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NO. 51946-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jerry T. Costello, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to establish the two counts of forgery, and those charges must be dismissed.

2. The court's refusal to give the proposed instruction defining "instrument" violated appellant's constitutional right to present a defense.

3. The court abused its discretion in excluding relevant evidence, impacting appellant's constitutional right to present a defense.

4. Trial counsel's failure to request necessary limiting instructions denied appellant effective assistance of counsel.

5. The legal financial obligation for the criminal filing fee was improperly imposed and must be stricken.

Issues pertaining to assignments of error

1. Appellant was convicted of two counts of forgery based on information he provided to complete business account applications. Where the evidence fails to establish that the account applications had legal efficacy or could be the foundation for legal liability, and where the evidence fails to show that those documents were falsely completed, must the forgery convictions be reversed?

2. Because the common law meaning of “instrument” as applied to the crime of forgery is outside the word’s common usage, appellant proposed an instruction defining that term. The court refused to give the instruction, and the jury was not informed it could only convict appellant of forgery if it found he falsely completed a document which had apparent legal efficacy. Did the court’s refusal violate appellant’s constitutional right to present a defense?

3. The State impeached a witness with prior inconsistent statements, and the defense sought to call a witness to explain the source of the prior statements. The trial court excluded the offered testimony, erroneously concluding that the prior statements were not in evidence. Did the court’s abuse of discretion impact appellant’s right to present a defense?

4. Did trial counsel’s failure to seek limiting instructions on the use of prior inconsistent statements and ER 404(b) evidence constitute ineffective assistance of counsel?

5. Since appellant was indigent at the time of sentencing, must the legal financial obligation for the criminal filing fee be stricken?

B. STATEMENT OF THE CASE

a. **The charges**

Appellant Anthony Smith was charged in Pierce County Superior Court with two counts of identity theft, two counts of forgery, one count of first degree theft, and one count of money laundering. CP 7-10. The trial court dismissed the identify theft charges for insufficient evidence. CP 438. Smith was tried with co-defendant Adrian Broussard, his half-brother, who was charged with theft and forgery involving different transactions, as well as three counts of unlawful possession of a controlled substance with intent to deliver. The State's theory was that both defendants participated in an overarching scheme with a third half-brother, Derek James, who pled guilty to a series of transactions separate from the ones Smith and Broussard were charged with. 2RP¹ 133.

Evidence at trial showed that that James, Broussard, and Smith each registered businesses with the Secretary of State in the spring of 2016. 5RP 628, 658, 674. They opened bank accounts for their businesses using social security numbers that were not theirs. 4RP 456-60, 569, 579. James and Broussard applied for loans to purchase cars from these businesses. The loan proceeds were not used to purchase the

¹ The Verbatim Report of Proceedings is contained in eleven volumes, designated as follows: 1RP—4/23/18; 2RP—4/24/18; 3RP—4/26/18; 4RP—4/20/18; 5RP—5/1/18; 6RP—5/2/18; 7RP—5/8/18; 8RP—5/10/18; 9RP—5/14/18 and 5/15/18; 10RP—5-24-18; 11RP—1/23/18.

cars but were deposited into the business accounts and then withdrawn. 4RP 470, 480, 498, 509-10, 530-31, 545; 5RP 625-58.

The charges against Smith arose from transactions related to his business accounts. Smith opened accounts at Wells Fargo Bank for A.J. Motors on June 23, 2016. 4RP 569, 574. The tax identification number Smith provided was actually a social security number belonging to another person. 5RP 660. A check for \$14,840 drawn on Inspirus Credit Union was deposited into the A.J. Motors checking account through an ATM on June 29, 2016. The check was payable to A.J. Motors and referenced Derek James. 4RP 570-71. On July 1, 2016, Smith closed the Wells Fargo accounts and transferred the balance to new accounts at Wells Fargo in the name of A.J. Motors. 4RP 578-79. The new account applications used the same information as the original applications. 4RP 579; 5RP 665. Smith withdrew the funds in two transactions on July 11, 2016. 4RP 579; 5RP 667.

Smith explained that he had purchased a credit privacy number to use as a tax identification number for his business, and that was the number he gave when he opened the accounts at Wells Fargo. 8RP 1085. He did not know the number was a social security number belonging to someone else. 8RP 1095-96.

Smith also testified that when he discovered a deposit of \$14,840 had been made to his account, he immediately told the teller that he didn't know where the money came from and asked if the check could be stopped and the funds returned to the source. 8RP 1098-99. The solution proposed by the account manager was to close the existing accounts and transfer the funds into new accounts, so that's what he did. 8RP 1102-03. The account manager confirmed that Smith reported the unauthorized deposit and asked if the check could be stopped. 8RP 1155. When the account manager determined that was not possible, he set up a lost and stolen transfer for Smith, opening new accounts using all the information from the old accounts, and then closing the old accounts. 8RP 1157-58.

b. The jury heard evidence of James's crimes and statements.

Prior to trial Smith moved to exclude James's guilty plea statement, arguing that the contents were hearsay and irrelevant. Counsel argued that no one should discuss the statement unless James testified and could be cross examined about it. 2RP 127-29. The State responded that it did not intend to use the statement unless James testified inconsistently with it. 2RP 130. It maintained that the overall scheme involving the James, Broussard, and Smith was relevant to the charges in the case, however. 2RP 133.

Defense counsel further moved to exclude evidence of the crimes James pled guilty to that were not charged in the present case. Counsel argued that since Smith was not charged with those crimes, they were not relevant. 2RP 135. The court granted the motion to preclude reference to the plea statement, contingent on James's testimony. 2RP 137. It denied the motion to limit testimony to the charges before the jury, however, saying that evidence which implicated the defendants in a larger scheme is relevant to whether they committed the charged crimes. 2RP 139.

At trial the State presented documentary exhibits establishing James's transactions. The court admitted them conditionally, subject to the State connecting them to the offenses Smith and Broussard were charged with. 4RP 475, 500, 534, 554. Although the State planned to establish this connection through testimony from James, that did not happen. James admitted registering a business and opening accounts. 6RP 877-78. He testified that he pleaded guilty to four counts each of identity theft, forgery, and theft. 6RP 896. But he denied that Smith had anything to do with the transactions he was involved in. 6RP 913.

When James would not answer questions about specific transactions, the State questioned him about his plea statement. 6RP 896. James testified that the facts contained in the plea statement did not come from him. His attorney prepared the statement and he initialed and signed

it so that he could enter the plea and start serving his sentence. 6RP 897-900. James acknowledged that the plea statement indicates, “The judge has asked me to state in my own words what makes me guilty of this crime. This is my statement.” 6RP 898. But he maintained that none of the facts in the plea statement were true. 6RP 898.

The State then read the statements contained in the plea form, asking James if he initialed next to those statements. 6RP 901-05. The prosecutor established that James initialed statements that he used social security numbers belonging to others to obtain vehicle loans for vehicles he didn’t intend to purchase, that he created purchase agreements using those social security numbers, and he took the purchase agreements to banks to obtain loans. Although James repeatedly testified that those statements were not true, he acknowledged initialing them on the plea form. 6RP 901-05.

The prosecutor then asked, “You and Mr. Smith and Mr. Broussard made multiple withdrawals from both the U.S. Bank account and from the Wells Fargo accounts, correct?” 6RP 906. “You each knew what the other two was doing, correct?” 6RP 906. “And the three of you were all working together to get the money, weren’t you?” 6RP 907. When James denied each of these statements, the prosecutor responded, “Except that’s all contained within the plea statement that you signed, correct?” 6RP

907. James acknowledged that he initialed and signed the plea form containing those assertions but again testified that those facts did not come from him. 6RP 907.

After James testified, the court conducted an ER 404(b) analysis regarding the admissibility of evidence of James's transactions. 7RP 943. The court found that evidence that the three brothers formed automobile companies within a three month time frame, using social security numbers that were not their own to conduct transactions pertaining to fictitious automobile sales, creates a reasonable inference that they each knew and understood the overall scheme and participated to some extent. 7RP 945-47. The court found that evidence of the overall scheme was strongly probative Smith's knowledge and intent to assist James, with little risk of unfair prejudice to the defense. 7RP 947-50. The court ruled that the conditionally admitted documents of James's transactions were fully admitted. It offered to give a limiting instruction if requested by the defense. 7RP 951. No limiting instruction was proposed or given. *See* CP 218-33, 244-58, 274-336.

Following James's testimony denying the truth of the statements in the plea form, which was prepared by his attorney, Broussard served a subpoena on James's attorney. The Department of Assigned Counsel moved to quash the subpoena, and the State supported that motion. 8RP

1005-06. Smith joined in the request to call James's attorney as a witness. 8RP 1010. The Defense argued that the attorney's testimony was necessary because the contents of the plea form were before the jury, and there was evidence that those contents were dictated to the attorney by the prosecutor. 8RP 1007-08, 1010. Counsel argued that James had testified that Smith and Broussard knew nothing about his crimes, and the State attempted to impeach him by reading the plea form and asking if he made those statements. The prior statements were therefore before the jury. 8RP 1010-11. The jury should be allowed to hear that those statements actually came from the prosecutor in an email to James's attorney. 8RP 1011.

The State acknowledged that it asked James about the contents of the plea form to impeach his trial testimony. It argued, however, that the origin of the statements was not material. 8RP 1012.

The court responded that while the prosecutor had asked James questions about the plea form, it was never admitted into evidence, and the prosecutor's questions were not evidence. 8RP 1006-07, 1009. The court stated, "There's no evidence admitted in front of this jury regarding the substantive content of that plea form. The only evidence in front of this jury is Mr. James acknowledging that he pled guilty followed by his repeated denial that those were his words. It's not up to this jury to

explore the validity of his guilty plea.” 8RP 1014. It noted that the prosecutor had attempted to prove what James did through documentary evidence, and the jury would give that evidence whatever weight it chooses when deciding whether either of these defendants were complicit, “but the State has offered no evidence and there’s been none admitted through Mr. James’s testimony as to what Mr. James did other than his statement that he formed a company... and opened a bank account.” RP 1014-15. The court granted the motion to quash the subpoena and denied the defense request to allow the attorney to testify. 8RP 1015.

Defense counsel did not request an instruction limiting the jury’s use of James’s prior statements to impeachment, and no limiting instruction was given. *See* CP 218-33, 244-58, 274-336.

c. The court declined to instruct the jury on the definition of “instrument” as to the forgery charges.

Counsel argued that case law establishes that the common law definition of “instrument” is applicable to a charge of forgery, and he proposed the following instruction:

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

An instrument is something, which, if genuine, may have legal effect or be the foundation of legal liability.

CP 224; 9RP 1210. The court instructed the jury on the definition of “written instrument” but declined to define “instrument.” CP 301; 10RP 1212. The defense took exception to the court’s ruling. 9RP 1211-12.

d. The court imposed the criminal filing fee without regard to Smith’s indigency.

At sentencing the court noted it was supposed to inquire into Smith’s financial situation, but that did not seem necessary since the State was only seeking mandatory legal financial obligations. 10RP 17. Defense counsel informed the court that Smith’s family had pooled their resources to pay for his defense, but Smith had no other funds, he is unemployed, and he is going to prison. He asked the court to waive all LFOs. 10RP 17. The court stated it was required to impose the crime victim penalty and court costs, but it would require a DNA fee only if Smith had not previously paid one. 10RP 25. The court imposed the \$200 filing fee. CP 438.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH FORGERY, AND THOSE CHARGES MUST BE DISMISSED.

The burden of proving the essential elements of a crime unequivocally rests on the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const.

art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an “indispensable” threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364. Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Smith was charged with two counts of forgery, which required the State to prove beyond a reasonable doubt that, with intent to defraud, Smith offered or put off as true two written instruments which he knew had been falsely completed. CP 300, 304; RCW 9A.60.020. The State’s theory was that Smith committed forgery when he provided a social security number that was not his own when completing the business account applications at Wells Fargo bank. 9RP 1233. The evidence does not establish either that the account applications were written instruments or that they were falsely completed.

A “forged instrument” is defined by statute as “a written instrument which has been falsely made, completed, or altered.” RCW

9A.60.010(6). The statute further defines “written instrument” as “[a]ny paper, document, or other instrument containing written or printed matter or its equivalent....” RCW 9A.60.010(7). While the statute does not define the term “instrument,” Washington courts have recognized that the common law definition applies, holding that an “instrument is something, which, if genuine, may have legal effect or be the foundation of legal liability.” *State v. Scoby*, 117 Wn.2d 55, 57-58, 810 P.2d 1358 (1991); *State v. Bradshaw*, 3 Wn. App. 2d 187, 191, 414 P.3d 1148, review denied, 191 Wn.2d 1007 (2018); *State v. Ring*, 191 Wn. App. 787, 792, 364 P.3d 853 (2015) (certificate of insurance constituted written instrument); *State v. Smith*, 72 Wn. App. 237, 240-43, 864 P.2d 406 (1993) (unsigned check was not a written instrument for forgery charge because it could not be the basis of liability). Thus, to support the forgery charges, the State was required to prove that the business account applications had legal efficacy.

In *Bradshaw*, an escrow agent obtained a certificate of liability insurance necessary to prove she had sufficient coverage to act as agent for a sale of commercial property. Her coverage limit was less than needed, so she altered the certificate. *Bradshaw*, 3 Wn. App. 2d at 188-189. The Court of Appeals held that the certificate of liability constituted a written instrument under the forgery statute. It noted that the certificate

holder was named was the Washington State Department of Financial Institutions, and the certificate was filed with the department as evidence that the defendant was in compliance with coverage requirements. Because the certificate was filed as a public record, it had legal efficacy. *Id.* at 193. The evidence also established that the certificate provided a foundation for legal liability, because there was testimony that insurance certificates are typically used by insureds as evidence of their coverage limits. *Id.* at 194. The evidence established that the defendant had falsely altered a written instrument and was therefore sufficient to support the forgery conviction. *Id.*

Unlike in *Bradshaw*, the evidence did not establish that the account applications in this case constituted written instruments. The account applications were admitted as exhibits 65 and 78. 4RP 566-67, 577. Testimony established that the name on the applications was A.J. Motors, LLC, Anthony J. Smith; that the social security number on the applications was not Smith's; and that Smith signed the applications. 4RP 569-70, 574-75, 579. There was no testimony that the applications had any legal effect or could be the foundation of legal liability, however.

Moreover, even if the account applications constitute written instruments, the evidence failed to establish that they were falsely completed. By statute, "To 'falsely complete' a written instrument 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.” RCW 9A.60.010(4).

There is a distinction between a forged document and a genuine document that contains false information. *See, e.g., State v. Mark*, 94 Wn.2d 520, 521-25, 618 P.2d 73 (1980). In *Mark*, a pharmacist filled out a form representing that he had filled prescriptions from doctors. Those representations were false, however. The pharmacist had authority to fill out the form, and the form was what it purported to be, it just contained false information. It therefore was not a forged document. *Id.*

The same is true here. The account applications are genuine documents. They are what they purport to be: applications for business accounts for A.J. Motors, signed by Smith. As the owner of the business, Smith had authority to complete account applications. In doing so, however, he provided false information. “Forgery does not involve the making of false entries in an otherwise genuine document.” *State v. Esquivel*, 71 Wn. App. 868, 870, 863 P.2d 113 (1993). “A misrepresentation of fact, so long as it does not purport to be the act of someone other than the maker, does not constitute forgery.” *Mark*, 94 Wn.2d at 523. Because Smith had authority to complete the account applications, and the applications are what they purport to be, they are not

forged documents. The evidence was insufficient to establish the charged forgeries, and those convictions must be reversed and the charges dismissed.

2. THE COURT'S FAILURE TO GIVE SMITH'S PROPOSED INSTRUCTION ON LEGAL EFFICACY VIOLATED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

The accused's constitutional right to due process includes the right have the jury instructed on his theory of the case if supported by the evidence. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1062 (1997); *State v. George*, 161 Wn. App. 86, 100, 249 P.3d 202, *review denied*, 172 Wn.2d 1007 (2011); *State v. Ginn*, 128 Wn. App. 872, 878, 177 P.3d 1155 (2005), *review denied*, 157 Wn.2d 1010 (2006). The refusal to so instruct is reversible error. *Redmond*, 150 Wn.2d at 495; *Williams*, 132 Wn.2d at 260. This Court reviews a trial court's decision not to give a defendant's proposed instruction *de novo* if the refusal is based on a ruling of law. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

In addition to instructing the jury as to the elements of the charged offense, the court should define any technical words or expressions. *State v. Pouncy*, 168 Wn.2d 382, 389, 229 P.3d 678 (2010); *State v. Scott*, 110 Wn.2d 682, 689-90, 757 P.2d 492 (1988) (referring to the "long-

recognized” technical term rule); *State v. Allen*, 101 Wn.2d 355, 361-62, 678 P.2d 798 (1984). A term is technical if its meaning differs from common usage. *State v. Brown*, 132 Wn.2d 529, 611, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998); *Allen*, 101 Wn.2d at 358.

To establish forgery as charged in this case, the State was required to prove that Smith offered or put off as true a written instrument that had been falsely completed. CP 299-304. For the purposes of a forgery conviction, “an instrument is something which, if genuine, may have legal effect or be the foundation of legal liability.” *Scoby*, 117 Wn.2d at 57-58. While legal efficacy is not a separate element of the offense of forgery, it is a definitional aspect of “instrument” which must be proved to the jury beyond a reasonable doubt. *Ring*, 191 Wn. App. at 793.

Because this common law meaning of the word “instrument” is a technical term outside the word’s common usage, Smith proposed an instruction defining that term as “something, which, if genuine, may have legal effect or be the foundation of legal liability.” CP 224. The court refused to give the instruction, however, stating that the parties could argue their theories of the case without the proposed definition. 9RP 1212. While the court instructed the jury on the statutory definition of “written instrument,” no instruction was given informing the jury of the

requirement that a written instrument appear to have actual legal efficacy. CP 274-336.

A defendant has the right “to have the jury base its decision on an accurate statement of the law applied to the facts of the case.” *State v. Miller*, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). The defendant “should not have to convince the jury what the law is.” *State v. Thomas*, 109 Wn.2d 222, 228, 743 P.2d 816 (1987); *accord Pouncy*, 168 Wn.2d at 392 (“It is not sufficient that counsel were able to argue to the jury their respective understandings of the term based on expert testimony; lawyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is.”). It was error for the court to refuse the proposed instruction which was a correct statement of the law, supported by the evidence.

Moreover, the error was not harmless. Had the jury been informed of the doctrine of legal efficacy, it might have concluded that the State failed to prove beyond a reasonable doubt that the account applications were instruments, because there was no testimony regarding the legal effect of the applications or any liability they created. Without the instruction defining instrument, defense counsel was left to try to convince the jury that the business account applications could not support a forgery charge. This Court cannot be convinced that the jury would have reached

the same verdict if the proposed instruction were given. Therefore Smith's forgery convictions must be reversed and remanded for a new trial. *See Pouncey*, 168 Wn.2d at 392.

3. EXCLUSION OF TESTIMONY REGARDING THE SOURCE OF JAMES'S PRIOR STATEMENTS VIOLATED SMITH'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Criminal defendants have the constitutional right to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22. Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest in doing so. *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Although a trial court has discretion to determine whether evidence is admissible, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. *See State v. Crowder*, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), *review denied*, 142 Wn.2d 1024, (2001).

Defense evidence need only be relevant to be admissible. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of

consequence ... more probable or less probable than it would be without the evidence.” ER 401. If the defense evidence is relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Darden*, 145 Wn.2d at 622.

The trial court violated Smith’s right to present a complete defense by excluding proposed testimony from James’s attorney regarding the facts included in James’s plea statement. The proposed testimony was relevant to rebut the State’s theory that Smith and Broussard were involved in James’s overall scheme to fraudulently obtain funds.

The State called James as a witness to attempt to establish a connection between him and the defendants. When James did not testify as the State expected, the prosecutor questioned him about his plea form, and James acknowledged that he signed and initialed the plea form, but he testified that it was prepared by his attorney. 6RP 897-905. The prosecutor established that James initialed statements in the form indicating that James, Broussard, and Smith were working together to get the money. 6RP 907.

Once the jury heard the contents of the plea form, the source of those statements became relevant. The defense made an offer of proof that James’s attorney drafted the plea form using facts dictated by the prosecutor. 8RP 1007-08, 1010-11. This evidence made it more likely

that James's testimony was credible and undercut the State's attempt to impeach him. The court concluded, however, that the proposed testimony was not relevant because the contents of the plea statement were not before the jury. 8RP 1014-15. This conclusion misconstrues the nature of the evidence and is an untenable reason for excluding the offered testimony.

The court acknowledged that the jury heard questions by the prosecutor about the statements in the plea form and James's denials that the statements were true. It concluded that since the prosecutor's questions are not evidence, there was no evidence before the jury regarding the contents of the form. 8RP 1006-07. What the court overlooked, however, is that James admitted that he initialed each of the statements in the plea form and that he signed the form as his guilty plea. So, even though he was now testifying inconsistently with the plea form and was offering an explanation for that inconsistency, the jury was still presented with evidence that he stated in his plea form that he and the defendants were working together and each knew what the other was doing.

Contrary to the court's conclusion, there was evidence before the jury regarding the contents of the plea form. Thus, the court's decision to exclude the offered defense evidence was based on untenable grounds and

constitutes an abuse of discretion. This erroneous decision impacted Smith's constitutional right to present a complete defense.

The denial of the right to present a complete defense is constitutional error. *Crane*, 476 U.S. at 690. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt that any trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The State cannot overcome the presumption of prejudice here. Through the State's impeachment of James the jury learned that he had previously made statements implicating Smith in his overall scheme. This was key to the State's case against Smith, which rested on connecting Smith to James's illegal actions. While James testified that those statements were not true and tried to explain why he made them, the defense was not permitted to present evidence as to their source, and the jury had no reason other than James's testimony not to rely on the prior statements. The court's error was not harmless beyond a reasonable doubt, and Smith's convictions must be reversed.

4. TRIAL COUNSEL'S FAILURE TO REQUEST
LIMITING INSTRUCTIONS DENIED SMITH
EFFECTIVE REPRESENTATION.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. A defendant is denied effective assistance when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694.

The Washington Supreme Court has recognized that counsel may be ineffective for failing to propose a jury instruction. *See State v. Thomas*, 109 Wn.2d at 226 (counsel ineffective in failing to propose instruction that would allow counsel to argue defendant's intoxication negated mens rea). In this case, although James's prior inconsistent statements were admissible only to impeach his credibility as a witness, defense counsel never asked the court to give a limiting instruction. Nor did counsel request an instruction limiting the use of the ER 404(b) evidence it admitted.

a. An instruction was necessary to limit the jury's use of James's prior inconsistent statements.

A witness may be impeached with prior out of court statements of material fact that are inconsistent with his or her testimony in court. ER 607; ER 613; *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005); *State v. Dickenson*, 48 Wn. App. 457, 466, 740 P.2d 312, *review denied*, 109 Wn.2d 1001 (1987). In most instances, prior inconsistent statements may not be used as substantive proof of the elements required for conviction. *State v. Burke*, 163 Wn.2d 204, 219, 181 P.3d 1 (2008). Impeachment evidence goes only to the witness's credibility; it may not be considered as proof of the substantive facts encompassed by the evidence.

Clinkenbeard, 130 Wn. App. at 569; *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

Prior inconsistent statements are not admitted under the assumption that the trial testimony is false and the earlier statements are true. Rather, the theory is that if a person says one thing on the witness stand, having said something else previously, there is a doubt as to the truthfulness of both statements. *State v. Williams*, 79 Wn. App. 21, 26, n. 14, 902 P.2d 1258 (1995) (citing 1 McCormick on Evidence § 34, at 114 (4th ed. 1992)). "These inconsistencies are important, not because one version of the events is more believable than the other, but because they raise serious questions about [the declarant's] credibility and perceptions." *State v. Newbern*, 95 Wn. App. 277, 295, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999). Thus, where prior inconsistent statements are admitted to impeach a witness, "an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary." *Johnson*, 40 Wn. App. at 377 (citing *State v. Pitts*, 62 Wn.2d 294, 297, 382 P.2d 508 (1963)).

When evidence is admissible for one purpose but not another, the court must give a limiting instruction on request by either party. ER 105; *State v. Gallgher*, 112 Wn. App. 601, 611, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003). A party's failure to request a limiting

instruction waives that party's right to the instruction and fails to preserve the claimed error for appeal. *Newbern*, 95 Wn. App. at 295-96. Without a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others. *State v. Meyers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

Here, James testified at trial that Smith had nothing to do with the transactions he was involved in, and that his prior statements that he, Smith, and Broussard were working together were not true. 6RP 907, 913. The State introduced the contents of James's plea form, which James acknowledged initialing and signing, to impeach James. 8RP 1012. Even though the defense was entitled to an instruction limiting the jury's use of James's prior statements, counsel failed to request one, creating the very real problem that the jury may have considered the statements in James's plea form as substantive evidence. *See State v. Hancock*, 109 Wn.2d 760, 766, 748 P.2d 611 (1988). Counsel's failure to request a limiting instruction constitutes deficient performance.

Counsel's error cannot be excused as trial strategy. While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). Moreover, "tactical" or "strategic" decisions by defense counsel must still be

reasonable decisions. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (“The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.”).

Although defense counsel may in some cases strategically decline to request a limiting instruction to avoid highlighting harmful evidence, that is not the case here. This was not a passing reference that the jury might otherwise ignore. James’s prior statements went to the heart of the State’s case. The State needed to establish Smith was aware of James’s illegal acts and participated in an overall scheme in order to prove Smith acted with intent to defraud in the forgery counts, that he exerted unauthorized control over funds belonging to another with intent to deprive in the theft count, and that he acted recklessly as to whether the funds were proceeds of unlawful activity in the money laundering charge. RCW 9A.60.020; RCW 9A.56.020; RCW 9A.83.020. By not ensuring that the jury knew it could use the statements only in evaluating James’s credibility, counsel ensured that the jury would consider the evidence as substantive proof of the charges.

Counsel’s deficient performance renders the trial outcome unreliable. It can be difficult for jury to grasp “the subtle distinction between impeachment and substantive evidence.” *Hancock*, 109 Wn.2d at 764. While the jury’s difficulty in making this distinction does not render

the statements inadmissible, it does make a cautionary instruction “both proper and necessary.” *See Johnson*, 40 Wn. App. at 377. Without an instruction, the jury likely relied on James’s prior statements as direct evidence that Smith committed the charged offenses. Rather than impeaching James’s credibility, the statements improperly bolstered the State’s case. Counsel’s error prejudiced the defense, and reversal is required.

b. An instruction was necessary to limit the use of evidence of James’s crimes.

The State may not present evidence of other crimes, wrongs, or acts, to prove the character of a person in order to show conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); ER 404(b). Such evidence may be admissible for other purposes, such as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). Before a court can admit evidence of past wrongs, it must “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the [permissible] purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Arredondo*, 188 Wn.2d 244, 257, 394 P.3d

348 (2017). The defendant is entitled, upon request, to an instruction expressly limiting use of the State's ER 404(b) evidence to the purpose for which it was admitted. *Gresham*, 173 Wn.2d at 423 (citing *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2006)).

In this case, the court admitted evidence of James's crimes, under the theory that Smith and Broussard were complicit in an overall scheme, to establish Smith's intent and absence of mistake in the charged offenses. 7RP 945-51. The jury needed to be informed that it could use the evidence for this purpose and no other. *See Gresham*, 173 Wn.2d at 423-34. Although the court told the parties it would give a limiting instruction if requested, trial counsel failed to make such a request.

As with the limiting instruction regarding James's prior inconsistent statements, there was no legitimate tactical reason not to seek an instruction limiting the jury's use of the ER 404(b) evidence. This is not a case where a limiting instruction might unduly emphasize some briefly referenced evidence. A significant portion of the State's evidence was aimed at proving James's illegal conduct with which Smith was not directly involved. It was crucial that the jury be informed of the only proper purpose for that evidence, so that it would not use it improperly to find Smith guilty based on other illegal actions of his brother. Counsel's

failure to propose a limiting instruction fell below the standard expected for effective representation.

There is a reasonable probability that counsel's deficient performance prejudiced the defense. Smith presented evidence at trial that he was not involved in James's scheme in any way. He testified that he registered his business and opened bank accounts for legitimate purposes, that he purchased what he believed to be a legitimate tax identification number, and that he had no knowledge of James's fraudulent transactions. 8RP 1081-85, 1095-96, 1108. Absent a limiting instruction, jurors were free to consider the evidence for whatever purpose they wished, including an improper purpose. There is no reason to believe the jurors would not disregard Smith's testimony and consider proof of James's offenses to conclude Smith must be a criminal type like his brother. Counsel's failure to request a necessary limiting instruction constitutes ineffective assistance of counsel, and Smith's convictions must be reversed.

5. STATUTORY AMENDMENTS PROHIBITING IMPOSITION OF CERTAIN LEGAL FINANCIAL OBLIGATIONS APPLY TO SMITH'S CASE, AND THOSE LFOS MUST BE STRICKEN.

In March 2018, the Legislature enacted Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018), modifying Washington's system for imposing and collecting LFOs.

Under this bill, statutory amendments prohibit the imposition of costs if the defendant is indigent at the time of sentencing,² prohibit imposition of the \$200 criminal filing fee on an indigent defendant³, and prohibit imposition of the \$100 DNA fee if the State has previously collected the offender's DNA as a result of a prior conviction.⁴ Laws of 2018, ch. 269 § 6, 17, 18. These amendments went into effect on June 7, 2018. *Id.*

The Washington Supreme Court recently held that the statutory amendments enacted by House Bill 1783 apply to cases pending on direct appeal when the amendments went into effect. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). Because these amendments pertain to costs imposed upon conviction, and Smith's case was not yet final when the amendments were enacted, he is entitled to benefit from this statutory change. *Ramirez*, 191 Wn.2d at 749.

² "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

³ "Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 36.18.202(2)(h).

⁴ "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law...." RCW 43.43.7541.

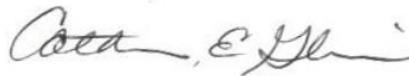
At sentencing, defense counsel informed the court that Smith was unemployed and had no source of income, and he asked the court to waive any and all LFOs. 10RP 17. Nonetheless, the court imposed LFOs it believed were mandatory, including the \$200 criminal filing fee. 10RP 25; CP 438. An order of indigency was entered authorizing appeal at public expense. CP 464-65. Because the statutory amendments expressly prohibit courts from imposing the criminal filing fee on indigent defendants, the filing fee must be stricken from the judgment and sentence. *See Ramirez*, 919 Wn.2d at 749 (remedy is to remand for trial court to strike improperly imposed LFOs).

D. CONCLUSION

For the reasons addressed above the forgery counts must be dismissed and the remaining convictions reversed and remanded for a new trial. The LFO for the criminal filing fee must be stricken.

DATED February 14, 2019.

Respectfully submitted,



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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibit in *State v. Anthony Smith*, Cause No. 51946-1-II as follows:

Anthony Smith DOC# 347279
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

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



Catherine E. Glinski
Done in Manchester, WA
February 14, 2019

GLINSKI LAW FIRM PLLC

February 14, 2019 - 12:34 PM

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