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STATE OF WASHINGTON
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NO. 41903-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

RHONDA GOUDIE,

Appellant.

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

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. ISSUES IN REPLY

1. In State v Banks,¹ the Court found that the failure to make a specific finding as to an essential element of the offense was error, but that it was harmless beyond a reasonable doubt. In doing so, the Banks Court reasoned that the missing finding was a necessary inference of the other unchallenged findings. Here, the other findings relied upon by the State relate to whether the checks were overpayment, not whether appellant was aware that she had received overpayments. Should this Court reject the State's harmless error analysis?

2. As charged, the State was required to prove which of the many rent checks were the overpayments. That determination did not turn on the credibility of any witness. Instead, the trial court was required to speculate as to which checks were the proper rent checks and which were the overpayments. Where the evidence against appellant turns upon speculation and conjecture, has the State failed to satisfy its burden of proof beyond a reasonable doubt?

¹ State v. Banks, 149 Wn.2d 38, 65 P.3d 1198 (2003)

II. ARGUMENT

A. THE STATE'S HARMLESS ERROR ANALYSIS IS NOT PERSUASIVE.

The trial court failed to enter adequate written findings of fact, as required by CrR 6.1(d) and State v. Russell, 68 Wn.2d 748, 750, 415 P.2d 503 (1966). Specifically, the trial court did not enter findings that Rhonda 1) wrongfully obtained the property, and 2) that Rhonda had intent to deprive Tom of that wrongfully obtained property. This last element is the cornerstone of theft, and what transforms a contractual dispute into a criminal offense. See State v. Kenney, 23 Wn. App. 220, 224-25, 595 P.2d 52 (1979).

In response, the State acknowledges the error, but then seeks refuge in the harmless error analysis of State v. Banks, supra. But the Banks decision hurts, rather than helps, the State's argument. In Banks, the court did not make a specific finding as to the knowledge element following a bench trial on the charge of unlawful possession of a firearm. At the time of the bench trial, the Washington Supreme Court had not yet ruled that knowledge was an essential element of that offense. Banks, at 42-44. The issue on appeal was whether the lack of a finding was subject to a

harmless error analysis, and if so, whether the other findings necessarily demonstrated that missing element.

In accepting the State's argument, the Washington Supreme Court relied upon the following finding made by the trial court: "Defendant [Banks] bent over and picked up the gun and got into his car, which was parked directly in front of the restaurant." Banks at 42, 46. The Court explained that the trial court's findings "necessitate an inference of knowledge." Id. at 46. As such, the trial court's finding that the defendant had bent over and picked up the gun made it unnecessary to remand the case for consideration of additional findings on the knowledge element.

In the present case, the State attempts to rely upon Banks. But the trial court findings cited by the State are of an entirely different nature. All of the findings cited by the State relate to whether Rhonda was entitled to all of the money collected from Tom Curry by Rhonda and the manager. See Brief of Respondent at 13-14. Thus, while they might establish a case for unjust enrichment, they do not necessitate a finding that Rhonda knew she was receiving too much money from Tom Curry.

Because the other findings do not rise to the high level of necessitating a finding as required under Banks, this Court should reject the State's harmless error analysis.

B. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS.

As discussed in the opening brief, the State cannot satisfy its burden by proving that Rhonda accepted checks that she should not have accepted with the intent of depriving Tom of his funds. She has been found guilty of wrongfully accepting two specific checks with the intent to deprive the rightful owner of that property. So even assuming she had committed a theft—which she didn't—the State had to present proof beyond a reasonable doubt as to those two checks.

This the State cannot do. Initially, the State is hampered by the lack of sufficient findings of fact. The trial court, apparently stymied by lack of evidence with which to distinguish the improper overpayments from the proper rent checks, failed to offer any justification in its findings as to why those two particular checks were the wrongfully obtained checks. As a result, the State is now left to speculate in its response brief as to why those two particular

checks were the criminal acts. The State's attempt to do so is unpersuasive.

The State's own witness was asked: "Was there a particular day of the month when rent would be collected?" to which Dewater responded, "We usually did it in the middle of the month." 2RP 22. This was consistent with Rhonda's testimony that the rent collection dates were staggered. 3RP 64. Both of the checks for which Rhonda was convicted were checks she obtained in the middle of the month. See Exhibit 11, 14. More importantly, in both cases, there had been a proper payment of the rent almost exactly a month earlier. (See AOB at 16-17 for a list of checks during six month period) Thus, even assuming that there were improper rent checks, any rational trier of fact would entertain a reasonable doubt as to whether these two specific checks were the improper ones, or whether checks collected at the non-scheduled rent dates were the improper ones. The State's speculation to the contrary is insufficient to support the convictions. See State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006) ("existence of a fact cannot rest upon guess, speculation, or conjecture."); State v. Chapin, 118 Wn.2d 681, 691-92, 826 P.2d 194 (1992) (conviction based on speculation cannot stand).

CONCLUSION

For the reasons set forth above, appellant asks this Court to reverse her convictions and remand the case for dismissal of the charges against her.

Respectfully Submitted on this 2nd Day of March, 2012.

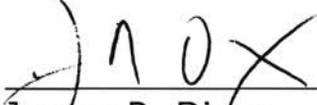
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CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing Reply Brief of Appellant to counsel for the State, postage prepaid, on March 2, 2012.

Dated March 2, 2012 in Seattle, WA



James R. Dixon
Attorney for Appellant

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