NO. 47690-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BOBBY ARLEND NORMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 14-1-05270-9

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion in its responses and rulings concerning the defendant's statements and inquiries concerning new counsel, a continuance or self-representation?

2. Did substantial evidence support the defendant's conviction of identity theft where the crime was an alternative means crimes, and furthermore where substantial evidence was presented of each act by which the crime could be committed?

3. Did the defendant's conviction of both identity theft and forgery violate double jeopardy where the two crimes involve harm to separate victims, and furthermore where an anti-merger clause indicated express legislative intent supporting multiple punishments?

4. Is identity theft constitutionally overbroad where it regulates behavior, not speech, and where it does not prohibit a substantial amount of protected expression?

B. STATEMENT OF THE CASE.

1. *Procedural Facts.*

On December 31, 2014, Appellant Bobby Arlend Norman (the "defendant") was charged with two crimes, second degree identity theft and forgery. CP 1-2. The charges stemmed from an incident on November 4, 2014, in which the defendant presented a stolen check for

payment payable to his order in the amount of $150.00 at a Timberland Bank branch. *Id.* RP 99-104. Exhibit 1.

The case was assigned for trial on May 21, 2015, a Thursday afternoon. RP 4. Before jury selection the trial court held a CrR 3.5 hearing and ruled on a number of routine pre-trial motions. RP 30-36. After jury selection the court recessed the trial until the following Tuesday following a three-day Memorial Day weekend.

When court reconvened on Tuesday morning, in response to the court's inquiry about whether the parties were ready for the jury, the defendant stated, "Your Honor, I would like to fire my attorney." RP 41. The trial court's response was, "Okay. Tell me about that." *Id.* Thereafter in a seven page colloquy the trial court responded to several other inquiries from the defendant, including (1) whether he could have a new attorney [RP41-42], (2) whether he could have a continuance if he were to represent himself [RP 42], (3) whether his prior criminal convictions were admissible [RP 42-43], and (4) whether he would have to take the stand [RP 44].

The trial court's response to each inquiry was provided patiently and respectfully. At the conclusion of the discussion, the defendant indicated that he was satisfied and ready to proceed. RP 44-45. Just before the jury came into the courtroom the defendant accepted a trial strategy decision made by his defense attorney and agreed to stipulations concerning authenticity of the surveillance video from the bank and chain

of custody for the stolen check. RP 45. Thereafter during the rest of the proceedings the defendant made no further attempt to discharge his attorney.

The trial proceeded with the State calling four witnesses and introducing six exhibits. RP 51-126. After a short recess at the end of the State's case, the defendant took the stand as the only defense witness. RP 127. The jury instructions proposed by the State were adopted by the court without objection. CP 12-36. RP 151-53. The defense did not proposed any instructions. The defendant was found guilty of both crimes. CP 37-38.

2. *Substantive Facts.*

On November 1, 2014, Timberland Bank customer Linda Loeck wrote a check to Capitol One for her monthly credit card bill. RP 51-52. She put the check in an envelope and left it in her mailbox. RP 53. She retained a carbon copy. *Id.* Her next contact concerning the check was when Timberland Bank teller, Kelly Deforrest, called her to ask whether she had written that check to the defendant. RP 55. She had not and she testified that (1) she did not know the defendant except by sight [RP 55], (2) that she had not written him the check [*Id.*], (3) that she had not given him permission to use her information [*Id.*], and (4) that she did not know who had written his name on her Capitol One check [RP 58].

The teller, Ms. Deforrest, testified about the defendant's presentment of the check for payment. She testified that the defendant

first appeared at the drive-up window but was told that he had to come into the bank because he was not a customer. RP 99. She and the other tellers noticed suspicious behavior. They noticed (1) that the truck that the defendant was in did not park in a parking space, (2) that the defendant was pacing and talking to the driver of the truck before he came in, (3) that the defendant was fidgeting, (4) that he came in once and then left the bank lobby for a brief time, and (5) that he was looking around once he came into the bank. RP 99-100. When the defendant finally came to Ms. Deforrest's teller station, she considered him to have raised red flags concerning the check. *Id.*

The check itself was also suspicious. RP 101. The payee line appeared to have been changed and written over with the defendant's name. *Id.* This prompted Ms. Deforrest to ask questions. She asked if he had written his own name on the check and the defendant denied that he had. RP 101-02. She then told him that she had to call Ms. Loeck and he responded, "Go ahead. Yeah. She's at home." RP 102. He claimed that Ms. Loeck had given him the check. *Id.* When Ms. Deforrest called Ms. Loeck, she discovered that Ms. Loeck did not know the defendant and that the check was stolen and had originally been written to Capitol One. RP 104-05. The defendant became irate after the phone call. RP 105. He wanted his identification back and wanted out of the bank. RP 105-06.

The defendant's actions inside the bank were captured on surveillance video. RP 110-18. Furthermore, in his testimony, the

defendant admitted having gone to the bank with the check and having presented it for payment. RP 130. He claimed that a person named "Drew" gave him the check in exchange for a Blue Ray disc player that he sold on Offer Up, a web site comparable to Craig's List. RP 131-35. He claimed not to have looked at the check and he disputed the teller's account of his statement about Ms. Loeck; he said that he never used Ms. Loeck's name. RP 143. The defendant admitted that he was not due any money from Ms. Loeck and that the check looked suspicious in that, "Yes. My name – on my name, it looks like a little – it looks a little messed up and darker than when I look at it right now." RP 139.

The jury convicted the defendant of both identity theft and forgery. CP 37-38. Having been convicted of both crimes, the defendant appeared for sentencing on June 12, 2015. CP 41-54. He stipulated to his prior criminal convictions and offender score, and was sentenced to the high end of the standard sentencing range. CP47. He filed this timely appeal the same day. CP 60.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS RESPONSES TO THE DEFENDANT'S STATEMENTS AND INQUIRIES ABOUT A NEW ATTORNEY, A CONTINUANCE OR SELF REPRESENTATION.

A criminal defendant's request for (1) new counsel, (2) a continuance or (3) self-representation, are matters entrusted to the

discretion of the trial court. ***State v. Hampton***, __ Wn. 2d__, __ P.3d __, (Supreme Court Case No. 90811-7, 2015 WL 7294538, pp.4-5, filed Nov. 19, 2015)("The balancing of a defendant's right to choice of counsel with a trial court's need to efficiently administer justice 'falls squarely within the discretion of the trial court'."), ***State v. Stenson***, 132 Wn. 2d 668, 733-34, 940 P.2d 1239(1997)("Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court."), citing ***Wheat v. United States***, 486 U.S. 153, 164, 108 S. Ct. 1692, 1697, 100 L. Ed. 2d 140 (1988), ***State v. DeWeese***, 117 Wn. 2d 369, 376, 816 P.2d 1 (1991), and ***State v. Sinclair***, 46 Wn. App. 433, 730 P.2d 742 (1986). ***State v. Hahn***, 106 Wn. 2d 885, 900-01, 726 P.2d 25 (1986)("This determination [of self-representation] is within the discretion of the trial court."), citing ***State v. Kolocotronis***, 73 Wn. 2d 92, 102, 436 P.2d 774 (1968). This court reviews such decisions for an abuse of discretion. ***State v. Lawrence***, 166 Wn. App. 378, 395-96, 271 P.3d 280 (2012). Abuse of discretion means that the decision was "manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard." ***State v. Coley***, 180 Wn. 2d 543, 559, 326 P.3d 702 (2014) (internal quotation marks omitted), quoting, ***State v. Madsen***, 168 Wn. 2d 496, 504, 229 P.3d 714 (2010).

In Washington, once a criminal case is set for trial, "no lawyer shall be allowed to withdraw from said cause, except upon written consent

of the court, for good and sufficient reason shown." CrR 3.1(e). When a motion for new counsel is made at such time that a continuance will be necessary, Washington courts are to beware of "mechanical tests" and "must decide based on 'the circumstances present'." ***State v. Hampton***, __ Wn. 2d__, __ P.3d __, (Supreme Court Case No. 90811-7, 2015 WL 7294538, filed Nov. 19, 2015) (Slip Opinion, p. 14.), quoting ***Ungar v. Sarafite***, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). The trial court is entitled to consider all relevant information, and in particular eleven factors derived from a leading criminal procedure treatise. *Id.*, citing 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.4(c) at 718–20 (3d ed.2007).

"The general loss of confidence or trust alone is not sufficient to substitute new counsel." ***State v. Stenson***, 132 Wn. 2d 668, 733-34, 940 P.2d 1239, 1272 (1997), citing ***Smith v. Lockhart***, 923 F.2d 1314, 1320 (8th Cir.1991). "A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Id.*

In addition to a qualified right to new counsel, criminal defendants also have both a federal and state constitutional right to self-representation. Sixth Amendment. Article 1, § 22. ***In re Rhome***, 172 Wn. 2d, 654, 659-60, 260 P.3d 874 (2011). ***Indiana v. Edwards***, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). ***State v. Kolocotronis***, 73

Wn. 2d 92, 436 P.2d 774 (1968). Where a defendant asks to represent himself, the request must be shown to have been unequivocal, knowing, voluntary, intelligent, and timely. ***City of Bellevue v. Acrey***, 103 Wn. 2d 203, 208–09, 691 P.2d 957 (1984), ***State v. Vermillion***, 112 Wn. App. 844, 851, 51 P.3d 188 (2002), *review denied*, 148 Wn. 2d 1022 (2003). "[A] criminal defendant's request to proceed pro se must be (1) timely made and (2) stated unequivocally." ***State v. Woods***, 143 Wn. 2d 561, 586, 23 P.3d 1046 (2001), citing ***State v. Stenson***, 132 Wn. 2d at 737.

The context in which a self-representation request is made, particularly where it is made in conjunction with a continuance motion, may be properly considered. ***State v. Woods***, 143 Wn. 2d at 586, citing ***State v. Luvene***, 127 Wn. 2d 690, 698-99, 903 P.2d 960 (1995). The consequences of the decision to proceed *pro se* can be serious; an "accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandably has been made." ***State v. Chavis***, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982).

In this case, the defendant made an oral motion for appointment of new counsel after the jury had been selected and after jeopardy had attached. RP 41. Such motions are not unusual and the experienced and patient trial judge considered the motion and sorted out the defendant's various requests and statements in a hearing before bringing the jury into

the courtroom. RP 41-47. It is a testament to the trial court's handling of the issues that after the hearing the defendant did not re-raise any of the issues. The trial was completed and the defendant was sentenced without any further similar requests.

The defendant's first statement in support of his motion was that he wished to fire his appointed attorney and have a new attorney appointed to represent him. RP 41-42. He gave very little reason for this other than he did not like the manner in which his attorney delivered legal advice. RP 42. In response, the trial court pointed out that the defendant's motion was made while the trial was underway, and advised the defendant that (1) the law did not provide that he could get his pick of appointed counsel, (2) that he could bring in counsel of his choice prepared to go forward with the trial "right now", and (3) that the defendant could "represent yourself if you want, if you don't want Mr. Jordan". RP 42. The defendant at no time indicated that he had resources to hire an attorney, nor that such counsel was ready to step in and go forward with the already begun trial. Also no motion for a mistrial was made.

During further colloquy, the trial court addressed the defendant's other questions and concerns one by one. These included continuance and self-representation. The defendant asked, "If I go pro se, can I have a continuance." RP 42. The trial judge advised him that, "If you want to represent yourself, then we need to have a discussion about that, what you understand about the law. I can't allow you to do that unless you

demonstrate that you understand the law and the Rules of Evidence. Is there a specific thing you want to tell me about?" RP 42. The discussion then turned to what was actually on the defendant's mind, namely whether his prior criminal convictions would be admitted into evidence. RP 42-43. The defendant was confused about the applicability of various evidence rules but seemed to accept his attorney's and the court's explanation of ER 609. RP 43. After the trial court gave its explanation of its ruling, the defendant said he was ready to proceed. RP 44.

The record does not support the defendant's claim that the trial court abused its discretion. The trial court responded to the defendant's concerns in a serious but compassionate manner. This is what one would hope of an experienced trial judge. The defendant's concerns were not discounted, quashed or ignored. After the continuance and self-representation questions, during the same hearing, the court also dealt with admitting evidence by stipulation and with the defendant's right to not take the stand. RP 44-45. Those issues too were resolved to his satisfaction.

The trial court addressed the defendant's issues one by one respectfully and openly, and by the end of the hearing, had no reason to think the defendant was dissatisfied with how he was being represented. RP 45-47. Under these circumstances, there is no basis for the claim that the trial court abused its discretion.

2. SUBSTANTIAL EVIDENCE SUPPORTED THE DEFENDANT'S CONVICTION OF IDENTITY THEFT WHERE THE CRIME IS NOT AN ALTERNATIVE MEANS CRIME, AND WHERE, IN ANY CASE, THERE WAS SUBSTANTIAL EVIDENCE FOR EACH ACT BY WHICH THE CRIME COULD BE COMMITTED.

Where a single crime can be committed in more ways than one, there must be juror unanimity as to guilt for the crime charged, but the jurors need not be unanimous as to the means by which the crime was committed so long as substantial evidence supports each alternative means presented. ***State v. Kitchen***, 110 Wn. 2d 403, 410-11, 756 P.2d 105 (1988) ("In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt."). "[T]here simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits." ***State v. Peterson***, 168 Wn. 2d 763, 769, 230 P.3d 588 (2010), quoting ***State v. Klimes***, 117 Wn. App. 758, 769, 73 P.3d 416 (2003).

A definition of a crime that provides several methods of committing a crime in the disjunctive does not necessarily create alternative means crime. ***State v. Laico***, 97 Wn. App. 759, 762, 987 P.2d 638 (1999). Where the word "knowingly" clearly relates to a series of verbs, its placement would suggest that only one means is intended. ***State v. Lindsey***, 177 Wn. App. 233, 241, 311 P.3d 61 (2013).

The definition of identity theft includes just such a placement of the word knowingly. RCW 9.35.020(1) states that no one "may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person." The placement of the knowingly element in identity theft may be compared to the same placement in the stolen property trafficking statute. ***State v. Owens***, 180 Wn. 2d 90, 97-98, 323 P.3d 1030 (2014). The stolen property trafficking statute provides that 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." RCW 9A.82.050(1). In ***Owens,*** the defendant argued, much as the defendant in this case has argued, that the disjunctive statutory verbs supported eight alternative means for committing first degree trafficking in stolen property.

The Supreme Court rejected that view. Because the word "knowingly" appeared in two different positions in the list of verbs, the ***Owens*** court concluded that the statute articulated only two alternative means, not eight. The court also pointed out that the first seven verbs were so closely related they did not really address distinct acts. *Id.* at 99, citing ***State v. Peterson***, 168 Wn. 2d 763, 230 P.3d 588 (2010), and ***State v. Lindsey***, 177 Wn. App. 233, 311 P.3d 61 (2013). Because substantial evidence supported each of the two alternative means, the court affirmed the conviction.

The statutory language used to define identity theft is quite similar to trafficking in stolen property. One who "organizes, plans, finances, directs, manages, or supervises" theft of property is completing necessary tasks incidental to the "theft of property for sale to others". RCW 9A.82.050(1). So too with identity theft, one who "obtain[s], possess[es], use[s], or transfer[s] a means of identification or financial information of another person" completes necessary tasks incidental to acting on the "intent to commit, or to aid or abet, any crime". RCW 9.35.020(1). It may be said in both instances that the disjunctive list of acts are a continuum of activity.

Since ***Owens*** and ***Lindsey*** strongly support the view that identity theft is not an alternative means crime, no showing of substantial evidence for any one of its verbs is necessary. Stated another way, there need not be substantial evidence of obtaining, possession, use, and transference of a victim's means of identification, there need be substantial evidence of any one of them.

With the foregoing having been said, however, because each of the verbs used to define identity theft is part of a continuum, it is also the case that each part of the continuum was supported by substantial evidence. For instance, it was undisputed that the defendant had possession of the stolen check bearing the victim's name and account information. After all, he admitted that he brought it to the bank. It was likewise undisputed that he had possession of the check, used it and transferred it to the bank.

His entire purpose in entering the bank was to present the check for payment. The issue at trial was not with the acts that the defendant performed but with his knowledge. The defendant's acts were not only supported by substantial evidence but were also not in dispute.

If a defendant is charged with committing a crime by more than one alternative means, the State must present substantial evidence to support each of the means charged. ***State v. Arndt***, 87 Wn. 2d 374, 377, 553 P.2d 1328 (1976). Were the court to reject the view that identity theft is not an alternative means crime, it would necessarily need to interpret the evidence in the light most favorable to the State and assume the truth of the State's evidence and all reasonable inferences that may be drawn from it. ***State v. Echeverria***, 85 Wn. App. 777, 782, 934 P.2d 1214 (1997), ***State v. B.J.S.***, 140 Wn. App. 91, 97, 169 P.3d 34 (2007). Where the evidence supporting each of the actions constituting identity theft was not meaningfully challenged, and where the only real issue was the defendant's knowledge, it can be said that no matter how this issue is reviewed, the defendant's challenge should be rejected.

3. THE PROSECUTION AND PUNISHMENT OF THE DEFENDANT FOR BOTH IDENTITY THEFT AND FORGERY DOES NOT VIOLATE DOUBLE JEOPARDY WHERE THE TWO CRIMES HARM DIFFERENT VICTIMS, AND WHERE AN ANTI-MERGER CLAUSE INDICATES THAT MULTIPLE PUNISHMENTS WERE INTENDED.

Both the Washington and federal double jeopardy clauses prohibit multiple prosecutions or punishments for the same offense. "Within this constraint, however, the legislature is free to define criminal conduct and specify its punishment." ***State v. Baldwin***, 150 Wn. 2d 448, 454, 78 P.3d 1005 (2003), citing ***State v. Calle,*** 125 Wn. 2d 769, 776, 888 P.2d 155 (1995). Where "an act or transaction violates more than one criminal statute, the double jeopardy question turns on whether the legislature intended to impose punishment under both statutes for the same act or transaction." *Id.*

The two statutes at issue in ***Baldwin*** are the same two statutes at issue in this case. In ***Baldwin,*** the defendant was prosecuted for identity theft and forgery arising from real estate fraud. The defendant used the identity theft victim's name to purchase real property by forging deeds of trust. The defendant was convicted of both identity theft and several counts of forgery. ***State v. Baldwin,*** 150 Wn. 2d at 453. On appeal, she made the same claim that is made in this appeal, namely that the identity

theft and forgeries were part of the same offense and that separate convictions would constitute double jeopardy. *Id.*

The Supreme Court rejected Ms. Baldwin's arguments. ***State v. Baldwin***, 150 Wn. 2d at 456-57. Analyzing the two statutes in light of both legislative intent and the constitutional same evidence test, the court observed that the identity theft and forgery statutes "do not expressly allow punishment under both statutes for the same act or transaction", but "neither do they satisfy the same evidence test since each offense contains an element not contained in the other." ***State v. Baldwin***, 150 Wn. 2d at 454-55, citing ***State v. Gocken***, 127 Wn. 2d 95, 896 P.2d 1267 (1995), ***Blockburger v. United States***, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Concerning the elements of the offences, the court noted that forgery requires the making, completion, or alteration of a written instrument and that identity theft only requires use of a means of identification with intent to commit an unlawful act. *Id. at* 455.

Baldwin found further support for its double jeopardy holding in the fact that the two crimes had different victims. The identity theft targeted the person whose identity was assumed whereas the forgery targeted the property owners who were swindled out of their real estate. "In addition, we believe the Court of Appeals was correct in concluding that when offenses harm different victims, the offenses are not factually

the same for purposes of double jeopardy." ***State v. Baldwin***, 150 Wn. 2d 448, 457, 78 P.3d 1005 (2003), citing ***State v. McJimpson***, 79 Wn. App. 164, 169, 901 P.2d 354 (1995).

In ***Baldwin,*** the victim of identity theft was the woman whose name and identity was stolen. By contrast, the victims of the forgeries were the parties who accepted the deeds of trust in exchange for the real estate. ***State v. Baldwin***, 150 Wn. 2d at 457. The same analysis applies in this case. Here, the victim of the identity theft was the woman whose name and check were stolen. By contrast the victim of the forgery was the bank where the stolen check was attempted to be cashed.

If ***Baldwin's*** analysis of legislative intent and the same evidence test is not enough, express legislation enacted since ***Baldwin*** provides additional support. In 2008, in response to a "unit of prosecution" double jeopardy case, the legislature passed an anti-merger provision for identity theft. RCW 9.35.020(4). (Laws 2008, Ch. 207, Sec. 4.) *See* ***State v. Leyda***, 157 Wn. 2d 335, 345, 157 Wn. 2d 335 (2005). That provision states, "Each crime prosecuted under this section shall be punished separately under chapter 9.94A RCW, unless it is the same criminal conduct as any other crime, under RCW 9.94A.589." Such express legislation can be viewed as a clear expression of legislative intent when it comes to the crime of identity theft.

In this case, the defendant has sought to distinguish the identity theft's anti-merger provision. Appellant's Opening Brief, p.15-17. While

it may be true that such a clause does not in all cases prevent the application of double jeopardy, it does when legislative intent is clear. ***State v. Timothy K.***, 107 Wn. App. 784, 792, 27 P.3d 1263 (2001). The court in ***Timothy K.*** found a clear expression of legislative intent: "The Legislature could hardly have been clearer in expressing its intent that malicious harassment be punished separately. And so we conclude that second degree malicious mischief is 'another crime' within the meaning of the anti-merger clause contained in the malicious harassment statute, which states that '[e]very person who commits another crime during the commission of a crime under this section may be punished and prosecuted for the other crime separately'." *Id.* at 792. The same analysis applies in this case considering the reasons the 2008 amendment was passed.

Double jeopardy is not offended merely because an incident, act or transaction satisfies the elements of multiple offenses. Had the offense in this case been committed by the same act (for example by a single gunshot) against the same victim (a single gunshot victim), there might have been some support for the defendant's double jeopardy argument. *See* ***In Re: Orange***, 152 Wn. 2d 795, 820, 100 P.3d 291, 304 (2004)("The two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault."). But here the defendant concedes that if a means of identity were taken in a robbery, both the robbery and the identity theft could be prosecuted.

Opening Brief, p.16. The defendant makes the same concession as to identity theft and trafficking in stolen property. Because there is no logical distinction to be made when the two crimes are instead identity theft and forgery, there is no reason that those two crimes may not also be separately prosecuted and punished. In light of (1) clear legislative intent expressed in the 2008 legislation, and (2) the presence of separate victims, the proper conclusion is that there was no double jeopardy violation when the defendant was prosecuted for both crimes.

4. IDENTITY THEFT IS NOT CONSTITUTIONALLY OVERBROAD WHERE IT IS A REGULATION OF BEHAVIOR, NOT SPEECH, AND WHERE, CONSIDERING THE STATUTE'S PLAINLY LEGITIMATE SWEEP, IT DOES NOT PROHIBIT A SUBSTANTIAL AMOUNT OF PROTECTED EXPRESSION.

The defendant contends that the identity theft statute is an overbroad infringement of free expression. A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities. ***City of Tacoma v. Luvene***, 118 Wn. 2d 826, 839, 827 P.2d 1374 (1992), citing ***Seattle v. Webster***, 115 Wn. 2d 635, 641, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S. Ct. 1690, 114 L. Ed. 2d 85 (1991), and ***Seattle v. Slack***, 113 Wn. 2d 850, 854, 784 P.2d 494 (1989). "An ordinance which regulates behavior, and not pure speech, will not be overturned unless the overbreadth is both real and substantial in relation to

the ordinance's plainly legitimate sweep." ***City of Tacoma v. Luvene***, 118 Wn. 2d at 839-40 (internal quotation marks omitted), quoting ***Seattle v. Webster***, 115 Wn. 2d at 641.

The identity theft statute at issue in this case regulates behavior not speech. It is no different from the drug loitering statute at issue in ***Luvene***. While the drug loitering statute admittedly had the potential to implicate "freedom of expressive association and freedom of movement", because of the statute's "specific intent and overt acts, the ordinance does not then reach into the arena of constitutionally protected First Amendment conduct. It prohibits soliciting, enticing, inducing, or procuring another to exchange, buy, sell, or use illegal drugs or drug paraphernalia." ***City of Tacoma v. Luvene***, 118 Wn. 2d at 844.

A similar analysis has been applied by this Court to crimes having much more potential to directly infringe public or political discourse. ***State v. Stephenson***, 89 Wn. App. 794, 807, 950 P.2d 38 (1998). As to intimidating a public servant, unless "there is a *realistic danger* that the statute will significantly compromise recognized First Amendment protections of parties not before the court, we will not declare it facially invalid on overbreadth grounds. . . We do not see that danger here." *Id.* (emphasis in the original, citation omitted), citing ***Members of City Council v. Taxpayers***, 466 U.S. 789, 800, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). Similarly in an intimidating a judge case, this Court stated, "It is not a *realistic danger* that a prosecutor would bring charges against a

person for threatening to run against a judge because of a ruling." ***State v. Knowles***, 91 Wn. App. 367 at 380, 957 P.2d 797 (1998) (emphasis in the original, footnote omitted).

Further evidence that identity theft regulates behavior, not speech, may be found in its legislative purpose. "The legislature intends to penalize for each unlawful act of improperly obtaining, possessing, using, or transferring means of identification or financial information of an individual person." RCW 9.35.001. Contrary to the arguments of the defendant the legislature did not create a thought crime nor seek to punish one's thoughts. The act of passing a forged check is an act, not speech.

In this case, the defendant's claim of overbreadth rests on an absurd suggestion. He claims that the first amendment protected him, and defendants like him, when he went to a bank with a stolen check, presented it to the teller, and falsely told the teller that the owner of the check had issued it to him. Were the first amendment to offer protection for fraud such as this, theft by deception crimes, check fraud and countless other fraud crimes could not be prosecuted. Such a result is not supported by any line of first amendment authority.

The identity theft statute defines the crime of identity theft by stating, "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). To obtain, to possess, to use or to transfer something is to

take action. Such actions cannot be considered "pure speech" because they are not communications or conveyances of thought or ideas. Instead they are actions taken with respect to an identity or property right. Except, perhaps in the case of civil disobedience or public performance, action or behavior is not generally thought of as speech. The identity theft statute regulates actions and behavior, not pure speech, and must be shown to be overbroad in relation to its plainly legitimate sweep.

To consider the plainly legitimate sweep of identity theft, a court's first task is to determine whether the statute reaches a "substantial amount of constitutionally protected conduct." ***City of Tacoma v. Luvene***, 118 Wn. 2d at 839. The speech at issue in this case, like all identity theft cases, is the false impersonation or usurpation of another person's identity or financial information. "Untruthful speech, commercial or otherwise, has never been protected for its own sake." ***Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.***, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), citing ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and ***Konigsberg v. State Bar***, 366 U.S. 36, 49, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961). Thus, where a defendant has obtained, possessed, used or transferred another person's means of identification or financial information falsely and for fraudulent purposes, no first amendment protection can be claimed.

Statutes are presumed constitutional. ***State v. Pualing***, 149 Wn. 2d 381, 386, 69 P.3d 331 (2003), citing ***State v. Crediford***, 130 Wn. 2d 747, 752, 927 P.2d 1129 (1996). "Furthermore, [a] statute or ordinance will be overturned only if the court is unable to place a sufficiently limiting construction on a standardless sweep of legislation." ***State v. Glas***, 147 Wn. 2d 410, 421, 54 P.3d 147 (2002) (internal quotation marks omitted), quoting ***City of Tacoma v. Luvene***, 118 Wn. 2d at 840. Criminal laws "may be facially invalid if they 'make unlawful a substantial amount of constitutionally protected conduct . . . even if they also have legitimate application.'" ***City of Seattle v. Huff***, 111 Wn. 2d 923, 925, 767 P.2d 572 (1989), quoting ***City of Houston v. Hill***, 482 U.S. 451, 459, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).

The defendant attempts to bolster his argument by suggesting that criminal intent - in his words, "thought crimes" - is sufficient for conviction of identity theft. Appellant's Opening Brief, p. 33. The same argument could be made about virtually any crime if one were to disregard all of the elements of the crime except the mental state. Both degrees of identity theft require the use of identification or financial information for a purpose, namely to obtain "credit, money, goods, services, or anything else of value". RCW 9.35.020(2) and (3). In this case, the jury instructions specified that identity theft has four elements, not two. CP 26. The third of the four elements required the State to prove that the defendant was obtaining or failed to obtain "credit, money, goods,

services, or anything else that is $1500 or less in value from the acts described in element (1)" CP 26. Contrary to the defendant's imaginative hypotheticals, the mere possession of a means of identification or financial information by itself would have been insufficient.

The defendant's argument about "thought crimes" can be viewed as a concession that identity theft includes a mental state element. This distinguishes it from a crime such as luring. ***State v. Homan***, __Wn. App.__, __P.3d __(Case No. 42529-7, filed December 15, 2015). In ***Homan***, this court held that luring must be interpreted to include a non-statutory mental element in order to prevent it from being construed as overbroad. *Id.*, Slip Opinion, p. 16. If identity theft did not already include a mental element, ***Homan*** might suggest a similar need for interpretation here.

In this case no such interpretation is necessary. The identity theft statute has a mental element, knowledge, and furthermore has an additional object-of-the-crime element, both of which distinguish it from luring. This Court's ***Homan*** decision supports the constitutionality of the identity theft statute.

Examination of the defendant's hypotheticals illustrates further the fallacy of his argument. In three of the hypotheticals, the means of identification was used to commit an assault or a murder. In the others it was used to facilitate extortion or harassment. Appellant's Opening Brief, p.33-35. The use of a phone book as a weapon is not the same as a use of

a means of identification as a means of identification. It is the use of a heavy object as a weapon.

The same holds true when information is used during other violent or extortionate crimes. Where a defendant forms an intent to commit a crime, be it assault, murder, extortion, or harassment, and where he either completes the crime or takes a substantial step, he has fulfilled the elements of the crime, or of a criminal attempt, but not identity theft. Such a defendant has not acquired the information and then sought to use it to obtain "credit, money, goods, services, or anything else of value". RCW 9.35.020(2) and (3). Identity theft requires that the defendant knowingly obtain a means of identification or financial information and then act upon or exploit the information fraudulently for profit. Where a defendant forms an intent to commit a crime not related to the information, the information may be a means to another crime but it is not identity theft.

The identity theft statute is not unconstitutionally overbroad because it does not reach a substantial amount of constitutionally protected speech. Criminal acts or speech are not constitutionally protected behavior. ***United States v. Stevens***, 559 U.S. 460, 471, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) ("As we noted [i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.) (internal quotation marks omitted), quoting ***New York v.***

Ferber, 458 U.S. 747, at 761–762, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) quoting ***Giboney v. Empire Storage & Ice Co.***, 336 U.S. 490, at 498, 69 S. Ct. 684 (1949). Furthermore, even when a criminal act can be said to have been done in civil disobedience, such as where vandalism is committed during a protest, there is no constitutional impediment to prosecution.

The identity theft statute does not criminalize "thought" any more than any other statute that has a mental state criminalizes thought. The legislature's clear intent was to punish unscrupulous persons who seek to profit from the personal and financial records of others. Legislative intent was to penalize, "each *unlawful act* of improperly obtaining, possessing, using, or transferring means of identification or financial information of an individual person." RCW 9.35.001 (emphasis added). The legislature did not intend to "criminalize thought," but rather to criminalize the *acts* of unscrupulous persons that fell within the statute.

Courts avoid absurd results when interpreting statutes and allow common sense to inform their analysis. ***State v. Alvarado***, 164 Wn. 2d 556, 562, 192 P.3d 345 (2008). To argue that throwing a phone book is identity theft is to argue an absurdity, not common sense. A law can only be unconstitutionally overbroad if it sweeps within its legitimate scope constitutionally protected activity. Fraudulent acts related to another person's personal or financial records are not constitutionally protected

behaviors. For this reason the identity theft statute is not unconstitutionally overbroad.

D. CONCLUSION.

For the foregoing reasons, the State urges the Court to affirm the defendant's convictions.

DATED: December 23, 2015.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-23-15 Theresa Kay
Date Signature

PIERCE COUNTY PROSECUTOR

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