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COURT OF APPEALS  
DIVISION II

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No. 37312-2-II

STATE OF WASHINGTON  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO  
DEPUTY

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STATE OF WASHINGTON,

Respondent,

v.

DEMETRIA S. HESTER,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Frederick Fleming, Judge

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*APPELLANT'S OPENING BRIEF*

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ..... 1

C. STATEMENT OF THE CASE ..... 2

    1. Procedural Facts ..... 2

    2. Testimony at trial ..... 2

D. ARGUMENT ..... 6

    THERE WAS INSUFFICIENT EVIDENCE TO PROVE ALL  
    OF THE ESSENTIAL ELEMENTS OF THE CRIMES ..... 6

E. CONCLUSION ..... 10

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995) . . . . . 6  
State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). . . . . 6  
State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992). . . . . 6, 10  
State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) . . . . . 7  
State v. Scooby, 117 Wn.2d 55, 810 P.2d 1358 (1991). . . . . 8

WASHINGTON COURT OF APPEALS

State v. Simmons, 113 Wn. App. 29, 51 P.3d 828 (2002) . . . . . 8

FEDERAL AND OTHER STATE CASELAW

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) . . . 6

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Article I, § 22. . . . . 6  
Fourteenth Amend. . . . . 6  
RCW 9A.56.020(1)(a) . . . . . 2  
RCW 9A.56.040(1)(a) . . . . . 2, 7  
RCW 9A.60.010. . . . . 9  
RCW 9A.60.020(1)(a) . . . . . 2, 7, 8  
RCW 9A.60.020(1)(b). . . . . 2, 8, 9  
Sixth Amend . . . . . 6

A. ASSIGNMENT OF ERROR

There was insufficient evidence to prove all of the essential elements of the crimes.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. To prove second-degree theft, the prosecution had to show that Hester wrongfully obtained or exerted unauthorized control over the property of another with intent to deprive him or her of such property.

Was there insufficient evidence to prove that Hester wrongfully obtained or exerted unauthorized control over money she got from cashing checks when there was insufficient evidence to prove that she knew anything was wrong with those checks? Further, was there insufficient evidence to prove an intent to deprive the bank of the money when Hester gave correct, current identification information, including providing her own fingerprint, in cashing the checks?

2. To prove forgery, the prosecution had to show that Hester falsely made, completed or altered a written instrument or possessed, uttered, offered, disposed of or put off as true a written instrument she knew to be forged. There was no evidence Hester made, completed or altered checks she received for payment of her work, and the checks appeared even to the bank teller to be legitimate. Nor was there evidence Hester knew the maker was fictitious or had not authorized the making of the checks, that the person who gave her the checks had done so without authority or that Hester herself had altered the checks. Was there insufficient evidence to prove the crimes?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Demetria Hester was charged by information with three counts of second-degree theft and four counts of forgery. CP 1-4; RCW 9A.56.020(1)(a); RCW 9A.56.040(1)(a); RCW 9A.60.020(1)(a) and (b).

Trial was held before the Honorable Frederick W. Fleming on October 25, 29-31, 2007, after which a jury acquitted Hester of two counts of forgery and one count of theft but found her guilty of the other two counts of theft and two counts of forgery. CP 69-75.<sup>1</sup> On January 4, 2008, the court ordered Ms. Hester to serve a “first-time offender” sentence. RP 210-15.

Hester appealed, and this pleading follows. See CP 96-107.

2. Testimony at trial

Holly Williams was working as a teller at a Wells Fargo Bank in Tacoma at 6<sup>th</sup> and Union on May 23, 2006 when, at about 9:42 a.m., a woman later identified as Demetria Hester came in and cashed a check for \$753.56. RP 31-38. Hester presented proper identification, gave a fingerprint when requested, and signed the back of the check, providing her address and phone number. RP 33-34, 39-40. This was all standard, because Hester did not have an account at Wells Fargo at the time. RP 53. Nothing about the check seemed improper, and Williams cashed it. RP 33-48. The check was made out to Hester and was drawn on the Wells Fargo account of “Cirque du Soleil America.” RP 48.

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<sup>1</sup>The verbatim report of proceedings consists of 6 chronologically paginated volumes, which will be referred to as “RP.”

The day before, at about 2:23 in the afternoon, Hester had cashed another check, also drawn on the same account and made out to her, in the amount of \$653.56, at a Wells Fargo in the Tacoma Mall. RP 46-48. About a half hour later, Hester had gone to a Money Mart to cash a check made out to her from a different bank, drawn on the account of Printing Control Graphics, but had been told that the check could not be cashed because it could not be verified. RP 92. A person from Printing Control Graphics testified that Money Mart had telephoned and asked for check verification but had been told the check was not valid. RP 108-109. Money Mart did not cash the check and instead gave it back to Hester. RP 108-109, 140.

Hester had also cashed a check drawn on the Cirque du Soleil account at about 9:12 on the morning of May 23, at a different Wells Fargo branch in Westgate. RP 48. The check was for \$753.56. RP 48. She had deposited another check from Printing Control Graphics into her savings account at her bank. RP 121-22.

A “financial crime investigator” for Wells Fargo testified that he learned of a problem with the account of “Cirque du Soleil” in May of 2006, after receiving a file with “some check fraud items on it” and a call from Tacoma police RP 42-45. He searched the video system and found pictures of Hester at the Tacoma Mall branch on May 22, 2006, at 2:23 p.m., at the 6<sup>th</sup> and Union branch at 9:12 a.m. on May 23, 2006, and, at about 9:30 a.m. on May 23, at the Westgate branch. RP 46-47.

The investigator opined that the Cirque du Soleil checks were “computer generated” using a software that he declared was “known for check fraud.” RP 49. Hester’s fingerprints were the fingerprints on the

Cirque du Soleil checks. RP 75-83.

Demetria Hester explained that she had been given the checks by one of her employers, "Do Right Services," a janitorial company, in payment for her work. RP 116-19. She was supposed to get paid once a month and was working from 25-30 hours per week at \$10.50 an hour, but had not been paid for awhile and had talked to the people at the state department of Labor and Industries, asking what she should do. RP 116. After she requested payment through "L and I," some checks came for her in the mail. RP 116. Hester called the man who had hired her for "Do Right," Kevin Lee, and asked him to explain. RP 116. He said the checks were payment for her services and told her that the checks had different payor names because his janitorial service company was no longer in business and he was paying her from two other companies he owned. RP 117-19.

Hester received two checks on May 21<sup>st</sup>, and three more on May 22. RP 120. Hester took the two checks she had received on May 21 and went to Money Mart the next day. RP 120. She was planning to cash the Printing Control Graphics check there, but they refused and gave the check back. RP 120. The Money Mart teller said she could not cash it because she could not "verify it." RP 121. Hester had not taken the check to a bank because the check was drawn on an out-of-state bank and she wanted to cash it right away. RP 121-22. When Money Mart would not cash it, Hester threw that check away. RP 121. When she got a later check from the same company, she deposited it into her bank account. RP 121.

Hester said she cashed the three other checks, from "Cirque du Soleil," at the bank that was on the check, Wells Fargo. RP 121. She

needed the cash to get money orders to pay her bills. RP 122. She went to different branches that were near her jobs. RP 122. She cashed one on the 23<sup>rd</sup> on her way to work, without realizing she had the other one with her in her car. RP 123. Once she discovered she had the other one with her, she stopped at another branch on her way to work to cash it. RP 123. She was supposed to be at work at around 10:00 and was going to stop at “Big Lots” prior to that to pick up a check for a job there. RP 137-40. She did so, talking to “Pam” at Big Lots, then stopped at a second branch of Wells Fargo nearby. RP 137, 141.

Hester explained that, although she had been working for “Do Right” since the beginning of March without pay, she continued working there because she was advised by the people at Labor and Industries that she should continue to work for Lee to get as much information as she could about him in order to file a charge if she was not paid. RP 125. At the time she got the checks, Lee owed her over \$1,500 a month, nearly \$4,500 in total. RP 131.

No one told her that the check at the money mart was not good at all. RP 132. They only told her it could not be “verified.” RP 132. Hester has never worked at a bank so she did not really know what that meant, just assuming that it meant the Money Mart person could not get it touch with someone to verify it at that time. RP 139. Hester freely admitted she had never done any work for either Cirque du Soleil or Printing Control Graphics and had no personal relationship with them. RP 143. She only cashed the checks on their accounts because of what Lee told her. RP 143.

When she got the checks, all of them had information attached to

them with stuff about “withholdings, MICA [sic] - - whatever they take out for Social Securities and stuff like that for your check.” RP 144.

No one from Cirque Du Soleil testified did that the checks were not authorized. RP 164.

Hester was acquitted of second-degree theft for the check she cashed on the 22<sup>nd</sup> at the Tacoma Mall Wells Fargo. CP 69. She was also acquitted of two counts of forgery for unspecified checks she cashed or tried to cash on the 22<sup>nd</sup>. CP 70, 71. She was found guilty of two counts of second-degree theft with Wells Fargo as the victim for the two checks cashed on May 23 at Wells Fargo branches, as well as two counts of forgery for those same checks. CP 72-75.

D. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO PROVE ALL OF THE ESSENTIAL ELEMENTS OF THE CRIMES

Under both the state and federal due process clauses, the prosecution must prove each element of its case, beyond a reasonable doubt, before a defendant can be found guilty. In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); Sixth Amend.; Fourteenth Amend.; Article I, § 22. Where the prosecution fails to present constitutionally sufficient evidence, reversal and dismissal is required. See State v. Markle, 118 Wn.2d 424, 440-41, 823 P.2d 1101 (1992).

Sufficiency of the evidence is tested by examining whether, taken in the light most favorable to the state, a rational trier of fact could have found the essential elements of the crime, beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). In addition,

all reasonable inferences are drawn in the state's favor and against the defendant. See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In this case, this Court should reverse and dismiss the convictions for forgery and second-degree theft, because the state failed to present sufficient evidence to prove all of the essential elements of the crimes.

First, there was insufficient evidence to prove Hester guilty of the two counts of second-degree theft. A person is guilty of that crime if he or she commits theft of property or services "which exceed(s) two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value." RCW 9A.56.040(1). A person commits "theft" if he or she "wrongfully obtain[s] or exert[s] unauthorized control over the property or services of another" with the intent "to deprive him or her of such property." RCW 9A.56.020(1)(a). Hester was found guilty of having "wrongfully obtained" the property of Wells Fargo, i.e., the money from the cashed checks, with intent to deprive Wells Fargo of that money. CP 72-73.

Thus, to prove Hester guilty as charged, the prosecution was required to prove that Hester had "wrongfully obtained" the money with intent to deprive Wells Fargo of it. The evidence was not sufficient to prove those elements. In cashing the checks, Hester presented proper and sufficient identification with her actual name and contact information. She gave her fingerprint when asked. In short, she did nothing to conceal her identity from the bank or in any way deceive them as to her whereabouts, which would indicate a guilty mind. There was also nothing about the checks which would indicate that the average person like Hester would be

put on notice that the checks were improper - the bank teller, Williams, specifically scrutinized the check she cashed and saw nothing untoward.

Second, there was insufficient evidence to prove the crimes of forgery for which Hester was convicted. The two counts for which the jury found guilt, counts VI and VII, were for the checks on the Cirque du Soleil account, cashed on May 23, 2006. CP 74-75. The crime of forgery is defined in RCW 9A.60.020(1)(a) and (b), which provide:

- (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.

There was no evidence that Hester in any way made, completed, or altered the checks she received from Lee. Thus, the only potential grounds upon which she could be convicted of forgery is if the prosecution proved that she cashed the two checks “with intent to defraud” and “knowledge” that those checks were forged. See e.g., State v. Scoby, 117 Wn.2d 55, 61-62, 810 P.2d 1358 (1991).

Again, the prosecution failed to present sufficient evidence to prove that those essential elements. To prove intent to injure or defraud under the forgery statute, the prosecution must show an intent to deceive and cause harm. State v. Simmons, 113 Wn. App. 29, 33, 51 P.3d 828 (2002). Thus, to prove Hester guilty of forgery for presenting the check to the bank, the prosecution was required to prove that she did so with intent to deceive the bank and cause harm. But there was no evidence that Hester knew the checks were in any way defective. The checks appeared even to the bank teller to be legitimate.

In addition, there was insufficient evidence to support a finding that Hester presented the checks with the required knowledge. Under the statute, the defendant must have possessed, uttered, offered, disposed of, or “put[] off as true” a written instrument “which he *knows* to be forged.” RCW 9A.60.020(1)(b) (emphasis added). An instrument is only forged if it has been “falsely made, completed, or altered.” RCW 9A.60.010(7). RCW 9A.60.010 defines “falsely make,” “falsely complete,” and “falsely alter,” as follows:

(4) To “falsely make” a written instrument means to make or draw a complete or incomplete written instrument which purports to be authentic, but which is not authentic either because the ostensible maker is fictitious or because, if real, he did not authorize the making or drawing thereof;

(5) To “falsely complete” a written instrument means to transform an incomplete written instrument into a complete one by adding or inserting matter, without the authority of anyone entitled to grant it;

(6) 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. Thus, to prove the essential “knowledge” element of the crime, the prosecution was required to prove 1) that Hester knew that the check was not authentic because its maker was fictitious or, if real, did not authorize its making or drawing, or 2) that Hester knew that someone had made the check “complete” by adding something that person had not been given authority to do, or 3) that Hester knew that someone had altered the check in some way without authorization to do so.

There was insufficient evidence to prove such knowledge here.

There was no evidence that Hester knew that Cirque du Soleil did not exist

or did not authorize the making or drawing of the checks, or that she knew the checks had been in any way “altered” without authority. The evidence indicated only that she had been given the checks in payment for her services, along with a plausible explanation from Lee.

Because there was insufficient evidence to support the convictions, this Court should reverse and dismiss the convictions for theft and forgery. See Markle, 118 Wn.2d at 440-41.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 8<sup>th</sup> day of September, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Ms. Demetria Hester, 1756-106th St. S., Apt. B-302, Tacoma, WA. 98444-8827.

DATED this 8th day of September, 2008.



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