NO. 46145-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN RING,

Appellant.

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

The Honorable Toni Sheldon, Judge
The Honorable Amber L. Finlay, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

I. THE INFORMATION DID NOT INCLUDE ALL THE ESSENTIAL ELEMENTS OF FORGERY.

In his opening brief, appellant John Ring asserts he was denied due process when the information charging him with three counts of forgery omitted the essential element of legal efficacy. Brief of Appellant (BOA) 13-19. In response, the State claims legal efficacy is not an essential element but is, instead, merely part of the definition of a written instrument that need not be included in the information. Brief of Respondent (BOR) at 4-7. This argument should be rejected, however, because it ignores the continued validity and applicability of a Washington Supreme Court decision.

The Washington Supreme Court has held the legal efficacy of a written instrument alleged to have been forged is an essential element that must be included in an information charging forgery. State v. Kuluris, 132 Wash. 149, 231 P. 782 (1925). The State charged and convicted Kuluris under Washington's former forgery statute, which – like the modern statute – did expressly include the legal efficacy element.[1] Id. at 149-150. The information addressed

[1] Washington's former forgery statute was in effect from 1909 until 1975. State v. Smith, 72 Wn. App. 237, 864, P.2d 406 (1993).

only the statutory elements. Id. Kuluris appealed his conviction, contending the information was deficient for failing to allege that the written instrument at issue was one which had legal efficacy. Id.

Agreeing with Kuluris, the Washington Supreme Court looked to the common law elements of forgery. Legal efficacy was consistently a necessary element of the crime.[2] Despite the fact that the statutory language did not expressly set forth the legal efficacy element, the Supreme Court concluded that this common law element was essential to establishing the crime of forgery. Consequently, it held that the State must allege this element in the information charging forgery. Because the State did not do so, the Supreme Court reversed Kuluris' conviction. Id. at 150-52.

Kuluris is still good law even under the modern forgery law (effective since 1975), and its holding is dispositive here. The Legislature is presumed to be familiar with judicial interpretations of statutes and, absent an indication it intended to overrule a

[2] As the United States Supreme Court has recognized "[f]orgery, at the common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." Moskal v. United States, 498 U.S. 103, 122, 111 S. Ct. 461, 472, 112 L. Ed. 2d 449 (1990) (citing 2 J. Bishop, Criminal Law § 523, p. 288 (5th ed. 1872)).

particular interpretation, amendments are presumed to be consistent with previous judicial decisions. In re Dependency of M.P., __ Wn. App. __, 340 P.3d 908, 914-15 (2014). There is nothing in the modern forgery statute (RCW 9A.60.020) that indicates any intention to overrule Kuluris and remove the common law element of legal efficacy. Hence, this Court must presume the Legislature was familiar with Kuluris and intended that the modern statute be applied consistently with that decision. Indeed, RCW 9A.60.020's legislative history supports this conclusion.

In State v. Smith, this Court considered the legal efficacy rule in the context of the modern forgery statute, finding the Legislature intended to continue the legal efficacy rule in Washington. 72 Wn. App. at 239-41. In reaching this conclusion, this Court reviewed the legislative history of RCW 9A.60.020, noting the following:

> A staff analysis of that bill stated: "The bill is basically a restatement of existing law, an amended 1909 statute." Senate Judiciary Committee, Bill Analysis Form, SB 2230 (January 30, 1975), page 1. The same staff analysis also made two comparisons pertinent here. Comparing the definitions in proposed RCW 9A.60.010 with the definitions in then-existing RCW 9.44.010, it concluded, "No significant change where previously defined." Bill Analysis Form at page 4. Comparing the elements of forgery in proposed RCW 9A.60.020 with the elements of forgery in then-

> existing RCW 9.44.020 and RCW 9.44.040–.080, it concluded, "Shortens existing provisions without significantly changing coverage." Bill Analysis Form at page 4.

Id. at 242.

Based on this history, the Smith Court concluded that, "the 1975 Legislature intended to continue the rule of legal efficacy that had been part of Washington law up to that time." Id. In so ruling, this Court expressly recognized that Kuluris was included in the body of case law that shaped how the legal efficacy rule functions within the context of Washington law. Id. at 240.

Kuluris is directly on point and requires reversal of Ring's forgery convictions. Arguing to the contrary, the State cites to recent cases that ostensibly look at the legal efficacy element through the lens of a definitional element. BOR at 7. However, none of those cases squarely considers whether legal efficacy is an essential element of the offense and, therefore, none have come close to overruling Kuluris.

After parsing the language of various cases, the most the State can conclude is that "rather than commenting on legal efficacy as if it were an element of forgery, [modern-day cases] appear to regard the legal efficacy requirement as a rule that

defines the term of the instrument." BOR at 7. This is not a compelling reason to reject Kuluris' continued viability, however.

The State is attempting to conjure a mature departure in Washington's forgery law from nothing more than judicial silence. None of the cases the State relies upon address the issue of legal efficacy in the same context as it was raised in Kuluris, and raised here. Indeed, to accept the State's supposition, one would have to conclude the Washington Supreme Court somewhere along the way tacitly rejected the common law elements of forgery that have existed for well over a century, overruled its own decision in Kuluris without any direct comment, and did so in cases where the adequacy of the information was not even in question. The case law simply does not support this kind of leap.

In sum, Kuluris' interpreted Washington's former forgery statute as requiring the State to include in the information the essential, non-statutory element of legal efficacy. The Legislative history of the modern statute shows Kuluris' interpretation survived the modern codification of the forgery offense. Hence, the decision remains good law. Under Kuluris, the State was required to include the legal efficacy element in the information charging Ring. It did

not. Consequently, this Court should reverse Ring's three forgery convictions. Kuluris, 132 Wash. at 152.

II. THE STATE ASSUMED THE BURDEN OF PROVING THAT APPELLANT CONCEALED THE STOLEN PROPERTY.

In his opening brief, Ring asserts the State was required to prove appellant "concealed" a stolen Wacker generator and a stolen Kubota backhoe before the jury could properly convict him of possession of stolen property. BOA at 29-34. In response, the State claims it was not required to prove appellant "concealed" the property because this is not an alternative means of committing the offense but is, instead, a definitional term. BOR at 18-19. The State is incorrect.

While the State is correct that the term "conceal" is not found in the statute creating the charged offense (RCW 9A.56.150) and is, instead, found in the statute defining "possessing stolen property" (RCW 9A.56.140), the State's claim that it did not have to prove this element is incorrect. BOR at 18-19. The State assumed that burden when the concealment element was specifically included in the to-convict instruction. CP 55, 61.

To-convict jury instructions must contain all the elements of the crime. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917

(1997). If the parties do not object to jury instructions, they become the law of the case. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). In a criminal case, if the State adds an unnecessary element in the to-convict instruction, the added element becomes the law of the case and the State assumes the burden of proving the added element. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). A criminal defendant may challenge the sufficiency of the evidence to support such added elements. Hickman, 135 Wn.2d at 102.

When the State includes the definitional alternatives for possessing stolen property (including "concealed") in the to-convict, the law of the case doctrine requires the State to prove each of these as if they were statutory elements. Compare, State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004) (holding the State was required to prove the defendant concealed property when that means was included in the to-convict); with, State v. Hayes, 164 Wn. App. 459, 478, 262 P.3d 538 (2011) (holding the State was not required to prove concealment when that means was not found in the to-convict instruction). As explained in appellant's opening brief, the State failed to do so. BOA at 32-33. Consequently, reversal is required.

B. CONCLUSION

For the reasons stated above, this Court should reverse Ring's three convictions for forgery and two of his convictions for possession of stolen property.

Dated this 25th day of February, 2015.

Respectfully submitted

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF FEBRUARY, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHN RING
DOC NO. 866651
WASHINGTON CORRECTIONS CNETER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF FEBRUARY, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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