

NO. 39329-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

DARRICK L. HUNTER,

Appellant.

09 DEC 10 PM 12:20
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____
DEPUTY

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

The Honorable Lisa Worswick, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR1

 Issues Presented on Appeal.....1

B. STATEMENT OF THE CASE.....2

 1. PROCEDURAL FACTS2

 2. SUBSTANTIVE FACTS.....2

C. ARGUMENT.....5

 1. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO INTRODUCE UNDER ER 404(b) EVIDENCE OF PRIOR BAD ACTS TO PROVE THE ELEMENT OF INTENT IN THE INSTANT CASE.....5

 2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF KNOWLEDGE AND INTENT TO DEFRAUD IN THE UNLAWFUL ISSUANCE OF CHECK CHARGES.....10

 3. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF KNOWLEDGE COLOR OR AID OF DECEPTION IN THE THEFT CHARGES..12

D. CONCLUSION.....14

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

| | |
|---|--------------|
| <i>Ben-Neth</i> , 34 Wn. App. 600, 663 P.2d 156 (1983)..... | 11-12 |
| <i>State v. Bythrow</i> , 114 Wash.2d 713, 790 P.2d 154 (1990)..... | 9 |
| <i>State v. Green</i> , 94 Wash.2d 216, 616 P.2d 628 (1980)..... | 11 |
| <i>State v. Stanton</i> , 68 Wn. App. 855, 845 P.2d 1365 (1993)..... | 7-10, 13, 14 |

FEDERAL CASES

| | |
|---|---|
| <i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)..... | 9 |
|---|---|

STATUTES, RULES AND OTHERS

| | |
|-----------------------|----------|
| RCW 9A.56.020..... | 2, 9, 13 |
| RCW 9A.56.030..... | 9 |
| RCW 9A.56.040..... | 2, 12 |
| RCW 9A.56.060(1)..... | 2, 9, 11 |
| ER 401..... | 7 |
| ER 403..... | 7 |
| ER 404..... | 9, 10 |

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by admitting under 404(b) evidence of prior uncharged acts of a similar nature to the instant charges.

2. The state failed to prove beyond a reasonable doubt the essential element of theft in the second degree: specifically knowledge of an empty account and by aid or deception.

3. The state failed to prove beyond a reasonable doubt the essential element of unlawful issuance of checks: specifically knowledge of his closed bank and intent to defraud.

Issues Presented on Appeal

1. Did the trial court abuse its discretion by admitting under 404(b) evidence of prior uncharged acts of a similar nature to the instant charges where the probative was outweighed by the overly prejudicial impact of the evidence?

2. Did the state meet its burden of proving that Hunter knew his account was closed and intentionally by aid of deception took money from Haynes?

3. Did the state meet its burden of proving that Hunter knew his account was closed and intentionally wrote checks knowing there were no funds to support the checks?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Darrick Hunter was charged with three counts of unlawful issuance of bank checks contrary to RCW 9A.56.060 and RCW 9A.56.040 and two counts of theft in the second degree contrary to RCW 9A.56.020(1)(b) and .040(1)(a). CP 1-3. Hunter was convicted as charged following a jury trial, the honorable Lisa Worswick presiding. CP 66-70.

Over defense objection, Judge Worswick imposed a standard range sentence for the crimes to run concurrent to each other but consecutive to convictions previously established in Judge Steiner's court, but waiting sentencing. CP 159-172; RP 216-219. This timely appeal follows. CP 173-185.

2. SUBSTANTIVE FACTS

In 2005 Mr. Hunter met and became romantically involved with Ms. Haynes who was a struggling student at TCC with financial problems. RP 103. Ms. Haynes asked Mr. Hunter to give her \$900 dollars to pay for rent so she would not be evicted. RP 105. Mr. Hunter wrote a check for \$900 but did not give it to Ms. Haynes, but instead put it in his back pack because he needed to check the status of his account before handing the check over. RP 106-107. Ms. Haynes obtained the check for \$900 without Mr. Hunter's knowledge and

cashed the check. RP 108-109.

Ms. Haynes told the investigating detective that she retained \$600 and gave Mr. Hunter back \$300. RP 99. Ms. Haynes denied this during testimony and stated that she only kept \$100. RP 57, 67. Ms. Haynes told the detective the \$600 was for college expenses, but told the jury that the \$100 was for filling out a modeling survey with Mr. Hunter's help. RP 56, 99.

Ms. Haynes did not tell Mr. Hunter that she cashed the check for \$900. RP 107-108. Instead she asked Mr. Hunter for the \$900, but when he checked his pack it was gone. RP Id. Mr. Hunter wrote a check for \$450 because Ms. Haynes stated that she could get by with that amount, but later asked for another \$450. RP 107. Mr. Hunter gave Ms. Haynes the second check for \$450 but told her not to cash either check until he had determined the funds in his account. RP 107. Mr. Haynes had \$5000-\$6000 in cash that he could access and did not want to have the checks cashed before determining if he needed to put cash in to his checking account. RP 105.

Mr. Hunter had to leave town for a funeral before checking his Wells Fargo account. Ms. Haynes, contrary to Mr. Hunter's request, cashed both checks for \$450 and the \$900 check. RP 107. According to Ms. Haynes she was contacted by her bank when the checks were returned by Wells Fargo for insufficient funds. RP 59.

The bank representative from Bank of America where Ms. Haynes banked, Mr. Scott Koestler, testified that he could not determine if the checks were deposited by Ms. Hayes, if they were honored by Wells Fargo or Bank of America, or cashed or refused. RP 83-86. He could only determine that the checks were processed through Bank of America. RP 85-86.

Similarly, the representative from Wells Fargo David Barnes could only determine that the checks were written on Mr. Hunter's account and that Mr. Hunter did not have an active account at that time. RP 46-49. There was nothing on any of the checks to indicate that Wells Fargo refused to honor the checks, but Mr. Haynes just assumed that they were not honored. RP 51-52.

There was no evidence that Mr. Hunter knew his Wells Fargo account was closed. In 2003 Mr. Hunter deposited more than \$3000 in his Wells Fargo checking account, someone wrote checks in excess of the deposits and the account was overdrawn and ultimately closed. RP 157-159-161. The bank official who testified could not establish that the bank sent Mr. Haynes notice of his overdrafts or that he was ever contacted about the bank's decision to close his account. *Id.* Rather, the bank is supposed to send electronic notice to the account holder when an account is overdrawn or closed, but there was no verification that this is what occurred with Mr. Hunter's account. RP 158-159. The negative balance in Mr. Hunter's account was transferred to his Wells

Fargo credit card and the balance was paid in full. Mr. Hunter did not owe Wells Fargo any money. RP 156, 158.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO INTRODUCE UNDER ER 404(b) EVIDENCE OF PRIOR BAD ACTS TO PROVE THE ELEMENT OF INTENT IN THE INSTANT CASE.

The trial court ruled that the state met its burden of proof under ER 404(b) to establish by a preponderance of evidence that in 2003 Mr. Hunter made empty deposits in ATM envelopes into his Wells Fargo account and mis-keyed deposits from ATM machines into his account, meaning the amount in the deposit slip did not match the amount in the envelope. RP 136-137, 143, 149. The trial court held that the prior incidents were admissible to show that Mr. Hunter had notice that his account was closed. RP 143, 149. The state did not present any evidence of overdrawn checks written on Mr. Hunter's account in 2003. RP 139, 150.

The defense objected on grounds that the evidence was insufficient to establish that Mr. Hunter was involved in the ATM transactions, and that any testimony about prior uncharged acts involving the Wells Fargo account was

overly prejudicial which outweighed the probative value to the state. RP 138-139.

The evidence established that on June 17, 2003 the account was charged for a \$270 mis-key. On June 25, 2003 there was another deposit of \$360 with a mis-key of \$624. On June 30, 2003 there was an empty envelope received for \$800 that was charged back to the account the next day. It was also mis-keyed so another \$600 was charged back to the account on July 1, 2003. RP 153-154 Mr. Hunter's bank account was frozen because of these incidents and the Bank generally sends notice to the account holder of the account freeze. The account was closed after the empty envelope deposit. RP 155. The account balance was sent to Mr. Hunter's Wells Fargo credit card account and paid in full. RP 156.

Mr. Hunter made over \$3000 in deposits into his Wells Fargo account between June 12, 2003 and July 1, 2003. RP 157. The bank official could not determine who made the ATM transactions; and had no reason to believe the mis-keyed amounts were intentional rather than accidental. RP 148, 153, 157-158.

The bank generally sends electronic notice by mail when there is a problem with an account, but Mr. Barnes could not determine if the notices were in fact sent or received, nor could the bank determine if the notices were returned to the bank as undeliverable. RP 158-159. Mr. Barnes was also

unaware if Mr. Hunter had overdraft protection. Mr. Barnes could determine that the bank did not suffer any losses on Mr. Hunter's account and the bank had no direct contact with Mr. Hunter. RP 156, 158-161.

Evidence can be relevant but not satisfy the balancing test under ER 403(b) which weighs the overly prejudicial versus probative impact of evidence. *State v. Stanton*, 68 Wn. App. 855, 862, 845 P.2d 1365 (1993). In *Stanton*, the Court held that evidence of two subsequent instances of unlawful issuance of a bank check that were temporally related (less than one year apart) to the instant case by several months and schematically similar could not be introduced to prove the defendant knew his bank account was in financial trouble because the evidence occurred after the charged conduct. *Stanton*, 68 Wn. App. at 862-863.

The Court specifically stated that prior financial trouble "sometimes make more probable than otherwise, within the meaning of ER 401," the issue of intent to deprive. *Id.* The Court in *Stanton* suppressed the evidence after performing a balancing test under ER 403(b) in which it determined that notwithstanding the limited probative value, ultimately the evidence was overly prejudicial. *Stanton*, 68 Wn. App. at 863.

In Hunter's case, similar to *Stanton*, the evidence of Hunter's prior account issues only *may* have made more probable than not the issue of

Hunter's knowledge of his account closure but not necessarily. First, the prior bank issues occurred in 2003, two years prior to the instant case. Second, the prior bank issues did not result in any fraud or theft charges or conduct that would have given rise to any criminal charges: the bank was not owed any money. Third, there was no evidence that Hunter knew his account was closed in 2003. Rather, Hunter testified that he was unsure of the amount of funds in his account and asked Haynes not to cash any checks until he could make certain that he had funds to cover the checks.

Similar to the findings in *Stanton*, the combined evidence in Hunter's case did not establish Hunter's knowledge of his bank account two years later. However, the evidence is undeniably overly prejudicial. The evidence makes it appear that the current charges were part of some long, ongoing scheme and plan. And the evidence makes Hunter look like a deadbeat. *Stanton*, 68 Wn. App. at 863.

Defense counsel objected and raised concerns that the trial court could not introduce the evidence of overdrawn checks, and account deficits from 2003 under a common scheme or plan theory. RP 139. The trial court ruled that the evidence was not admissible on this theory but then acknowledged that the evidence was precisely that of a common scheme designed to:

show notice of the defendant of the closure, notice of the

overdraws and the fact that the defendant did, perhaps contrary to the testimony or contrary to the inferences that could be drawn from his testimony, use this account at some point.

RP 143. Later, the trial court expressly acknowledged that:

this is the exact same type of activity that's being alleged here, which could definitely be prejudicial against the probative value, which is the issue regarding closure and a direct contradiction of the defendant's testimony or inferences that could be drawn from the testimony outweighs the prejudicial effect, and I would allow it.

RP 143.

The Court in *Stanton* addressed the issue of the admissibility of prior similar acts to prove a common scheme or plan and held that “common scheme or plan” is not an element of either theft or unlawful issuance of checks. RCW 9A.56.030(1); RCW 9A.56.020(1); RCW 9A.56.060(1). *Stanton*, 68 Wn. App. at 863. Because common scheme or plan is not an element of the charged offenses, it cannot be used to prove an element of the charged crimes. It is however possible that a common scheme or plan can sometimes serve as a basis for inferring the existence of similar intent on a charged occasion. However, both the uncharged act and intent accompanying that uncharged act must be proven by a preponderance of the evidence under ER 404(b). *Stanton*, 68 Wn. App at 864-865; *State v. Bythrow*, 114 Wash.2d

In reviewing the sufficiency of the evidence to convict, “ ‘the relevant question 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. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980), *quoting Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

To convict Mr. Hunter of unlawful issuance of checks, the jury had to find beyond reasonable doubt that he (1) with intent to defraud, (2) made out checks to Ms. Haynes (3) knowing at the time he wrote the checks that he did not have sufficient funds in the accounts to honor the checks in full upon their presentation. RCW 9A.56.060(1); *Ben-Neth*, 34 Wn. App. 600, 606, 663 P.2d 156 (1983).

There are not many published cases in Washington addressing the sufficiency of evidence in charges of unlawful issuance of checks. *State v. Ben-Neth, supra* is one of the few cases. Therein the main issue was whether computerized records were admissible to establish the corpus of the crimes. That issue is not present in Mr. Hunter’s case. However, in *Ben-Neth*, unlike in Mr. Hunter’s case, the Court held that the evidence was sufficient to sustain a conviction for unlawful issuance of checks where the state introduced evidence that “Ben-Neth was sent overdraft notices from the bank for each of

his dishonored checks, was contacted numerous times by creditors regarding his NSF checks, and was sent bank statements showing his negative balances”, and he made no deposits into the account. *Ben-Neth*, 34 Wn. App. at 606.

In Mr. Hunter’s case, unlike in *Ben-Neth*, the state did not present any evidence that Mr. Hunter knew that his account was closed. No creditors sent Mr. Hunter notices and there was no evidence that the bank actually sent him any notices. Moreover, unlike in *Ben-Neth*, Mr. Hunter did make deposits and paid off his credit card balance. For these reasons, *Ben-Neth* is distinguishable and the counts of unlawful issuance of a check must be reversed.

3. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF KNOWLEDGE OR COLOR OR AID OF DECEPTION IN THE THEFT CHARGES.

RCW 9A.56.040 defines theft in the second degree as:

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle. RCW 9A.56.040.

As charged in Hunter’s case, theft is defined as:

(1) “Theft” means:

(a) To wrongfully obtain or exert unauthorized control

over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

RCW 9A.56.020(1)(a),(b). To prove that Mr. Hunter is guilty of theft, the state had to prove beyond a reasonable doubt that he knew that his account was closed and intended to steal money from Ms. Haynes by having her cash checks he knew would be refused by the bank. *Id.*

In *Stanton*, 68 Wn. App. at 867, a case involving theft by writing bad checks, the Court of Appeals reversed the convictions on other grounds and held evidence to be “marginal” where the state presented evidence that Stanton, an unlicensed contractor, contracted to build a sun room with an exercise pool for approximately \$22,000. The homeowner paid him \$23,702 for his work. On September 27, 1988, Stanton contracted to purchase a swim spa from Spa World for the home owner’ sun room. The spa cost \$8,624. Stanton made a partial payment but failed to pay the balance. After discussing the issue with Spa World, Stanton wrote a check for the balance and asked Spa World to hold the check for 30 days. The check bounced twice. Thereafter, Spa World and Stanton agreed to a payment and work schedule for Stanton to

pay off his debt, but Stanton failed to fulfill the agreement. *State v. Stanton*, 68 Wn. App. at 857.

In Hunter's case, the evidence is far less comprehensive than the "marginal" evidence in *Stanton*. Here Haynes testified inconsistently that she cashed checks for Hunter and not herself, but told the detectives shortly after reporting the incidents that she cashed the checks and kept the lion's share of the proceeds. RP 56-58, 99-100. Hunter testified that he specifically told Haynes not to cash any of the checks. RP 107. The combined evidence does not establish that Hunter intended to steal from Haynes by means of deception. Moreover, the state failed to present any evidence that Hunter knew that his account was closed and used deception to obtain money from Haynes. For these reasons, the theft charges should be reversed for insufficient evidence.

D. CONCLUSION

Darrick Hunter respectfully request this Court dismiss his charges with prejudice for insufficient evidence or in the alternative reverse and remand for a new trial with exclusion of the erroneously admitted 404(b) evidence.

DATED this 24th day of September 2009.

Respectfully submitted,


LISE ELLNER

WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Derrick Hunter DOC# 320996 Airway Heights Corrections Center 11919 W Sprague Ave Post Office Box 1899 Airway Heights, WA 99001-1899 a true copy of the document to which this certificate is affixed, on December 9, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

FILED
COURT OF APPEALS
DIVISION II
09 DEC 10 PM 12:21
STATE OF WASHINGTON
BY DEREK Y