

NO. 35343-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SCOTT ALAN NORDQUIST,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it admitted hearsay that the check the defendant attempted to cash was stolen.

2. Trial counsel's failure to object when the state repeatedly elicited evidence that the police officers believed that the defendant was guilty of the crimes charged denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and under United States Constitution, Sixth Amendment.

3. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of guilt on a forgery charge unsupported by substantial evidence.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it admits hearsay that a check the defendant attempted to cash was stolen?

2. Does a trial counsel's failure to object when the state repeatedly elicits evidence that police officers believed that the defendant was guilty of the crimes charged deny the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and under United States Constitution, Sixth Amendment?

3. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment of guilt on a charge unsupported by substantial evidence?

STATEMENT OF THE CASE

Factual History

On July 11, 2006, a person by the name of Amy approached the defendant about cashing a check she said she got from Jodi Hamer. RP 75, 84-89. In fact, Jodi Hamer was then in the hospital in Seattle, and Amy told the defendant that she would allow the defendant to use the money to put gas in his truck so he could take her to see Ms. Hamer. RP 60-65. Amy told the defendant that Ms. Hamer had authorized the use of the check. RP 84-89. Upon receipt of the check the defendant went to his own bank to cash it. *Id.* He was unsuccessful because he did not have funds sufficient to cover it were it returned. *Id.* As a result, the defendant went to Fibre Federal Credit Union, the originating bank. *Id.* Once at Fibre he went through the drive up line. *Id.* However, the teller for the drive up banking told the defendant to enter the bank, which he did. *Id.* He then presented the check for payment along with two valid forms of identifications, which were a state identity card and a credit card. RP 38-40.

After checking the computer the teller saw that the maker's account had been flagged with a note about missing checks and instructions to verify the signature. RP 40. At this point she excused herself and took the check to compare it with the signature card on the maker's account. RP 41. Seeing that the signatures did not appear to match she took the check and the

signature card to her supervisor, who called the police. RP 42-43. About 15 minutes later one police officer and then another arrived and approached the defendant, who had been waiting patiently during this process. RP 49. After verifying the defendant's identification the officers took him to a private room, which he told them that he had got the check from Amy, who had authorization from Ms. Hamer to cash the check to pay for gas to get Amy up to Seattle to visit Ms. Hamer in the hospital. RP 60-64, 66-69, 94-95.

A short while later the two officers arrested the defendant after a bank employee verified with Ms. Hamer that she had not authorized the issuance of the check. RP 76. During a search incident to arrest the officers found a small blue baggie that had less than .1 grams of what later tested to be methamphetamine in it. RP 78-80, 100, 106-116. According to the officers the defendant was completely cooperative during their entire contact with him. RP 96.

Procedural History

By information filed 7-14-06 the Cowlitz County Prosecutor charged the defendant Scott Alan Nordquist with one count of possession of methamphetamine and one count of forgery out of the incident at the Fibre Federal Credit Union. CP 1-2. The case later came on for trial with the state calling the two arresting officers, the bank teller who took the check from the defendant, Jodi Hamer, and a forensic scientist as witnesses. RP 27, 54, 65,

94, 106. These witnesses testified to the facts contained in the previous *Factual History*. *Id.* 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 RP 40-41. The court admitted this evidence over the defendant's objection that it was hearsay. *Id.*

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, 76, 97, 100, 102. Specifically Officer Jolly testified that after she spoke with the bank employees she arrested the defendant for forgery, read him his *Miranda* rights, put handcuffs on him, and searched him incident to arrest. *Id.* Neither Officer Jolly nor the state explained why the fact of arrest, the fact of the *Miranda* reading, the handcuffing, or the search make it any more or less likely that the defendant had committed the crimes charged. *Id.* In addition, Officer Monge told the jury that after Officer Jolly returned from speaking with bank employees she arrested him, read him his rights, handcuffed him, and searched him incident to arrest. *Id.* Once again, neither Officer Monge nor the state explained how Officer Monge's rendition of the fact of the arrest, the fact of the *Miranda* reading, the handcuffing, or the search incident to arrest made it any more or less likely that the defendant had committed the crimes charged. *Id.*

Following the testimony of the state's witnesses both parties rested their cases. RP 119, 125. They then presented closing argument after the court instructed the jury without objection or exception. RP 136-172. The jury later returned verdicts of "guilty" on both counts. RP 175, CP 34, 35. Two days after the guilty verdicts the court imposed sentences within the standard range. CP 37-49. The defendant thereafter filed timely notice of appeal. CP 50.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ADMITTED HEARSAY THAT THE CHECK THE DEFENDANT ATTEMPTED TO CASH WAS STOLEN.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999).

For example, in *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999), the prosecutor filed a motion to revoke a defendant's SOSSA sentence, based in large part on a claim that he had exposed himself to a 13-year-old and a 14-year-old girl. During the revocation hearing, the state relied upon hearsay to establish the facts of the alleged exposure, and the state did not present any evidence as to why it failed to call the two girls themselves. After the court granted the motion and revoked the sentence, the defendant appealed arguing in part that the trial court denied him due process when it admitted the hearsay account of the incident without presenting any evidence on the reliability of the hearsay. The Washington Supreme Court agreed, holding that the trial court had violated the defendant's due process rights when it

based its decision at least in part upon unreliable evidence.

In the case at bar, the trial court admitted evidence over defense objection that the teller at the bank with whom the defendant attempted to cash a check read information on her computer that indicated that the check the defendant was attempting to cash was “stolen.” As the following explains, this evidence was inadmissible hearsay and its use denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

Under ER 802, hearsay “is not admissible except as provided by these rules, by other court rules, or by statute.” Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. “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.

ER 801(c).

The phrase “other than one made by the declarant while testifying at the trial or hearing” includes an out of court statement made by an in court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). This restriction arises from the “unwillingness to countenance the general use of prior prepared statements” as substantive evidence. *See* Advisory Committee’s Note to Federal Rules of Evidence 801(d)(1).

In the case at bar the defense objected to the bank teller’s testimony

that the account on which the defendant presented a check for payment had a notation "stolen series of checks" on it. The state specifically elicited this evidence in an attempt to convince the jury that the defendant not only had a forged check in his possession, but he also had a stolen check in his possession, making it much more likely that he knew that the check had been forged. The problem with this evidence is that it was inadmissible hearsay. The teller was simply testifying to a statement that some other person put in the computer concerning information that person might have had or might have heard. Although such evidence might be generally admissible as a business record under RCW 5.45.020, the state did not present evidence to qualify it as such in the case at bar. This hearsay exception states:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

In this case the teller did not testify that she was the custodian of the records found in the computer. Neither did she state that the computer records were made in the regular course of business at or near the time of the act. Absent such evidence, the admission of the teller's testimony concerning computer notations on the account cannot be justified under this exception.

Since no other hearsay exception exists for the admission of this evidence, the trial court erred when it overruled the defendant's objection. In addition, the admission of this evidence denied the defendant a fair trial because it put the defendant's actions in an extremely unfavorable light. All of the evidence presented at trial placed the defendant in a good light, and did not support any other claim other than the defendant acted out of a good faith belief, albeit mistaken, that the check was not forged. Thus, in the case at bar it is more likely than not that but for this evidence the jury would have returned a verdict of "not guilty" on the forgery charge. As a result, the admission of this evidence denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, and the defendant is entitled to a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE REPEATEDLY ELICITED EVIDENCE THAT THE POLICE OFFICERS BELIEVED THAT THE DEFENDANT WAS GUILTY OF THE CRIMES CHARGED DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper

functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object when the state repeatedly elicited irrelevant and prejudicial evidence that the two police officers thought the

defendant guilty in that they arrested him, handcuffed him, and read him his *Miranda* rights. The following presents this argument.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial the prosecutor must refrain from any statements or conduct that express his/her personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a “substantial likelihood” that any such conduct, comment, or questioning has affected the jury’s verdict, then the defendant’s right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When this Walker was called to testify he admitted to previously beating the defendant, but he denied having threatened to have the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which

he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

However, when Livingston was examined outside the presence of the jury he refused to testify concerning his conversation with Walker as he didn't want to be labeled a "snitch." Although the court gave Livingston an 11 month sentence for contempt it refused to allow defense counsel to cross-examine Walker concerning his admissions to Livingston. Following verdicts of guilty the defendant appealed arguing that the trial court erred when it refused to allow the offered cross-examination of Walker.

In rejecting the defendant's claim, the Court of Appeals stated the following.

Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence. *See State v. Yoakum*, 37 Wash.2d 137, 222 P.2d 181 (1950).

State v. Denton, 58 Wn.App. at 257 (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Similarly in *State v. Yoakum, supra*, the defendant was charged with Second Degree Assault out of an incident in which the defendant knifed another person during a fight outside a bar. During the trial the defendant testified and claimed self defense. During cross examination the prosecutor

repeatedly impeached the defendant with a transcript of a taped conversation the defendant made to the police. However, the prosecutor never did offer either the transcript into evidence or call the officer to testify concerning the statement.

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-examination to evidence within the personal knowledge of the prosecutor never made part of the record. In setting out the law on this issue, the Washington Supreme Court relied upon and quoted extensively from the Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936).

In *Hash* the defendant appealed his conviction for statutory rape, arguing that the trial court had erred when it allowed the prosecutor to cross-examine a witness concerning inconsistent statements the witness had previously made to the prosecutor in his office in front of another deputy prosecuting attorney. The Arizona Supreme Court stated the following concerning the state's impeachment of the witness.

It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in the question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate him Ed Frazier, deputy county attorney, a

lawyer of high standing for integrity and ability. These questions were not put, as the court assumed 'as a basis for impeachment. Their certain effect was to discredit the witness J. A. Edgar. The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he may possess under the guise of cross-examination, as in this case.

* * *

To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Edgar would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone the case should be retried.

State v. Yoakum, 37 Wn.2d 142-143 (quoting *Hash v. Arizona*, 59 P.2d at 311).

In *Yoakum* the Washington Supreme Court went on the reverse the defendant's conviction, stating as follows.

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity was prejudicial to the rights of appellant.

State v. Yoakum, 37 Wn.2d at 144.

Similarly, no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

In *State v. Carlin*, the court put the principle as follows:

“[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... ‘merely tells the jury what result to reach.’” (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. “Personal opinions on the guilt ... of a party are obvious examples” of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant’s guilt is an improper lay or expert opinion because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant’s guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; See also *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state’s expert to testify in a rape case that the alleged victim suffered from “rape trauma syndrome” or “post-traumatic stress disorder” because it inferentially constituted a statement of opinion as to the defendant’s guilt or innocence).

For example, in *State v. Carlin*, *supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal the defendant argued that this testimony constituted

an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that “[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Under this rule the fact of an arrest is not evidence because it constitutes the arresting officer’s opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant’s vehicle hit the plaintiff’s vehicle. Following a defense verdict the plaintiff appealed arguing that defendant’s argument in closing that the attending officers’ failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. The court agreed and granted a new trial.

While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent’s negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury. The question of whether respondent was negligent in driving in too close proximity to appellant’s vehicle falls into this category. Therefore, the witness’ opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he issued, would not be acceptable as opinion evidence.

Warren v. Hart, 71 Wn.2d at 514.

Although *Warren* was a civil case the same principle applies in criminal cases: the fact of an arrest is not admissible evidence because it constitutes the opinion of the arresting officer on guilt which is the very fact the jury and only the jury must decide.

In this case the prosecutor repeatedly violated the defendant's right to a fair trial when the state elicited irrelevant evidence that two police officers arrested the defendant, handcuffed him, read the *Miranda* warnings to him, and searched him "incident to arrest."¹ Specifically Officer Jolly testified that after she spoke with the bank employees she arrested the defendant for forgery, read him his *Miranda* rights, put handcuffs on him, and searched him incident to arrest. *Id.* Neither Officer Jolly nor the state explained why the fact of arrest, the fact of the *Miranda* reading, the handcuffing, or the search make it any more or less likely that the defendant had committed the crimes charged. *Id.* In addition, Officer Monge told the jury that after Officer Jolly returned from speaking with bank employees she arrested him, read him his rights, handcuffed him, and searched him incident to arrest. *Id.* Once again, neither Officer Monge nor the state explained how Officer Monge's rendition

¹The fact of the search was relevant because it uncovered the blue baggie. However, the fact that the search was made pursuant to an arrest was not relevant in that it did not make any fact at issue either slightly more or less likely.

of the fact of the arrest, the fact of the *Miranda* reading, the handcuffing, or the search incident to arrest made it any more or less likely that the defendant had committed the crimes charged. *Id.*

The fact was that none of this evidence was relevant at all in this case. Its sole purpose was to convey to the jury that which both officers were forbidden to voice on the witness stand: that they both believed that the defendant was guilty. No possible tactical advantage could be obtained from this evidence. Thus, trial counsel's failure to object fell below the standard of a reasonable prudent attorney. In addition, as was mentioned in Argument I, all of the defendant actions presented to the jury were consistent with innocence. He used his own identification when he attempted to cash the check and he waited for over 15 minutes for the police to arrive without ever attempting to leave the bank. Under these facts it is more likely than not that the state's actions in eliciting the officer's inferred opinions that the defendant was guilty of forgery changed what would have been an acquittal to a conviction. Consequently, counsel's failure to object caused prejudice. As a result, the defendant is entitled to a new trial based upon ineffective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

III. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF GUILT ON A FORGERY CHARGE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that the defendant’s fingerprints were also found on a piece of paper located by

a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar the state charged the defendant in Count II with forgery under RCW 9A.60.020. This statute provides:

(1) A person is guilty of forgery if, with intent to injure or defraud:

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

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

RCW 9.94A.020.

In the case at bar the defendant did not dispute that the check he attempted to cash was forged. Rather he argued that (1) he did not “falsely” make, complete, or alter it, and (2) he did not know it to be forged. Thus, the defendant argued that he acted without *scienter*. In fact, the evidence before the court is completely devoid of an evidence that the defendant acted with a *mens rea*. In examining this claim the defendant points out that under the forgery statute the lack of *scienter* or *mens rea* is not an affirmative defense. Rather it is an element of the offense that the state had the burden of proving beyond a reasonable doubt. Neither does the statute create a rebuttal presumption of *scienter* for a person in possession of a forged instrument.

It is true that evidence of *scienter* may be proven directly or circumstantially from any number of facts as the decision in *State v. Allenbach*, 2006 WL 3490934 (Wa.App. Div. 2 2006), illustrates. In this case the defendant was convicted of forgery and argued on appeal that the state had failed to present substantial evidence that he acted with *scienter*. However the court of appeals disagreed, holding as follows:

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.

Allenbach, 2006 WL 3490934 at 6.

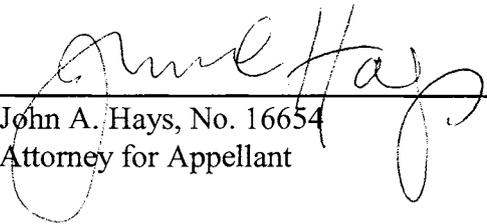
By contrast, in the case at bar the defendant's actions were completely consistent with innocence and inconsistent with guilty knowledge. Unlike *Allenbach*, in which the defendant left the bank and his identification as soon as the teller questioned the check he was attempt to case, in the case at bar the defendant remained calmly at the bank for over fifteen minutes after it became apparent that the bank questioned the validity of the check. He did not ask for the return of his identification and he did not attempt to flee. Even two uniformed officers arrived he made no attempt to leave and he cooperated completely. Thus, in the case at bar, unlike *Allenbach*, there is no evidence from which the jury could infer *scienter*. As a result, the trial court erred when it entered the verdict of conviction to the forgery charge because substantial evidence does not support the evidence of *scienter*.

CONCLUSION

The defendant is entitled to a new trial based upon the state's use of inadmissible evidence that denied the defendant his right to a fair trial. In addition, the defendant is entitled to dismissal of the forgery charge because the state failed to present substantial evidence to support each element of that offense.

DATED this 13TH day of March, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ER 801

The following definitions apply under this article:

(a) Statement. A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A 'declarant' is a person who makes a statement.

(c) Hearsay. '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.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized

by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 802

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

RCW 5.45.020

Business records as evidence

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 9A.60.020

Forgery

(1) A person is guilty of forgery if, with intent to injure or defraud:

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

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

(2) In a proceeding under this section that is related to an identity theft under RCW 9.35.020, 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.

(3) Forgery is a class C felony.

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

STATE OF WASHINGTON,)
Respondent,)
vs.)
SCOTT ALAN NORDQUIST,)
Appellant.)

NO. 06-1-00882-8
COURT OF APPEALS NO:
355343-1-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
COUNTY OF COWLITZ) ss.

CATHY RUSSELL, being duly sworn on oath, states that on the 13TH day of MARCH, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR
COWLITZ COUNTY PROSECUTING ATTY
312 S.W. 1ST STREET
KELSO, WA 98626

SCOTT ALAN NORDQUIST #256703
STAFFORD CREEK CORR. CTR
191 CONSTANTINE WAY
ABERDEEN, WA 98520

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 13TH day of MARCH, 2007.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 13th day of MARCH, 2007.



Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-09

AFFIDAVIT OF MAILING - 1

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