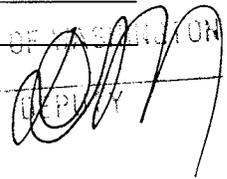


NO. 37312-2

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COURT OF APPEALS
DIVISION II

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

DEMETRIA S. HESTER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming, Judge

No. 07-1-02012-0

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence for a trier of fact to find defendant guilty of second degree theft and forgery?

B. STATEMENT OF THE CASE.

1. Procedure

On April 16, 2007, Pierce County Prosecuting Attorney's Office charged Demetria Hester 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).

On October 25, 2007, the matter proceeded to trial before the Honorable Frederick W. Fleming. RP 1. On October 31, 2007, the jury found defendant guilty on two counts of theft and two counts of forgery; the jury acquitted defendant of one count of theft and two counts of forgery. CP 81-91.

On January 4, 2008, defendant was sentenced to 12 months of community custody, and 240 hours of community service. CP 81-91. On February 4, 2008, defendant filed a timely notice of appeal. CP 96-107.

2. Facts

Defendant started working for Do Right Services, a janitorial company, in early March 2006. RP 123, 125. Defendant worked

anywhere from 25-30 hours a week and was supposed to get paid \$10.50 an hour. RP 116. Defendant claims she never received a paycheck from Do Right Services. RP 116. Defendant said that she called "L & I" to inquire about not receiving payments. RP 116. After defendant called "L & I," defendant received two checks in the mail on May 21, 2006, and three checks in the mail on May 22, 2006. RP 120, 133. RP 116, 126. Two of the checks were issued from a company Printing Control Graphics, and the three checks were issued from a company Cirque du Soleil America. RP 121. Defendant did not have a relationship with either Printing Control Graphics or Cirque du Soleil America. RP 109, 143. After receiving the checks in the mail, defendant called her employer, Mr. Lee, to inquire if the checks were payment for her services. RP 117. Mr. Lee confirmed that the checks were payment for her services. RP 117. Mr. Lee told defendant Do Right Services was no longer in business and he owned the Printing Control Graphics and Cirque du Soleil. RP 119.

On May 22, 2006, defendant cashed a check issued from Cirque du Soleil America for \$653.56 at the Tacoma Mall Wells Fargo at 2:23 p.m. RP 52. Later that afternoon at 4:30 p.m., defendant attempted to cash another check for \$853.56 from Printing Control Graphics at a Money Mart in Tacoma. RP 60, 66, 120, 131. When defendant attempted to cash the check, Money Mart called Printing Control Graphics to verify the accuracy of the check. RP 108. Nancy Charpentier, an accounting representative from Printing Control Graphics, told Money Mart that the

check was not legitimate and was a forgery of some kind. RP 108. Ms. Charpentier also told Money Mart to call the police. RP 108. Money Mart refused to cash the check and gave the check back to defendant. RP 120. Defendant threw the check away. RP 121. Defendant said Money Mart told her they could not cash the check because they could not verify it. RP 121. Defendant said she received a second check from Printing Control Graphics that she deposited at Bank of America, where she has an account. RP 121. Money Mart copied the check and forwarded it to the police. RP 59.

On May 23, 2006, defendant, went to the Tacoma Mall Wells Fargo and cashed a check for \$753.56 at 9:12 a.m. RP 47-48, 52. Shortly thereafter, at 9:29 a.m. that same morning, defendant went to the Westgate Wells Fargo and cashed another check for \$753.56. RP 47, 52. The driving distance between the two branches is less than fifteen minutes. RP 48. Defendant did not have an account with Wells Fargo. RP 53. Defendant said she did not deposit checks in her Bank of America account because she had to pay bills. RP 122. When asked why she went to three different Wells Fargo branches, defendant said it was because they were near her job. RP 122. Regarding the two checks cashed in the morning at two separate Wells Fargo branches, defendant said she did not cash them at the same time because one was in her car and one was in her purse. RP 123. Defendant also said she did not go back to the first Wells Fargo because she was on her way somewhere else. RP 135.

David Barnes, a financial crime investigator for Wells Fargo, testified that he learned of a problem with account holder Cirque du Soleil America in May 2006, after receiving a file with “some check fraud items on it”, and a call from a Tacoma Police detective. RP 42-45. Mr. Barnes searched the video system and found pictures of defendant at the Tacoma Mall Wells Fargo on May 22, 2006, at 2:23 p.m., at the 6th and Union branch at 9:12 a.m. on May 23, 2006, and at the Westgate branch at 9:29 a.m. RP 46-47.

Mr. Barnes noted that the Cirque du Soleil checks were computer generated using a software that is known for check fraud. RP 49. Mr. Barnes could tell that the checks were computer generated because the serial numbers were the largest items on the checks. RP 49. Defendant’s fingerprints matched the fingerprints on the Cirque du Soleil checks. RP 82-83.

C. ARGUMENT.

1. THE JURY HAD SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF SECOND DEGREE THEFT AND FORGERY.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review

is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the

witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. The prosecution presented sufficient evidence for a rational trier of fact to find defendant guilty of second degree theft.

To prove a defendant guilty of theft in the second degree, the State had to convince a jury of the following elements beyond a reasonable doubt: (1) that on or about the 23rd day of May, 2006, defendant wrongfully obtained or exerted unauthorized control over property of another; (2) that property exceeded \$250 in value; (3) that the defendant intended to deprive the other person of the property; (4) and that the acts occurred in the State of Washington. Jury Instruction 13, RCW 9A.56.040(1). Appellant is disputing the first and third elements.

There is no question defendant wrongfully obtained the checks and intended to deprive the money from Wells Fargo. While the checks in question were issued to defendant, the checks were issued from companies that defendant had no relationship with. RP 143.

In addition, defendant's behavior is consistent with an overall scheme to cash fraudulent checks. Defendant attempted to cash four checks, at four different times, at three different locations, within a 24 hour time period. RP 52, 66, 47-48. Because defendant received the checks in two separate groups, defendant could have cashed multiple checks at the same time. In addition, while defendant maintained an account at Bank of America, where she cashed one of five checks, defendant does not offer a logical or coherent explanation for cashing the other four checks at different times, and at locations where she did not have accounts. RP 121. Defendant maintains that she cashed the checks at banks close to her work. RP 122. Defendant also maintains that she went to two different Wells Fargo locations within twenty minutes of each other because she had left one check in the car while she was at the first bank, so she went to a different bank to cash the second check. RP 135. Because a reasonable person would likely cash the checks at the same time, and because a reasonable person would likely cash the checks at one's personal bank, defendant's story raises credibility concerns.

Thus, the jury properly inferred that defendant wrongfully obtained checks with an intention to deprive others as evidenced by her erratic and illogical behavior.

- b. The prosecution presented sufficient evidence for a rational trier of fact to find defendant guilty of forgery.

To prove a defendant guilty of forgery, the State had to convince a jury of the following elements beyond a reasonable doubt: (1) that on or about May 23, 2006, defendant possessed, offered, disposed of or put off as true, a written instrument which had been falsely made, completed or altered; (2) that defendant knew that the instrument had been falsely made, completed or altered; (3) that defendant acted with the intent to injure or defraud; and (4) that the acts occurred in the State of Washington. Jury Instructions 18 & 19, RCW 9A.60.020(1). Defendant is disputing the first and third elements.

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.

Mere possession of a forged item is not sufficient to prove knowledge, however possession with slight corroborating evidence may be sufficient to prove knowledge. *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358 1362 (1991) (citing *State v. Douglas*, 71 Wn.2d 303, 428 P.2d 535 (1967); *State v. Ladely*, 82 Wn.2d 172, 175, 509 P.2d 658 (1973))). While appellant claims there was “nothing about the checks which would indicate that the average person like Hester would be put on notice that the checks were improper,” the record does not substantiate that assertion. (See Appellant’s Brief pp. 7-8). There is ample corroborating evidence demonstrating defendant acted with knowledge. First, the nature of the check supports an inference that defendant knew the checks were illegitimate. Cirque du Soleil and Printing Control Graphics had no relation with defendant, as defendant was never employed by either company. RP 143. Second, after Money Mart refused to cash one of the checks after verifying the check was fraudulent, defendant proceeded to cash the two remaining checks at two different locations. RP 47-48, 52. While a reasonable person would have followed through with one’s employer and verified the legitimacy of the other checks, defendant

proceeded to cash the remaining checks. Because defendant continued to cash checks after multiple notices that the checks were improper, defendant's actions indicate that defendant knew that her behavior was illegal.

In addition to acting with knowledge that the checks in question were fraudulent, defendant acted with intent to deprive the banks of the money as evidenced in the argument in section a. Another factor indicating defendant acted with knowledge and intent is the discrepancy in defendant's account of the amount of money she claimed was owed to her, versus the maximum amount of money she could have earned. While defendant claims Mr. Lee owed her \$4,500.00 for her work at Do Right, the figure is not an accurate reflection of the amount she could have earned. RP 131. Defendant claims to have worked for Do Right for 3 months. RP 131. Defendant was supposed to be paid \$10.50 an hour. RP 116. In the best case scenario, defendant would have worked 30 hours a week for all 12 weeks and would be entitled to a gross income of \$3,780.00, not \$4,500.00. RP 116. Defendant's story does not add up.

Thus, viewing the evidence in the light most favorable to the state, there is no question defendant knew the checks were forged. The conduct of defendant and the circumstances in this case substantiate that the defendant acted with knowledge and intent.

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D. CONCLUSION.

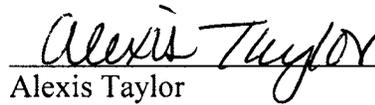
For the foregoing reasons, the State respectfully requests this Court affirm defendant's conviction and sentence.

DATED: November 13, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088


Alexis Taylor
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11-13-08 
Date Signature