

original

NO. 35758-5-II

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

ORIGINAL

STATE OF WASHINGTON,

Respondent,

v.

TYE MOORE,

Appellant.

cm

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00874-8

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Although four of the seven forgery “to-convict” instructions omitted a requirement that the State prove that the Defendant knew the written instruments were forged, the error was harmless because this court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.

2. Whether, viewing the evidence in a light most favorable to the State, the evidence was sufficient for a jury to have found each element of the crime beyond a reasonable doubt?

3. Whether the Defendant’s right against double jeopardy was violated when the relevant statute plainly and unambiguously defines the unit of prosecution as the written instrument that is falsely made or put off as true, and when each of the forgery counts below involved a different unit of prosecution because each count was based on a different written instrument?

4. Whether the Defendant is precluded from arguing on appeal that the seven forgery counts constituted the same criminal conduct when he waived this issue by failing to raise it below and by specifically stating to the trial court that the forgery counts “each constitute separate and distinct criminal conduct?”

5. Whether, viewing the evidence in a light most favorable to the State, the evidence was sufficient to show that the Defendant committed theft by using corporate funds to pay for his personal expenses?

6. Whether the Defendant is precluded from arguing on appeal that the trial court erred in giving jury instruction number 12 when the Defendant did not object to this instruction below?

7. Whether the Defendant's claim of ineffective assistance of counsel must fail when: (1) the Defendant was not entitled to a good faith claim of title instruction; (2) even if he had been entitled to it, the decision to not request the instruction was a tactical decision and tactical decisions cannot serve as the basis for an ineffective assistance claim; and, (3) the Defendant has failed to show that he was prejudiced?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Tye Moore was charged by a third amended information filed in Kitsap County Superior Court with seven counts of forgery, one count of theft in the second degree, and one count of theft in the first degree. CP 200. A jury found the Defendant guilty as charged, and the trial court imposed a standard range sentence. CP 304, 383. This appeal followed.

B. FACTS

This charges in the present case stemmed from allegations that the Defendant essentially embezzled money from his business partners by repeatedly using company funds to pay for his own personal expenses and then attempted to cover up his thefts by altering invoices from vendors, writing false and misleading memo lines on company checks, and by creating a company ledger, all of which were intended to suggest that the funds used for the Defendant's personal expenses were actually spent on legitimate company business.

The record below showed that in the summer of 2002, the Defendant was hired to do some work on the roof of the home of Debra and Don Aldridge. RP 86-89, 572. Eventually the Aldridges became friends with the Defendant and his family, as they both had children that were of similar ages. RP 86-89, 572-73.

The Aldridges ran a carpet cleaning business that they had owned for over ten years. RP 228. In 2004, the Defendant suggested to the Aldridges that they all could go into business together building spec homes. RP 90-91. The Defendant explained to Ms. Aldridge that there was another couple that he wanted to go into business with, but he thought the Aldridges were more like-minded and felt he could trust them more because they had integrity. RP 91. The Defendant told Ms. Aldridge that they (the Aldridges) probably had

a lot of equity in their home and assured them they could get a loan to start the business. RP 90, 96.

Ms Aldridge said the proposal was “kind of foreign” to her, so it took a while to sink in, but eventually she talked to her husband about it, and the Aldridges ultimately decided that this would be a good way to give the Defendant and his family a start in life. RP 91.

The eventual plan was to form a business and then build houses, with the Defendant acting as a general contractor who would oversee the construction of the homes while the Aldridges’ role would be to provide financing. RP 230. Ms. Aldridge explained that they were not entering the business for their own benefit, but were doing so in order to get the Defendant and his family started in their own business and that, after a few projects, the Aldridges intended to give the business to the Defendant. RP 101-02. For this reason, the Aldridges agreed that the Defendant would receive 80% of the profits and the Aldridges would only keep 20% of the profits. RP 101, 230.

In February of 2005 the two couples formed a corporation called “Northwest Construction SVC Inc.,” and the Defendant began looking for properties to purchase. RP 93-96.

The Aldridges then applied for, and received, a construction loan with Westsound Bank, and the Aldridges put up their personal home as security for the loan. RP 93, 96-97. Before the loan went through, the Defendant would call Ms. Aldridge nearly every day to see if she had heard from the bank. RP 173. After the loan went through and the money was deposited in the bank, the Defendant no longer called and Ms. Aldridge had to track the Defendant down to find out what was going on with the project. RP 173.

Eventually the company purchased a property on Sroufe Street in May of 2005. The construction loan was for \$209,000 and the purchase price of the property was approximately \$70,000. RP 136. The Defendant suggested that a separate bank account should be set up for each project, so one bank account was set up for the Sroufe home and “all monies were to be used to build that home only.” RP 96. Ms Aldridge further explained that it was her understanding that the corporate money would be used only for the Sroufe home, as that was the “only place it was supposed to go” and that that is “what we had agreed upon.” RP 111. She also explained that the money “wasn’t supposed to go towards anything else, so we never thought it would.” RP 111.

With respect to the Sroufe project, Ms Aldridge explained that the understanding was that the Defendant would do the general contracting and would “do all the hiring and overseeing.” RP 104. In addition, Ms Aldridge

understood that the Defendant would personally take on some of the jobs that would have been hired out, such as the roofing, and that the Defendant would do these jobs for less than the bids made by others. RP 104-05. Ms. Aldridge explained that it was her understanding that the Defendant would be paid as an employee of the corporation for this work, and she told the Defendant that she had a payroll program set up and would handle that. RP 105.

As construction on the Sroufe home moved along, Ms. Aldridge stated she would ask the Defendant how the project was going and that every time she asked, the Defendant told her that the project was going well and was under budget. RP 109-10. From May to July, Ms. Aldridge would call the Defendant weekly to talk about the project and would occasionally invite the Defendant and his family to dinner to talk about the project. RP 110-11.

Ms Aldridge eventually became a little concerned when the Defendant decided to run for a position on the Port Orchard City Council, but the Defendant assured her that he could handle both tasks and would only campaign at night and work on the Sroufe house during the day. RP 111.

In July, the Defendant refinanced his personal home in order to pay for some remodeling of that home and to fund his campaign for city council. RP 114-16. In order to help the Defendant save money, Aldridges let the

Moore family move into their home and live there rent-free. RP 114-15. The Defendant and his family lived with the Aldridges until September. RP 116.

In late September or early October, Ms. Aldridge became concerned because the corporate checking account had gotten low and she was concerned that there was not enough money left in the account to finish the Sroufe project. RP 116-17. Ms Aldridge spoke to the Defendant about her concerns, and the Defendant said that everything was fine and the project was still under budget. RP 118.

Ms Aldridge also explained that she had asked the Defendant for documentation regarding the project because originally they had discussed there being monthly reports showing what money had been spent. RP 119. Every time she asked, however, the Defendant had explained that the documentation was "with the accountant." RP 119. At trial, however, the accountant stated that the Defendant never provided her with any receipts or invoices. RP 351.

Finally, in August, Ms Aldridge told the Defendant that she needed to see some kind of ledger. RP 119. The Defendant provided a ledger, and this was the only thing she ever got. RP 119.

When Ms Aldridge reviewed the ledger, her concerns were allayed a bit since it looked like everything was going towards the Sroufe house. RP 127-28. Ms Aldridge, however, did note that there was an entry that was for a "Tye Moore draw," and that she asked the Defendant about this and he explained it was for some work he had done on some pillars. RP 125. Aldridge explained that the Defendant had told her that he had not taken any money at all, and that she was concerned because the ledger entry contradicted the Defendant's representation that he had not taken any money at all. RP 125-26. When Aldridge reviewed the ledger there were no entries regarding checks being written to pay for the Defendant's remodel of his personal home or to pay for his campaign. RP 127-28. Rather, everything was noted as going toward the Sroufe house. RP 128.

Several weeks later, Aldridge again became concerned when she learned that there had been another draw on the account and she did not think that the project could be completed on what was left in the account. RP 129. Ms Aldridge then went to the bank and requested documentation regarding all of the account's activity. RP 129. The bank gave her documentation on the checking account as well as information on a credit card that was supposed to be used only for emergencies. RP 129. Aldridge explained that the understanding was that checks would be used whenever possible because "it was easier bookkeeping wise to keep track of it that way," and that the

credit card would only be used if someone would not take a check. RP 129-30. When Ms. Aldridge reviewed the credit card statements she “dropped [her] teeth on the floor.” RP 130. Ms Aldridge explained that she was devastated by what the account information showed because it showed that a lot of money had been spent and she knew at that point that the house could not be finished on what was left. RP 130. She the closed the checking account and had the bank shut down the draws so that the Defendant could not get any more money from the account. RP 130.

Ms Aldridge called the Defendant and asked to meet with the Aldridges and a mediator, but neither the Defendant nor his wife would agree to a meeting. RP 133-34. A meeting was, however, eventually scheduled, but it never occurred. RP 134-35. After this last attempt at contact in late October, Ms. Aldridge went to the police and reported what had happened. RP 135.

Ms Aldridge also began collecting the account records, checks, and receipts from all the vendors she could because she was finding that the checks themselves did not match the entries in the ledger. RP 141-42, 208-09.

The Port Orchard Police Department also investigated the matter and served a search warrant on the Defendant’s residence at 280 Flower Meadows

on February 8, 2006. RP 294-96. The Defendant handed a number of documents to the police, and officers also located other documents in a filing cabinet. RP 298-99.

The documents collected by Ms. Aldridge and the police revealed that the Defendant had repeatedly used corporation funds to pay for work at his personal home and for expenses related to his campaign and had then doctored a number of documents to cover up these activities. In particular, the investigation revealed the following:

The Fred Hill Invoice and Check 2037.

On August 10, 2005 a company called Fred Hills Materials delivered concrete to the remodeling project at the Defendant's home at 280 Flower Meadows. RP 276, 283-84, Exhibit 3, 7. An employee delivered the concrete and specifically remembered the job site. RP 281-84. An invoice was created that memorialized the delivery and indicated that the concrete was delivered to the 280 Flowers Meadow address. RP 281-84, Exhibit 3.

The Defendant paid for the delivery at the time of the delivery using check number 2037 from Northwest Construction SVC. RP 283, 618, Exhibit 8. On the memo line of the check the Defendant wrote "570 Sroufe" rather than the address 280 Flower Meadows where the concrete was actually used. RP 618-19, Exhibit 8. The amount of the invoice and check number

2037 was \$688.25. Exhibit 3, 8. The transaction was subsequently entered into the Northwest Construction SVC ledger with a notation that the Payee was Fred Hill for "cost of goods sold" and a memo line that stated "570 Sroufe." Exhibit 1. Although the original invoice created by Fred Hills Materials listed a job address as "280 Flower Meadows," the copy of the invoice that the Defendant later provided to the Aldridges had been altered and had a hand written notation that the job address was 570 Sroufe. Copies of both the original and altered invoice were also found during the search of the Defendant's residence. RP 303-06.

In short, the memo line of the check, the company ledger, and the altered copy of the invoice all indicated or suggested that the concrete had been used at the 570 Sroufe home when the concrete had in fact been used at the Defendant's home.

The Danny's Concrete Pumping Invoice and Check 2038

On the same day that Fred Hills Materials delivered the concrete to the Defendant's residence, a company called Danny's Concrete Pumping was present at the site and assisted in the pouring of the foundation at the Defendant's home. RP 315-29. The charge for this service was \$283.42 and an invoice was created which listed the address as 280 Flower Meadow. RP 315, 321, Exhibit 9. The Defendant paid for this work using check number

2038 from Northwest Construction SVC. RP 321, 646-47, Exhibit 12. On the memo line of the check the Defendant wrote "570 Sroufe/Concrete" rather than the address 280 Flower Meadows where the concrete was actually used. RP 647, Exhibit 12. The transaction was subsequently entered into the Northwest Construction SVC ledger with a notation that the Payee was Danny's Concrete for "cost of goods sold" and a memo line which stated "570 Sroufe." Exhibit 1. Although the original invoice created by Danny's Concrete Pumping listed the address as "280 Flower Meadows," the copy of the invoice that the Defendant later provided to the Aldridges had been altered and listed the address as 570 Sroufe. RP 153, Exhibit 10. A copy of the altered invoice was also found during the search of the Defendant's residence. RP 307, Exhibit 11.

Again, the memo line of the check, the company ledger, and the altered copy of the invoice all indicated or suggested that the services had been provided at the 570 Sroufe home when the concrete had in fact been pumped at the Defendant's home.

Invoice 133 from Northwest Construction Services.

One of the other documents that the Defendant gave to the Aldridges was a Northwest Construction Services Inc invoice that listed work that the Defendant claimed he had done at the 570 Sroufe house, including the

installation of “visqueen under [the] house.” Exhibit 15A. The total amount of this invoice was \$1000. Exhibit 15A. A contractor who worked on the Sroufe house, however, testified that he and/or his employee (and not the Defendant) actually installed the visqueen under the house. RP 385-86.

The CD

Moore explained that he scanned the receipts and invoices for the Sroufe project and placed electronic copies of these documents onto a CD, and that he gave copies of the CD to the Aldridges and to the bank. RP 143, 506. The CD specifically contained copies of Exhibits 4, 10, 15A as well as other receipts and invoices. RP 143, 154, 156, 165, Exhibit 2.

The Ledger

The company ledger contained numerous inaccuracies including the Fred Hills and the Danny’s Concrete invoice discussed above and the checks associated with those invoices. Exhibit 1. It also included numerous other inaccuracies. For instance, several payments to Kimberly Shaw was inaccurately listed as payment to Home Depot, Kitsap Lumber, and Parker Lumber. RP 701-04, 709. Kim Shaw was the Defendant’s campaign manager. RP 669. In addition, a payment to PIP was inaccurately listed as payment to Gray Lumber RP. 702-03. PIP printing was a sign company that often did printing for political campaigns and did some printing for the Committee to

Elect Tye Moore that was paid for with a check from Northwest Construction Services. RP 472-73, Exhibit 45. Finally, several payment to Joe Rouse were inaccurately listed as payments to Evergreen Lumber, Gray Lumber, and Kitsap Lumber, and Danny's Concrete Pumping. RP. 706, 708, 709-10. Mr. Rouse was hired by the Defendant, and worked on both the Defendant's home and the "570 Sroufe" project, although most of his time was spent at the Defendant's home. RP 465-67.

Richard Kitchen, an investigator from the Kitsap County Prosecutor's Office, was present when the search warrant was executed on the Defendant's home and he interviewed the Defendant at that time. RP 474, 493-94. The Defendant claimed that Ms. Aldridge had initially approached him about going into business together, and that he had initially rejected the idea because he didn't think it was a good idea to go into business with friends. RP 498-99. The Defendant explained that the receipts and invoices for the Sroufe project were scanned and then placed on a compact disk which he then sent to the bank and to the Aldridges. RP 506. The Defendant was asked if he had made any alterations to the receipts or invoices, and he stated he had not. RP 506. He also stated that the receipts and invoices were only for the 570 Sroufe project. RP 507.

The Defendant did say that, as a matter of convenience, he would write checks from the corporate account to pay for things that he personally

owed, and that he did this rather than writing a check from the corporation to himself and then placing the check in his personal account. RP 510.

When Mr. Kitchen confronted the Defendant with the different copies of the invoices that had been submitted to the bank and the Aldridges and the original invoices obtained from the vendors, the Defendant asked, “Am I going to be arrested and taken to jail?” RP 561.

At trial, the Defendant offered various explanations for the discrepancies discovered by the Aldridges and the police. For instance, with respect to the memo lines on checks number 2037 and 2038, the Defendant claimed that he “made a mistake” and that these checks were actually money paid out to cover work done on his residence. RP 659-60.¹ At another point, the Defendant claimed he wrote “570 Sroufe” on the memo line to remind himself that he wrote the check as a sort of compensation for work he had done at the Sroufe house. RP 619.

The Defendant also explained that he compensated himself for work he had done on the Sroufe project by writing company checks to cover his personal expenses, and noted that he would reference those payments on the documents by noting “Tye’s payroll” or “owner draw” on the memo line of

¹ The Defendant also admitted that he directed his wife to write check 2030 (Exhibit 19) and that this check also paid for work done on his private residence that was again a “mistake” and was done in error. RP 662.

the check. RP 621-23, Exhibit 40, 42.

With respect to the altered Fred Hills and Danny's Concrete invoices, the Defendant claimed that the copies of the invoices were hard to read so he made hand-written notations on them before he scanned the documents that he was preparing to give to Ms. Aldridge. RP 646. The Defendant explained that he wrote the wrong address on the invoices because he was confused about which project work had been done on. RP 646-47.

The Defendant also admitted paying for temporary workers used at his personal home with the corporation credit card. RP 656-58. He claimed he did so because he did not give any thought to which job site the workers actually worked at when he was contacted by the Labor Ready labor company and asked to pay the bill. RP 657. The Defendant also admitted that a worker he employed named Mr. Rousse was paid by company check despite the fact that he also worked at the Defendant's home. RP 666. When asked, "How do you justify writing him checks for money that – that apparently could have been owed him from your home project," Moore responded, "Again, at the end of the project, if there was any question about anything we could settle up at that time." RP 666.

The Defendant also attempted to explain the inaccurate entries in the ledger by indicating that he prepared the ledger quickly because he felt

obligated to get something to Ms. Aldridge and that some of the entries, therefore, were estimates and he never had a chance before departing the company to go back and correct the ledger entries. RP 714-15.

III. ARGUMENT

- A. **ALTHOUGH FOUR OF THE SEVEN FORGERY "TO-CONVICT" INSTRUCTIONS OMITTED A REQUIREMENT THAT THE STATE PROVE THAT THE DEFENDANT KNEW THE WRITTEN INSTRUMENTS WERE FORGED, THE ERROR WAS HARMLESS BECAUSE THIS COURT CAN CONCLUDE BEYOND A REASONABLE DOUBT THAT THE JURY VERDICT WOULD HAVE BEEN THE SAME ABSENT THE ERROR.**

The Defendant argues that the trial court erred by improperly instructing the jury regarding the elements of forgery. The State concedes that the to-convict instructions on four of the seven forgery counts were inaccurate. The error, however, was harmless.

RCW 9A.60.020(1) provides that 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.

The forgery statute, therefore, provides two prongs under which a defendant may commit a forgery, and those two prongs will be referred to as the “falsely makes” prong and the “possession” prong in this brief.² The Defendant argues that the jury instructions failed to include the requirement that the State must prove that the Defendant knew the instruments were forged when the State charges the Defendant under the “possession” prong. App.’s Br. at 17.

Furthermore, the Defendant argues that each of the forgery-to-convict instructions were the same. App.’s Br. at 17-18. This is incorrect. In the present case there were seven forgery counts. For counts I, III, and V, the jury was instructed under both forgery prongs and the to-convict instructions for these counts omitted the phrase “which he knows to be forged” from the possession prong. CP 287, 289, 291. Similarly, for count II, the jury was only instructed on the possession prong (and not the “falsely makes” prong) and the to-convict instruction omitted the phrase “which he knows to be forged”

² The Statute, in its entirety, reads as follows:

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.

from the possession prong, CP 288. An omission or misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of the crime charged is error. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). These four to-convict instructions, therefore, were given in error as they failed to include the required element of knowledge that the written instruments were forged.

On counts IV, VI and VII, however, the jury was only instructed on the “falsely makes” prong of forgery, which does not require proof that the defendant knew the written instruments were forged. CP 290, 292, 293, RCW 9A.60.020(1)(a). There was, therefore, no instructional error with respect to counts IV, VI and VII.

As the Defendant points out, the next issue is whether the error with respect to counts I, II, III and V was harmless. App.’s Br. at 19. In *State v. Thomas*, 150 Wn.2d 821, 844-45, 83 P.3d 970 (2004), the Washington Supreme Court stated that it had adopted the rule that an erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis. *Thomas*, 150 Wn.2d at 844, citing *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). The *Thomas* court also noted that, “[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an

unreliable vehicle for determining guilt or innocence.” *Thomas*, 150 Wn.2d at 845, *citing Neder*, 527 U.S. at 9, 119 S. Ct. 1827. Finally, the *Thomas* court stated that, “The *Neder* test for determining the harmlessness of a constitutional error is: ‘whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Thomas*, 150 Wn.2d at 845, *citing Neder*, 527 U.S. at 15, 119 S. Ct. 1827. The Washington Supreme Court, therefore, held that, “In order to hold the error harmless, we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’” *Brown*, 147 Wn.2d at 341, *citing Neder*, 527 U.S. at 19, 119 S. Ct. 1827. Ultimately, the *Brown* court held that,

Under recent Washington case law, as well as *Neder v. United States*, an erroneous jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has not relieved the State of its burden to prove each element of the case. To determine whether an erroneous instruction is harmless in a given case, an analysis must be completed as to each defendant and each count charged. From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Brown, 147 Wn.2d at 344.

Similarly, in the *Thomas* case, the Court outlined that,

Under the evidence that was presented, it was Thomas who: devised the plan to rob; thought about killing Geist

beforehand; was friends with the victim and could lure him out on false pretenses; brought his gun with him that evening; was known to the victim and thus, had to eliminate him as a witness; solicited others to help him in his plan. We agree that “[Thomas] was so entrenched as a major participant in the murder that his culpability cannot be lessened even if his accomplice pulled the trigger.” For purposes of upholding Thomas's conviction for first degree murder, we find the errors in the accomplice liability and “to convict” instructions to be harmless beyond a reasonable doubt. We thereby affirm Thomas's conviction for first degree murder

Thomas, 150 Wn.2d at 846 (citations omitted).

In the present case, the evidence was overwhelming that the Defendant knew that the documents relating to counts I, II, III and V were forged.

First, all four of the to-convict instructions required the State to prove that the Defendant “acted with intent to injure or defraud.” CP 287, 288, 289, 291. As acting with intent includes acting with knowledge, it is hard to conceptualize how a defendant could act with intent to injure or defraud without necessarily knowing that the documents he possessed were forged. In any event, the evidence relating to counts I, II, III and V, overwhelmingly showed that the Defendant possessed the forged instruments with knowledge that they were forged.

Count I was based on the company ledger, and the Defendant admitted at trial that he knew at the time he gave the ledger to the Aldridges

that the ledger was inaccurate. RP 714-15 . His explanation, however, was that he intended to go back and fix the inaccuracies at a later date. RP 714-15. He also claimed that he told Ms. Aldridge that the ledger was incomplete. RP 715. The jury, however, necessarily disregarded the Defendant's explanation, however, as it found that he acted with intent to defraud or injure. This fact, combined with the Defendant's admission that he knew the ledger contained inaccurate information at the time, shows that the error complained of did not contribute to the jury's verdict on count I.

With respect to Count II (which related to the CD), the Defendant admitted he made the CD. RP 628. Again, the jury necessarily found that the Defendant acted with the intent to injure or defraud with respect to this count. For these reasons, the error was harmless.

Counts III and V involved checks number 2037 and number 2038. These checks both contained a memo line that stated "570 Sroufe" despite the fact that, as the Defendant admitted, the checks were written for work performed at the Defendant's residence at 280 Flower Meadows. In short, there was no dispute at trial that the Defendant was the one who filled in the memo line of these checks, and the jury necessarily found that he did so with the intent to defraud. At trial, the Defendant essentially offered two explanations for his conduct. At one point he admitted that the notation "570 Sroufe" was a mistake, and at another point he claimed that the notation was

his own way of reminding himself that the checks represented a reimbursement for work he had performed at the Sroufe house. RP 659-60. The jury, however, necessarily rejected these explanations when it found that he acted with intent to injure or defraud. The error in failing to instruct the jury regarding the Defendant's knowledge was, therefore, harmless since there was no dispute that the Defendant personally filled in the inaccurate information and the jury found that:(1) he had "possessed or uttered or disposed of or put off as true a forged instrument;" and, (2) had acted with intent to injure or defraud. In short, the record shows beyond a reasonable doubt that the failure to instruct the jury regarding the Defendant's knowledge did not contribute to the jury's verdict with respect to counts III and V.

B. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT FOR A JURY TO HAVE FOUND EACH ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

The Defendant next claims that there was insufficient evidence to convict him of any of the counts of forgery. App.'s Br. at 13-17. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational jury could have found each element of the crime beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The Defendant's argument, which is based language found in *State v. Mark*, 94 Wn. 2d 520, 618 P.2d 73 (1980), is that 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. App.'s Br. at 13. The *Mark* court further outlined that under the common law there was a "significant distinction between a forgery and a writing falsely representing that the facts which it

reports are true.” *Mark*, 94 Wn.2d at 524.

The Defendant’s reliance on *Mark*, however, is misplaced, because the *Mark* decision was discussing the common law crime of forgery which was codified in a previous version of the forgery statute as the charge of forgery in the first degree. While *Mark* was an accurate statement regarding common law forgery and the statutory crime of first degree forgery, it did not apply to the then existing crime of second degree forgery and should not apply to the new forgery statute, as the new statute, by its plain language, is not the same as common law forgery.

In *Mark*, the defendant was charged under RCW 9.44.010 and .020 (the general definition statute and the statute for first degree forgery). *Mark*, 94 Wn.2d at 522. Former RCW 9.44.010 was the definition statute, and RCW 9.44.020 was the statute for first degree forgery. RCW 9.44.040, the statute for second degree forgery, however, was not mentioned in the *Mark* opinion.

Under the former statutory scheme, first degree forgery was essentially common law forgery, and provided, inter alia, that every person who, with intent to defraud, shall forge any writing or instrument was guilty of forgery. Former RCW 9.44.020. Second degree forgery, however, was clearly distinguished from common law forgery, since it stated;

RCW 9.44.040 Second degree . Every person who, with intent to injure or defraud shall-

(1) Make any false entry in any public or private record or account; or

(2) Fail to make a true entry of any material matter in any public or private record or account; or

(3) Forge any letter or written communication or copy or purported copy thereof, or send or deliver, or connive at the sending or delivery of any false or fictitious telegraph message or copy or purported copy thereof, whereby or wherein the sentiments, opinions, conduct, character, purpose, property, interests or rights of any person shall be misrepresented or may be injuriously affected, or, knowing any such letter, communication or message or any copy or purported copy thereof to be false, shall utter or publish the same or any copy or purported copy thereof as true, shall be guilty of forgery in the second degree, and shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than five thousand dollars.

Former RCW 9.44.040.

In short, the former forgery statutes clearly expanded on the common law definition of forgery and included acts such as making false entries in records and failing to make true entries of material matters in private records.

The clear language of the former second degree forgery statute, then, was not limited by the common law rule regarding the “significant distinction between a forgery and a writing falsely representing that the facts which it reports are true.” *Mark*, 94 Wn.2d at 524. Rather, second degree forgery specifically applied to falsely representing facts that were reported to be true when the act was done with respect to public or private records.

As this court explained in *State v. Smith*, 72 Wn. App. 237, 864 P.2d 406 (1993), in 1975 the Washington Legislature adopted the present forgery statutes as part of the new criminal code. *Smith*, 72 Wn. App. at 240. As this court noted in *Smith*, the Legislative history of the 1975 code shows that the new code was intended to be entirely consistent with present Washington forgery law was a restatement of existing law that shorten the existing provisions without significantly changing coverage,

A precursor of the 1975 criminal code was a document colloquially known as “the Orange Code”. That document contained a comment stating that the new provisions on forgery “appear entirely consistent with present Washington law, both in RCW 9.44.010 [which contained the then-existing statutory definitions pertaining to forgery] and elsewhere in the forgery chapter.” Orange Code, comment 2, at 266. Another precursor of the 1975 code was Senate Bill 2230. A staff analysis of that bill stated: “The bill is basically a restatement of existing law, an amended 1909 statute.” Senate Judiciary Committee, Bill Analysis Form, SB 2230 (January 30, 1975), page 1. The same staff analysis also made two comparisons pertinent here. Comparing the definitions in proposed RCW 9A.60.010 with the definitions in then-existing RCW 9.44.010, it concluded, “No significant change where previously defined.” Bill Analysis Form at page 4. Comparing the elements of forgery in proposed RCW 9A.60.020 with the elements of forgery in then-existing RCW 9.44.020 and RCW 9.44.040-.080, it concluded, “Shortens existing provisions without significantly changing coverage.” Bill Analysis Form at page 4. Overall, this history indicates that the 1975 Legislature intended to continue the rule of legal efficacy that had been part of Washington law up to that time.

Smith, 72 Wn. App. at 241-42.

In short, the history of the forgery statute shows that the old statutes clearly covered false entries in otherwise genuine public or private records, and the legislative history for the 1975 code shows that the current forgery statutes were intended to be entirely consistent with former Washington forgery law and was simply a restatement of existing law that shorten the existing provisions without significantly changing coverage. Nothing in the legislative history demonstrates an intention to eliminate second degree forgery and to revert entirely back to the old common law definition of forgery.

Similarly, under the plain language of the current forgery statute there is no requirement that the written instrument must purport to be the act of someone other than the maker, nor is there any language which suggests that the statute was meant to incorporate the common law rule that there is a significant distinction between a forgery and a writing falsely representing that the facts which it reports are true. Rather, under the plain language of the statute, 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 9A.60.020.

Furthermore, a "forged instrument" means a written instrument which has been falsely made, completed, or altered, and to "falsely alter" a written instrument means to change, without authorization by anyone entitled to grant it, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner. RCW 9A.60.010. Finally, a "written instrument" means: (a) **Any** paper, document, or other instrument containing written or printed matter or its equivalent; or (b) **any** access device, token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification. RCW 9A.60.010 (emphasis added).

The plain language of the statute, therefore, encompass acts which falsely alter "any" document with intent to defraud or injure. The plain language, therefore clearly covers a broader scope than the old common law definition of forgery.

The State concedes that the *Mark* court correctly stated the requirement under common law forgery that a misrepresentation of fact, so long as it does not purport to be the act of someone other than the maker, did not constitute forgery and that under the common law there was a distinction between "forgery" and a writing which merely falsely represented that the facts which it reported were true. The State also agrees that these common law rules applied to former first degree forgery statute that was the subject of

the charges in *Mark*. These common law restrictions, however, did not apply to the former second degree forgery statute and they should not apply to the present crime of forgery, as the common law restrictions are contrary to the plain language of the current statute and run contrary to the legislative history of the current statute.

Under the plain language of the present forgery statute, there was sufficient evidence in the present case to support the jury's finding of guilt for each count.

First, with respect to counts IV and VI (the altered invoices from Fred Hills Materials and Danny's Concrete Pumping) the evidence showed that the defendant altered the invoices from the two vendors by changing the job address on each invoice from "280 Flower Meadows" to "570 Sroufe." In so doing, the Defendant made a misrepresentation of fact that purported to be made by the vendors, and his acts, therefore, would have qualified even under the restrictive common law definition of forgery. In addition, his actions constituted forgery under the current statute because he altered the invoices by erasing or obliterating the true job address and adding in a new, false, job address.

With respect to Count I (the company ledger), Count II (the CD), Count III (check 2037), Count V (check 2038) and Count VII (invoice 133)

the evidence showed that the defendant possessed, uttered, offered, disposed of, or put off as true a written instrument knowing that it had been “falsely altered” by the insertion of new matter, and that the possession was with the intent to defraud or injure.

In short, the evidence, when viewed in a light most favorable to the State, showed that the Defendant made false entries and/or notations on all of the charged documents and did so with the intent to defraud or injure.

C. THE DEFENDANT’S RIGHT AGAINST DOUBLE JEOPARDY WAS NOT VIOLATED BECAUSE THE RELEVANT STATUTE PLAINLY AND UNAMBIGUOUSLY DEFINES THE UNIT OF PROSECUTION AS THE WRITTEN INSTRUMENT THAT IS FALSELY MADE OR PUT OFF AS TRUE AND EACH OF THE FORGERY COUNTS BELOW, THEREFORE, INVOLVED A DIFFERENT UNIT OF PROSECUTION BECAUSE EACH COUNT WAS BASED ON A DIFFERENT WRITTEN INSTRUMENT.

The Defendant next claims that his forgery convictions violated the unit of prosecution rule of the double jeopardy clause. App.’s Br. at 33. This claim is without merit because the relevant unit of prosecution is each written instrument (that is falsely made or put off as true) and each of the forgery counts below was based on a different written instrument.

The double jeopardy clause prohibits a defendant “from being punished multiple times for the same offense.” *State v. Williams*, 118 Wn. App. 178, 183, 73 P.3d 376 (2003), *citing State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). One situation in which that can occur involves multiple charges based on the same statute. In that situation, a court must inquire, “[W]hat ‘unit of prosecution’ has the Legislature intended as the punishable act under the specific criminal statute.” *Williams*, 118 Wn. App. at 183, *citing Adel*, 136 Wn.2d at 634, 965 P.2d 1072.

As outlined above, the statute at issue in the present case is RCW 9A.60.020. It 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.

This statute plainly and unambiguously defines the unit of prosecution as the written instrument that is falsely made or put off as true. *Williams*, 118 Wn. App. at 183. In the present case, each of the forgery counts was based on a different written instrument, thus, each involved a different unit of prosecution, and none abridged the Defendant’s right against double jeopardy. *Williams*, 118 Wn. App. at 183.

D. THE DEFENDANT IS PRECLUDED FROM ARGUING ON APPEAL THAT THE SEVEN FORGERY COUNTS CONSTITUTED THE SAME CRIMINAL CONDUCT BECAUSE HE WAIVED THIS ISSUE BY FAILING TO RAISE IT BELOW AND BY SPECIFICALLY STATING TO THE TRIAL COURT THAT THE FORGERY COUNTS "EACH CONSTITUTE SEPARATE AND DISTINCT CRIMINAL CONDUCT."

The Defendant next claims that his multiple forgery convictions constituted the same criminal conduct. This claim is without merit because the Defendant did not preserve this issue for appeal because he did not raise the issue below and specifically acknowledged in his written sentencing memorandum that the forgery counts each constituted separate and distinct criminal acts and should each count in the offender score.

Generally, a defendant cannot waive a challenge to a miscalculated offender score. *State v. O'Neal*, 126 Wn. App. 395, 432, 109 P.3d 429 (2005), citing *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). When the sentencing error is a legal one, the waiver doctrine does not apply. *Goodwin*, 146 Wn.2d at 874, 50 P.3d 618. As a threshold matter on appeal, however, the defendant must show the existence of an error of fact or law "within the four corners of his judgment and sentence." *O'Neal*, 126 Wn. App. at 432, citing *State v. Ross*, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004).

But a defendant may waive a miscalculated offender score if the alleged error involves an agreement to facts, later disputed, or a matter of trial court discretion. *O'Neal*, 126 Wn. App. at 432, citing *Goodwin*, 146 Wn.2d at 874, 50 P.3d 618. "Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion." *O'Neal*, 126 Wn. App. at 432, citing *State v. Nitsch*, 100 Wn. App. 512, 521, 523, 997 P.2d 1000 (2000).

The *Goodwin* court cited *Nitsch* with approval, noting that the Court of Appeals properly found waiver. *Goodwin*, 146 Wn.2d at 875, 50 P.3d 618. In *Nitsch*, the defendant entered an Alford plea of guilty to first degree burglary and first degree assault. *Nitsch*, 100 Wn. App. at 517. In the presentence report, *Nitsch* alleged a standard range identical to that calculated by the State. *Nitsch*, 100 Wn. App. at 522. At sentencing, *Nitsch* and the State both agreed to the calculation of his standard range. *Nitsch*, 100 Wn. App. at 517. For the first time on appeal, *Nitsch* argued that his two convictions constituted the same criminal conduct. *Nitsch*, 100 Wn. App. at 514.

The Court of Appeals noted that *Nitsch* did not merely remain silent but instead affirmatively acknowledged his standard range, thereby implicitly asserting that his crimes did not constitute the same criminal conduct. *Nitsch*, 100 Wn. App. at 522. Because *Nitsch* agreed to the calculation of his standard range, the court held that he waived review of the issue. *Nitsch*, 100 Wn.

App. at 514.

Similarly, in *O'Neal*, the court of appeals found that the defense counsel affirmatively acknowledged the calculation of his offender score, and thus waived any argument regarding same criminal conduct on appeal. *O'Neal*, 126 Wn. App. at 433. Like the defendant in *Nitsch*, *O'Neal* affirmatively acknowledged the calculation of his standard range, indicating that his prior convictions did not constitute the same criminal conduct, and the court concluded that *O'Neal* had, therefore waived the issue on appeal. *O'Neal*, 126 Wn. App. at 433-34.

In the present case, the Defendant argues for the first time on appeal that the seven forgery counts constituted the same criminal conduct. In the court below, the Defendant had argued only that the theft conviction should be considered the same criminal conduct as some of the seven forgery counts, and argued, therefore, that the offender score should be a six. CP 364, 366. Specifically, the Defendant stated,

Consistent with the above analysis, the defense submits that Mr. Moore's offender score for the Theft in the first degree count is a "6." The same calculation is true for the forgery counts. In short, counts 1-7 each constitute separate and distinct criminal conduct; but the conduct for which Mr. Moore has been convicted for counts 3-7 should be considered the "same criminal conduct" by this court for purposes with regard to Count IX. This results in an offender score of "6" for each of the types of charges Mr. Moore faced at trial."

CP 366. At no time did the Defendant argue that each of the forgery counts constituted the same criminal conduct as the other forgery counts. In addition, this was not a case where the Defendant merely stood silent regarding the seven forgery counts. Rather, the Defendant specifically stated that, "counts 1-7 each constitute separate and distinct criminal conduct" and resulted in an offender score of six. CP 366. The Defendant, therefore, failed to raise the argument that the seven forgery counts themselves constituted the same criminal conduct and he may not now raise that issue for the first time on appeal.

E. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT TO SHOW THAT THE DEFENDANT COMMITTED THEFT BY USING CORPORATE FUNDS TO PAY FOR HIS PERSONAL EXPENSES.

The Defendant next claims that there was insufficient evidence to sustain the theft conviction because there was no evidence that the property he took was the "property of another." This claim is without merit because the evidence showed that the Defendant was not authorized to expend corporate funds for his personal expenses.

As outlined above, evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the

crime beyond a reasonable doubt. *Pirtle*, 127 Wn.2d at 643; *Green*, 94 Wn.2d at 220-21. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Moles*, 130 Wn. App. at 465. Circumstantial and direct evidence are equally reliable. *Delmarter*, 94 Wn.2d at 638.

As cited by the Defendant, the court in *State v. Joy*, 121 Wn.2d 333, 341, 851 P.2d 654 (1993) held 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. App.'s Br. at 22. In *Joy*, the defendant was a contractor who was charged with theft after he exerted unauthorized control over funds provided to him by homeowners who had given him the funds for contracting work. *Joy*, 121 Wn.2d at 335. The court ultimately upheld the convictions for those counts where there was evidence that there had been oral agreements that the money paid to the contractor was to be used for the building projects. *Joy*, 121 Wn.2d at 341-42.

In the present case the record shows that the corporate funds were to be used to build the Sroufe home and that "all monies were to be used to build that home only." RP 96. Ms Aldridge further explained that it was her understanding that the corporate money would be used only for the Sroufe home as that was the "only place it was supposed to go" and that that is "what

we had agreed upon.” RP 111. She also explained that the money “wasn’t supposed to go towards anything else, so we never thought it would.” RP 111.

Although Ms. Aldridge did explain that they had agreed that the Defendant could be paid for some of the work he did on the project, she further explained that the understanding was that the Defendant would be paid as an employee of the corporation for this work, and that she had told the Defendant that she had a payroll program set up and would handle that. RP 105.

Viewing this evidence in a light most favorable to the State, the evidence was sufficient for the jury to find that the Defendant was not authorized to simply write corporate funds to outside vendors to pay for work done on his personal residence. In addition, the lengths the Defendant went to in order to cover up his expenditures of corporate funds for his private expenses only served to bolster the jury’s reasonable conclusion that the Defendant fully understood that he was not authorized to spend the funds in the manner he did.

F. THE DEFENDANT IS PRECLUDED FROM ARGUING ON APPEAL THAT THE TRIAL COURT ERRED IN GIVING JURY INSTRUCTION NUMBER 12 BECAUSE THE DEFENDANT DID NOT OBJECT TO THIS INSTRUCTION BELOW.

Moore next claims that the trial court erred in giving jury instruction number 12 regarding corporate officers. App.'s Br. at 24. This claim is without merit because the Defendant did not preserve the issue for appeal and because the jury instructions properly informed the jury of the law, were not misleading, and permitted the parties to argue their theories of the case.

Jury instructions satisfy the fair trial requirement when, taken as a whole, they properly inform the jury of the law, are not misleading, and permit the parties to argue their theories of the case. *State v. Morgan*, 123 Wn. App. 810, 814-15, 99.P.3d 411 (2004).

Furthermore, an objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988); *State v. Dent*, 123 Wn.2d 467, 478, 869 P.2d 392 (1994). Stated another way, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." Washington Rules of Appellate Procedure (RAP) 2.5(a). *See also State v. Munguia*, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001). The appellant must show actual prejudice in order to

establish that the error is “manifest.” *Munguia*, 107 Wn. App. at 340 (*citing State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). Furthermore, a party objecting to a jury instruction must “state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused.” CrR 6.15(c). The purpose of CrR 6.15(c) is to give the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Moreover, a jury instruction becomes the law of the case if there was no specific objection to it at trial. *State v. Perez-Cervantes*, 141 Wn.2d 468, 476 n. 1, 6 P.3d 1160 (2000).

The Defendant concedes that he did not object to Instruction 12 below and he does not allege on appeal that the instruction inaccurately stated the law. App.’s Br. at 25. Rather, the Defendant argues that it is unclear how the jury instruction applied to the facts of the case. App.’s Br. at 26. The Defendant, however, fails to show how the instruction constituted manifest error affecting a constitutional right.

Secondly, the Defendant argues that the instruction transferred a burden to the Defendant and “implies” that it is defense if the corporate officer acts in good faith, and claims that the instruction placed a burden on the Defendant to prove that he acted in good faith. App.’s Br. at 27.³ The

³ Instruction 12 stated, in part,

Defendant's argument is without merit because the language in the instruction does not place any burden on the Defendant. The Defendant argues that because the instruction states that corporate officers are required to act in good faith this somehow placed a burden on the Defendant to prove that he acted accordingly. The Defendant, however, fails to explain why this is so and provides no authority to support his claim.

Rather, the Defendant properly points out that 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." App.'s Br. at 27 (emphasis added), *citing 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).

Deal and *Cantu*, however, are distinguishable. In *Deal*, for instance, the instruction at issue stated that the jury could have understood that when a person enters or remains unlawfully in a building there was a mandatory

"A corporation is a person under the law and has an existence separate from its 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 286.

The instruction goes on to include several other paragraphs relating to corporations, and these additional paragraphs were taken from instruction proposed by the Defendant. See CP 219-229.

presumption that the person acted with intent to commit a crime “unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.” *Deal*, 128 Wn.2d at 698. Ultimately the court concluded that a reasonable juror could have concluded that “a finding of intent to commit a crime was required unless Deal proved otherwise.” *Deal*, 128 Wn.2d at 701-02.

Similarly, in *Cantu* the court held that the trial court had impermissibly applied a mandatory presumption in this case when it held that the defense offered no evidence to rebut the statutory inference of criminal intent. *Cantu*, 156 Wn.2d at 827. In both *Deal* and *Cantu*, the court faced instructions that expressly created a mandatory presumption. Thus, the problem in *Deal* and *Cantu* was that “the trier of fact was required to draw a certain inference.” App.’s Br. at 27 citing *Cantu*, 156 Wn.2d 819.⁴

The instruction at issue in the present case, however, never states that the trier of fact is “required” to draw certain inferences nor does the instruction even state that the jury is “permitted” to draw any inferences. Rather, the instruction merely states what an officer of a corporation can or cannot do. Nothing in the instruction creates any permissive or mandatory

⁴ See, also, *State v. McCullum*, 98 Wn.2d 484, 487-494, 656 P.2d 1064 (1983) holding that self defense instruction inappropriately shifted the burden to the defendant when the instruction stated “the burden is upon that defendant to prove that the homicide was done in self-defense.”

presumptions, and the instruction, therefore, does not shift any burden to the Defendant and his arguments to the contrary must fail.

In short, the Defendant waived any objection to Instruction 12 by failing to object below. In addition, the Defendant has failed to show any error with respect to Instruction 12 as the instruction does not place any burden whatsoever on the Defendant.

G. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE: (1) THE DEFENDANT WAS NOT ENTITLED TO A GOOD FAITH CLAIM OF TITLE INSTRUCTIONS; (2) EVEN IF HE HAD BEEN ENTITLED TO IT, THE DECISION TO NOT REQUEST THE INSTRUCTION WAS A TACTICAL DECISION AND TACTICAL DECISION CANNOT SERVE AS THE BASIS FOR AN INEFFECTIVE ASSISTANCE CLAIM; AND, (3) THE DEFENDANT HAS FAILED TO SHOW THAT HE WAS PREJUDICED.

The Defendant next claims that he received ineffective assistance of counsel because his attorney failed to request an instruction on good faith claim of title. App.'s Br. at 28. This claim is without merit because the Defendant was not entitled to such an instruction and because, even if he had been, the decision to not seek such an instruction was a legitimate trial strategy and the Defendant has failed to demonstrate any prejudice.

To establish that counsel was ineffective, the Defendant must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816 (1987), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Furthermore, there is a strong presumption that defense counsel's conduct is not deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). In addition, legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

A reviewing court will find counsel to be ineffective if his representation fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is prejudiced where there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed. *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must prove both prongs of the test in order to prove ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003).

As the Defendant points out, a defendant is only entitled to the good faith claim of title instruction if he can show that openly and avowedly took the property at issue. App.'s Br. at 30, citing *State v. Ager*, 128 Wn.2d 85, 93,

904 P.2d 715 (1995). In the present case there was no evidence that the Defendant “openly and avowedly” took the money at issue. Rather, the overwhelming evidence was that the Defendant did everything he could to hide the fact that he took corporate money. For instance, on the only two checks that the Defendant made a notation referencing “Tye’s Payroll” or “Tye Moore/Owner Draw” (Exhibits 40 and 42) the Defendant hid these transactions by making false entries in the company ledger showing that the checks had been written to Office Depot and Speedy Excavating. Exhibit 1. In addition, the Defendant told Ms. Aldridge that he had not taken any money at all. RP 125-26. The only money that the Defendant openly took during the charging period associated with the Theft count was a line item notation that the Defendant wrote himself a check, number 2048, as “reimbursed expenses” in the amount of \$450. Exhibit 1. The State, however, never claimed at trial that the Defendant was not entitled to that particular reimbursement and the state never introduced any evidence regarding that check. During cross examination the State went through the litany of checks that fell within the charging period for the theft count, but check number 2048 was not mentioned at all. RP 701-10. Rather, the State went through each check that had been written to pay for a personal expense of the Defendant but had been entered into the ledger as expenses relating to the Sroufe project. RP 701-10.

In addition, the Defendant never claimed during his testimony that he ever openly and avowedly took any of the funds at issue, nor was there any evidence that he ever told the Aldridges (or accurately documented) that these checks at issue were used to pay for his personal expenses. For these reasons, the Defendant failed to provide a factual basis to support the good faith claim of title instruction.

Furthermore, even if the Defendant had been able to establish a factual basis for the instruction, the Defendant has still failed to show that the decision to not request the instruction was not a tactical decision. Under the instructions given, the State was required to show that the Defendant wrongfully obtained or exerted unauthorized control over property of another, or by color or aid of deception obtained control over property of another. CP 299. The Defendant, therefore, was free to argue that he thought he was authorized to act as he did, and that is exactly what the Defendant did with respect to the theft count: he argued that he did not wrongfully take any money because he was entitled to the money based on the work he had performed. RP 844.

If, however, the Defendant had requested the good faith claim of title instruction, then the jury would have been instructed that it was a defense to the theft charge that the money was taken “openly and avowedly under a claim of title made in good faith, even though the claim be untenable.”

App.'s Br. at 29. The language of this instruction demonstrates the tactical reason why the defense would not want this instruction. First, it states that, for the defense to work, the money had to have been taken openly and avowedly. As the Defendant had no evidence to support such a claim, this instruction would simply not have worked in the Defendant's favor. Secondly, under the instruction actually given, the Defendant was free to simply argue that he had a right to the money he took whether he took it openly or not.

In short, if the good faith claim of title instruction had been given, the Defendant would have needed to show that the money was taken openly: a fact the Defendant did not need to show under the instructions given by the trial court. Thus, it was a legitimate trial strategy to not request a good faith claim of title instruction, and the Defendant cannot show that his counsel was ineffective for failing to request the instruction.

Finally, the Defendant's claim of ineffective assistance of counsel must fail because he can show no prejudice. As outlined above, there simply was no evidence that the Defendant took the money openly and avowedly. Even if this court were to find that there were several items that arguably were taken openly, these items were wither outside the relevant charging period for the theft charge or were never argued as evidence supporting the theft charge. In addition, any items that were taken openly were of such a

small amount that they could not have had any effect on the jury's ultimate conclusion regarding how much money was taken.

For all of these reasons the Defendant ineffective assistance claim must fail.

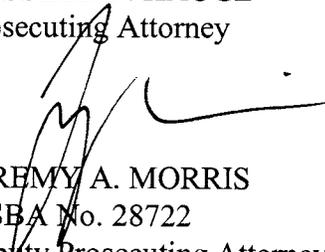
IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED November 8, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



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