

NO. 36378-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

KURT POUST,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
08 MAY 14 AM 8:58  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 05-1-01230-5

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED May 12, 2008, Port Orchard, WA *[Signature]*  
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court erred by giving jury instructions that mirrored the language of the relevant statutes, did not misstate the law or mislead the jury, and allowed the Defendant to argue his theory of the case?

2. Whether the evidence was sufficient when, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt?

3. Whether the Defendant's claim that his trial counsel was ineffective for failing to object to the jury instructions on theft must fail when the Defendant cannot show that his counsel was deficient or that there was prejudice because the instructions accurately stated the law and allowed the Defendant to argue his theory of the case?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The Defendant, Kurt Poust, was charged by second amended information filed in Kitsap County Superior Court with three counts of Theft in the First Degree. CP 98.

## B. FACTS

Leslie Reynolds Taylor hired the Defendant to remodel her home by adding a third story to the house. RP 10, 12. In May of 2003, Ms. Taylor gave the Defendant a check for \$3,146.50 as a down payment to start the construction. RP 13-14. The check was cashed, but the Defendant never started construction on the project and never returned the money. RP 14.

Ms. Taylor's understanding was that there was going to be an effort to have the project done by the Fourth of July. RP 14. At the trial in 2007, Ms. Taylor admitted that she now understands that even if the project had been started in May, the project could not have been completed by the fourth of July. RP 27. Ms. Taylor later learned that the Defendant had left town, so she hired another company to do the remodel. RP 18-19.

In August of 2003, Charles McDowell hired the Defendant to build a deck on his house. RP 34-35. The Defendant told Mr. McDowell that he needed him to provide a partial payment to pay for materials, and Mr. McDowell gave the Defendant a check for \$2,588.65. RP 36, 38, 42. The check was cashed soon thereafter. RP 43.

The Defendant was to start construction in approximately six to eight weeks, RP 39-40. A written contract was prepared by the Defendant, and Mr. McDowell signed the contract and gave it to the Defendant. RP 41. The Defendant told Mr. McDowell that as soon as he got back to the office he

would make Mr. McDowell a copy of the signed contract and send it to him in the mail. RP 41. The Defendant, however, never sent a copy. RP 41.

The Defendant never began construction on the porch, and when Mr. McDowell attempted to contact the Defendant to inquire when the Defendant would be starting the project, the Defendant never returned Mr. McDowell's calls. RP 43-44. Mr. McDowell never actually saw or spoke with the Defendant after he gave the check to the Defendant on August 13, 2007. RP 44.

In June or July of 2003, Patricia Nervik had the Defendant make a bid on a remodel project on her home. RP 49-50. The Defendant worked up a bid and put a contract together. RP 51. Ms. Nervik decided to go ahead and hire the Defendant, and the Defendant told her that she needed to make a down payment of \$10,500. RP 51, 53. Ms. Nervik paid the Defendant \$10,500 on July 30, 2003, and it was her understanding that this money was to be used to pay an architect and to obtain building permits. RP 53-54.

The checks were cashed, but the Defendant never began work on Ms. Nervik's home. Ms. Nervik tried several times to get in touch with the Defendant but her attempts were unsuccessful and she later learned from someone else that the Defendant had left town. RP 56. The Defendant never paid any money to the architect and never obtained the building permits for

Ms. Nervik's project. RP 57-59.

The Defendant testified at trial. With respect to Ms. Taylor's project, although he admitted that physical construction had not been started on the house, he claimed that he had actually spent money hiring a surveyor, engineer and architect others to do a structural analysis and survey of Ms Taylor's property. RP 71-72, 115.

With Respect to Ms. Nervik's project, the Defendant similarly admitted that construction was never started, but claimed that he had retained a surveyor, an engineer and an architect who had performed work on the project. RP 102-3, 114.

The Defendant also claimed that he paid some wrought iron fabricators approximately \$1500 to prepare posts and railings for Mr. McDowell's project. RP 84-85, 102.

The Defendant testified that during the summer of 2007 he had numerous other clients, was very busy, and had "10 to 30" jobs going. RP 85-86. The Defendant also stated that his usual practice was to have frequent contact with his clients. RP 117. Specifically, he stated that he would contact his clients: daily if a project was in production; two or three times a week if a project was in design; and, once every two or three weeks if a project was "in permit." RP 117

In September, the Defendant stated that one of the employees became angry after a payroll check didn't clear and demanded his money and was "intimidating" to the point that the Defendant became worried. RP 89-90. The Defendant admitted that he then left town abruptly and went to Portland, but claimed he did this because he was scared and had been receiving threats. RP 97-99.

The Defendant's claim, however, that he had paid surveyors, engineers, architects, and iron fabricators for work on the three projects was uncorroborated by any written documentation or by any testimony from any of the other people mentioned. Although the Defendant claimed he kept an accounting of everything his business paid out, he did not provide any documentation to support his claim that he had paid various people for work on the three projects. RP 112, 121

At the conclusion of the evidence, the Defendant made a motion to dismiss, claiming that there was insufficient evidence that the Defendant used deception to acquire the property of the victims or that he had the intent to deprive at the time he obtained payment from the victims. RP 123-24. The State countered that the definition of deception was that the Defendant promised to perform what he knew he couldn't deliver or didn't intend to deliver and that the jury was entitled to determine this issue. RP 124-5. The court denied the Defendant's motion noting that there were "competing

interpretations of the evidence” and that the jury would be allowed to weigh the evidence. RP 125.

The State filed proposed jury instructions, and when asked, the Defendant specifically stated that he was not proposing any other instructions and that the State’s proposed instructions were sufficient. CP 112-34, RP 92.

The court instructed the jury on the law. CP 151-70, RP 127. The three “to convict” instructions stated that the State was required to prove, inter alia, that the Defendant, by color or aid of deception, obtained control over the property of another with the intent to deprive the other person of the property. CP 159-61. Instruction Number 10 stated that,

By color or aid of deception means that the deception operated to bring about the obtaining of the property or services. It is not necessary that deception be the sole means of obtaining the property or services.

CP 163, WPIC 79.03. The trial court also used WPIC 79.04, which stated that,

Deception occurs when an actor knowingly promises performance which the actor does not intend to perform or knows will not be performed.

CP 164.

In closing arguments, the State argued that the Defendant had deceived the three victims by promising to do work while knowing that the

work was not going to be completed and promised “to do things that he knew he wouldn’t be able to deliver on.” RP 128-29. The State further argued that the jury had to look at all the circumstances to determine what the Defendant’s intent was. RP 129. The State pointed out that the Defendant had said his usual practice was to contact his clients fairly regularly, yet the three victims testified that the Defendant never had any contact to speak of with the Defendant. RP 132. The State also pointed out that it was required to prove that the Defendant promised to do work he knew he could not deliver or did not intend to deliver. RP 136. At the end of the argument, the State summed up by stating,

What matters is that Mr. Poust deceived three people in 2003. He made promises he knew he could not deliver. And that is why he’s guilty of Theft in the First Degree, three counts.

RP 138.

The Defendant argued in closing that the State had failed to prove that it was the Defendant’s intent at the time the contracts were entered to deprive the victims of their money. RP 138-39. The Defendant noted that the State was alleging that he “never had the intent to complete the work.” RP 141. To counter this allegation, the Defendant argued that the testimony that he hired other people on the jobs showed that he had intended to do the work. RP 141. Later, the Defendant again argued that the evidence did not show that he

had “the intent to deprive [Ms. Taylor] from the beginning.” RP 143. The Defendant did not dispute that money changed hands; rather, the Defendant argued that “the intent, when the money was received, was not to deprive that person from the get-go.” RP 145-46. Again, the Defendant argued that there was not evidence to prove beyond a reasonable doubt that “he had the intent the day he signed these contracts or that he had some plan to where he was going to get away with the money.” RP 147.

In rebuttal, the State argued again that on the issue of intent the jury had to go back and look at the “circumstances when these contracts were done.” RP 150. The State again pointed out that there was no evidence other than the Defendant’s own words to show that he ever intended to complete the jobs. RP 150-51. Rather, the evidence showed that the Defendant never intended to complete the work and that that was the deception. RP 151.

After deliberating, the jury returned guilty verdicts on all three counts. CP 171. The trial court then imposed a standard range sentence. CP 189. This appeal followed.

### III. ARGUMENT

#### A. THE TRIAL COURT DID NOT ERR BY GIVING JURY INSTRUCTIONS THAT MIRRORED THE LANGUAGE OF THE RELEVANT STATUTES, DID NOT MISSTATE THE LAW OR MISLEAD THE JURY, AND ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE.

The Defendant argues that the court's instructions to the jury regarding theft in first degree relieved the State of its burden of proving that the Defendant had the intent to deprive at the time he obtained the victims' property. App.'s Br. at 5-6. This claim is without merit because the instructions did not misstate the law or mislead the jury, and the Defendant was able to argue his theory of the case.

The instructions used by the trial court below directly mirrored the language of the operative statute and required the State to show that the Defendant used color or aid of deception to obtain control over property of another, with intent to deprive the other person of such property. CP 159-61, RCW 9A.56.020. In addition, the instructions accurately stated that "by color or aid of deception" means that the deception operated to bring about the obtaining of the property or services. CP 163, RCW 9A.56.010. Finally, the instructions stated that deception occurs when an actor knowingly promises performance which the actor does not intend to perform or knows will not be performed. CP 164. Again, this language is from the controlling statute. See

RCW 9A.56.010.

Furthermore, throughout the closing arguments both parties repeatedly argued that the State was required to show that the deception and intent to deprive were present when the Defendant first obtained the property. *See*, RP 128-29, 136, 138-39, 141, 143, 145-47, 150. These arguments, again, mirrored the statutory language and were proper. The instructions, therefore, were completely proper because they did not misstate the law and allowed both parties to argue their theory of the case.

The Defendant apparently argues that the instructions were “infirm” because the charging dates included a range of dates. App.’s Br. at 5-6. The fact that the charging date included a range of dates, however, does not change the fact that the instructions still specifically required the State to prove that the Defendant had the requisite intent at the time he obtained the money. Although the range of dates allowed some flexibility with respect to the specific date of the crime, the instructions still required the State to prove the crime, namely, that the Defendant obtained property by deception with the intent to deprive.

The Defendant claims that the use of a range of dates allowed inferences of intent “occurring after the time Mr. Poust obtained the money.” App.’s Br. at 6. This argument, however, is without merit because the

instructions specifically and clearly required that the State prove that the Defendant used deception to *obtain* the money.<sup>1</sup> In addition, the instructions specifically stated that deception occurs when an actor knowingly promises performance which the actor does not intend to perform or knows will not be performed. CP 164. Finally, the arguments of both parties further solidified what the instructions already made clear, namely, that the State had to prove that the Defendant used deception to obtain the funds and had the intent to deprive at that time. No contrary argument was ever made.

Furthermore, the Defendant's reliance on *State v. Reid*, 74 Wn. App. 281, 872 P.2d 1135 (1999) is misplaced, as that case involved an instruction not used in the present case. In *Reid*, the court gave an instruction that stated, "fraudulent intent may be inferred from the retention for a long period of time of property to which one has no right." *Reid*, 74 Wn. App. at 284. The court held that this specific instruction was improper. *Reid*, 74 Wn. App. at 289. *Reid*, therefore, is distinguishable from the present case because no such

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<sup>1</sup> The reason for the use of a range of dates is apparent from the Second Amended Information. CP 98. The specific charging language alleged that the Defendant committed the crime by either obtaining the property by color or aid of deception or by wrongfully obtaining or exerting unauthorized control over the property. Under the exerting unauthorized control prong, the relevant charging period would have extended throughout the time period where the Defendant retained the victim's money. Thus, a range of dates was needed. When the jury was ultimately instructed, however, the State chose to only go under the "color or aid of deception prong." While the State could have conceivably moved to amend the information and narrow the relevant charging dates, such an amendment was unnecessary as the specific date of the offense was not material and because there was some uncertainty about which specific dates the Defendant obtained the various checks as well as when he actually cashed the checks and obtained the actual funds. The use of a range of

instruction was given in the present case. Rather, the trial court's instruction here merely mirrored the relevant statutory language.

For all of the above mentioned reasons, the Defendant's argument that the instructions were improper is without merit.

**B. THE EVIDENCE WAS SUFFICIENT BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.**

The Defendant next claims that the evidence was insufficient. App.'s Br. at 6-9. This claim is without merit because, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the charged crimes 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.*

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dates, therefore, was still appropriate.

*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 relevant inquiry, therefore, is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991)(emphasis in original), *citing State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

A defendant commits the crime of theft in the first degree if he or she, by color or aid of deception, obtains control over the property or services of another exceeding \$1500 with intent to deprive the other person of such property or services. RCW 9A.56.020, 030. Deception occurs when a person promises performance which the actor does not intend to perform or knows will not be performed. RCW 9A.56.010.

The Defendant essentially argues that the evidence was insufficient because “the facts of the present case are not inconsistent with the hypothesis that Mr. Poust intended to perform at the time of the contract.” App.’s Br. at 8. The contention is incorrect, however, because “the existence of hypothetical explanations consistent with innocence does not mean there is insufficient evidence to support a conviction,” even if that evidence is circumstantial as opposed to direct. *State v. V.J.W.*, 37 Wn. App. 428, 433, 680 P.2d 1068 (1984); *See also, State v. Gosby*, 85 Wn.2d 758, 764-67, 539 P.2d 680 (1975)(the existence of innocent explanations does not preclude a finding of guilty). A Defendant is no more entitled to prevail on a sufficiency challenge merely because he can come up with a possible innocent explanation than he is entitled to have a jury believe his explanation at trial. The actual issue, thus, is not whether the Defendant can come up with an innocent explanation, but rather, the test is whether a reasonable jury could have found that the Defendant committed the crime beyond a reasonable doubt. In addition, the Defendant’s arguments fails to acknowledge the fundamental principal that in a sufficiency challenge the court is to view the evidence in a light most favorable to the State (and not in a light most favorable to a defendant).

In the present case the jury was able to view the Defendant’s testimony in person and was uniquely able to access his credibility. The jury

could have simply disbelieved the Defendant's "innocent" explanations that were completely uncorroborated. Thus, on appeal, the sole issue is whether the evidence was sufficient when viewed in a light most favorable to the State. Here the evidence showed that over a relatively short period of time the Defendant took money from three victims in exchange for his promise to perform construction projects. Each victim testified that no work was performed and that the Defendant did not maintain contact with them despite his own admissions that he usually maintained frequent contact with his clients (and often despite the victim's repeated attempts to contact the Defendant). From this, a reasonable jury could have inferred that the Defendant never had any intention of performing as promised. In addition, the fact that there were three individual victims also is evidence that the Defendant obtained the funds by deception and knowingly promised performance which he did not intend to perform or knew would not be performed. *See, for example, State v. Bonefield*, 37 Wn. App. 878, 683 P.2d 1129, review denied, 102 Wn.2d 1014 (1984)(holding evidence was sufficient to support conviction for first degree theft when multiple numerous victims paid defendant deposits for cord wood they never received); *State v. Joy*, 121 Wn.2d 333, 851 P.2d 654 (1993)(where court held that although evidence that contractor took money from five victims but did not perform promised work was insufficient to support conviction for theft by

embezzlement, remand for a new trial was appropriate on theft by deception prong); *Powers v. State*, 963 So.2d 679, 692 (Ala.Crim.App., 2006)(Evidence of other similar failures to perform may be considered to establish that the defendant never intended to perform the promise made, and the defendant's fraudulent intent can be inferred from the defendant's conduct and the circumstances of the case).

The fact the Defendant had "10 to 30" jobs going this same time period, as well as the fact that he later left the area without contacting the victims and apparently had financial difficulties was further circumstantial evidence that the Defendant knew from the very beginning that he would not be completing the work he had promised. From all of this evidence the jury could have concluded that the Defendant was simply defrauding clients and raising money to take with him when he eventually fled the area.

In addition, the Defendant's testimony showed that he thought everything was "alright" because he had a bond and assumed that the victims would be repaid from his contractor's bond. From this testimony, the jury could have also reasonably inferred that the Defendant obtained the funds with intention of never performing the work and was attempting to raise funds and leave the area. In essence, the jury could have concluded that the Defendant could have viewed his deceptions as a quick way to raise cash that caused only a minor harm, as the Defendant himself seemed to believe the

existence of the bond made his actions acceptable. The fact that the victims might later be reimbursed by the bond does not change the fact that the act is still a theft, however, as intent to permanently deprive is not necessary to support a conviction of theft by deception. *State v. Vargas* (1984) 37 Wn. App. 780, 683 P.2d 234.

The fact that the Defendant was able to posit alternative explanations for his behaviors does not prevent a jury from reaching a contrary conclusion nor does it prevent a reasonable jury from finding that each of the Defendant's actions were circumstantial evidence supporting the conclusion that the Defendant never intended to perform as promised. As a reasonable jury could have found that the Defendant's explanations were not credible and could have concluded that the evidence as a whole showed that he never intended to complete the work he promised to do, the evidence was sufficient.

**C. THE DEFENDANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE JURY INSTRUCTIONS ON THEFT MUST FAIL BECAUSE THE DEFENDANT CANNOT SHOW THAT HIS COUNSEL WAS DEFICIENT OR THAT THERE WAS PREJUDICE BECAUSE THE INSTRUCTIONS ACCURATELY STATED THE LAW AND ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE.**

The Defendant next claims that he received ineffective assistance of counsel. App.'s Br. at 9-12. This claim is without merit because the

Defendant has failed to show deficient performance or 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). A reviewing court will find counsel to be ineffective if his or her 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).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The Defendant's claim regarding ineffective assistance in the present case is based on his argument that the jury instructions were improper.

App.'s Br. at 11-12. As outlined above, however, the jury instructions mirrored the operative statutes and accurately stated the law. In addition, the Defendant was allowed to argue his theory of the case; a point that the Defendant concedes on appeal. App.'s Br. at 11. In short, the instructions required the State to prove that the Defendant obtained the victims' property through by color or aid of deception and that the deception "operated to bring about the obtaining of the property." CP 159-61, 163. As these instructions were appropriate, the Defendant has failed to show that his trial counsel was deficient for failing to object to the instructions. In addition, the Defendant can show no prejudice from the use of instructions that accurately stated the law and allowed his attorney to argue his theory of the case.

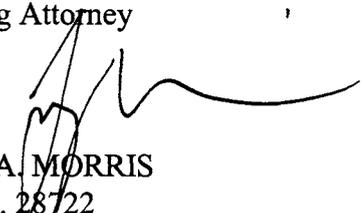
#### IV. CONCLUSION

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

DATED May 12, 2008.

Respectfully submitted,

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