

Original

NO. 33955-2-II

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

STATE OF WASHINGTON, Respondent, v. JAMES B. ALLENBACH, Appellant.
FROM THE SUPERIOR COURT FOR CLARK COUNTY THE HONORABLE ROGER A. BENNETT CLARK COUNTY SUPERIOR COURT CAUSE NO. 04-1-02482-0
BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

On December 21, 2004, the defendant was charged by way of Information with two counts: Identity Theft in the Second Degree which purportedly occurred on September 22, 2004, and Forgery also committed on the same day. The transaction involved concerned the cashing of a forged check in the amount of \$450.00 drawn on the account of Charles M. Brown at the Washington Mutual Bank.

To establish this, the State called Leone Billmeyer. Ms. Billmeyer was a bank teller at the Washington Mutual Bank and was working on September 22, 2004. (RP 83-84). She testified that a customer came into the bank to attempt to cash a check. She requested of him two pieces of identification since he wasn't a regular customer of that bank. (RP 85-86). He gave her a driver's license and a credit card for purposes of his identification. (RP 86). Because of the amount of the check, she took the additional step of attempting to verify the signature of the maker of the check against signature cards that are on line. She indicated that the signature in the computer and the signature on the check that she was given

did not match. (RP 86-87). At that point, she told the customer (the defendant) that she was going to have to call the maker of the check to see if he had written the check. She indicated that she did call Mr. Brown, the purported maker of the check (RP 87-88). He did not write the check.

While she was on the phone, the defendant left the bank and went outside and was seen with someone else. (RP 89). He did not return to the bank to pick up the check or his items of identification (driver's license and credit card) that he had left in the bank. (RP 90). She indicated when she told the defendant that she needed to check with the account holder to verify the check that he appeared to her to be nervous. (RP 92). She indicated that once he left, that she telephoned the police. They came out and took the check and the pieces of identification. (RP 93-94).

The teller, on cross examination, was asked whether or not the defendant had indicated to her that he was going to bring in the person who wrote the check to him. In otherwords, he was going to bring that person into the bank to explain the situation. She said no, that he did not make such an offer. (RP 96).

The State also called Charles M. Brown, who was the purported maker of the forged check. He indicated that he had

been banking with Washington Mutual Bank for approximately fifteen years although it was principally down in California, since they had just, within the last several years, moved up to the Pacific Northwest. (RP 98). He testified to the jury that his initial order of checks from Washington Mutual had not arrived at his mailbox. (RP 100). He indicated that the check that was cashed was one that he had not received. It had his account number on it and also contained personal information concerning him. Further, he indicated that he did not recognize the defendant nor did he give the defendant any of his personal information at any previous time. He indicated that he did not give the defendant permission to try to cash a check using his, Mr. Brown's, personal information. He indicated that he had not signed the check and it was not his writing. He never wrote a check for \$450.00 to the defendant. (RP 101-102).

The next witness called by the State was Clark County deputy sheriff, Kyle Kendall. Deputy Kendall indicated that he and Detective Sample responded to the Washington Mutual Bank where they received the check and personal identification. He testified that they went over to Mr. Allenbach's residence to talk to him concerning this matter. He testified that they were initially

called out to the bank at about 10:30 in the morning and it was several hours later when they made contact with the defendant at his home. (RP 107). He indicated that when they first went to the defendant's home that he was willing to answer questions. He appeared to the officer to be very nervous, and very excited. (RP 108).

He admitted to the officer that he had been at the Washington Mutual Bank earlier in the day and that he had left his Visa card and driver's license at the bank, along with a check. (RP 109). They asked him where he got the check and he told the officers that he got it from an acquaintance. At first he was unable to provide a name of this acquaintance. Later in the discussion with the defendant, he indicated that the acquaintance's name was Hector, but he had no further information beyond that. (RP 110).

The officer described the defendant's mannerisms while answering the questions.

ANSWER: (KENDALL): "Mr. Allenbach -- Every question he would ask him, he would repeat back to us, almost unsure of himself, before he would answer. His responses came slowly to our questions.

Again, he appeared very jittery. He, himself, would sit or stand, walk around the room, sit, stand, again very restless in his man -- his motions and actions." (RP 110, l. 14-21).

The officer indicated that when they first talked to him, he didn't know who gave him the check. Later, he indicated that the person's name was Hector. The discussion then went on to trying to identify who Hector was and what involvement he might have in this. He indicated to the officers that he had no idea how to contact Hector, no phone number to contact him at, he just indicated that Hector always contacted him. (RP 111-112). "He indicated that if he needed to contact Hector that Hector would call him and that he would usually meet him somewhere. He indicated that he would usually meet him somewhere around the area of the Wal-Mart on Highway 99." (RP 112).

He indicated that he had cashed a check previously for Hector, at a different Washington Mutual location, for roughly the same amount, approximately \$425.00. (RP 113).

The officers asked him why he was cashing checks for Hector and he replied that Hector had trouble with his identification, or was unable to get identification and needed assistance in cashing some checks. Initially, he told them that he was just doing the check cashing to help Hector but after further questioning of the defendant, he finally admitted to the officers that he owed

Hector money and was cashing the checks and giving Hector the money to pay off a debt. As they discussed this in further detail, the defendant admitted that he had a drug problem and that the money that he received from these checks went to Hector to pay off a crystal meth habit that he had. (RP 114-115).

At this point in the discussion with the defendant, they left to try to find Hector and gather more information about him. They left the defendant's residence on September 22, 2004. They returned to the defendant's residence on October 1, 2004, after being unsuccessful in locating the gentleman named Hector and after they had further discovered that the check that he talked about passing at a previous time for Hector at a different Washington Mutual Bank had come back to the same account (Mr. Brown's). (RP 116-117). On October 1, 2004, when they talked to the defendant he "stated almost instantaneously when we opened the door that he had had a conversation with his wife and they wanted to repay the \$425.00 from the previous check and asked us if we could advise him of Mr. Brown's address and phone number so that they could make an apology to Mr. Brown." (RP 118, l. 2-7).

He further went on to indicate that he had notified Hector that he would no longer be purchasing drugs from him and that he

would not talk to him in the future. He told the officers that he didn't know how to find Hector.

The State also called Detective Sample as a witness. His testimony was very similar to the other police officer.

The defendant testified in his own behalf. He indicated that after he attempted to pass the check, that he went out to talk to Hector and told him that there was a problem with it and Hector told him to get into the car and the defendant said that Hector threatened him and told him it was a bad check. (RP 143). He further indicated that he has not seen Hector since then and in fact he indicated that Hector had moved to California. (RP 144). He indicated also that when the officers came back for the second interview he had found out that Hector was a drug dealer and that he feared for his family. (RP 144).

The defense attorney talked to the defendant about the second time that the officers showed up and asked him whether or not he told them that this was paying back a drug purchase. The defendant denied this.

"QUESTION: (MR. HARP) Now, there were some statements that according to the police officers you made to them about repaying a drug debt. Could you explain that to us, please?"

ANSWER: (MR. ALLENBACH) The second time when they showed up, I told them that I said that I feared for my wife and the family. I said, is there a way that I can get a hold of this gentleman and pay back this debt to him, even though I didn't have any part of the money?

QUESTION: Okay, that's Mr. Brown. Did – now, my question concerned a debt for drugs, supposedly, that you owed this Hector or somebody.

ANSWER: There was no debt of drugs. There was nothing involved in that. I told them he was a drug dealer and he offered me drugs. . . .

QUESTION: Did you tell the police officer that you had purchased drugs from Hector?

ANSWER: No. (RP 145, l. 24 – 146, l. 18).

On cross examination, the defendant was asked concerning Hector and the leaving of his identification and other items at the bank. His responses were as follows:

“Q: And during that four months, you worked with Hector for at least a month –

A: No.

Q: -- prior to September –

A: Yeah.

Q: -- 22nd; is that right?

A: Yeah.

Q: Okay. But you didn't tell the deputies that you worked with him at the construction company,

A: Because I was protecting him. I didn't know what to – what exactly was going on.

Q: Okay. So you concealed that information from the deputies. Let's talk about other things that were concealed and hidden.

When you were in the bank, you go up to the bank teller, you handed the check over –

A: Yes.

Q: -- right? Okay.

You give 'em the check, you give 'em your driver's license, you give 'em your ID card.

A: Uh-huh.

Q: And you are asked about the validity of the check and you leave those there, you leave your driver's license, you leave your check, you leave your Visa card.

A: Yeah.

Q: And then Hector told you you needed to go?

A: Yes.

Q: And you went home?

A: He threatened me.

Q: You went home.

A: Yeah, but he threatened me, he said, "Get in the car or you're in trouble."

Q: Leaving your ID there.

A: I didn't want him to take the car.

Q: But you didn't go back and get it, did you?

MR. HARP: Objection, argumentative.

MR. DAVID: I'll –

THE COURT: Overruled.

MR. DAVID: -- rephrase that.

BY MR. DAVID: (Continuing)

Q: Did you go back and get your driver's license?

A: No, because he told me –

Q: Did you go back and get your credit card?

A: No.

Q: Did you go back and explain to the bank that there was a mistake?

A: No.

Q: You just went home and ignored it.

A: No.”

(RP 149, l. 15 – 151. l 14).

As part of rebuttal, the State recalled Deputy Kendall who further clarified the information concerning the purchasing of drugs from Hector and that he was cashing these checks to pay off the drug debt. The testimony went as follows:

"Q: (MR. DAVID) Just going back to the discussion a couple of minutes ago, the defendant testified that he had not talked to you about the – about him purchasing drugs or controlled substances from Hector.

Do you recall a conversation where you talked about his purchase of controlled substances from Hector?

A: (KENDALL) Yes, sir.

Q: Please explain.

A: Okay. And I'm gonna refer back to my report. Towards the middle of the report, I had talked to Mr. Allenbach and one of the statements Mr. Allenbach stated was Allenbach then asked us if we thought he stole the money, because he then stated, 'I'm too stupid to think of anything like this.'

Deputy Sample asked Allenbach if he received any part of the money when he would cash the checks for Hector. Allenbach admitted that he did not receive any money, but the money went to pay – went to Hector to pay off Allenbach's crystal meth habit, and that was –

Q: So you talked to him about him paying his drug debt back to Hector.

A: Yes, sir.

THE DEFENDANT: Oh, God.

BY MR. DAVID: (Continuing)

Q: And he indicated – so he indicated he had been buying drugs from –

A: He did –

Q: -- Hector.

A: -- he admitted he had a problem.

Q: And that was apparently continuing?

A: He didn't say at the moment if it was continuing, he said that he had had a problem and that he owed Hector, and that was one of the reasons he had engaged in helping Hector apparently with cashing these checks.

Q: Now, the other issue that I just wanted to go through is the discussion about trying to locate Hector?

A: Yes.

Q: Did you have any discussion about how he -- did he explain to you about how you could locate Hector?

A: Mr. Allenbach made no statements of where we could find Hector, where he was located. We had -- one of the reasons we had left and then come back at a later time was to hopefully Mr. Allenbach would have some more clear information so we could pursue this Hector if he really had presented Mr. Allenbach these checks.

And none of that information was provided by Mr. Allenbach to us of where Hector's lo- -- whereabouts where or how we could locate him."

(RP 155, l. 14 – 157, l. 13)

II. RESPONSE TO ASSIGNMENTS OF ERROR A AND B

The first two assignments of error deal with jury instructions given by the court.

No exceptions were taken by the defense to the giving of the instructions by the court. (RP 208). In fact, the prosecution and defense spent some time with Judge Bennett, on the record, going through the jury instructions and tailoring them to the fashion that was agreeable to all parties. (RP 193-204). The State submits that this issue has not been preserved for appeal. State v. Sengxay, 80 Wn.App. 11, 906 P.2d 368 (1995). In order to preserve this issue for appeal, the defendant needed to have complied with CrR 6.15(c) and excepted to the jury instructions. State v. Salas, 127 Wn.2d 173, 897 P.2d 1246 (1995). Jury instructions that are not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); State v. Salas, *supra* at 182.

The State would also submit that the defense should be precluded from challenging the jury instructions under the concept of invited error. Defense counsel participated in crafting the instructions that the defense now seeks to challenge. Error, if any, was invited and the instructions became the law of the case. State

v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). However, assuming that the Court of Appeals may wish to address the issue, the State offers the following arguments:

The number of instructions given on any point generally rests in the trial court's discretion and the court has considerable discretion in determining how the instructions will be worded. State v. Ellison, 36 Wn.App. 564, 576, 676 P.2d 533 (1984); State v. Dana, 73 Wn.2d 533, 536, 439 P.2d 403 (1968). Instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and properly inform the jury of the applicable law. State v. Irons, 101 Wn.App. 544, 549, 4 P.2d 174 (2000).

A copy of the court's instructions to the jury in our case is attached hereto and incorporated by this reference. (CP 20).

The elements instruction for Identity Theft in the Second Degree is Court's Instruction No. 5. The State submits that this is an accurate description of the essential elements of the crime. The crime can be committed by the defendant knowingly using a means of identification or financial information of another person if, the defendant or an accomplice, is doing that with an intent to commit any crime. (RCW 9.35.020). Even if the court were to find some

type of problem with the definition, an instructional error requires reversible only when it relieves the State of its burden of proving every essential element of the crime. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003).

Identity theft is found under RCW 9.35.020. The applicable sections of the statute read as follows:

“RCW 9.35.020. Identity Theft.

(1) 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.

(3) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value that is less than \$1,500.00 in value or when no credit, money, goods, services, or anything of value is obtained shall constitute Identity Theft in the Second Degree. Identity Theft in the Second Degree is a Class C felony punishable according to Chapter 9A.20 RCW.”

In State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), it was determined that identity theft is not the same as forgery. These crimes involve different victims and different factual recitations and, as such, do not violate double jeopardy. It was also decided by the Supreme Court that identity theft is not unconstitutionally vague.

In State v. Leyda, 122 Wn.App. 633, 94 P.3d 397 (2004), it was determined that credit cards can be used for purposes of identity theft. The Court went on to further explain the rationale behind the identity theft statutes.

“Under Leyda’s reading of the statute, repeated use of a stolen credit card for weeks or months would be punished no more severely than a single use of the same card. One who possessed a stack of stolen credit cards, intending to use them, but never doing so, would commit as many crimes as the stack held cards, while the thief who possessed only one card, but used it over and over, would commit only one crime. The identity thief would thus have a strong incentive to use a stolen card as often and for as much as possible, knowing that he or she could be charged with only one count. We do not believe the Legislature intended these results.

Further, identity theft causes several different kinds of harm. A thief who steals money harms the victim only once, whether or not he later spends the money. But a thief who uses stolen personal information to make purchases steals the information, and the credit, and the goods. These are separate harms, identified by the Legislature to be separately punished.

We hold that the unit of prosecution for identity theft is the use of the victim’s means of identification or financial information with intent to commit a crime. Leyda used a stolen credit card in four separate transactions. Double jeopardy was not violated when Leyda was convicted of four counts of Second Degree Identity Theft.” Leyda at 637-638.

In State v. Fisher, 131 Wn.App. 125, 126 P.3d 62 (2006), the defendant was charged with identity theft and possession of

stolen property charges. At the time of the defendant's arrest, he had multiple pieces of identification, checks, and account numbers belonging to several different people in his possession. The defendant was charged with one count of Second Degree Identity Theft relating to one individual and then one count of Second Degree Identity Theft related to another person for possessing their means of identification or financial information. Additional charges of possession of stolen property in the first and second degree and forgery were dropped in exchange for pleas to the two counts of Second Degree Identity Theft. The argument at the appellate level was whether or not the unit of prosecution for identity theft would merge the two victims to one thus lowering his total point score. The court held that the unit of prosecution was not only the "use" of the item of identification but also would include the "possession" of the means of identification or financial information of another. Cf State v. Berry, 129 Wn.App. 59, 117 P.3d 1162 (2005).

The State submits that the elements instruction for Identity Theft in the Second Degree is an accurate statement of the law. Instructions were crafted by both sides and allowed both sides to argue their theory of the case. Finally, the State submits that these

assignments of error have not been preserved for purposes of appeal.

III. RESPONSE TO ASSIGNMENTS OF ERROR C AND D

The next two assignments of error deal with the sufficiency of evidence to establish identity theft in the second degree and forgery, Counts 1 and 2 of the Information. (CP 1).

To determine whether sufficient evidence supports a conviction, we use the familiar test found in State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) and State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The Appellate Court will view the facts and inferences in a light most favorable to the State, and will find the evidence sufficient if it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. The appellate court need not be convinced of a defendant's guilt beyond a reasonable doubt, only that substantial evidence supports the State's case. State v. Fiser, 99 Wn.App. 714, 718, 995 P.2d 107 (2000). Circumstantial evidence is as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) and finally, the appellate court will defer to the

trier of fact regarding a witness' credibility or conflicting testimony. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The State has set forth the testimony related to the two counts in the Statement of Facts provided in this brief. The State submits that reasonable inferences drawn in favor of the State and interpreted most strongly against the defendant indicate that a rational trier of fact could have found guilt beyond a reasonable doubt as it relates to identity theft in the second degree and forgery.

IV. RESPONSE TO ASSIGNMENT OF ERROR E

This assignment of error is an argument that identity theft is unconstitutionally vague. As indicated previously, this matter has been argued in the appellate system and the statute has been found to be constitutional and not vague. In State v. Baldwin, supra (2003), the Supreme Court held that the statutes are not unconstitutionally vague as they related to her identity theft convictions. A statute is presumed to be constitutional. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). The party challenging the constitutionality of a statute has the burden of

proving it is unconstitutional beyond a reasonable doubt. State v. Brayman, 110 Wn.2d 183, 193, 751 P.2d 294 (1998). Due process does not require impossible standards of specificity or mathematical certainty. Some degree of vagueness is inherent in the use of our language. State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998).

In our situation, the appellant makes two arguments. The first one is that because the court entered into a lengthy discussion about the basis of an identity theft charge, that therefore that shows that it must be vague "if lawyers and judges cannot understand what is prohibited, it is probable others without legal training won't either." (App. Br. p. 20, l. 12-13). However, the judge and lawyers were able to fashion jury instructions that they felt were appropriate to explain the legislation to a jury. This argument raised by the appellant is without merit.

The second argument is that the definition of financial information does not provide ascertainable standards of guilt. As previously stated, the jury was properly instructed on the elements of the crime. This argument also is without merit.

The State submits that the appellant in challenging the constitutionality of the statute has not proven beyond a reasonable

doubt that it is vague either facially or vague as applied. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

V. RESPONSE TO ASSIGNMENT OF ERROR F

The next assignment of error is that the trial court erred in denying the defendant's motion to exclude evidence of a drug debt as constituting improper character evidence that should have been excluded under ER 404(b).

ER 401 defines "relevant evidence" as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Even a minimal logical relevancy is adequate if there exists a reasonable connection between the evidence and the relevant issues. State v. Bebb, 44 Wn.App. 803, 814, 723 P.2d 512 (1986). A trial court's decision regarding relevancy is discretionary and may be reviewed only for abuse of that discretion. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); cert. denied, 498 U.S. 1046 (1991). The court abuses its discretion when its decision is manifestly unreasonable,

or is exercised on untenable grounds or for untenable reasons. State v. Alexander, 125 Wn.2d 717, 731, 888 P.2d 1169 (1995).

Evidentiary rulings generally are not of constitutional magnitude and therefore require reversal only if the defendant is prejudiced. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). That prejudice is not presumed. The error is prejudicial only if “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

In our case, the officers testified that the defendant raised with them the question of drug use and that the person that he received the check from was his drug dealer. Further, the defendant told the officer that the reason for cashing of the checks was to repay a drug debt to this person. Thus, the information concerning the drug use has relevance to the underlying crime and it is more probative than prejudicial. It goes directly to his knowledge and intent in being an accomplice in the forgery and identity theft.

ER 404(b) thus allows evidence to be presented of other illicit activity to show motive or intent, the absence of accident or

mistake or a common scheme or plan. The ultimate test of admissibility is whether the relevancy and the necessity of the evidence outweighs its prejudice to the defendant. State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950). That question, however, is one left to the sound discretion of the trial court. State v. Goebel, supra at 379. The State submits that the trial court here did not abuse its discretion with regard to admission of the collateral criminal activity. It is not manifestly unreasonable or exercised on untenable grounds or for untenable reasons to allow information to go to the jury to explain a motive or intent on the part of the defendant for passing a bad check and further goes to the absence of accident or mistake which was his claim when he testified. In fact, the defendant, when he testified, denied that he told the police anything about a drug habit or problem or that the accomplice was his drug dealer. His entire defense was that this was one big mistake and that he was a fall guy for the criminal activities of Hector. (See opening statement by the defense, "Mr. Allenbach was basically set up, . . ." (RP 59, l. 4-5)).

The State submits that there has been no showing that the trial court did not exercise its discretion properly in this matter.

VI. RESPONSE TO ASSIGNMENT OF ERROR G

The next assignment of error raised by the defendant is that he was denied effective assistance of counsel. To establish counsel as constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). In determining whether counsel's performance was deficient, there is a strong presumption of adequacy. Competency is not measured by the result. State v. Early, 70 Wn.App. 452, 461, 853 P.2d 964 (1993). Finally, to demonstrate prejudice, a defendant must establish that counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. If either part of the test is not satisfied, the inquiry need go no further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

The first part of the argument made by defense counsel on appeal is that the trial counsel failed to object to the instruction on financial information. It was contained as the definition of

Instruction No. 6 in the packet of instructions provided to the jury. (CP 20). However, there were two definitions that could have been utilized by the jury to find guilt beyond a reasonable doubt. One of them was the “financial information” that counsel on appeal makes claim is deficient. But counsel on appeal does not refer to the other way of committing this crime which is by “means of identification”. That definition is Instruction No. 7 and no one is objecting to that. Thus, for the sake of argument, assume that the definition of “financial information” was inadequate, it still would not prove or support a proposition that the defendant would not have been found guilty because he was also using the “means of identification” of Mr. Brown in perpetuating this fraud. There has been no showing that the trial would have been different.

Likewise, counsel on appeal claims that failing to request a limiting instruction regarding the use of drugs and owing Hector for a drug debt was a demonstration of ineffectiveness. The counsel on appeal makes argument that there is no conceivable, strategic explanation for his failure to request a limiting instruction. The State would disagree with that analysis. It is often seen that the defense does not wish to emphasize an error of dispute particularly where the defendant has categorically denied making statements

to two law enforcement officers who have testified concerning the statement that was made. Plus, it went directly to his claimed defense – fear of harm from Hector (the drug dealer) and that the defendant was set up. (RP 58-59; 146; 150-151). There is a strong presumption that is accorded the trial attorney that his representation is effective. To overcome that, there must be a clear showing of ineffectiveness derived from the record as a whole. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). If the actions of the defense attorney can fairly be characterized as legitimate trial strategy or tactic then the action cannot form the basis of an ineffective assistance of counsel claim. In such case, the first prong of the Strickland test is not met. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994); State v. McDonald, 138 Wn.2d 680, 697, 981 P.2d 443 (1999).

The State submits that there has been no showing here of ineffectiveness at the trial court level.

VII. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 27 day of June, 2006.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: 
Michael C. Kinnie, WSBA #7869
Senior Deputy Prosecuting Attorney

APPENDIX "A"

F I L L E D
APR 14 2005
JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JAMES BRADLEY ALLENBACH,

Defendant.

No. 04-1-02482-0

COURT'S INSTRUCTIONS TO THE JURY

[Handwritten Signature]
SUPERIOR COURT JUDGE

4/13/05
DATE

Received @ 10:44 AM

F I L L E D
APR 14 2005

JoAnne McBride, Clerk, Clark Co.

Jennifer R. Olson
Deputy Clerk

20

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the

witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

3

INSTRUCTION NO. _____

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

To convict the defendant of the crime of Identity Theft in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 22nd day of September, 2004, the defendant knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, to-wit: Charles M. Brown, ~~whether that person is living or dead;~~

2. That he did so with the intent to commit, or to aid or abet any crime; and

3. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 6

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

INSTRUCTION NO. 7

The term “means of identification” means information or an item that is not describing finances or credit but is personal to or identifiable with an individual including: a current name of the person, telephone number, or identifier of the individual.

INSTRUCTION NO. 8

To convict the defendant of the crime of forgery, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 22nd day of September, 2004, the defendant possessed or uttered or offered or disposed of or put off as true a written instrument which had been falsely made, completed or altered;

(2) That the defendant knew that the instrument had been falsely made, completed or altered;

(3) That the defendant acted with intent to injure or defraud; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 89

Forged instrument means a written instrument which has been falsely made, completed or altered.

INSTRUCTION NO. 10

Written instrument means any paper, document or other instrument containing written or printed matter or its equivalent.

INSTRUCTION NO. 11

Falsefully make means to make or draw a complete written instrument which purports to be authentic, but which is not authentic because the ostensible maker did not authorize the making or drawing thereof.

INSTRUCTION NO. 12

Falsely complete means to transform an incomplete written instrument into a complete one by adding or inserting matter, without the authority of anyone entitled to grant it.

INSTRUCTION NO. 13

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 14

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 15

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 18

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreman. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form for each count.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The foreman will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

IN THE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JAMES B. ALLENBACH,
Appellant.

No. 33955-2-II

Clark Co. Cause No. 04-1-02482-0

DECLARATION OF TRANSMISSION
BY MAILING

STATE OF WASHINGTON)
) : ss
COUNTY OF CLARK)

06 JUN -9 AM 9:02
 COURT APPEALS
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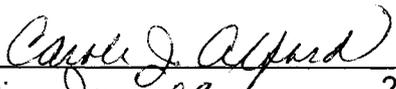
On June 29, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

DATED this 29th day of June, 2006.

JAMES B. ALLENBACH DOC #948595 Coyote Ridge Corrections Center PO Box 769 1301 North Ephrata Connell, WA 99326	Kyra K. LaFayette Attorney at Law 514 W. 9 th Street Vancouver, WA 98660
TO: David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	

DOCUMENTS: BRIEF OF RESPONDENT

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



 Date: June 29, 2006.
 Place: Vancouver, Washington.