

Original

No. 35758-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

v.

TYE CHRISTOPHER MOORE

CLERK OF COURT
STATE OF WASHINGTON
JUL 11 2010
EMM

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

Thomas W. McAllister
WSBA #35832
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

ORIGINAL

TABLE OF CONTENTS

A. Assignments of Error.....1

B. Statement of Fact.....3

C. Argument.....13

 1. The evidence is insufficient to convict Mr. Moore of the offense of forgery when the documents he is alleged to have forged were what they purported to be.....13

 2. The trial court erred by not instructing the jury that forgery requires proof that the defendant know the written instrument is forged..17

 3. The State’s evidence was insufficient to sustain a conviction on one count of first degree theft where it failed to show that the property in the theft charge was that “of another.”.....21

 4. The trial court erred by not making clear that Instruction 12 was an affirmative defense and by impermissibly shifting the burden to the defendant to prove he acted (1) in good faith; (2) with the care an ordinary, prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director or officer reasonably believes to be in the best interests of the corporation.....24

 5. Mr. Moore did not receive effective assistance of counsel when his attorney failed to advance a defense authorized by statute and there was evidence to support the defense.....28

 6. The multiple convictions for forgery violate the “unit of prosecution” rule of the double jeopardy clause.....33

 7. Mr. Moore’s multiple forgery convictions constituted same criminal conduct.....34

D. Conclusion.....36

TABLE OF AUTHORITIES

Cases

<u>Dexter Horton Nat'l Bank v. United States Fidelity & Guar. Co.</u> , 149 Wn. 343, 270 P. 799 (1928)	14
<u>In re PRP of Hubert</u> , ___ Wn.App. ___, 158 P.3d 1282 (2007).....	29
<u>In re Winship</u> , 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970).....	27
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L. Ed. 2d 35 (1999).....	19
<u>People v. Bendit</u> , 111 Cal. 274, 43 P. 901 (1896)	14
<u>People v. Vineberg</u> , 125 Cal.App. 3d at 137 (1981).....	30
<u>Sandstrom v. Montana</u> , 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).....	27
<u>State v. Acosta</u> , 101 Wn.2d 612; 683 P.2d 1069 (1984)	27
<u>State v. Adame</u> , 56 Wn.App. 803, 811, 785 P.2d 1144, <u>review denied</u> , 114 Wash. 2d 1030 (1990).....	35
<u>State v. Adel</u> , 136 Wn.2d 629, 965 P.2d 1072 (1998).....	33
<u>State v. Ager</u> , 128 Wn.2d 85, 93, 904 P.2d 715 (1995).....	30
<u>State v. Bassett</u> , 50 Wn. App. 23, 746 P.2d 1240 (1987)	18
<u>State v. Cantu</u> , 156 Wn.2d 819, 132 P.3d 725 (2006)	27
<u>State v. Deal</u> , 128 Wn.2d 693, 701, 911 P.2d 996 (1996)	27
<u>State v. Dunaway</u> , 109 Wn.2d 207, 743 P.2d 1237 (1987)	35
<u>State v. Hescock</u> , 98 Wn. App. 600; 989 P.2d 1251 (1999).....	15
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	18
<u>State v. Hicks</u> , 102 Wn.2d 182, 187, 683 P.2d 186, (1984)	32
<u>State v. Joy</u> , 121 Wa.2d 333, 341, 851 P.2d 654 (1993)	22
<u>State v. LeFaber</u> , 128 Wn.2d 896, 900, 913 P.2d 369 (1996)	18
<u>State v. Leyda</u> , 157 Wn.2d 335, 138 P.3d 610 (2006).....	33
<u>State v. Mark</u> , 94 Wn. 2d 520, 618 P.2d 73 (1980).....	13
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983)	31
<u>State v. Mills</u> , 154 Wn.2d 1; 109 P.3d 415 (2005)	18
<u>State v. Mimbach</u> , 420 N.W.2d 252 (Minn. Ct of Appl 1988).....	15
<u>State v. Ose</u> , 156 Wn.2d 140, 124 P.3d 635 (2005)	33
<u>State v. Pike</u> , 118 Wa.2d 585, 826 P.2d 152 (1992).....	22
<u>State v. Soderholm</u> , 68 Wn. App. 363, 373, 842 P.2d 1039 (1993)	13
<u>State v. Watkins</u> , 136 Wn. App. 240, 148 P.3d 1112 (2006)	18, 26
<u>State v. Williams</u> , 118 Wn. App. 178; 73 P.3d 376 (2003).....	34
<u>State v. Womac</u> , ___ Wn.2d ___, ___ P.3d ___ (2007)	33
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	28

A. Assignments of Error

Assignments of Error

1. The evidence is insufficient to convict Mr. Moore of the offense of forgery when the documents he is alleged to have forged were what they purported to be.

2. The trial court erred by not instructing the jury that forgery requires proof that the defendant know the written instrument is forged.

3. The State's evidence was insufficient to sustain a conviction on one count of first degree theft where it failed to show that the property in the theft charge was that "of another."

4. The trial court erred by not making clear that Instruction 12 was an affirmative defense and by impermissibly shifting the burden to the defendant to prove he acted (1) in good faith; (2) with the care an ordinary, prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director or officer reasonably believes to be in the best interests of the corporation.

5. Mr. Moore did not receive effective assistance of counsel when his attorney failed to advance a defense authorized by statute and there was evidence to support the defense.

6. Mr. Moore's multiple convictions for forgery violate the "unit of prosecution" rule of the double jeopardy clause and should be dismissed.

7. The trial court erred by concluding that the multiple convictions for forgery constitute same criminal conduct.

Issues Pertaining to Assignments of Error

1. Was the evidence sufficient to convict Mr. Moore of the offense of forgery when the documents he is alleged to have forged were what they purported to be?

2. Did the trial court err by not instructing the jury that forgery requires proof that the defendant know the written instrument is forged?

3. Was the State's evidence sufficient to sustain a conviction on one count of first degree theft where it failed to show that the property in the theft charge was that "of another?"

4. Did the trial court err by not making clear that Instruction 12 was an affirmative defense and by impermissibly shifting the burden to the defendant to prove he acted (1) in good faith; (2) with the care an ordinary, prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director or officer reasonably believes to be in the best interests of the corporation?

5. Did Mr. Moore receive effective assistance of counsel when his attorney failed to advance a defense authorized by statute and there was evidence to support the defense?

6. Do the multiple convictions for forgery violate the “unit of prosecution” rule of the double jeopardy clause?

7. Do the multiple convictions for forgery constitute same criminal conduct?

B. Statement of Fact

Tye Moore appeals from a jury verdict convicting him of nine felony counts of forgery and theft. At the time of trial, Mr. Moore had been in the construction business for nineteen years. RP 571. Mr. Moore’s only experience prior to this case was in construction. RP 824. He was in constant need of instruction and tutoring of project finances. RP 830.

Mr. Moore first met Debra and Don Aldridge on a warm sunny day in the summer of 2002. RP 89. He was originally hired by them to replace a roof on their home. RP 572. Mr. Moore and his family became friends and confidants of Ms. and Don Aldridge. RP 573. This friendship resulted in a business venture in 2005. RP 96. Mr. Moore was initially reluctant to mix friendship with business, but eventually agreed. RP 575.

The parties agreed to form a corporation and to build a “spec home.” RP 91. A “spec home” is a house designed to be purchased by a person of average income and is not built with expensive features. RP 91.

In February of 2005 a corporation called Northwest Construction SVC, Inc. was formed with the Moores owning 80 percent of the shares and the Aldridges having 20 percent. RP 96, 102, 577. It was agreed that 80 percent of the profits generated through the construction project would go to Mr. Moore with the remaining 20 percent to the Aldridges. RP 101, 642. Mr. Moore and his wife Elizabeth were declared the president and vice president of Northwest Construction SVC, Inc. RP 112. A bank account was set up in the name of the corporation at West Sound Bank. RP 579. As the president of the corporation, Mr. Moore had full authority to write checks on the corporate account. RP 112.

Ms. Aldridge concedes that while she was aware that Mr. Moore was president, she had no understanding of what obligations and duties were attached to the title. RP 112. No limits were ever imposed on the authorizations the president of Northwest Construction SVC was allowed or what liabilities would attach. RP 103. The only thing agreed to by all was that Mr. Moore would be responsible for running the day to day operations. RP 112. Ms. Aldridge said in her own words that she and her husband were far too busy to run Northwest Construction SVC, Inc. RP 231, 582-83.

No formal written agreements were ever entered to delineate the responsibilities for the corporate officers. RP 100, 102. There was an oral

agreement that Mr. Moore would be paid for work that he completed that would have otherwise been paid to a sub-contractor. RP 104-105, 590. Ms. Aldridge believed that a written agreement was unnecessary because she and Mr. Moore shared the same faith in Jesus. RP, 92. She described her religious practice as “walking with the Lord,” and she believed Mr. Moore was as well. RP 92.

In May of 2005, the corporation purchased a piece of property on Sroufe Street for that purpose. RP 94. At the same time as the project on Sroufe Street was underway, Mr. Moore was also remodeling his own home on 280 Flower Meadows Lane. RP 116. The house on Sroufe Street and the house on Flower Meadows Lane would become the center of a controversy between the Moores and the Aldridges.

In August, Mr. Moore met with the Aldridges to discuss matters regarding a charity. RP 609. Both Mr. Moore and Ms. Aldridge served as board members for a charity with work in Romania. RP 132. A controversy developed with regards to Ms. Aldridge’s participation in that charity which later resulted in her resignation. RP 132. Following her falling out with the mission board, Ms. Aldridge’s interest in the Sroufe project increased. RP 132-33.

Even before ground was broken on the project, Mr. Moore sought help from a Melissa Austin of the CPA firm of Cox & Lucy. Mr. Moore

desperately needed help in managing project finances. RP 602-04. Moore first requested assistance in February of 2005. It was not until August of 2005 that Melissa Austin eventually saw Mr. Moore to provide instruction on the accounting software. RP 643. The instruction provided lasted approximately one hour and a half after the project on Sroufe Street had been underway for 3 months. RP 601. The training provided was much too little and much too late. RP 602-603. This was seen by his difficulty in operating the accounting software and seeking assistance from those with even less financial training and experience than himself.

Funding for the project on Sroufe Street was secured in May of 2005 and construction began on the house that same month. RP 98. The Adridges secured a construction loan for \$209,000. RP 136. The Aldridges maintained regular communication with Mr. Moore during the summer of 2005. RP 593. During this same time Mr. Moore began to remodel his own house on Flower Meadow Lane. Moore used several of the same suppliers on his own remodel project, similar to the house of Sroufe Street. RP 619. Even with his remodel project underway, Moore remained vigilant over the work on the Sroufe Street project and mindful of his obligations. RP 583-84, 587. Moore even took it upon himself to replace work at the spec house such as the visqueen which he believed was substandard. RP 649-650. He performed tasks like this in order to

see the project completed correctly as well as to earn compensation that had been agreed to by all parties. RP 104-105. By August of 2005, approximately 85 percent of the spec house was complete and there remained a total of \$22,000 in the construction account to complete construction. RP 117, 598. In the end, it required an additional \$40,000 to complete the project. RP 138.

Ms. Aldridge questioned the bank regarding the amount of funding left in the construction loan and demanded a review of the checking account. RP 127. Ms. Aldridge discovered what she believed to be irregularities with the loan funds and began to question certain expenditures. RP 127. Her concerns developed through a ledger provided along with copies of receipts on a compact disc that Mr. Moore produced. RP 120, 143, 609-610. The ledger and compact disk were later charged as forgeries in Counts I and II of the third amended information. CP 200.

Ms. Aldridge discovered a check made payable to Mr. Moore for \$1,000 dated June 2, 2005. CP 10, RP 125. Mr. Moore explained this check as reimbursement for expenses on the spec house, but Ms. Aldridge doubted this explanation when she reviewed the project's timeline. RP 126. Ms. Aldridge concluded that "nothing matched" between checks from the operating account and the ledger. RP 141-42. Ms. Aldridge believed that several checks were written for personal expenses unrelated

to the construction project. CP 10. Receipts and invoices were provided by Mr. Moore in an effort to rectify the inaccurate ledger entries. CP 10, RP 141. Ms. Aldridge's concerns increased upon review of the corporate credit card statements. RP 130. Eventually her concerns led her to report Mr. Moore to the Port Orchard Police under the belief that he had forged and stolen funding through the spec house project. RP 142. She had the checking account frozen. RP 130, 674. With no access to funding and the increasing difficulty of dealing with Ms. and Don Aldridge, Mr. Moore was forced to withdraw his participation in the construction project. RP 632.

Based upon these facts, the State filed a third amended information alleging seven counts of forgery and two counts of felony theft. CP 200. The jury convicted him as charged. CP 304. For Counts I, III, and V of the forgery counts, the jury was asked two questions on a special verdict form. The first question was, "Did the defendant, Tye Christopher Moore, falsely alter a written instrument?" CP, 307. The second question was, "Did the defendant, Tye Christopher Moore, possess or offer or dispose of or put off as true a forged instrument?" CP 307. For each of the applicable counts, the jury wrote, "Not Unanimous" to the first question and wrote, "Yes," to the second question. CP 307. There were also special verdict

questions for the two theft counts. A breakdown of the various charges is as follows.

Count I is based upon the ledger Mr. Moore provided to the Aldridges. RP 808. Ex. 1. The ledger is a two page print out utilizing Quickbooks software. Ex. 1. It contains a running balance of the corporate account. Among the checks is check numbers 2037 and 2038. Ex. 1.

Count II is the compact disc Mr. Moore gave to the Aldridges. RP 812, Ex. 2. It contained copies of receipts paid out of the corporate account for work allegedly completed on behalf of the Sroufe Street project. RP 812. The State made a great deal of the fact that invoice number 27800 was included in the receipts. At oral argument, the prosecutor said the following about the collection of receipts in the compact disc, "You've heard testimony about the things that were printed from that, the different invoices, specifically the 27800 invoice. And so that qualifies as a forged instrument." RP 813. The compact disk also contains a copy of invoice number 2839 from Danny's Concrete Pumping. RP 815.

Count III was a charge of forgery based upon check number 2037 that Mr. Moore wrote. RP, 814, Ex. 3. The check was written on August 10, 2005 to Fred Hill Materials for \$688.25. Ex. 3. On the memo line is

written the words, "570 Sroufe." RP 286, 791. The check was delivered to John Wright of Fred Hill Materials upon delivery of concrete to 280 Flower Meadows Road. RP, 283. The exhibit that was admitted into evidence is the same check Mr. Wright received on August 10, 2005. RP, 286.

Count IV again relates to invoice number 27800 from Fred Hill Materials, Inc. RP 815, Ex. 3-4. Exhibit 3 is the original invoice that was processed by Fred Hill Materials. Ex. 3. The line "Job Address" lists "280 Flower Meadows," the same address to which Mr. Wright delivered concrete. Ex. 3, RP 283. Mr. Moore presented the Adridges' with a copy of the invoice (by means of the above-referenced compact disc) that has handwritten the words "570 Sroufe" in the job address line. Ex. 4. The typewritten portions of the invoice are almost impossible to read. Ex. 4. Mr. Moore admitted writing in the words "570 Sroufe," but testified that he did not intend to deceive the Adridges. RP 630. He testified that he "inadvertently intermingled all of the receipts" for the Sroufe and Flower Meadows projects and, because the wording of the invoice was difficult to "decipher," mistakenly assumed the invoice was for the Sroufe project. RP 629.

Count V was based on check number 2038 written on August 10, 2005 to Danny's Concrete Pumping in the amount of \$283.42. Ex 12. The memo line reads "570 Sroufe/Concrete" RP 327, 815.

Count VI also concerns Danny's Concrete Pumping. Ex.11. The original invoice number 2839 indicates that concrete services were delivered to 280 Flower Meadows. Ex. 11. The invoice presented to the Adridges indicates an address of "570 Sroufe." Ex. 12.

Count VII, also a forgery count, is a bit different than the other forgery counts. It pertains to Exhibit 15A. Mr. Moore submitted an invoice to Ms. Aldridge on Northwest Construction Services letterhead for \$1000 for visqueen work. Ex. 15A, RP 168. The Sroufe house needed a visqueen layer installed under the house. RP 649. Visqueen is a plastic layer under a house designed to protect the underside of the house. RP 384. Mr. Moore hired a subcontractor named Paul Davis to complete this project. RP 385-86. Mr. Davis did not complete the work himself, but used an employee. RP 386. After the work was complete, he was paid. RP 387. According to Mr. Moore, after Mr. Davis completed the work, it was subject to a framing and mechanical inspection by Rick Pope. RP 649. Mr. Pope determined that there was an abnormal amount of debris under the house and the visqueen would need to be replaced. RP 650. Rather than hire it out again, Mr. Moore decided to replace the visqueen himself.

RP 650. The State presented the testimony of a temporary laborer that worked at the job site for three months, who said he did not see Mr. Moore replace the visqueen, but there was no other evidence to establish whether Mr. Moore did or did not do the work. RP 456-58.

Count VIII was for theft in the second degree. The investigation revealed an \$840.11 credit card charge as payment for labor provided for Moore's personal remodeling project. RP 816. Mr. Moore admitted making the credit card transaction. RP 657. Mr. Moore testified he received a phone call from Labor Ready saying that he had an outstanding balance. RP 657. Mr. Moore asked if they took credit cards and, receiving an affirmative answer, paid with the corporate credit card. RP 657. He did not make the connection until later that the outstanding bill was not for the Sroufe project. RP 657.

Count IX was for theft in the first degree. This charge was supported by several checks Tye Moore wrote between June 22 and August 30, 2005. RP 818. The trial court treated counts VIII and IX as same criminal conduct for purposes of sentencing. CP 383.

C. Argument

1. The evidence is insufficient to convict Mr. Moore of the offense of forgery when the documents he is alleged to have forged were what they purported to be.

Evidence is sufficient if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Soderholm, 68 Wn. App. 363, 373, 842 P.2d 1039 (1993). The evidence in this case is insufficient to establish the elements of forgery.

A misrepresentation of fact, so long as it does not purport to be the act of someone other than the maker, does not constitute forgery. State v. Mark, 94 Wn. 2d 520, 618 P.2d 73 (1980). In Mark, the defendant was a pharmacist who was charged with forgery based upon his submission of claim forms for Medicaid reimbursement which misrepresented the number and kind of prescriptions he had received. The court noted that in writing the physicians' names on the claim forms, the defendant represented that the physicians had submitted prescriptions to him (which was not always true), but that the defendant did not represent that the doctors themselves had signed the claim forms. The Court reversed the conviction saying, "Since the claim forms submitted by the defendant

were exactly what they purported to be, it was error to instruct the jury that it could properly find the defendant guilty of forgery." Mark at 524.

A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not. Dexter Horton Nat'l Bank v. United States Fidelity & Guar. Co., 149 Wn. 343, 270 P. 799 (1928), citing People v. Bendit, 111 Cal. 274, 43 P. 901 (1896). Although Dexter Horton is a civil case, it was relied upon as authority in the Mark case.

In Dexter Horton, an employee of Crenshaw & Bloxom named H.N. Howe endorsed, without authority, a check payable to Crenshaw & Bloxom as follows: "Crenshaw & Bloxom, H.N. Howe, Cashier." The court held that this endorsement was not a forgery saying, "[W]hile the endorsement thus inferentially contains a false statement of fact and was made for an unlawful purpose, still the writing, while false in the sense that it spoke a lie, was not falsely made, in that it purported to be anything different from what it actually was." Dexter Horton at 347.

Though a forgery, like false pretenses, requires a lie, it must be a lie about the document itself: the lie must relate to the genuineness of the

document. Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* 90, at 671 (1972). Thus, "forgery does not involve the making of false entries in an otherwise genuine document." It is for this reason that a person cannot be convicted of forgery for signing his own name on a check. State v. Hescock, 98 Wn. App. 600; 989 P.2d 1251 (1999).

The Minnesota Court of Appeals cited both the Mark case and Professor LaFave when it reversed the forgery conviction of a gun dealer who, after a burglary, signed an insurance statement alleging that guns had been stolen that had not, in fact been stolen. State v. Mimbach, 420 N.W.2d 252 (Minn. Ct of Appl 1988). The common law of forgery does not permit a conviction when a "representation made in a document compiled for the sole purpose of making or recording a claim." In doing so, the Court distinguished the insurance statement from altered business records.

Mr. Moore was convicted of seven counts of forgery. Each will be addressed individually. Count I is the ledger Mr. Moore provided to the Aldridges. Ex. 1. This ledger cannot be a forgery. It is exactly what it purports to be: a running tally of the money spent by the corporation. There is nothing about the ledger from which it can be concluded that the entries are not genuine. Assuming arguendo that the ledger is evidence that money spent on behalf of the corporation was in fact being spent on

other projects, the document is not itself a forgery. This conviction should be dismissed.

Count II is the compact disc with a collection of receipts and invoices. Ex. 2. Assuming the facts most favorable to the State, two of the invoices had been altered by Mr. Moore. Ex. 2. But the compact disk did not fraudulently purport to be what it is not. Count II is not supported by the evidence.

Counts III and V were the alleged forgery of check numbers 2037 and 2038 that Mr. Moore wrote. Ex. 3, 12. It is difficult to understand how Exhibits 3 and 12 are forged because Mr. Moore had the authority as corporation president to write the checks and, once Mr. Moore passed the checks, they were never altered in any way. The State made a great deal of the fact that Mr. Moore wrote "570 Sroufe" in the memo lines. But a valid check does not require that anything be listed in memo line at all. See, generally, UCC, article 3, chapter 62A-3 RCW. Even assuming that the statement "570 Sroufe" is a misrepresentation of fact, there is no allegation that that statement was written by anyone other than Mr. Moore. The checks in Counts III and V are comparable to the check in the Dexter Horton case. The checks were what they purported to be and were not forged.

Count IV and VI concern the altered invoices to Fred Hill Materials, Inc. and Danny's Concrete Pumping Ex. 3-4, 11. Assuming the facts most favorable to the State, Mr. Moore altered both invoices to change the address lines. But the making of false entries in an otherwise genuine document cannot be forgery.

Count VII cannot be a forgery because it is what it purports to be: an invoice. The State's theory was that Mr. Moore did not complete the work as he claimed. First, there was no testimony from any witness that Mr. Moore did not lay the visqueen as he claimed. Second, even if Mr. Moore did not lay the visqueen, the crime would be theft for taking money for services not provided, not forgery for filling out an invoice. The invoice in Count VII is comparable to the Medicaid reimbursements in Mark, a true written instrument that requests money for services not provided. All seven forgeries should be dismissed for insufficient evidence.

2. The trial court erred by not instructing the jury that forgery requires proof that the defendant know the written instrument is forged.

Each of the forgery "to convict" jury instructions read as follows:
“(1) That on or between [dates] (a) the defendant falsely altered a written

instrument; or (b) the defendant possessed or uttered or offered or disposed of or put off as true a forged instrument.” CP 287-93. Noticeably absent from the instructions is the requirement that defendant knows the written instrument to be forged. RCW 9A.60.020(1)(b). This error in the “to convict” instruction is manifest error that may be raised for the first time on appeal. RAP 2.5(a)(3).

Instructions are sufficient if they (1) correctly state the law, (2) are not misleading, and (3) permit each party to argue its theory of the case. State v. Bassett, 50 Wn. App. 23, 746 P.2d 1240 (1987). Jury instructions must be read as a whole to determine if they properly instructed the jury on the applicable law. State v. Mills, 154 Wn.2d 1; 109 P.3d 415 (2005). But case law supports the position that the language of the “to convict” instruction is read more critically than other instructions because its purpose is to spell out exactly what the jury must find in order to convict. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998).

The standard for clarity in a jury instruction is higher than for a statute. Courts may resolve ambiguous wording in a statute by utilizing rules of construction, but jurors lack such interpretative tools. Accordingly, a jury instruction must be manifestly apparent to the average juror. State v. Watkins, 136 Wn. App. 240, 148 P.3d 1112 (2006) citing State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

The “to convict” instructions in this case are not manifestly apparent to the average juror. They do not make clear that Mr. Moore was required to know that the documents in question were forged.

The State will undoubtedly argue that the error in this case is harmless beyond a reasonable doubt. Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L. Ed. 2d 35 (1999). First, although the “to convict” instruction does not include the language “which he or she knows to be forged,” the definition instruction does include that language. See Jury Instruction 8, CP 282. Second, the State will probably argue that the evidence was overwhelming that Mr. Moore knew the documents were forged. Neither of these arguments is persuasive.

Reading the jury instructions as a whole, the only thing that can be concluded is that they are very confusing. The relevant instructions are instructions number 8 through 19. CP 282-93. Juror Instruction 8 is the definition of the crime of forgery, which is the only place where the phrase “which he or she knew to be forged” can be found. Curiously, although the jury instructions include the standard WPIC definition of “intent,” the Court did not instruct the jury on the definition of “knowledge.” CP 281. Jury Instruction 9 defines written instrument.

Jury instruction 10 defined a forged instrument. This instruction is important because in the “to convict” instructions, the jury was asked to

find that Mr. Moore put off as true a forged instrument. Jury Instruction 11 defines the phrase “falsely alter.” Noticeably absent from both Jury Instructions 10 and 11 is the requirement that Mr. Moore know the forged instrument is forged. Had the phrase been included in either Jury Instruction 10 or 11, and then read as a whole, the instructions might convey all the elements of the offense.

The “to convict” instructions bifurcate Jury Instruction number 8. The jury was instructed in the “to convict” instruction that Mr. Moore can be convicted if either: (a) he falsely altered a written instrument; or (b) he possessed or uttered or disposed of or put off as true a forged instrument. CP 287. The jury was further instructed that (a) and (b) are alternatives and only one need be proved. We know from the special verdicts that the jury found prong (b) to be proved. CP 307. Given the fact that the jury was instructed that not all elements of forgery need be proved, it cannot be said that, read as a whole, the jury instructions made clear that knowledge was must be proved in order to convict of prong (b). Read as a whole, the jury instructions omitted a material element of the offense.

Nor can it be said, given the specifics of the jury verdict, that the evidence was overwhelming that Mr. Moore knew the written instruments were forged. The error of omitting the phrase “which he or she knows to be forged” was repeated in the special verdict forms. CP 307. The jury

could not unanimously agree whether Mr. Moore falsely altered the forged documents in question. But they did unanimously agree that he possessed or uttered or offered or disposed of or put off as true a forged instrument. From this we can deduce that some of the jurors concluded the State proved Mr. Moore put off as true a forged instrument, but the State did not prove that Mr. Moore himself was the one who falsely altered the written instrument. Given the fact that some of the jurors did not believe that Mr. Moore himself falsely altered the written instruments, the omission of the requirement that Mr. Moore knew the written instrument was forged cannot be deemed harmless beyond a reasonable doubt.

3. The State's evidence was insufficient to sustain a conviction on one count of first degree theft where it failed to show that the property in the theft charge was that "of another."

In order to convict Mr. Moore of first degree theft, the State had to prove beyond a reasonable doubt: (1) (a) That Tye Moore wrongfully obtained or exerted unauthorized control over property of another; or (1)(b) by color or aid of deception, obtained control of property of another; (2) the property exceeded a value of \$1,500; and (3) Moore intended to deprive the other person of the property; and (4) the acts occurred in the State of Washington. Moore argues that the State failed to

present sufficient evidence that the testimony and facts presented at trial demonstrated that the property in question was that “of another” and Moore intended to deprive the other person of the property.

To constitute property of another, the item must be one in which another person has an interest, and the defendant may not lawfully exert control over the item absent permission of that other person. State v. Pike, 118 Wa.2d 585, 826 P.2d 152 (1992). In State v. Joy, the court declared that an agreement that authorizes someone to hold control of funds but places restrictions on the uses is sufficient to support a finding that the funds are property of another. State v. Joy, 121 Wa.2d 333, 341, 851 P.2d 654 (1993). Different from the facts in the Joy case, here there existed no formal written agreement with regards to the administration of corporate funds. RP 100, 102. Ultimately, the loan was to be used in the construction of the spec house, but no testimony was offered at trial to indicate that by-laws were written and formal agreements made as to how the corporate funds would be dispersed. RP 100, 102-103.

Tye Moore’s only duty was “building this house.” RP 104. At trial, no formal agreements were ever shown to indicate financial duties and responsibilities of the parties involved. No written agreements or contracts were introduced at trial to show any restrictions placed upon Mr. Moore in using the corporate funds. Both the defense and prosecution

witnesses agreed that Mr. Moore was entitled to compensation for work he performed at the Sroufe Street house that was separate from his general contracting duties. RP 104. From this testimony, it is clear that not only was his access to corporate funding unfettered, Mr. Moore actually held a specific claim to a portion of the corporation's funds through wages owed to him. RP 589-592, 652-653. Because no restrictions were placed upon Mr. Moore in regards to his use of the corporate funds, none of the shareholders held an interest in the corporate accounts that would make the funding "the property of another" for purposes of RCW 9A.56.030.

Mr. Moore was also listed as the president of Northwest Construction, SVC on the corporate papers filed with the WA Secretary of State. RP 102-103. Ms. Aldridge admitted that she knew Mr. Moore was the president of the corporation. RP 112. Ms. Aldridge also admitted that she knew Mr. Moore would have access to the corporate checking account and its funds. RP 112. The corporate papers indicated that Mr. Moore and his wife held an 80% interest in the corporation. RP 102. The Aldridges were left with the remaining 20% interest in Northwest Construction SVC. RP 102. Debra and Don Aldridge's participation in Northwest Construction SVC was limited to their funding of the corporate accounts through a loan they had secured. RP 93, 96. It can be inferred based upon the funding provided by the Aldridges, that Northwest

Construction SVC's only obligation to the Aldridges was in the capacity of a debtor. RP 93. The Aldridges' interest was limited to a debt owed to them, not a specific claim to property. Evidence presented at trial clearly shows that the defendant was authorized to use the funds i.e. Mr. Moore was allowed "control of the property." What was not shown by the prosecution at trial was a formalized agreement either in the form of a contract, corporate papers or financial controls which would impose limitations upon Mr. Moore's use of the funds or demonstrate a specific claim to any corporate properties by the victims.

4. The trial court erred by not making clear that Instruction 12 was an affirmative defense and by impermissibly shifting the burden to the defendant to prove he acted (1) in good faith; (2) with the care an ordinary, prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director or officer reasonably believes to be in the best interests of the corporation.

Both sides proposed a variety of jury instructions regarding the law of corporations. CP 207-17, 241-45. The State proposed the following instruction:

A corporation is a person under the law and has an existence separate from the shareholders, directors, and officers. In any corporation, all directors and officers with discretionary

authority are required by law to discharge their duties under that authority (1) in good faith; (2) with the care an ordinary, prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director or officer reasonably believes to be in the best interests of the corporation.

CP 123. Mr. Moore's counsel did not object to this instruction, which eventually became the first paragraph of Instruction Number 12. CP 286.

Instruction 12 mirrors the language of RCW 23B.08.300 and .420. It does not appear Instruction 12 has even before been discussed in a reported criminal case. There are two problems with Instruction 12. First, there is no nexus between Instruction 12 and the other instructions. The instruction begins like a definition instruction ("A corporation is a person. . .), yet there is little in the remainder of the instructions that requires a definition of a corporation. The only use of the word "corporation" outside of Instruction 12 is in Instruction 21. CP 295. Instruction 21 is a four paragraph instruction where the last paragraph reads: "Wrongfully obtains or exerts unauthorized control also means having any property or services in one's possession, custody or control as agent, employee, or officer of any person or corporation. . ." CP 295. If Instruction 12 is a definitional instruction, it is unclear how it assisted the jury in determining whether Mr. Moore wrongfully obtained property. It is also unclear

whether the instruction pertains to the theft charges, the forgery charges, or both.

From the record, the intent of Instruction 12 was to promote the defense theory of the case and provide a framework for the jury possibly to acquit if they believed Mr. Moore was acting within the scope of his duties as an officer of the corporation. The Court properly understood this, saying, “I think the central issue in this case here is not what the corporation’s powers are to act, but rather what the defendant’s – whether the defendant contact was lawful vis-à-vis the corporation.” RP 755. But the instruction does not accomplish this goal. It sets forth general principles of corporation law without tying them to the elements of the theft and forgery. A simple solution to this problem would have been to model the instruction on the many affirmative defense pattern instructions, such as self defense or unwitting possession. Instead of beginning the instruction with a definitional phrase (“A corporation is a person . . .”), the instruction could have begun with a phrase describing an affirmative defense (“It is a defense to the crimes of theft and forgery that . . .”). As pointed out above, a jury instruction must be manifestly apparent to the average juror. State v. Watkins, 136 Wn. App. 240, 148 P.3d 1112 (2006). It is not apparent in this case how the jury was to apply Instruction 12 in determining the facts of the case.

The second, and more legally significant, problem with the instruction is that it impermissibly transfers the burden of proof to the defendant. While Instruction 12 implies it is a defense for corporate officers to discharge their duties in good faith, reasonably, and with the best interests of the corporation in mind, it also says that corporate officers are “required” to act in such a manner. By stating that corporate officers are “required” to act in good faith, Instruction 12 placed the burden on Mr. Moore to prove that he acted accordingly.

Due process requires that the burden be on the plaintiff, not the defendant, to prove each element of the offense. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970). The burden of persuasion is deemed to be shifted if the trier of fact is required to draw a certain inference upon the failure of the defendant to prove by some quantum of evidence that the inference should not be drawn. State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006); State v. Deal, 128 Wn.2d 693, 701, 911 P.2d 996 (1996), citing Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

The State bears the burden of proving the absence of any defense that negates an element of the offense. State v. Acosta, 101 Wn.2d 612; 683 P.2d 1069 (1984). In this case, by instructing the jury that Mr. Moore was “required” to act in good faith, the trial court placed the burden on

him to prove by some quantum of evidence that acted in good faith, reasonably, and in a manner the director or officer reasonably believes to be in the best interests of the corporation. This requirement negated the elements that he wrongfully obtained property of another, an element of theft. It also negated the element that he changed, without authorization, a written instrument, as required by the forgery charge. The instruction impermissibly shifts the burden of proof.

Although Mr. Moore did not object to Instruction 12 at trial, an instruction that impermissibly transfers the burden of proof may be raised for the first time on appeal. Deal at 698. Instruction 12 is confusing, does not clearly state how it is to be applied to the elements of the offenses, and impermissibly transfers the burden of proof. Reversal is required.

5. Mr. Moore did not receive effective assistance of counsel when his attorney failed to advance a defense authorized by statute and there was evidence to support the defense.

Mr. Moore did not receive effective assistance of counsel when his attorney failed to request an affirmative defense instruction to which he was entitled. The Sixth Amendment guarantees the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, Mr. Moore must show that his

counsel's performance fell below an objective reasonableness standard in light of all the circumstances. Second, he must show that he was prejudiced by his counsel's mistake. Where counsel in a criminal case fails to advance a defense authorized by statute and there is evidence to support the defense, counsel's performance is deficient. In re PRP of Hubert, __ Wn.App. __, 158 P.3d 1282 (2007).

Mr. Moore presented testimony at trial which demonstrated that he lacked the requisite intent to commit the crimes of theft in the first and second degrees through color or aid of deception. He held a good faith belief that the money involved in counts VIII & IX of the third amended information was owed to him as part of a compensation plan agreed to by all parties. RP 590-592. In his own words, he provided testimony to show that the funds he withdrew were related to his compensation on the project and he had no intent to defraud and permanently deprive another of property. RP 658, 662, 666, 671-672.

The instruction for the affirmative defense of good faith claim of title was not submitted to the jury. This instruction is derived from RCW 9A.56.020(2):

In any prosecution for theft, it shall be a sufficient defense that:

- (a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

A defendant on trial for the crime of theft is allowed this instruction if the evidence would support a good faith claim of title to any property unlawfully taken. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). See also People v. Vineberg, 125 Cal.App. 3d at 137 (1981). The defendant must show (1) an opened and avowed taking of property, and (2) a good faith claim of title to the property. Ager, 128 Wn.2d at 95. This requires the defense to do more than just “assert a vague right to claim for property.” Ager, 128 Wn.2d at 95.

Mr. Moore’s testimony provided evidence to the jury that the property was taken openly and avowedly. The Aldridges had unlimited access to the construction site as well as bank accounts and financial records for the project. RP 232, 592, 595, 596. Mr. Moore even provided a ledger created by himself and a local accounting firm to the victims. RP 238, 609. When asked whether or not the Adridges wished to participate in the construction of the home, they provided a negative response. RP 211. Testimony by the State’s witnesses showed that the Aldridges had been by the construction site “a half dozen times” from the months of June through August of 2005. RP 232. A cursory inspection of financial documents and the construction site would have revealed any concerns of

the Adridges . Nothing on the part of the defendant was done to hide and deny access to the project finances.

The second part of the Ager test requires that there be a good faith claim of title to the property taken, even though it be untenable. Here, both the defense and State's witnesses testified that the defendant was entitled to compensation for work performed above his role as general contractor. RP 105, 591-592. The defendant testified as to when and how he made withdraws from the account. RP 658, 662, 666, 671-672.

The agreements regarding his compensation provided the legal basis for the defendant to believe that he had a right to the funds. Unlike the facts in Ager where the defendant relied upon a statutory interpretation of the insurance code to claim title to property, the defendant here was under the belief that these agreements for his compensation as well as the unrestricted access he had in the management of the funds was enough to secure his claim of title.

Animus furandi, intent to steal or unlawfully deprive, is a required element to the charge of theft. A good faith belief that one is lawfully entitled to property negates this element of the crime. State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983). The prosecution must prove beyond a reasonable doubt the nonexistence of this good faith belief to the claim once the defense negates an element of the offense. McCullum, at

490. The jury should be instructed that the State must prove beyond a reasonable doubt the absence of the good faith claim of title once the accused presents evidence that he lacked animus furandi. State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186, (1984).

The defendant is entitled to the claim of title defense set forth in RCW 9A.56.020(2) given the fact that he showed in court (1) that the property taken was open and avowed and (2) the defendant has both legal and factual basis for a good faith belief that he has title to take the property. Evidence that gives rise to the inference of the defendant's good faith belief in the claim for title would be the testimony as to the compensation he was entitled to, the lack of controls on corporate funds and the authority given him to manage company finances.

The failure of Mr. Moore's counsel to request an affirmative defense instruction to which he was entitled prejudiced his defense and constituted ineffective assistance of counsel. His case is materially identical to the situation in Hubert. In Hubert, the defendant was charged with second degree rape for having sexual intercourse with a woman who was mentally incapacitated or physically helpless due to her state of intoxication. The defendant testified, based upon her actions and statements, that he believed she was capable of consenting. Defense counsel did not request the affirmative defense authorized by RCW

9A.44.030(1). The Court of Appeals reversed based upon ineffective assistance of counsel. Likewise, Mr. Moore's case should be reversed for the failure of his counsel to request a statutorily authorized affirmative defense.

6. The multiple convictions for forgery violate the “unit of prosecution” rule of the double jeopardy clause.

The Fifth Amendment Double Jeopardy Clause requires dismissal of multiple convictions when they constitute the same offense in fact and law. State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998). Because Mr. Moore was convicted of multiple counts of forgery, he was convicted of multiple counts of the same offense as a matter of law. In order to determine if they are the same offense as a matter of fact, Washington courts rely on the “unit of prosecution” rule. State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006); State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005). The remedy for violation of the double jeopardy clause is dismissal of the remaining convictions. State v. Womac, ___ Wn.2d ___, ___ P.3d __ (2007).

In Leyda, the defendant obtained the victim's credit card information and used it four times for financial gain. He was convicted of four counts of identity theft. The Supreme Court reversed three counts

and held that there was only one unit of prosecution. Conversely, in Ose, the defendant who possessed 25 stolen credit cards belonging to 25 different victims was properly convicted of 25 felonies.

The Court of Appeals has recently held, in the context of forgery, that each forged document constitutes a separate unit of prosecution, regardless of the fact that the defendant executed each document as part of a larger plan to defraud. State v. Williams, 118 Wn. App. 178; 73 P.3d 376 (2003).

Applying these principles to Mr. Moore's case, two counts of forgery constitute the same unit of prosecution. Count I, the ledger, lists two allegedly forged checks. The State cannot convict Mr. Moore of forging the checks and then claiming that the same checks are forged. Similarly, Count II, the compact disc, includes copies of two altered invoices. It violates double jeopardy to convict Mr. Moore of both altering the invoice, then separately convicting him of copying the same altered invoice. Counts I and II should be dismissed.

7. Mr. Moore's multiple forgery convictions constituted same criminal conduct.

The trial court concluded that none of the forgeries constituted same criminal conduct. This was error.

Same criminal conduct means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(a). Intent, as used in this analysis, “is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime.” State v. Adame, 56 Wn.App. 803, 811, 785 P.2d 1144, review denied, 114 Wash. 2d 1030 (1990). In State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987), the Court focused on the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next.

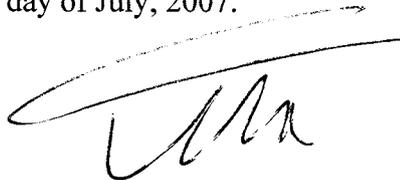
Viewed as a whole, each of the first six counts of the third amended information occurred on the same date and place, and involves the same victim and same criminal intent. On August 10, 2005, Mr. Moore paid two companies, Fred Hill Materials and Danny’s Concrete Pumping, to install concrete at 280 Flower Meadows Road. The work was paid with corporate funds. The documents related to the two purchases were made to appear that the concrete work was completed at 570 Sroufe, however. Everything occurred on the same date and place. The victim was the corporation, Northwest Construction SVC. The criminal intent was also the same: disguise the purchase of building materials purchased with corporate funds that were actually used in Mr. Moore’s personal

home. The first six counts all meet the definition of same criminal conduct and the trial court erred by concluding otherwise.

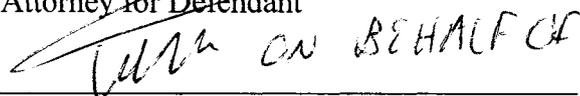
D. Conclusion

All of the offenses in the third amended information should be reversed and dismissed for insufficient evidence. In the alternative, all of the offenses in the third amended information should be reversed and remanded for a new trial because of multiple defects with the jury instructions. Finally, a remand for sentencing is required because some of the current offenses counted in Mr. Moore's offender score should not have been considered, either because they should have been dismissed as part of the same unit of prosecution as required by the double jeopardy clause or because they constitute same criminal conduct.

DATED this 24th day of July, 2007.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant



Thomas W. McAllister, WSBA #35832
Attorney for Defendant

07 JUL 28 PM 2:15
STATE OF WASHINGTON
BY Chmm
DEPUTY

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

STATE OF WASHINGTON,)	Case No.: 06-1-00874-8
)	Court of Appeals No.: 35758-5-II
Respondent,)	
)	AFFIDAVIT OF SERVICE
vs.)	
TYE CHRISTOPHER MOORE,)	
)	
Defendant.)	

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

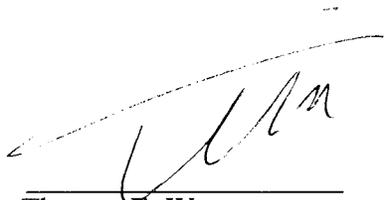
I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On July 24, 2007, I sent an original and copy, postage prepaid, of the BRIEF OF APPELLANT to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

On July 24, 2007, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-4683.

1 On July 24, 2007, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to Mr.
2 Tye Moore, DOC# 301121, Olympic Corrections Center, 11235 Hoh Mainline, Forks, WA
3 98331.

4
5 Dated this 24th day of July, 2007.



6
7
8 Thomas E. Weaver
9 WSBA #22488
10 Attorney for Defendant

11 SUBSCRIBED AND SWORN to before me this 24th day of July, 2007.



12
13 Christy A. McAdoo
14 NOTARY PUBLIC in and for
15 the State of Washington.
16 My commission expires: 07/31/2010

17
18
19
20
21
22
23
24
25