

No. 44807-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

IBRAHIM HASSAN,

Appellant.

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

The Honorable Christine Schaller, Judge
Cause No. 13-1-00140-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the charging language of the two counts of second degree theft omitted an essential element of that crime, thus violating Hassan's constitutional right to notice of the charges against him.

2. Whether the court's instructions to the jury omitted an essential element of the crimes charged or were inconsistent, thus violating Hassan's constitutional right to due process.

3. Whether the court imposed an incorrect amount of restitution, and whether counsel was ineffective for failing to object to it.

B. STATEMENT OF THE CASE.

1. Substantive facts.

In April of 2012, Ibrahim Hassan opened both personal and business accounts with the Navy Federal Credit Union. RP 15-16.¹ Membership in that credit union is open only to members of the military and Department of Defense, as well as their families or members of their households. RP 16-17. Some months later the credit union discovered that Hassan no longer qualified to be a member, and on November 15, 2012, Hassan met with Jennifer Sparkman, the assistant manager of the Bremerton branch of Navy Federal Credit Union. RP 15, 17-18. On that date, Sparkman closed the checking accounts, transferred the money to the savings

¹ All references to the Verbatim Report of Proceedings are to the two-volume transcript dated April 8, 9, and 15, 2013.

accounts, and then closed the savings accounts. She escorted Hassan to a teller window, where he received the money that had been in those accounts. RP 18-19,147.

On November 26, 2012, Hassan opened business and personal checking and savings accounts at the OBee Credit Union. RP 91. On December 29, 2012, a check for \$2450, drawn on Hassan's closed Navy Federal Credit Union account, was deposited into his OBee Credit Union personal checking account; before the deposit, the balance in that account was \$28.98. RP 83, 94. Of the funds from the newly deposited check, Hassan was permitted to immediately withdraw up to \$1000. RP 84. He immediately withdrew \$500, and another \$302 was withdrawn via an ATM transaction the same day. RP 85-86, 94. On December 31, a check for \$955, drawn on Hassan's closed Navy Federal Credit Union account, was deposited into his OBee Credit Union personal checking account, and the entire amount was made available to him immediately. RP 88-89. That same day Hassan withdrew \$600 via an ATM and \$160 using a debit card. RP 90. Both of the Navy Federal Credit Union checks were returned because the account on which they were drawn was closed. RP

88, 91. At the time of trial, April 8-9, 2013, Hassan did not owe any money to OBee Credit Union. RP 96.

Tiffany Gilpin, at the time of trial, was 21 years old and a manager at a Burger King restaurant. RP 23. She had met Hassan at the restaurant in the summer of 2011. They became friends and frequently went shopping, had coffee, or did things such as get haircuts and manicures together. Gilpin testified at trial that she treated him as if he were a girlfriend. He came to Burger King about every other day. RP 24-26. In December of 2012, Gilpin was experiencing car problems and the estimate for the repairs was approximately \$1000. RP 26-27. Hassan offered to loan Gilpin the money to pay for those repairs. On January 14, 2013, they met at a Bank of America branch in Lacey, where Hassan signed a check for \$2400. Gilpin filled in at least part of the check because Hassan said he had poor handwriting. RP28-30. The check was written on a business account for IH Sales and Marketing. RP 60. Hassan then asked Gilpin to deposit the check into her account, withdraw \$1400 and give the cash to him. RP 32. Hassan did not explain why he wanted the cash, and she was under the impression that he was going to take it to her mechanic, because he had told her he'd go with her a couple of days later to get the car fixed. When she

asked him why he didn't just withdraw the money from his own account, he told her that his credit union was some distance away and it would be easier to do it this way. RP 31, 33.

Although Hassan had told Gilpin he'd go with her to the mechanic's, he never showed up. RP 31. About that same time, Gilpin deposited her paycheck from Burger King into her Bank of America account, which was when she found out that Hassan's check had bounced and her account was overdrawn. RP 34-35. Although Hassan still came to Burger King on a regular basis, Gilpin no longer associated with him. Gilpin testified that Hassan gave her \$400, but that occurred "before the incident." RP 44.

Gilpin reported the matter to the Lacey Police Department and Officer Stephanie Rangel investigated. RP 59. The business address printed on the check was vacant, but Rangel eventually located Hassan on January 26, 2013. He told the officer there was a mix-up because his account with Navy Federal Credit Union had been closed the day before and he had just opened an account with OBee Credit Union the same day, January 25, 2013. RP 62-64.

Hassan lived in Apartment B-88 of the Capitol Club Apartments. On January 4, 2013, he went into the manager's office

and paid his January rent with a check for \$875. RP 47-48. That check was returned because the account on which it was drawn was closed. RP 49.

Hassan testified in his own defense. Although his answers were often confusing, he said he had thought that although his Navy Federal Credit Union accounts were either frozen or closed, the matter was still under review and that he might be allowed to continue to hold accounts there. RP 122-24. He also said that he thought a credit card company was depositing money into his business account at Navy Federal. RP 126. He expected the checks to clear. RP 131, 142. He further testified that Gilpin was aware he was having "issues" with his bank and that she did not give him any cash. RP 139-40. Hassan did admit on cross-examination that he knew the check he wrote to Gilpin was on a closed account. RP 150, 153.

2. Procedural facts.

Hassan was charged with two counts of unlawful issuance of bank checks or drafts and two counts of second degree theft. CP 2-3. No pretrial motions were heard and the matter was tried to a jury on April 8 and 9, 2013. The jury found Hassan guilty of all four charges. CP 26-29. He was sentenced on April 15, 2013 to a

standard range sentence of five and a half months on each count, all running concurrently. In addition to other legal financial obligations, Hassan was ordered to pay \$2400 in restitution to Gilpin. CP 4-11. He now appeals.

C. ARGUMENT.

1. The charging language for the two counts of second degree theft did not omit an essential element. The amount of the thefts exceeded the statutory limit of \$750 without aggregating Hassan's withdrawals from OBee Credit Union.

Hassan argues that in order to reach the \$750 minimum amount to meet the definition of second degree theft, the State had to aggregate the withdrawals he made from OBee Credit Union. The charging language did not allege an aggregation and therefore he claims that the charging language was constitutionally insufficient. The State disagrees. The amount of money that was made available to Hassan each time he deposited a check into his OBee Credit Union account more than met the statutory limit of \$750. When the theft is alleged to involve deception, the amount the defendant had control over is the measure of the value of the property stolen.

Second degree theft is defined by RCW 9A.56.040. In pertinent part, that statute reads:

(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 9A.41.101 or a motor vehicle.

Hassan was charged with theft as defined in RCW 9A.56.020(1)(a) and (b). CP 2-3. That statute, in pertinent parts, reads:

(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.

Hassan was charged in Count III with second degree theft occurring on December 29, 2012. CP 2. On that date, he deposited into his OBee Credit Union account a check for \$2450, drawn on the Navy Federal Credit Union, an account that was closed. RP 20, 83. Even though that check had not cleared, OBee Credit Union allowed Hassan to access up to \$1000 of the money. RP 84-85. He withdrew \$500 and \$302 in two separate transactions that same day. RP 85-86. His check was returned because the account was closed. RP 88.

The second degree theft charged in Count IV occurred on December 31, 2012. CP 3. On that date he deposited a check for \$955 into his OBee Credit Union account, a check also drawn on the Navy Federal Credit Union account. RP 88-89. All of that money was available to him immediately, even though the check had not cleared. RP 89. He withdrew \$600 and \$160 in two separate transactions the same day that the check was deposited. RP 90. That check was returned because the account was closed. RP 91.

Hassan argues that the amount of the theft was the amount of the cash that he withdrew from his accounts following the deposit of the two bad checks. If he were correct, the State would agree that the minimum \$750 requirement of second degree theft would not be met without aggregating the two withdrawals in each instance. The State further agrees that if that were the case, the charging language must allege a common scheme or plan in order to aggregate the two amounts. RCW 9A.56.010(21)(c); State v. Rivas, 168 Wn. App. 882, 890, 278 P.3d 686 (2012). However, the theft charges were not based on the amount of cash Hassan withdrew, but the amount that was available to him--\$1000 in the first instance and \$955 in the second.

Theft does not encompass merely possession of wrongfully obtained property but “control over the property or services of another.” RCW 9A.56.020(1)(a) and (b). Theft by deception, which was charged in this case, encompasses the taking, not only of property, but also of “the value thereof.” RCW 9A.56.020(1)(b). The loss to the victim must be measured at the point the defendant “obtains control” over the property, not whether the property was later recovered, or whether the defendant did not take actual possession of it. See State v. Lee, 128 Wn.2d 151, 162, 904 P.2d 1143 (1995) (“ . . . the matter is stated in terms of the owner’s deprivation rather than the thief’s gain . . . ”, quoting 2 WAYNE R. LAFAYE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 8.5 at 357 (1986)).

To “obtain control over” means, “in relation to property, to bring about a transfer or purported transfer to the obtainer or another of a legally recognized interest in the property.” RCW 9A.56.010(10)(a). When Hassan deposited the check for \$2450, he obtained control over \$1000 of the money, and when he deposited the check for \$955, he obtained control over the entire amount. The value of the stolen property was the amount he was permitted to withdraw before his checks cleared, not the amount he

actually withdrew. Because both of those amounts are greater than \$750, no aggregation was required and thus the State did not have to allege a common scheme or plan. The statute for theft by deception does not focus on the net result of the property the defendant actually gets his hands on, but rather it centers on the deceptive act and the value of the property over which he obtained control.

In State v. George, 161 Wn.2d 203, 164 P.3d 506 (2007), the defendants, father and son, had obtained an old and worn out truck. They attempted to sell it by advertising it in a newspaper; they misrepresented the mileage and condition of the vehicle by a wide margin. Police detectives saw the ad, thought it sounded too good to be true, and pretended to be interested buyers. The detectives agreed to pay the asking price of \$5500. They handed over a cashier's check in that amount and, after the sale was completed, arrested the defendants. Id. at 205-06. They were charged with attempted first degree theft by deception. Id. at 206. At trial, the Georges argued that the State had failed to prove the value of the truck and thus had not proven that the potential victim suffered any actual loss. Id. at 209. They were convicted; the Court of Appeals and the Supreme Court affirmed. In doing so, the

latter court said that where the charge is theft by deception the statute is concerned with the value of property obtained, not the “net result of the exchange.” The amount at issue was the check for \$5500, not the actual value of the truck. Id. at 209. Citing to State v. Sargent, 2 Wn.2d 190, 192, 97 P.2d 692, 100 P.2d 20 (1940), the court “recognized that the substance, or ‘gist,’ of the crime is the victim’s loss of property by deceptive methods and that the actual pecuniary loss is irrelevant.” George, 161 Wn.2d at 210.

When the property obtained by deception is a check, and the check is cancelled before the defendant can even attempt to cash it, the value of the property stolen is still the face value of the check. State v. Love, ___ Wn. App. ___, 309 P.3d 1209, 1215-16. (2013).

The word “value” typically means the market value of the property in the area at the time of the crime, and with respect to checks, the value “shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

Id. at 1215; RCW 9A.56.010(21).

Under the reasoning of George and Love, the value of the property Hassan obtained by deception was the amount of money the OBe Credit Union made available to him as soon as he deposited his worthless checks. For both charges, that amount

was greater than \$750, constituting second degree theft without aggregating anything and without consideration of the amounts Hassan actually withdrew from the credit union.

The charging document was constitutionally sufficient.

2. The jury instructions did not omit any essential elements of the crimes of second degree theft or unlawful issuance of bank checks. The instructions were not inconsistent.

Hassan did not object or take exception to any of the instructions given to the jury. RP 104. Failure to instruct the jury on an essential element of a charged crime is an error of constitutional magnitude that may be raised for the first time on appeal. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

a. Common scheme or plan element of second degree theft.

Hassan claims that the to-convict jury instructions for the crime of second degree theft omitted the essential element of common scheme or plan to permit aggregation of two thefts for each count. CP 36-37. As argued above, the State did not aggregate multiple thefts to reach the statutory minimum of \$750 for second degree theft. For all of those reasons, the jury instructions, which did not include the element of common scheme or plan, did not omit an essential element.

b. Bank or other depository for the payment of money.

The crime of unlawful issuance of bank checks, as charged against Hassan, is prohibited by RCW 9A.56.060(1). That statute reads:

Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he or she has not sufficient funds in, or credit with the bank or other depository, to meet the check or draft, in full upon its presentation, is guilty of unlawful issuance of bank check. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or other depository for the payment of such check or draft, and the uttering or delivery of such a check or draft to another person without such fund or credit to meet the same shall be prime facie evidence of an intent to defraud.

Hassan now claims that the fact that the unlawful check was drawn on a bank or other depository for the payment of money is an essential element of the offense which was omitted from the to-convict instructions for Counts I and II. CP 34-35. He cites to no cases which hold that this is an essential element of the offense, and the State has not been able to locate such a case either. The core of the offense "is the issuance of a check knowing there are insufficient funds in the bank to pay it with an intent to defraud."

State v. Boyanovsky, 41 Wn. App. 166, 169, 702 P.2d 1237 (1985).

The Washington Pattern Jury Instructions (WPIC) do not include as a separate element that the check or draft was drawn on a bank or other depository for the payment of money. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 73.02 (3rd ed. 2008, modified in 2009).

“An essential element is one whose specification is necessary to establish the very illegality of the behavior.” State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing to United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983). It hardly seems that the nature of the institution on which the checks were drawn goes to the very illegality of the crime of unlawful issuance of bank checks.

Even if Hassan were correct, the to-convict instructions, numbers 7 and 8, given to the jury did include the fact that the check was drawn on a bank or depository.

To convict the defendant of the crime of unlawful issuance of a bank check as charged in Count [I and II], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about [date], the defendant, acting with intent to defraud, made or delivered a check or draft to another person;

(2) That said check or draft was in an amount greater than \$750;

(3) That at the time of such making or delivery the defendant knew 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; and

(4) That any of these acts occurred in the State of Washington.

CP 34-35, emphasis added.

All of the essential elements of the charge of unlawful issuance of a check were included in the jury instructions. There was no error.

c. Contradictory instructions.

Hassan maintains that the jury instructions were contradictory because the to-convict instructions for unlawful issuance of a check did not contain the element that the check or draft be drawn on a bank or other depository for the payment of money, whereas Instruction No. 9, defining the crime, did use that phrase. CP 34-35. Instruction No. 9 reads:

A person commits the crime of unlawful issuance of a bank check when, with intent to defraud, he or she makes or delivers to another person any check or draft in an amount greater than \$750 on a bank or other depository for the payment of money, and the person knows at the time of such making or delivery that he or she does not have sufficient funds in, or credit with, the bank or other depository, to meet the check or draft, in full, upon its presentation.

CP 35.

These instructions are not contradictory. As argued in the preceding section, that language was used in the to-convict instruction, but even if it wasn't, the two instructions are not contradictory. Instruction No. 9 may be more expansive and explain the crime further, but that is not the same as contradicting the to-convict instruction.

Hassan cites to Dever v. Fowler, 63 Wn. App. 35, 816 P.2d 1237 (1991), to support his argument that the two instructions provided inconsistent decisional standards. It is only irreconcilable instructions that are reversible error, however, and that is not the case here. Id. at 41-42. There was no error.

3. The court imposed the amount of restitution supported by the evidence admitted at trial.

Hassan maintains that the court imposed restitution for damages not proved by a preponderance of the evidence.

At sentencing, the trial court imposed restitution of \$2400 to be paid to Gilpin. CP 6; RP 247. Defense counsel brought to the court's attention that Hassan had paid Gilpin \$400. The court responded that although Hassan testified to that effect,² Gilpin

² Hassan did not testify that he had paid Gilpin anything. RP 132-142, 149-50. Defense counsel asked questions of Gilpin on cross examination that suggested he had paid \$400, but Gilpin testified that the money was paid "before the incident." RP 44.

testified that he gave her the \$400 before the incident with the check. The prosecutor agreed with that interpretation. RP 248.

Gilpin testified that she deposited Hassan's check for \$2400 and withdrew \$1400 in cash, which she gave to him. RP 33-34. A few days later she found out her account was overdrawn because Hassan's check had bounced. RP 35. She asked him to return the money and he did not. RP 43-44. Nowhere in her testimony did she indicate she was not held responsible for the total amount of Hassan's check. Hassan testified that he did not receive any cash from Gilpin, RP 140, and nowhere in his testimony did he say that he had paid any of the money back. The defense did not challenge any amount other than the \$400, nor did it claim that Gilpin was not held responsible by her bank for the face value of the check.

Unless the defendant agrees to the amount of the restitution, the State must prove it by a preponderance of the evidence. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). "A trial court's order of restitution will not be disturbed on appeal absent abuse of discretion." State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). An abuse of discretion occurs when that discretion is "manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." State v. Cunningham, 96 Wn.2d 31, 34, 633

P.2d 886 (1981) (quoting State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

The court here obviously considered Gilpin more credible than Hassan. 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 evidence before the court supported by at least a preponderance of the evidence that Gilpin suffered a loss of \$2400 at a minimum. Hassan asserts that Gilpin could not access the \$1000 that remained in her account after she withdrew the cash, and therefore it was not a loss to her, but there is nothing in the record that supports that assumption. The \$2400 was an easily ascertainable measure of Gilpin's loss and the court did not abuse its discretion by imposing it.

Hassan further argues that his attorney was ineffective for failing to object to the court's restitution order. He did, in fact, attempt to reduce it by \$400. RP 248.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas,

109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Id.* at 689; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Under the circumstances of this case, where counsel vigorously represented Hassan throughout the trial, it cannot be said he failed to function as counsel by accepting the trial court's interpretation of the evidence or challenging an amount of restitution that was, in fact, supported by the evidence.

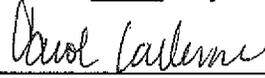
The court's restitution order should be affirmed.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Hassan's

convictions as well as the amount of restitution imposed by the trial court.

Respectfully submitted this 17th day of December, 2013.



Carol La Verne, WSBA# 19229
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THURSTON COUNTY PROSECUTOR

December 17, 2013 - 11:47 AM

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