

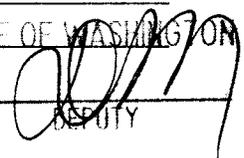
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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

DERRICK HUNTER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 07-1-01793-5

Brief of Respondent

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

1. Whether the trial court properly used its discretion when admitting 404(b) evidence where the evidence was relevant and necessary to rebut the defendant's testimony.
2. Whether the State adduced sufficient evidence to support the Unlawful Issuance of Checks and Second Degree Theft convictions.

B. STATEMENT OF THE CASE.

1. Procedure

On April 3, 2007, the State charged Derrick Lang Hunter, hereinafter "the defendant," with 5 counts: Counts I, II, and III, Unlawful Issuance of Checks or Drafts; Counts IV and V, Theft in the Second Degree. CP 1-3.

The case was assigned to the Honorable Lisa Worswick for trial. Upon completion of the State's case in chief, the defendant moved to dismiss Counts I, II, and III for lack of evidence. RP 88. The court denied the motion. RP 94. Upon hearing the evidence, and deliberating on it, the jury found the defendant guilty as charged. CP 66-70. The court sentenced the defendant to the low-end standard range on all five charges, imposing 22 months confinement on each charge, to run concurrently with

each other. CP 159-172. The court ordered the 22 month sentence to run consecutive with the defendant's felony sentence in cause number 07-1-00612-7, pursuant to RCW 9.94A.589. *Id.* The defendant filed this timely notice of appeal. CP 173-185.

2. Facts

On April 10, 2006, the defendant, while posing as a model talent scout, approached Tacoma Community College (TCC) student Jamerika Haynes at the TCC campus. RP 54-55. At the time, Ms. Haynes was a freshman attending TCC straight out of high school. RP 72. Ms. Haynes testified at trial that the defendant claimed he worked as a freelance agent recruiting talent for modeling companies, and happened to be in Washington visiting family. RP 56. The defendant told Ms. Haynes she would be good at modeling and offered to pay her to take a modeling survey that would fund her career. *Id.* Ms. Haynes felt like a modeling career would help her pay college expenses so she agreed to take the survey. RP 76. When Ms. Haynes finished the survey, the defendant said he had a problem reaching the survey company for payment, but offered to write Ms. Haynes a personal check instead for \$900. RP 56-57.

On April 10, 2006 the defendant presented Ms. Haynes check number 1107 for a Wells Fargo account belonging to the defendant. RP 46. Ms. Haynes deposited the check into her banking account at Bank of America on April 11, 2006 through an ATM. RP 57; 66. She then returned \$800 to the defendant who wanted to hold onto the money until

funds from the survey came through. RP 57. On April 11, 2006, the defendant asked Ms. Haynes to cash another check for him as a favor. RP 57. He wrote Ms. Haynes check number 1108, for \$450, drawn on the same Wells Fargo account. RP 47; 58. Ms. Haynes cashed the check the same day at a Bank of America branch and gave the \$450 to the defendant. RP 48; 58. On April 12, 2006, the defendant once again asked Ms. Haynes to cash a check for him as a favor. RP 58. Ms. Haynes cashed check number 1109, written for \$450, and drawn on the same Wells Fargo account, at a Bank of America branch and gave the defendant the \$450. RP 48; 58-59. The defendant showed Ms. Haynes large amounts of cash and an American Express gold card to ensure her he had access to money. RP 65.

The following Monday, Ms. Haynes called Bank of America to report her debit card missing or stolen. RP 59. The bank notified Ms. Haynes that her account was overdrawn by \$1800, the total amount of the three checks. *Id.* Scott Koestler, a Bank of America branch manager, testified that when a bad check is presented, a reverse is done against the Bank of America account holder who presented the check. RP 84. Ms. Haynes filed a civil claim against the defendant through small claims court. RP 60. The defendant failed to show for the August 2008 hearing, and the court awarded Ms. Haynes default judgment. *Id.* Ms. Haynes never received the \$1800.

Tacoma Police Detective Christie Yglesias testified that Ms. Haynes contacted the Tacoma Police Department in April 2006 to report the bad checks and stolen money. RP 98. Detective Yglesias reported Ms. Haynes initially claimed the checks were given to her by the defendant to help pay for college. RP 100. Ms. Haynes briefly mentioned modeling to Detective Yglesias during the interview. RP 100. Detective Yglesias testified Ms. Haynes appeared visibly upset, and embarrassed during the initial interview. RP 101. Detective Yglesias noted Ms. Haynes cried and thought herself stupid for cashing the checks. RP 101.

David Barnes, a bank fraud investigator for Wells Fargo Bank, testified during the State's case in chief that Wells Fargo Bank keeps digital records of checks, deposit slips, bank statements, and other important documents. RP 44. Between April 10, 2006, and April 12, 2006, Wells Fargo received check numbers 1107 (\$900), 1108 (\$450), and 1109 (\$450) for payment, drawn from an account belonging to the defendant. RP 46-48. The account associated with the checks had been closed on August 8, 2003, more than two and a half years prior to the defendant writing checks to Ms. Haynes. RP 45.

The defendant testified at trial and denied knowing his Wells Fargo checking account had been closed when he wrote the three checks totaling \$1800. RP 129. According to the defendant, he dated Ms. Haynes from February 2006 until April 2006. RP 103. In April 2006, the defendant claimed Ms. Haynes asked him for money to help with her expenses. RP

105. The defendant testified he wrote the \$900, check but because he rarely used the Wells Fargo account, he claims he held onto the check until he could assure the account had appropriate funds. RP 106. The defendant believes Ms. Haynes stole the check and deposited it without his knowledge or permission. RP 127. The defendant testified he then wrote Ms. Haynes two more checks for \$450 each, but asked her to wait before depositing them. RP 107. The defendant claims Ms. Haynes deposited all three checks, including the \$900, without his permission, then called him after the checks bounced claiming the defendant owed her \$1800. RP 108. The defendant testified he was in Oregon when Ms. Haynes deposited the checks, dealing with issues from a jail sentence he served from July 2003, until March or April of 2005. RP 130.

To rebut the defendant's claims that he did not know the closed status of his Wells Fargo checking account, and therefore did not intend to defraud the bank, the State sought to admit 404(b) evidence as rebuttal. RP 136-137. After allowing argument on both sides, and hearing the proposed evidence, the court found the 404(b) evidence admissible. RP 149. The State recalled Mr. Barnes who testified that the defendant opened the Wells Fargo checking account in question on June 12, 2003. RP 153. On June 17, 2003, during an ATM transaction, the amount keyed into the ATM for the deposit was larger than the actual deposit amount. RP 153. Mr. Barnes testified that when this happens, a computer generates a notice and mails a letter to the account holder. RP 159. The

mailing address for the defendant's bank account matched the address on the defendant's checks. RP 156. On June 24, 2003, another mis-key occurred in an amount \$360 over the actual deposit. RP 154. Another computer generated notice would have been sent to the defendant. RP 155. On June 30, 2003, the bank received an \$800 ATM deposit for the defendant's account, but the deposit envelope contained no money. RP 154. During that same transaction, an additional mis-key for \$600 was entered. *Id.* Another computer generated notice would have been sent to the defendant. RP 155. After this incident, Wells Fargo froze the defendant's checking account. *Id.* When Wells Fargo freezes a checking account, a notice is sent to the account holder. *Id.* On August 8, 2003, Wells Fargo transferred the overdraft balance on the defendant's account to a credit card in his name, closed the checking account, and sent notice to the defendant. RP 156. During the two month lifespan of the defendant's Wells Fargo account, the defendant never reported any lost or stolen ATM cards, any issues with his pin number, or any address changes. RP 154, 161. No other name appeared on the account. RP 148.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF PRIOR BAD ACTS UNDER ER 404(b), TO PROVE THE DEFENDANT KNEW HIS CHECKS WOULD BOUNCE.

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rule's list of purposes for which evidence of other crimes or misconduct may be admitted is not intended to be exclusive. *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

Prior bad acts are admissible if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. *State v. Boot*, 89 Wn. App. 780, 788, 950 P.2d 964 (1998), citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more probable. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

Before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) establish by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. *State v. Hernandez*, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000), *citing State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). In determining relevancy, (1) the purpose for which the evidence is offered "must be of consequence to the out-come of the action", and (2) "the evidence must tend to make the existence of the identified fact more . . . probable." *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986), *citing State v. Salterelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). On appeal, if any substantial evidence in the record supports a finding that the prior act occurred, the evidence has met the standard of proof. *State v. Roth*, 75 Wn. App. 808, 816, 881 P.2d 268 (1994). Admission of evidence under ER 404(b) is reviewed for abuse of discretion. *Hernandez*, at 322, *citing State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995).

In the instant case, the State sought to admit 404(b) evidence of prior crimes, wrongs, or acts to rebut the defendant's claim that he did not know Wells Fargo closed his checking account in 2003. RP 136-137. The defendant contends the State sought to show a "common scheme or plan" with this evidence, however, the record reflects the State intended to prove

the defendant's knowledge and rebut the defendant's claim of accident, mistake, or good faith when issuing the bad checks. Appellant's Brief 8-10; RP 136-137. Evidence to prove knowledge is admissible when knowledge is an element of the crime charged, is relevant in the general sense, and has a tendency to prove the defendant's knowledge of the facts in the case at hand. *State v. Bacotgarcia*, 59 Wn. App. 815, 801 P.2d 993 (1990); *State v. Stanton*, 68 Wn. App. 855, 845 P.2d 1365 (1993). Evidence of prior crimes, wrongs, or bad acts is admissible to prove knowledge only when the defendant claims the charged crime stemmed from an accident or mistake, or the defendant claims he was acting in good faith. *State v. Dewey*, 93 Wn. App. 50, 966 P.2d 414 (1998).

To prove the defendant unlawfully issued bank checks, the State had to prove, inter alia, the defendant knew at the time of such issuance that he did not have sufficient funds in his Wells Fargo account to honor the checks in full upon their presentation. See CP 41-63, Jury Instruction No. 11-13; RCW 9A.56.060(1). At trial, the defendant denied knowing Wells Fargo closed his checking account in 2003.

The State: And your testimony is you didn't know the account was closed?

The defendant: No, ma'am. As a matter of fact, when Jamerika had told me all this stuff and I told her I – I specifically told her I did not know. And when I called Wells Fargo to find out what's going on, the people were very rude to me or whatever. I threatened to file a lawsuit against them. Once I threatened to file a lawsuit against them, they stopped giving me information and talking to

me. That's when I found out the account had been closed since 2003.

RP 129. After the defendant finished testifying, the State sought to admit evidence that the defendant knew Wells Fargo closed his checking account in 2003. RP 136.

The State: One of the issues that the defense has brought forward was that Mr. Hunter did not have any notice that this was a closed account, therefore he could not have intended to defraud as is required as an element of the jury instructions that would be proposed by the State and the defense.

RP 137. Specifically, the State sought to introduce evidence that shortly after opening the account in June 2003, several empty deposits and ATM problems occurred, resulting in notices sent to the defendant. *Id.*

Additionally, the State sought to introduce evidence that Wells Fargo sent notice of the account's closure to the defendant's address. RP 138.

The State adduced this evidence through rebuttal testimony from David Barnes. RP 143. Mr. Barnes presented bank records showing the accounts opening date (June 12, 2003), the dates of several ATM deposit discrepancies (June 17, 2003, June 24, 2003, June 30, 2003, and July 1, 2003), and the accounts closure date (August 8, 2003). RP 154-156. The records indicated the account held a negative balance when closed. RP 156. The bank recovered the balance by charging a credit card connected to the defendant's account. *Id.* Mr. Barnes testified Wells Fargo

automatically sends notices to account holders following discrepancies, account closures, and account balance transfers to credit cards. RP 154-156. Mr. Barnes also testified that the defendant never reported trouble with his ATM card or PIN number during the two month lifespan of the checking account and that the card and PIN number would have been used for the above ATM activities. RP 154.

The offered evidence meets the four part test discussed in *Hernandez*, 99 Wn. App. at 321. First, the State established by a preponderance of the evidence that the acts occurred. Mr. Barnes had the bank records with him at trial confirming the prior acts occurred. Given that each of the acts offered as evidence occurred at an ATM requiring use of the defendant's debit card and the defendant's PIN number, a reasonable person could conclude the defendant committed the prior acts offered as 404(b) evidence. Second, the State and the trial judge recognized the purpose of the 404(b) evidence as rebutting the defendant's claim that he did not know Wells Fargo closed his account in 2003. RP 136-137, 141-142. Third, the evidence passes relevancy tests as it tends to show that commission of the prior acts not only resulted in notices sent to the defendant, but also resulted in the closure of the defendant's account two months after he opened the account, and two and a half years before the defendant wrote and presented the bad checks in this case. The

evidence therefore makes defendant's knowledge of the account's closure much more probable than not. Additionally, the evidence is relevant to show the defendant's motive when having Ms. Haynes cash checks for him. By using the 404(b) evidence to show the defendant knew his checking account was closed or lacked funds, the State also showed how the defendant intended to defraud when asking Ms. Haynes to cash his checks at Bank of America. Because the defendant attempted to contradict the testimony of Ms. Haynes, the 404(b) evidence is relevant and necessary to support the truthfulness of Ms. Haynes testimony. Finally, the probative value in using this evidence to support the existence of an essential element of the crime charged outweighs any prejudicial effects the evidence carries. Any evidence against a defendant is prejudicial to a certain degree, however, the defendant created the necessity for this evidence by strictly denying any knowledge that Wells Fargo had closed the defendant's account two and half years prior. The defendant's statements largely increased the need for, and probative value of, this rebuttal evidence. Therefore, the trial court did not abuse its discretion by admitting the 404(b) evidence against the defendant.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE
FROM WHICH THE JURY COULD FIND THE
DEFENDANT GUILTY AS CHARGED

Due process requires the State to bear the burden of proving each element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 489, 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 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). 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, 829 P.2d 1068 (1992); *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. The defendant challenges the sufficiency of the evidence that he (1) intentionally and knowingly issued bad checks to Ms. Haynes; and (2) knowingly by color or aid of deception deprived Ms. Haynes of her property. Appellant's Brief 10, 12.

- a. The State adduced sufficient evidence to support the Unlawful Issuance of Checks or Drafts conviction.

To convict the defendant of Unlawful Issuance of Checks or Drafts, the State had to prove beyond a reasonable doubt that:

- (1) on or about the period the 10th day of April 2006 to the 17th day of April 2006, the defendant did make or deliver a check or draft to another person;
- (2) said check or draft was in an amount greater than \$250; and
- (3) at the time of such making or delivery the defendant knew that he did not have sufficient funds in or credit with the bank or depository to meet the check or draft in full upon its presentation;
- (4) the defendant was acting with intent to defraud; and
- (5) the acts occurred in the State of Washington.

CP 41-63, Jury Instruction No. 11-13. *See also* RCW 9A.56.060. The defendant claims the State did not adduce sufficient evidence to prove he knew he did not have sufficient funds with Wells Fargo to satisfy the checks in full upon their presentation.

A person knows or acts knowingly when:

He or she is aware of that fact circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

CP 41-63, Jury Instruction No. 8.

In *State v. Ben-Neth*, 34 Wn. App. 600, 663 P.2d 156 (1983), the court held that the State adduced sufficient evidence to prove Ben-Neth's knowledge that he was drawing checks on an account with insufficient funds. *Id.* at 606. One month after opening an account with Pacific Bank, Ben-Neth had three checks returned for insufficient funds. *Id.* at 601. The bank sent notices to the defendant for each returned check. *Id.* Additionally, Ben-Neth's creditors contacted him about the bounced checks. *Id.* Shortly thereafter, the bank closed Ben-Neth's account. *Id.* There was no evidence Ben-Neth received notice of the account's closure. *Id.* After the bank closed the account, Ben-Neth wrote and distributed four more checks drawn on the closed account. *Id.* Ben-Neth challenged the sufficiency of the evidence that he knew his account had insufficient funds. *Id.* at 606. Despite not knowing the account had been closed, the court found the State presented sufficient evidence to prove Ben-Neth knew the account had insufficient funds when writing and presenting his checks. *Id.*

Similarly, Mr. Barnes testified in the defendant's case that between June 12, 2003, and August 8, 2003, the defendant made empty envelope deposits and entered wrong deposit amounts on the ATM keypad on four different occasions. RP 153-154. Each of these acts results in a computer generated notice being sent to the account holder's address. RP 155. A reasonable person can assume that an account holder will be aware of account problems such as these, especially in an account open only a few weeks. Mr. Barnes further testified that when Wells Fargo closed the defendant's account on August 8, 2003, the bank transferred the defendant's remaining overdraft balance to the defendant's credit card. RP 156. The defendant claims he paid off his credit card balance. Appellant's Brief 12. A reasonable person could further assume the defendant would not pay off a mysterious charge on his credit card balance without first inquiring into the source of the charge. This evidence is similar to the evidence presented against Ben-Neth. Wells Fargo sent the defendant notices, just as Pacific Bank sent Ben-Neth notices. RP 155; *Ben-Neth*, 34 Wn. App. at 601. It is unclear whether the defendant or Ben-Neth received direct notice of their account closures. RP 159; *Ben-Neth*, 34 Wn. App. at 601. Additionally, both men continued to write checks on closed accounts. RP 46-48; *Ben-Neth*, 34 Wn. App. at 601. Based on this evidence alone, a reasonable jury could

find the defendant in the case at hand knew Wells Fargo closed his account. However, unlike in *Ben-Neth*, the jury in this case received further evidence to support their conclusion that the defendant knew Wells Fargo closed his account in 2003.

The defendant did not attempt to cash any checks himself. Rather, he gained the trust of a young female college student and convinced her to cash the checks for him “as a favor.” RP 57. This behavior indicates a consciousness of guilt. The jury could reasonably infer the defendant knew he would be unable to cash the checks himself at Wells Fargo, so he instead had Ms. Haynes cash the checks for him at Bank of America. The defendant’s actions in having Ms. Haynes cash his checks rather than the defendant simply using his ATM card to withdraw money from the Wells Fargo account shows the defendant knew attempts to withdraw money from an ATM would prove unsuccessful. Additionally, the defendant’s failure to make further contact with Ms. Haynes after receiving money from the final check indicates the defendant knew the checks would eventually bounce and overdraw Ms. Haynes Bank of America account. There is sufficient evidence to prove the defendant knew Wells Fargo closed his checking account, making any checks drawn on that account invalid.

The defendant also contends the State failed to adduce sufficient evidence to prove beyond a reasonable doubt the defendant had intent to defraud. Appellant's Brief 10. The court instructed the jury that a person acts with intent when "acting with the objective or purpose to accomplish a result, which constitutes a crime." CP 41-63, Jury Instruction No. 7. As discussed above, the State adduced sufficient evidence to prove beyond a reasonable doubt that the defendant knew Wells Fargo closed his checking account prior to him having Ms. Haynes cash his checks. Knowing this, the defendant acted with the purpose of fraudulently obtaining cash when he asked Ms. Haynes to cash his checks and return the money to him. The State adduced sufficient evidence to prove beyond a reasonable doubt the defendant intended to defraud.

- b. The State adduced sufficient evidence to support the Second Degree Theft conviction.

To convict the defendant of Second Degree Theft, the jury had to find beyond a reasonable doubt that:

- (1) during the period April 10, 2006 to April 17, 2006, the defendant by color or aid of deception, obtained control over property of another;
- (2) the property or services or valued thereof exceeded \$250.00 in value;

(3) the defendant intended to deprive the other person of the property or services; and

(4) the acts occurred in the State of Washington.

CP 41-63, Jury Instruction No. 18, 19. *See also* RCW 9A.56.020. The defendant claims the State failed to adduce sufficient evidence to prove the defendant committed theft by color or aid of deception. The court instructed the jury 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 41-63, Jury Instruction No. 16. Deception occurs when “an actor knowingly creates or confirms another’s false impression which the actor knows to be false or fails to correct another’s impression which the actor previously has created...” CP 41-63, Jury Instruction No. 17.

The defendant approached Ms. Haynes and claimed he could jumpstart a modeling career for her. RP 54-55. After the defendant gained Ms. Haynes trust, he gave her the initial \$900 check. RP 57. When Bank of America allowed Ms. Haynes to deposit and receive cash from the \$900 check, the defendant asked Ms. Haynes to cash two more checks for him. RP 57-59. As discussed above, the defendant knew his Wells Fargo account was closed, or alternatively knew the account

contained insufficient funds, yet he let Ms. Haynes continue to believe he had an account with adequate funds. The defendant also showed Ms. Haynes large amounts of cash and an American Express gold card to convince her that he had plenty of money. RP 65. Rather than correcting Ms. Haynes' false impression of the defendant's financial situation, the defendant continued to have Ms. Haynes cash his checks. This constitutes sufficient evidence to prove beyond a reasonable doubt that the defendant committed theft by color or aid of deception.

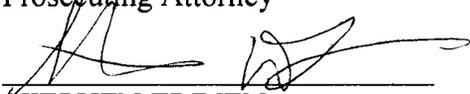
It must be noted that the defendant took the stand and gave a story largely contradicting the State's evidence discussed above. RP 101-131. This means the jury was asked to assess the defendant's credibility in making their factual determinations as to the evidence presented during testimony. By its verdict, the jury clearly found the defendant was not credible when testifying. This credibility assessment must be considered when weighing the sufficiency of the evidence. Accepting the State's evidence as true, and viewing the evidence in the light most favorable to the State, the jury had sufficient evidence, and was within their rights, to find the defendant guilty as charged.

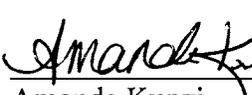
D. CONCLUSION.

For the reasons stated above, the State asks this Court to affirm the defendant's judgment and sentence.

DATED: February 9, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney

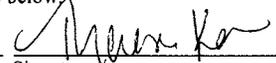

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925


Amanda Kunzi
Legal Intern

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BY _____
DEPUTY

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

2/9/10 
Date Signature