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STATE OF WASHINGTON

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No. 33955-2-II

IN THE COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

JAMES B. ALLENBACH, Appellant.

---

BRIEF OF APPELLANT

---

Kyra K. LaFayette, #36671  
Steven W. Thayer, P.S.

Attorney for Appellant

STEVEN W. THAYER, P.S.

Attorney at Law  
514 W. 9th Street  
Vancouver, WA 98660  
(360) 694-8290

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1  
2 **I. ASSIGNMENTS OF ERROR**

3 **Assignments of Error**

4 A. The instructions to the jury denied defendant his constitutional right to  
5 due process by relieving the state of the burden of proving every essential  
6 element of the charge of identity theft.

7 B. Defendant assigns error to instruction No. 6:

8 The term 'financial information' means any information identifiable  
9 to the individual that concerns account numbers held for the purpose  
10 of account access or transaction initiation.

11 C. The trial court erred in denying defendant's Motion for New Trial and  
12 Arrest of Judgment based on insufficient evidence of the charge of  
13 identity theft.

14 D. The trial court erred in denying defendant's Motion for New Trial and  
15 Arrest of Judgment based on insufficient evidence of the charge of  
16 forgery.

17 E. The statutory formulation of identity theft contained in RCW  
18 9.35.020/9.35.005 fails to provide ascertainable standards of guilt against  
19 arbitrary enforcement as applied in this case and is therefore  
20 unconstitutionally vague under the Fourteenth Amendment of the United  
21 States Constitution and article 1, section 3 of the Washington State  
22 Constitution.

23 F. The trial court erred in denying defendant's motion to exclude evidence  
24 of a drug debt as constituting improper character evidence that should  
25 have been excluded under ER 404(b).

26 G. The defendant was denied effective assistance as guaranteed by the Sixth  
Amendment of the United States Constitution and article 1, section 22 of  
the Washington State Constitution due to the failure of counsel to (1)  
except to the trial court's instruction No. 6 to the jury, and (2) offer a  
limiting instruction regarding testimony received concerning the  
defendant's drug debt.

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**Issues Pertaining to Assignments of Error**

1. Whether the state was relieved of its burden of proving every element of the crime of identity theft, and the defendant thereby denied due process and a fair trial, where the trial court instructed the jury that the term “‘financial information’ means any information identifiable to the individual that concerns *account numbers*....” instead of instructing that it means “any information identifiable to the individual that concerns account numbers *and balances*,” as required by RCW 9.35.005.
2. Whether the record contains sufficient evidence of identity theft to sustain the verdict of the jury.
3. Whether the record contains sufficient evidence of forgery to sustain the verdict of the jury.
4. Whether the statutes defining identity theft, as applied in this case, are unconstitutionally vague for failure to provide ascertainable standards of guilt to protect against arbitrary enforcement.
5. Whether evidence of a drug debt owed by the defendant should have been excluded under ER 404(b).
6. Whether the defendant was denied effective assistance due to the failure of counsel to (a) except to the court’s instruction No. 6 to the jury, and (b) offer a limiting instruction regarding testimony received concerning the defendant’s drug debt.

1  
2 **II. STATEMENT OF THE CASE**

3 **A. Factual background**

4 On September 22, 2005, James Allenbach presented a check for  
5 payment at Washington Mutual Bank. RP 83, 86. The check was made  
6 payable to James Allenbach. Ex 1. He provided two forms of identification  
7 to the bank teller, his driver's license and credit card. RP 86, Ex 2.

8  
9 The check was drawn on the account of Charles Brown, and  
10 purportedly signed by the account holder when it came into the defendant's  
11 possession. RP 84, 141. Hector, a former co-worker, asked him to cash the  
12 check. RP 25, 140. They previously worked together at Richart Construction  
13 Company. RP 140. The defendant cashed another check drawn on Mr.  
14 Brown's account just one week prior to September 22 without incident. RP  
15 25, 141. On September 22 the bank teller checked the signature card for Mr.  
16 Brown and noticed the signature on the check presented by the defendant did  
17 not match. RP 86-87. The bank teller told the defendant that she was going  
18 to check with the account holder because the signature did not match. RP 87.  
19 143. At that point, he went out to his car where Hector was waiting and told  
20 them they were having problems with the check and asked him to come into  
21 the bank to clear up the matter. RP 143. Hector said, "No, we have to  
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2 leave.” RP 143. The defendant insisted that Hector clear up the problem, but  
3 he refused again, threatened the defendant, and told him to get in the car  
4 because the check was bad. RP 143. Then the defendant left with Hector and  
5 did not return to retrieve his driver’s license and credit card. RP 90, 144.  
6

7 Clark County Sheriff Detective Phillip Sample and Deputy Kyle  
8 Kendall were dispatched to Washington Mutual Bank on September 22 to  
9 investigate the transaction. RP 64-65, 104-105. After receiving the two  
10 pieces of identification left by the defendant and a license plate number on  
11 the vehicle he left in, the deputies accessed his local address. RP 105-106,  
12 19. They made contact with the defendant at that address. RP 20. The  
13 defendant cooperated with the investigation and explained how the check  
14 came into his possession. RP 20-72. Detective Sample and Deputy Kendall  
15 testified that during the initial contact with the defendant, he revealed that he  
16 had a drug dependency and was going to use the money to pay off what he  
17 owed Hector. RP 75. They did not arrest the defendant that day in hopes of  
18 getting more information on Hector. RP 76.  
19

20  
21 In October, they returned to the defendant’s home to continue the  
22 investigation. RP 76. The defendant testified that he just discovered Hector  
23 was a drug dealer and told the deputies he feared for the safety of his family if  
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2 he turned in Hector. RP 144. He also told deputies that Hector was living at  
3 Knoll Apartments off Highway 99. RP 144. During this second contact the  
4 defendant told the deputies that he wished to apologize and repay the Browns  
5 for the first \$425.00 he cashed. RP 76-77, 79.  
6

7 After his second contact with Detective Sample and Deputy Kendall,  
8 the defendant went to Knoll Apartments to speak with the manager, Sheila  
9 Owsley. RP 145, 182. He asked her if the deputies had been investigating  
10 Hector. She said they did not contact her. RP 145. Owsley employed and  
11 rented apartments to Hector Briuzela and the defendant. RP 184-188.  
12

13 **B. Procedural history**  
14

15 An information charging one count of forgery and one count of  
16 identity theft in the second degree was filed December 21, 2004. CP 2. A  
17 jury trial convened before the Honorable Roger A. Bennett on April 13, 2005.

18 The Court denied defendant's Motion to Suppress held prior to trial. RP 8-  
19 13. Following the State's case, the defendant moved to dismiss the charge of  
20 identity theft in the second degree. RP 124. The Court took the matter under  
21 advisement until the conclusion of defendant's case at which point he heard  
22 additional argument on the motion and ultimately it was denied. RP 137,  
23  
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2 182. On April 14, 2005, the defendant was convicted on both counts. CP 21,  
3 22. On October 7, 2005, a hearing was held on Defendant's Motion for New  
4 Trial and Arrested Judgment. RP 232. The Court found the Motion was  
5 timely filed but it was ultimately denied. RP 240.  
6

7 The defendant was sentenced on October 7, 2005 to a term of 90 days  
8 (work release if qualified) with fines and costs and standard probationary  
9 conditions. RP 249. The defendant timely appealed and remains free on  
10 conditions pending disposition by this Court.  
11

### 12 **III. ARGUMENT**

13 **A. Where the trial court instructed the jury that the term “‘financial  
14 information’ means any information identifiable to the individual  
15 that concerns account numbers...,” instead of instructing that it  
16 means “any information identifiable to the individual that  
17 concerns account numbers and balances,” the state was relieved  
18 of its burden of proving every element of the crime of identity  
19 theft, and the defendant was denied his right to due process of  
20 law and a fair trial.<sup>1</sup>**

21 In a criminal prosecution, due process requires the state to prove every  
22 element of the charged crime beyond a reasonable doubt. State v. Smith, 155  
23 Wn.2d 496, 501, 120 P.3d 559 (2005) (citing In re Winship, 397 U.S. 358,  
24 361-64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) and State v. Teal, 152 Wn.2d

25 <sup>1</sup> Although this issue was not raised below, it is of constitutional magnitude and may be  
26 raised for the first time on appeal. State v. Byrd, 72 Wn. App. 774, 782, 868 P.2d 158  
(1994), affirmed, 125 Wn.2d 707, 887 P.2d 396 (1995).

1  
2 333, 337, 96 P.3d 974 (2004)). Jury instructions must list all of the elements  
3 of the crime, since failure to list all elements would permit the jury to convict  
4 without proof of the omitted element. Id. at 502. “In determining the  
5 elements of a statutorily defined crime, principles of statutory construction  
6 require us to give effect to all statutory language if possible.” Id. at 502.  
7

8 Questions of statutory construction are reviewed de novo. Smith, 155  
9 Wn.2d at 501 (citing State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d  
10 196 (2005) and State, Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146  
11 Wn.2d 1, 9, 43 P.3d 4 (2002)). If a statute’s meaning is plain on its face, then  
12 the court must give effect to that plain meaning as an expression of legislative  
13 intent. Campbell & Gwinn, L.L.C., 146 Wn.2d at 9-10. Plain meaning is  
14 discerned from all that the legislature has said in the statute and related  
15 statutes which disclose legislative intent about the provision in question. Id.  
16 If, after this inquiry, the statute remains susceptible to more than one  
17 reasonable meaning, the statute is ambiguous and it is appropriate to resort to  
18 aids of construction, including legislative history. Id.  
19  
20

21 The identity theft statute requires proof of the following: “No person  
22 may knowingly obtain, possess, use, or transfer a means of identification or  
23 financial information of another person, living or dead, with the intent to  
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2 commit, or to aid or abet, any crime.” RCW 9.35.020 (2004). The element  
3 relevant to our inquiry is “financial information,” defined as:

4 ‘Financial information’ means any of the following information  
5 identifiable to the individual that concerns the *amount and conditions*  
6 *of an individual’s assets, liabilities, or credit*:

7 (a) Account numbers *and balances*;

8 (b) Transactional information concerning an account; and

9 (c) codes, passwords, social security numbers, tax identification  
10 numbers, driver’s license or permit numbers, state identicard numbers  
11 issued by the department of licensing, and other information held for  
12 the purpose of account access or transaction initiation. RCW  
9.35.005(1) (2001) (emphasis added).

13 From the foregoing, it is clear that RCW 9.35.005 lists three categories of  
14 “financial information.” The state proceeded under subsection (a), which  
15 requires proof of both “account numbers and balances.”<sup>2</sup> Nevertheless, the  
16 court’s instruction No. 6 reads as follows:

17 The term ‘financial information’ means any information identifiable  
18 to the individual that concerns *account numbers* held for the purpose  
19 of account access or transaction initiation. CP 20 (No. 6) (emphasis  
added).

20 Thus, despite the fact the statute clearly, unambiguously, and specifically  
21 defines “financial information” as requiring proof of *account numbers* and  
22 *balances*, the court’s instruction failed to require that the state prove both,  
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2 Because in the conjunctive. See discussion of statutory construction *infra* at 13-14.

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2 and thereby relieved the state from having to prove an essential element of  
3 identity theft. RP 135-136.

4           Assuming arguendo that the court could find the definition of  
5 financial information somehow ambiguous, ie. that it is susceptible to more  
6 than one interpretation as to whether both account numbers and balances are  
7 essential elements, then we must resort to the canons of statutory construction  
8 and legislative history.

9  
10           *Expressio unius est exclusion alterius* is a canon of statutory  
11 construction meaning to express one thing in a statute implies the exclusion  
12 of another. State v. Delgado, 148, Wn.2d 723, 729, 63 P.3d 792 (2003)  
13 (quoting In re Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002)). The  
14 legislature is presumed to know the rules of statutory construction. State v.  
15 Blilie, 132 Wn.2d 484, 492, 939 P.2d 691 (1997); In re Smith, 139 Wn.2d  
16 199, 204, 986 P.2d 131 (1999). The legislature has consistently referred to  
17 *checks* as “written instruments” under Chapter 9A.60 which includes the  
18 crimes of forgery and obtaining a signature by deception or duress. Unlawful  
19 issuance of checks or drafts also refers to checks as a “check” or “bank  
20 check.” RCW 9A.56.060 (1982). The crimes of forgery and unlawful  
21 issuance of a check were created in 1975, twenty-four years before the crimes  
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2 of identity theft and improperly obtaining financial information passed the  
3 legislature. Thus, the legislature has previously demonstrated an ability to  
4 include *checks* in the definition of financial information, and because the  
5 legislature defined “financial information” in RCW 9.35.005 without  
6 reference to written instruments or *checks*, it is implied that *checks* were  
7 meant to be excluded.  
8

9 Legislative history also supports the defendant’s position that neither  
10 the means of identification prong nor the financial information prong were  
11 intended to encompass the facts in this case. Financial information and  
12 means of identification had significantly different purposes when they were  
13 created in 1999. Originally they were two separate crimes. The first was a  
14 crime to improperly obtain financial information from a financial information  
15 repository. The latter was a crime to use or transfer another person’s means  
16 of identification with intent to commit a crime. RCW 9.35.010 (2001) still  
17 prohibits improperly obtaining financial information from a repository.  
18 However, it was not until 2001 that financial information was also included  
19 in the identity theft statute as an alternative to means of identification. Wa.  
20 Sen. 5449, 57<sup>th</sup> Leg., 1<sup>st</sup> Sess. 21 (March 5, 2001). The definition of financial  
21 information is the same for improperly obtaining financial information and  
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2 identity theft. As a result, the legislative history shows checks did not come  
3 within the statutory definition of financial information for the crime of  
4 improperly obtaining financial information, and because the definition is the  
5 same for identity theft, the legislature clearly did not contemplate the  
6 possession, use, or transfer of checks in creating the crime of identity theft.  
7

8 The Washington State Legislature first addressed improperly  
9 obtaining financial information and identity theft in 1999. Predictably the  
10 original draft did not pass, but, significantly, it defined financial information  
11 as follows:  
12

13 'Financial information' means any information related to the assets,  
14 liabilities, or credit of an individual and is identifiable to the  
15 individual, *including account numbers, account balances and other*  
16 *account data*, transactional information concerning any account, and  
17 codes, passwords, and other means of access to accounts or means to  
18 initiate transactions, such as mother's maiden name. Financial  
19 information includes an individual's social security, driver's license,  
20 and tax identification number. Wa. H. 1250, 56<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess.  
21 2 (January 20, 1999).

18 Less than one month later, the legislature changed the definition of financial  
19 information in SHB 1250, which would later pass the House and Senate:  
20

21 'Financial information' means, to the extent it is nonpublic, any of the  
22 following information identifiable to the individual that concerns the  
23 amount and conditions of an individual's assets, liabilities, or credit:

- 24 (i) *Account numbers and balances;*  
25 (ii) Transactional information concerning any account; and  
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3 (iii) Codes, passwords, social security numbers, tax identification  
4 numbers, driver's license or permit numbers, state identocard  
5 information held for the purpose of account access or  
6 transaction initiation. Wa. H. 1250, 56<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess. 2  
(February 22, 1999).

7 The *last antecedent rule* of statutory construction provides that, unless  
8 contrary intention appears in the statute, qualifying words and phrases refer to  
9 the last antecedent. In re Smith, 139 Wn.2d at 204. "And" is the qualifying  
10 word and "account numbers" is the antecedent and there is no comma prior to  
11 the term balances. The legislature previously had account numbers and  
12 account balances separated by a comma, but changed the language to its  
13 present form, "account numbers and balances." The term "and" is  
14 conjunctive, not disjunctive, therefore both are required. Thus, the legislative  
15 intent is clear in this case that *account numbers* and *balances* are both  
16 essential elements of financial information.  
17

18 Finally, to uphold the defendant's identity theft conviction would  
19 render portions of RCW 9.35.005(1) meaningless; specifically, the language  
20 created by the legislature requiring proof of both "account numbers and  
21 balances" to fulfill the definition of "financial information" under subsection  
22 (a). See State ex rel. Gallwey v. Grimm, 146 Wn.2d 445, 464, 48 P.3d 274  
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2 (2002) (whenever possible, courts should avoid a statutory construction  
3 which nullifies, voids, or renders meaningless or superfluous any section or  
4 words).

5  
6 Having established that the jury was improperly instructed, it is well-  
7 established: “Instructional error is presumed to be prejudicial *unless it*  
8 *affirmatively appears to be harmless.*” State v. Brown, 147 Wn.2d 330, 340,  
9 58 P.2d 889 (2002). The test for harmless error is whether it appears beyond  
10 a reasonable doubt that the error complained of did not contribute to the  
11 verdict obtained. Id. at 341. When applied to an element omitted from, or  
12 misstated in, a jury instruction, the error is harmless if that element is  
13 supported by uncontroverted evidence. Id. There was no evidence of account  
14 balances presented by the state, therefore the error was not harmless, and  
15 defendant’s conviction on the identity theft count must be reversed.  
16

17  
18 **B. The record contains insufficient evidence of identity theft to sustain**  
19 **the verdict of the jury.**

20 A reviewing court will reverse a conviction for insufficient evidence  
21 only where no rational trier of fact could find that all elements of the crime  
22 were proved beyond a reasonable doubt. Smith, 155 Wn.2d at 501 (citing  
23 State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). The evidence  
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1  
2 is insufficient in this case to sustain a conviction of identity theft because the  
3 facts do not fall within the purview of the statute and therefore no rational  
4 trier of fact could find all elements were proved beyond a reasonable doubt.

5  
6 The first prong of the identity theft statute requires proof of a means  
7 of identification, defined as:

8 ‘Means of identification’ means information or *an item that is not*  
9 *describing finances or credit* but is personal to or identifiable with an  
10 individual or other person, including: A current or former name of the  
11 person, telephone number, an electronic address, or identifier of the  
12 individual or a member of his or her family, including the ancestor of  
13 the person; information relating to a change in name, address,  
14 telephone number, or electronic address or identifier of the individual  
15 or his or her family; a social security, driver’s license, or tax  
16 identification number of the individual or a member of his or her  
17 family; and other information that could be used to identify the  
18 person, including unique biometric data. RCW 9.35.005(2) (2001)  
19 (emphasis added).

20 The state relied on the name and address located on the check as  
21 constituting a means of identification: “In this case, he—his use of the check  
22 containing the victim’s name fell under the ‘means of identification.’” RP  
23 236. However the statute specifically excludes from its definition *any item*  
24 *describing finances or credit*. Because a check describes finances or credit it  
25 should have been excluded.

26 In 2004 the legislature made the following findings:

The legislature finds that identity theft and other types of fraud is a

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2 significant problem in the state of Washington, costing our citizens  
3 and businesses millions each year. The most common method of  
4 accomplishing identity theft and other fraudulent activity is by  
5 securing a fraudulently issued driver's license. It is the purpose of  
6 this act to significantly reduce identity theft and other fraud by  
7 preventing the fraudulent issuance of driver's licenses and  
8 identicards. Wa. Sen. 5412, 58<sup>th</sup> Leg. , 1<sup>st</sup> Sess. 1 (February 10,  
9 2004).

10 The legislature expressly stated their concern with identity theft accomplished  
11 by means of fraudulently issued driver's licenses, and declares that the  
12 *purpose* of the act is to reduce the fraudulent issuance of driver's licenses and  
13 identicards. In the same bill the legislature also required the Department of  
14 Licensing to implement a new biometric matching system by January 1, 2006  
15 to verify the identity of an applicant for renewal or issuance of a license or  
16 identicard. *Id.*; see RCW 46.20.037 (2004). Consequently, it is clear that the  
17 legislative intent, as it pertains to means of identification, was narrowly  
18 focused on identity cards, and it is not consistent with the statute to include  
19 the standard name and address printed on a check.

20 As discussed above, the second prong of identity theft is "financial  
21 information." In the alternative, the state attempts to classify the check  
22 presented by the defendant as financial information, specifically account  
23 numbers and balances. During defendant's motion for a new trial the state  
24 argued, "the account numbers and such fell under the 'identification'—it fell  
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2 within the provision for financial information.” RP 236. But the only  
3 evidence submitted to the jury was the *account number* running along the  
4 bottom of the check. The court received no testimony concerning *account*  
5 *balances*, or that such information was ever obtained, possessed or used by  
6 the defendant. If the state argues that the check *does not* describe finances or  
7 credit, so that it falls under the definition for means of identification, they  
8 cannot at the same time be heard to argue that same check *does* describe  
9 assets, liabilities, or credit under the definition of financial information. The  
10 state cannot have it both ways.  
11

12  
13 **C. The record contains insufficient evidence of forgery to sustain the**  
14 **verdict of the jury.**

15 The elements of forgery require, “with intent to injure or defraud: [h]e  
16 possesses, utters, offers, disposes of, or puts off as true a written instrument  
17 which he knows to be forged.” RCW 9A.60.020(1)(b) (2003). The state  
18 failed to prove the defendant acted with intent or had knowledge the check  
19 was forged. In evaluating sufficiency of the evidence, the existence of a fact  
20 cannot rest upon guess, speculation or conjecture. State v. Hutton, 7 Wn.  
21 App 726, 728, 502 P.2d 1037 (1972).  
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23 In State v. Sewell, 49 Wn.2d 244, 246, 299 P.2d 570 (1956), for  
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2 example, the defendant was charged with burglary. The state's case was  
3 entirely circumstantial, essentially based upon the fact that Sewell's  
4 fingerprint was found on the broken glass of the rear door and that someone  
5 had entered the premises. In reversing the conviction, the state supreme court  
6 held that the record contained no evidence or circumstance from which the  
7 jury could determine that Sewell had entered the premises, and the verdict or  
8 product of speculation pyramiding inference upon inference; first, that the  
9 fingerprint was placed on the glass during the evening in question, second,  
10 that the defendant broke the glass, and third, that, having broken the glass, he  
11 thereafter entered the premises.  
12

13  
14 Likewise in the case at bench the verdict on the forgery count amounts  
15 to speculation based upon inference pyramided upon inference. First, the  
16 defendant needed money to pay off a drug debt; second, Hector falsely  
17 completed the instrument; third, Hector would credit the cash received from  
18 the forged check towards defendant's drug debt; fourth, the defendant used  
19 his own identification when cashing the check because he did not think he  
20 would get caught; and fifth, the defendant knew the previous check was  
21 forged.  
22

23 Moreover, there was no testimony regarding the defendant's financial  
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2 situation tending to show he would use any means possible to pay off the  
3 drug debt. The state did not establish who falsely completed the check. They  
4 did not present any evidence proving the cash received would be credited  
5 towards the debt, or that he knew the previous check was forged.  
6

7 Nor did the state prove knowledge. Possession alone is insufficient to  
8 establish knowledge, although possession together with slight corroborating  
9 evidence may be sufficient. State v. Scoby, 117 Wn.2d 55, 62, 1 P.2d 1358  
10 (1991). Defendant's drug debt does not constitute sufficient corroborating  
11 evidence to prove knowledge that the check was forged.  
12

13 This is not a case where the defendant used a fictitious name to cover  
14 his identity, which could be used as corroborating evidence of guilty  
15 knowledge. See State v. Tollett, 71 Wn.2d 806, 811, 431 P.2d 168 (1967),  
16 cert. denied 392 U.S. 914, 88 S.Ct. 2076, 20 L.Ed.2d 1373 (1968). It is  
17 uncontested that the defendant did not make, complete, or alter Mr. Brown's  
18 signature or otherwise fill out the check. He received the check which was  
19 already filled out and endorsed it with his own name. Just a week prior the  
20 date in question he cashed a check allegedly completed by Mr. Brown  
21 without incident. Under these circumstances a reasonable person would  
22 assume a second check from the same person was validly executed, not  
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2 forged. And that is exactly what happened here. The defendant did not have  
3 knowledge that the check was forged until after he presented the check for  
4 payment, as evidenced by the fact that he attempted to bring Hector back in  
5 the bank to clear up the confusion. As a result, there is no evidence that the  
6 defendant possessed the requisite knowledge at the time he possessed or  
7 disposed of the check, and the forgery conviction should be reversed.<sup>3</sup>  
8

9 **D. The statutes defining identity theft, as applied in this case, are**  
10 **unconstitutionally vague for failure to provide ascertainable**  
11 **standards of guilt to protect against arbitrary enforcement.**

12 According to the Fourteenth Amendment of the United States  
13 Constitution and article 1, section 3 of the Washington State Constitution, the  
14 due process vagueness doctrine provides citizens with fair warning of what  
15 conduct they must avoid and also protects them from arbitrary, ad hoc, or  
16 discriminatory law enforcement. State v. Sansone, 127 Wn.App. 630, 638,  
17 111 P.3d 1251 (2005). Under the due process clause a statute is void for  
18 vagueness if either: (1) it does not define the offense with sufficient  
19 definiteness such that ordinary people can understand what conduct is  
20 prohibited, or (2) it does not provide ascertainable standards of guilt to  
21 protect against arbitrary enforcement. Id. at 638-639. Vagueness challenges  
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<sup>3</sup> Without knowledge the check was forged the defendant could not have had "intent to  
25 injure or defraud." If the evidence is insufficient to prove knowledge of forgery, it must  
26 follow that the state's evidence was insufficient to prove intent to commit the crime of

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2 to enactments which do not involve First Amendment rights must be  
3 evaluated as applied to the facts of each case, and not reviewed for facial  
4 vagueness. State v. Douglass, 115 Wn.2d 171, 182-183, 795 P.2d 693  
5 (1990). RCW 9.35.005 is unconstitutionally vague as applied in this case.  
6

7 First, it is apparent from the trial court's lengthy discussion that  
8 ordinary people cannot understand what conduct is prohibited by the identity  
9 theft statute. RP 124-137, 162-182. The court itself debated whether a check  
10 endorsed and presented for payment without assuming anyone else's identity  
11 fits within the statute. If lawyers and judges cannot understand what is  
12 prohibited, it is probable others without legal training won't either.  
13

14 Second, the definition of financial information does not provide  
15 ascertainable standards of guilt in this case because the court erroneously  
16 instructed the jury on the elements of the crime. Failure to provide  
17 ascertainable standards of guilt would lead to arbitrary enforcement, because,  
18 as the State argued at trial, "[t]he intent was to make [identity theft] as broad  
19 as possible to cover any time you misuse someone else's information." RP  
20 168. Without a clear understanding of the statutory elements, people would  
21 be prosecuted whether or not intended by the legislature. In this case, the  
22 court structured the elements of financial information to fit the theory  
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25 identity theft as well.

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2 provided by the state instead of instructing according to the statutory  
3 requirements. RP 135. Consequently, the statute is unconstitutionally vague  
4 as applied to the defendant, and the identity theft conviction must be  
5 reversed.  
6

7 **E. Evidence of the drug debt owed by the defendant should have**  
8 **been excluded under ER 404(b).**

9 ER 404 (a) generally requires exclusion of evidence of other crimes,  
10 wrongs or acts when offered to prove character. Such evidence may be  
11 allowed for other purposes, such as proof of intent or knowledge. ER 404(b).  
12

13 Evidence that is otherwise admissible under ER 404(b) should be  
14 excluded under ER 403 if its probative value is outweighed by the danger of  
15 unfair prejudice. ER 403 is an integral part of the test for admissibility under  
16 ER 404(b), thus ER 403 is not a separate basis for objection that needs to be  
17 considered only if raised in the court below. Karl B. Tegland, Courtroom  
18 Handbook on Washington Evidence vol. 5D, 233 (2005 ed., West 2004). The  
19 court must balance probative value against prejudicial effect on the record in  
20 order to justify admission of the evidence. State v. Jackson, 102 Wn.2d 689,  
21 689 P.2d 76 (1984).  
22

23 Admission of ER 404(b) evidence is reviewed for abuse of discretion.  
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2           State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). An abuse exists  
3 when a trial court's decision is manifestly unreasonable or based on untenable  
4 grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615  
5 (1995). In the context of this case, the defendant's drug use and debt owed  
6 constituted improper character evidence and should have been excluded  
7 under ER 404(b).  
8

9           In State v. LaFever, 102 Wn.2d 777, 690 P.2d 574 (1984) (overruled  
10 on other grounds), the trial court admitted evidence of defendant's heroin  
11 habit to prove motive to commit robbery. The Court of Appeals upheld  
12 admission of the drug use evidence despite its prejudicial effect, because: (1)  
13 the trial court gave a limiting instruction on the proper use of defendant's  
14 drug addiction, (2) conclusive evidence that the defendant had a costly heroin  
15 habit and did not have sufficient income to finance his addiction existed, and  
16 (3) empirical data showed a dramatically increased likelihood that a person  
17 addicted to heroin will commit robbery. State v. LaFever, 35 Wn. App. 729,  
18 734, 669 P.2d 1251 (1983), rev'd, 102 Wn.2d 777, 690 P.2d 574 (1984). The  
19 Washington Supreme Court reversed the decision of the court below and held  
20 the trial court erred in admitting evidence of defendant's heroin habit.  
21 LaFever, 102 Wn.2d at 785.  
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2 Similarly, in the case at bench, the trial court admitted evidence of  
3 defendant's use of drugs and drug debt as establishing an inference that  
4 defendant somehow had knowledge the check was forged. RP 50. Clearly, if  
5 the evidence was improperly admitted in LaFever, where the court at least  
6 had empirical data connecting the use of drugs to the type of crime charged,  
7 the evidence was improperly admitted in the case at bench where no such  
8 empirical data exists.  
9

10 The defendant's drug debt constituted the state's only evidence of  
11 knowledge and intent. As a result the jury could not have convicted the  
12 defendant of either forgery or identity theft in its absence. Consequently, the  
13 erroneous admission of the evidence requires reversal. State v. Acosta, 123  
14 Wn. App. 424, 98 P.3d 503 (2004); see State v. Robtoy, 98 Wn.2d 30, 44,  
15 653 P.2d 284 (1982).  
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18 F. **The defendant was denied effective assistance due to the failure of**  
19 **counsel to (1) except to the court's instruction No. 6 to the jury,**  
20 **and (2) offer a limiting instruction regarding testimony**  
21 **concerning the defendant's drug debt.**

22 To demonstrate ineffective assistance of counsel, a defendant must  
23 show: (1) defense counsel's representation was deficient, and (2) defense  
24 counsel's deficient representation prejudiced the defendant. State v.  
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2 McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Representation is  
3 deficient if it fell below an objective standard of reasonableness based on  
4 consideration of all the circumstances. State v. Rodriguez, 121 Wn. App.  
5 180, 184, 87 P.3d 1201 (2004). The defendant was prejudiced if there is a  
6 reasonable probability that, except for counsel's unprofessional errors, the  
7 result of the proceeding would have been different. McFarland, 127 Wn.2d at  
8 334.  
9

10 Courts engage in a strong presumption counsel's representation was  
11 effective, but the presumption can be overcome by showing deficient  
12 representation. Id. at 336. The defendant can prove deficiency by showing  
13 an absence of legitimate strategic or tactical reasons supporting the  
14 challenged conduct. Id.  
15

16 In the case at bench, defense counsel failed to object to the instruction  
17 on financial information. The court's instruction erroneously reduced the  
18 burden on the State to prove all elements of identity theft. As previously  
19 discussed, the court struck account balances from the instruction. In  
20 Rodriguez, for example, the Court of Appeals held the self-defense  
21 instructions proposed by defense counsel relieved the state of its burden to  
22 disprove self-defense and reversed his conviction. 121 Wn. App. at 188. The  
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2 court found defense counsel's performance deficient because, as in the case at  
3 bench, no conceivable strategic explanation exists which could justify  
4 relieving the State of its statutorily mandated burden of proof. Id. at 187.  
5

6 Defense counsel also failed to request a limiting instruction regarding  
7 evidence that defendant used drugs and owed Hector for a drug debt, despite  
8 the fact that the court to give such an instruction. RP 13. The defendant's use  
9 of drugs and the existence of a drug debt was the only evidence of knowledge  
10 presented by the State. Because evidence of drug use is extremely  
11 prejudicial, no conceivable strategic explanation for defense counsel's failure  
12 to request a limiting instruction exists, and this case should be reversed and  
13 remanded for a new trial.  
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2 **IV. CONCLUSION**

3 Based upon the foregoing arguments and authorities, defendant's  
4 conviction and sentence on both counts should be reversed, and this case  
5 remanded for a new trial.  
6

7  
8 DATED this 13<sup>th</sup> day of March, 2006.  
9

10 Respectfully submitted,

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13 Kyra K. LaFayette

14 Attorney for Appellant  
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STATE OF WASHINGTON

BY CMm  
DEPUTY

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,	)	
Respondent,	)	No. 33955-2-II
	)	
vs.	)	PROOF
	)	OF SERVICE
JAMES B. ALLENBACH,	)	
Appellant.	)	
_____	)	

I declare that on March 13, 2006, true copies of the Brief of Appellant and Verbatim Report of Proceedings were served on counsel of record for Respondent via hand delivery in an envelope addressed as follows:

James David  
Deputy Prosecuting Attorney  
1013 Franklin Street  
Vancouver, WA 98660

I further declare that a true copy of the Brief of Appellant was served on Appellant James Allenbach via first-class mail in an envelope addressed as follows:

James Allenbach  
1607 NE 156<sup>th</sup> Street  
Vancouver, WA 98686

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed at Vancouver, Washington this 13<sup>th</sup> day of March, 2006.

Betty Olsen  
Betty Olsen, Legal Assistant

Proof of Service- 1

STEVEN W. THAYER, P.S.

Attorney at Law  
514 W. 9th Street  
Vancouver, WA 98660  
(360) 694-8290