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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY SMITH, APPELLANT

Appeal from the Superior Court of Pierce County

No. 16-1-03561-4

Brief of Respondent

MARY E. ROBNETT
Pierce County Prosecuting Attorney

JEREMY A. MORRIS
Special Deputy Prosecuting Attorney
Glisson & Morris, PS
623 Dwight Street
Port Orchard, WA 98366
PH: (360) 519-3500

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I. COUNTERSTATEMENT OF THE ISSUES.

1. Whether Mr. Smith's claim that there was insufficient evidence to support his forgery convictions is without merit when, viewing the evidence in a light most favorable to the State, a rational finder of fact could have found that the elements of the charged offenses were proved beyond a reasonable doubt?

2. Whether Mr. Smith's claim that the trial court erred in refusing to give his proposed instruction on legal efficacy is without merit when the trial court acted well within its broad discretion in declining to give such an instruction and when even if one were to assume for the sake of argument that the trial court erred, any error in this regard was clearly harmless?

3. Whether the trial court abused its discretion in excluding testimony from Mr. James' defense counsel regarding the circumstances surrounding the drafting of the factual statement included in his guilty plea form when such testimony was not material to any of the issues before the jury in the present case?

4. Whether Mr. Smith's claim of ineffective assistance of counsel is without merit when he has failed to show either deficient performance or prejudice?

5. Concession of Error – The State concedes that the \$200 filing fee should be stricken pursuant to *Ramirez*.

II. STATEMENT OF THE CASE.

A. PROCEDURAL HISTORY

The Appellant, Anthony Smith, was charged with Identity Theft in the First Degree, Theft in the First Degree, Identity Theft in the Second Degree, Money Laundering, and two counts of Forgery. CP 7-10. The trial court dismissed the two identity theft counts. CP 438, RP 995-96.¹ Following a jury trial, Mr. Smith was found guilty of the remaining offenses, and the trial court then imposed a standard range sentence. CP 337-40, 435-441. This appeal followed.

B. FACTS

Mr. Smith is the half-brother of both Derek James and Adrian Broussard, both of whom were co-defendants with Mr. Smith in the court below. RP 461. The three cases were joined for trial, but prior to trial Mr. James entered a guilty plea. RP (01/23/18) 7. Mr. Smith and Mr. Broussard's cases were tried together, beginning on April 23, 2018.

¹ The transcripts in this case consists of one volumes from a January 23, 2018 pre-trial hearings as well as a sentencing hearing held on May 24, 2018 that are each individually paginated. Those volumes from 1/23/18 and 5/24/18 will be cited with the respective date of the hearing noted in the following format: "RP (05/24/18) 3." The transcripts from the actual trial consists of nine volumes which are consecutively paginated. Citations to the record from those nine trial volumes will be in the following format: "RP 213" with no date listed.

The evidence at trial generally showed that Mr. James², Mr. Broussard, and Mr. Smith were involved in number of fraudulent transactions involving auto loans obtained from a number of credit unions. The typical pattern was that one of the individuals would go to a credit union and obtain a loan for him to purchase a car from one of a number of fictitious auto dealer businesses that Mr. Broussard, Mr. Smith, and Mr. James had created. The credit union would then issue a check made payable to one of the fake auto businesses and the check would list whichever person applied for the loan applicant as the “remitter” (the person who requested the loan and on whose behalf the check was issued). RP 634. The check would then be deposited by Mr. Smith, Mr. Broussard, or Mr. James into a business account for the one of the fictitious auto dealer businesses. In short, the defendants set up a number of fake auto dealer businesses, took out auto loans at a number of banks for fictitious auto purchases, and the deposited those loan proceeds into the bank accounts of their fake auto dealer businesses.

² Prior to the beginning of testimony, the defendants objected to the admission of the evidence relating to Mr. James and his activities, arguing that there was no connection between the actions of Mr. James and the actions of the defendants, and this issue was briefly discussed as part of the motions in limine. RP 138-41. The trial court reserved a final ruling on this issue and indicated that it would conditionally admit evidence (conditioned on the State connecting this evidence with the defendant and the charged offenses), and then revisit the issue once the court had a better sense of the relationship of this evidence to Mr. Broussard and Mr. Smith. *See, e.g.*, RP 474-75, 488, 502.

The Three Auto Dealer Businesses are Registered with the Secretary of State and Bank Accounts are Opened in Their Name.

Specifically, the evidence at trial showed that on April 12, 2016, Mr. James registered a business named “Fast Lane Autos” with the Secretary of State. RP 627-29. That very same day, Mr. Broussard registered a business named “Brown Bear Auto” with the Secretary of State’s office. RP 668, 674. On June 17, 2016 Mr. Smith registered a business named “A.J. Motors” with the Secretary of State. RP 658.

Mr. Broussard, Mr. James, and Mr. Smith also each opened up business banking accounts for their businesses. Specifically, on March 30, 2016, Mr. Broussard opened two accounts at Wells Fargo (accounts ending in numbers 9814 and 7116). RP 580-586. Surveillance footage from Wells Fargo confirmed that Mr. Broussard was indeed the person who opened the two accounts on March 30. RP 583-85.

On May 7, 2016 Mr. James opened an account at US Bank under the name of Derek James d/b/a Fast Lane Auto. RP 799-800, 812, 816. Surveillance footage from the bank on May 7th shows Mr. James at the counter and the footage also showed that with Mr. Broussard was standing with him. RP 810-813.

On June 3, 2016 Mr. James opened two account at Wells Fargo for Fast Lane Autos (accounts ending in numbers 7391 and 2281). RP 546.

On June 23, 2016 Mr. Smith opened two accounts for A.J. Motors Wells Fargo (account ending in numbers 3271 and 3685). RP 455, 574-79, 659-660. On July 1, 2016 Mr. Smith opened a second account for A.J. Motors at Wells Fargo (account ending in numbers 3685). RP 575-579. On both bank account applications, Exhibits 65 and 78, Mr. Smith used a social security number ending in "3110," which belonged to a ten year old from Indiana. RP 456, 569, 579.

Specific Transactions Involving Fraudulent Auto Loans

Harborstone Credit Union - May 6, 2016

On May 6, 2016 Mr. James went to the Fife branch of Harborstone Credit Union and applied for an auto loan to purchase a Chevy vehicle from Fast Lane Autos. RP 529-31, 630-31, 639. In filing out the application Mr. James used a social security number that belonged to a 13 year old who lived in Nebraska. RP 458, 531, 631-32. Surveillance footage of this transaction showed that it was Derek James who applied for and obtained this loan. RP 529, 634. Harborstone then issued a check in the amount of \$11,500 on that same day (May 6th) made payable to Fast Lane Autos with the remitter named as Derek James. RP 633-35. The check was ultimately

deposited into the US Bank account, discussed above, that Mr. James opened soon after the Harborstone check was issued. RP 635, 810-13.

TwinStar Credit Union - June 10, 2016

On June 10, 2016, Mr. James went to a branch of TwinStar Credit Union in the Parkland/Spanaway area and applied for an auto loan to purchase a Kia vehicle from Fast Lane Autos. RP 636, 638-40, 643. In filing out the application Mr. James used a social security number that belonged to a 10 year old who lived in Kentucky. RP 457, 638. Surveillance footage of this transaction showed that it was Mr. James who applied for and obtained this loan. RP 499-500.

TwinStar Credit Union then issued a check in the amount of \$15,340 made payable to Fast Lane Autos with the remitter named as Derek James. RP 640-41. On June 14, 2016, the TwinStar check was deposited via a Wells Fargo ATM machine in Tacoma into the Wells Fargo account of Fast Lane Autos. RP 562, 564-65, 641. Surveillance footage of this ATM deposit showed that it was Derek James who made the ATM deposit. RP 641-42. The following day Mr. James made three cash withdrawals from the Wells Fargo account in the amounts of \$3,500, \$5,000, and \$9,500. RP 642, 643. Investigation showed that Mr. James never purchased the Kia vehicle. RP 643.

TAPCO Credit Union - June 10, 2016

On June 10, 2016 (the same day as the TwinStar transaction detailed above), the Appellant, Mr. Broussard, went to a Tacoma branch of TAPCO Credit Union and applied for an auto loan to purchase a 2012 Chrysler vehicle from Fast Lane Autos. RP 643-44. In filing out the application Mr. Broussard used an invalid social security number that an agent of the Social Security Administration testified had never actually been assigned to any person. RP 461, 644. Surveillance footage showed that it was Mr. Broussard who applied for and obtained this loan. RP 791-94. TAPCO Credit Union then issued a check in the amount of \$ 13,400 on that same day (June 10, 2016) made payable to Fast Lane Autos. RP 643-44. Later that same day the TAPCO check was deposited into the Fast Lane Autos account at Wells Fargo by Derek James (a fact that was demonstrated through surveillance footage). RP 652-53. Investigation showed that Mr. Broussard never purchased the Chrysler vehicle. RP 650.

Verity Credit Union - June 21, 2016

On June 21, 2016 Mr. James obtained an auto loan from a Seattle branch of Verity Credit Union purportedly for the purpose of purchasing a 2012 Chrysler from Fast Lane Autos. RP 653-56. In filing out the application Mr. James used a social security number that belonged to a 10 year old who was born in Indiana and who appeared to now live in Ohio.

RP 457, 654-55. Surveillance footage of this transaction showed that it was Mr. James who applied for, and obtained, this loan. RP 473, 654. Verity Credit Union then issued a check in the amount of \$16,340 made payable to Fast Lane Autos with the remitter named as Derek James. RP 565, 654. The check was ultimately deposited that same day, June 21, into the Fast Lane Autos account at Wells Fargo. RP 562, 565, 655-56. The deposit was made by Mr. James via an ATM in Renton (a fact that was demonstrated through surveillance footage). RP 656-57. Investigation showed that Mr. James never purchased the Chrysler vehicle. RP 655.

Inspirus Credit Union - June 24, 2016

On June 24, 2016 Mr. James went to Inspirus Credit Union and applied for an auto loan to purchase a 2013 Cadillac vehicle from A.J. Motors. RP 657-58. Surveillance footage of this transaction showed that it was Mr. James who applied for, and obtained, this loan. RP 488, 683. Inspirus Credit Union then issued a check in the amount of \$14,840 on June 28th, made payable to A.J. Motors (with the remitter listed as Derek James). RP 588, 659, 664. Investigation showed that Mr. James never purchased the Cadillac vehicle. RP 658.

The Inspirus check was ultimately deposited on June 29th into the Wells Fargo account of A.J. Motors that Mr. Smith had just opened a few

days earlier. RP 568, 574, 588, 660, 685. The deposit was made via an ATM at the Tacoma Mall branch of Wells Fargo, and although surveillance footage of the deposit was admitted at trial, the footage was of such poor quality that the person making the actual deposit could not be definitively identified. RP 571, 660-62.

Two days later, on July 1, 2016, Mr. Smith opened a second account for A.J. Motors at Wells Fargo (account ending in numbers 3685). RP 575-579, 665. That same day Mr. Smith (identified via surveillance footage) transferred the proceeds from the Inspirus Credit Union loan from the old account (ending in numbers 3271) into the brand new A.J. Motors account at Wells Fargo (ending in number 3685). RP 579, 666-67. On July 11, 2016 Mr. Smith (identified through surveillance footage) made two cash withdrawals (in the amounts of \$5,000 and \$9,800) from the new account. RP 666-67. Bank account statements showed that the only funds in the new account (and the only deposit that had ever been made into the account) was the transfer of the \$14,840 in loan proceeds from the Inspirus loan. RP 667.

Tacoma Police Detective Elizabeth Schieferdecker complied much of the evidence outlined above, and after she had completed her investigation of the above listed transactions, she prepared a "bulletin" or

law enforcement “alert” to notify other law enforcement officers about the investigation. RP 674-75.

The Trial Court’s Ruling Regarding the Admissibility of
the Evidence Relating to Mr. James’s Actions.

Prior to the beginning of testimony the defendants objected to the admission of the evidence relating to Mr. James and his activities, and this issue was briefly discussed as part of the motions in limine. RP 138-41.

The issue then arose again when the State sought to admit the first of the banking records at trial. RP 474. Specifically, Mr. Broussard’s counsel objected to the relevance of the documents relating solely to Mr. James. RP 474. The trial court overruled the objection “on the condition that further testimony in this case establishes a connections with these particular defendants, so these exhibits are admitted on the condition that that connection be made later in the case.” RP 474-75. The trial court then continued to “conditionally” admit the evidence relating to Mr. James throughout the trial. See, e.g., RP 488, 502, 534-35, etc.

Ultimately, the trial court gave its ruling regarding the conditionally admitted evidence on May 8, 2018. RP 939-51. The trial court began by acknowledging that the defendants had made ongoing objections to the evidence relating to Mr. James and that the defense argument was that this

evidence pertained only to Mr. James and should not be admitted at trial. RP 939-40. The trial court further explained that it had held off in making a final decision on the evidence due to the complexity of the case, and that the court wanted to see how the evidence unfolded in order to get a “clearer overall picture.” RP 940.

The trial court then gave a detailed and thorough oral ruling on the issue. RP 941-51. The trial court began by noting that in the charging documents the State alleged that Mr. Broussard and Mr. Smith committed the various financial crimes as either a principal or an accomplice. RP 941. This was important in the trial court’s view, because under an accomplice liability theory the State had to prove that the defendant had knowledge that their act promoted or facilitated a crime. RP 941. The court further explained that such knowledge could be proven in several ways, including through evidence of direct participation by the defendants. RP 942. The court noted, however, that a second way to prove knowledge was for the State to show that the defendants were active participants in a larger, overarching, ongoing criminal scheme. RP 943. The court then explained that,

[I]f the circumstantial evidence and the reasonable inferences that may be taken from the evidence shows that the defendants knew about and willingly participated in Mr. James' overall criminal scheme, then, in my view, this would have a strong tendency to prove that they had knowledge of

particular crimes that are part of the overall scheme, specifically the crimes that they're accused of participating in. So if a person knows about and is engaged in the whole, then logically that helps prove that they're knowingly involved in constituent parts of the whole.

RP 943. The trial court then went through the evidence that tended to show that Mr. Broussard and Mr. Smith had knowledge of, and participated in a larger scheme. First, the court noted that each of the brothers formed auto sales companies and registered them with the Secretary of State, and that Mr. Broussard and Mr. James had registered their companies on the exact same date. RP 945. It was thus, reasonable, according to the court to infer that this was not merely coincidental, but rather showed that the three men had communicated about the scheme and planned their actions together. RP 945.

In addition, the court noted that each of the brothers had utilized social security number that were not their own during the transactions, and that this commonality was again circumstantial evidence showing knowledge and planning on the part of the three brothers. RP 945. Next, each of the brothers was involved to some degree with the loan applications (although Mr. James participated more than the other two) and this further demonstrated that each man knew of and understood the overall scheme and participated in it to some degree. RP 946. In addition, the court noted that the surveillance footage also showed that Mr. Broussard was present with

Mr. James inside the US Bank branch during one of the transactions. RP 948.

Furthermore, with respect to those transactions undertaken solely by Mr. James, the court explained that evidence regarding those transactions was highly probative to demonstrate that there was an overall plan. RP 947. In addition, Mr. James' action in those instances was essentially identical to the action in the transactions where Mr. Broussard and Mr. Smith were directly involved (and which were the basis for the charges against them), and the court noted that,

It is relevant and important for the jury to know the full extent of the alleged criminal scheme and to not be forced to view the conduct of the defendants in a vacuum, in isolation from the overall scheme. Proof of the alleged overall plan is necessary in order to prove what it was that the defendants were actively allegedly participating in.

So the evidence of Mr. James' conduct, which at first glance looks like it has no connection to the defendants, ultimately serves to underscore and make clear that there was an overarching plan and what that plan was. Therefore, Mr. James' nearly identical conduct to that of the defendants is, again, circumstantially probative of each defendants' overall knowledge and motive and their respective intentions, and as to Mr. Smith the absence of a mistake.

RP 947.

The court also addressed the evidence under an ER 404(b) analysis, even though that rule had not been raised by the defense, and the court concluded that the purpose for this evidence under ER 404(b) was to

provide proof of the defendants' knowledge, intent, and motive. RP 944, 946-47. In addition the court found little risk of unfair prejudice or confusion (that would outweigh the probative value of the evidence) since the evidence regarding Mr. James's activities was separate and distinct from the other two and the evidence had "no emotional or inflammatory content such that ER 403 should bar its admission." RP 949. Furthermore, the transactions for which Mr. Broussard and Mr. Smith were charged were going to be clearly separated out in the jury instruction by individual counts, and the trial court noted that the jury was presumed to follow the court's instructions. RP 949-50.

With respect to the actual documentary evidence itself, the trial court further noted that the documents speak for themselves and bear the names of the person involved and that the surveillance footage further clarified exactly who was involved in each transaction. RP 950. Thus the documents (and photos) themselves prevent confusion. RP 950. The trial court thus concluded that,

So on balance then, as I apply Evidence Rule 404(b) and Evidence Rule 403, I believe and find that the circumstantial evidence of an overall criminal scheme and the defendants' knowledge of it and their motive and intent to participate is highly probative and its probative value, in the Court's view, clearly outweighs the minimal risks that are cautioned against in Evidence Rule 403. Therefore, the conditionally

admitted documents are now fully admitted. They will go to the jury along with the rest of the evidence in this case.

RP 951.

III. ARGUMENT.

- A. MR. SMITH'S CLAIM THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT HIS FORGERY CONVICTIONS IS WITHOUT MERIT BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL FINDER OF FACT COULD HAVE FOUND THAT THE ELEMENTS OF THE CHARGED OFFENSES WERE PROVEN BEYOND A REASONABLE DOUBT.

Mr. Smith first claims that there was insufficient evidence to support the jury's finding of guilt on his two forgery counts. App.'s Br. at 11. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational finder of fact could have found the elements of the charged offense beyond a reasonable doubt.

A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that may be drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Whether sufficient evidence supports a conviction depends on whether, when viewed in the light most favorable to the prosecution, any rational finder of fact could have found the elements of the crime beyond a

reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014).

Under Washington law a person is guilty of forgery if, with intent to injure or defraud:

(a) He or she falsely makes, completes, or alters a written instrument.

(b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

RCW 9A.60.020(1). A written instrument is broadly defined as:

(a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or (b) any access device, token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.

RCW 9A.60.010 (7). The current version of the forgery statute was enacted in 1975, and this Court has explained that at common law (prior to 1975) forgery was the act of falsely making or materially altering, with intent to defraud, a writing “which, if genuine, might apparently be of efficacy or the foundation of legal liability.” *State v. Smith*, 72 Wn.App. 237, 864 P.2d 406 (1993). This Court then explained that this “rule of legal efficacy” was a provision of the common law that shall supplement the current penal statutes of this state, pursuant to RCW 9A.04.060. *Smith*, 72 Wn.App. at 241. This Court also examined the legislative history of the 1975 statute and found that “the Legislature intended to continue the then-existing rule

of legal efficacy.” *Id* at 241. This Court in *Smith* thus concluded that under the modern forgery statute the instrument “must be ‘something which, if genuine may have legal effect or be the foundation of legal liability.’” *Smith*, 72 Wn.App. at 409-10, quoting, *State v. Scoby*, 117 Wn.2d 55, 57–58, 810 P.2d 1358 (1991).

Furthermore, in *Scoby* the Washington Supreme Court examined the modern statute and the previous version in effect prior to 1975 and concluded that the Legislature did not intend any change in the law regarding whether *money* (that is, currency) is a written instrument. *Scoby*, 117 Wn.2d at 59-60. In addition, the Supreme Court specifically held that the use of the expression “written instrument: in the modern statute was “meant to encompass the full range of items in the previous statute, including currency.” *Scoby*, 117 Wn.2d at 59-60.³ In short, all of the items

³ The pre-1975 statute read as follows:

“Every person who, with intent to defraud, shall forge any writing or instrument by which any claim, privilege, right, obligation or authority, or any right or title to property, real or personal, is or purports to be, or upon the happening of some future event may be, evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, or any request for the payment of money or delivery of property or any assurance of money or property, or any writing or instrument for the identification of any person, or any public record or paper on file in any public office, or any certified or authenticated copy of such record or paper, or any entry in any public or private record of account, or any judgment, decree, order, mandate, return, writ or process of any court, tribunal, judge, justice of the peace, commissioner or magistrate, or the official return or report of, or a license issued by, any public officer, or any pleading, demurrer, motion, affidavit, appearance, notice, cost bill, statement of facts, bill of exceptions or proposed statement of facts or bill of exceptions in any action or proceeding whether pending or not, or the draft of any bill or resolution that has been presented to either house of the legislature of this state, whether engrossed

listed in the previous statute, including currency, are to be treated as written instruments under the modern, post 1975, statute.

Under the previous statute, the “full range of items” included “any writing or instrument by which any claim, privilege, right, obligation or authority, or any right or title to property, real or personal, is or purports to be, or upon the happening of some future event may be, evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected.” Former RCW 9.44.020. As this Court explained in *Smith*, the legislative history shows that although the modern statute was shorter the new law was intended to be entirely consistent with previous Washington law, and the new bill was basically a restatement of existing law with no significant changes. *Smith*, 72 Wn.App. at 241-42 (examining the legislative history of the 1975 forgery law). This is, of course, consistent with the Supreme Court’s conclusion in *Scoby* that the expression “written instrument” in the modern statute was “meant to encompass the full range of items in the previous statute.” *Scoby*, 117 Wn.2d at 59-60.

or not, or the great seal of this state, the seal of any public officer, court, notary public or corporation, or any public seal authorized or recognized by the laws of this or any other state or government, or any impression of any such seal; or shall forge or counterfeit any coin or money of any state or government, or any bank or treasury bill, any note or postage or revenue stamp; or who, without authority shall make or engrave any plate in the form or similitude of any writing, instrument, seal, coin, money, stamp or thing which may be the subject of forgery, shall be guilty of forgery in the first degree, and shall be punished by imprisonment in the state penitentiary for not more than twenty years.”
Former RCW 9.44.020 (1909).

Under the language of the pre-1975 law, any writing by which any privilege right or obligation is created (or will be created upon the happening of some future event) is a proper basis of a forgery prosecution. In the present case the bank account applications would clearly fall under this broad language, as the application establishes the terms under which the rights, privileges, and obligations of a bank account holder are to be governed. Although the application itself must be approved, the statutory language would cover this “future event” (that is, the approval of the application) and thus the application would qualify under the former statute. As the Supreme Court explained in *Scoby*, the modern statute was “meant to encompass the full range of items in the previous statute.” *Scoby*, 117 Wn.2d at 59-60. Thus, the bank applications in the present case are covered under the previous statute for the simple reason that they qualified under the plain language of the pre-1975 statute, which was meant to be carried over into the new, modern, forgery statute according to our Supreme Court in *Scoby*.

In addition, although the Respondent could find no Washington cases dealing specifically with the issue of bank account applications and the “rule of legal efficacy,” at least one other jurisdiction has addressed this issue. In a line of cases, the military courts have explained that Article 123 of the Uniform Code of Military Justice, 10 USC § 905, defines forgery as

Any person subject to this chapter who, with intent to defraud—

(1) falsely makes or alters any signature to, or any part of, *any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice*; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;

is guilty of forgery and shall be punished as a court-martial may direct.

10 U.S.C. § 905. In addition, as the crime of forgery has been applied under the Code of Military Justice there is also a “legal efficacy” requirement (which mirrors the same rule under the common law of Washington). *See, U.S. v. White*, 35 M.J. 154, 156 (C.M.A. 1992).

Numerous military courts have examined the specific issue of whether a checking account application meets the legal efficacy requirement.⁴ In *U.S. v. Ivey*, 32 M.J. 590, 591 (A.C.M.R.1991), *aff'd*, 35 M.J. 62 (C.M.A.1992), for instance, the military court discussed the legal efficacy requirement and held that,

An application for a checking account, when accepted by the bank, creates a contract, conferring rights and imposing obligations on both the bank and the depositor. The bank is obliged to pay checks drawn on the account, perform certain bookkeeping functions, and provide blank checks, the means used in this case to commit the other offenses. The depositor is obliged to pay service charges and reimburse the bank for

⁴ Washington courts have in the past examined opinions from military courts when useful. *See, e.g., State v. Trochez-Jiminez*, 173 Wn.App. 423, 431-33, 294 P.3d 783 (2013)

overdrafts. Accordingly, we hold that an application for a checking account is a proper subject of forgery.

Ivey, 32 M.J. at 591 (internal citations omitted). Other military courts have reached the same conclusion. *See, e.g., White*, 35 M.J. at 156 (finding that the legal efficacy test was met as the applications at issue established the “various types of legal obligations imposed on the bank and the account holder,” such as a \$10.00 maintenance fee and a \$15.00 fee for overdrawn accounts.); *U.S. v. Sherman*, 52 M.J. 856, 859 (C.M.A. 2000) (citing *Ivey* and *White* for the conclusion that a false application for checking accounts meet the legal efficacy requirement.).

These holdings from the military courts addressed the same issue before this court: namely, whether the bank application in the present case meet the legal efficacy requirement. The military courts applied a common sense analysis and concluded that the applications, when accepted by the bank, clearly create legal obligations and rights and thus meet the efficacy requirement. This analysis dovetails closely with the analysis above regarding the language from former RCW 9.44.020 which specified that any writing that creates, or on the happening of some future event (such as the bank’s acceptance of the application) creates, a privilege, right or obligation is the proper basis for a forgery charge.

For all of these reasons this Court should hold that a bank application such as the ones at issue in the present case are a proper basis for the forgery charges and met the legal efficacy requirement under Washington law.

Mr. Smith next claims that “even if the account applications constitute written instruments” the evidence failed to establish they were falsely completed and that they were, instead, genuine documents that merely contained false information. App.’s Br. at 14-15. Specifically, Mr. Smith cites to *State v. Mark*, 94 Wn.2d 520, 523, 618 P.2d 73 (1980) for the proposition that “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.” App.’s Br. at 15, *quoting Mark*, 94 Wn.2d at 523.

Mark, however, does not support Mr. Smith’s argument. In *Mark*, the defendant was a pharmacist who had submitted claim forms to DSHS which falsely stated that he had provided prescriptions to federal Medicaid recipients. *Mark*, 94 Wn.2d at 521-22. The Supreme Court held that this was not a forgery as the claim forms were what they purported to be (claim forms from the pharmacist) and that the defendant was authorized to fill out the forms, he just included false information in the forms which was insufficient to be a forgery. *Id* at 522, 524.

The present case, however, is distinguishable from *Mark* because in the present case Mr. Smith filled out the bank applications using a social security number belonging to someone else (a ten year old from Indiana), and thus he was not authorized to fill out the applications using that social security number. *See*, Exhibits 65 and 78; RP 456, 569, 579. The use of someone else's social security number in the present case thus constituted something more than a mere representation of fact; rather, it purported to be an application by and from someone with a social security number ending in 3110. As that social security number did not belong to Mr. Smith, the application clearly purported to be the act of someone other than Mr. Smith and thus did not comply with the *Mark* court's holding that "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 (emphasis added). To the contrary, the application did purport to be the act of someone other than Mr. Smith (specifically, someone with a social security number ending in 3110) and thus was sufficient to establish a forgery under Washington Law. This conclusion is further supported by the fact that RCW 9A.60.010(7) defines a forged instrument as "a written instrument which has been falsely made, completed, or altered" and RCW 9A.60.010(5) defines to "falsely complete" as "transform[ing] an

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

In the present case Mr. Smith falsely completed the bank applications by adding or inserting the social security number belonging to someone else. This act met the statutory definition of forgery, complied with the common law list of acts that constitute forgery (because it was a writing that created certain rights and obligations), and met the common law test for legal efficacy. Nothing more was required. Mr. Smith’s claim that the evidence was insufficient, therefore, is without merit.

B. MR. SMITH’S CLAIM THAT THE TRIAL COURT ERRED IN REFUSING TO GIVE HIS PROPOSED INSTRUCTION ON LEGAL EFFICACY IS WITHOUT MERIT BECAUSE THE TRIAL COURT ACTED WELL WITHIN ITS BROAD DISCRETION IN DECLINING TO GIVE SUCH AN INSTRUCTION AND BECAUSE EVEN IF ONE WERE TO ASSUME FOR THE SAKE OF ARGUMENT THAT THE TRIAL COURT ERRED, ANY ERROR IN THIS REGARD WAS CLEARLY HARMLESS.

Mr. Smith next argues that the trial court erred in refusing to give his proposed instruction of legal efficacy. App.’s Br. at 16. Mr. Smith’s claim, however, is without merit as the trial court acted well within its broad discretion in refusing to give the proposed instruction.

A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. *State v. Picard*, 90 Wn.App. 890, 902, 954 P.2d 336, *review denied*, 136 Wn.2d 1021, 969 P.2d 1065 (1998). A court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "[A] specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case." *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), *quoting State v. Rice*, 110 Wn.2d 577, 603, 757 P.2d 889 (1988).

In the present case the trial court instructed the jury regarding the definitions relating to forgery:

A person commits the crime of Forgery when, with intent to injure or defraud, he or she falsely completes a written instrument or possesses, offers, or puts off as true, a written instrument which he or she knows to be forged. CP 299.

"Written instrument" means any paper, document or other instrument containing written or printed matter or its equivalent. CP 301.

"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. CP 302.

"Forged instrument" means a written instrument, which has been falsely completed. CP 303.

These instructions mirrored the Washington pattern instructions numbers 130.01, 130.10, 130.12 and 130.14 respectively.

Mr. Smith proposed a modified version of WPIC 130.10 (the definition of “written instrument”) that would have added language to the pattern instruction. Specifically, Mr. Smith’s proposed instruction added a sentence that stated, “An instrument is something, which, if genuine, may have legal effect or be the foundation of legal liability.” CP 224. Mr. Smith’s proposed instruction also included a citation to the comment from WPIC 130.10 which discussed the issue of legal efficacy and specifically stated that: “Because issues of legal efficacy will generally be for the court to determine, rather than the jury, the committee has not included the common law definition in the instruction.” CP 224, *see also*, 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 130.10 (4th Ed. 2016).

The Washington Supreme Court has explained that our state has adopted pattern jury instructions to assist trial courts and that these pattern instructions are “drafted and approved by a committee that includes judges, law professors, and practicing attorneys.” *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Furthermore, pattern instructions “generally have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state.” *Id* at 308.

In the present case the trial court declined to give the additional language proposed by Mr. Smith in its final instructions to the jury, finding that the it was the court’s belief that all parties were going to be able to

argue their respective theories of this case using these instruction on the law.
RP 1212.

Mr. Smith has not claimed that the trial court's instructions misstated the law or were otherwise inaccurate, and Mr. Smith also concedes that "legal efficacy is not a separate element of the offense of forgery." App.'s Br. at 17, *citing State v. Ring*, 191 Wn.App. 787, 793, 364 P.3d 853 (2015). Furthermore, as stated above, the comment to WPIC 130.10 clearly explains why the WPIC committee thoughtfully decided not to include the language regarding legal efficacy in the pattern instruction, and the trial court in the present case clearly acted well within its discretion in reaching a similar conclusion.

Given these facts, Mr. Smith has failed to show that the trial court abused its broad discretion in declining to give the proposed language regarding legal efficacy and instead decided to give the pattern instruction which accurately stated the law and allowed Mr. Smith to argue his theory of the case.

In addition, even if one were to assume for the sake of argument that the trial court erred in declining to give Mr. Smith's proposed instruction, any error in that regard would be harmless error and would not warrant a reversal.

A trial court's failure to define a technical term may be harmless error. *State v. Flora*, 160 Wn.App. 549, 554, 249 P.3d 188 (2011), *citing In re Det. of Pouncey*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010). “A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *Flora*, 160 Wn.App. at 554, *citing State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). Similarly, “An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Carter*, 154 Wn.2d 71, 81, 109 P.3d 823 (2005), *citing State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). Whether a flawed jury instruction is harmless error depends on the facts of a particular case. *Carter*, 154 Wn.2d at 81, *citing Brown*, 147 Wn.2d at 81.

In the present case the bank account applications at issue clearly meet the standard for legal efficacy for all the reasons outlined in the previous section of this brief. As a result, giving an additional instruction on legal efficacy would not have had an effect on the verdict or final outcome in this case, as the documents spoke for themselves and clearly met the requirements regarding legal efficacy. Thus any error in this regard would have been harmless.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING TESTIMONY FROM MR. JAMES' DEFENSE COUNSEL REGARDING THE CIRCUMSTANCES SURROUNDING THE DRAFTING OF THE FACTUAL STATEMENT INCLUDED IN HIS GUILTY PLEA FORM AS SUCH TESTIMONY WAS NOT MATERIAL TO ANY OF THE ISSUES BEFORE THE JURY IN THE PRESENT CASE.

Mr. Smith next claims that the trial court abused its discretion in excluding evidence that certain statements contained in the guilty plea of a witness, Mr. James, were written into the guilty plea form by Mr. James's attorney and that this was done at the suggestion of the prosecutor. App.'s Br. at 19-20. This claim is without merit because the trial court acted well within its broad discretion in determining that the proposed testimony was not material to any of the issues in the present case.

A trial court's decision on the admissibility of evidence is reviewed for abuse of discretion. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Dobbs*, 180 Wn.2d at 10, 320 P.3d 705, quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

In the present case the State called Mr. James and attempted to ask him numerous questions about his own conduct and a few questions about the actions of Mr. Smith and Mr. Broussard. RP 868-907. After answering

“yes” to the initial question regarding whether he had registered a business, Mr. James soon began to either answer the prosecutor’s questions by stating he didn’t remember, he didn’t know, or that he had “no comment.” RP 877-887. The trial court then admonished Mr. James outside the presence of the jury. RP 887-96. When the testimony resumed, the prosecutor turned to the circumstances of Mr. James’ guilty plea. RP 896. Mr. James admitted that he had entered a plea but immediately began denying that he had made any factual statements as part of the plea. RP 896. The prosecutor handed Mr. James a copy of the plea form, and Mr. James immediately stated that the statements were not his but were the statements of his attorney. RP 897.

The prosecutor then asked Mr. James if paragraph 11 of the plea form contained a “series of facts.” RP 898. Mr. James did not answer directly and stated that they were not facts from him. RP 898. Mr. James again explained that any statement came from his attorney, not from him. RP 898. The prosecutor then asked Mr. James if his initials appeared next to paragraph 11, and Mr. James, in a roundabout manner, said his initials appeared “right there” and “everywhere where it said initial” because he just wanted to hurry up and plead so he could start his sentence. RP 898-99.

The prosecutor then made an attempt to review some of the specific facts that were apparently contained in paragraph 11 and asked if he had

used social security numbers belonging to others. RP 899-900. Mr. James again said this was the statement of his attorney, and when asked if he agreed to it, Mr. James said, "Like I said, all I did was initial it so I can hurry up and get out of Pierce County so I can start my sentence that you gave me." RP 899-900.

The prosecutor then asked Mr. James several questions about whether his written statement had included certain facts, but Mr. James never directly answered. RP 903. Instead he answered with "I don't know" or some variation of that. RP 903.

Finally, the prosecutor asked a few limited questions about whether Mr. Smith's statement included information about the involvement of Mr. Smith and Mr. Broussad. That exchange went as follows:

Q. (By Ms. Vitikainen) Yes or no, Mr. James. Mr. Smith knew that M.M. was a real person when he opened the Wells Fargo account for A.J. Motors?

A. Nobody knew anything besides me, simple as that.

Q. Except you initialed -- MS. VITIKAINEN: Sorry, Your Honor.

Q. (By Ms. Vitikainen) That was included in your statement, right?

A. No, not my statement, no, not my statement, because I didn't even make no statement.

Q. You also deposited the \$14,840 check into Mr. Smith's A.J. Motors account, correct?

A. That's not correct.

Q. And you knew that Mr. Smith did this, correct?

A. Not correct. I don't even know where you even got that from. Like I said, these are not from me.

Q. You also knew that Mr. Broussard --

A. How are you going to tell me what I knew?

Q. You also knew that Mr. Broussard created a purchase agreement between himself and Fast Lane Autos using a social security number that wasn't his own, correct?

A. Not correct, for the last time.

...

Q. (By Ms. Vitikainen) Mr. Broussard took that purchase order and --

A. Like I said, these statements are not even mine, so why do you keep asking me questions on these statements? They're not mine.

Q. Please let me finish my question, Mr. James. Mr. Broussard took that purchase agreement to TAPCO and obtained a check in the amount of \$13,400, correct?

A. I don't know what happened.

Q. You and Mr. Smith and Mr. Broussard made multiple withdrawals from both the U.S. Bank account and from the Wells Fargo accounts, correct?

A. Not correct.

Q. You each knew what the other two was doing, correct?

A. Not correct.

Q. And the three of you were all working together to get the money, weren't you?

A. Not correct.

Q. Except that's all contained within the plea statement that you signed, correct?

A. No, not correct.

Q. That's not your signature at the bottom of paragraph 11?

A. Like I said, these statements are not correct, for the last time. They're not from my mouth.

Q. But you adopted --

A. No, I didn't adopt anything. They're not from my mouth.

Q. You told the Court you adopted them as your own, correct?

A. They're not mine. Like I said, all I did was initial and sign just so I can hurry up and leave.

RP 905-07. The passages above were the only time the prosecutor asked Mr. James any questions about the actions of Mr. Smith or Mr. Broussard.

In response to the prosecutor's questions about what Mr. Smith knew or did, Mr. James responded initially that "Nobody knew anything besides me, simple as that," and thereafter he answered with the statement "Not correct." Even when the prosecutor asked if the plea formed contained such statements about Mr. Smith and Mr. Broussard, Mr. James again answered, "Not correct." RP 32. The final few questions do appear to include some sort of admission by Mr. James that he did initial something, but it is not entirely clear whether that statement applied to the actual statements about the actions of Mr. Smith or Mr. Broussard.

The actual plea form was never admitted as an exhibit, and any suggestion about what that form might have said about Mr. Smith and Mr. Broussard occurred in the above exchanges where Mr. James answered "not correct" in response to the prosecutor's questions.

As a result of Mr. James' testimony, counsel for Mr. Broussard apparently subpoenaed Mr. James defense counsel, Nick Andrews, and a motion to quash the subpoena was filed. RP 1005-06. In discussing the proposed testimony of Mr. James' defense counsel, Mr. Smith's counsel indicated that the testimony would likely show that Mr. James' attorney wrote the factual statement in the plea form and that the actual language came at the suggestion of the prosecutor, and that this fact would help to essentially diminish the prosecutor's impeachment of Mr. James. RP 1011.

The trial court, however, pointed out that about the only thing Mr. Mr. James acknowledged was that he formed a corporation and was related to the defendants. RP 1008-09. The court further explained that when the prosecutor tried to get Mr. James to acknowledge that in his plea statement had had stated he acted in concert with the defendants, Mr. James refused to acknowledge this. RP 1009. The court then pointed out that "Mr. James said nothing that would implicate your client" and that the court didn't see how the testimony of the attorney would advance anything that's relevant in this case. RP 1009-10.

After some additional comments from counsel, the trial court issued its ruling as follows:

The jury has already been told at the beginning of this case and will be told in final instructions that the comments of the lawyers, the arguments of the lawyers, and that includes the

questions that are asked by the lawyers, are not evidence. There has been nothing that came through Mr. James' testimony that would warrant and make material Mr. Andrews testifying as to the origin of the statement that was presented to the Court. I cannot see any materiality to Mr. Andrews testifying in this case.

RP 1011-12. The court further explained that,

I understand logically what defense counsel are trying to do here, but, number one, I don't believe that testimony on this subject from attorney Andrews is relevant to any of the issues that are in this case. I have to also evaluate whether calling Mr. Andrews would confuse the issues before the jury, mislead the jury within the meaning of Evidence Rule 403, and create unfair prejudice to the plaintiff, and I believe it would. It would put Ms. Vitikainen in the impossible position of trying to respond to theoretical testimony, or if he testified this way and Mr. Andrews' testimony that Ms. Vitikainen had drafted this, it puts Ms. Vitikainen in the position of being a witness to explain to the jury how that came about, and all to what end?

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.

The facts of what Mr. James did that led to his convictions have been attempted to be proven by the State through the documentary evidence that this Court has admitted. The jury will give that whatever weight it deserves and the jury will decide whether the State has proven that either of these defendants were complicit in what Mr. James did, but the State has offered no evidence and there's been none admitted through Mr. James' testimony as to what Mr. James did other than his statement that he formed a company. He admitted that much, and I think he admitted that he may have opened a bank account.

So, I'm going to grant the motion to quash the subpoena. I'm denying Mr. Broussard's request, subpoena, that Mr. Andrews testify in the case.

RP 1013-15.

On appeal, Mr. Smith argues that the trial court abused its discretion in excluding testimony from Mr. James' attorney. App.'s Br. at 19. Mr. Smith argues that this testimony was needed to rebut the State's theory that Mr. James was working with Mr. Smith. App.'s Br. at 20. Mr. Smith further claims that "The prosecutor established that James initialed statements in the form indicating that James, Broussard, and Smith were working together to get money." App.'s Br. at 20, citing RP 907.

The record, however, does not show that the prosecutor clearly established that Mr. James initialed such statements. Rather, when James was asked if the three were working together, James response was "Not correct." RP 907. The prosecutor followed up by saying, "Except that's all contained with the plea statement that you signed, correct?", but Mr. James again responded with "Not correct." RP 907. Mr. James did state he initialed and signed the form, but it is not clear from the trial testimony that the factual statement even contained the comments about Mr. Smith or Mr. James, or that Mr. James had initialed such specific provisions (if they did exist).

Furthermore, Mr. James was quite clear that any statement was not written by him, but was written by his attorney. The State never disputed that this was true; rather the State merely tried to get Mr. James to acknowledge that he had adopted the statement and signed the form indicating it was his statement. Thus it is unclear what relevance the proposed testimony would have had. The jury had already heard (repeatedly) that Mr. James didn't write the statement and this was never disputed, so testimony that Mr. James's counsel wrote the statement and did so at the suggestion of the prosecutor would have added little to the case.

In any event, the trial court clearly considered the possible relevance of the proposed testimony and found that it was not relevant. RP 1013-15. This ruling was supported by the fact that Mr. James' actual testimony said nothing that implicated Mr. Smith or Mr. Broussard. Thus, nothing about the trial court's ruling regarding this minimally relevant (at best) evidence demonstrates that the trial court abused its discretion. To the contrary, the record shows that the trial court carefully considered the proposed evidence as well as the actual testimony of Mr. James and reached a ruling that was well within the trial court's broad discretion.⁵ Mr. Smith's claims to the contrary, therefore, are without merit.

⁵ Again, even if one were to assume for the sake of argument that the trial court somehow erred in excluding the evidence, any error would have been harmless beyond a reasonable doubt given the minimal relevance of the evidence and the fact that Mr. James had not

D. MR. SMITH'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT BECAUSE HE HAS FAILED TO SHOW EITHER DEFICIENT PERFORMANCE OR PREJUDICE.

Mr. Smith next claims argues that his counsel was ineffective for failing to request a limiting instruction regarding Mr. James' "prior inconsistent statements" and the testimony regarding Mr. James' actions. App.'s Br. at 23-29. This claim is without merit because Mr. Smith cannot show either deficient representation or prejudice.

To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id* at 33. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. *Id* at 34.

In the present appeal Mr. Smith first claims that his trial counsel was ineffective for failing to request a limiting instruction regarding Mr. James's prior statements. App.'s Br. at 24. Specifically, Mr. Smith argues that at

given testimony implicating Mr. Smith (or acknowledged making any prior statements implicating Mr. Smith).

trial Mr. James testified that his “prior statements that he, Smith, and Broussard were working together were not true,” and that the State “introduced the contents of Mr. James’ plea form.” RP 26.

Mr. Smith’s characterization of the record, however, is questionable. As stated in the previous section, Mr. James did not specifically acknowledge that his plea form stated that the three men were working together. RP 907. In addition, the State never introduced the full contents of the plea form at trial and the exact contents of Mr. James’ statements in that form (especially as it related to Mr. Smith) were never developed through testimony. Thus, it is unclear what purpose a limiting instruction would have served, as there was no true impeachment evidence offered (at least not in the traditional sense).

Furthermore, as Mr. Smith acknowledges in his brief, trial counsel’s decisions are afforded great deference. App.’s Br. at 26, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1998). In addition, “[b]ecause the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wn.2d at 336.

In the present case Mr. Smith’s counsel could well have concluded due to legitimate strategic or tactical reasons that a limiting instruction

regarding the impeachment of Mr. James (to the extent that such impeachment even took place) would cause the jury to unnecessarily focus on this “impeachment” when the actual evidence at trial regarding any prior statements was not at all damaging to Mr. Smith. In addition, counsel could have reasonably concluded that such a limiting instruction might actually cause the jury to think that there was more to Mr. James’ “impeachment” than there actually was, and that drawing attention to the impeachment would do more harm than good, especially when Mr. James actual testimony was quite clear that Mr. Smith was not involved in the scheme.

Furthermore, given the minimal impeachment evidence (if any) that was actually introduced, Mr. Smith cannot show prejudice or that there is a reasonable probability that, except for counsel's failure to request a limiting instruction, the result of the proceeding would have been different. Mr. Smith’s claim regarding the lack of a limiting instruction regarding the “impeachment” evidence, therefore, must fail as he can show neither deficient performance nor prejudice.

Mr. Smith’s second claim is that his counsel was deficient for failing to request a limiting instruction regarding the evidence of Mr. James’ prior acts, which Mr. Smith characterizes as ER 404(b) evidence. App.’s Br. at 28-29. Specifically, Mr. Smith argues that a limiting instruction was needed so that the jury would only consider the evidence of Mr. James’ acts in so

far as it related to Mr. Smith's involvement in the overall scheme as well as his intent and absence of mistake. App.'s Br. at 29.

As the Supreme Court has explained, ER 404(b), properly understood, "is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). As the prior act evidence in the present case was merely evidence of *Mr. James'* prior acts (and not the prior acts of Mr. Smith), it is unclear what possible purpose the jury could have used this evidence for other than to show Mr. Smith's knowledge, intent and involvement in the overall scheme. There was no danger that the jury would use the evidence of Mr. James' prior acts to show he that acted in conformity with his character, since Mr. James was not on trial. Furthermore, as this evidence related solely to the prior acts of someone else, there simply was no danger that the jury would incorrectly use this evidence as evidence of *Mr. Smith's* propensity or character, which is, of course, the traditional reason for an ER 404(b) limiting instruction. For example, a limiting instruction for ER 404(b) typically states that the prior act evidence may not be used for the purpose of concluding that the *defendant* has a particular character and has acted in conformity with that character. *Gresham*, 173

Wn.2d at 423-24. Such a limiting instruction would have made no sense in the present case since the prior bad acts were the acts of someone else.

In short, because the prior act evidence (to the extent that the evidence can be so characterized) related solely to the prior acts of Mr. James, it is not even clear that an ER 404(b) limiting instruction was proper. Thus counsel cannot be said to have acted deficiently in failing to request such an instruction. In addition, Mr. Smith cannot show prejudice because as the acts at issue were the prior acts of Mr. James there simply was no danger that the jury would use those acts to show that *Mr. Smith* somehow acted in conformity with Mr. James's character.

Finally, in his brief Mr. Smith claims that it was "crucial" that the jury be informed that the it could not find Mr. Smith guilty based on the prior acts of his brother Mr. James. App.'s Br. at 29. The record shows, however, that the charges below were carefully delineated in such a way as that the jury could only convict Mr. Smith for the actions that he was involved in either as a principal or as an accomplice, and the limited time period for his specific offenses worked to limit any use of Mr. James' prior acts, other than the fact they jury could consider Mr. James' prior acts to the extent that they were evidence of the overall scheme and of Mr. Smith's knowledge and intent (which Mr. Smith acknowledges was proper). App.'s Br. at 29.

In conclusion, as the prior bad act evidence was evidence of Mr. James' actions, there simply no danger in the present case that the jury would somehow consider this as evidence of Mr. Smith's character (or that Mr. Smith somehow acted in conformity with his character). Mr. Smith, therefore, cannot show either deficient performance or prejudice, and his claim of ineffective assistance of counsel must fail.

E. CONCESSION OF ERROR - THE STATE CONCEDES THAT THE \$200 FILING FEE SHOULD BE STRICKEN PURSUANT TO *RAMIREZ*.

Mr. Smith's final argument is that this court must strike the \$200 filing fee pursuant to the holding in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). App.'s Br. at 30. The State concedes that the filing fee should be stricken pursuant to *Ramirez*.

House Bill 1783, which became effective June 7, 2018, prohibits trial courts from imposing discretionary legal financial obligations (LFOs) on defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 6(3); *Ramirez*, 191 Wn.2d at 738, 747. This change to the criminal filing fee statute is now codified in RCW 36.18.020(2)(h). As the court held in *Ramirez*, these changes to the criminal filing fee statute apply prospectively to cases pending direct appeal prior to June 7, 2018. *Ramirez*, 191 Wn.2d at 747. Mr. Smith filed his notice of appeal on May 25, 2018. CP 450. Accordingly, the change in law applies to Mr. Smith's case, and the

record shows that the trial court signed an order of indigency in this matter. CP 464-65. Because Mr. Smith is indigent, the criminal filing fee must be struck pursuant to *Ramirez*.

IV. CONCLUSION.

For the foregoing reasons, Mr. Smith's convictions and sentence should be affirmed, except for the portion of the judgment and sentence that imposed the \$200 criminal filing fee.

DATED: May 30, 2019

Respectfully submitted,

MARY E. ROBNETT
Pierce County Prosecuting Attorney

JEREMY A. MORRIS
WSBA No. 28722
Special Deputy Prosecuting Attorney
Glisson & Morris, PS
623 Dwight Street
Port Orchard, WA 98366
PH: (360) 519-3500



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

5/30/19

Date Signature

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, written over a horizontal line.

GLISSON & MORRIS

May 30, 2019 - 2:00 PM

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