

SUPREME COURT No. \_\_\_\_\_  
COURT OF APPEALS No. 73954-9-1

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DONNA ELIZABETH GREEN,

Petitioner.

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**ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION**

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Green, No. 73954-9-I, filed June 19, 2017 (unpublished).

C. ADDITIONAL ISSUE PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issue the State raised in the Court of Appeals, which was not reached by that court:

1. The Court of Appeals affirmed the trial court's conclusion that the statutory defense of good faith claim of title did not apply to the charge of theft by deception. As an alternative ground to affirm, the State renews its argument that if it was error to refuse to instruct the jury as to the defense of good faith claim of title, the error was harmless beyond a reasonable doubt.

D. STATEMENT OF THE CASE

The defendant, Donna Elizabeth Green, was convicted of one count of theft in the first degree and five counts of forgery. CP

115-20. The relevant facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 1-4.

The Court of Appeals affirmed the convictions in a unanimous unpublished opinion. State v. Green, 73954-9-1 (Wash. Ct. App. June 19, 2017) (unpublished).

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the issues raised by Green in her petition for review, which comprise all of the issues raised in the Court of Appeals.

If review is accepted, the State seeks cross-review of an alternative argument it raised in the Court of Appeals but that the court's decision did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary. However, if this Court grants review, in the interests of justice and full consideration of the issues, this Court also should grant review of the alternative argument raised by the State in the Court of Appeals, that any instructional error was harmless. RAP 1.2(a); RAP 13.7(b). That argument is summarized below and set forth more fully in the briefing in the Court of Appeals.

1. IF THE TRIAL COURT ERRED IN REFUSING AN INSTRUCTION AS TO GOOD FAITH CLAIM OF TITLE, THAT ERROR WAS HARMLESS.

Green argues that she was deprived of due process because the trial court refused to instruct the jury that good faith claim of title is a defense to theft. Because the only theft charge before the jury was theft by deception, that defense was inapplicable. Washington courts have repeatedly held the defense inapplicable under these circumstances. The Court of Appeals in this case reaffirmed that principle and held that the trial court properly refused the proposed instruction. State v. Green, 73954-9-1 (Wash. Ct. App. June 19, 2017) (unpublished). Even if that defense was applicable, failure to instruct the jury as to that defense was harmless beyond a reasonable doubt.

The defense of good faith claim of title is statutorily defined: "The property or services was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." RCW 9A.56.020(2)(a). In State v. Stanton, the Court of Appeals held that the good faith claim of title defense is inapplicable as a matter of law to a charge of theft by deception. 68 Wn. App. 855, 868, 845 P.2d 1365 (1993). Theft by deception

means “by color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(b). The court in Stanton concluded that the required finding that a defendant obtained control of the property by color or aid of deception “necessarily includes an implied finding that the defendant did not obtain control over the property ‘openly and avowedly under a good faith claim of title.’” 68 Wn. App. at 868.

In State v. Casey, the Court of Appeals reaffirmed that holding. 81 Wn. App. 524, 527, 915 P.2d 587 (1996). It rejected the argument raised by Green, that because RCW 9A.56.020(2) provides that good faith claim of title is a sufficient defense in any prosecution for theft, the instruction is required in every theft case where it is supported by substantial evidence. Id. The court held that the instruction is not required in a case of theft by deception because “it is logically impossible to convict without impliedly rejecting any claim of good faith.” Id.

The court in Casey noted that the Supreme Court had reached the same conclusion when it held the good faith claim of title defense inapplicable to the charge of larceny by obtaining money by false pretenses, in State v. Mercy, 55 Wn.2d 530, 533,



348 P.2d 978 (1960). Obtaining money by false pretenses under the former larceny statute encompassed theft by deception under the current theft statute. Former RCW 9.54.010 (1915).<sup>1</sup> The defense of good faith claim of title appeared in former RCW 9.54.120 in the same form it appears in the current statute: "In any prosecution for larceny it shall be a sufficient defense that the property was appropriate openly and avowedly under a claim of title preferred in good faith, even though the claim be untenable."

A number of intermediate appellate court decisions in addition to Casey have applied this Court's analysis in Mercy to the current theft statute, holding that the defense of good faith claim of title is inapplicable to theft by deception. State v. Ellard, 46 Wn. App. 242, 245, 730 P.2d 109 (1986); State v. Pestrin, 43 Wn. App. 705, 708-10, 719 P.2d 137 (1986); State v. Wellington, 34 Wn. App. 607, 612, 663 P.2d 496 (1983). See also State v. Hull, 83 Wn. App. 786, 799, 924 P.2d 375 (1996) (defense inapplicable when patently deceptive means were used to accomplish theft).

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<sup>1</sup> Former RCW 9.54.010 provided: Every person who, with intent to deprive or defraud the owner thereof –... (2) Shall obtain... the possession of or title to any property, real or personal, by color or aid of any order for the payment or delivery of property or money or any check or draft, knowing that the maker or drawer of such order, check or draft was not authorized or entitled to make or draw the same, or by color or aid of any fraudulent or false representation, personation or pretence or any false token or writing or by any trick, device, bunco game or fortune-telling; or ... Steals such property and shall be guilty of larceny.

In order to convict Green of theft, the jury was required to find that she committed theft by deception. CP 96. Green proposed an instruction that good faith claim of title was a defense to that charge and proposed a to-convict instruction on the theft charge that included an element requiring disproof of that defense. CP 12, 19<sup>2</sup>. The trial court properly rejected those instructions because that defense was inapplicable. 2RP 70-71.

Even if the trial court improperly refused the instruction, that decision was harmless beyond a reasonable doubt as to the theft conviction because to convict, the jury had to conclude that Green obtained the money, which was property of another, by color or aid of deception. CP 96. It would be impossible to make that finding without rejecting the theory that Green was acting openly and in good faith. That is the reason all courts that have considered this question have found the defense inapplicable, as discussed above. For the same reason, any error in refusing the instruction was harmless.

The claimed error is entirely irrelevant to the forgery convictions, as the defense is unavailable for forgery and the proposed instructions specified that it would be applicable only as a

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<sup>2</sup> Defense proposed instructions were filed on June 9 and on June 22, 2015. The documents appear to be exact duplicates. Compare CP 11-27 with CP 150-66.

defense to theft. CP 12, 19. Theft is not an element of forgery. RCW 9A.60.020. All of the forgeries occurred after Donna Mae Green's death, so defendant Green could not have been signing on Donna Mae Green's behalf. In convicting Green of forgery, the jury concluded that Green acted with intent to defraud and there is no reason that an instruction that it is a defense to theft that a person acted openly and with a good faith claim to title would have affected that conclusion.

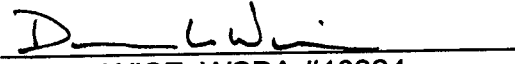
F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issue identified in Sections C and E, supra.

DATED this 17th day of August, 2017.

Respectfully submitted,

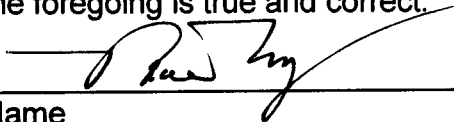
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Kathleen A. Shea, containing a copy of the Answer To Petition For Review And Cross-Petition filed in State v. Donna Elizabeth Green, Supreme Court No. \_\_\_\_\_ (Court of Appeals Cause No. 73954-9-1), in the Supreme Court for the State of Washington.

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

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

08-17-17  
Date

**KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT**

**August 17, 2017 - 12:05 PM**

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ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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