redacted]0893	INTNET	N

State's Exhibit 18 (detail)

The two payments totaled $11,175.73, but Detective Evans told the jury that they totaled "11,115, I think and maybe some change."[113]

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[109] RR4:134; RR7:592 (SE16) (showing "Desc Date:220620" and "Desc Date:220627" in the information for the two transactions).

[110] RR4:136.

[111] RR7:599 (SE16), 671 (SE17); SE22 (Response Packet p. 55).

[112] RR7:709 (SE18).

[113] RR4:135.

Based on that rough estimate, Detective Evans turned his attention to the next payment on Adaji's Discover statement—an "Internet payment" of $11,381.92 to Adaji's card on July 8, which Detective Evans concluded was an "approximate" payment "to cover that balance."[114]

07/08	INTERNET PAYMENT - THANK YOU	-$11,381.92
07/08	CASHBACK BONUS REDEMPTION PYMT/STMT CRDT	-$37.22
07/13	RETURNED INTERNET PMT	$11,381.92
07/14	PHONE PAYMENT - THANK YOU	-$11,381.92

State's Exhibit 17 & 22 (detail)

He then pointed out that this payment was returned on July 13, meaning that "it was given back to whoever it came from similar to how Ms. Noh's payments were given back to her."[115] Detective Evans apparently did not realize that "whoever it came from" was Adaji himself—the payment came from one of his own bank accounts.[116]

6121	2022-07-08	11381.92	[redacted]	[redacted]6506	INTNET	N
6121	2022-07-08	-11381.92	0	0	PAYADJ	Y

VALUE CHECKING [redacted]6506 — UNITED COMMUNITY BANK — 11/19/2021 9:37:49 AM
Printed by: BRANDON RENCH — Reporting Institution: 0

Demand Deposit [redacted]6506 - OJONIMI ADAJI ([redacted])

	Relationship	Date of Birth	Phone Number	Tax Identification
OJONIMI ADAJI ([redacted])	Owner/Signer	*** **, ****	**********	Foreign

State's Exhibit 18 & 12 (details)

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[114] RR4:136 RR7:671 (SE17); SE22 (Response Packet p. 55).

[115] RR4:137.

[116] *Compare* RR7:709 (SE18) (showing the payment came from the account number ending in -6506) *with* RR7:43–47 (SE12) (showing that Adaji owned the bank account ending in -6506).

After the payment was returned, the exact same amount was paid to the card again via a "phone payment" on July 14.[117] To make such a phone payment, Detective Evans told the jury, a person would need their own bank account and routing numbers.[118] Detective Evans said that he did not trace where this payment came from.[119] Had he done so, he would have learned that it, too, came from one of Adaji's own accounts.[120]

6121	2022-07-14	11381.92	[redacted]	[redacted]3540	CMSPBP	N

63					
64	Bank Account Number	Routing Number	Link Result	Created At	Unlinked At
65	[redacted]3506	[redacted]	SUCCESS	2021-11-10	2022-06-10 16:32:13
66	[redacted]3540		SUCCESS	2022-07-23	2023-06-08 20:49:10
67	[redacted]		SUCCESS	2023-10-18	N/A
68					

State's Exhibit 18 & 22 (details)

—The Cash App records show transfers that correspond to other purchases on Adaji's credit card.

Adaji's Cash App records contained his name, address history, and bank card and account numbers that linked the account to him; this is all information that must be provided to sign up for the Cash App service.[121]

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[117] RR4:137–38.

[118] RR4:137.

[119] RR4:164.

[120] *Compare* RR7:709 (SE18) (showing the payment came from the account number ending in -8540) *with* SE22 (Spreadsheet, line 66) (showing that Adaji owned the bank account ending in -8540 and had linked it to his Cash App account).

[121] RR4:142; SE22 (Spreadsheet, lines 5–12, 15–31, 38–49, 52–67).

Because Cash App required "verified ID's," Detective Evans focused only on Adaji and did not consider that "anybody else could have access to his account."[122] Because he focused on Adaji as "the account holder," he did not investigate whether someone else was accessing Adaji's account, and he made no effort to eliminate other suspects.[123]

Detective Evans testified that there were transactions in the Cash App records that were "suspicious" because "these same transactions showed up" in the Discover statements.[124] He pointed to one transaction, on June 21, in which Adaji used his Discover card to send "Shegs" $3,000 through Cash App.[125] The Discover statement shows a $3,090 purchase "because Cash App charges a 3 percent fee when you use a credit card to send money."[126] And there were two other transactions the same day that similarly matched both accounts: a $356.16 transfer to "Shegs" (charged as $366.84) and a $100 transfer to "Ayo" (charged as $103).[127]

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[122] RR4:151.

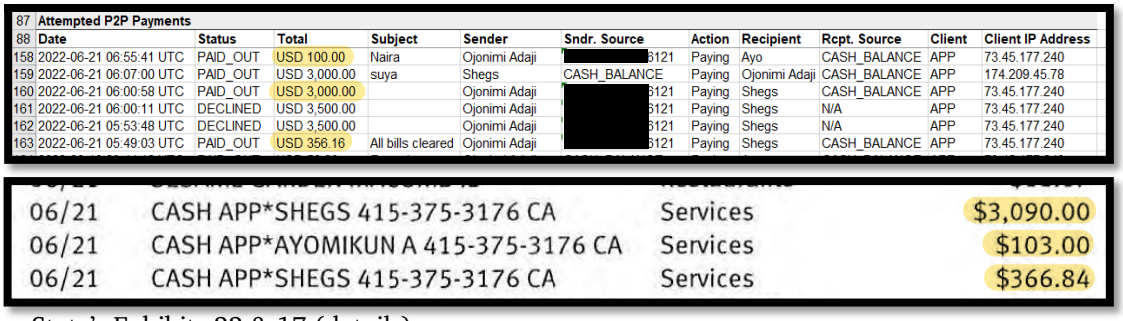
[123] RR4:160.

[124] RR4:144.

[125] RR4:145; SE22 (Spreadsheet, line 160).

[126] RR4:145–46; RR7:665 (SE17).

[127] RR4:146; RR7:665 (SE17); SE22 (Spreadsheet, lines 158 & 163).



87	Attempted P2P Payments										
88	Date	Status	Total	Subject	Sender	Sndr. Source	Action	Recipient	Rcpt. Source	Client	Client IP Address
158	2022-06-21 06:55:41 UTC	PAID_OUT	USD 100.00	Naira	Ojonimi Adaji	[redacted]3121	Paying	Ayo	CASH_BALANCE	APP	73.45.177.240
159	2022-06-21 06:07:00 UTC	PAID_OUT	USD 3,000.00	suya	Shegs	CASH_BALANCE	Paying	Ojonimi Adaji	CASH_BALANCE	APP	174.209.45.78
160	2022-06-21 06:00:58 UTC	PAID_OUT	USD 3,000.00		Ojonimi Adaji	[redacted]3121	Paying	Shegs	CASH_BALANCE	APP	73.45.177.240
161	2022-06-21 06:00:11 UTC	DECLINED	USD 3,500.00		Ojonimi Adaji	[redacted]3121	Paying	Shegs	N/A	APP	73.45.177.240
162	2022-06-21 05:53:48 UTC	DECLINED	USD 3,500.00		Ojonimi Adaji	[redacted]3121	Paying	Shegs	N/A	APP	73.45.177.240
163	2022-06-21 05:49:03 UTC	PAID_OUT	USD 356.16	All bills cleared	Ojonimi Adaji	[redacted]3121	Paying	Shegs	CASH_BALANCE	APP	73.45.177.240

06/21	CASH APP*SHEGS 415-375-3176 CA	Services	$3,090.00
06/21	CASH APP*AYOMIKUN A 415-375-3176 CA	Services	$103.00
06/21	CASH APP*SHEGS 415-375-3176 CA	Services	$366.84

State's Exhibits 22 & 17 (details)

Detective Evans told the jury that all of this was significant because Adaji's credit limit was $4,000, yet at the start of June, he had an outstanding balance of $3,999.03, which meant that any more payments from the card would be rejected.[128]

"And so," Detective Evans declared, "on June 20th, we get that payment … for $3,939.32 from Ms. Noh; and on the same day, you see 3,400 or 500 or so sent right back out via Cash App from Mr. Adaji's Cash App account."[129] In other words, said Evans, "he was able to pay off his balance, get access to that credit limit[,] and then immediately send it to those two people across those three transactions."[130]

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[128] RR4:147; RR7:659 (SE17).

[129] RR4:147.

[130] RR4:147–48. Detective Evans did not mention that the Cash App records also show that Adaji *received* $3,000 within minutes of sending $3,000. SE22 (Spreadsheet, line 159).

Summary of the Argument

Issue One

The evidence is legally insufficient to support Adaji's conviction for fraudulent use or possession of identifying information because the State failed to prove the item of identifying information that it alleged in the indictment.

Because the statutory definition of "identifying information" is incorporated into the offense definition, and each separate item of identifying information is the allowable unit of prosecution, the specific description of the alleged item of identifying information is an essential element of the offense that must be included in the hypothetically correct jury charge.

Here, the State alleged a single item of identifying information: "financial account information of Esther Noh." But at trial it proved a completely different item of identifying information—the bank account number of The Law Firm of Esther S. Noh, PLLC. The firm, as a PLLC, is a separate and distinct "person" from Esther Noh, and its bank account number is a separate and distinct item of identifying information from any account that identifies Ms. Noh.

The State presented no evidence of any "financial account information of Esther Noh" at trial. This material variance from the indictment is a failure of proof, and Adaji is entitled to an acquittal.

Issue Two

The evidence is legally insufficient to support Adaji's conviction for theft of money because the State failed to prove that any money was ever appropriated.

Because the gravamen of theft includes both ownership and deprivation of specific property, the description of the allegedly stolen property is an essential element that must be included in the hypothetically correct jury charge.

Here, the State alleged in the indictment that the property was "money." For purposes of theft, "money" is a subset of "document" and means "legal tender coins or legal tender currency of the United States." But at trial the State proved merely an electronic transfer of funds between two accounts. No document, much less any legal tender, was ever proved to have been appropriated. Because the electronic transfer proved has significant restrictions on negotiability, it is unlike checks or other sight orders that the courts have held to be equivalent to cash.

Because the State presented no evidence that "money" was appropriated, the evidence is insufficient to prove an essential element of the offense, and Adaji is entitled to an acquittal.

Issue Three

The judgments in both cases contain errors that this Court should correct:

- Neither judgment reflects the statute for the offense.
- The theft judgment assesses $290 in duplicative court costs and $50 in duplicative reimbursement fees that may be assessed only once per trial.
- The theft judgment assesses a $50 Capias-Execution fee that is unsupported by the record.
- Both judgments include a $5 Arrest fee even though the record does not show that Adaji was ever arrested without a warrant or capias.
- The fraudulent use or possession judgment assesses $5 too much in Release fees because the record shows only three instances in which Adaji was released.
- The theft judgment assesses $100 in reimbursement fees for summoning witnesses, but the record contains only four subpoenas that were validly served by a peace officer. At $5 per subpoena, the court should have assessed only $20.

Issue Four

The bills of costs each include the fine, which is not a cost that should be included in a bill of costs, and also the improperly assessed costs and fees that were also included in the judgment. This Court should delete them from the bills of costs.

ARGUMENT

Issues One and Two
(Legal Sufficiency)

Standard of Review for Legal Sufficiency

> The Fourteenth Amendment's guarantee of due process of law prohibits a criminal defendant from being convicted of an offense and denied his liberty except upon proof sufficient to persuade a rational trier of fact beyond a reasonable doubt of every fact necessary to constitute the offense.

Baltimore v. State, 689 S.W.3d 331, 340 (Tex. Crim. App. 2024) (citing *In re Winship*, 397 U.S. 358, 364 (1970); *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003)).

To determine whether evidence is legally sufficient to sustain a conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Baltimore*, 689 S.W.3d at 340. The reviewing court defers to the factfinder's resolution of conflicts in the testimony, weighing of the evidence, and drawing of reasonable inferences from basic facts to ultimate facts, in light of the "cumulative force of all evidence." *Baltimore*, 689 S.W.3d at 341.

A "mere modicum" of evidence is not sufficient to rationally support a conviction beyond a reasonable doubt. *Id.* at 340. The "question considered on an evidentiary sufficiency review is not whether there was *any* evidence to support a conviction, but whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt." *Id.* (emphasis in original).

To determine whether the State has met its burden of proving guilt beyond a reasonable doubt, the reviewing court compares the evidence produced at trial to the essential elements of the offense as defined by the hypothetically correct jury charge. *Baltimore*, 689 S.W.3d at 341; *Delarosa v. State*, 677 S.W.3d 668, 673 (Tex. Crim. App. 2023); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id.*

The law authorized by the indictment consists of the statutory elements of the offense as modified by the indictment allegations. *Baltimore*, 689 S.W.3d at 341 (citing *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000)); *Delarosa*, 677 S.W.3d at 673–74 (same). When a statute lists more than one method of committing an offense or definition of an element of an offense, and the indictment

alleges some, but not all, of the statutorily listed methods or definitions, the State is limited to the methods and definitions alleged. *Ramjattansingh v. State*, 548 S.W.3d 540, 546 (Tex. Crim. App. 2018) (citing *Cada v. State*, 334 S.W.3d 766, 773–74 (Tex. Crim. App. 2011)).

Sometimes the words in the indictment do not perfectly match the proof at trial. *Byrd v. State*, 336 S.W.3d 242, 246–48 (Tex. Crim. App. 2011). To get around this, the Court of Criminal Appeals has held that the hypothetically correct jury charge "need not incorporate allegations that give rise to immaterial variances." *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012) (quoting *Gollihar v. State*, 46 S.W.3d 243, 256 (Tex. Crim. App. 2001)).

The Court of Criminal Appeals has identified three categories of variance:

1) a statutory allegation that defines the offense;
2) a non-statutory allegation that is descriptive of an element of the offense that defines or helps define the allowable unit of prosecution; and
3) a non-statutory allegation that has nothing to do with the allowable unit of prosecution.

Ramjattansingh, 548 S.W.3d at 547. The first category is always material, and the hypothetically correct jury charge will always include the statutory allegations in the indictment. *Id.* The third category is never material, and the hypothetically correct jury charge

will never include that kind non-statutory allegation in the indictment. *Id.*

The second category is "sometimes material," and "the hypothetically correct jury charge will sometimes include the non-statutory allegations in the indictment and sometimes not." *Id.* Such a variance is material if it "really amounts to a failure to prove the offense alleged." *Johnson*, 364 S.W.3d at 295 (citing *Byrd*, 336 S.W.3d at 246–48). If the proof at trial "shows an entirely different offense" than what was alleged in the charging instrument, then the variance is material, and the evidence is legally insufficient. *Id.*

The Court made clear that when it said "different offense" it was referring to the "allowable unit of prosecution" for an offense. *Johnson*, 364 S.W.3d at 295. Using murder as an example, the Court pointed out that "each victim is an allowable unit of prosecution." *Id.* Thus, if the State alleges the murder of Dangerous Dan, but proves the murder of Little Nell, the State has proved a different offense and "the defendant is entitled to an acquittal." *Byrd*, 336 S.W.3d at 246–47.

1. Issue 1: The evidence is legally insufficient to support Adaji's conviction for fraudulent use or possession of identifying information.

The evidence is legally insufficient to support Adaji's conviction for fraudulent use or possession of identifying information because the State failed to prove the alleged item of identifying information.

The State alleged a single item of identifying information in the indictment: "financial institution account number of Esther Noh,"[131] and the court listed the same item in the application paragraph of the jury charge.[132]

But at trial, the State presented no evidence of a "financial institution account number of Esther Noh." Instead, the State presented evidence of an account number that belonged to, and identified, The Law Firm of Esther S. Noh, PLLC, which is a separate and unique person. This is a fatal variance that constitutes a complete failure of proof, and therefore the evidence is legally insufficient.

[131] CR508:59.

[132] CR508:143.

1.1. The essential elements of the offense include the specific item of identifying information that constitutes the allowable unit of prosecution.

1.1.1. The statutory elements incorporate the definition of "identifying information."

The Penal Code provides that a person commits the offense of fraudulent use or possession of identifying information if:

> … the person, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of … identifying information of another person without the other person's consent or effective consent.

Tex. Penal Code § 32.51(b)(1); *Ex parte Bodden*, No. WR-90,536-02, __ S.W.3d __, 2024 WL 5059236, at *6 (Tex. Crim. App. Dec. 11, 2024). The offense is a state jail felony if the number of items obtained, possessed, transferred, or used is less than five. Tex. Penal Code § 32.51(c)(1); *Bodden*, 2024 WL 5059236, at *4.

The offense definition in section 32.51(b) "incorporates" the statutory definition of "identifying information" in section 32.51(a). *Bodden*, 2024 WL 5059236, at *6. "Identifying information" means "information that alone or in conjunction with other information identifies a person, including a person's … unique electronic identification number, address, routing code, or financial institution account number." Tex. Penal Code § 32.51(a)(1)(C). The first part of this definition is "a general definition for what constitutes

'identifying information,'" while the second part is one of a "nonexclusive list of examples of such 'identifying information.'" *Bodden*, 2024 WL 5059236, at *5.

Each separate item of identifying information is the "allowable unit of prosecution" under section 32.51(b). *Mayfield v. State*, 676 S.W.3d 244, 252 (Tex. App.—Fort Worth 2023, pet. ref'd); *State v. Donaldson*, 557 S.W.3d 33, 46 (Tex. App.—Austin 2017, no pet.); *cf. Cortez v. State*, 469 S.W.3d 593, 597–98 (Tex. Crim. App. 2015) (assuming, without deciding, that "item of identifying information" is the unit of prosecution).

Accordingly, the specific description of the alleged item of identifying information is descriptive of an element of the offense that defines or helps define the allowable unit of prosecution, so it can give rise to a material variance and should be included in the hypothetically correct jury charge. *Ramjattansingh*, 548 S.W.3d at 547; *Johnson*, 364 S.W.3d at 295–96; *Byrd*, 336 S.W.3d at 246–47.

1.1.2. The indictment narrowed the allegation of "identifying information" in this case.

The indictment in cause no. 1793508 alleged that:

> … Ojonimi Adaji … did … with the intent to defraud and harm another, obtain and/or possess and/or transfer and/or use less than five items of identifying information, namely, financial institution account

> number of Esther Noh, hereafter called the Complainant[,] without the Complainant's consent.[133]

The indictment generally tracked the statute. It alleged every "prohibited conduct" in the statute—obtain, possess, transfer, and use. *See Bodden*, 2024 WL 5059236, at *6 (calling these acts the "prohibited conduct"). It alleged the entire culpable mental state—albeit in reverse order. And it alleged the state-jail felony number of items.

But the indictment narrowed two elemental allegations. It first narrowed the circumstance element by alleging only that the offense was without Esther Noh's consent, rather than without her consent "or effective consent."[134]

It then narrowed the "identifying information" element by alleging the "financial institution account number of Esther Noh."[135] This narrowed allegation accomplished three things. First, by alleging a single statutory example of identifying information—"financial institution account number"—it omitted and excluded all other kinds of identifying information. Second, by alleging the person identified by the information—"Esther Noh"—it omitted and

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[133] CR508:59.

[134] CR508:59. "Consent" and "effective consent" mean different things. Tex. Penal Code § 1.07(a)(11), (19). Lack of effective consent was added to the statute in 2019, so it's possible the State used an old template. *Bodden*, 2024 WL 5059236, at *5 n.8.

[135] CR508:59.

excluded all other persons who might be identified. And third, by describing the specific item of identifying information at issue—"financial institution account number of Esther Noh"—it omitted and excluded all other specific items of identifying information, including all other specific financial institution account numbers of other persons.

1.1.3. The hypothetically correct jury charge includes the specific item of identifying information that the State had to prove beyond a reasonable doubt.

In light of the narrowed allegations in the indictment, the essential elements of the offense in the hypothetically correct jury charge, as authorized by the indictment, are that:

1) Ojonimi Adaji
2) with intent to harm or defraud another
3) obtained, possessed, transferred, or used
4) less than five items of identifying information, namely, the financial institution account number of Esther Noh
5) without Esther Noh's consent.[136]

Compared to these essential elements, the State's proof at trial fails because the State did not prove the financial institution account number of Esther Noh.

[136] The given charge tracked this hypothetically correct charge. CR508:143.

1.2. The bank account number of Esther Noh is a different item of identifying information from the bank account number of The Law Firm of Esther S. Noh, PLLC.

The offense definition in section 32.51(b) incorporates the statutory definition of "identifying information" in section 32.51(a). *Bodden*, 2024 WL 5059236, at *6. "Identifying information" means "information that alone or in conjunction with other information identifies a person, including a person's … unique electronic identification number, address, routing code, or financial institution account number." Tex. Penal Code § 32.51(a)(1)(C). "Financial institution" includes "a bank." Tex. Penal Code § 32.01(1).

Accordingly, a person's "financial institution account number" includes a person's bank account number, and that number constitutes an "item of identifying information" if it, alone or in conjunction with other information possessed by the defendant, is sufficient to identify the person or the person's account. *Bodden*, 2024 WL 5059236, at *7.

In the Penal Code, a "person" is "an individual or a corporation, association, limited liability company, or other entity or organization governed by the Business Organizations Code." Tex. Penal Code § 1.07(a)(38). An "individual" is "a human being who is alive." Tex. Penal Code § 1.07(a)(26). One "entity governed by the Business Organizations Code," meanwhile, is a professional limited liability company. Tex. Bus. Orgs. Code §§ 301.003(4), (6), 304.001.

Thus, both human beings and professional limited liability companies are "persons" under the Penal Code. Esther Noh—a living human being—is a "person," and The Law Firm of Esther S. Noh, PLLC—a professional limited liability company—is also a "person." Tex. Penal Code § 1.07(a)(38). The bank account number of Esther Noh, which identifies Esther Noh, is therefore a different item of identifying information from the bank account number of The Law Firm of Esther S. Noh, PLLC, which identifies the firm.

1.3. The variance between allegation and proof is material and constitutes a failure of proof.

Thus, in this case, there is a material variance between the allegation in the indictment and the proof at trial. Because each separate "item of identifying information" is the allowable unit of prosecution, *Mayfield*, 676 S.W.3d at 252; *Donaldson*, 557 S.W.3d at 46, a variance between the allegation and proof of the specific item of identifying information changes the allowable unit of prosecution and is therefore material. *Ramjattansingh*, 548 S.W.3d at 547; *Johnson*, 364 S.W.3d at 295–96; *Byrd*, 336 S.W.3d at 246–47.

The State alleged the "account number of Esther Noh," but it presented evidence only of a Chase Business checking account held by The Law Firm of Esther S. Noh, PLLC.[137] That's proof of an

[137] RR4:88; RR7:559–64, 614 (SE16).

"entirely different offense" than what was alleged in the indictment. *Johnson*, 364 S.W.3d at 295.

This variance is no different from how the Court of Criminal Appeals has repeatedly evaluated the offense of murder, where the unit of prosecution is each victim. *Johnson*, 364 S.W.3d at 295. "Murder may be murder, but killing one person is not the same offense as killing an entirely different person." *Byrd*, 336 S.W.3d at 246. If the State alleges that the defendant killed Dangerous Dan, but instead proves that the defendant killed Little Nell, "the State has failed to prove its allegation, and the defendant is entitled to an acquittal." *Id.* at 246–47.

The same is true here. To put it in comparable terms, in this case the State alleged identifying information of Dangerous Dan, but it proved identifying information of Little Nell. The State failed to prove its allegation, so Adaji is entitled to an acquittal.

1.4. The witnesses' false testimony about who owned the account does not meet the State's burden.

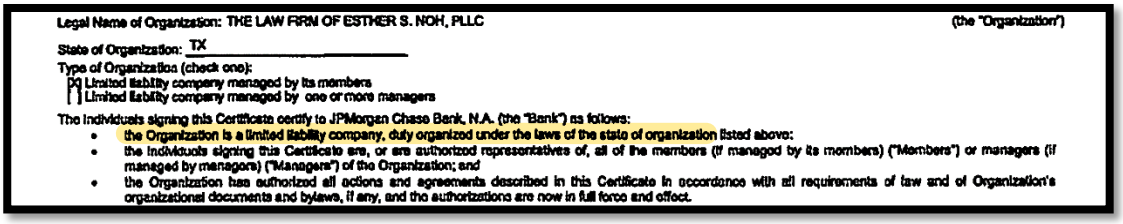
True, the state presented *some* evidence that the bank account at issue was held by Esther Noh: Both Ms. Noh and Detective Evans testified that she was the "account holder."[138] But this testimony is

[138] RR4:90, 116.

not merely contradicted by the State's own evidence, it is shown by that evidence to be patently untrue as a matter of law.

State's Exhibit 16 shows that the bank account belonged to The Law Firm of Esther S. Noh, PLLC, which is a member managed limited liability company, organized in Texas, with its own taxpayer identification number.[139] Ms. Noh is not listed as the account owner, but rather as a "member" and "authorized person." Those are legal terms signifying that the firm is an entity organized under the Business Organizations Code. *See* Tex. Bus. Orgs. Code §§ 1.002(53) (defining "member"), 101.101(a) (requiring a limited liability company to have at least one member), 101.251(a)(2) (providing for member-managed limited liability companies), 301.004 (defining "authorized person").

In fact, by signing the Business Depository Certificate for the account, Ms. Noh certified to Chase Bank that "the Organization is a limited liability company, duly organized under the laws of" Texas.[140]



Legal Name of Organization: THE LAW FIRM OF ESTHER S. NOH, PLLC (the "Organization")

State of Organization: TX

Type of Organization (check one):
[X] Limited liability company managed by its members
[ ] Limited liability company managed by one or more managers

The individuals signing this Certificate certify to JPMorgan Chase Bank, N.A. (the "Bank") as follows:

- the Organization is a limited liability company, duly organized under the laws of the state of organization listed above;
- the individuals signing this Certificate are, or are authorized representatives of, all of the members (if managed by its members) ("Members") or managers (if managed by managers) ("Managers") of the Organization; and
- the Organization has authorized all actions and agreements described in this Certificate in accordance with all requirements of law and of Organization's organizational documents and bylaws, if any, and the authorizations are now in full force and effect.

State's Exhibit 16 (detail)

[139] RR7:559–64, 614 (SE16).

[140] RR7:561–62 (SE16).

Therefore, the "mere modicum" of evidence provided by the witnesses' testimony is not sufficient to prove that Ms. Noh was the "account holder." Rather, in light of the "cumulative force of all the evidence," no rational trier of fact could believe the false testimony. *Baltimore*, 689 S.W.3d at 341 n. 29 (quoting *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012)).

The cumulative force of the evidence shows that the witnesses' testimony about the "account holder" is wholly unsupported and false. The Court of Criminal Appeals has held that "unsupported opinions" may fall short of the beyond-a-reasonable-doubt standard, particularly with respect to opinions regarding legal concepts. *Baltimore*, 689 S.W.3d at 343–44. In the same way, patently false testimony about the owner of a bank account should also fall short of meeting the State's burden.

Simply put: When the witnesses testified that Esther Noh was the "account holder" for the account, they lied. And no other evidence showed that Ms. Noh owned, held, or was identified by, any bank account. Instead, the evidence showed that the bank account at issue was owned by, and identified, The Law Firm of Esther S. Noh, PLLC. That is a separate and distinct item of identifying information than what was alleged in the indictment. It proves a separate and distinct offense.

1.5. Cases in which there was merely a variation in name are not on point.

This case is unlike cases in which there was merely a variance in the name of *the same victim*. *See, e.g.*, *Fuller v. State*, 73 S.W.3d 250, 252–54 (Tex. Crim. App. 2002) (indictment alleged "Olen B. Fuller," while proof showed "Buddy Fuller" or "Mr. Fuller"); *King v. State*, 19 S.W.2d 52, 53 (Tex. Crim. App. 1928) (indictment alleged "First State Bank" while proof showed "First State Bank, Sulphur Springs, Tex."); *see also Awad v. State*, No. 14-18-00250-CR, 2019 WL 2939935, at *4 (Tex. App.—Houston [14th Dist.] July 9, 2019, pet. ref'd) (mem. op., not designated for publication) (indictment identified "Progressive" while proof showed "Progressive County Mutual Ins Co.").

Here, the State didn't allege "Esther Noh" and prove "Esther *S.* Noh." Nor did it allege "The Law Firm of Esther S. Noh" and prove "The Law Firm of Esther S. Noh*, PLLC.*" Instead, it alleged one person (Esther Noh, an individual) and proved another (The Law Firm of Esther S. Noh, PLLC, an entity). Esther Noh is not the law firm, and the law firm is not Esther Noh. They are different persons. Their identifying information proves different offenses.

1.6. Conclusion: The State failed to prove its allegation, and Adaji is entitled to an acquittal.

When the State alleged an item of identifying information as the "financial institution account number of Esther Noh," but instead proved a bank account number of The Law Firm of Esther S. Noh, PLLC, this material variance was "a failure of proof." *Byrd*, 336 S.W.3d at 247. The indictment set out one distinct offense, but the proof showed an entirely different offense. *Id.* The State "failed to prove its allegation," and Adaji "is entitled to an acquittal." *Id.* at 246–47. This Court should reverse Adaji's conviction in cause number 1793508 and render a judgment of acquittal. Tex. R. App. P. 43.2(c).

2. Issue 2: The evidence is legally insufficient to support Adaji's conviction for theft.

The evidence is legally insufficient to support Adaji's theft conviction in cause no. 1793510 because the State failed to prove the specific property that it alleged. The State alleged a theft of "money," but it proved only an electronic transfer of funds that was never converted into legal tender.

2.1. The essential elements of theft include the specific description of the property.

2.1.1. The statutory elements include a description of the property.

A person commits theft if he unlawfully appropriates property with intent to deprive the owner of property. Tex. Penal Code § 31.03(a); *Byrd*, 336 S.W.3d at 250. Appropriation of property is unlawful if it is without the owner's effective consent. Tex. Penal Code § 31.03(b)(1); *Byrd*, 336 S.W.3d at 251. The offense is a state jail felony if the value of the property stolen is $2,500 or more but less than $30,000. Tex. Penal Code § 31.03(e)(4)(A).

The gravamen of theft "is in depriving the true owner of the use, benefit, enjoyment or value of his property, without his consent." *Byrd*, 336 S.W.3d at 250. This gravamen is "two-pronged": 1) taking certain specified property away from its rightful owner, or 2) depriving that owner of its use or enjoyment. *Id.* at 251.

Because the gravamen of theft comprises both ownership and deprivation of specific property, "the jury charge must incorporate those statutorily required descriptions of both ownership and property." *Byrd*, 336 S.W.3d at 257 (citing Tex. Code Crim. Proc. art. 21.08 (requiring allegation of ownership in indictment), 21.09 (requiring description of property in indictment)). Therefore, the hypothetically correct jury charge in a theft prosecution must incorporate both "the name of the owner *and a description of the property*." *Id.* (emphasis added).[141]

2.1.2. The indictment specifically described the property as "money."

The indictment in cause no. 1793510 alleged that:

> … Ojonimi Adaji … did … unlawfully[] appropriate, by acquiring and otherwise exercising control over property, namely, money owned by Esther Noh, hereafter styled the Complainant, of the value of at least two thousand five hundred dollars and less than thirty thousand

[141] In *Villarreal v. State*, 504 S.W.3d 494, 515 (Tex. App.—Corpus Christi–Edinburg 2016, pet. ref'd), the Thirteenth Court of Appeals said that "the type of property appropriated is not a substantive element of the theft offense that is required to be included in a hypothetically correct jury charge." That case was wrongly decided. The Court didn't mention *Byrd*—at all. The court offered a single case citation to support the quoted statement: *Fuller*, 73 S.W.3d at 254. *Id.* But *Fuller* doesn't say that. Meanwhile, *Byrd*—which was decided after *Fuller*—expressly says otherwise. *Villarreal* therefore contradicts controlling case law from the Court of Criminal Appeals.

dollars, with the intent to deprive the Complainant of the property.[142]

This indictment therefore specifically described the property at issue as "money," to the exclusion of all other property.

2.1.3. The hypothetically correct jury charge includes the allegation that the property was "money."

In light of the allegations in the indictment, the essential elements of theft in the hypothetically correct jury charge, as authorized by the indictment, are that:

1) Ojonimi Adaji
2) unlawfully—that is, without Esther Noh's effective consent,
3) appropriated, by acquiring and otherwise exercising control over,
4) property, namely, money,
5) owned by Esther Noh,
6) of the value of at least $2,500 and less than $30,000,
7) with the intent to deprive Esther Noh of the property.

The State therefore had to prove beyond a reasonable doubt that "money" was appropriated. It failed to do so. The State proved that there was an electronic transfer of funds, but it did not prove that *money* was ever appropriated.

[142] CR510:72.

2.2. In the theft context, "money" means legal tender coins or currency, not electronic funds.

2.2.1. The Court of Criminal Appeals has held that "money" means legal tender coins or currency.

The Court of Criminal Appeals has recognized that "[t]he term 'money,' as used in relation to the crime of theft, has been judicially defined as *legal tender coins* or *legal tender currency* of the United States." *Cousins v. State*, 224 S.W.2d 260, 261 (Tex. Crim. App. 1949) (emphasis added). "Such," said the Court, "also is the definition of that term as commonly known and understood." *Id.*

2.2.2. This holding is still valid under the modern Penal Code.

As recently as 2020, the First Court of Appeals recognized the ongoing validity of this definition of "money." *Hines v. State*, 608 S.W.3d 354, 370 (Tex. App.—Houston [1st Dist.] 2020, no pet.).This Court, however, has noted that *Cousins* was decided prior to the modern Penal Code. *Earls v. State*, 650 S.W.2d 858, 862 (Tex. App.—Houston [14th Dist.] 1982), *aff'd*, 707 S.W.2d 82 (Tex. Crim. App. 1986).

In *Cousins*, the Court construed the Old Code theft statute, which provided that:

> The term "property," as used in relation to the crime of theft, includes money, bank bills, goods of every description commonly sold as merchandise, every kind of agricultural produce, clothing, any writing containing

> evidence of an existing debt, contract, liability, promise or ownership of property real or personal, any receipts for money, discharge release acquittance, and printed book or manuscript, and in general any and every article commonly known as and called personal property, and all writings of every description, provided such property possesses any ascertainable value.

1948 Vernon's Texas Penal Code art. 1418. This definition, while wordier, is not much different from the modern Penal Code, which similarly defines "property" as:

> A) real property;
> B) tangible or intangible personal property including anything severed from land; or
> C) a document, including money, that represents or embodies anything of value.

Tex. Penal Code § 31.01(5).

This definition reveals two key things about "money." First, it continues to specifically list "money" as a type of property, so the longstanding judicial definition of "money" as "legal tender coins or legal tender currency of the United States" continues to remain valid, just as the First Court of Appeals has recognized. *Hines*, 608 S.W.3d at 370. Second, it specifically identifies "money" as a "document," which also indicates that the longstanding judicial definition of "money" remains appropriate in the theft context.

2.2.3. "Money" has a broader definition under the UCC that doesn't apply to the Penal Code.

"Money" can have other definitions in other contexts. In the Uniform Commercial Code, for example, "money" means "a medium of exchange currently authorized or adopted by a domestic or foreign government" and "includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries." Tex. Bus. & Com. Code § 1.201(b)(24). *See HHH Farms, L.L.C. v. Fannin Bank*, 648 S.W.3d 387, 426–27 (Tex. App.—Texarkana 2022, pet. denied).

This is a broader definition of "money" than in the Penal Code. By defining "money" as "a medium of exchange" and "a monetary unit," the UCC allows "money" to include intangible, non-document items that may not necessarily be legal tender coins or currency.

"Legal tender" is "the money (bills and coins) approved in a country for the payment of debts, the purchase of goods, and other exchanges for value," and the UCC has "rejected" "the narrow view that money is limited to legal tender." *HHH Farms*, 648 S.W.3d at 426–27 (citing *Legal Tender*, Black's Law Dictionary (11th ed. 2019); Tex. Bus. & Com. Code § 1.201 cmt. 24). Accordingly, "funds in a deposit account may fit within the definition of 'money'" for purposes of the UCC. *Id.* at 427.

But not so with the Penal Code, which retains the "narrow view" of money that the UCC rejected. The Penal Code limits "money" to being a type of "document." Tex. Penal Code § 31.01(5)(C). It also specifies that "money" is a fundamentally separate thing from "tangible or intangible personal property." *Id.* § 31.01(5)(B), (C).

Accordingly, under the Penal Code "money" must be a "document" that constitutes "legal tender coins or legal tender currency of the United States." Therefore, electronically recorded bank funds are not "money," and a mere electronic transfer of funds between financial institutions does not involve "money" *as that word is defined for purposes of theft*.

2.3. The evidence in this case showed merely an electronic transfer of funds, so the evidence is insufficient to prove appropriation of "money" as alleged.

The evidence in this case showed merely "electronic withdrawals" from the firm's bank account.[143] That evidence is not sufficient for any rational juror to conclude that "money"—that is, "legal tender"—was ever appropriated. There was no testimony or other evidence that any legal tender coins or currency was appropriated as specifically alleged in the indictment. Because the "specified property" is an essential element of the offense that must be proved

[143] RR4:91–92, 116–18; RR7:592 (SE16).

beyond a reasonable doubt, the evidence is insufficient to sustain Adaji's conviction. *Byrd*, 336 S.W.3d at 257.

2.4. Cases that hold that a negotiated check is sufficient to prove "money" are distinguishable because an electronic transfer between accounts, unlike a check, is not a sight order.

There is a line of theft cases in which the Court of Criminal Appeals has held the evidence to be legally sufficient when the indictment alleged "money" but the evidence at trial showed something else. *See Jackson v. State*, 646 S.W.2d 225, 226 (Tex. Crim. App. 1983); *Kirkpatrick v. State*, 515 S.W.2d 289, 293 (Tex. Crim. App. 1974); *Rick v. State*, 207 S.W.2d 629, 630 (Tex. Crim. App. 1947); *see also Mueshler v. State*, 178 S.W.3d 151, 153–55 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

These cases are distinguishable. In each case, the indictment alleged "money" or "cash," and the evidence showed a *negotiated check* by which the defendant received money. *Jackson*, 646 S.W.2d at 226; *Kirkpatrick*, 515 S.W.2d at 293; *Rick*, 207 S.W.2d at 629–30; *Mueshler*, 178 S.W.3d at 154–55. A check is indisputably a document. *Simmons v. State*, 109 S.W.3d 469, 477 (Tex. Crim. App. 2003) ("a check is a 'document that represents or embodies value'"). And, as the Court of Criminal Appeals held, a check was "the instrumentality by which" each defendant "received the cash." *Jackson*, 646 S.W.2d at 226.

Indeed, under the modern Penal Code, a check is a "sight order." Tex. Penal Code § 1.07(a)(46-a). A "sight order" is a "written or electronic instruction to pay money that is authorized by the person giving the instruction and that is payable on demand or at a definite time by the person being instructed to pay." *Id.* The term includes "a check, an electronic debit, or an automatic bank draft." *Id.* With a sight order, "money" is "payable on demand." *Id.* Accordingly, the First Court of Appeals has concluded that "checks are considered cash money." *Mueshler*, 178 S.W.3d at 155.

The same cannot be said for an "electronic withdrawal" from one account to another.[144] Unlike with a check or other sight order, when funds are electronically transferred between accounts, no "document" is ever tendered or negotiated, and no cash is ever obtained.

Instead, as the evidence in this case shows, electronic transfers between accounts can take several days to post.[145] And these electronic transfers can be easily reversed—indeed, as one State's Exhibit showed, the transfers can be reversed the very same day.[146]

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[144] RR4:118.

[145] RR4:134.

[146] RR7:709 (SE18).

2.5. An electronic transfer between accounts is more akin to an insurance draft because it has restrictions on negotiability.

This case is more akin to *Chachere v. State*, 811 S.W.2d 135 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd), in which the First Court of Appeals found a fatal variance between the indictment's allegation of "cash money" and the proof at trial that the defendant received, endorsed, and passed an "insurance draft." *Id.* at 136.

The court held that this insurance draft was not "money." *Id.* The court observed that an insurance draft, unlike a check, has conditions and restrictions on its negotiability. *Id.* It must be endorsed by the lienholder of the insured property, and clear title has to be attached to the draft, releasing it to the insurance company. *Id.* Moreover, even with the lienholder's endorsement, the defendant could not simply cash the draft; he had to take it to a bank, which, within 10 days, would return the draft to the insurance company's bank for approval, after which the payment "is then made to the payee's bank, and ultimately, to the payee." *Id.* at 136–37.

"[B]ecause of all the steps required to be completed before the draft could be negotiated," the court concluded that the draft was "not readily negotiable into cash," nor had it been converted into cash or credit. *Id.* at 137. Accordingly, the court held, theft of the draft was not theft of money, and the evidence was insufficient to support Chachere's conviction for theft of cash money. *Id.*

The "electronic withdrawal" in this case is comparable to the insurance draft in *Chachere* because there are significant restrictions on negotiability. First, to initiate an electronic transfer, a person must have access to the sending bank account and routing numbers.[147] Second, the funds are merely transferred to another electronic account, rather than to the person.[148] Third, a person initiating the transfer cannot simply cash it out; the transfer can be electronically reversed just as easily as it is electronically initiated.[149] Finally, as the Eleventh Court of Appeals has recognized, depositing funds in a bank account creates a creditor debtor relationship between the depositor and the bank, in which title to the money passes to the bank, subject to the depositor's demand for payment. *Hodge v. Northern Trust Bank*, 54 S.W.3d 518, 522 (Tex. App.—Eastland 2001, pet. denied).

These restrictions on negotiability mean that the mere initiation of an electronic transfer of funds between accounts does not make the funds "readily negotiable into cash," nor does it result in the receipt of cash money. Accordingly, an electronic transfer of the sort proved in this case is not the equivalent of money. *Chachere*, 811 S.W.2d at 137.

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[147] RR4:137.

[148] RR4:133, 150; RR7:665 (SE17).

[149] RR4:136; RR7:599 (SE16), 671 (SE17), 709 (SE18).

2.6. Conclusion: The State failed to prove the appropriation of money, so Adaji is entitled to an acquittal.

The proof in this case of an electronic transfer is not proof of appropriation of money, so the evidence is legally insufficient to support Adaji's conviction for theft of money. *Chachere,* 811 S.W.2d at 137. This Court should reverse the judgment of conviction in cause no. 1793510 and render a judgment of acquittal. Tex. R. App. P. 43.2(c).

Issues Three & Four
(Judgments & Bills of Costs)

There are errors in the judgments and the bills of costs. This Court should fix them.

Authority to Correct Judgments and Bills of Costs

This Court has the authority to modify a trial court's judgment to make the record speak the truth when it has the necessary information to do so. Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992). A defendant may challenge the costs imposed in a bill of costs for the first time on appeal when the costs are not imposed in open court and the judgment does not contain an itemization of the costs. *London v. State*, 490 S.W.3d 503, 507 (Tex. Crim. App. 2016).

This Court may modify a bill of costs on appeal because the bill of costs obligates an appellant to pay the items listed. *Jones v. State*, 691 S.W.3d 671, 679 (Tex. App.—Houston [14th Dist.] 2024, pet. ref'd). A court of appeals may modify the bill of costs independent of the trial court's judgment. *Pruitt v. State*, 646 S.W.3d 879, 883 (Tex. App.—Amarillo 2022, no pet.); *Bryant v. State*, 642 S.W.3d 847, 850 (Tex. App.—Waco 2021, no pet.); *Dority v. State*, 631 S.W.3d 779, 794 (Tex. App.—Eastland 2021, no pet.); *Contreras v. State*, Nos. 05-20-00185-CR, 05-20-00186-CR, 2021 WL 6071640, at *8 (Tex.

App.—Dallas Dec. 23, 2021, no pet.) (mem. op., not designated for publication); *see also* Tex. R. App. P. 43.6 (a court of appeals "may make any … appropriate order that the law and the nature of the case require").

3. Issue 3: This Court should modify the judgments to correct multiple errors.

This Court should correct six errors in the judgments.

3.1. This Court should modify both judgments to reflect the statutes for each offense.

The first error is in both judgments: Neither lists the statute for the offense. Both contain a space labelled "Statute for Offense," but both are blank underneath that heading.[150]

The Code of Criminal Procedure does not specifically require a judgment to state the statute for the offense. Instead, it requires the Office of Court Administration to promulgate a standardized felony judgment form, and it requires courts to use that form. Tex. Code Crim. Proc. art. 42.01, § 4. The standardized felony judgment form promulgated by OCA contains a field for the "Statute for Offense."[151]

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[150] CR508:157; CR510:254.

[151] Office of Court Administration, *Rules & Forms—Standardized Felony Judgment Forms*, "Judgment of Conviction by Jury" & "Instructions for Felony Judgment Forms," online at https://www.txcourts.gov/forms/ (last visited Dec. 18, 2024).

Accordingly, a court must include the statute for the offense on the judgment.

In these cases, the court did not include the statute for the offense in either judgment. This Court should modify the "Statute for Offense" in each judgment to say, respectively: "Tex. Penal Code § 32.51(b)(1), (c)(1)" in cause number 1793508, and "Tex. Penal Code § 31.03(a), (e)(4)(A)" in cause number 1793510.[152] Tex. R. App. P. 43.2(b).

3.2. This Court should delete $290 in duplicate consolidated court costs and $50 in duplicate reimbursement fees from the theft judgment.

The second error is in the theft judgment, which assesses $290 in court costs and $260 in reimbursement fees.[153] This is error because the same court costs and $50 of the same reimbursement fees were also assessed in the other judgment,[154] and the Code of Criminal Procedure requires that costs and fees be assessed only once in a single criminal action:

> In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant.

[152] CR508:157; CR510:254.

[153] CR510:254.

[154] CR508:157.

Tex. Code Crim. Proc. art. 102.073(a). Each cost or fee is assessed using the highest category of offense that is possible based on the defendant's convictions. *Id*. 102.073(b). *See Jones*, 691 S.W.3d at 678 (citing *Robinson v. State*, 514 S.W.3d 816, 828 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd)). If the convictions are for the same category of offense and the costs are the same, the costs and fees should be assessed in the case with the lowest trial court cause number. *Williams v. State*, 495 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2016, pet. dism'd).

In this case, the two indictments were tried together in a single criminal action, and Adaji was convicted of both offenses, so the court was authorized to assess each court cost and fee only once. *Id.*

The record shows that the $290 in court costs assessed in each judgment comprises a $185 State Consolidated Court Cost and a $105 Local Consolidated Court Cost.[155] *See* Tex. Local Gov't Code §§ 133.102(a)(1) (requiring $185 State Consolidated Court Cost upon felony conviction); 134.101(a) (requiring $105 Local Consolidated Court Cost upon felony conviction). These assessments are identical, so the trial court improperly assessed duplicate costs.

[155] CR508:157 ($290 cost assessment in judgment), 160 (breakdown in bill of costs); CR510:254 ($290 cost assessment in judgment), 257 (breakdown in bill of costs).

Meanwhile, the bill of costs in each case shows that the following reimbursement fees were assessed in both cases:[156]

	1793508	**1793510**
Capias Execution	$100	$100
Bond Approval	$20	$20
Commitment	$10	$15
Release	$20	$15
Arrest w/out Capias	$5	$5
Summon Jury	$5	$5

The Code of Criminal Procedure authorizes the assessment of each of these fees "to defray the cost of the services provided in the case by a peace officer." *See* Tex. Code Crim. Proc. art. 102.011(a)(1) ($5 for arrest without warrant), (2) ($50 for executing an issued arrest warrant or capias), (5) ($10 for taking and approving a bond), (6) ($5 for commitment or release), (7) ($5 for summoning a jury, if a jury is summoned).

This Court has concluded that the Code of Criminal Procedure allows the *Arrest* and *Capias-Execution* fees to be assessed for each conviction if the record shows that the defendant was arrested for each offense. *Guerra v. State*, 547 S.W.3d 445, 447 (Tex. App.—Houston [14th Dist.], 2018, no pet.). That is because the Code of Criminal Procedure "specifically requires that [those fees] 'shall be

[156] CR508:160; CR510:257. The Witness-Summoning fee, which was assessed in the theft case only, is addressed separately below.

assessed on conviction, regardless of whether the defendant was also arrested at the same time for another offense, and shall be assessed for each arrest made of a defendant arising out of the offense for which the defendant has been convicted.'" *Id.* (quoting Tex. Code Crim. Proc. art. 102.011(e)).

That statute does not apply to the Bond-Approval, Commitment, Release, or Summon-Jury fees, however, so those remain subject to the one-assessment-per-trial provision. Tex. Code Crim. Proc. art. 102.011(e) (referring only to a fee "under Subsection (a)(1) or (2)"). Accordingly, the Arrest and Capias-Execution fees can be assessed for each conviction in this case, but the other fees cannot.

The court therefore improperly assessed $20 in Bond-Approval feed, $10 in Commitment fees, $15 in Release fees, and $5 in Summon-Jury fees twice, for a total of $50 in duplicative assessments.

Because the two offenses are the same level, this Court should leave the assessed costs in the first (lowest-numbered) judgment, and it should modify the theft judgment, in cause number 1793510, to delete the duplicate $290 court costs, as well as the $50 in duplicate reimbursement fees.[157] *Jones*, 691 S.W.3d at 678; *Guerra*,

[157] Doing so will leave an additional, non-duplicate $5 Commitment fee assessment in the theft judgment.

547 S.W.3d at 446–47; *Williams*, 495 S.W.3d at 590; Tex. Code Crim. Proc. art. 102.073(a), (b), Tex. R. App. P. 43.2(b).

3.3. This Court should delete $50 from the Capias-Execution fee in the theft judgment.

The third error is also in the theft judgment's reimbursement-fee assessment, which includes $100 for "Capias Execution."[158] This is error because the record in the theft case contains only one executed capias.

A court is authorized to assess a $50 reimbursement fee for "executing … an issued arrest warrant, capias, or capias pro fine" "to defray the costs of services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(2). A cost may not be imposed for a service not performed. *Id.* art. 103.002.[159]

The record in the theft case contains only one executed capias—a capias that issued November 4, 2022 and was returned executed on January 1, 2023.[160] There is no other executed capias in the record. Instead, the record contains a document entitled "Court Directive: Remand Defendant to Custody," which issued January 26, 2023, and

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[158] CR510:257.

[159] The Old Code of Criminal Procedure, being less apt to mince words than the 1965 revision, called this practice what it is: "Extortion." *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

[160] CR510:41.

purported to revoke Adaji's bail and remand him to custody.[161] This document is not a capias. A "capias" is:

> … a writ that is 1) issued by a judge of the court having jurisdiction of a case after commitment or bail and before trial, or by a clerk at the direction of the judge; and 2) directed "To any peace officer of the State of Texas", commanding the officer to arrest a person accused of an offense and bring the arrested person before that court immediately or on a day or at a term stated in the writ.

Tex. Code Crim. Proc. art. 23.01. The "Court Directive" does not satisfy these requirements: It is not directed to any peace officer of the State of Texas, it does not command the officer to arrest the defendant, and it does not command the officer to bring the defendant before the court.[162] Accordingly, this document does not support the assessment of a $50 Capias-Execution fee.

Because the record supports the assessment of only one $50 Capias-Execution fee in the theft case, this Court should delete $50

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[161] CR510:76. The record in the fraudulent use or possession case contains both a capias executed January 1, 2023, and a second capias executed January 23, 2023. CR508:27, 66. Interestingly, the Harris County Sheriff's Office purported to have executed this second capias twice—8 minutes apart. CR508:66 (capias executed at 14:35), 71 (capias executed at 14:27). But the second copy, claimed to have been executed on January 23 at 14:27, also says that the capias itself was not "received" until January 24. CR508:71. It's hard to understand how a Sheriff's Office could execute a capias a full 24 hours *before* receiving the capias in the first place, yet the Harris County Sheriff claims to have pulled it off.

[162] CR510:76.

from the reimbursement-fee assessment in the judgment. Tex. R. App. P. 43.2(b).

3.4. This Court should delete the $5 Arrest fee from both judgments.

The fourth error is in the reimbursement-fee assessment in both judgments, each of which includes $5 for "Arrest w/out Capias."[163] This is error because neither record shows that Adaji was ever arrested without a capias or warrant.

A court is authorized to assess a $5 reimbursement fee for "making an arrest without a warrant" "to defray the costs of services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(1). But a cost may not be imposed for a service not performed. *Id.* art. 103.002.[164]

The record in both cases is devoid of any evidence that Adaji was ever arrested without a warrant or capias.[165] Because the record does not show that Adaji was ever arrested without a warrant or capias, the record does not support the assessment of the $5 Arrest fee in either judgment. This Court should delete it. Tex. R. App. P. 43.2(b).

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[163] CR508:160; CR510:257.

[164] It would be "Extortion" to do so. *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

[165] CR508:1–215; CR510:1–311.

3.5. This Court should delete $5 from the assessed "Release" fees from the fraudulent use or possession judgment.

The fifth error is in the reimbursement-fee assessment in the fraudulent use or possession judgment, which includes $20 for "Release."[166] This is error because the record shows only three instances in which Adaji was released.

A court is authorized to assess a $5 reimbursement fee for "commitment or release" "to defray the costs of services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(6). But a cost may not be imposed for a service not performed. *Id.* art. 103.002.[167]

This Court has concluded that a $5 Release fee is supported by the record when the defendant was released on bond prior to trial. *Garza v. State*, 425 S.W.3d 649, 654 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). In this case, the record shows that Adaji was released twice prior to trial: when he posted $7,500 bail following his first arrest, and when he posted $15,000 bail following his second arrest.[168] The record further shows that Adaji was released a third time after trial, when he posted a $30,000 appeal bond.[169]

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[166] CR508:160.

[167] Still "Extortion." *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

[168] CR508:208; 210.

[169] CR508:212–13.

Three instances of release support an assessment of $15 in reimbursement fees, not $20. Because the record does not show that Adaji was ever released a fourth time by a peace officer, the record does not support the $20 assessment. This Court should delete $5 from the reimbursement-fee assessment in the judgment in cause no. 1793508. Tex. R. App. P. 43.2(b).

3.6. This Court should delete $80 from the reimbursement fees in the theft judgment because only 4 out of 20 subpoenas were validly served by a peace officer.

The sixth error is in the reimbursement-fee assessment in the theft judgment, which includes $100 for "LEA - Summon Witness."[170] This is $80 too much because sixteen—all but four—of the subpoenas were not validly served by a peace officer.

3.6.1. A court may not impose a witness-summoning fee for a subpoena that was not validly served by a peace officer.

A court is authorized to assess a $5 reimbursement fee "for summoning a witness" "to defray the cost of the services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(3). But a cost may not be imposed for a service not performed. *Id.* art. 103.002.[171] The Court of Criminal Appeals has

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[170] CR510:257.

[171] The "Extortion" continues. *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

held that the witness-summoning fee is constitutional only because it serves a legitimate purpose of reimbursing "the expenses … *actually incurred by peace officers* in serving process on witnesses needed for the defendant's proceedings." *Allen v. State*, 614 S.W.3d 736, 745 (Tex. Crim. App. 2019) (emphasis added).

When nothing in the record demonstrates that a peace officer served a subpoena on a witness or conveyed or attached a witness, there is no basis for assessing fees related to summoning, attaching, or conveying witnesses. *Rhodes v. State*, 676 S.W.3d 228, 233 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (striking fees for "attach/convey witness" where there was no evidence that a peace officer served a subpoena on any witness or conveyed or attached any witness); *see also Wilson v. State*, Nos. 05-22-00452-CR, 05-22-00453-CR, 2023 WL 4758470, at *2 (Tex. App.—Dallas July 26, 2023, pet. ref'd) (mem. op., not designated for publication) (striking witness-service fees for two witnesses when the record showed that neither witness was summoned); *Robles v. State*, No. 01-16-00199-CR, 2018 WL 1056482, at *6 (Tex. App.—Houston [1st Dist.] Feb. 27, 2018, pet. ref'd) (mem. op., not designated for publication) (striking $10 of $25 witness fee when record showed that two of five subpoenas were never served).

Thus, for a court to assess a $5 witness-summoning fee, the record must show two things: 1) valid service of a subpoena 2) by a peace officer.

A criminal subpoena "may summon one or more persons to appear" in court to testify or to bring specified evidence "on a specified day." Tex. Code Crim. Proc. art. 24.01(a), 24.02. A criminal subpoena is served in one of four ways:

> 1) reading the subpoena in the hearing of the witness;
> 2) delivering a copy of the subpoena to the witness;
> 3) electronically transmitting a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address of the witness; or
> 4) mailing a copy of the subpoena by certified mail, return receipt requested, to the last known address of the witness unless [two exceptions apply].

Tex. Code Crim. Proc. art. 24.04(a).

The return of the subpoena must show either 1) the time and manner of service, if read or delivered to the witness; 2) the acknowledgment of receipt, if emailed; 3) the return receipt, if sent by certified mail; or 4) the cause of failure to serve, if the subpoena is not served. *Id.* art. 24.04(b).

Service not made in accordance with the statute is invalid. *Ex parte Terrell*, 95 S.W. 536, 537–38 (Tex. Crim. App. 1906) (applying 1895 Vernon's Code of Criminal Procedure art. 515, which is the direct predecessor of the modern art. 24.04); *see also Fuller v. State*,

No. 14-94-00064-CR, 1996 WL 11176, at *1–2 (Tex. App.—Houston [14th Dist.] Jan. 11, 1996, no pet.) (not designated for publication) (witness was not validly served, to authorize a writ of attachment, when the record did not show compliance with the statutory methods of service).

Even if a subpoena is validly served, it cannot merely be assumed that a *peace officer* served the subpoena. The subpoena may name a person "to summon the person whose appearance is sought." *Id.* art. 24.01(b). That person must be either 1) a peace officer, or 2) at least 18 years old and, at the time the subpoena is issued, not a participant in the proceeding for which the appearance is sought.[172] *Id.* Accordingly, a subpoena may be served by someone who is not a peace officer, so long as they otherwise qualify under the statute. *See* Tex. Att'y Gen. Op. No. KP-0207 (2018).

[172] Until 1981, only a peace officer could serve criminal subpoenas. Back then, a criminal subpoena was "a writ issued to the sheriff or other proper officer commanding him to summon one or more persons … to testify," and therefore it could be served only by a peace officer. *See* Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, art. 24.01, 1965 Tex. Gen. Laws 317, 416 (amended 1981); *see also* 1925 Vernon's Code of Criminal Procedure art. 461. The legislature changed this in 1981 to allow service of subpoenas by any qualified individual. *See* Act of May 15, 1981, 67th Leg., R.S., ch. 209, § 1, art. 24.01, 1981 Tex. Gen. Laws 503, 503 (codified at Tex. Code Crim. Proc. art. 24.01).

3.6.2. The record shows that 16 of the 20 subpoenas in the theft case were not validly served by a peace officer, so this Court should strike the fees that the trial court imposed for them.

Here, the bill of costs in the theft case shows that the court assessed $100 for "LEA Summon Witness."[173] At $5 per subpoena, this equates to 20 served subpoenas, and the record contains 20 subpoenas and 20 unique returns.[174] But one subpoena was returned "Un-Executed," thirteen were served by a District Attorney rather than a peace officer, and two more have returns that do not show valid service by a peace officer. Altogether, this means that 16 of the 20 subpoenas were not validly served by a peace officer and cannot support the assessed fees.

3.6.2.1. The "Un-Executed" subpoena does not support a witness-summoning fee.

One of the 20 subpoenas was returned "Un-Executed."[175] The return is explicit: "No Method Attempted / HCSO does not effectuate service in another state."[176]

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[173] CR510:257.

[174] The subpoenas: CR510:83, 89, 94, 109, 115, 121, 127, 143, 145, 147, 159, 175, 182, 191, 196, 201, 203, 205, 214, 219. The returns: CR510:85, 90, 95, 111, 117, 123, 129, 149, 151, 154, 161, 177, 184, 193, 198, 207, 208, 211, 216, 221. The record also contains 4 duplicate returns. CR510:150, 152, 154, 212. It also contains 3 returns that add information about how service was attempted for two of the subpoenas. CR510:153, 209–10.

[175] CR510:117.

[176] CR510:117.

This return is like those quoted in *Wilson*—where one return said that the subpoena was "cancelled," and the other one said the witness was not served because of a "bad" address. *Wilson*, 2023 WL 4758470, at *2. It shows that no witness on the subpoena was served or summoned.

"It follows," as the court said in *Wilson*, "that if the witnesses were not summoned, the service being charged for was not performed." *Id.* Thus, no expenses were actually incurred, and the "Un-Executed" subpoena cannot be the basis of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson,* 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

3.6.2.2. Thirteen "Executed" subpoenas were served by a District Attorney rather than a peace officer.

Of the remaining 19 subpoenas that were returned "Executed," thirteen returns state that they were served by a "District Attorney" rather than a peace officer.[177]

A District Attorney is not a peace officer. *See* Tex. Code Crim. Proc. art. 2.12 ("Who are Peace Officers"). A District Attorney's *investigator* is a peace officer. Tex. Code Crim. Proc. art. 2.12(5). But none of the thirteen subpoenas or returns states that it was served by

[177] CR510:85, 90, 95, 111, 123, 129, 161, 177, 184, 193, 198, 216, 221.

an investigator.[178] Because these thirteen subpoenas were not served by a peace officer, they cannot form the basis of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson,* 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6; Tex. Code Crim. Proc. art. 24.01(b).

3.6.2.3. Two of the Six "Executed" subpoenas served by a peace officer were not validly served.

The remaining six subpoenas were returned "Executed" *and* served by a peace officer, and their returns describe the "action[s] taken to summon" the witnesses:

- Email (x4):
  - Emailed to witness and/or designated recipient (x2)[179]
  - Location is Parkside Place Apts. Office has no history of witness in system. Emailed to witness and/or designated recipient[180]
  - Emailed to witness at provided address.[181]
- Peace Officer (x2):
  - Delivered to HPD Liaison (x2)[182]

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[178] *Id.* In fact, the application for each subpoena specifically stated that it was to be served by "DA." CR510:81, 87, 92, 106, 118, 124, 157, 173, 179, 189, 194, 213, 217.

[179] CR510:151, 208.

[180] CR510:154.

[181] CR510:211.

[182] CR510:149, 207.

The four "email" returns appear to show proper service and can support the assessment of a $5 witness-summoning fee for each subpoena. Tex. Code Crim. Proc. art. 24.04(a)(3) (describing proper method of electronic service).

The two "Peace Officer" returns, however, do not show proper service under article 24.04. Both returns are for subpoenas to Detective Evans, but they state that they were "Delivered to HPD Liaison," rather than to Detective Evans.[183]

Delivery of a subpoena under art. 24.04(a)(2) requires "personal delivery." *Hedgecock v. State*, No. 05-07-01315-CR, 2008 WL 4756990, at *4–5 (Tex. App.—Dallas Oct. 31, 2008, no pet.) (mem. op., not designated for publication) (determining that "delivery" of out-of-county subpoena under Tex. Code Crim. Proc. art. 24.17 is the same as "delivery" of an in-county subpoena under art. 24.04(a)(2), and concluding that when a witness "was not served via personal delivery," the witness "was not properly served").

Because these two returns show that they were delivered to an unnamed "HPD Liaison" rather than Detective Evans, they do not show that the witness was properly served. *Hedgecock*, 2008 WL 4756990, at *4–5. Accordingly, no expenses were legitimately incurred by a peace officer in serving process on the witness, and this

[183] CR510:149, 207.

subpoena cannot support the assessment of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson*, 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

Thus, of the 19 "Executed" subpoenas, 15 cannot support the assessment of a $5 witness-summoning fee. That leaves four subpoenas for which a $5 fee could be properly assessed, for a total assessment of $20 rather than $100. This Court should modify the judgment to reduce the amount of assessed reimbursement fees by $80. Tex. R. App. P. 43.2(b).

3.7. Conclusion: Summary of All Judgment Modifications

Putting all of this together, this Court should modify each judgment as follows:

Cause No. 1793508	**Cause No. 1793510**
Statute for Offense:	Statute for Offense:
TEX. PENAL CODE § 32.51(B)(1), (C)(1)	**TEX. PENAL CODE § 31.03(a), (e)(4)(A)**
Court Costs:	Court Costs:
$ 290	**$ ~~290~~ 0**
Reimbursement Fees:	Reimbursement Fees:
$ ~~160~~ 150	**$ ~~260~~ 75**

4. This Court should modify the bills of costs to remove improperly-included items.

There are two errors in the bills of costs. First, each bill includes the $5,000 fine, which is a punishment rather than an item of cost; second, each bill includes improperly assessed costs and fees.

4.1. This Court should delete the $5,000 fine from each bill of cost.

Each bill of cost includes the $5,000 fine that the jury assessed as punishment.[184] This Court should remove the fine from the bill of costs in each case.

Fines are punitive and intended to be part of the convicted defendant's sentence. *Williams*, 495 S.W.3d at 590 (citing *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011)). Costs, by contrast, are non-punitive. *Id.* The bill of costs must contain "the items of cost" in a case. *Id.* at 591 (citing Tex. Code Crim. Proc. art. 103.001). A fine is not a cost, and it should not be included in the bill of costs. *Id.*

In this case, the jury assessed a $5,000 fine in each case, and the court ordered that the sentences run concurrently.[185] Adaji may therefore be assessed the $5,000 fine only once because a trial court's order that sentences run concurrently applies to the entire

[184] CR508:154, 160; CR510:250, 257.

[185] RR6:39–40, 43; CR508:154, 157; CR510:250, 254.

sentence, including fines. *Id.* (citing *State v. Crook*, 248 S.W.3d 172, 174 (Tex. Crim. App. 2008)).

By including a $5,000 fine in each bill of costs, the court and clerk have improperly obligated Adaji to pay that amount twice as a cost rather than once as a punishment. *Jones*, 691 S.W.3d at 679; *Williams*, 495 S.W.3d at 590–91. This Court should delete the fine from both bills of costs. *Williams*, 495 S.W.3d at 591; Tex. R. App. P. 43.2(b), 43.6.

4.2. This Court should modify the bills of costs to remove the improperly assessed court costs and reimbursement fees.

Every improperly assessed court cost and reimbursement fee that was included in the judgment is also itemized in the bills of costs.[186] Just as this Court should modify the assessments in the judgments to delete the improperly assessed costs and fees, it should modify the bills of costs to delete the itemized assessments. *Pruitt*, 646 S.W.3d at 883; *Dority*, 631 S.W.3d at 794; *Bryant*, 642 S.W.3d at 850; *Contreras*, 2021 WL 6071640, at *7–8; Tex. R. App. P. 43.2(b), 43.6.

4.3. Conclusion: Summary of All Bill of Costs Modifications

Putting all of this together, this Court should modify each bill of costs as follows:

[186] CR508:160; CR510:257.

Cause No. 1793508[187]

Fee Description	Amount Assessed
~~Fine~~	~~$5,000.00~~
Consolidated Court Cost -State	$185.00
Consolidated Court Cost -Local	$105.00
LEA - Capias Execution	$100.00
LEA - Bond Approval Fee	$20.00
LEA - Commitment Fee	$10.00
LEA - Release Fee	~~$20.00~~ 15.00
~~LEA - Arrest w/out Capias~~	~~$5.00~~
LEA - Summon Jury	$5.00
Assessed Date: 8/28/2024	**Total Amount Assessed: ~~$5,440.00~~ 440.00**
	Total Paid: $0.00
	Total Due: ~~$5,440.00~~ 440.00

Cause No. 1793510

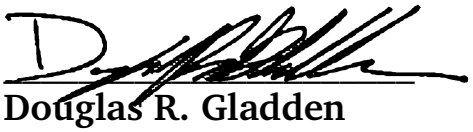
Fee Description	Amount Assessed
~~Fine~~	~~$5,000.00~~
~~Consolidated Court Cost -State~~	~~$185.00~~
~~Consolidated Court Cost -Local~~	~~$105.00~~
LEA - Capias Execution	~~$100.00~~ 50.00
LEA - Summon Witness	~~$100.00~~ 20.00
~~LEA - Bond Approval Fee~~	~~$20.00~~
~~LEA - Commitment Fee~~	~~$10.00~~
LEA - Release Fee	~~$15.00~~ 5.00
~~LEA - Arrest w/out Capias~~	~~$5.00~~
~~LEA - Summon Jury~~	~~$5.00~~
Assessed Date: 8/28/2024	**Total Amount Assessed: ~~$5,550.00~~ 75.00**
	Total Paid: $0.00
	Total Due: ~~$5,550.00~~ 75.00

[187] The costs and fees originally listed in this bill of costs total $5,450, but the bill lists the total as $5,440. CR508:160.

Prayer

Adaji prays that this Honorable Court reverse the trial court's judgments and render judgments of acquittal.

Respectfully submitted,



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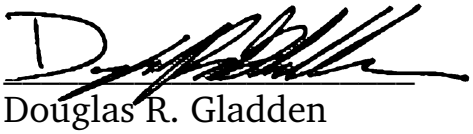

Douglas R. Gladden

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I certify that a true copy of this brief was served on Jessica Caird, attorney for the State of Texas, on December 31, 2024, by electronic service to caird_jessica@dao.hctx.net.

Douglas R. Gladden

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