SUPREME COURT NO. 95850-5

NO. 75853-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STACY BRADSHAW,

Petitioner.

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

The Honorable Jeffrey M. Ramsdell, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Stacy Bradshaw asks this Court to grant review of the court of appeals' published decision in State v. Bradshaw, No. 75853-5-I, --- Wn.App. ---, 414 P.3d 1148, filed April 09, 2018 (Appendix A).

B. ISSUES PRESENTED FOR REVIEW

This case presents the question of whether an insurance certificate has "legal efficacy" and is a "written instrument" under Washington's criminal forgery statute, RCW 9A.60.010, .020, and presents the following issues for review:

1. Is this Court's review warranted under RAP 13.4(b)(1) & (2) because the decision of the court of appeals conflicts with 120 years of Washington jurisprudence defining "legal efficacy"? E.g. State v. Barkuloo, 18 Wash. 52 (1897); State v. Scoby, 117 Wn.2d 55, 810 P.2d 1358 (1991); State v. Smith, 72 Wn. App. 237, 864 P.2d 406 (1993).

2. Is this Court's review warranted under RAP 13.4(b)(4) to determine whether to accept the court of appeals' substantial expansion of the term "legal efficacy" where it will invite a wide array of charges hitherto excluded from the statute's terms.

3. Is this Court's review warranted under RAP 13.4(b)(3) and (b)(4) to determine whether the court of appeals violated principles of State and federal due process under article I, section 3 and the Fourteenth

Amendment by applying a novel construction of the criminal forgery statute to Bradshaw?

C. STATEMENT OF THE CASE

1. Charges and trial testimony

The King County Prosecutor's Office charged Stacy Bradshaw with one count of forgery. CP 1. The State alleged Bradshaw altered a certificate of liability insurance, and knowing it to be forged, put it off as true to Umpqua Bank. CP 1.

Undisputed evidence at the bench trial established the following. Bradshaw was the owner and licensed designated escrow officer of North Sound Escrow. CP 166 (finding I.1); RP 223. North Sound Escrow was selected by a commercial buyer and seller to serve as the escrow agent for a real estate sale involving a property in Kirkland, WA. CP 166 (finding I.2). The purchase price was $1.325 million. Exh. 2, p. 1. (Purchase and Sale Agreement); also RP 81 (between 1.3-1.4 million). The buyer arranged for a loan through Umpqua Bank. RP 80.

The escrow company's duties included ensuring title to the property passed free of encumbrances, and receiving the loan funds and transmitting them to the seller. RP 78-90. Escrow companies generally charge a fee for their services, half paid by the buyer and half paid by the seller. RP 80. From the bank's perspective, part of an escrow company's role is to provide

insurance coverage, so that if funds are stolen or misplaced during the transaction, the escrow company would have the ability to reimburse any party who suffered a loss. RP 79.

The bank had no say in the selection of North Sound Escrow as the escrow agent; Umpqua employee, Maxim Lissak, testified this decision was made by the buyer and seller, and was something the bank would "just have to live with." RP 78; see also CP 166 (finding I.2). Lissak was not familiar with North Sound Escrow, and was more used to transacting business with larger, multi-billion dollar companies who routinely maintained large amounts of insurance coverage. CP 167 (finding I.3); RP 82-83. Lissak wanted to ensure the bank's assets were fully protected. CP 167 (finding I.4); RP 82. To that end, he asked for a copy of North Sound Escrow's Errors and Omissions (E&O) coverage, to ensure it was sufficient to cover the full amount of the loan. CP 167 (finding I.4); RP 82-83, 88, 113.

In response Bradshaw emailed a copy of the Certificate of Liability Insurance, listing her E&O insurance and Crime insurance limits as two million dollars each. CP 167 (finding I.4); RP 83. Lissak and his colleagues noticed the document had been altered to show two million dollars in coverage. CP 167 (finding I.5); RP 23, 86. They inquired with Kibble & Prentice, the insurance company and "producer" of the certificate, who

confirmed North Sound Escrow had only one million dollars for each of E&O and Crime insurance coverage. CP 167 (finding I.6); RP 90, 129.

2. Certificate of Liability Insurance

A copy of the altered certificate of liability insurance was admitted at trial. RP 83, 86; Exh. 1, p. 6 (App. B). The following disclaimer appears near the top of the document in all capital letters:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE INSURING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

The certificate lists Kibble & Prentice as the "producer" and lists three separate insurance companies as the "Insurer(s) Affording Coverage." Exh. 1, p. 6.

The certificate lists "North Sound Escrow, LLC" as the only "Insured" and offers no indication that any other beneficiaries are contemplated by the parties. Exh. 1, p. 6. The certificate lists "State of Washington, Dept of Financial Institutions" as the "Certificate Holder." Exh. 1, p. 6. The certificate specifically states, "If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. ... A statement on this certificate does not confer rights to the certificate holder

in lieu of such endorsement(s)." Exh. 1, p. 6 (capitalization in original). No such endorsement is visible on the certificate. Exh. 1, p. 6.

> The certificate states the following:
>
> This is to certify that the policies of insurance listed below have been issued to the insurer named above for the policy period indicated. Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies. Limits shown may have been reduced by paid claims.

Exh. 1, p. 6 (emphasis added).

The certificate lists three types of insurance, Crime, E&O, and Excess Crime. Exh. 1, p. 6. The certificate (as provided by Bradshaw to Umpqua Bank), shows coverage limits of "$2M," "$2M," and "$800K" respectively. Exh. 1, p. 6. On the certificate, the "2M" shown for Crime and E&O insurance limits is of a larger and different font type than the rest of the text on the certificate. Exh. 1, p. 6.

Steven Sherman, Chief of Enforcement for the Department of Financial Institutions (DFI) testified as follows. RP 214-25. Under Washington law, escrow companies, also known as "escrow agents," and escrow officers must be licensed by DFI. RP 216. Escrow agents are required by statute and regulations to maintain insurance policies in the amount of one million dollars for fidelity or crime coverage and fifty-thousand dollars for E&O coverage. RP 219-20. The fidelity or crime

insurance covers losses resulting from theft or similar acts while the E&O insurance covers losses resulting from errors or omissions by the escrow company or its employees. RP 219-20. DFI requires proof that these insurance requirements have been met as part of its escrow licensing and annual relicensing processes. RP 221. If the policies lapse, the licenses are suspended and the escrow agent and associated officers are not permitted to conduct escrow activities. RP 221.

An email chain between Bradshaw and Kibble & Prentice was also admitted at trial. RP 139; Exh. 5, p. 1-3. It showed Kibble & Prentice had previously mailed a certificate of insurance to DFI, and later mailed a second and then a third certificate to DFI at Bradshaw's request. Exh. 5, p. 1-3. The purpose of Kibble & Prentice mailing the original certificate to DFI was not discussed or established by the email chain. Exh. 5, p. 1-3. Rather, the testifying Kibble & Prentice employee incorrectly assumed DFI was "probably a client of North Sound Escrow," and that the certificate had been requested in furtherance of that customer relationship. RP 140. The email chain did establish that the purpose of the third certificate's mailing to DFI was to provide DFI with North Sound Escrow's new, corrected address. Exh. 5, p. 1-3. No other evidence was presented in contradiction.

The third certificate was attached to the most recent email. Exh. 5, p. 4. The certificate shows "$1M" in E&O coverage and "$1M" in crime

coverage. Exh. 5, p. 4. The unique identifying number in the bottom left corner, beginning "#S116 ..." matches the number on the certificate sent by Bradshaw to Umpqua Bank. Exh. 5, p. 4; see RP 278 (oral findings). This established the third emailed certificate and the altered certificate sent to Umpqua Bank were originally the same document. Exh. 5, p. 4; see RP 278 (oral findings).

The exhibits and testimony did not establish precisely what documents were contained within Bradshaw's or North Sound Escrow's actual application for licensing with DFI.

Testimony from Kibble & Prentice established that with E&O policies, it was Kibble & Prentice's practice to "issue a binder" as proof of insurance. RP 136. This binder provided the effective and expiration dates, and coverage limits. RP 136. The purpose of the binder was to provide "temporary evidence of the insurance until the policy is delivered some 30 to 90 days later. ... ." RP 136. When asked about the purpose of the certificate of insurance, the Kibble & Prentice representative explained it was for "letting [the client] know what the coverage is they have in place" but explained such certificates were not provided as proof of insurance "because they do have their policy and/or maybe a binder." RP 136-37.

However, despite defense argument to the contrary, the trial court incorrectly recalled that Snyder had testified the "certificate of insurance is,

quote, evidence of what's in place. She said certificates of insurance are evidence of insurance." RP 291.

3. Trial arguments of the parties

The defense stipulated the certificate provided by Bradshaw to Umpqua Bank had been altered. RP 291. Bradshaw did not testify or call any witnesses. RP 348-49.

As discussed in more detail below, the defense argued, before, during and after the trial, that the evidence was insufficient to support a charge of forgery because the certificate lacked "legal efficacy" and was not a "written instrument." E.g. RP 23, 226; CP 172.

The State advanced several theories to argue the certificate was a written instrument: the plain language of the statute was dispositive, the certificate had legal efficacy because it was submitted to a government agency, and the certificate had legal efficacy because the bank could have relied on it and might later have suffered damages. E.g. RP 253, 258, 260.

4. Initial trial court ruling

The trial court found Bradshaw altered the certificate of insurance with intent to defraud the bank. CP 167 (Finding I.6). The trial court also concluded the certificate had "legal efficacy" and so was a "written instrument" under the forgery statute. CP 168 (Conclusion II.5 (citing RCW 9A.60.010(7))).

In reaching this conclusion, the trial court rejected the State's argument that the plain language of the statute resolved the question. RP 275-76; CP 168 (Conclusion III (incorporating oral findings and conclusions)). Instead, it found the statute's definition of "written instrument" was "recognizably unhelpful" and required application to the common law. RP 275-76 (citing RCW 9A.60.010(7)(a)). The common law required that to be a "written instrument," a document must have "legal efficacy" defined as "something that if genuine may have legal effect or be the foundation of legal liability" or "have efficacy in affecting some legal right." RP 276 (citing State v. Morse, 38 Wn.2d 927, 234 P.2d 478 (1951); Smith, 72 Wn. App. at 241-42[1]).

The trial court initially found the State's argument regarding hypothetical civil legal claims by the bank did not resolve the issue. RP 278-79. The court found defense was "correct" that according to case law, "representations in the certificate itself cannot be utilized as a basis for establishing civil liability," but reasoned "this case is not about asserting a civil claim based upon the contents of the certificate of liability." RP 276-

[1] The transcript shows the trial court as citing to "State v. Hayslip," which counsel interprets to mean "State v. Smith." RP 276. Alternatively, the trial court could be referencing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). However, that case held an insurance company was liable under the doctrine of *respondeat superior* for its employee's fraud, and did not discuss the definition of "written instrument" under Washington's forgery statute. Pacific Mut. Life Ins. Co., 499 U.S. at 15.

77. The trial court also considered the disclaimers noted on the certificate and relevant case law to conclude the certificate "is merely a summary of insurance coverage[]s that was issue[d]," may not even provide an accurate statement of remaining insurance coverage because "the limits set forth therein may have already been reduced by paid claims," and "does not provide a basis for asserting any claims for civil liability; at least under the current case law." RP 278. As a result, "The fact that the Umpqua Bank did not ... suffer any adverse consequences as a result is not relevant to the question of whether the certificate has legal effect." RP 279.

The trial court also initially reasoned Bradshaw had submitted the certificate to DFI in order to satisfy the statutory requirement (proof of insurance) for relicensing of North Sound Escrow as an escrow agent. RP 278-79. The trial court reasoned that although other parties might request a certificate of liability insurance for various purposes, the certificate provided by Bradshaw to Umpqua Bank was the same certificate she had provided to DFI as part of a package of documents used to establish insurance compliance for North Sound Escrow's relicensing. RP 279. The trial court concluded that based on these facts, the certificate was something that "did have legal effect." RP 279. As a result, it had "legal efficacy" and was a "written instrument" for purpose of the forgery statute. RP 279. The court denied the defense motion to dismiss. RP 279.

5. Motion to reopen and modification of findings

Bradshaw moved to reopen the case to allow for further cross-examination of the State's witness regarding whether DFI had in fact relied on the certificate of liability insurance to establish North Sound Escrow's compliance with statutory and regulatory insurance requirements. RP 307. Although additional testimony was never taken, Bradshaw argued that she was required to submit very particular documents to establish insurance requirements, and those required documents are not the same as the certificate of liability insurance generated by Kibble & Prentice. RP 314.

After hearing argument from both parties, the trial court retreated from its initial factual finding that the certificate had been submitted to DFI specifically for the purpose of establishing compliance with statutory and regulatory insurance requirements. The court observed "that pursuant to the department's own standards and the WAC, [DFI] wouldn't have relied upon the certificate of insurance for purposes of determining, for example, that the E&O insurance was satisfied." RP 326. However, the court reasoned "the department requires individuals who want to be licensed escrow agents to provide application materials to satisfy the statutory requirements to get that license. That material is gathered up in … a packet, and they keep it." RP 326. The court reasoned that because the certificate and other documents are "all part of that same packet of materials submitted in

support of the request for a license," such documents "are clearly public records, even if they're in excess of what the department might require." RP 326-27.

The court observed, "The certificate of insurance that was provided ostensibly was the document that was provided to the department and would be found on file in support of that application for licensing. And to me that makes it a public record right out -- right out of the gate." RP 327. Thus, the court reasoned that mere filing with the department as part of the larger licensing application package, regardless of whether it was submitted or considered for the purpose of establishing compliance with insurance requirements, was sufficient to make the certificate a "public record." RP 326-27. The court reasoned earlier definitions of common law forgery "lists a public record" as a document sufficient to establish a forgery charge, and so concluded the certificate was a "written instrument." RP 326.

The court denied the defense motion to reopen, reasoning that the factual question of whether the certificate had been submitted in order to establish compliance with statutory and regulatory insurance requirements was not relevant to the legal question. RP 327.

The trial court also observed that Kibble & Prentice may have issued certificates of liability insurance to other parties for other purposes. RP 327. The court observed that had Bradshaw provided Umpqua Bank with a

different certificate that had not been filed with DFI, "I might be hard pressed to call that a public record because it's not on file with a government agency anywhere for any purpose. But that's not the factual scenario that's in front of me right now." RP 327-28.

6. Post-trial conviction and second modification of findings

After a bench trial, the court found Bradshaw guilty of one count of forgery. CP 168 (Conclusion III), 288; RP 358.

Bradshaw moved for a new trial and for arrest of judgment arguing, among other reasoning, the State had not proven the certificate had "legal efficacy" and the court should have applied the rule of lenity. CP 169-75. The trial court denied the motion. CP 283-84.

In so ruling, the court provided what it referred to as a "secondary analysis" to support its conclusion. RP 388. The trial court returned to the State's earlier rejected argument and reasoned that if Umpqua Bank had not noticed the alteration, it would have "contractually relied upon the representations in that document" "without any more documentation." RP 387. The trial court reasoned that regardless of whether such reliance "was a bright idea or not is not the question." RP 387.

The trial court also reasoned that where there is "no case on point," and the conduct was not "specifically called out in the statute" did not mean that the rule of lenity should apply or that "the benefit of doubt" should go

to the defendant. RP 388. The trial court reasoned this "is not the way our law is developed." RP 388.

7. Appellate arguments & decision

Bradshaw appealed, arguing there was insufficient evidence to support her conviction because the certificate lacked legal efficacy. Br. App. at 18. Specifically, common law jurisprudence defines legal efficacy as requiring a document to have automatic operation of law, either because it purports to create some legal entitlement or because it was issued by a government entity. Id. Where the certificate was neither, it lacked legal efficacy, regardless of whether it was filed with a government entity or might become a piece of evidence in a hypothetical future civil legal claim. Id.; see also Reply Br. App. at 7-14.

The State argued the certificate had legal efficacy as a public record because it was required by law to be filed with DFI. Br. Resp. at 8. The State also argued the certificate was a written instrument because, "if genuine, it would have induced the bank to fund the transaction" through Bradshaw's company, and had the transaction gone awry, the bank could have sued Bradshaw's company for damages in a civil case for misrepresentation. Id. at 10.

In her reply brief, Bradshaw pointed out that well-established case law held the bank could not seek damages from the insurance company on

the basis of the certificate, and the bank lacked the authority to cut Bradshaw's company out of the transaction. Reply Br. App. at 1, 5.

The court of appeals affirmed Bradshaw's conviction, finding the certificate had legal efficacy "both as a public record and as a foundation for legal liability." Bradshaw, 414 P.3d at 1150.

The court held the certificate had "legal efficacy" as a "public record." Id. at 1151-52. The court reasoned the certificate was a "public record" because it was on file with a government agency, here DFI, and the document was "required by law to be filed or recorded or necessary or convenient to the discharge of a Public official's duties." Id. at 1151 (citing State v. Richards, 109 Wn. App. 648, 654, 36 P.3d 1119 (2001).

The court acknowledged prior cases discussing the "public record" category of written instruments all involved documents issued by a government entity, not merely received by a government entity. Bradshaw, 414 P.3d at 1151. However, the court reasoned that by adding the requirement that such documents must be "necessary or convenient" to official duties, this definition would still ensure those documents that "accidentally" found their way into a government file, or were "immaterial to the agency's duties" could not form the basis of a forgery charge. Id.

The court also found the certificate had legal efficacy "because it provides a foundation for legal liability." Id. at 1152. The court reasoned

"if Umpqua had suffered damages as a result of the alteration and had sued Bradshaw for fraudulent misrepresentation, the original unaltered document would be a foundational piece of evidence." Id.

Finally, the court declined to apply the rule of lenity, reasoning the statute provided "fair warning" that Bradshaw's conduct was covered and prohibited. Id. at 1153.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A NOVEL DEFINITION OF "WRITTEN INSTRUMENT" UNDER THE CRIMINAL FORGERY STATUTE PREVAILS OVER 120 YEARS OF JURISPRUDENCE.

1. The court of appeals' decision presents a conflict with published court of appeals and Washington Supreme Court jurisprudence under RAP 13.4(b)(1) & (2).

The court of appeals' decision conflicts with 120 years of Washington jurisprudence.

The decision holds the certificate has legal efficacy because it was required by statute to be filed with DFI. Bradshaw, 414 P.3d at 1151. This conflicts with a significant body of case law that has only ever recognized documents issued by a government entity as part of official duties. Barkuloo, 18 Wash. at 53-54 (quoting Hill's Pen. Code, § 63) ("'certificate of a justice of the peace or other public officer, auditor's warrant [i.e. check issued by a county government], treasury note, [or] county order.'"); State

v. Esquivel, 71 Wn. App. 868, 869, 863 P.2d 113 (1993) (alien registration, social security, temporary resident alien cards); Richards, 109 Wn. App. at 650 (state drivers licenses); but see State v. Mark, 94 Wn.2d 520, 524, 618 P.2d 73 (1980) (assuming genuine Medicaid reimbursement forms containing falsified information submitted by a private party to government entity were written instruments); State v. Marshall, 25 Wn. App. 240, 242, 606 P.2d 278 (1980) (same).

The court of appeals' decision also concludes the certificate has legal efficacy because it is the foundation for legal liability. Bradshaw, 414 P.3d at 1152. This reasoning conflicts with Washington jurisprudence recognizing that the distinction between apparent legal efficacy and actual legal effect is at the heart of the harm remedied by the forgery statute.

Case law illustrates that the common law requirement of "legal efficacy" is better understood as a requirement of "apparent legal efficacy." The doctrine requires more than establishing that a hypothetical civil legal claim may utilize the document as evidence. Rather, the document or object itself, if genuine, must have automatic legal effect. See Morse, 38 Wn.2d at 930 (finding check appeared to bind the purported payor but had no actual legal effect, and so had legal efficacy); State v. Taes, 5 Wn.2d 51, 53-54, 104 P.2d 751 (1940) (same); State v. Smith, 72 Wn. App. 237, 238, 864 P.2d 406 (1993) (same); see also Scoby, 117 Wn.2d at 56; Barkuloo, 18

Wash. at 53-54 (listing includes only documents with legal effect by automatic operation of law).

Where the court of appeals' reasoning conflicts with 120 years of published court of appeals and Washington Supreme Court jurisprudence, this Court should accept review under RAP 13.4(b)(1) and (2).

2. This case presents an issue of substantial public interest under RAP 13.4(b)(4).

As discussed above, the court of appeals' published decision finds that any document has legal efficacy if it may become evidence in a future lawsuit or if it is required to be on file with a government entity somewhere. This presents an issue of substantial public interest because the reasoning greatly expands the scope of documents which may form the basis of a forgery charge, and thereby opens the floodgates to charges based on novel theories of prosecution. It also undermines the essential purpose of the forgery statute: to remedy harms caused where a document purports to create legal entitlement by automatic operation of law (i.e. has apparent legal efficacy) but in fact creates no legal entitlement (i.e. has no actual legal effect). Other harms, such as the use of a document containing false claims to induce agreement, are adequately addressed in civil contracts law and need not rely on the criminal forgery statute for redress.

This Court should accept review under RAP 13.4(b)(4).

3. This case presents a significant question of State and federal constitutional law under RAP 13.4(b)(3).

As discussed above, the court of appeals' decision is out of step with 120 years of jurisprudence. By failing to apply the rule of lenity to this novel interpretation of the forgery statute, the decision violates Bradshaw's due process rights under both the Washington and federal constitutions.

The purpose of the "rule of lenity" is to "ensure[] fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." U.S. v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). As noted by the U.S. Supreme Court, the rule of lenity is closely related to constitutional due process rights and the "fair warning" requirement, as articulated by Justice Holmes. "[W]hat Justice HOLMES spoke of as "fair warning ... in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Id. at 265 (quoting McBoyle v. U.S., 283 U.S. 25, 27, 51 S. Ct. 340, 341, 75 L. Ed. 816 (1931)). "'The ... principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" Id. at 265 (quoting Bouie v. City of Columbia, 378 U.S. 347, 351, 84 S. Ct. 1697, 1701, 12 L. Ed. 2d 894 (1964) (quoting U.S. v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 811-812, 98 L. Ed. 989 (1954))).

> [A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, ... due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope ... .

Lanier, 520 U.S. at 266 (emphasis added) (citations omitted); also U.S. CONST., AMEND. XIV; WASH. CONST., ART. I, SEC. 3.

This case presents the significant constitutional issue of whether principles of due process permit the application of the court of appeals' novel construction of the criminal forgery statute to Bradshaw. This Court should accept review under RAP 13.4(b)(3).

E. CONCLUSION

For the aforementioned reasons, Bradshaw respectfully asks this Court to grant review under RAP 13.4(b)(1), (2), (3), and (4).

DATED this 9th day of May, 2018.

Respectfully submitted,

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Appendix A

414 P.3d 1148
Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,
v.
Stacy Ann BRADSHAW, Appellant.

No. 75853-5-I
|
FILED: April 9, 2018

Synopsis

Background: Defendant was convicted following a bench trial in the Superior Court, King County, Jeffrey M. Ramsdell, J., of forgery. Defendant appealed.

Holdings: The Court of Appeals, Becker, J., held that:

[1] an altered certificate of insurance had legal efficacy as a public record, as required to support a forgery conviction;

[2] An altered certificate of insurance was sufficient to provide a foundation for legal liability necessary to support forgery conviction; and

[3] rule of lenity did not apply.

Affirmed.

***1149** Appeal from King County Superior Court, Docket No: 16-1-00827-1, Honorable Jeffrey M Ramsdell.

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Opinion

Becker, J.

¶ 1 To support a charge under the current forgery statute, the State must prove that the allegedly altered written instrument had "legal efficacy." Here, an escrow agent was convicted of forgery for altering a certificate of insurance to make it appear she had ***1150** enough liability insurance to cover a transaction she had been hired to handle. We affirm the conviction against a challenge to the sufficiency of the evidence. The certificate of insurance had legal efficacy both as a public record and as a foundation for legal liability.

FACTS

¶ 2 In 2014, appellant Stacy Bradshaw was a licensed escrow agent and the owner of North Sound Escrow. By law, an escrow agent must maintain several types of liability insurance. Bradshaw had coverage for crime as well as for errors and omissions through the insurance firm USI Kibble & Prentice. The limits were $1 million per claim.

¶ 3 In February 2014, Bradshaw was retained as the escrow agent for the sale of commercial property for the price of approximately $1.4 million. Umpqua Bank was the lender for one of the parties. Umpqua asked Bradshaw for a copy of her insurance information. Bradshaw obtained a "Certificate of Liability Insurance" from Kibble & Prentice showing her limits of $ 1 million. She gave Umpqua a copy of the certificate that was altered to represent that Bradshaw had coverage limits of $2 million. Umpqua noticed the alterations and contacted both Kibble & Prentice and the Department of Financial Institutions, the agency that regulates escrow agents. This led to the prosecution of Bradshaw on one count of forgery.

¶ 4 Bradshaw waived her right to a jury trial. The court convicted Bradshaw as charged and sentenced her to 40 hours of community service, $3,600 in financial restitution, and 6 months of community supervision. Bradshaw's appeal challenges the sufficiency of the evidence.

ANALYSIS

[1]¶ 5 Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits a 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).

¶ 6 "At common law, 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 Wash.App. 237, 239, 864 P.2d 406 (1993), quoting 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 493 n.1, at 114-15 (14th ed. 1981). The forgery statute in effect from 1909 to 1975, former RCW 9.44 (1909),[1] listed categories of documents that satisfied the legal efficacy requirement, such as money, public records, and court records. State v. Scoby, 117 Wash.2d 55, 59, 810 P.2d 1358, 815 P.2d 1362 (1991). Legislation revising the forgery statute in 1975 removed the particularized list of categories of items susceptible to forgery. ***1151** The current forgery statute simply prohibits the forgery of a "written instrument."

¶ 7 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).

[2]¶ 8 At Bradshaw's trial, the only issue was whether the certificate of insurance ii was a "written instrument." A written instrument is broadly defined in the current statute 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). This definition was intended to continue the common law requirement that the instrument be something which, if genuine, may have legal effect. Smith, 72 Wash.App. at 241-43, 864 P.2d 406.

[3]¶ 9 Bradshaw assigns error to the trial court's conclusion that the certificate of liability insurance satisfies the rule of legal efficacy.

Public Record

¶ 10 The certificate holder named on Bradshaw's certificate of liability insurance is the Washington State Department of Financial Institutions. The certificate was filed with the department as evidence that Bradshaw was in compliance with coverage requirements. The trial court determined that the certificate has legal efficacy as a public record.

[4]¶ 11 The former statute explicitly recognized that any "paper on file in any public office" is a writing susceptible to forgery. Former RCW 9.44.020 (1909). Because the current version of the forgery statute was not intended to curtail the list of forgeable items, a public record is within the meaning of the term "written instrument." Scoby, 117 Wash.2d at 60, 810 P.2d 1358, 815 P.2d 1362. Bradshaw claims, however, that to meet the requirement of legal efficacy as a public record, the written instrument must be issued by a government agency. She argues that if the mere filing of a document with a government agency converts a document into a written instrument susceptible to forgery, the common law requirement for legal efficacy becomes meaningless.

¶ 12 It is true that in the cases cited by Bradshaw, the written instrument in question was issued by an agency rather than merely being filed with the agency. State v. Richards, 109 Wash.App. 648, 650, 36 P.3d 1119 (2001) (traffic citation issued by police officer); State v. Barkuloo, 18 Wash.52, 52-53, 50 P. 577, 50 P. 577 (1897) (county auditor's warrant); State v. Esquivel, 71 Wash.App. 868, 869, 863 P.2d 113 (1993) (federal alien registration and social security cards); State v. Mark, 94 Wash.2d 520, 522, 618 P.2d 73 (1980) (prescription reimbursement forms provided by state agency). But nothing in those cases suggests that a document filed with a public office has legal efficacy only if the agency issues the document.

¶ 13 This court has held, citing a treatise, that a government or public record may be the subject of forgery if it is required by law to be filed or recorded or necessary or convenient to the discharge of a public official's duties. Richards, 109 Wash.App. at 654, 36 P.3d 1119. This limitation ensures that a written document that accidentally finds its way into a public agency's files, or is immaterial to the agency's duties, does not become the foundation of a forgery charge. It is not forgery to make an alteration "which is not material, i.e., the legal efficacy

of the instrument is not affected." 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 486, at 84 (15th ed. 1996). "Forgery covers virtually every kind of instrument *which has an effect on private or public rights*." 4 TORCIA § 489, at 88 (1996) (emphasis added).

¶ 14 The defendant in Richards was convicted of forgery for signing a traffic citation with a false name. Because attempting to obtain an arrestee's signature on a citation is necessary to the discharge of a state trooper's public duties, this court concluded that "a signed traffic citation is a written instrument ***1152** with legal efficacy that may be susceptible to forgery." Richards, 109 Wash.App. at 655, 36 P.3d 1119.

¶ 15 Like Richards, this is not a case where an altered document found its way into an agency file accidentally. The certificate had material significance to the department. As part of the licensing process, an escrow agent must submit proof of financial responsibility to the department, including a fidelity bond providing coverage in the aggregate amount of one million dollars. RCW 18.44.201(1). To demonstrate compliance with the requirement for a fidelity bond, the applicant is required by regulation to provide the department with a certificate of insurance that includes the aggregate amount of coverage. WAC 208-680-310 (6). Maintaining such insurance is "a condition precedent to the escrow agent's authority to transact escrow business in this state." RCW 18.44.201(4).

¶ 16 Bradshaw claims the evidence is insufficient to prove her certificate of insurance is a public record because the State did not establish that anyone in the department scrutinized it during the process of renewing her license. She appears to assume there is a strict requirement for proof that the agency relied on the document in question in carrying out its duties. Bradshaw cites no authority for this proposition, and we have found none. A certificate of insurance is necessary or convenient to the department's responsibility for licensing escrow agents. Whether the agency actually looked at Bradshaw's certificate when it decided to renew her license is immaterial.

¶ 17 In short, the record shows that Bradshaw's certificate of insurance was a type of document required by law to be filed arid necessary or convenient to the discharge of the duties of the department. In view of the regulatory scheme, the trial court reasonably found that a certificate of insurance coverage for an escrow agent is a written instrument, the alteration of which supports a forgery charge because it is a public record with legal efficacy.

Foundation for Legal Liability

[5]¶ 18 The trial court also found that a certificate of insurance has legal efficacy under another theory—because it provides a foundation for legal liability.

¶ 19 At common law, forgery required a "writing 'which, if genuine, might apparently be of legal efficacy or the foundation of legal liability.' " Smith, 72 Wash.App. at 239, 864 P.2d 406, quoting 4 TORCIA § 493 n.1, at 114-15 (1981).

¶ 20 Washington cases holding that a document provides a foundation for legal liability tend to have a fact pattern involving alteration of currency or a check. For example, in Scoby, a dollar bill was altered by pasting onto it corners taken from a twenty-dollar bill. The dollar bill had legal efficacy because it was "an obligation of the United States that must be redeemed on demand." Scoby, 117 Wash.2d at 58, 810 P.2d 1358, 815 P.2d 1362. In contrast, the unsigned check in Smith did not have legal efficacy because no person is liable for an unsigned check. Smith, 72 Wash.App. at 243, 864 P.2d 406. Similarly, an instrument purporting to be a check but lacking the name of any bank does not have legal efficacy; an order to pay money without stating what bank or person is to pay it, even if genuine, does not affect a legal right. State v. Taes, 5 Wash.2d 51, 53, 104 P.2d 751 (1940). Bradshaw attempts to derive from these cases a rule that to serve as the foundation of legal liability, the written instrument must, on its face, confer a legal right—like a check or a contract. But nothing in these cases suggests they were intended to be read so narrowly.

¶ 21 Bradshaw's certificate of insurance, before alteration, was genuine. It was a representation of the limits of her coverage. The trial court correctly reasoned that if Umpqua had suffered damages as a result of the alteration and had sued Bradshaw for fraudulent misrepresentation, the original unaltered document would be a foundational piece of evidence of Bradshaw's liability. And this is true even though the certificate states on its face that it "is issued as a matter of information only and confers no rights upon the certificate holder." The court heard testimony that insurance certificates are typically used by insureds as evidence of their current policies and limits and that Bradshaw's certificate ***1153** provided such evidence to the department.

¶ 22 Sufficient evidence supports the trial court's determination that Bradshaw's certificate of insurance had legal efficacy as a foundation for legal liability.

Rule of Lenity

[6] [7]¶ 23 Finally, Bradshaw invokes the rule of lenity to argue for reversal of her conviction. The rule of lenity operates to resolve statutory ambiguities in favor of a criminal defendant. In re Personal Restraint of Sietz, 124 Wash.2d 645, 652, 880 P.2d 34 (1994). It "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." United States v. Lanier, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

¶ 24 The forgery statute provides a fair warning that it applies to Bradshaw's conduct. She falsely altered a written instrument with intent to injure or defraud: The requirement that the written instrument have legal efficacy is a limitation on the statutory definition of forgery, not an expansion of it. Because Bradshaw's conduct is clearly covered by the statute, the rule of lenity is not applicable.

Affirmed.

WE CONCUR:

Leach, J.

Dwyer, J.

All Citations

414 P.3d 1148

Footnotes

1 First degree. 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 of 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 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).

End of Document

Appendix B

Exh. 1, p.6

Altered Insurance Certificate

Client#: 581618 NORTHSOU6

ACORD™ CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY): 1/28/2014

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER Kibble & Prentice, a USI Co SC 601 Union Street, Suite 1000 Seattle, WA 98101	CONTACT NAME: PHONE (A/C, No, Ext): 206 441-6300 FAX (A/C, No): 610-362-8503 E-MAIL ADDRESS: Select@KPcom.com
INSURED North Sound Escrow, LLC 4100 194th Street SW, #300 Lynnwood, WA 98036	INSURER(S) AFFORDING COVERAGE — NAIC # INSURER A : Travelers Casualty and Surety C — 31194 INSURER B : Protective Insurance Company — 12416 INSURER C : Markel American Insurance Compa — 28932 INSURER D : INSURER E : INSURER F :

COVERAGES CERTIFICATE NUMBER: REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
	GENERAL LIABILITY						EACH OCCURRENCE $
	☐ COMMERCIAL GENERAL LIABILITY						DAMAGE TO RENTED PREMISES (Ea occurrence) $
	☐ ☐ CLAIMS-MADE ☐ OCCUR						MED EXP (Any one person) $
							PERSONAL & ADV INJURY $
							GENERAL AGGREGATE $
	GEN'L AGGREGATE LIMIT APPLIES PER:						PRODUCTS - COMP/OP AGG $
	☐ POLICY ☐ PRO-JECT ☐ LOC						$
	AUTOMOBILE LIABILITY						COMBINED SINGLE LIMIT (Ea accident) $
	☐ ANY AUTO						BODILY INJURY (Per person) $
	☐ ALL OWNED AUTOS ☐ SCHEDULED AUTOS						BODILY INJURY (Per accident) $
	☐ HIRED AUTOS ☐ NON-OWNED AUTOS						PROPERTY DAMAGE (Per accident) $
							$
	☐ UMBRELLA LIAB ☐ OCCUR						EACH OCCURRENCE $
	☐ EXCESS LIAB ☐ CLAIMS-MADE						AGGREGATE $
	☐ DED ☐ RETENTION $						$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY Y / N						☐ WC STATU-TORY LIMITS ☐ OTH-ER
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? ☐	N / A					E.L. EACH ACCIDENT $
	(Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below						E.L. DISEASE - EA EMPLOYEE $
							E.L. DISEASE - POLICY LIMIT $
A	Crime - DED: $10K			105544359	11/01/2013	11/01/2014	$2M per claim/aggregate
B	E&O - DED: $10K			MPL12751113	11/01/2013	11/01/2014	$2M per claim/aggregate
C	Excess Crime			5221PR01627100	12/18/2013	12/18/2014	$800K - Ded: $200K

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

Current Locations:
-4100 194th Street SW, #300 Lynnwood, WA 98036
-1027 State Avenue, Marysville, WA 98270

Covers principals, corporate officers, partners, employees and escrow officers for all offices of the named
(See Attached Descriptions)

CERTIFICATE HOLDER

State of Washington
Dept of Financial Institutions
P.O. Box 41200
Olympia, WA 98504-1200

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

Angela D. Johnson

NIELSEN, BROMAN & KOCH P.L.L.C.

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