FILED
COURT OF APPEALS
STATE OF WASHINGTON
BY

NO. 40418-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANNY JAMES LAFEVER,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. Substantial Evidence Does Not Support the Conclusion That the Defendant Acted as an Accomplice in Any of His Brother's Crimes.

2. Substantial Evidence Does not Support the Conclusion that the Document the Defendant's Brother Signed Was a Written Instrument for the Purposes of Committing a Forgery.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment of conviction against the defendant for crimes the defendant allegedly committed as an accomplice when substantial evidence does not support the conclusion that the defendant acted as an accomplice?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment of conviction against that defendant for forgery when the instruction the defendant's accomplice signed to commit the forgery had neither legal efficacy nor apparent legal efficacy?

STATEMENT OF THE CASE

Factual History

On February 4, 2008, Cowlitz County District Court Judge Koss entered two orders on separate misdemeanor cases sentencing the defendant Danny James LaFever to two consecutive five day jail sentences, converted to a total of 10 days of out-of-custody work crew. RP 15-17.[1] After imposing these sentences, the court gave the defendant a referral to the offender services office to arrange to complete his work crew assignment. Exhibit 1. Upon receipt of this referral he went to the office of Cowlitz County Offender Services and signed up for the work crew. RP 22-30. As part of this process, the defendant signed an application to participate in offender services, a guidelines for work crew, and the work crew rules. Exhibits 5-7, RP 22-30. He then arranged to work on weekends, starting in 12 days on February 16th. RP 32-37. In fact, the Cowlitz County Offender Services is quite flexible and allows most offenders to set the days for work crew that fit their schedules. RP 54-56

In fact, according to the defendant, he had no intention of fulfilling his work crew assignment. RP 86-89. Rather, he signed up for it in order to

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[1]The record herein includes two continuously number volumes of verbatim reports of the trial and sentencing in this case. It is referred to herein as "RP [page #]."

"buy time", since he was then working as an apprentice electrician seven days a week for 10 to 12 hours a day on a "shutdown" at the "Wauna" Paper Mill about 40 miles from Longview. RP 90-92. Had he gone into jail on the day he was sentenced, he would have been fired. RP 86-89. As a result, he intended to work the shutdown for as many weeks as it would run, and then turn himself into the court to have the work crew referral converted back to jail time. RP 91-92. After signing up for work crew, the defendant told his mother what he was doing, and then went to work, spending some nights over the next few weeks in a motel provided by his employer and returning and spending some nights in Longview. RP 91-93.

According to the defendant's younger brother Darren, he found out about the defendant's plan to skip work release from their mother after the defendant had left town to work at the mill. RP 120. In fact, Darren had previously been part of the out of custody work crew on a number of prior occasions, and he knew that the work crew supervisor did not check identification. RP 115-116. Since he was not working at the time, he decided to appear for work crew, pretend he was his older brother Danny, and serve his brother's work crew obligation so Danny would not have to go to jail after he returned to town after working the shutdown. RP 115-122. As a result, he appeared in his brother's place and finished nine days of work crew on February 16th, 17th, 23rd, and 24th and March 1st, 2nd, 8th, 15th and 22nd.

RP 122. At the end of each day, Darren signed the defendant's name to the work crew roster to indicate that the defendant had worked that day. *Id.*

At the beginning of the 10th day of workcrew, the supervisor asked Darren to produce identification to prove that he was the person who had been referred to work crew. RP 122. When he told the work crew supervisor that he had left his identification at home, the supervisor told him to go get it. RP 122-123. Darren then left the job site and did not return. *Id.* Three days later, a police officer went to Darren's residence and asked to speak with the defendant. RP 74-77. When Darren said that the defendant was not home, the officer explained that there was a claim that someone had performed work crew for the defendant. *Id.* Upon hearing this, Darren asked for an attorney and the officer left. RP 81. At this point, Darren called the defendant and told him about the officer's visit. RP 94-97. According to the defendant and his brother Darren, this was the first time that the defendant found out what his brother had done. RP 94-97, 120.

Later that same day, the defendant called the officer who had been asking for him and lied to him, stating that he had been the one appearing for work crew. RP 96-97. The defendant, through his attorney, repeated this lie to District Court Judge Koss, who nonetheless converted the 10 days work crew and sent the defendant to jail for 10 days. RP 111. According to the defendant, he lied to the officer and to the court in order to protect his

brother. *Id.* The defendant's brother later pled guilty to numerous counts of criminal impersonation and forgery based upon his conduct. RP 125.

Procedural History

By information filed March 12, 2009, the Cowlitz county prosecutor charged the defendant Danny James LaFever with 10 counts of first degree criminal impersonation in violation of RCW 9A.60.040(1)(a), and nine counts of forgery under RCW 9A.60.020(1). CP 1-7. In each count, the state alleged that the defendant committed the crimes as an accomplice under RCW 9A.08.020. *Id.* Following an unsuccessful motion to dismiss, the case came on for trial before a jury. RP 1; CP 20-35. During the trial, the state called four witnesses. RP 18-42, 46-50, 51-70, 71-80. The defense then called the defendant and his brother Darren as its only witnesses. RP 86-113, 114-131. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History. The court also admitted a number of exhibits, including the referral to work crew, the work crew sign-in sheet, the defendant's application for work crew, the work crew guidelines, and the work crew rules. Exhibits 1-2, 5-8.

Following the reception of evidence, the court instructed the jury without objection from either party. RP 137-138. The court included the following instruction on accomplice liability proposed by the state:

INSTRUCTION NO. 6

> A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not.

CP 48.

During closing, the state argued that the defendant's brother was guilty of 10 counts of first degree criminal impersonation when he performed 10 days of work crew for his brother, and that the defendant's brother was guilty of nine counts of forgery for the nine times he had signed the defendant's name at the end of the nine days he was on the work crew. RP 160-177. The state then argued that the defendant was guilty of each of these crimes as an accomplice because the evidence showed that he had asked his brother to perform work crew for him. RP 160-177. After closing and deliberation, the jury returned verdicts of guilty on all counts. CP 79-97.

At sentencing, the court first dismissed counts XII through XIX, finding that the defendant's conduct constituted a single count of forgery instead of nine. RP 198-208; CP 133. The court then determined that the single remaining count of forgery constituted the "same criminal conduct" to each criminal impersonation. RP 208. As a result, the court found that the defendant had an offender score of 9 concurrent points. *Id.* Based upon this finding, the court sentenced the defendant to four months on each count of criminal impersonation on a range of 0 to 12 months, and 22 months on the single remaining count of forgery on a range of 22 to 29 months, with all counts to run concurrently. CP 129-144. The defendant thereafter filed timely notice of appeal. CP 146-147.

ARGUMENT

THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT FOR CRIMES UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant's right under Washington Constitution, Article 1, § 9 and United States Constitution, Sixth Amendment to be free from double jeopardy. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence 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." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant as an accomplice to his brother's commission of 10 counts of criminal impersonation under RCW 9A.60.040(1)(a) and nine counts of forgery under RCW 9A.60.020(1). As the following sets out, substantial evidence does not support the conclusion that the defendant acted as an accomplice to his brother's crimes. In addition, substantial evidence does not support the conclusion that the

document the defendant's brother signed was a "written instrument" within the definition of the forgery statute under RCW 9A.60.020.

(1) Substantial Evidence Does Not Support the Conclusion That the Defendant Acted as an Accomplice in Any of His Brother's Crimes.

In the case at bar, the state charged the defendant with both the criminal impersonations and the forgeries as an accomplice to his brother's acts. Indeed, the state requested, and the court gave, an instruction on accomplice liability. *See* Instruction No. 6 at CP 48. In Washington State, accomplice liability is defined under RCW 9A.08.020(3), which states as follows:

> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it; or
>
> (b) His conduct is expressly declared by law to establish his complicity.

RCW 9A.08.020(3).

Under this statute, the defendant must take some affirmative action in promoting the offense and mere presence, even it that presence "bolsters"

or "gives support" to the perpetrator, does not constitute action sufficient to impose accomplice liability. *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (juvenile's presence, knowledge of theft and personal acquaintance with active participants was insufficient to constitute abetting crime of reckless endangerment without some showing of intent to encourage criminal conduct). In addition, substantial evidence, whether on the issue of criminal liability as a principal or an accomplice, must be based upon more that mere speculation, surmise and conjecture. *State v. Uglem*, 68 Wn.2d 428, 413 P.2d 643 (1966). The decision in *State v. Hiser*, 51 Wn.2d 282, 317 P.2d 1072 (1957), illustrates this principle.

In *State v. Hiser*, *supra*, the defendant's accomplice had used a check to purchase merchandise at a market in Selah, Washington. The check was drawn on the account of a "Nellie Willard" at the Selah State Bank. While the defendant was still in the market, the manager became suspicious and called the police, who arrested the defendant on a charge of forgery. At the defendant's trial, the state called a number of witnesses, including a woman by the name of "Nellie Willard," who testified that she did not have an account at the Selah State Bank, and she had not written the check the defendant passed at the market. The jury convicted, and the defendant appealed, arguing that the state had failed to present substantial evidence that the check in question was not genuine, as is required under the applicable

statutes to support a conviction for forgery.

The state replied that Nellie Willard's testimony constituted substantial evidence that the check was false. However, the Washington Supreme Court disagreed and reversed, holding as follows:

> The state, in its brief, says, "It was established that the checks presented . . . at the Midway Market were not drawn or made by Nellie Willard, whose name appeared on them." A more exact statement would be that the state established that the checks presented were not drawn by the Nellie Willard called as a witness by the state.
>
> The checks were never presented to the bank; nor was there any testimony from the bank as to whether it had an account in the name of another Nellie Willard, or as to whether the checks would have been honored if presented.
>
> The spurious character of the instrument is, of course, an essential element of the crime of first-degree forgery.
>
> The circumstances were extremely suspicious, and it was concededly doubtful whether there was an account in the Selah State Bank in the name of Nellie Willard on which the defendant was authorized to write checks. ***There is, however, a clear hiatus in the proof which cannot be filled by suspicion, speculation, or surmise.***

State v. Hiser, 51 Wn.2d at 283 (emphasis added) (citations omitted).

Although the decision in *Hiser* is over 50 years old, it precisely illustrates the deficiency in the case at bar. As the court noted in *Hiser*, "[t]he circumstances were extremely suspicious" and "it was . . . doubtful" that the check in question was genuine. Similarly, in the case at bar, the circumstances were also "extremely suspicious" and it is also "doubtful" that the defendant's brother would have performed the defendant's work crew

obligation without the defendant having asked him to do so. However, as the court ultimately noted in *Hiser*, extreme suspicion and doubt do not constitute substantial evidence sufficient to support a criminal conviction. Rather, in the final analysis, they constitute "a clear hiatus in the proof which cannot be filled by suspicion, speculation, or surmise." Similarly, the "extreme suspicion" in the case at bar that the defendant solicited his brother to perform his work crew obligation does not constitute substantial evidence of that element of the crime. In the final analysis, it constitutes "a clear hiatus in the proof which cannot be filled by suspicion, speculation, or surmise." Thus, in the same manner in *Hiser* that substantial evidence did not support the conviction, so in the case at bar substantial evidence does not support the defendant's convictions. As a result, the trial court's acceptance of the jury's verdict violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

(2) Substantial Evidence Does not Support the Conclusion that the Document the Defendant's Brother Signed Was a Written Instrument for the Purposes of Committing a Forgery.

The crime of forgery is defined as follows in RCW 9A.60.020 as follows:

> (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.

RCW 9A.60.020.

As a careful review of this statute reveals, the gravamen of the offense of forgery is to either possess or falsely make, alter or complete a "written instrument" with the requisite intent to defraud. The term "written instrument," as used in this statute, is defined as follows:

> (1) "Written instrument" means: (a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or (b) any access device, token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification;

RCW 9A.60.010(1).

Although this definition does not include any requirement that a writing have any particular legal effect to qualify as a "written instrument," at common law, only writings that had "legal efficacy" qualified as "written instruments." The courts of this state have read this requirement into RCW 9A.60.010(1). *State v. Morse*, 38 Wn.2d 927, 234 P.2d 478 (1951). Thus, for the purpose of RCW 9A.60.010 and the forgery statute, a writing is not a "written instrument" unless it has "legal efficacy." That is to say, the writing must be "something which, if genuine, may have legal effect or be the foundation of legal liability." *State v. Scoby*, 57 Wn.App. 809, 811, 790 P.2d 226 (1990), *affirmed*, 117 Wn.2d 55, 810 P.2d 1358 (1991).

For example, in *State v. Smith,* 72 Wn.App. 237, 864 P.2d 406 (1993), the state convicted the defendant of forgery following a trial in which the state proved that the defendant had stolen a check, made it out payable to herself for $225.00, signed her name on the back, and then cashed it at a delicatessen. The defendant then appealed, arguing that under the decision in *State v. Scoby*, *supra*, the check did not qualify as a "written instrument" for the purposes of the forgery statute because it bore no signature from a maker and, under the uniform commercial code, created no legal liability. Thus, the defendant argued that it had no "legal effect." The Court of Appeals agreed, holding as follows:

> To borrow words from *Scoby*, the instrument must be "something which, if genuine, may have legal effect or be the foundation of legal liability." *Scoby*, 117 Wn.2d at 57-58, 810 P.2d 1358. A check that lacks the signature of any drawer fails this test, for "[n]o person is liable on an instrument unless his signature appears thereon." RCW 62A.3-401(1); see also RCW 62A.3-104(1); Official Comment to Uniform Commercial Code § 3-510. Accordingly, the check in issue here was insufficient to support a conviction for forgery.

State v. Smith, 72 Wn.App. at 243.

In the case at bar, the defendant's brother signed the defendant's name to a sheet of paper at the end of each day that he was out with the work crew. This document, Exhibit 2, was not created by statute, and the signature on it neither had "legal effect" nor was it "the foundation of legal liability." Rather, it was simply a record-keeping device for Cowlitz County Offender

services. That is to say, the fact that the paper was signed or unsigned did not affect the defendant's work crew obligation. That obligation was created when Judge Koss converted 10 days of jail to 10 days of work crew, and that obligation could only be extinguished by the defendant's performing the work crew obligation by appearing and working for 10 days.

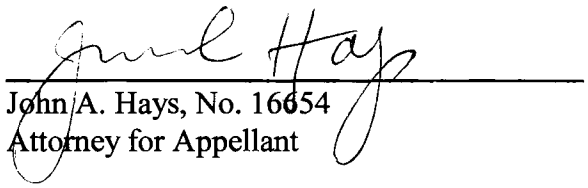
The fact that offender services might have been deceived by the paper and erroneously reported that the defendant had completed his obligation does not mean that the document had "legal effect." This fact is illustrated by the *Smith* case, in that the defendant was able to use the unsigned check into deceiving a bank into giving her money. It is not the capability of the document to deceive that makes it a "written instrument" for the purposes of the forgery statute. Rather, it is the fact that the document has "legal efficacy" that makes it a "written instrument." Since the document here at issue had no true "legal efficacy," it was not a "written instrument" for the purposes of the forgery statute. As a result, substantial evidence does not support the defendant's conviction for forgery.

CONCLUSION

The defendant's convictions are not supported by substantial evidence. As a result, this court should vacate those convictions and remand the defendant's case with instructions to dismiss with prejudice. In the alternative, the court should vacate the defendant's forgery conviction based upon the lack of substantial evidence to support this count, and then remand the case for re-sentencing on the remaining charges.

DATED this19th day of August, 2010.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9A.08.020
Liability for conduct of another – Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

(4) A person who is legally incapable of committing a particular crime himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He is a victim of that crime; or

(b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

RCW 9A.60.020

(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.

(2) In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

(3) Forgery is a class C felony.

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY_____
DEPUTY

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

STATE OF WASHINGTON, **Respondent** **vs.** **DANNY JAMES LAFEVER,** **Appellant**	**NO. 09-1-00220-4** **COURT OF APPEALS NO:** **40418-4-II** **AFFIRMATION OF SERVICE**

STATE OF WASHINGTON)
) : ss.
County of Cowlitz)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **August 19, 2009** , I personally placed in the mail the following documents

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

to the following:

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Dated this 19TH day of August, 2010 at LONGVIEW, Washington.

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