No. 47690-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Bobby Norman,

Appellant.

Pierce County Superior Court Cause No. 14-1-05270-9

The Honorable Judge K.A. van Doorninck

Appellant's Opening Brief

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   ISSUE 1: Absent a proper colloquy, a request to proceed *pro se* is presumed knowing, intelligent, and voluntary. Did the trial court apply the wrong legal standard in refusing to allow Mr. Norman to represent himself, based on his ignorance of the law and the evidence rules?

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11. Mr. Norman was convicted through operation of a statute that is unconstitutionally overbroad.

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. THE COURT ENTERED TWO FELONY CONVICTIONS BASED ON BOBBY NORMAN'S PRESENTATION OF A SINGLE $150 CHECK.

A. The state alleged that Mr. Norman presented a single check, altered to show himself as payee.

According to the state's witnesses, Bobby Norman approached a teller at a Timberland bank branch and presented a check along with his identification card. RP 100, 104, 111; Ex. 3. The check was drawn on the account of Linda Loeck and showed Mr. Norman as payee. RP 100, 104, 111; Ex. 3. The teller thought that the payee line appeared to have been written over and asked if he had written his name on the check. RP 101. Mr. Norman denied it. RP 101.

The teller said she would have to call Loeck, and Mr. Norman told her to go ahead. RP 101-102, 144. The teller called Loeck, who denied writing the check to Mr. Norman. RP 51-52, 104-05. Loeck said she had made out the check to "Capital One" and put it in the mail. RP 51-53, 104-105.

At trial, Mr. Norman testified that he received the check from a woman named "Drew" in exchange for a DVD player. RP 132-133. He

stated that he went to the bank immediately after receiving the check and did not look at it closely before presenting it. RP 131-132.

B. After a jury trial, the court entered two felony convictions, resulting in a five-year sentence.

The state charged Mr. Norman with both forgery and second degree identity theft. CP 1-2. Second degree identity theft and forgery are both class C felonies. RCW 9.35.020(3); RCW 9A.60.020.

The court instructed the jury that, to convict Mr. Norman of identity theft, it had to find that the state had proved beyond a reasonable doubt that Mr. Norman had, among other things, "knowingly obtained, possessed, transferred, or used a means of identification or financial information of another person." CP 26. The court instructed the jury that "[m]eans of identification" included

> a current or former name of the person, telephone number, an electronic address, and identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in [any of these pieces of information]; . . . and other information that could be used to identify the person."

CP 23.

The prosecutor argued from this instruction in closing that Mr. Norman's use of Loeck's name alone sufficed to satisfy the relevant element of identity theft. Specifically, after showing the check to the jury, the prosecutor argued as follows:

> The victim's name, Linda Loeck, is right there. So he obtained, used, possessed or transferred a means of identification. Her name. That's all that is necessary to use the means of identification of another person.

RP 162. The prosecutor also relied on the appearance of the bank's routing number on the check to argue that Mr. Norman obtained, possessed, or transferred another person's means of identification or financial information. RP 162.

The jury returned guilty verdicts on both counts. CP 37-38; RP 189-93. The court subsequently entered convictions for both forgery and second degree identity theft. CP 43-51.

At sentencing, the state recommended sentences at the top of the standard range: 57 months for the identity theft count and 29 months for forgery count, to run concurrently. RP 197. Mr. Norman's attorney argued for a sentence below the high end of the range on the ground that the legislature did not intend the identity theft statute to cover the alleged conduct. RP 199-202. Mr. Norman's attorney also argued for leniency on the ground that the identity theft statute was overbroad. RP 200-202.

The court agreed that Mr. Norman's conduct was "not the typical Identity Theft that we think of." RP 205. The court nonetheless granted the state's request and imposed the maximum standard-range sentence: 57

months confinement followed by three months' community custody. CP 47-48; RP 205-206. Mr. Norman appeals. CP 60.

II. WHEN MR. NORMAN TRIED TO DISCHARGE HIS ATTORNEY, THE COURT INFORMED HIM HE COULD NOT PROCEED PRO SE UNLESS HE UNDERSTOOD THE LAW AND THE RULES OF EVIDENCE.

A. Mr. Norman asked to fire his attorney.

Before swearing in the first witness, the court asked if the parties were ready for the jury. RP 41. Mr. Norman's attorney replied that they were ready, without telling the court that Mr. Norman wished to end the representation. RP 41.

Mr. Norman immediately spoke up, however, and addressed the court directly, stating, "Your Honor, I would like to fire my attorney." RP 41. Mr. Norman informed the court that he felt his attorney did not have his best interest at heart, asserting that the lawyer had pressured him to accept a plea deal even though he maintained his innocence[1] and wanted to go to trial. RP 41.

Mr. Norman further asserted that his attorney had previously refused to inform the court that Mr. Norman wanted to fire him. RP 41. Mr. Norman stated that, when he asked his attorney to bring the conflict to

[1] *See* RP 204 (BN repeats his trial defense at allocution).

the court's attention, the attorney replied, "[t]hat's not my job to do that." RP 41. Defense counsel did not deny these allegations. RP 41-43.

B. The court informed Mr. Norman that his only viable option was to represent himself, but that he could not proceed pro se unless he demonstrated that he understood the law and the rules of evidence.

The court responded to Mr. Norman's request by telling him that, unless he had a private attorney ready to go that day, his only choice was to proceed pro se. RP 42. The court knew, however, that Mr. Norman was indigent and could not afford a private attorney.[2] CP 3.

Mr. Norman then expressed interest in representing himself, asking if he could have a continuance in order to prepare. RP 42. The court refused to grant a continuance. RP 42.

The court then told Mr. Norman that it would not allow him to represent himself "unless [he] demonstrate[d] that [he] underst[ood] the law and the Rules of Evidence." RP 42. After hearing this, Mr. Norman decided to proceed with his previously appointed attorney. RP 43-44. The court conducted no further colloquy regarding Mr. Norman's desire to represent himself.

[2] The court file reflects a Notice of Appearance filed by an attorney from the Pierce County Department of Assigned Counsel.

ARGUMENT

I. THE COURT VIOLATED MR. NORMAN'S RIGHT TO SELF-REPRESENTATION, OR IN THE ALTERNATIVE, HIS RIGHT TO COUNSEL, BY FORCING HIM TO ACCEPT REPRESENTATION FROM A STATE-APPOINTED LAWYER AGAINST HIS WILL.

A. Standard of review and governing law.

Both the federal and Washington constitutions guarantee criminal defendants the right to self-representation. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This right is "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *Madsen*, 168 Wn.2d at 503. The relevant constitutional provisions make clear that the assistance of counsel "shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Faretta*, 422 U.S. at 820; *see also Madsen*, 168 Wn.2d at 503.

Because a defendant who exercises the right to self-representation necessarily waives the right to counsel, appellate courts review a trial court's denial of a request to proceed pro se for abuse of discretion. *Madsen*, 168 Wn.2d at 504. A court abuses its discretion if it bases its decision on an incorrect legal standard. *Madsen*, 168 Wn.2d at 504.

The presumption against waiver of the right to counsel does not "give a court carte blanche to deny" a defendant's request to proceed pro se. *Madsen*, 168 Wn.2d at 504. Instead, a court may deny such a request only for certain specific reasons. *Madsen*, 168 Wn.2d at 504-05.

These reasons do not include a defendant's lack of technical knowledge of the law or expertise in courtroom procedures. *Madsen*, 168 Wn.2d at 504-05. Thus, a court may not deny an otherwise proper request on the grounds that the defendant does not understand the law or the rules of evidence.[3] *Faretta*, 422 U.S. at 836; *State v. Vermillion*, 112 Wn. App. 844, 857-58, 51 P.3d 188 (2002).

When a defendant asks to proceed pro se, furthermore, the court has a duty to conduct a proper colloquy to determine if the request is knowing, voluntary, and intelligent. *Madsen*, 168 Wn.2d at 506. In considering such a request, the "court cannot stack the deck against a defendant" by failing to conduct "a proper colloquy to determine whether the requirements for waiver are sufficiently met." *Madsen*, 168 Wn.2d at 506. This means that if a trial court does not conduct an adequate colloquy, the reviewing court presumes that the request was voluntary,

[3] When a defendant seeks to represent himself, the court may ask about his knowledge to determine whether he understands the risks involved, but "[n]o showing of technical knowledge is required" for a defendant to proceed pro se. *Vermillion*, 112 Wn. App. at 857.

knowing, and intelligent unless the record affirmatively shows otherwise. *Madsen*, 168 Wn.2d at 506.

A trial court's refusal to appoint new counsel is also reviewed for abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). A court "necessarily abuses its discretion" by violating a criminal defendant's constitutional rights. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A trial court also abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248-50 (10th Cir. 2002); *see also State v. Lopez*, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel,* 136 Wn.2d 629, 965 P.2d 1072 (1998).

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the defendant's Sixth Amendment right, even in the absence of prejudice. *Cross,* 156 Wn.2d at 607. To compel an accused to " 'undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.' " *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979).

When a defendant requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross*, 156 Wn.2d at 607-610; *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008).

An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross*, 156 Wn.2d at 610.

The court "must conduct 'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern.' . . . The inquiry must also provide a 'sufficient basis for reaching an informed decision." *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001). Furthermore, "in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." *Adelzo-Gonzalez*, 268 F.3d at 776-77. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Adelzo-Gonzalez*, 268 F.3d at 776-77.

B. When Mr. Norman tried to fire his attorney, the court effectively told him he had no choice but to accept the representation.

As discussed, when Mr. Norman tried to fire his attorney, the court informed him that he could only do so if he had a private attorney ready for trial immediately or if he proceeded pro se. RP 42. The court knew, however, that Mr. Norman could not afford a private attorney. CP 3. The court thus knew Mr. Norman had only one real alternative to his state-appointed attorney: self-representation.

When Mr. Norman expressed the desire to represent himself, however, the court told him it would not allow him to do so unless he demonstrated that he knew the law and the rules of evidence. RP 42. The court's statement directly contradicts the rule expressed in *Faretta*, 422 U.S. at 836. The court also knew that Mr. Norman did not understand such matters. *See* RP 41-43.

Thus, the court "stack[ed] the deck against" him, effectively telling Mr. Norman that he had no real option but to accept the state-appointed lawyer's representation anyway. *Madsen*, 168 Wn.2d at 506. The court did so based on an erroneous legal standard.

The court did not develop an adequate basis for an informed decision on Mr. Norman's request to fire his attorney by conducting a specific and targeted inquiry into the conflict. *See Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-79. The court compounded this error by also failing to conduct a proper colloquy regarding Mr. Norman's desire to represent himself. This court must therefore presume that Mr. Norman's request was proper.[4] *Madsen*, 168 Wn.2d at 506.

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[4] Mr. Norman unambiguously stated that he did not want the public defender to represent him, and clearly expressed a desire to represent himself. RP 41-42. The court did not find that this request was untimely or ambiguous. RP 41-42. *See Madsen*, 168 Wn.2d at 504-05 (enumerating the grounds on which a trial court may properly deny a request for self-representation). Although a court may properly deny such a request on the ground that it is untimely, here the delay in informing the court of Mr. Norman's desire to fire his lawyer until after jury selection resulted from the attorney's improper conduct. That is, the court did not learn of the defendant's request sooner only because his attorney refused to communicate

The court violated Mr. Norman's right to self representation, or in the alternative, his right to counsel. The remedy is to reverse and remand, without inquiry into prejudice. *Vermillion*, 112 Wn. App. at 851; *Williams*, 594 F.2d at 1260-61.

II. THE COURT VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY BY ENTERING CONVICTIONS FOR BOTH SECOND-DEGREE IDENTITY THEFT AND FORGERY BASED ON MR. NORMAN'S PRESENTATION OF A SINGLE CHECK.

A. Standard of review and governing law.

The double jeopardy clauses of both the federal and Washington constitutions "prohibit multiple prosecutions or punishments for the same offense." *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). Where the same conduct violates two criminal statutes, entering convictions under both violates the double jeopardy prohibition unless the legislature clearly intended to impose multiple punishments for the same act or transaction. *Baldwin*, 150 Wn.2d at 454. Unless the legislature clearly intended multiple punishments, courts reviewing double jeopardy

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it to the court. *See* RP 41-42. The attorney's conduct violated RPC 1.16(a)(3) and 3.3(a)(1), which require a lawyer to seek to withdraw from the representation if discharged by the client and to inform the court of material facts. Therefore, this court should not hold that delay against Mr. Norman. *Madsen*, 168 Wn.2d at 508 (holding that the proper date from which to evaluate the timeliness of a request to proceed pro se is the date the defendant initially made it).

claims apply the "same evidence" test, discussed below.[5] *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005); *Baldwin*, 150 Wn.2d at 454.

B. The legislature did not expressly authorize punishment for both second-degree identity theft and forgery based on presentation of a single check altered to show the defendant as payee.

The language, context, and legislative history of the identity theft statute do not make clear that the legislature intended to allow for multiple punishments under the circumstances presented here. Therefore, this court should apply the same evidence test.

The legislature intended the identity theft statute to target novel frauds and schemes that "may result in significant harm to a person's privacy, financial security, and other interests" but did not necessarily fall within the scope of then-existing criminal statutes. *See* RCW 9.35.001 (legislative findings and a statement of intent). The legislature based the statute in part on a finding "that unscrupulous persons find ever more clever ways . . . to improperly obtain, possess, use, and transfer another person's means of identification or financial information." RCW 9.35.001. This shows that the statute was intended to target novel,

[5] *See Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

sophisticated criminal schemes, not to multiply punishment for commonplace petty crimes long covered by other laws.

The legislative history also shows that the bill's proponents aimed chiefly at conduct that would threaten the privacy and credit scores of individuals and corporations. *State v. Evans*, 177 Wn.2d 186, 201, 298 P.3d 724 (2013) (discussing legislative history); House Bill Analysis, HB 1250, 56th leg. (reg. sess.) 1999 (summarizing testimony in favor). This indicates that the legislature did not intend the statute to impose multiple punishment for conduct that posed no meaningful risk to anyone's privacy or credit rating.

Although the statute contains an anti-merger clause, the mere fact that a criminal statute includes such a provision does not necessarily establish that the legislature intended to impose multiple punishments in a particular context.[6] For example, this court examined anti-merger language identical to that used here in *State v. Timothy K.*, 107 Wn. App. 784, 788-89, 27 P.3d 1263 (2001). The court held that the anti-merger provision did not necessarily establish that the legislature intended to authorize multiple punishments for a single course of conduct violating

[6] The forgery statute also contains a reference to identity theft, but that provision concerns jurisdiction and venue and has no bearing on the issues here. RCW 9A.60.020.

both the malicious harassment and the malicious mischief statutes.[7] *Timothy K.*, 107 Wn. App. at 788-89.

The anti-merger clause at issue provides that "[e]very person who, in the commission of identity theft, shall commit any other crime may be punished therefor as well as for the identity theft." RCW 9.35.020(6). This language is not dispositive, however, as to whether the legislature intended impose multiple punishments on a person who, in the commission of a run-of-the-mill forgery, happens to engage in conduct that also technically violates the identity theft statute. The language and legislative history of the provision indicate that it was not intended to allow for multiple punishments under the circumstances presented here.

The anti-merger clause by its terms covers situations where, in the course of improperly obtaining, transferring, or using a person's identifying information, a defendant also commits another crime. RCW 9.35.020(6). For example, someone who, intending to use it to commit a crime, obtains another's financial information by committing a robbery, could be punished for both the robbery and the identity theft. Similarly, someone who, in the course of an identity theft scheme, also traffics in stolen property, could be punished for both crimes.

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[7] RCW 9A.36.080; RCW 9A.48.080. The court thus applied the same evidence test instead. *Timothy K.*, 107 Wn. App. at 788-90.

The legislature added the provision in 2008, not to impose multiple punishments for the same act or transaction, but as part of an amendment expressly intended to reject our Supreme Court's holding in *State v. Leyda*, 157 Wn.2d 335, 138 P.3d 610 (2006). LAWS OF 2008, Ch. 207 § 1 (S.B. 5878). The *Leyda* court had held that the unit of prosecution for identity theft included all proscribed conduct involving a single piece of identification or financial information. 157 Wn.2d at 350-51. The legislature made the amendments to ensure that each subsequent use of the same person's information could give rise to a separate charge.[8] LAWS OF 2008, Ch. 207 § 1 (S.B. 5878).

Here, the state did not allege that Mr. Norman committed another crime in the course of obtaining, transferring, or using the alleged victims' personal information. Instead, it alleged that he happened to possess such information in the course of committing a forgery.

Mr. Norman allegedly committed an ordinary forgery: presenting Loeck's check with his own name substituted for the actual payee's. Thus, according to the state's evidence, he simply presented a forged document that happened to contain Loeck's and the bank's names and

[8] Because the state alleged that Mr. Norman used the information only one time, the unit of prosecution is not at issue here.

financial information. No evidence suggested that he posed as or sought to obtain credit in the name of another person.

As the trial court acknowledged, the conduct alleged was "not the typical Identity Theft that we think of, [but] does fit within the statute." RP 205. Because he did not alter the amount of the check, and presented it to Loeck's own bank, the alleged conduct did not meaningfully threaten anyone's privacy or credit rating. The state did not allege any criminal purpose in addition to or independent of the underlying forgery.

The statutory language, context, and legislative history do not clearly establish that the legislature intended to impose multiple punishments under these circumstances. Accordingly, this court should apply the same evidence test. *Freeman*, 153 Wn.2d at 772.

C. Under the same evidence test, the convictions violate the prohibition against double jeopardy.

Application of the same evidence test shows that imposing separate punishments for forgery and identity theft under the facts of this case violates the double jeopardy prohibition. The result in *Baldwin*, 150 Wn.2d 448, where our Supreme Court found no double jeopardy violation on distinguishable facts, does not control here.

1. As charged and proved, the two crimes are the same in law and in fact.

Courts applying the same evidence test "presume that the legislature did not intend to punish criminal conduct twice when '*the evidence required* to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other.' " *Freeman*, 153 Wn.2d at 776 (quoting *In re Personal Restraint of Orange*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004)) (some internal quotation marks omitted) (emphasis added in *Orange*). Under this test, entering multiple convictions for the same underlying conduct generally violates the double jeopardy prohibition unless "each offense includes an element not included in the other, and each requires proof of a fact the other does not." *State v. Hughes*, 166 Wn.2d 675, 682, 212 P.3d 558 (2009).

The fact that one could in principle violate one statute without violating the other, however, does not mean that both convictions may stand: the reviewing court instead "consider[s] the elements of the crimes as charged and proved, not merely at the level of an abstract articulation of the elements." *Freeman*, 153 Wn.2d at 777. That is, "if the crimes, as charged and proved, are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary." *Freeman*, 153 Wn.2d at 777.

Our Supreme Court clarified the same evidence analysis a decade ago[9] in *Orange*, 152 Wn.2d at 815-21. The *Orange* court made clear that a court reviewing a double jeopardy challenge may not simply examine the elements in the abstract and decide whether it is theoretically possible to commit one crime without committing the other. *Orange*, 152 Wn.2d at 817-20. Instead, the reviewing court must give meaning to generic terms in the statute using the specific facts of each case.[10] *Orange*, 152 Wn.2d at 818.

The *Orange* court acknowledged that, on an abstract level, convictions for first degree assault and attempted murder require proof of different elements. *Orange*, 152 Wn.2d at 817-18. Applying the principles just discussed, however, the court held that entering convictions for both crimes violated the prohibition against double jeopardy where the two charges stemmed from the same shot directed at the same victim. *Orange*, 152 Wn.2d at 820.

The same applies here, where both charges stemmed from Mr. Norman's possession of a single check. That is, as charged and proved,

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[9] Shortly before it decided the *Freeman* case.

[10] *See also In re Personal Restraint of Francis*, 170 Wn.2d 517, 523-24, 242 P.3d 866 (2010) ("We do not consider the elements of the offenses in the abstract; that is, we do not consider all the ways in which the State could have charged an element of an offense, but rather we consider how the State actually charged the offense.").

the state did not have to establish any fact to obtain a conviction for identity theft that it did not also have to prove for the forgery conviction.

In order to prove the forgery charge under the specific facts of this case, the state had to establish that Mr. Norman possessed Loeck's check, knowing it had been altered to show himself as payee, with intent to injure or defraud: specifically, to fraudulently obtain the $150. RCW 9A.60.020. In order to prove the identity theft charge, the state had to prove that Mr. Norman possessed the same check with the same criminal intent: specifically, to fraudulently obtain the $150.

Everything the state had to establish to prove the identity theft charge it also had to establish to prove the forgery.[11] Thus, as charged and proved here, the crimes were the same in law for purposes of the same elements test. *Francis*, 170 Wn.2d at 523-24; *Orange*, 152 Wn.2d at 818-21; *State v. Potter*, 31 Wn. App. 883, 888, 645 P.2d 60 (1982).

The crimes were also the same in fact. As noted, both crimes were based on Mr. Norman's possession or use of the exact same check in order to obtain the same amount of money with the same intent.

The two crimes also involved identical victims. To prove the identity theft, the state relied on the presence of both Loeck's name and

[11] Indeed, when a court convicts a defendant of forgery based on presenting another's check, the evidence will *always* suffice to support a conviction for identity theft as well, even where the check is merely altered to show the defendant as payee.

the bank's routing number[12] on the check. RP 162. The check also bore the bank's name. Ex. 1. Thus, Loeck and the bank were both alleged victims of the identity theft.

Loeck and the bank were also both victims of the forgery. In *State v. Calvert*, this court held that, where the defendant presents a forged check to a bank, both the bank and the account holder are victims of the forgery. 79 Wn. App. 569, 580, 903 P.2d 1003 (1995). Thus, both crimes also had the exact same victims.

2. *Baldwin* does not control here.

In *Baldwin*, decided before *Orange*, our Supreme Court held that entering convictions for both identity theft and forgery did not amount to a double jeopardy violation under the circumstances presented there. 150 Wn.2d at 456-57. Baldwin obtained a driver's license in Kaytie Allshouse's name, but with Baldwin's picture, then purchased real property using Allshouse's identity, forging Allshouse's name on various loan documents. *Baldwin*, 150 Wn.2d at 451-52.

The court first held that the crimes were not the same in law because " 'it is possible to commit identity theft without committing forgery.' " *Baldwin*, 150 Wn.2d at 456. Second, the court held that the

[12] A corporation can properly be a victim of identity theft. *Evans*, 177 Wn.2d at 207-08.

crimes were not the same in fact because they had different victims: the victim of the identity theft was Allshouse, while the victims of the forged loan documents were the lenders. *Baldwin*, 150 Wn.2d at 457.

The court's subsequent clarification of the same evidence test in *Orange*, discussed above, disposes of the *Baldwin* court's first reason for denying the appellant's double jeopardy claim in that case. The fact that "it is possible to commit" one crime without committing the other no longer suffices to establish that the two are the same in law. *Baldwin*, 150 Wn.2d at 456; *Orange*, 152 Wn.2d at 817-20; *State v. Womac*, 160 Wn.2d 643, 652-53, 160 P.3d 40 (2007). Instead, a reviewing court must substitute generic terms with the specific factual allegations relevant to the case as charged and proved. *Orange*, 152 Wn.2d at 818. As shown, substituting the specific conduct alleged here for the statutes' generic terms establishes that the two crimes charged are the same in law.

The *Baldwin* court's second reason, that the crimes there were not the same in fact because they had different victims, also does not control here. As described, both charges against Mr. Norman involved identical victims. Thus, the state based both charges on the same underlying act, involving the same criminal intent and directed at the same victims.

The crimes were the same in law and fact under the same evidence test. *Baldwin* is not to the contrary. Entry of convictions for both crimes

violated the prohibition against double jeopardy. The remedy is to vacate one of the convictions. *Hughes*, 166 Wn.2d at 686 & n. 13.

III. THE IDENTITY THEFT CONVICTION VIOLATED MR. NORMAN'S RIGHT TO A UNANIMOUS JURY

Criminal defendants enjoy the right to a unanimous jury verdict. Art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). The entry of Mr. Norman's identity theft conviction violated this right because the jury was not unanimous as to the means of commission.

A. Identity theft is an alternative means crime.

A statute categorizing distinct acts that amount to the same offense establishes an "alternative means" crime. *State v. Harrington*, 181 Wn. App. 805, 818, 333 P.3d 410 *review denied*, 337 P.3d 326 (2014). Statutes create alternative means when the disjunctive terms are "not merely descriptive or definitional but rather, separate and essential terms of the offense." *State v. Peterson*, 174 Wn. App. 828, 851, 301 P.3d 1060, *review denied*, 178 Wn.2d 1021, 312 P.3d 650 (2013).

For example, statutory language creates alternative means by referring to a person who, "with criminal negligence, starves, dehydrates, or suffocates an animal." *Id.* at 851-853 (holding that RCW 16.25.205(2) establishes three alternative means of committing first degree animal cruelty). Under that statute, starvation, dehydration, or suffocation are

"three distinct ways of committing the crime... [They] are not descriptive or definitional but are essential elements." *Id.* at 852.

Similarly, a statutory provision creates three alternative means by referring to an attempt to prevent a domestic violence victim "from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official." *State v. Nonog*, 145 Wn. App. 802, 812, 187 P.3d 335 (2008) *aff'd on other grounds*, 169 Wn.2d 220, 237 P.3d 250 (2010) (addressing interfering with domestic violence reporting, RCW 9A.36.150(1)). These variations "in the conduct of the would-be reporter . . . are not merely descriptive or definitional of essential terms. The variations are themselves essential terms." *Id.*

In the same vein, RCW 69.50.401(1) defines an alternative means crime. *State v. Huynh*, 175 Wn. App. 896, 904-06, 307 P.3d 788, *review denied*, 179 Wn.2d 1007, 315 P.3d 531 (2013). For the same reasons just discussed, the *Huynh* court held that provision's language, "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance," creates three alternative means of committing the offense. 175 Wn. App. at 904-06.

Applying these principles, identity theft is also an alternative means crime. The statute provides that "[n]o person may knowingly obtain, possess, use, or transfer a means of identification or financial

information" with intent to commit a crime. RCW 9.35.020(1). This disjunctive language creates alternative means because the terms are "not merely descriptive or definitional but rather, separate and essential terms of the offense." *Peterson*, 174 Wn. App. at 851.

The analysis in *State v. Owens*, 180 Wn.2d 90, 98, 323 P.3d 1030 (2014), is instructive. The *Owens* court considered the following language from RCW 9A.82.050(1), defining trafficking in stolen property:

> A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

180 Wn.2d at 96-97. *Owens* rejected the argument that this language created eight alternative means of committing the crime, instead holding that the statute created only two alternative means. 180 Wn.2d at 98.

The court held that the initial group of seven terms (initiates, organizes, etc.) " 'relate to different aspects of a single category of criminal conduct,' " and merely enumerate "different ways of committing one act." *Owens*, 180 Wn.2d at 99 (quoting *State v. Lindsey*, 177 Wn. App. 233, 240-41, 311 P.3d 61 (2013) *review denied*, 180 Wn.2d 1022, 328 P.3d 903 (2014)). *State v. Lindsey*, a decision of this court of which *Owens* approved,[13] had reached the same conclusion based in part on the

[13] *Owens*, 180 Wn.2d at 97-99.

fact that "the statutory language easily divides into two sections describing two different offenders." *Lindsey*, 177 Wn. App. at 242. Accordingly, the first seven terms simply further define a single element rather than establish separate means of committing the crime. *Owens*, 180 Wn.2d at 99; *Lindsey*, 177 Wn. App. at 242.

These cases suggest a consistent, workable rule: if a statute "easily divides" into two or more sections "describ[ing] distinct means of committing the offense," then each section outlines an alternative means and any subsections are definitional. *Lindsey*, 177 Wn. App. at 241-42. On the other hand, if there is only one section, or if the statute does not "easily divide[ ]" into multiple sections, the various parts are examined to see if they are merely "different ways of committing one act." *Owens*, 180 Wn.2d at 99. If so, they comprise a single means of committing the offense (as with the first seven terms of RCW 9A.82.050(1)). If not, the statute creates alternative means.

Here, the statutory language does not easily divide into subsections, and the four means of committing identity theft do not describe a single act. RCW 9.35.020(1). For example, a person may obtain or possess financial information without using it or transferring it. Similarly, one could use information without transferring it. This stands in sharp contrast to the first seven terms in the trafficking statute:

> it would be hard to imagine a single act of stealing whereby a person "organizes" the theft but does not "plan" it. Likewise, it would be difficult to imagine a situation whereby a person "directs" the theft but does not "manage" it.

Owens, 180 Wn.2d at 99.

The four actions listed in RCW 9.35.020(1) - obtain, possess, use, or transfer - do not divide easily into subsections and vary too significantly in meaning to constitute "merely different ways of committing one act." *Owens*, 180 Wn.2d at 99. The statute thus describes a crime with four alternative means of commission.

B. The state failed to present evidence proving that Mr. Norman "transferred" financial information.

The court instructed jurors on alternative means of committing identity theft, but did not require the jury to unanimously agree as to the means. CP 20, 26, 12-36. In such circumstances, the state must present sufficient evidence supporting every alternative. *State v. Garcia*, 179 Wn.2d 828, 835-36, 318 P.3d 266 (2014).

Here, the state did not present sufficient evidence supporting the "transferred" alternative. The only evidence suggesting that Mr. Norman "transferred" financial information was that he handed a check drawn on Timberland bank to a teller at Timberland bank. RP 69, 80, 163; Ex. 1.

Because the bank already had the information, Mr. Norman did not "transfer" it. RP 69, 80, 163; Ex. 1. The statute criminalizes the transfer

of information itself, not the document or file containing the information. RCW 9.35.020. Physically moving a check from one location to another cannot, by itself, qualify as transferring financial information. Similarly, giving a check to someone already in possession of the financial information printed on it cannot qualify as transferring the information.

Accordingly, Mr. Norman's identity theft conviction cannot stand. *Garcia*, 179 Wn.2d at 835-36. Mr. Norman gave a check drawn on Timberland bank to a teller at that bank. He did not transfer any financial information; the bank already had the information. Therefore, the evidence was insufficient to support the "transfer" alternative means.

Because the state presented insufficient evidence of one of the alternative means, the lack of a unanimity instruction or a special verdict requires reversal of Mr. Norman's conviction and remand for a new trial. *Garcia*, 179 Wn.2d at 835-36. He may not be retried on the "transfer" alternative of identity theft. *Garcia*, 179 Wn.2d at 844.

IV. THE IDENTITY THEFT STATUTE VIOLATES THE FIRST AMENDMENT

A. Standard of review and governing law.

Under the overbreadth doctrine, a law criminalizing expression violates the first amendment "if it sweeps within its prohibitions constitutionally protected free speech activities." *State v. Johnston*, 156

Wn.2d 355, 363, 127 P.3d 707 (2006) (internal quotation marks omitted). Where the state restricts expression based on its content, courts presume the restriction invalid, and the state "bears the burden to rebut that presumption." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

Our Supreme Court has cautioned that "[c]riminal statutes require particular scrutiny and may be facially invalid if they make unlawful a substantial amount of constitutionally protected conduct . . . even if they also have legitimate application." *State v. Pauling*, 149 Wn.2d 381, 386, 69 P.3d 331 (2003) (internal quotation marks omitted). Thus, a defendant may challenge a statute as overbroad even where the First Amendment clearly does not protect his own conduct, "because prior restraints on free speech pose a greater harm to society than the possibility that some unprotected speech will go unpunished." *Pauling*, 149 Wn.2d at 387 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).

A statute that prohibits constitutionally protected expression must be invalidated as overbroad unless the reviewing court can impose a proper limiting construction. *Johnston*, 156 Wn.2d at 362-36; *Pauling*, 149 Wn.2d at 386. To save a law restricting expression based on its

content from constitutional infirmity, "the statute must be construed to prohibit only unprotected speech." *Johnston*, 156 Wn.2d at 362-63.

B. The identity theft statute restricts expression based on its content.

The identity theft statute prohibits obtaining, possessing, using, or transferring a "means of identification or financial information of another person, living or dead, with intent to commit, aid, or abet any crime." RCW 9.35.020(1). It further specifies that "means of identification or financial information" includes

> [t]ransactional information concerning an account; . . . [a] current or former name of the person, telephone number, ... or identifier of the individual or a member of his or her family, . . . and other information that could be used to identify the person.

RCW 9.35.005.

By its plain terms, then, the statute targets expression and communication: the recording or transfer of information or ideas using sounds, gestures, or symbols.[14] It explicitly does so, furthermore, based

[14] Standard dictionary definitions of expression and communication include, respectively, "an act, process, or instance of representing in a medium (as words): . . . a mode, means, or use of significant representation or symbolism," and "the act or process of using words, sounds, signs, or behaviors to express or exchange information or to express your ideas, thoughts, feelings, etc., to someone else[;] information transmitted or conveyed[,] a verbal or written message[, and] a process by which information is exchanged between individuals through a common system of symbols, signs, or behavior." Merriam Webster Online Dictionary, expression, communication, http://www.merriam-webster.com/dictionary/expression; http://www.merriam-webster.com/dictionary/communication (accessed October 13, 2015).

on the content of the expression or communication. That is, it prohibits only messages or representations containing specific types of information.

Thus, the statute explicitly and expressly prohibits expression based on its content. *See Cohen v. California*, 403 U.S. 15, 18-19, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). It is therefore overbroad unless it can plausibly be construed to prohibit only activities the First Amendment does not protect. *Johnston*, 156 Wn.2d at 362-63.

C. The statute prohibits constitutionally protected expression.

The identity theft statute prohibits a substantial amount of expression protected by the First Amendment. It effectively creates thought crimes which virtually everyone commits at some time.

1. The First Amendment protects freedom of thought.

The United States Supreme Court has made clear that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (internal quotation marks omitted). This court has further held that "[f]reedom of thought and speech is the matrix, the indispensable condition of nearly every other form of freedom. *State v. Maryott*, 6 Wn. App. 96, 98, 492 P.2d 239 (1971) (citing *Palko v.*

Connecticut, 302 U.S. 319, 326, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (*overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)).

The First Amendment unquestionably protects the freedom of thought as well as of expression: "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–235, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). Thus, the state may not "control the moral content of a person's thoughts." *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). Similarly, the state may not "punish one's thoughts, desires, or motives, through indirect evidence, without reference to any objective fact." *United States v. Oviedo*, 525 F.2d 881, 884 (5th Cir. 1976).

2. The identity theft statute reaches a substantial amount of First-Amendment-protected activity by creating thought crimes.

The identity theft statute effectively creates thought crimes, and reaches a substantial amount of activity protected by the first amendment. As shown below, the statute reaches a significant amount of such activity in relation to its legitimate sweep.

Someone who, for example, makes note of an offensive driver's license plate number and vehicle description in a fit of pique, intending to later assault the driver, violates the statute even if he or she has no ability to carry out the plan and forgets all about it within the hour. That is, he or she has obtained and possessed "information that could be used to identify the person . . . with the intent to commit . . . any crime." RCW 9.35.005(3), .020(1).

Similarly, someone holding a telephone directory who decides to throw it at a person in unprovoked anger, but who then regains control and refrains from doing so, has "possesse[d]" the "means of identification" of an entire city, with the intent to "commit . . . any crime." RCW 9.35.005(3), .020(1). By the statute's plain terms, the person would thus be guilty of thousands of counts of identity theft—a class C felony—despite having sinned only in the mind. *See* RCW 9.35.001 (specifying that the unit of prosecution for identity theft is each possession or use of the means of identification of each victim); *State v. K.R.*, 169 Wn. App. 742, 746 n. 1, 282 P.3d 1112 (2012).

As another example, consider a person who knows the names, contact information, and descriptions of former members of a now-unpopular organization. He decides to exploit the information to pressure them to give him money, but later scraps the plan after discovering his

intended course of action would constitute a crime. Nonetheless, the statute's plain language makes him guilty of multiple counts of identity theft, even though he never actually did anything at all.

The statute also plainly prohibits protected communication, as the following example shows. Levi and Simeon see someone on the street. Levi says to Simeon, "That's Shechem, the man who raped my sister." Levi intends to kill Shechem in the future, and secretly hopes Simeon will volunteer to help. Simeon does not volunteer, and Levi never acts on his intent. Nonetheless, Levi has used or transferred a means of identification (Shechem's name) with intent to commit a crime (murder). Unquestionably, however, the First Amendment protects Levi's speech.

As another example demonstrating that the law prohibits a substantial amount of protected expression, consider Iago, who hates Cassio, the secret lover of Othello's wife, Desdemona. Iago knows that Othello both suspects Desdemona of infidelity and intends to threaten her lover with death. Iago informs Othello of the affair and gives him Cassio's name and description, intending this to help Othello find and commit felony harassment against Cassio. Othello never seeks Cassio, however, and instead divorces Desdemona.

Iago has knowingly used or transferred Cassio's identifying information, with the intent to aid or abet Othello in committing a crime.

Even though he did no more than inform Othello about Desdemona's paramour—a communication clearly protected by the First Amendment—he has committed identity theft under the statute's plain language.

Indeed, virtually anyone who forms criminal intent, even for the briefest moment, arguably violates the identity theft statute. That is, the statute does not by its terms require any particular connection between the information and the intended crime, and most people possess other people's names and identifying information at all times.[15] The moment one in possession of such information decides to commit a crime, no matter how briefly or implausibly, he or she has committed a felony.

As the examples above show, the statute reaches a substantial amount of protected thought and expression relative to its legitimate sweep. The statute is invalid, then, unless it is susceptible to a limiting construction that confines its prohibition to unprotected activity.

D. No limiting construction can save the statute from overbreadth.

The ability of prosecutors to exercise charging discretion cannot cure an overbreadth problem. *United States v. Stevens*, 559 U.S. 460, 480, 130 S.Ct. 1577, 1591, 176 L.Ed.2d 435 (2010). That is, a law that by its

[15] Each of the above examples involves a clear nexus between the information possessed or transferred and the intended crime. Despite this, each involves an unconstitutional application of the statute. Thus, even were this court to seek to save the statute from

terms prohibits a substantial amount of protected activity is invalid even if prosecutors actually use it only against unprotected activities. *Id.*

Courts may save a statute from overbreadth by imposing a limiting construction, furthermore, "only if it is 'readily susceptible' to such a construction." *Stevens*, 559 U.S. 460, 480 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997)). The statute at issue here expressly prohibits bare possession of information where the defendant has "the intent to commit, aid, or abet *any* crime." RCW 9.35.020(1) (emphasis added). No construction consistent with this extremely broad language could prevent the statute from applying to citizens who merely have certain legally available information and think about committing some crime with it. As the examples above show, the other alternative means similarly apply by their terms to a substantial amount of protected thought and expression.

The identity theft statute is overbroad, and no limiting construction can prevent it from reaching a substantial amount of protected activity. Therefore, even though Mr. Norman's own alleged conduct falls within the statute's legitimate sweep, the statute must be invalidated and his

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overbreadth by construing it to require a connection between the information and the crime, the law still reaches a substantial amount of protected activity.

identity theft conviction reversed. *Broadrick*, 413 U.S. at 612; *Pauling*, 149 Wn.2d at 387.

CONCLUSION

When Mr. Norman tried to fire his attorney, the trial court misinformed him that he could represent himself only if he showed that he understood the law and the rules of evidence. This error improperly denied Mr. Norman his right to self-representation or his right to counsel. However characterized, this error requires reversal of Mr. Norman's convictions without a showing of prejudice.

In the alternative, this court should vacate one of Mr. Norman's convictions due to a double jeopardy violation. The legislature did not clearly intend the identity theft statute to authorize multiple punishments in the circumstances presented here. Under the same evidence test, the crimes are the same in law and fact as charged and proved. Entry of convictions for both thus violates the prohibition against double jeopardy.

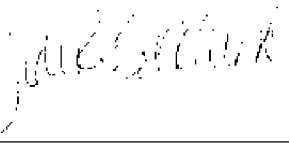
In addition, this court should reverse Mr. Norman's identity theft conviction because it violates his right to a unanimous verdict. The statute defines an alternative means crime. The state presented no evidence on one of the alternatives, that Mr. Norman transferred any financial information. The trial court did not instruct the jury that it had to

unanimously agree on the means of commission. Therefore, the verdict fails to establish that the jury was unanimous as to the means by which Mr. Norman committed the crime.

Finally, this court should also reverse Mr. Norman's identity theft conviction because the statute violates the First Amendment. It reaches a substantial amount of protected activity relative to its legitimate sweep by creating thought crimes, and no limiting construction consistent with its plain terms can save it from overbreadth.

Respectfully submitted on October 15, 2015,

BACKLUND AND MISTRY



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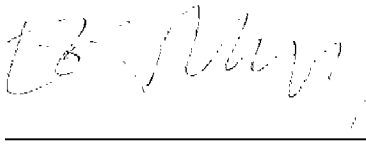

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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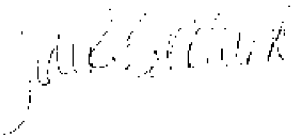
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 15, 2015.



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