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Supreme Court No. (to be set)
Court of Appeals No. 75031-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Bobby Norman
Appellant/Petitioner

Pierce County Superior Court Cause No. 14-1-05270-9
The Honorable Kitty-Ann van Doorninck

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. IDENTITY OF PETITIONER 4

II. COURT OF APPEALS DECISION 4

III. ISSUES PRESENTED FOR REVIEW 4

IV. STATEMENT OF THE CASE 4

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 7

A. The Supreme Court should accept review and hold that the trial judge violated Mr. Norman's right to proceed *pro se* by telling him "I can't allow you to do that unless you demonstrate that you understand the law and the Rules of Evidence." This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4). 7

B. The Supreme Court should accept review and hold that the identity theft statute is unconstitutionally overbroad because it creates thought crimes and criminalizes free expression. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4). 10

VI. CONCLUSION 17

Appendix: Court of Appeals Decision

TABLE OF AUTHORITIES

FEDERAL CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) 11

Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) 11, 16

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) 7, 8, 9

Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) 15

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) 11

United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976) 12

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) 10

United States v. Stevens, 559 U.S. 460, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) 15

WASHINGTON STATE CASES

State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006) 10

State v. K.R., 169 Wn. App. 742, 282 P.3d 1112 (2012) 13

State v. Madsen, 168 Wn.2d 496, 229 P.3d 714 (2010) 7, 8, 9

State v. Pauling, 149 Wn.2d 381, 69 P.3d 331 (2003) 10, 16

State v. Vermillion, 112 Wn. App. 844, 51 P.3d 188 (2002) 8, 9

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I 10, 11, 13, 14, 16

U.S. Const. Amend. VI 7

U.S. Const. Amend. XIV 7

Wash. Const. art. I, §22 7

WASHINGTON STATUTES

RCW 9.35.001 12

RCW 9.35.005 ..... 11, 12, 16

RCW 9.35.020 ..... 11, 12, 15, 16

OTHER AUTHORITIES

RAP 13.4 ..... 7, 10, 17

I. IDENTITY OF PETITIONER

Petitioner Bobby Norman, the appellant below, asks the court to review the decision of Division II of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Bobby Norman seeks review of the Court of Appeals unpublished opinion entered on June 6, 2016. A copy of the opinion is attached. *See* Appendix.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the trial court apply the wrong legal standard by refusing to allow Mr. Norman to represent himself because of his ignorance of the law and the Rules of Evidence?

ISSUE 2: Is the identity theft statute unconstitutionally overbroad because it criminalizes thoughts and protected speech?

IV. STATEMENT OF THE CASE

Bobby Norman was charged with forgery and second-degree identity theft after he tried to cash a check made out to himself. CP 1-2; RP 51-52, 100, 104-105, 111; Ex. 3. He had received the check from a woman named "Drew" in exchange for a DVD player. RP 132-133. He

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

At the start of trial, Mr. Norman told the judge he wanted to "fire" his court-appointed attorney. RP 41. He said that he'd previously asked his attorney to bring the conflict to the court's attention, but his attorney had replied "[t]hat's not my job to do that." RP 41. Defense counsel did not deny these allegations. RP 41-43.

The judge responded by telling Mr. Norman that he'd have to represent himself unless he had a private attorney ready to go that day.[1] RP 42. Mr. Norman asked about representing himself.[2] RP 42.

In response, the judge told Mr. Norman "I can't allow you to do that unless you demonstrate that you understand the law and the Rules of Evidence." RP 42. After hearing this, Mr. Norman decided to proceed with appointed counsel. RP 43-44.

Following presentation of the evidence, the court instructed jurors that they could convict Mr. Norman of identity theft if he'd "knowingly obtained, possessed, transferred, or used a means of identification or

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[1] Mr. Norman had been appointed an attorney through Pierce County's Department of Assigned Counsel. CP 3.

[2] He asked "If I go *pro se*, can I have a continuance?" The court replied "Absolutely not." RP 42.

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 in closing that Mr. Norman's possession of Loeck's name alone sufficed to prove identity theft:

> 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, and the court entered convictions for both charges. CP 37-38, 43-51; RP 189-93. The judge agreed that Mr. Norman's conduct was "not the typical Identity Theft that we think of." RP 205. The court nonetheless imposed 57 months of confinement. CP 47-48; RP 205-206. Mr. Norman appealed, and the Court of Appeals affirmed in an unpublished opinion. CP 60; Appendix. Mr. Norman seeks review of this decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the trial judge violated Mr. Norman's right to proceed *pro se* by telling him "I can't allow you to do that unless you demonstrate that you understand the law and the Rules of Evidence." This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

1. Standard of review and governing law.

Both the federal and state constitutions guarantee criminal defendants the right to self-representation. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §22; *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). The unjustified denial of this right requires reversal. *Madsen,* 168 Wn.2d at 503.

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

2. The trial court erroneously forced Mr. Norman to forego his right to proceed *pro se*.

When Mr. Norman expressed the desire to represent himself, the court explicitly told him he could not unless he demonstrated knowledge

[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.

of 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.[4]

Thus, the court "stack[ed] the deck against" him, effectively telling Mr. Norman that he had no real option but to accept appointed counsel's representation anyway. *Madsen*, 168 Wn.2d at 506. The court did so based on an erroneous legal standard. The court violated Mr. Norman's right to self-representation. The remedy is to reverse and remand, without inquiry into prejudice. *Vermillion,* 112 Wn. App. at 851.

The Court of Appeals decision completely ignores the trial judge's statement ("I can't allow you to do that..., RP 42) and its effect on Mr. Norman. No mention is made of this critical interaction in the court's statement of the facts (Appendix, pp. 2-3) or in its application of the law to the facts (Appendix, pp. 6-7). The Court of Appeals' decision rests on its failure to address the trial judge's erroneous statement of the law, which prompted Mr. Norman to abandon the idea of proceeding *pro se*. RP 42; Appendix, pp. 6-7.

The Supreme Court should accept review and hold that the trial judge violated Mr. Norman's state and federal right to proceed *pro se.* This case presents a significant issue of constitutional law that is also of

[4] The court also knew that Mr. Norman did not understand such matters. *See* RP 41-43.

substantial public interest. Review is appropriate under RAP 13.4(b)(3) and (4).

B. The Supreme Court should accept review and hold that the identity theft statute is unconstitutionally overbroad because it creates thought crimes and criminalizes free expression. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

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).

Criminal 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)).

The identity theft statute prohibits possessing a person's name with intent to commit a crime. RCW 9.35.005; RCW 9.35.020(1). This criminalizes thought.

The statute also prohibits transferring a person's name with intent to commit a crime. RCW 9.35.005; RCW 9.35.020(1). This criminalizes communication.

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).

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

For example, a person who 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), RCW 9.35.020(1).

Similarly, a person who decides to throw a telephone directory at someone but who refrains from doing so is guilty of identity theft: such a person has "possesse[d]" the "means of identification" of an entire city, with the intent to "commit . . . any crime." RCW 9.35.005; RCW 9.35.020(1). By the statute's plain terms, this person could be charged with 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 prohibits protected communication, as the following biblically-inspired 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), and thus is guilty of identity theft. Unquestionably, however, the First Amendment protects Levi's speech.

A literary example involves 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 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.[5] The moment one in possession of such information considers committing 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.

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

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 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, but "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 Court of Appeals erroneously concludes that the statutory language "does not create thought crimes," because conviction requires proof of *mens rea* and "the proscribed violative action." Appendix, p. 13. This is incorrect. By its plain terms, the *mens rea*—intent to commit a

crime—need only be accompanied by thought (possession of information) or communication (transfer of information). RCW 9.35.005; RCW 9.35.020(1). No action is required.

Without explanation, the Court of Appeals also finds

> no *real* danger that the statute will compromise the expression of constitutionally protected behavior. The only "speech" truly proscribed here is that which is untruthful and integral to criminal conduct, which the First Amendment does not protect. Appendix, pp. 13-14 (emphasis in original).

In fact, the statute criminalizes *truthful* speech – communication of a person's name, for example. And the communication need not be "integral"[6] to any conduct, criminal or otherwise. A person who communicates someone's name is guilty of the crime, if done with intent to commit a crime.

The Supreme Court should accept review and hold that the identity theft statute is overbroad, and that no limiting construction can prevent it from reaching a substantial amount of protected activity. The statute must be invalidated and Mr. Norman's identity theft conviction reversed. *Broadrick*, 413 U.S. at 612; *Pauling*, 149 Wn.2d at 387.

[6] Appendix, p. 14.

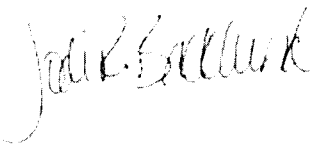
This case raises a significant constitutional issue that is of substantial public interest. Review is therefore appropriate under RAP 13.4(B).

VI. CONCLUSION

The issues here are significant under the state and federal constitutions. Furthermore, because the issues could impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted June 21, 2016.

BACKLUND AND MISTRY



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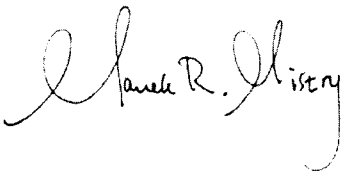

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Bobby Norman, DOC #887747
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and I sent an electronic copy to

Pierce County Prosecuting Attorney
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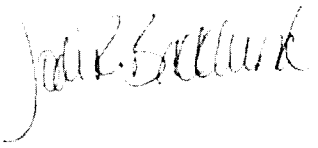
through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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 June 21, 2016.



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APPENDIX:

COURT OF APPEALS UNPUBLISHED OPINION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BOBBY ARLEND NORMAN, Appellant.	)	DIVISION ONE No. 75031-3-I UNPUBLISHED OPINION FILED: June 6, 2016

DWYER, J. — Following a jury trial, Bobby Norman was convicted of second degree identity theft and forgery. He now appeals, contending that (1) the court violated his right to counsel, (2) his multiple convictions violate double jeopardy prohibitions, (3) his identity theft conviction was obtained in violation of his right to a unanimous jury verdict, and (4) the identity theft statute is unconstitutionally overbroad, in violation of the First Amendment. We affirm both convictions.

I

On November 4, 2014, Norman entered a Timberland Bank branch and approached a teller. He presented her with a check for $150. The check was drawn on the account of Linda Loeck and showed Norman as the payee. However, the payee line appeared to have been changed and written over with Norman's name.

The check was stolen. Loeck had originally written and mailed it to Capitol One. She did not know who had written Norman's name on the check. Loeck had never met Norman, much less given him permission to use her personal information.

Norman was charged with one count of identity theft in the second degree, pursuant to RCW 9.35.020(3), and one count of forgery, pursuant to RCW 9A.60.020(1)(a)(b). The case proceeded to trial. Because Norman was indigent, he was assigned a court appointed lawyer.

Trial began on May 21, 2015, on a Thursday afternoon. The court held a CrR 3.5 hearing and ruled on numerous pretrial motions, then held jury selection. Once a jury was selected, the court recessed.

Court reconvened on Tuesday morning, following the Memorial Day holiday. When the court inquired whether the parties were ready for the jury to be brought into the courtroom, Norman responded, "Your Honor, I would like to fire my attorney. . . . I don't believe he has my best interest." Norman then elaborated:

> The other day he told me, "Have you ever heard the saying, 'death by gun'? Well, you're doing death by trial." There have been many times that I've tried to contact him and he told me that if I wasn't going to take the deal, don't call him because I'm wasting his time. I'm just fed up with him. I asked him to bring this to the Court's attention and he said that's not my job to do that, it's his job. So I would rather have a different attorney, please.

The court then commenced a colloquy with Norman, during which it addressed this allegation and others of Norman's concerns, including whether: (1) he could have a continuance if he were to represent himself, (2) whether his

prior criminal convictions would be admissible, and (3) whether he would have to take the stand.

The court asked Norman if there was anything he specifically wanted to discuss. During the ensuing conversation, the court learned that Norman's dissatisfaction with his attorney stemmed from Norman's confusion about the admissibility of his prior convictions.

> MR. JORDAN: Your Honor, he wants to talk about ER 609 and what's admissible, and I told him that that was my call and that I knew what was admissible and what wasn't. So I don't know. He thinks he can keep out his entire criminal history and I explained to him that you will decide what part of his criminal history will come in if he testifies, and that's when he said he wanted a new attorney.
>
> Does that pretty much summarize it?
>
> THE DEFENDANT: Yeah. That was the last straw.

The court then explained to Norman which of his prior convictions could be admitted into evidence, and under what circumstances. At the conclusion of this discussion, Norman indicated that he had no further questions or concerns and was ready for the jury. During the rest of the proceedings, Norman made no further attempt to discharge his attorney.

At the conclusion of the trial, a jury found Norman guilty of both second degree identity theft and forgery.

II

Norman contends that the trial court violated both his right to counsel and his right to self-representation by forcing him to accept representation from a court appointed lawyer against his will. This is so, he asserts, because the court

improperly denied his request to fire his attorney and have new counsel appointed, as well as his request to proceed pro se. We disagree.

The federal and state constitutions guarantee a criminal defendant both the right to counsel and the right to self-representation. U.S. CONST. amends. VI and XIV; WASH. CONST. art. 1, § 22; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Luvene, 127 Wn.2d 690, 698, 903 P.2d 960 (1995). A trial court has discretion to grant or deny both an indigent criminal defendant's request for reappointment of counsel and a request to proceed pro se. See State v. Stenson, 132 Wn.2d 668, 733-34, 940 P.2d 1239 (1997); State v. Modica, 136 Wn. App. 434, 443, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). This discretion "lies along a continuum that corresponds with the timeliness of the request[s]," as "[t]he burdens imposed upon the trial court, the jurors, the witnesses, and the integrity of the criminal justice system increase as trial approaches or when trial has already commenced." Modica, 136 Wn. App. at 443. The court possesses the most discretion when a defendant makes these requests after a trial has begun. Modica, 136 Wn. App. at 443-44. A court abuses its discretion if its decision is 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).

A

Norman first challenges the trial court's refusal to appoint him new counsel. A defendant's loss of trust or confidence in his attorney is not alone sufficient to warrant a substitution of counsel. Stenson, 132 Wn.2d at 734.

Rather, "[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." Stenson, 132 Wn.2d at 734. When a defendant requests new counsel at such a time that a continuance is necessary, courts cannot apply mechanical tests, but must decide to deny or grant such requests based on the circumstances present. State v. Hampton, 184 Wn.2d 656, 669, 361 P.3d 734 (2015).

Herein, Norman did not establish the existence of either an irreconcilable conflict or a complete breakdown in communication between him and his attorney.[1] Following Norman's request that a new attorney be appointed, the court inquired as to his concerns regarding his current attorney. The court learned that Norman's dissatisfaction stemmed from his confusion about the admissibility of his prior convictions. Thereafter, the court explained to Norman which of his convictions were admissible, and under what circumstances they could be admitted. Following this colloquy, Norman made no further requests to discharge the attorney but, instead, indicated that he was ready to proceed to trial. Such an indication suggests that, to the extent that there had previously existed any conflict between Norman and his attorney, it was then resolved.[2] Because Norman did not show good cause to warrant substitution of counsel, the

[1] Norman does not assert that there existed a conflict of interest between him and his attorney.

[2] Contrary to Norman's contentions, this was a specific and targeted colloquy when the court twice asked Norman to specifically explain his dissatisfaction with his lawyer and then proceeded to resolve the issue, as well as Norman's other questions and concerns.

trial court did not abuse its discretion when it denied his request for appointment of substitute counsel.

B

Norman next challenges the trial court's refusal to allow him to proceed pro se. The right to self-representation is not self-executing. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). Rather, "[a] criminal defendant who desires to waive the right to counsel and proceed pro se must make an affirmative demand." Modica, 136 Wn. App. at 441. Specifically, the request must have been knowing, voluntary, intelligent, *timely*, and *unequivocal.* Woods, 143 Wn.2d at 586; City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). The context in which a self-representation request is made, particularly where it is made in conjunction with a continuance motion, may also be properly considered. See Woods, 143 Wn.2d at 586; Luvene, 127 Wn.2d at 698-99. "[T]he preferred procedure for determining the validity of a waiver involves the trial court's colloquy with the defendant, conducted on the record." Modica, 136 Wn. App. at 441.

Norman's request to proceed pro se was untimely. Norman initially requested to proceed pro se during the colloquy that ensued after he indicated his desire to fire his attorney. This request was made after the trial had commenced, with the jury impaneled and sworn and jeopardy having attached. He then specifically requested a continuance, should he proceed pro se.[3] To have allowed Norman to proceed pro se at this time—and especially to have

[3] Norman does not challenge the trial court's denial of his request for a continuance.

granted him a continuance—would have imposed a significant burden on the court, witnesses, and jurors, who were all prepared to begin trial. Thus, his request was untimely.

Furthermore, his request was equivocal. Following the trial court's discussion with Norman regarding the admissibility of his prior convictions, Norman indicated that he was ready for the trial to begin. Indeed, after this discussion, he made no further requests to proceed pro se. His only mention of going pro se was a conditional mention, premised upon obtaining a continuance. He never made an unequivocal request.

Norman's request to proceed pro se was both untimely and equivocal. Thus, the trial court did not abuse its discretion in denying Norman's request.[4]

III

Norman next contends that the trial court violated the prohibition against double jeopardy by entering judgment on his convictions for both second degree identity theft and forgery based on his presentation of a single check. We disagree.

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[4] Contrary to Norman's contentions, the trial court did not rely on an incorrect legal standard when it denied Norman's request to proceed pro se. The court told Norman: "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." While this off the cuff statement was perhaps unartful, the judge's point was to inform Norman that, before he would be permitted to proceed pro se, the court would first have to engage in a colloquy with him to confirm that his request was made intelligently, knowingly, and voluntarily. During this colloquy, the court would have informed Norman that, were he to represent himself, he would be bound by the rules of evidence throughout the course of the trial, just as any attorney would be so bound. The court was thus acting in accord with precedent, which requires a court to "assur[e] that decisions regarding self-representation are made with at least minimal knowledge of what the task entails", including assuring that the defendant is "aware of the existence of technical rules and that presenting a defense is not just a matter of telling one's story." Acrey, 103 Wn.2d at 210-11.

Both the federal and state constitutions prohibit double jeopardy. U.S. CONST. amend. V; WASH. CONST. art. 1, § 9. Within this constraint, 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); 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." Baldwin, 150 Wn.2d at 454.

This presents a question of statutory interpretation, which we review de novo. Cannabis Action Coal. v. City of Kent, 180 Wn. App. 455, 469, 322 P.3d 1246 (2014), aff'd, 183 Wn.2d 219, 351 P.3d 151 (2015). The goal of statutory interpretation is to discern and give effect to legislative intent. Cannabis Action Coal., 180 Wn. App. at 469. "If the statute's meaning is plain on its face, we give effect to that plain meaning as the expression of what was intended." TracFone Wireless, Inc. v. Dep't of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010).

We first examine whether the language of the relevant statutes expressly allows for convictions under both statutes for the same act or transaction. Calle, 125 Wn.2d at 776. The identity theft statute provides, in pertinent part:

> Every person who, in the commission of identity theft, shall commit any other crime may be punished therefor as well as for the identity theft, and may be prosecuted for each crime separately.

RCW 9.35.020(6).

Thus, it is clear that the legislature sought to allow convictions for multiple offenses where identity theft is one of the offenses. We will follow this legislative

intent so long as proof of the elements of forgery do not also constitute proof of the elements of identity theft. State v. Lynch, 93 Wn. App. 716, 724-26, 970 P.2d 769 (1999). In other words, was it necessary to prove the forgery in order to prove the identity theft? If it was not, the anti-merger statute controls our analysis.[5]

To prove identity theft, the State presented evidence that Norman transferred Loeck's check—which contained a means of identifying Loeck—to Timberland Bank. This evidence does not support the forgery charge. In contrast, to prove forgery, the State presented evidence that Norman had written in his name as the payee on the check. Likewise, this evidence does not support the identity theft charge. That the crimes had different victims—Loeck was the victim of identity theft, while Timberland Bank was the victim of the forgery—further supports a finding that it was not necessary for the prosecution to establish the elements of the forgery charge in order to establish the elements of the identity theft charge. Thus, the anti-merger statute controls our analysis, see State v. Timothy K., 107 Wn. App. 784, 790-92, 27 P.3d 1263 (2001), and Norman's claim of error fails.[6]

IV

Norman additionally contends that his second degree identity theft conviction violated his right to a unanimous jury verdict. This is so, he asserts,

[5] The legislature clearly envisioned prosecutions alleging both identity theft and forgery. In the forgery statute, it commands, "[i]n a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides." RCW 9A.60.020(2).

[6] This holding is in accord with the Supreme Court's decision in State v. Baldwin, 150 Wn.2d 448.

because, as set forth in RCW 9.35.020, identity theft is an alternative means crime and the State failed to present sufficient evidence of each alternative means. We disagree.

Norman's claim presents a question of statutory interpretation. As stated previously, we review questions of statutory interpretation de novo. Cannabis Action Coal., 180 Wn. App. at 469.

The pertinent statute provides: "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).

While each statute must be individually analyzed, our Supreme Court has established some principles to guide a determination of whether a criminal statute sets forth alternative means of committing a crime.

> One guiding principle is that the use of a disjunctive "or" in a list of methods of committing the crime does not necessarily create alternative means of committing the crime. State v. Peterson, 168 Wn.2d 763, 769, 770, 230 P.3d 588 (2010). Another principle provides that the alternative means doctrine does not apply to mere definitional instructions; a statutory definition does not create a "means within a means." State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007).

State v. Owens, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014).

Our Supreme Court's analysis in Owens is instructive in this case. Therein, the court considered whether trafficking in stolen property is an alternative means crime. The pertinent statute provided: "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).

The defendant in Owens argued, much as Norman argues here, that the verbs listed in the statute supported the conclusion that the legislature had set forth eight alternative means of committing first degree trafficking in stolen property. See Owens, 180 Wn.2d at 95-99. The Supreme Court rejected this interpretation. Owens, 180 Wn.2d at 98-99. It concluded instead that the statute created only two alternative means. Owens, 180 Wn.2d at 98-99.

In determining that each listed verb did not constitute an alternative means, the court explained:

> [I]t 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. Any one act of stealing often involves more than one of these terms. Thus, these terms are merely different ways of committing one act, specifically stealing. . . . [A]n individual's conduct under [this statute] does not vary significantly between the seven terms listed.

Owens, 180 Wn.2d at 99. Stated differently, the verbs listed were so closely related that they did not address distinct acts. Instead, these verbs all defined variations of the same act.

The language of the identity theft statute at issue herein is, in relevant respects, similar to that of the statute interpreted in Owens. As in Owens, the disjunctive list of acts contained within this statute describes a continuum of related activity, rather than various distinct acts. For example, it is difficult to imagine a situation whereby a person transfers a means of identification, but

does not first possess it. Thus, the identity theft statute sets forth only one—not four—means of committing the crime.

Because identity theft is not an alternative means crime, Norman's second degree identity theft conviction was not obtained in violation of his right to a unanimous jury verdict. There was no error.

V

Norman next contends that RCW 9.35.020 violates the First Amendment of the United States Constitution. This is so, he asserts, because it is so overbroad that it prohibits constitutionally protected expression. We disagree.

"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). Speech integral to criminal conduct is not constitutionally protected, United States v. Stevens, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010), nor is untruthful speech protected for its own sake. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

An ordinance that regulates behavior, but not pure speech, will not be overturned unless the overbreadth is real and substantial in relation to the ordinance's plainly legitimate sweep. City of Tacoma, 118 Wn.2d at 839-40. Indeed, "[a]lthough it is possible to conceive of circumstances in which application of [a] statute would be unreasonable, that alone will not render it unconstitutional. Unless there is a *realistic danger* that [a] statute will significantly compromise recognized First Amendment protections of parties not

before the court, [it will not be] declare[d] . . . facially invalid on overbreadth grounds." State v. Stephenson, 89 Wn. App. 794, 804, 950 P.2d 38 (1998) (emphasis added) (citation omitted) (citing Members of City Council v. Taxpayers, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)); see also State v. Knowles, 91 Wn. App. 367, 380, 957 P.2d 797 (1998).

In deference to the legislature's constitutional role as the definer of crimes, we interpret statutes with the presumption that they are constitutional. State v. Pauling, 149 Wn.2d 381, 386, 69 P.3d 331 (2003).

RCW 9.35.020 states that "[n]o 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." This statute specifically regulates behavior, as evidenced in the 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. The statute by its terms prohibits such conduct only when committed with the requisite mens rea—intent to commit a crime—as defined therein. Contrary to Norman's arguments, this language does not create thought crimes. An individual cannot violate the statute unless he or she both possesses the requisite mens rea and commits the proscribed violative action.

Because an individual violates the identity theft statute only under these conditions, it is not overbroad. Indeed, there is no *real* danger that the statute will compromise the expression of constitutionally protected behavior. The only

"speech" truly proscribed here is that which is untruthful and integral to criminal conduct, which the First Amendment does not protect. Thus, the identity theft statute is not overbroad. It does not violate the First Amendment.

Affirmed.[7]

We concur:

[7] Norman filed a supplemental brief pursuant to RAP 10.1(h), in which he asked that we deny any appellate costs the State may request in this case, should it prevail. The State did not respond to this request. Accordingly, even though the State is the prevailing party, we grant Norman's request. No costs shall be awarded.