

NO. 35343-1-II
Cowlitz Co. Cause NO. 06-1-00882-8

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

SCOTT ALAN NORDQUIST,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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AMENDED BRIEF OF RESPONDENT

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I. BRIEF ANSWER

The trial court did not err when it admitted testimony that the teller was to use caution when verifying the signature on certain numbered checks which ‘may have been stolen’ since such testimony was not admitted to prove the truth of the matter asserted. The Appellant was not denied effective assistance of trial counsel since the officer’s comments on the arrest of the defendant did not constitute an impermissible opinion on the guilt of the defendant. Additionally, there was sufficient evidence to support the Appellant’s forgery conviction.

II. STATEMENT OF THE CASE.

A. EXCEPTIONS TO APPELLANT’S STATEMENT OF THE CASE

As noted here, the State does not accept portions of the Appellant’s statement of the case.

(1) “Stolen Series of Check” The State contends that portion of the Appellant’s Statement of the Case under procedural history, which contains the following: “This testimony included the teller’s statements that her computer stated that Jodi Hamer’s account showed the following notation: ‘Stolen series of checks’. RP [sic] 40-41”, Brief of App. at 5, fails to comply with RAP 10.3(a)(5), which requires a “fair statement of the facts and procedure relevant to the issues presented for

review, without argument. Reference to the record must be included for each factual statement.” The statement above quoted from the Appellant’s brief does not comply with the rule since it is not a “fair statement of the facts” in this case. The Appellant uses quotes apparently to indicate that the teller’s statement included the phrase “Stolen series of checks”.

However, a review of the record will show that the quote “Stolen series of checks” does not appear at the portion of the record cited by the Appellant. Rather, the record indicates that – after the trial court overruled defense counsel’s hearsay objection – Kendra Thompson testified that “There was a memo stating that this particular series of check numbers may have been stolen and to use caution when verifying the signature.” RP at 40.

The State contends that the above-mentioned sentence from the Appellant’s brief should not be considered by the court as it fails to comply with RAP 10.3(a)(5).

(2) Opinion of Guilt by Officers: Additionally, the State contends that portion of the Appellant’s statement of the case which states: “In addition, without defense objection the state repeatedly elicited evidence from the two police officers that they believed the defendant guilty of the forgery in that they arrested the defendant and Mirandized based upon their opinion of guilt. RP 72-72 [sic], 76, 97, 102”, Br. of

App. at 5, also fails to comply with RAP 10.3(a)(5), which requires a “fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.” The statement above quoted from the Appellant’s brief does not comply with the rules since it is not a “fair statement of the facts” in this case.

In the portions of the record cited by the Appellant the officers are testifying about the circumstances surrounding their arrest of the Appellant. Nowhere in the record cited by the Appellant do the officers voice an opinion or conclusion that the defendant is guilty of the crime of forgery, or of any crime. Rather, the officers testified:

(1) How Officer Jolly read the defendant his Miranda rights, RP at 72-73;

(2) That Officer Jolly placed the defendant under arrest for forgery, RP at 76;

(3) That Officer Monge heard Officer Jolly read the defendant his Miranda rights, RP at 97; and

(4) That Officer Monge described placing the defendant under arrest for forgery. RP at 102.

The State contends that the court should not consider the above mentioned sentence from the Appellant's statement of the case as it fails to comply with RAP 10.3(a)(5).

B. Factual Background

Kendra Thompson, a teller at Fibre Federal Credit Union in Longview, Washington, was working the teller window on July 11, 2006. RP at 38. The defendant approached and presented a check for payment, along with a credit card and Washington Driver's license. RP at 39. Thompson noted that the account noted that "this particular series of check numbers may have been stolen and to use caution when verifying the signature." RP at 40. Thompson checked the signature on the check with the signature from prior checks of the account holder. Thompson also checked and compared the signature with the actual card signed by the member. RP at 41. Tellers verify signatures "any time a Fibre Credit Union check is presented." RP at 42. Thompson then went to her supervisor, attempted to contact the account holder, and then the supervisor called police. RP at 43. Thompson identified the defendant as the person who presented the check to her. RP at 46. The defendant "patiently waited" while the credit union examined the check. RP at 50. The defendant was in the bank for about fifteen minutes until the police

arrived, and it took the police about three minutes to arrive after Thompson went back to check the signature card. RP at 53.

Jodi Hamer testified that she opened a checking account at Fibre Federal Credit Union, and that she reported to the credit union that she could not locate checks. RP at 54. Hamer testified that she had an account at Fibre in July of 2006, and that her signature card on file contained her signature. RP at 55. Hamer testified that the check presented by the defendant was her check, but that it was not in her handwriting, and that she did not recognize the signature. RP at 55. Hamer further testified that she did not write the check, that she knew the defendant, and that she did not give the defendant the check, did not tell anybody else to give the defendant a check, and did not give the defendant or anyone else permission to write a check. RP at 56.

Longview Police Officer Jennifer Jolly testified that she encountered the defendant at the Fibre Federal Credit Union in Longview. RP at 67. Officer Jolly first stood back and observed the defendant for a few minutes waiting for her partner to arrive. RP at 68. Officer Jolly and Officer Monge then took the defendant to a back room at the credit union to conduct the investigation. RP at 69. Officer Jolly spoke with the teller while Officer Monge remained in the room with the defendant. RP at 69. Officer Jolly looked at the questioned check and the account holder's

signature card, and observed that they didn't appear to match. RP at 71. Officer Jolly then contacted the defendant and read him his Miranda rights. RP at 72.

The defendant told Officer Jolly that he received the check from a 'girl named Amy', that she "gave him the check because she wanted him to give her a ride up to Seattle to go visit Jodi Hamer who was in the hospital, and he said that she had obtained a check from Jodi and gave it to him to cash." RP at 74. Officer Jolly confronted the defendant and asked the defendant why Amy would "go from Longview all the way to Seattle to get a check from Jodi in order to come all the way back to Longview to cash a check in order to give him gas money to go back to Seattle to visit Jodi." RP at 75. The defendant responded "well, now that you put it that way, it doesn't make any sense." RP at 75.

Officer Jolly then placed the defendant under arrest for forgery, and placed the defendant into handcuffs. RP at 76. As Officer Monge was removing items from the defendant's pocket and putting items on the table, a "tiny blue baggie" fell to the ground. RP at 78. Officer Jolly asked the defendant about the baggie, and the defendant responded that "these aren't my pants." RP at 80.

Bruce Siggins from the Washington State Patrol Crime Lab testified that the item in evidence contained methamphetamine. RP at 111. The defendant did not testify. Rp at 123.

C. Procedural Background

The Cowlitz County Superior Court, the Honorable Stephen Warning, conducted a jury trial on September 11, 2006. After deliberation, the jury returned a verdict finding the defendant guilty of possessing methamphetamine in count I, and guilty of forgery in count II. RP at 175, CP at 34, 35. The court sentenced the defendant to 29 months in prison. CP at 42. This appeal followed.

III. ARGUMENT

A. TRIAL COURT DID NOT ERR WHEN IT ADMITTED STATEMENT THAT TELLER WAS TO 'USE CAUTION' WHEN CASHING CERTAIN NUMBERED CHECKS ON THE ACCOUNT SINCE THE CHECKS 'MAY HAVE BEEN STOLEN'.

At trial Kendra Thompson, a teller for Fibre Federal Credit Union, testified that she conducted a transaction with Scott Nordquist at the Credit Union. RP at 38. Thompson testified that Nordquist presented a check along with a Washington driver's license and a credit card when Nordquist stepped up to her teller window. RP at 39. Thompson checked Nordquist's ID, then checked on the account of Jodi Hamer, the account holder. RP at 39-40.

The State asked Thompson if there were “any notes of significance on that account”. Defense counsel objected, claiming hearsay. RP at 40. The court allowed the response, and Thompson testified that she brought up Hamer’s account information, and there was “a memo stating that this particular series of check numbers may have been stolen and to use caution when verifying the signature.” RP at 40.

1. Standard of Review

The Appellant claims that the trial court denied the defendant a fair trial when the court “admitted hearsay that the check the defendant attempted to cash was stolen.” Br. of App. at 7. The defendant does not argue for a particular standard of review. See Br. of App. at 7-10.

An appellate court reviews a trial court’s evidentiary rulings for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). The burden is on the appellant to prove an abuse of discretion. *State v. Hentz*, 32 Wn.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983). An appellate court may uphold a trial court’s evidentiary ruling on the

grounds the trial court used or on other proper grounds the record supports. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). See *State v. Williams*, ___ Wn.App. ___, 154 P.3d 322, 326 (Div. 2, 2007)

Whether excluding or admitting evidence at trial, an appellate court reviews such decisions under the same standard of review: abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). Thus, the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002), *State v. Shaw*, 120 Wn.App. 847, 850, 86 P.3d 823 (Div. 1, 2004)

Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). See *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004)

2. The Trial Court Did Not Abuse its Discretion when it Admitted Statement That the Teller Was to ‘Use Caution’ Since the Check “May Have Been Stolen”.

The burden is on the appellant to prove an abuse of discretion. *State v. Hentz*, 32 Wn.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983). The Appellant here has not carried that burden.

(a) **Not Hearsay:** The statement apparently objected to by the Appellant -- “that this particular series of check numbers may have been stolen and to use caution when verifying the signature”, RP at 40 -- is not hearsay since it was not offered to prove the truth of the matter asserted. ER 801(c). (“ ‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”) That is, it was not offered to prove that the check offered by the defendant was a stolen check, or that the defendant stole the check. The defendant was not charged with possessing a stolen check or with stealing the check, but was charged with forgery.

The Appellant cites to *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999) (Brief of App. at 7-8). *Dahl* is not pertinent here since the trial court in *Dahl* did not consider the exclusion or admission of evidence at a trial, but rather the challenged proceedings occurred at a proceeding to

revoke a Special Sex Offender Sentencing Alternative (SSOSA) sentence. *Dahl*, 139 Wn.2d at 679. The Appellant's trial here did not involve a SSOSA sentence, nor was it a proceeding to revoke a SSOSA sentence.

The Appellant cites to no authority that the proper standard of appellate review of a trial court's evidentiary ruling is that the trial court had violated the defendant's due process rights when it 'based its decision at least in part upon unreliable evidence.' Br. of App. at 7-8, citing to *Dahl*.

The Appellant also cites to *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (Div. 2, 2003), but only apparently to provide a citation to a definition about hearsay under ER 801(c). Br. of App. at 8. *Sua*, however, does not support an argument that a trial court abuses its sound discretion by admitting hearsay evidence. In *Sua* the court reversed and remanded concluding that the trial court erred in admitting as substantive evidence prior inconsistent written statements of a witness who testified at trial. *Sua*, 115 Wn.App. at 49. The written statements were not signed under oath or penalty of perjury. *Sua*, 115 Wn.App. at 33. At trial the complaining witness, a female child age 16, testified that the defendant had not taken indecent liberties with her. *Sua*, 115 Wn.App. at 33. The State subsequently introduced the written statement of the child, first as

impeachment evidence, then as substantive evidence. *Sua*, 115 Wn.App.at 34-35, 37.

The contested testimony here, that the ‘particular series of check numbers may have been stolen and to use caution when verifying the signature’, RP at 40, was admissible since the matter asserted is that the teller is to ‘use caution’ when verifying the signature on the check because the particular series of check numbers ‘may have been stolen’. The teller was not testifying that in fact the individual check she examined was stolen. Rather she testified that she was being cautious in verifying the signature on the ‘particular series of check numbers’, because those check numbers were reported stolen. Indeed, after testifying that she read the caution in the bank computer, the teller then testified that she checked the signature on the check with the actual signature card on file with the bank. RP at 41-43.

When out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no Confrontation Clause concerns arise. *State v. Mason*, 126 P.3d 34, 41 (Div. 1, 2005), citing *Crawford*, 124 S.Ct. at 1369 n. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)). The teller’s statements about needing to use caution when verifying signatures on the check provided background and context for the teller’s subsequent action, that is

that she then compared the signature on the check with the signature on file with the credit union. RP at 41-43. Appellate courts have allowed similar testimony to explain why a social worker contacted CPS, *State v. Moses*, 129 Wn.App. 718, 732, 119 P.3d 906 (Div. 1, 2005), and to explain why a police officer seized certain items from the defendant's home. *State v. Mason*, 127 Wn.App. 554, 126 P.3d 34, 41 (2005).

The State contends that F.M.'s statement to the social worker is not testimonial hearsay because it was not offered to prove the truth of the matter asserted. The *Crawford* Court explicitly excluded testimonial statements that were not introduced for the truth of the matter asserted from a Confrontation Clause analysis. *Crawford*, 541 U.S. at 59 n. 9, 124 S.Ct. 1354. At trial, the State asked Muller why she contacted CPS. Muller testified that she contacted CPS because F.M. told her that his dad kicked his mom. We conclude that F.M.'s statement was not introduced for the truth of the matter asserted, but to show why Muller contacted CPS. F.M.'s statement did not implicate *Crawford*, and the trial court did not err in admitting this testimony.

State v. Moses, 129 Wn.App. 718, 732, 119 P.3d 906 (Div. 1, 2005)

(b) Trial Court Did Not Abuse Its Discretion by Admitting Teller's Statements

The Appellant claims that the trial court erred by admitting the teller's statements over defense hearsay objection, since such evidence was inadmissible hearsay. Br. of App. at 9-10. The Appellant cites to ER 802, *Sua*, and *Dahl*, but does not cite to authority to show that here the trial court abused its discretion in admitting the teller's statement that "There was a memo stating that this particular series of check numbers

may have been stolen and to use caution when verifying the signature.”
RP at 40.

The court here admitted the teller’s testimony over trial defense counsel’s hearsay objection, but the court did not state a basis for admitting the testimony. RP at 40. The Appellant has not shown that no reasonable person would have decided to admit the teller’s testimony in this case. See *Castellanos*, 132 Wn.2d at 97. Further, the Appellant has failed to show that the evidence was admitted ‘on untenable grounds or for untenable reasons.’ *Thang*, 145 Wn.2d at 642.

First, as noted above, the teller’s testimony was not hearsay, and helped explain the background or context for the teller’s actions of comparing signatures on the check. RP at 41-43. Second, the teller was testifying about a business record, but here that business record did not go to the heart of the issue at trial, that being whether the defendant forged the check. Compare with *State v. Barringer*, 32 Wn.App. 882, 885, 650 P.2d 1129 (Div. 1, 1982).

The teller’s testimony concerning the computer records may also qualify as a business record hearsay exception. Reviewing courts broadly interpret the statutory terms “custodian” and “other qualified witness.” *State v. Quincy*, 122 Wn.App. 395, 399, 95 P.3d 353 (Div. 1, 2004), citing *State v. Ben-Neth*, 34 Wn.App. 600, 603, 663 P.2d 156 (Div. 1, 1983).

It is not necessary that the person who actually made the record provide the foundation. *Id.* “Testimony by one who has custody of the record as a regular part of his work or has supervision of its creation (‘other qualified witness’ under the statute) will suffice.” *Id.* (citing *Cantrill v. American Mail Line, Ltd.*, 42 Wn.2d 590, 257 P.2d 179 (1953)). For example, in *Ben-Neth*, we upheld admission of the defendant’s bank records under the business record exception, even though the witness who provided the foundation was not a records custodian, because he was able to describe the method for retrieving monthly account statements from the computer. *Id.* at 604-05, 663 P.2d 156.

State v. Quincy, 122 Wn.App. 395, 399, 95 P.3d 353 (Div. 1, 2004)

Here the teller testified that she used a ‘standard command’ that would provide ‘pertinent information’ concerning the account. RP at 40. She testified that she would ‘routinely check’ for such information. RP at 40. This is similar to the bank information admitted in *Ben-Neth*, in which the appellate court found that the trial court did not abuse its discretion by its admission. *Ben-Neth*, 34 Wn.App. at 605.

(c) Any Error Harmless

Additionally, there is nothing in the record to show that the error, if any, of the trial court in admitting the teller’s statement was prejudicial to the defendant. The checking account holder testified that three times she reported to the credit union that she could not locate checks, that certain check numbers were misplaced. RP at 54. She testified that the check in question was not signed by her, and that she did not give the defendant permission to write a check for her. RP at 55. An appellate court may

determine that an error in admitting hearsay is harmless. *State v. Crowder*, 103 Wn.App. 20, 28, 11 P.3d 828 (Div. 1, 2000). That is the situation here as well, since the account holder testified at trial about her checks being misplaced, which is the assertion which was noted in the credit union's records.

B. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

1. Standard of Review

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. Rosborough*, 62 Wn.App. 341, 348, 814 P.2d 679, *review denied*, 118 Wn.2d 1003, 822 P.2d 287 (1991). To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994). There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be

given when evaluating counsel's strategic decisions. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). See *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)

2. Trial Defense Counsel's Performance Was Objectively Reasonable, and There Was No Prejudice to Appellant

The Appellant was not denied effective assistance of counsel when trial defense counsel failed to object when the officers in the case testified about arresting the defendant. Br. of App. at 11-12. The Appellant appears to claim that the officer's testimony about the arrest of the defendant amounts to an opinion on the guilt of the defendant. Br. of App. at 18. However, the Appellant fails to provide any citation to authority to support that claim.

The primary case cited by the Appellant is *Warren v. Hart*, 71 Wn.2d 512 (1967). Br. of App. at 17-18. *Warren* involved an auto accident, where the jury returned a verdict for respondent, the driver of the following vehicle in a car collision. The appellant claimed that the trial court "erred in permitting the introduction of evidence regarding citations not having been issued by the investigating officer." *Warren*, 71 Wn.2d at

514. The court cited *Billington v. Schaal*, 42 Wn.2d 878, 882 (1953), which was the source of the appellant's citation on page 18. However, contrary to the Appellant's assertion here, the *Warren* court did not reverse based on the trial court's admission of evidence about the failure of the officer to issue a citation. The *Warren* court found this assignment of error "without merit". *Warren*, 71 Wn.2d at 516. The court stated that "What the police officer did or did not do with respect to issuing a citation to either party when he arrived at the scene was utterly immaterial to the issues submitted to the jury." *Warren*, 71 Wn.2d at 518.

Rather, what the *Warren* court found merited a new trial was the argument by trial counsel that "the officer's function was to hold a trial on the spot and that the jury should consider or be guided in its deliberation by what he did or did not do . . ." *Warren*, 71 Wn.2d at 518. The court found such comments to be "flagrant misconduct that no instruction which the trial court could have given could have cured the prejudicial effects of counsel's argument." *Warren*, 71 Wn.2d at 518. *Warren* provides no guidance here.

There appears to be no reported case which directly addresses the issue of whether testimony by a police officer concerning an arrest of a defendant constitutes an opinion on the guilt of the defendant.

In *City of Seattle v. Heatley*, the officer testified that he made a determination that the defendant was obviously intoxicated and testified as follows:

Based on my, his physical appearance and my observations of that and based on all the tests I gave him as a whole, I determined that Mr. Heatley was obviously intoxicated and affected by the alcoholic drink that he'd been, he could not drive a motor vehicle in a safe manner. At that time, I did place Mr. Heatley under arrest for DWI.

City of Seattle v. Heatley, 70 Wn.App. 573, 576, 854 P.2d 658 (Div. 1, 1993). The appellant objected to the testimony of the officer as an opinion of guilt, not because the officer mentioned the arrest, but because of the officer's 'obviously intoxicated' comment. *Heatley*, 70 Wn. App. At 578.

The general rule is that no witness, lay or expert, may "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *see also State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). Such testimony has been characterized as unfairly prejudicial because it "invad[es] the exclusive province of the finder of fact." *Black*, 109 Wn.2d at 348, 745 P.2d 12. Improper opinions on guilt usually involve an assertion pertaining directly to the defendant. *See, e.g., Garrison*, 71 Wn.2d at 312, 427 P.2d 1012; *cf. State v. Carlin*, 40 Wn.App. 698, 700, 700 P.2d 323 (1985) (police officer testified that tracking dog followed defendant's "fresh guilt scent"). Because issues of credibility are reserved strictly for the trier of fact, testimony regarding the credibility of a key witness may also be improper. *See, e.g., State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992) (by stating his belief that child was not lying about sexual abuse, expert "effectively testified" that defendant was guilty as charged); *see also Black*, 109 Wn.2d at 349, 745 P.2d 12 (in rape case, expert testimony that victim suffered from rape trauma syndrome

constituted “in essence” a statement that defendant was guilty where defense was consent).

However, testimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.

City of Seattle v. Heatley, 70 Wn.App. 573, 577-578, 854 P.2d 658 (Div. 1, 1993)

Appellate courts are concerned about opinion testimony concerning the guilt of the defendant. *Black*, 109 Wn.2d at 348. No Washington court has ruled that an officer testifying about an arrest of a defendant is providing an opinion about the guilt of the defendant, and the Appellant has not cited to any Washington appellate case to support that proposition. The court should reject the Appellant’s contention that trial defense counsel’s failure to object to the officer’s testimony about the arrest of the defendant fell below an objective standard of reasonableness. See *Strickland*, 466 U.S. at 693. The Appellant’s argument fails to overcome the ‘strong presumption that trial counsel’s performance was adequate’ and the ‘exceptional deference’ that must be given when evaluating counsel’s strategic decisions. See *Strickland*, 466 U.S. at 689.

Further, the Appellant fails to cite to authority to support that there was any resulting prejudice. *Rosborough*, 62 Wn.App. at 348. Since there is no authority to support that the trial counsel’s performance was not

adequate, and since there is no authority to support that there was any resulting prejudice to the defendant, the Appellant was not denied effective counsel.

C. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION

The Appellant claims that there was a lack of substantial evidence to support the conviction. Br. of App. at 20. The State believes that the claim raises the issue that is more properly framed as whether there was sufficient evidence to support the conviction.

1. Standard of Review

When reviewing the sufficiency of the evidence to support a conviction, “the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). “ ‘When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.’ ” *Joy*, 121 Wn.2d at 339, 851 P.2d 654 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). See *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995)

2. Discussion

The Appellant cites to *State v. Allenbach*, 136 Wn.App. 95, 147 P.3d 644 (Div. 2, 2006) for the quote cited on page 23 of the Appellant's brief. However, that quote appears in the unpublished portion of the *Allenbach* opinion. The State contends that the court should not consider that portion of the Appellant's brief that cites to the unpublished portion of the *Allenbach* opinion for failing to comply with RAP 10.4(h).

An appellate court need not consider an argument that is not supported by authority. *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991) (citation omitted), *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 545, 869 P.2d 1045 (1994). Since the defendant cites to the unpublished portion of the *Allenbach*, then the Appellant has failed to provide authority to support the argument that there was insufficient evidence to support the conviction in this case.

The Appellant concedes that the check he attempted to cash was forged. Br. of App. at 23. The State accepts that concession. The Appellant also does not assign error or challenge the sufficiency of evidence as it relates to the Appellant's drug (violation of the uniform controlled substances act) conviction. The State concurs that there was no error related to the Appellant's controlled substance violation.

The Appellant's sole sufficiency claim focuses on whether there was '*scienter*' or *mens rea* to show that the defendant had knowledge that the defendant 'falsely' made, completed or altered the check and knew it was forged. Br. of App. at 23. The Appellant provides no citation to the record to support this claim, but rather notes that knowledge is "an element of the offense that the state had the burden of proving beyond a reasonable doubt." Br. of App. at 23.

The Appellant cites *State v. Allenbach*, 136 Wn.App. 95, 147 P.3d 644 (Div. 2, 2006), to support that there was no *scienter* or *mens rea*. However, the *Allenbach* decision focused on whether the identity theft statute was unconstitutionally vague either as applied or otherwise. The *Allenbach* court found that RCW 9.35.005(1)(a), the identity theft statute, was not unconstitutionally vague. *Allenbach*, 136 Wn.App. at 103.

Only the unpublished portion of the *Allenbach* decision focused on the sufficiency of the evidence to support Allenbach's forgery conviction. See attachment, *State v. Allenbach*, Westlaw opinion, unpublished portion at page 8. And even the unpublished quote cited by the Appellant notes that there was sufficient evidence to support Allenbach's conviction for Forgery. Br. of App. at 23.

Kendra Thompson, a teller at Fibre Federal Credit Union, identified the defendant in court as the person who presented the

challenged check. RP at 46. Thompson noted that the signature on the check and the signature on file didn't match. RP at 43. Thompson testified that the defendant said he had a check to cash, and handed the check to Thompson. RP at 39.

Jodi Hamer testified that she did not sign the challenged check, that she knew the defendant, but did not give him a check, and did not give the defendant permission to write a check. RP at 55-56. Officer Jolly testified that following Miranda warnings, the defendant claimed that he received the check from "a girl named Amy" but that the defendant did not know her last name, that she gave the defendant a check because "she wanted him to give her a ride up to Seattle to go visit Jodi Hamer who was in the hospital, and he said that she had obtained a check from Jodi Hamer and gave it to him to cash." RP at 74. The defendant further explained to Officer Jolly that "Amy obtained the check from Jodi and then came back to Longview". RP at 75.

Washington's definition of forgery contains two elements: (1) the defendant must falsely make, complete, or alter a written instrument, and (2) the defendant must do so with an intent to injure or defraud. *State v. Daniels*, 106 Wn.App. 571, 573, 23 P.3d 1125 (Div. 1,2001)

In cases of forgery, "although possession alone is not sufficient to prove guilty knowledge, possession together with slight corroborating

evidence of knowledge may be sufficient.” *State v. Scoby*, 117 Wn.2d 55, 61-62, 810 P.2d 1358, 815 P.2d 1362 (1991).

In *State v. Goodlow*, the defendant claimed that he did not commit forgery simply because the defendant presented altered checks. The court found there was sufficient evidence to support the forgery conviction: “There was direct evidence by Geneva Tanner that Goodlow presented one of the \$300 checks. There was identification through Goodlow’s driver’s license and the use of his savings account number.” *State v. Goodlow*, 27 Wn.App. 769, 772, 620 P.2d 1015 (Div. 1, 1980)

In *State v. Atkins*, the court found there was sufficient evidence to support the conviction for forgery on facts similar to those in this case. *State v. Atkins*, 26 Wn.2d 392, 393, 174 P.2d 427 (1946)

The method of proving the forgeries and disposal of the forged instruments was as follows; Concerning count one, a witness testified that appellant presented a check to him, and that the endorsement thereon was made by appellant with an indelible pencil in the presence of the witness; other witnesses testifying as to counts two, three, and four, stated in each instance that they cashed checks in their places of business for appellant. All of the witnesses stated that the checks were not signed by persons who had accounts in the bank.

John F. Gallagher was then called and testified that a comparison of the signature on the checks mentioned in counts two, three, and four, with the signature on the check in count one revealed that they were in the same handwriting as the proven signature on the check identified in count one.

State v. Atkins, 26 Wn.2d 392, 393, 174 P.2d 427 (1946)

In the related crime of possession of stolen property, the court frequently has held that the giving of a false explanation or one that is improbable or difficult to verify, in conjunction with possession, is sufficient to find guilty knowledge. *State v. Ladely*, 82 Wn.2d 172, 175, 509 P.2d 658 P.2d 658 (1973). Here the defendant, when confronted by Officer Jolly, claimed that his friend Amy got the check from Jodi Hamer in Seattle, in order for the defendant to travel from Longview back up to Seattle. RP at 75. The defendant, when confronted with the story, told Officer Jolly that ‘now that you put it that way, it doesn’t make any sense.’ RP at 75. This is an improbable or false explanation that suffices to show guilty knowledge. See *Ladely*, 82 Wn.2d at 175.

The Appellant fails to provide authority to support the argument that there was insufficient evidence to support the forgery conviction. Additionally, as the defendant gave a false or improbable story about how he acquired the check, that supports a showing of guilty knowledge, and is sufficient to support the forgery conviction here. See *Ladely*, 82 Wn.2d at 175.

IV. CONCLUSION

The Appellant’s convictions should be affirmed. The trial court did not abuse its discretion by admitting the teller’s testimony that she was to use caution when verifying signatures on the account. The Appellant

was not denied effective assistance of counsel, and there was sufficient evidence to support the forgery conviction.

Respectfully submitted this 22nd day of May, 2007

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Prosecuting Attorney

By 
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Deputy Prosecuting Attorney
Representing Respondent

Westlaw

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State v. Allenbach
 Wash.App. Div. 2, 2006.

Court of Appeals of Washington, Division 2.
 STATE of Washington, Respondent,
 v.
 James Bradley ALLENBACH, Appellant.
 No. 33955-2-II.

Dec. 5, 2006.

Background: Defendant was convicted in the Clark Superior Court, Roger A. Bennett, J., of forgery and second degree identity theft, and he appealed.

Holding: The Court of Appeals, Hunt, J., held that identity theft statute is not unconstitutionally vague.

Affirmed.

West Headnotes

[1] **Constitutional Law** 92 ↪ 48(4.1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions

92k48 Presumptions and Construction in Favor of Constitutionality

92k48(4) Application to Particular Legislation or Action or to Particular Constitutional Questions

92k48(4.1) k. In General. Most Cited Cases

The party asserting a due process vagueness challenge bears the heavy burden of proving the statute's unconstitutionality beyond a reasonable doubt; the challenger overcomes the presumption of the statute's constitutionality only in exceptional

cases. U.S.C.A. Const.Amend. 14.

[2] **Constitutional Law** 92 ↪ 251.4

92 Constitutional Law

92XII Due Process of Law

92k251.4 k. Vagueness or Overbreadth. Most Cited Cases

The due process vagueness doctrine serves two important purposes: first, to provide citizens with fair warning of what conduct they must avoid, and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement. U.S.C.A. Const.Amend. 14.

[3] **Constitutional Law** 92 ↪ 258(2)

92 Constitutional Law

92XII Due Process of Law

92k256 Criminal Prosecutions

92k258 Creation or Definition of Offense
 92k258(2) k. Certainty and Definiteness in General. Most Cited Cases

Under the due process clause, a criminal prohibition is void for vagueness if it fails either (1) to define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) to provide ascertainable standards of guilt to protect against arbitrary enforcement. U.S.C.A. Const.Amend. 14.

[4] **Constitutional Law** 92 ↪ 258(2)

92 Constitutional Law

92XII Due Process of Law

92k256 Criminal Prosecutions

92k258 Creation or Definition of Offense
 92k258(2) k. Certainty and Definiteness in General. Most Cited Cases

On a due process vagueness challenge to a penal statute, courts do not look at the language of a challenged statute in a vacuum, but consider its entire context; a statute is not unconstitutional if the general area of conduct against which it is directed

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is made plain, although strict specificity is not required, and the exact point where actions cross the line into prohibited conduct need not be predicted so long as persons of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 ↩ 258(3.1)

92 Constitutional Law
 92XII Due Process of Law
 92k256 Criminal Prosecutions
 92k258 Creation or Definition of Offense
 92k258(3) Particular Statutes and Ordinances
 92k258(3.1) k. In General. Most Cited Cases

False Pretenses 170 ↩ 2

170 False Pretenses
 170k2 k. Statutory Provisions. Most Cited Cases
 The phrase "account numbers and balances" in the definition of "financial information" in the identity theft statute is not unconstitutionally vague, and is sufficient to apprise citizens that a blank check qualifies as "financial information" for purposes of identity theft by a person forging the maker's signature; construction of the statute such that a person is guilty of identity theft by possessing, obtaining, using, or transferring another's check with intent to commit a crime only if that person also has in his possession the account's balance, would be absurd. West's RCWA 9.35.005(1)(a).

Steven Whitman Thayer, Kyra Kay Lafayette, Attorneys at Law, Vancouver, WA, for Appellant.
 Michael C. Kinnie, Attorney at Law, Vancouver, WA, for Respondent.

PUBLISHED IN PART OPINION

HUNT, J.

*97 ¶ 1 James Allenbach appeals his forgery and second degree identity theft convictions. He argues that (1) the identity theft definition statute, RCW 9.35.005(1), is unconstitutionally vague in its definition of "financial information"; (2) the trial

court erred in admitting evidence of Allenbach's drug habit and drug debt as his reason for presenting the forged check; (3) the trial court erred by instructing the jury on alternative means of committing identity theft; (4) there was insufficient evidence to support both convictions; and (5) he had ineffective assistance of counsel. We affirm.

FACTS

I. Forgery and Identity Theft

¶ 2 James Allenbach presented a check for \$450 at the Washington Mutual Bank in Clark County. The check was drawn on the account of Charles Brown, payable to Allenbach. Brown had never received his new checks in the mail, he had not written a previously cashed check from this new batch of checks, he did not know or authorize Allenbach to use his checks, and he had never written any check payable to Allenbach, including this one. Along with the check, Allenbach presented two forms of identification-his driver's license and his credit card.

*98 ¶ 3 Because of the amount, the teller attempted to verify the maker's signature on the check against the account holder's signature on file with the bank, noticed that the signatures did not match, and informed Allenbach that she was going to call Brown to verify the check. Allenbach appeared nervous. According to Allenbach, he told the teller that the check maker was in a car in the parking lot and that he would retrieve him to clear up the situation. While the teller was on the phone with Brown, Allenbach (1) left the bank; (2) went outside to a parked car; (3) began conversing with a person in the car, who, according to Allenbach, was a drug dealer named "Hector"; and (4) left in the car shortly thereafter, without returning for the check, his driver's license, or his credit card, all of which he left behind with the teller in the bank. The teller wrote down the license plate number.

**646 ¶ 4 Brown confirmed to the teller that he had not written the check to Allenbach, nor did he know Allenbach. The teller phoned the police.

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When Clark County Sheriff's Detective Sample and Deputy Kendall arrived, he collected the check, Allenbach's driver's license, and credit card from the teller, and the license plate number of the car in which Allenbach had driven away. In addition to Brown's account number, the check contained his personal information, including his name and address.

¶ 5 Sample and Kendall went to Allenbach's home to talk to him about the incident. Although he appeared nervous and "jittery," Allenbach agreed to talk with them. Allenbach admitted that he had been at the bank earlier that day and had left behind his credit card, his driver's license, and the check. He explained that (1) he had received the check from "Hector," an acquaintance and former co-employee; (2) he was cashing the check for Hector; (3) he had previously cashed a similar check for Hector at a different Washington Mutual Bank branch without incident; (4) he was cashing the checks for Hector (a) because Hector had trouble with his identification (Allenbach's initial explanation), and (b) to pay off a drug debt he owed to Hector for his methamphetamine⁹⁹ habit (Allenbach's later explanation); ^{FN1} and (5) he did not know how to contact Hector, but Hector usually contacted him near the Wal-Mart on Highway 99. The officers then left Allenbach's home ^{FN2} to investigate Hector.

FN1. The officers' and Allenbach's testimonies conflicted as to whether Allenbach admitted that his debt was for purchasing drugs from Hector or whether drug-dealer Hector had merely offered drugs to Allenbach.

FN2. The officers did not arrest Allenbach at this time.

¶ 6 Unsuccessful in locating Hector, Sample and Kendall returned to Allenbach's home after learning that Allenbach had cashed a different check for \$425, also drawn on Brown's account, at another Washington Mutual Bank branch. Allenbach (1) met them at the door, (2) instantaneously stated that he and his wife wished to apologize and to repay

Brown the \$425 drawn from Brown's account with the earlier check, and (3) told the officers he did not know where Hector lived, but he had notified Hector that he (Allenbach) would no longer be purchasing drugs from Hector or communicating with him.

¶ 7 According to Allenbach's later trial testimony, after he left the bank (1) he had learned from Hector that the check was bad, (2) Hector had threatened him, and (3) he did not tell the officers where to find Hector because Hector was a drug dealer and he (Allenbach) feared for the safety of himself and his family.

II. Procedure

¶ 8 The State charged Allenbach with one count of forgery, RCW 9A.60.020(1)(a)(b), and one count of second degree identity theft, RCW 9.35.020(3). The trial court denied Allenbach's motion to suppress. Both attorneys took active roles in drafting the jury instructions. Neither objected to any jury instruction that the trial court gave. The jury convicted Allenbach as charged. The trial court denied his motion for a new trial and arrest of judgment.

¶ 9 Allenbach appeals.

*100 ANALYSIS

I. Identity Theft Statutes

¶ 10 Allenbach argues that RCW 9.35.005's definition of "financial information" is unconstitutionally vague ^{FN3} as applied, because it does not apprise citizens with fair warning of what conduct is prohibited. ^{FN4} We disagree.

FN3. Although Allenbach asserts generally that "RCW 9.35.005 is unconstitutionally vague as applied in this case," his vagueness arguments in his brief and at oral argument focus exclusively on only

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one of several statutory definitions of "financial information"—"account numbers and balances," RCW 9.35.005(1)(a)—the specific portion of the statute under which he was convicted. Br. of Appellant at 20.

FN4. Allenbach does not, however, assert that the charging statute, RCW 9.35.020, is also vague.

A. Standard of Review

[1] ¶ 11 Construction of a statute is a question of law, which we review de novo **647 under the error of law standard. *Pasco v. Pub. Employment Relations Comm.*, 119 Wash.2d 504, 507, 833 P.2d 381 (1992), *Inland Empire Distrib. Sys., Inc. v. Utils. & Transp. Comm.*, 112 Wash.2d 278, 282, 770 P.2d 624 (1989). The party asserting a vagueness challenge bears the heavy burden of proving the statute's unconstitutionality beyond a reasonable doubt. *City of Spokane v. Douglass*, 115 Wash.2d 171, 177, 795 P.2d 693 (1990). The challenger overcomes the presumption of the statute's constitutionality only in exceptional cases. *City of Seattle v. Eze*, 111 Wash.2d 22, 28, 759 P.2d 366 (1988).

[2][3] ¶ 12 The due process vagueness doctrine serves two important purposes: "first, to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement." *State v. Halstien*, 122 Wash.2d 109, 117, 857 P.2d 270 (1993). Under the due process clause,^{FN5} a criminal prohibition is void for vagueness if it fails either (1) to define the offense with sufficient definiteness such that *101 ordinary people can understand what conduct is prohibited, or (2) to provide ascertainable standards of guilt to protect against arbitrary enforcement. *Douglass*, 115 Wash.2d at 178, 795 P.2d 693.

FN5. U.S. Const. amend. V.

[4] ¶ 13 We do not look at the language of a challenged statute in a vacuum; rather, we consider its entire context. A statute is not unconstitutional

if the general area of conduct against which it is directed is made plain. Nonetheless, strict specificity is not required. The exact point where actions cross the line into prohibited conduct need not be predicted so long as persons of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement. *Seattle v. Webster*, 115 Wash.2d 635, 643, 802 P.2d 1333 (1990), *cert denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

B. RCW 9.35.005-Identity Theft

¶ 14 RCW 9.35.020 proscribes as identity theft: knowingly obtaining, possessing, using, or transferring a means of another's identification or financial information with the intent to commit or to aid any crime.^{FN6} The challenged*102 statute, RCW 9.35.005(1), defines "financial information" as follows:

FN6. RCW 9.35.020 provides:

(1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

(2) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(3) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value that is less than one thousand five hundred dollars in value, or when no credit, money, goods, services, or

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anything of value is obtained shall constitute identity theft in the second degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

(4) A person who violates this section is liable for civil damages of one thousand dollars or actual damages, whichever is greater, including costs to repair the victim's credit record, and reasonable attorneys' fees as determined by the court.

(5) In a proceeding under this section, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

(6) The provisions of this section do not apply to any person who obtains another person's driver's license or other form of identification for the sole purpose of misrepresenting his or her age.

(7) In a proceeding under this section in which a person's means of identification or financial information was used without that person's authorization, and when there has been a conviction, the sentencing court may issue such orders as are necessary to correct a public record that contains false information resulting from a violation of this section.

****648** (1) "Financial information" means any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit:

- (a) Account numbers and balances;
- (b) Transactional information concerning an account; and
- (c) Codes, passwords, social security numbers, tax identification numbers, driver's license or permit numbers, state identicard numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

RCW 9.35.005(1) thus provides a clear list of

specific types of information that qualify as "financial information" for purposes of committing the crime of identity theft under RCW 9.35.020.

[5] ¶ 15 Allenbach argues that the RCW 9.35.005(1)(a) phrase "account numbers and balances" is insufficient to apprise citizens that a blank check qualifies as "financial information" for purposes of identity theft.^{FN7} We disagree.

FN7. Allenbach also argues that the statute is vague because (1) neither the trial court nor the attorneys could understand the statute, and (2) there are no clear, standard jury instructions associated with this statute. These arguments fail because they do not prove the statute's vagueness beyond a reasonable doubt.

¶ 16 First, in our view, reading the plain language of RCW 9.35.005(1) subsection (a), a reasonable person of ordinary intelligence would understand that a blank check, *103 which bears the account number and owner's name, qualifies as "financial information." Second, reading subsection (a) in context, we note that RCW 9.35.005(1) includes the following other definitions of "financial information": "[t]ransactional information concerning an account," subsection (b), and "other information held for the purpose of account access," listing multiple specific examples. Thus, even in the unlikely event that a person would not understand the proscribed conduct from the subsection (a) alone, certainly a reasonable person would understand the proscribed conduct from reading all three RCW 9.35.005(1) definitions of "financial information" together with RCW 9.35.020, which defines the crime of identity theft with specific reference to possession or use of another's "financial information,"

¶ 17 Third, and most importantly, we adhere to the well-settled rule that we must construe the law to avoid an absurd result. *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003). In essence, Allenbach argues that in order to convict him under the RCW 9.35.005(1)(a) definition of "financial information," the State had to prove that he

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criminally possessed *both* the account number and the bank account balance, not merely the account number on a blank check. In our view, it would be an absurd construction of the statute and the Legislature's intent in criminalizing identity theft were we to read RCW 9.35.005(1)(a), as Allenbach suggests, such that a person is guilty of identity theft by possessing, obtaining, using, or transferring another's check with intent to commit a crime *only* if that person also has in his possession the account's balance.

¶ 18 We hold, therefore, that Allenbach has failed to meet his burden of proving beyond a reasonable doubt that RCW 9.35.005(1)(a) is unconstitutionally vague either as applied or otherwise.

¶ 19 Affirmed.

¶ 20 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder *104 shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. Jury Instructions

¶ 20 In a related argument, Allenbach argues that (1) the trial court erred by instructing the jury that financial information means any information that is identifiable to the individual that concerns *account numbers* only, when the statute defines "financial information" as any information that is identifiable to an individual that concerns "account numbers and balances"; (2) this instructional error removed an essential element from the proof required for conviction, resulting in a manifest constitutional error-violation of his due process rights; and (3) therefore, CrR 6.15(c) does not preclude appellate review.^{FN8}

FN8. Where an alleged error is a "manifest error affecting a constitutional right," the issue may be raised for the first time on appeal. RAP 2.5(a)(3). But such is not the case here.

¶ 21 Allenbach failed to challenge this instruction below. And because we reject Allenbach's reading of the statute in a manner that would make it unconstitutional, his argument is not one of constitutional magnitude that we may address for the first time on appeal. Thus, we do not further address the merits of this argument.

A. CrR 6.15(c)

¶ 22 The general rule is that in order to preserve a challenge to jury instructions, the party must object and state the reasons for objection on the record in the trial court. CrR 6.15(c), *State v. Salas*, 127 Wash.2d 173, 181-82, 897 P.2d 1246 (1995). Where the party fails to object, the jury instructions become the law of the case. *State v. Hickman*, 135 Wash.2d 97, 102, 954 P.2d 900 (1998). Allenbach's failure to object to the jury instructions at trial triggers the CrR 6.15(c) prohibition to his challenging the instructions for the first time on appeal, except in the context of his companion argument that his failure to challenge the instructions below was the result of ineffective assistance of counsel.^{FN9} *State v. Aho*, 137 Wash.2d 736, 744-45, 975 P.2d 512 (1999). Thus, we address the issue only in the ineffective assistance of counsel context.

FN9. Because the jury instructions here clearly stated the necessary requirements for conviction, there is no question of constitutional due process. See *State v. Allen*, 101 Wash.2d 355, 678 P.2d 798 (1984); *State v. Johnson*, 100 Wash.2d 607, 614, 674 P.2d 145 (1983). Thus, Allenbach does not meet the RAP 2.5(a)(3) exception to the general rule.

B. Effective Assistance of Counsel.

¶ 23 Allenbach argues that his trial counsel was ineffective because he failed (1) to object to jury instruction number 6,^{FN10} and (2) to ask the trial court to give a limiting instruction to the jury about Allenbach's drug debt to Hector. Again, we disagree.

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FN10. "The term 'financial information' means any information identifiable to the individual that concerns account numbers held for the purpose of account access or transaction initiation." Clerk's Papers at 12.

1. Standard of Review

¶ 24 Both the federal and state constitutions guarantee an accused the effective assistance of counsel. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, the appellant must show both that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced him. *State v. Hendrickson*, 129 Wash.2d 61, 77-78, 917 P.2d 563 (1996), *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wash.2d 668, 705, 940 P.2d 1239 (1997). We give great judicial deference to trial counsel's performance, which we strongly presume was effective. *State v. McFarland*, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995).

¶ 25 The jury instructions here were not erroneous; thus, there was no deficiency in counsel's performance for failing to object to them. "Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law." *State v. Riley*, 137 Wash.2d 904, 909, 976 P.2d 624 (1999) (quoting *State v. Bowerman*, 115 Wash.2d 794, 809, 802 P.2d 116 (1990)). We review the adequacy of jury instructions de novo as a question of law. *State v. Pirtle*, 127 Wash.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

2. No deficient performance

¶ 26 Our review begins with the plain language of the statute. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wash.2d 40, 53, 905 P.2d 338 (1995). Where a statute is unambiguous, we determine legislative intent from the language of the statute

alone. *Waste Mgmt. v. WUTC*, 123 Wash.2d 621, 629, 869 P.2d 1034 (1994), *Daniel William Eaton*, 110 Wash.2d 892, 898, 757 P.2d 961 (1988).

¶ 27 A plain reading of RCW 9.35.005(1) shows that in subsections (a), (b), and (c), the Legislature intended to list three general categories of information that qualify as "financial information" for purposes of the identity theft crime proscribed under RCW 9.35.020. Allenbach asserts that category (a), with its conjunctive "and" and no comma, requires both listed items, namely "account numbers and balances," to be present, and therefore proved, to qualify as "financial information" for purposes of identity theft. As we explain above, Allenbach misinterprets the statute.

¶ 28 RCW 9.35.005(1) provides that "[f]inancial information" means *any* of the following information identifiable to the individual." (Emphasis added.) The statute does not say or require that *all* listed forms of information must be charged and proved. That some subsections use the conjunctive "and" in listing various types of information, with or without a comma, does not mean that all types listed in a particular subsection are required for an identity theft prosecution. It would be an absurd reading of the definition statute to require that a defendant must be shown to have possessed both the account number and the account balance to support a conviction for identity theft using the RCW 9.35.005(1)(a) definition of "financial information." As we note above, we follow the principle that we construe the law to avoid absurd results. *J.P.*, 149 Wash.2d at 450, 69 P.3d 318.

¶ 29 Taken as a whole, it is clear from a plain reading of the statute ^{FN11} that the Legislature did not intend that a defendant must possess both "account numbers *and* balances" to be guilty of criminal possession of "financial information" for purposes of proving identity theft. We hold, therefore, that (1) the jury instruction's defining "financial information" as only "account balances" was not in error, and (2) Allenbach has thus failed to show deficient performance by trial counsel based on counsel's "failure" to object to instruction number 6. Therefore, with respect to this

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instruction, we need not address the prejudice prong of the ineffective assistance of counsel test.

FN11. See also part I of our Analysis, *supra*.

III. Sufficient Evidence

¶ 30 Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

A. Identity Theft

¶ 31 Allenbach argues that there was insufficient evidence to support the jury's verdict that he possessed "financial information" because the evidence showed that he possessed only Mr. Brown's bank account numbers, not also Mr. Brown's bank account balance. This argument builds on his previous argument that the jury instructions should have defined "financial information" as included both account numbers *and* balances.^{FN12} This argument fails.

FN12. Alternatively, Allenbach argues that the evidence was insufficient to support a finding that he possessed a "means of identification." This argument assumes that a bank check does not qualify as a "means of identification" under the statutory definition. We need not address whether a check qualifies as "financial information" because, based on our reading of RCW 9.35.005(1)(a) that account numbers alone meet the statutory definition, *infra*, there is sufficient evidence to support a rational finding of fact that Allenbach possessed "financial information."

¶ 32 The question here is whether a check bearing the payor's account number is a sufficient basis for a

rational trier of fact to find beyond a reasonable doubt that Allenbach was in possession of an "account number." As explained earlier, we answer this question in the affirmative. We hold, therefore, that there was sufficient evidence to convict Allenbach of identity theft.

B. Forgery

¶ 33 Additionally, Allenbach argues that there was insufficient evidence to support the element of knowledge, an essential element to prove forgery. RCW 9A.60.020(1)(b) provides the third forgery element: A defendant is guilty of forgery where he "possesses, utters, offers, disposes of, or puts off as true a written instrument which he *knows* to be forged." (Emphasis added.) Asserting that "Hector" gave Allenbach the check and he did not know it was forged, Allenbach asserts that the State failed to prove that he acted with intent or had knowledge that the check he presented to the bank was forged. This argument also fails.

¶ 34 Allenbach claimed he had received the check from Hector, not from Mr. Brown. When asked by the bank teller why the payor's signature on the check did not match Mr. Brown's signature on file, Allenbach walked out of the bank, leaving behind his identification and the check. Viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to find that Allenbach had both intent to defraud and knowledge that the check was forged.

IV. Character Evidence

¶ 35 Allenbach next argues that the trial court abused its discretion and violated ER 404(b) by allowing evidence of his drug habit under ER 403 -that he told police (1) he had a drug debt he owed to Hector, and (2) he believed that, if successfully cashed, the check would go toward paying off this debt. Over Allenbach's objection, the trial court allowed this evidence to show that Allenbach knew the check was unauthorized and that he possessed and presented it to the bank with intent to commit,

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to aid, or to abet a crime-forgery and identity theft. Allenbach also argues that his trial counsel was ineffective in failing to request a limiting instruction when this evidence came in.^{FN13}

FN13. “[I]f the evidence is admitted, the court must limit the purpose for which it may be considered by the jury.” *State v. Bowen*, 48 Wash.App. 187, 190, 738 P.2d 316 (1987).

¶ 36 Assuming, without deciding, that allowing this drug debt evidence was error, we hold that both its admission and counsel's failure to request a limiting instruction were harmless. Reversal is not required “ ‘unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.’ ” *State v. Bourgeois*, 133 Wash.2d 389, 403, 945 P.2d 1120 (1997) (citations omitted). Noting that the prejudice test is central to both the test for ineffective assistance of counsel and for abuse of trial court discretion in evidentiary rulings, we apply these two tests concurrently.

¶ 37 Applying the above test, we find that, within reasonable probabilities, the outcome of Allenbach's trial would not have been materially affected without admission of Allenbach's statement to the officers about his drug debt to Hector. Allenbach admitted presenting the check. He was aware that the name on the check, Mr. Brown, was not the name of the person who allegedly gave him the check, “Hector,” for whom Allenbach claimed he had previously cashed other checks. When the bank teller questioned him about the discrepancy between the signature on the check and the signature on file with the bank, and told him she was going to call the account owner for verification, Allenbach fled, leaving behind the check, his driver's license and his credit card. Later, during the officers' second visit to his home, Allenbach voluntarily and spontaneously offered apologies and to repay Brown the \$425 Allenbach had gotten from cashing a previous check. In light of this other strong evidence, a reasonable jury could conclude that Allenbach had intent, knowledge, and motive to commit forgery and identity theft even without

evidence of his drug debt and habit. We hold, therefore, that admitting this evidence was not prejudicial, any error was harmless, and trial counsel's failure to request a limiting instruction was not ineffective assistance.

¶ 38 Affirmed.

We concur: HOUGHTON, C.J., and VAN DEREN, J.
 Wash.App. Div. 2, 2006.
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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Appellant,)
)
 vs.)
)
 SCOTT A. NORDQUIST,)
)
 Respondent.)
 _____)

NO. 35343-1-II
Cowlitz County No.
06-1-00882-8

CERTIFICATE OF
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DIVISION II
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I, Audrey J. Gilliam, certify and declare:

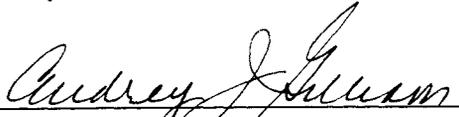
That on the 22 day of May, 2007, I deposited in the mails of
the United States Postal Service, first class mail, a properly stamped and
address envelope, containing Amended Brief of Respondent addressed to
the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632

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

Dated this 22 day of May, 2007.


Audrey J. Gilliam