

COURT OF APPEALS
DIVISION II

NO. 38995-9-II

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

STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON, Respondent

v.

AARON MICHAEL FALLON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE DIANE M. WOOLDARD
CLARK COUNTY SUPERIOR COURT
CAUSE NO. 08-1-01010-4 and 08-1-01007-4

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The facts necessary to respond to the assignments of error will be set forth in the argument section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the State failed to prove beyond a reasonable doubt that the defendant committed the crime of forgery.

The defendant was charged by Third Amended Information with the crime of forgery. (CP 23). The allegations are set forth as follows:

That he, AARON MICHAEL FALLON, in the County of Clark, State of Washington, on or about March 1, 2008 with intent to injure or defraud did falsely make, complete or alter a written instrument described as follows, to-wit: Check No 046451, dated February 21, 2008, in the amount of \$4,500.00, drawn on the account of Goodway, at the Bank of America, made payable to Aaron M. Fallon and purportedly signed by a representative of Goodway, or knowing the same to be forged, did possess, utter, offer, dispose of or put off as true to Albertson's grocery store, such written instrument, contrary to Revised Code of Washington 9A.60.020(1)(a) and/or (1)(b).

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When a defendant challenges

the sufficiency of evidence in a criminal case, the Appellate Court draws all reasonable inferences from the evidence in favor of the State and interprets all reasonable inferences from the evidence strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). Finally, the Appellate Court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011, 833 P.2d 386 (1992). Put another way, 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).

The check in question was admitted as Exhibit No. 22. (RP 301).

The State in its case-in-chief called Lia Johnson. (RP 286).

Ms. Johnson explained that she was employed by the Bank of America as a teller. (RP 287-288). She testified that the defendant presented her with a check from a company, Goodway. She was familiar

with these checks and noticed that it did not look legitimate. She indicated that the check appeared to be unusual and she questioned whether or not it was an authentic check. (RP 289-291).

The deputy prosecutor asked Ms. Johnson what the bank does when it thinks there is an issue about authenticity of a check. She indicated that they use a program called "Image View" to compare the check with known legitimate checks already in their system.

Q. (Deputy Prosecutor): Who's the account holder on the check?

A. (Ms. Johnson): Goodway Technologies Corporation.

Q. Okay. And is it a Bank of America check? You were starting to answer (inaudible)?

A. Yes. Yes.

Q. It is? Okay. What - - and what dollar amount is it, again?

A. \$4500.

Q. All right. And who is it made out to?

A. Aaron M. Fallon.

Q. Okay. And did you notice anything unusual about - - well, in this process, with this check, did you go in through any processes to determine if it was a legitimate check?

A. We did; yes.

Q. And what did you do?

A. We have a system at the bank, and I assume other banks do, too, called Image View.

Q. Um-hum.

A. And if - - any check that has come through Bank of America before, there's an image captured of the front and the back of the check so we can check and see if the signature matches something on the signature card, or to see if the particular person consistently signs those checks.

Q. Okay.

A. And - -

Q. And in this case, did you pull up Image View?

A. We did.

Q. And did you notice anything different about some of the type in the case?

A. Um-hum.

Q. What did you notice?

THE COURT: Is that a yes?

THE WITNESS: Yes.

MR. RICHARDSON: Thank you.

THE WITNESS: I'm sorry. Yes.

Q. (By Mr. Richardson) What did you notice?

A. Every other check that we did pull up, the type was spaced out more. Like, where it says, "Pay to the order of" was still stacked on top of each other; but the name and address - - the city and state were spaced out more from

each other, line by line. And no other check that we pulled up looked like that; so that was really odd.

Q. Okay.

THE COURT: Can you hear her?

UNIDENTIFIED SPEAKERS: (Inaudible).

THE COURT: Okay.

THE WITNESS: I'll speak up anyway.

Q. (By Mr. Richardson) So that the type in the "pay to the order" looked different in spacing?

A. It did.

Q. Okay.

A. Yeah.

Q. Now, this check - - what did - - what did you ultimately do with this check? Did you give it to anyone in particular?

A. I gave it to my manager, mostly because, to be extra cautious, I do like to have a second set of eyes look at a check that I'm cashing, especially when it's this high a dollar amount.

Q. Okay. So that was happening at the time that the individual was trying to pass the check?

A. Yes.

Q. Okay.

A. Yes, I took it back to have her look at it. Because I don't have access to Image View. And so, for this dollar amount of the check, I do need her clearance on it anyway.

Q. Okay.

A. So she has access to that, and she - -

Q. She pulled it up for you (inaudible)?

Q. She went back and she looked at it.

- (RP 290, L.15 – 293, L.13)

The bank teller asked the defendant to see his identification again to verify the information. While she was doing this, it became obvious there were some concerns and the manager was calling the Sheriff's Department because she was suspecting that the check might not have been made out to the defendant by the owner. (RP 295). The State moved to admit Exhibit No. 22 (the check) and the court allowed voir dire in front of the jury to further clarify the information about this check. It is at that time that there is a long discussion by the teller concerning the image view and how that is utilized by a bank. (RP 298-301). The bottom line was that they had multiple examples of proper checks and that this one did not appear to be a regular type of check that they could honor.

The witness was also shown surveillance photos from the bank and was able to identify photographs which clearly showed the defendant involved in the passing of the check. (RP 303-304). The defendant is identified on the record as the person trying to pass the check to the teller. (RP 307). She also testified that the defendant left the bank before the law

enforcement officers arrived. He left the bank without out the check which they had in their possession. (RP 308; 311).

On cross-examination, she again discussed the Image View program and the fact that there were discrepancies in the check which caused the bank authorities to feel that there were some legitimate issues concerning the authenticity of the check. (RP 309-310).

When the defendant testified, he explained that Exhibit No. 22 was given to him to pay for items he sold. Basically, he indicated that he got the check from a friend of a friend. Supposedly the second friend's dad owned the company. He obviously had no involvement with that particular company and only knew the person as "Ralph". (RP 402-403). He acknowledged to the jury that he did not hang around when there was some delay in getting the check cashed and that he took off because he "panicked". (RP 405). On cross-examination, the defendant acknowledged that he had no contact with the company and did not know any of the personnel.

Q. (By Mr. Richardson, Deputy Prosecutor) And actually, the clerk is right. It's Exhibit No. 22. And so, I'm going to show you this time, and you've just testified a little bit about it.

A. (Defendant) Yes.

Q. This Goodway check: Had you done business with Goodway? Is this someone that you had been in regular business with?

A. Oh, no. No. I haven't - - actually, I haven't even heard of - - of them.

Q. Okay.

A. I never heard of these people.

Q. And the individual that you're purporting to have gotten this check from, or claiming that gave you this check - - had you done business with that person before?

A. No. I have not. Well, Mike was involved, because it was his friend. So I did do business with Mike, and that check that came from Mike passed; so I thought, you know, everything was legit.

Q. All right.

A. You know, well, why would my - - I thought, my friend - - would do that to me?

Q. Okay. This particular Goodway check - - you never contacted the business, Goodway, yourself, did you?

A. No, I did not.

Q. Okay. And this check is for \$4500, isn't it?

A. Yes.

Q. And you didn't have a personal contact with him, with regard to selling - - what was it you were trying to sell?

A. A cement cutter, a paint machine, and a whole bunch of - - of units that went with the paint machine.

Q. Okay. Well, now, did you give them that equipment?

A. Yes, I did.

Q. And what happened to it?

A. Supposedly - - I thought it went to these people. And (inaudible) I don't think it did.

Q. Did you ever get paid for it?

A. Absolutely not.

Q. Did you report that as a theft?

A. I wanted to, and I asked, and they said, it's just hearsay. It - - it wouldn't matter.

Q. So did anyone take a report?

A. No.

- (RP 415, L.1 – 416, L.21)

On cross-examination, the deputy prosecutor also wanted to know about where he got the check and the circumstances that caused him to leave before the police arrived.

Q. (Deputy Prosecutor) So you're making a \$4500 transaction without any paper trail; is that right?

A. (Defendant) Yeah, I mean - -

Q. Is that a small transaction to you?

A. I - - I've cashed things bigger than that.

Q. Okay. Now, this - - this person that you worked with - - this "Ralph," you said?

A. Well, Ralph was - -

Q. The buyer?

A. Well, yeah. He had - - he said he had the company - - his dad owned his company.

Q. Okay. And you don't know Ralph's last name?

A. Not on the top of my head, no.

Q. And where's Ralph today?

A. That I know? I do not know.

Q. Okay.

A. I don't talk - - I don't talk to these people.

Q. Okay.

A. I try to - - try to get ahold of Ralph when I left this at the bank to tell them - - tell them, hey, they weren't cashing this.

Q. And you have no proof of that either, do you?

A. When I left?

Q. That you tried to get ahold of Ralph?

A. Only, like, a - - probably a cell phone bill or something, but - - so - -

Q. Well, if you have a cell phone number for Ralph, why haven't you contacted Ralph since?

A. I don't. I don't. I tried to get ahold of Mike to get ahold of Ralph to get ahold of me.

Q. And this is - - seems like a - - a legitimate business transaction to you?

A. I thought it was. I mean, I've - - I've cashed some checks bigger than this, and I had no problems with it.

Q. Okay.

A. And - -

Q. Now, if you had no problems with it, why are you, by your own statement, you said, "I seen all these cops and I panicked and left." If you had no problem with the check (inaudible)?

A. Well, I don't - - I didn't know what was going on side.

THE COURT: Okay. You guys need to talk one at a time - -

MR. RICHARDSON: Okay.

THE COURT: - - because the record doesn't pick it up. So make sure that you - -

THE WITNESS: Sorry.

THE COURT: - - ask a question, and let it finish before the answer and vice versa.

Q. (By Mr. Richardson) So why - - I - - I - - I'll repeat - - repeat the question. You said, "I seen all these cops and I panicked and left." Why - - why did you do that if you thought this was a legitimate transaction?

A. I didn't even know what - - the cops were there for me, or for anything.

Q. Well, what'd you - -

A. The cops were going inside the place, and I thought something was going on inside there - -

Q. So you panicked and left?

A. - - without - - I mean, I didn't know they were there because of this check. I was, like, "Oh, what's going on in there? Well, I'm out of here."

Q. Okay.

A. To me, I mean, I thought it might have been a burglary, a robbery, or a holdup. I didn't know what was going on in there.

- (RP 418, L.1 – 420, L.18)

The defendant is guilty of forgery "if, with intent to injure or defraud," he possessed "a written instrument which he knows to be forged." RCW 9A.60.020(1)(b); (CP 23 – Third Amended Information). A jury may infer a defendant's criminal intent from the surrounding facts and circumstances if they "plainly indicate such an intent as a matter of logical probability." State v. Esquivel, 71 Wn. App. 868, 871, 863 P.2d 113 (1993) (quoting State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)). Although possession alone is insufficient to prove guilty knowledge, "possession together with slight corroborating evidence of knowledge may be sufficient." State v. Scoby, 117 Wn.2d 55, 61-62, 810 P.2d 1358, 815 P.2d 1362 (1991). The unexplained possession of a forged instrument raises an inference or is strong evidence of guilt of forgery by

the possessor. Esquivel, 71 Wn. App. at 871. Flight following the commission of a crime is admissible if it creates a reasonable and substantive inference of guilt or was a deliberate effort to evade arrest.

State v. Bruton, 66 Wn.2d 111, 112-113, 401 P.2d 340 (1965).

Specifically, Division One of this court has held:

Forgery does not involve the making of false entries in an otherwise genuine document. It does involve the manufacture of a false or spurious document made to appear to be other than what it actually is. As stated in W. LaFave & A. Scott, Criminal Law § 90, at 671 (1972): “Though a forgery, like false pretense, requires a lie, it must be a lie about the document itself: the lie must relate to the genuineness of the document.”

- State v. Sullivan, 28 Wn. App. 29, 33, 621 P.2d 212 (1980)

Drawing all reasonable inferences in the light most favorable to the State, there was sufficient circumstantial evidence for the jury to find beyond a reasonable doubt that the defendant knew that the check was fraudulent and that he intended to deprive a third party of funds.

Here, the false instruments contained the names of defendants. In the case of the registration cards, their photographs and signatures appeared on them. As a matter of logical probability, intent to defraud could be inferred from such facts and circumstances. See Bergeron, at 19-20; Woods, at 591. Indeed, the instruments’ only value would be to falsely represent the defendants’ right to legally be in this country. By showing the cards to the officers, they misrepresented their legal status, even though they did not misrepresent their legal names and other details about them. Their intent to defraud the specific officers is not required. RCW 10.58.040 states: Whenever

an intent to defraud shall be made an element of an offense, it shall be sufficient if an intent appears to defraud any person, association or body politic or corporate whatsoever.

- State v. Esquivel, 71 Wn. App. 868, 872, 863 P.2d 113 (1993)

The State submits that there is sufficient evidence here to allow the question of the forgery to go to the jury.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a question about his sentencing. The argument is it is indeterminate because it places the burden on the Department of Corrections to ensure that the statutory maximum is not violated. The felony judgment and sentence (CP 164) indicates on page 5 as part of Section 4.5 that:

The combined total amount of confinement and community placement or community custody shall not exceed the statutory maximum. RCW 9.94A.505(5).

The State submits that this matter has recently been settled by the State Supreme Court in In re Pers. Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009).

A sentencing court “may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime

as provided in chapter 9A.20 RCW.” RCW 9.94A.505(5); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004) (the total punishment, including imprisonment and community custody, may not exceed the statutory maximum). Furthermore, a court must impose a determinate sentence that states exactly the months of total confinement and community supervision. Former RCW 9.94A.030(18) (2006); see also In re Pers. Restraint of Quackenbush, 142 Wn.2d 928, 935, 16 P.3d 638 (2001) (Sentencing Reform Act changed Washington’s sentencing scheme from indeterminate to determinate sentences).

In Sloan, Division One reviewed the sentence for a class C felony in which the court imposed a 60-month sentence and 36 to 48 months of community custody. After considering the defendant’s potential to earn early release time in prison, Division One found no violation of RCW 9.94A.505(5) and remanded for the sentencing court to clarify its sentence reasoning: To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum. Sloan, 121 Wn. App. at 223-24. The Court adopted the Sloan court’s reasoning in State v. Vant, 145 Wn. App. 592, 605-07, 186 P.3d 1149 (2008).

The trial court included in the defendant's sentence the type of clarification approved of in Sloan and Vant, (CP – Felony Judgment and Sentence, page 5, section 4.5). The Washington Supreme Court recently held that such clarification does not result in an indeterminate sentence. In re Pers. Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023, 2009 WL 2182745 (July 23, 2009). Following the petitioner's conviction of three counts of first degree attempted robbery, the trial court sentenced him to 120 months of total confinement and 18 to 36 months of community custody. Brooks, 211 P.3d 1023, 2009 WL 2182745, at 1. Attempted robbery is a class B felony carrying a statutory maximum of 120 months confinement. RCW 9A.20.020(1)(b). After the trial court amended the judgment and sentence to clarify that the combined total of confinement and community custody could not exceed the statutory maximum, the Supreme Court held that the amended sentence was not indeterminate because it had defined a range and determinate maximum within which the DOC could determine the appropriate amount of community custody.

Under the current statutory scheme, the exact amount of time to be served can almost never be determined when the sentence is imposed by the court. The only thing that can be determined at the time of sentencing is the maximum amount of time an offender will serve in confinement and the maximum amount of time the offender may serve in totality. While the DOC was left the responsibility of ensuring Brooks did not serve more than 120 months of confinement and community custody, this responsibility

stemmed from both the requirements of the SRA and the sentence that the court *imposed*. ... It is the SRA itself that gave courts the power to impose sentences and the DOC the responsibility to set the amount of community custody to be served within the sentence.

- Brooks, 211 P.3d 1023, 2009 WL 2182745, at 5 (emphasis in original).

The State submits the new case law controls and the defendant's claim that he received an unlawful indeterminate sentence fails.

IV. CONCLUSION

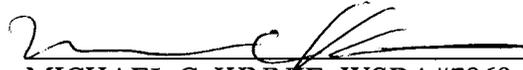
The trial court should be affirmed in all respects.

DATED this 28 day of Sept, 2009.

Respectfully submitted:

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