

**NO. 49163-0-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**BRICE S. NOWACKI,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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## **I. ISSUES**

1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ADMITTING EXHIBIT # 2 AND EXHIBIT # 3 FOR IMPEACHMENT PURPOSES?
2. DID SERGEANT NEVES GIVE AN OPINION REGARDING THE APPELLANT'S VERACITY AND GUILT TO DEPRIVE THE APPELLANT OF HIS RIGHT TO A FAIR TRIAL?
3. DID THE STATE COMMIT PROSECUTORIAL MISCONDUCT TO PREJUDICE THE APPELLANT?
4. WAS THE APPELLANT DENIED OF EFFECTIVE ASSISTANCE OF COUNSEL?

## **II. SHORT ANSWERS**

1. NO, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBIT # 2 AND EXHIBIT # 3 FOR IMPEACHMENT PURPOSES.
2. NO, SERGEANT NEVES DID NOT GIVE AN OPINION REGARDING THE APPELLANT'S VERACITY AND GUILT TO DEPRIVE THE APPELLANT OF HIS RIGHT TO A FAIR TRIAL.
3. NO, THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT TO PREJUDICE THE APPELLANT.
4. NO, THE APPELLANT WAS NOT DENIED OF EFFECTIVE ASSISTANCE OF COUNSEL.

## **III. FACTS**

The appellant was charged with (I) Forgery and (II) Making A False Statement To A Public Servant. On May 31, 2016, the appellant exercised his right to a jury trial. The Honorable Michael Evans presided

over the appellant's jury trial. May 31<sup>st</sup> Transcript, p. 5-210, and June 1<sup>st</sup> Transcript, p. 3-68.

Count II was not in dispute and the appellant conceded Count II during his closing remarks. June 1<sup>st</sup> Transcript, p. 47-48. With regards to Count I, most of the facts pertaining to that charge were not in dispute at trial. Prior to July 30, 2015, Nichole Brese had several of her Red Canoe Credit Union checks stolen and closed her accounts at Red Canoe Credit Union. One of her stolen checks was forged and given to the appellant. The forged check was numbered 1075, off of the closed account of Nichole Brese, in the amount of \$350, dated July 2015, payable to Brice Casky, and payment for work. May 31<sup>st</sup> Transcript, p. 68 and 71, and June 1<sup>st</sup> Transcript, p. 19-20. On July 30, 2015, the appellant unsuccessfully tried to cash the forged Nichole Brese check at Fibre Federal Credit Union. May 31<sup>st</sup> Transcript, p. 62-87. The only issue at trial was whether the appellant knowingly tried to cash the forged Nichole Brese check. The appellant said during closing that, "[s]o, ladies and gentlemen, those are the facts and really what this comes down to, and Mr. Nguyen is correct, is knowledge. Did my client know that the check was forged?" June 1<sup>st</sup> Transcript, p. 52.

For its case in chief, the State called Nichole Brese, Jennifer Lee, and Sergeant Neves as witnesses. Ms. Brese had a checking and a saving

account with Red Canoe Credit Union. May 31<sup>st</sup> Transcript, p. 90. Prior to July 30, 2015, Ms. Brese closed her accounts at Red Canoe Credit Union because she had no money in the accounts and her checks were stolen from her. May 31<sup>st</sup> Transcript, p. 90. In July 2015, several of her stolen checks were forged and drawn on the closed accounts. Ms. Brese did not know the appellant, did not write any checks to the appellant, and did not give the appellant permission to have any of her checks. May 31<sup>st</sup> Transcript, p. 91.

On July 30, 2015, Jennifer Lee was a teller at the Castle Rock Fibre Federal Credit Union branch. May 31<sup>st</sup> Transcript, p. 63 and 67. That day, the appellant came inside the credit union and contacted Ms. Lee about cashing a Red Canoe Credit Union check. The appellant had a checking account with Fibre Federal Credit Union. The Red Canoe Credit Union check was numbered 1075, off of the account of Nichole Brese, in the amount of \$350, dated July 2015, payable to Brice Casky, and the payment was for work. May 31<sup>st</sup> Transcript, p. 68 and 71, and June 1<sup>st</sup> Transcript, p. 19-20.

The appellant told Ms. Lee that his name was misspelled on the check. May 31<sup>st</sup> Transcript, p. 68 and 71. The situation did not seem right to Ms. Lee because the check had no date listed and misspelled the appellant's name. Therefore, Ms. Lee engaged the appellant in a

conversation about the check. The appellant told Ms. Lee that he was cashing the check for his friend. Ms. Lee asked the appellant if his friend, Nichole, was a man or a woman. The appellant indicated his friend, Nichole, was a man. Ms. Lee became more suspicious and told the appellant that she thought it was kind of a scam. Ms. Lee took the appellant's identification and check, and called the Red Canoe Credit Union. Transcript, p. 71-73. Ms. Lee learned Ms. Brese's Red Canoe Credit Union account was closed and contacted her supervisor about the situation. May 31<sup>st</sup> Transcript, p. 74-75. Subsequently, the police was called about the on-going situation. May 31<sup>st</sup> Transcript, p. 75. Ms. Lee did not return the appellant's identification or check, saw the appellant eventually leave the credit union without his identification or check, and witnessed Sergeant Neves contact the appellant outside the credit union. Prior to the appellant leaving, Ms. Lee noticed the appellant wandering inside the credit union and being probably nervous. May 31<sup>st</sup> Transcript, p. 84-86.

Sergeant Neves of the Castle Rock Police Department responded to the credit union's 911 call. May 31<sup>st</sup> Transcript, p. 97 and 100. Sergeant Neves responded to the credit union within several minutes, did not activate his lights or siren, and called for cover units. Deputy Spencer and

Deputy Enbody of the Cowlitz County Sheriff's Office responded to assist. May 31<sup>st</sup> Transcript, p. 100-101.

Sergeant Neves was the first to arrive at 5:25 PM. May 31<sup>st</sup> Transcript, p. 101. As Sergeant Neves approached the front doors on foot, the appellant walked out of the credit union, away from the credit union and towards Sergeant Neves. The appellant appeared very nervous. The appellant looked both way as he came out of the credit union and glanced around. When the appellant saw Sergeant Neves, the appellant immediately lowered his head and did not initiate any eye contact. May 31<sup>st</sup> Transcript, p. 101-102.

Sergeant Neves initiated contact with the appellant and asked the appellant, "What's going on?" During their first contact, the appellant indicated he was at the credit union to cash a check. Sergeant Neves told the appellant, "That's why I'm here, too." The appellant responded, "Shit, I just knew it." May 31<sup>st</sup> Transcript, p. 99-100 and 103-105. At the time, Sergeant Neves had no information on the case and had yet to speak to any of the witnesses inside the credit union. May 31<sup>st</sup> Transcript, p.105 and 107-108.

Shortly after Sergeant Neves initiated contact with the appellant, Deputy Spencer arrived on scene without activating his lights and siren. Shortly after Deputy Spencer arrived, a white SUV pulled into the credit

union parking lot. The appellant told Sergeant Neves the person he was cashing the check for was inside the white SUV. May 31<sup>st</sup> Transcript, p. 106-107. Sergeant Neves asked Deputy Spencer to contact the occupant inside the white SUV and asked the appellant to go back into the credit union so Sergeant Neves could speak to the bank employees. The appellant agreed to go back inside the credit union. May 31<sup>st</sup> Transcript, p. 107-108

During their second contact inside the credit union, the appellant told Sergeant Neves that Nichole Brese was his male friend who he knew personally. The appellant indicated that he hung out with Nichole Brese this past weekend and that Nichole Brese gave him the check to cash because Nichole Brese did not have a bank account. The appellant also told Sergeant Neves that his friend, Austin Malakowsky, had cashed several checks for Nichole Brese and Austin Malakowsky had dropped him off at the credit union. During their second contact, Sergeant Neves did not know who was in the white SUV and did not know what had transpired between Deputy Spencer and the occupant of the white SUV. May 31<sup>st</sup> Transcript, p. 109-112.

After their second contact, Sergeant Neves spoke to Deputy Spencer and Austin Malakowsky, the occupant inside the white SUV. Sergeant Neves learned that Mr. Malakowsky had a Red Canoe Credit

Union account, had cashed multiple checks for Justin Dunaway, and had come from Red Canoe Credit Union after an unsuccessful attempt to cash another Nichole Brese check. Sergeant Neves subsequently took Mr. Malakowsky into custody. May 31<sup>st</sup> Transcript, p. 112-113 and 117-118.

After securing Mr. Malakowsky, Sergeant Neves re-contacted the appellant. During their third contact, the appellant immediately apologized and told Sergeant Neves that he had lied and did not want to get into trouble. The appellant told Sergeant Neves that he lied about knowing Nichole Brese and that he got the check from Mr. Malakowsky when he got into Mr. Malakowsky's vehicle. The appellant indicated that he and Mr. Malakowsky were long-time friends and that Mr. Malakowsky asked him to cash the check and took him to Fibre Federal Credit Union. The appellant also indicated that he contacted his mother about chasing the check for Mr. Malakowsky and his mother told him it was not a good idea. The appellant indicated he should have listened to his mother. May 31<sup>st</sup> Transcript, p. 113-115.

Subsequently, Deputy Enbody arrived on scene, printed a photo of Justin Dunaway, and show the photo to Mr. Malakowsky and the appellant. Mr. Malakowsky confirmed Justin Dunaway was the person he got the checks from. The appellant also indicated that Justin Dunaway was the person he got the check from. May 31<sup>st</sup> Transcript, p. 115-116.

The appellant's statement at this point contradicted his earlier statement about getting the check from Mr. Malakowsky, May 31<sup>st</sup> Transcript, p. 113-115, and was later contradicted by Mr. Malakowsky when Mr. Malakowsky testified for the appellant. Mr. Malakowsky later testified to giving the appellant the check and was surprised the appellant told Sergeant Neves that he had obtained the check from Mr. Dunaway. May 31<sup>st</sup> Transcript, p. 132-134 and 141.

On August 1, 2015, Sergeant Neves contacted Nichole Brese about her checks. May 31<sup>st</sup> Transcript, p. 117. Prior to speaking with Sergeant Neves, Ms. Brese was not aware her stolen checks had been forged and negotiated on her closed account. May 31<sup>st</sup> Transcript, p. 93.

On his cross examination of Sergeant Neves, the appellant mostly asked questions designed to create and solicit the impression that he had cooperated with Sergeant Neves's investigation. In particular, the appellant had Sergeant Neves testify to the appellant not running away, not attempting to flee, answering Sergeant Neves' questions, volunteering and telling Sergeant Neves about his involvement, tipping Sergeant Neves to Mr. Malakowsky's involvement, agreeing to go back inside the credit union for Sergeant Neves to investigate the case, and being compliant with the investigation. May 31<sup>st</sup> Transcript, p. 119-121.

Mr. Malakowsky and the appellant testified for the defense. During his direct examination, Mr. Malakowsky indicated he was real good friend with the appellant and only an acquaintance with Mr. Dunaway. May 31<sup>st</sup> Transcript, p. 126-127. Prior to July 30, 2015, Mr. Malakowsky agreed and successfully cashed five to six forged Nichole Brese checks for Mr. Dunaway. Mr. Malakowsky had an account with the Red Canoe Credit Union. In exchange, Mr. Dunaway gave Mr. Malakowsky between one hundred to three hundred dollars for each cashed check. May 31<sup>st</sup> Transcript, p. 127-130. Initially, Mr. Malakowsky did not question the legitimacy of the checks. After the third check, Mr. Dunaway told Mr. Malakowsky the checks were fake and Mr. Malakowsky continued to cash checks for Mr. Dunaway. May 31<sup>st</sup> Transcript, p. 128 and 130. Prior to July 30, 2015, Mr. Malakowsky told the appellant that he had cashed some checks for a guy and received money for cashing the checks. The appellant was skeptical of the legality of the arrangement. Mr. Malakowsky took a day to convince the appellant that the checks were real and the arrangement was legal. May 31<sup>st</sup> Transcript, p. 131-132 and 137-138.

On July 30, 2015, the appellant agreed to cash a check for Mr. Malakowsky. May 31<sup>st</sup> Transcript, p. 133. That day, Mr. Malakowsky received two forged Nichole Brese checks from Mr. Dunaway and

dropped Mr. Dunaway off at his mother's house prior to meeting with the appellant. Mr. Malakowsky proceeded to drive and pick up the appellant. During their drive to Castle Rock, Mr. Malakowsky gave the appellant one of the two forged checks. May 31<sup>st</sup> Transcript, p. 132-133. Mr. Malakowsky proceeded to drop the appellant off at Fibre Federal Credit Union for the appellant to cash one of the forged checks. Mr. Malakowsky proceeded to go to Red Canoe Credit Union to cash the other forged check. The appellant and Mr. Malakowsky were to get \$100 dollars for cashing the checks. Mr. Malakowsky explained the arrangement to the appellant. May 31<sup>st</sup> Transcript, p. 134-135.

After failing to cash the forged check at Red Canoe Credit Union, Mr. Malakowsky went to pick the appellant up at Fibre Federal Credit Union. May 31<sup>st</sup> Transcript, p. 135-136. When Mr. Malakowsky returned to Fibre Federal Credit Union, he saw the appellant talking to a police officer and thought they should not have done it in the middle of the day. Mr. Malakowsky testified that he could not just leave the appellant because they were very good friends. Mr. Malakowsky was concerned for his friend; thus, he stopped his vehicle. Mr. Malakowsky told law enforcement what he had been doing and tried to explain to law enforcement that the appellant was not involved at all. May 31<sup>st</sup> Transcript, p. 136-137.

On cross examination, Mr. Malakowsky was surprised that the appellant had told Sergeant Neves that the appellant had gotten the forged check from Mr. Dunaway. May 31<sup>st</sup> Transcript, p. 141. Mr. Malakowsky admitted that he did not tell Deputy Spencer that he had duped the appellant into cashing the forged check. May 31<sup>st</sup> Transcript, p. 143. Mr. Malakowsky also admitted to writing a statement for Officer Gann, Exhibit # 2. May 31<sup>st</sup> Transcript, p. 143-144. In Exhibit # 2, Mr. Malakowsky wrote, "I met a guy named Justin Dunaway he told me he needed help cashing his checks. So I helped him. I didn't know where the checks came from or how he got them he gave me about 100 per check and I think 5 checks were deposited I did not know they were fake. I thought I was helping a friend but instead I was being set up."

During cross examination, Mr. Malakowsky contradicted his direct testimony about him stopping to help the appellant when he indicated that his statement to Deputy Spencer and first written statement to Officer Gann did not say anything to help the appellant because Mr. Malakowsky was trying to save his own ass and did not care what happened to the appellant. May 31<sup>st</sup> Transcript, p. 136-137 and 145-146.

During cross examination, Mr. Malakowsky also indicated he did not look closely at the forged checks and did not know the forged checks were on Nichole Brese's account. Mr. Malakowsky did not tell the

appellant to tell the teller or Sergeant Neves that he was good friend with Nichole Brese. May 31<sup>st</sup> Transcript, p. 147-148. Mr. Malakowsky also admitted to writing a second written statement after he pled guilty on his case, Exhibit # 3. May 31<sup>st</sup> Transcript, p. 144-145. Mr. Malakowsky's second written statement was done for the appellant's attorney in the appellant attorney's office. May 31<sup>st</sup> Transcript, p. 144-145. In Exhibit # 3, Mr. Malakowsky wrote, "I conned my friend Brice into cashing a fake check. I told him since he needed money if he cashed this check he would get a good portion of the money that comes out of it he had no clue that what he was doing was illegal and Brice Nowacki is the man I conned." The court admitted both of Mr. Malakowsky's written statements over the appellant's objection. May 31<sup>st</sup> Transcript, p. 145-147.

On redirect examination, the appellant's attorney asked Mr. Malakowsky about the admitted Exhibit # 2. Mr. Malakowsky again contradicted his direct testimony about him stopping to help the appellant and explained that his first written statement did nothing help the appellant because Mr. Malakowsky was scared, was trying to help himself as much as possible, and did not think it was a good time to advocate for the appellant. May 31<sup>st</sup> Transcript, p. 136-137 and 150-151.

On direct examination, the appellant testified that prior to July 30, 2015, Mr. Dunaway asked the appellant and the appellant's mother to cash

checks for him. The appellant discussed the situation with his mother and his mother warned him and told him that it was a bad idea. The appellant declined Mr. Dunaway's request because it did not feel right. May 31<sup>st</sup> Transcript, p. 169. Subsequently, Mr. Malakowsky asked the appellant to cash a check in return for some money. The appellant admitted to being reluctant initially because it sounded too good to be true. May 31<sup>st</sup> Transcript, p. 156-157. However, Mr. Malakowsky overcame the appellant's reluctance and the appellant eventually agreed to cash a check for Mr. Malakowsky. May 31<sup>st</sup> Transcript, p. 157-158.

On direct examination, the appellant indicated that despite having a checking account with Fibre Federal Credit Union, he had never wrote a check before and had no experience with checks. May 31<sup>st</sup> Transcript, p. 159-160. Appellant admitted that when Sergeant Neves approached him that he had a decent feeling that the check he tried to pass was a bad check, but he did not question its validity before that point. May 31<sup>st</sup> Transcript, p. 163-164. The appellant proceeded to testify about how he cooperated with Sergeant Neves's investigation by trying to explain to Sergeant Neves his involvement, tipping Sergeant Neves to Mr. Malakowsky, volunteering information regarding the case, and not running or attempting to run away. May 31<sup>st</sup> Transcript, p. 165-167

On cross examination, the appellant admitted to having his checking account for six years and lying to Ms. Lee. May 31<sup>st</sup> Transcript, p. 170-171. The appellant admitted to never telling Sergeant Neves about being initially reluctant to cash the check for Mr. Malakowsky and only agreeing to do so after Mr. Malakowsky had overcome his initial reluctance. May 31<sup>st</sup> Transcript, p. 171-172.

After the appellant's testimony, the State recalled Sergeant Neves as a rebuttal witness. May 31<sup>st</sup> Transcript, p. 174. Sergeant Neves indicated that at no time during their multiple contacts on July 30, 2015, did the appellant indicate he was reluctant to cash the check for Mr. Malakowsky and had only agreed to do so after Mr. Malakowsky had overcome his reluctance. May 31<sup>st</sup> Transcript, p. 175-176. Sergeant Neves also testified on rebuttal that Mr. Malakowsky never tried to help the appellant at the scene and did not say anything about the appellant being initially reluctant to cash the check and only agreeing to cash the check after Mr. Malakowsky overcame the appellant's reluctance. May 31<sup>st</sup> Transcript, p. 178-179.

The appellant then cross examined Sergeant Neves on rebuttal about the appellant having never admitted to knowing the check was forged. In particular:

Appellant: All right. And, you know, frankly, the two real pertinent parts that -- well, how's this: During all three of those, you know, instances, during all three of those -- those periods where you talked to my client, he never once said, "I knew it was fake;" correct?.

Neves: I don't recall him specifically saying that he knew that it was fake.

Appellant: Okay. Because that would've been in your report; correct?

Neves: Correct.

Appellant: That would've have been very important for this type of case; correct?

Neves: Correct.

Appellant: Okay. He didn't say: I knew they were forging it; I knew that they were using some stolen checks. There was nothing like that, correct?

Neves: In the multiple versions that he told me, that's correct. May 31<sup>st</sup> Transcript p. 181-182

The State then redirect examined Sergeant Neves in light of the appellant's cross examination about the appellant having never admitted to knowing the check was forged. In particular:

State: When you investigate cases, do people just always confess to everything?

Neves: Most people lie to the police --

State: Okay

Neves: -- they don't confess.

State: Did Mr. Malakowsky ever say that he knew the checks were fake?

Neves: I don't recall him ever telling me that.

State: Okay. So, he didn't say that?

Neves: Correct.

State: Did you expect Mr. Nowacki to tell you that he knew the checks were fake?

Appellant: Objection; relevance.

Court: Sustained.

State: No further questions, Your Honor. May 31<sup>st</sup> Transcript, p. 182-183.

The appellant then re-crossed Sergeant Neves on rebuttal about people confessing to crimes. In particular:

Appellant: People do, in fact, confess though; don't they?

Neves: They do.

Appellant: All right. It's not a rare occurrence, unfortunately, for my line of work?

Neves: Sometimes it takes a little investigation, but at times they do confess.

Appellant: All right, thank you, no other questions. May 31<sup>st</sup> Transcript, p. 183.

The State also called Officer Gann of the Castle Rock Police Department as a rebuttal witnesses against Mr. Malakowsky direct

examination testimony that he stopped to help the appellant. Officer Gann testified to obtaining Mr. Malakowsky's first written statement and that Mr. Malakowsky did not say anything about having to bribe or overbear the appellant's reluctance to get the appellant to cash the forged check. May 31<sup>st</sup> Transcript, p. 185.

During closing, the State started with a discussion about the undisputed evidence in the case, including the forged check. It is undisputed the forged check that the appellant tried to cash was numbered 1075, off of a closed account of Nichole Brese, in the amount of \$350, dated July 2015, payable to Brice Casky, and payment for work. June 1<sup>st</sup> Transcript, p. 19-20. The State proceeded to talk about the suspicious circumstance involving the appellant's attempt to cash check # 1075 and said:

"Now, what -- it's undisputed that there is a suspicious circumstance. We know that through several things. First of all, we know the check, in and of itself, is off an email account photo. We know the spell -- the name of the Defendant is spelled wrong; there's no date; and, then, the reason for the payment is for work. And if we take it further, by all accounts, any testimony that is being offered is that the check was received from a male off of a female's account. That, in itself, is a suspicious circumstance." June 1<sup>st</sup> Transcript, p. 21.

The appellant did not object to the State's comment. June 1<sup>st</sup> Transcript, p. 21.

Later on during closing, the State talked about the appellant's interaction with Ms. Lee at Fibre Federal Credit Union and said:

“So he tells her: I have a guy friend, Nichole, who has a fellow by the name, Ron. Because objectively, once he went into the bank he's trying to get the money, he's trying to get the easy money, he's getting paid. So now he's altering the facts as he knows 'em to achieve the goal that he wants, which is getting money. I have a guy friend, Nichole. And what he says is a little weird, because he's -- I'm cashing a check for a friend off of that friend's account. Etc...” June 1<sup>st</sup> Transcript, p. 25.

The appellant did not object to the State's comment. June 1<sup>st</sup> Transcript, p. 25. Appellant later made a similar comment on his closing regarding the likeliness of a male having a female name and stated. “He explained that he got it from a person named Nicole, and at that point he, in fact, believed the person's name was Nicole. Was that far-fetched that there is a guy named Nicole? Yes. Is there a boy named Sue? Sometimes.” June 1<sup>st</sup> Transcript, p. 48.

On closing, the appellant conceded the he did make a false material statement to a public servant. June 1<sup>st</sup> Transcript, p. 47-48. As for the forgery charge, the appellant acknowledged there was only one disputed issue and stated. “[s]o, ladies and gentlemen, those are the facts and really what this comes down to, and Mr. Nguyen is correct, is knowledge. Did my client know that the check was forged?” June 1<sup>st</sup> Transcript, p. 52.

During his closing, the appellant repeatedly talked about how he cooperated with the police. “My client is then asked to go back into the bank. He complies, he’s not forced to, he’s cooperative. He’s asked to basically hang around while they go talk to the bank personnel, he does that. He’s not guarded, he doesn’t run.” May 31<sup>st</sup> Transcript, p. 47. “You look at, essentially, how well he cooperated with police. You know, you have a situation where he walked into his own bank, gave his own ID, didn’t try and escape, explained what happened, and tried to do something on his own account.” June 1<sup>st</sup> Transcript, p. 56. “And then when police come he actually cooperates to a ridiculous extent. When the officer confronts him with the fact that he’s there about the check, he says, ‘Aw shit,’ and the immediately geos: ‘I got it from him.’ Who would do that?” May 31<sup>st</sup> Transcript, p. 57.

At the conclusion of the case, the jury found the appellant guilty of both charges. June 1<sup>st</sup> Transcript, p. 64. The appellant now appeals his convictions.

#### IV. ARGUMENTS

##### 1. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBIT # 2 AND EXHIBIT # 3 FOR IMPEACHMENT PURPOSES.**

Appellate courts review the trial courts’ decisions to admit or exclude evidence under an abuse of discretion standard. State v. Swan,

114 Wash.2d 613, 658 (1990) and Reese v. Stroh, 128 Wash.2d 300, 310 (1995). A trial court's relevancy determinations, including its balancing of probative value against unfair prejudicial effects, are matters within the trial court's discretion and should be overturned only if no reasonable person could take the view adopted by the trial court. State v. Russell, 125 Wash.2d 24, 78 (1994), State v. Hudlow, 99 Wash.2d 1, 17 (1983), State v. Castellanos, 132 Wash.2d 94, 97 (1997). A trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence. State v. Taylor, 60 Wash.2d 32, 40 (1962). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. State v. Guloy, 104 Wash.2d 412, 421 (1985).

Under ER 607, the "credibility of a witness may be attacked by any party, including the party calling the witness." There are five methods for impeaching the credibility of a witness: (a) the witness may be shown to be biased, (b) the witness may be challenged on the basis of mental or sensory deficiencies, (c) evidence may be introduced to contradict facts to which the witness had testified, (d) the character of the witness may be attacked by evidence of poor reputation, specific instances of misconduct, or prior convictions, and (e) the witness may be shown to have made a

prior in consistent statement. Impeachment by evidence of poor reputation or general misconduct is governed by ER 608. The use of the witness's prior convictions for impeachment is governed by ER 609. Impeachment by evidence of a witness's prior inconsistent statement is governed by ER 613. Other methods of impeachment are governed by decisional law. Karl B. Tegland, Wash. Prac. § 607:1 at 274-275 (2016-2017 Edition).

Although the court may require that a witness be shown his or her prior inconsistent statement before he or she is asked about it at trial, extrinsic evidence of acts or conduct may be introduced to prove a witness's bias without first calling such acts or conduct to the witness's attention. State v. Wilder, 4 Wash.App. 850, 855 (1971); ER 613(a).

On direct examination, Mr. Malakowsky testified the appellant initially questioned the legality of cashing a check in exchange for money, but Mr. Malakowsky encouraged, enticed, and overcame the appellant's reluctance by assuring the appellant that it was legal. Therefore, when the appellant went to cash the check, he did not know what he was doing was illegal and did not know it was a forged check. The appellant's direct testimony resembled those of Mr. Malakowsky. Neither of their direct testimonies resemble what they told law enforcement in their numerous prior contacts with law enforcement on July 30, 2015. Mr. Malakowsky

also testified on direct that he stopped his vehicle and tried to tell law enforcement that the appellant was not involved at all. The appellant raised the issue of him being duped by Mr. Malakowsky and not knowing the check was forged to the forefront of the case.

It is noteworthy that Exhibit # 2 and Exhibit # 3 were admitted on cross examination of Mr. Malakowsky after Mr. Malakowsky had testified on the appellant's behalf. Exhibit # 2 and Exhibit # 3 were admitted to impeach Mr. Malakowsky's direct testimony. Exhibit # 2 and Exhibit # 3 were not admitted for the truth of the matter asserted in those exhibits. Had the State believed the contents of Exhibit # 2, Mr. Malakowsky would not have been arrested and charged in connection with this case. Had the State believed the contents of Exhibit # 3, the State would not have pursued its case against the appellant.

**THE TRIAL COURT DID NOT ABUSE ITS  
DISCRETION WHEN IT ADMITTED EXHIBIT # 2  
INTO EVIDENCE BECAUSE EXHIBIT # 2 WAS  
RELEVANT TO REBUT A MATERIAL FACT  
TESTIFIED BY MR. MALAKOWSKY ON HIS  
DIRECT EXAMINATION.**

The trial court's admission of Exhibit # 2 into evidence was not an abuse of discretion. When evidence contradicts substantive testimony from a witness, it is considered impeachment by contradiction. Jacqueline's Washington, Inc. v. Mercantile Stores Co., 80 Wash.2d 784,

788 (1972). Impeachment by contradiction is merely the process of offering relevant, substantive rebuttal evidence and consequently, must be independently admissible under the usual rules of evidence. Jacqueline's Washington, Inc. v. Mercantile Stores Co., 80 Wash.2d at 788-789; State v. Hubbard, 103 Wash.2d 570, 576 (1985).

“Impeachment by prior inconsistent statement should not be confused with what is sometimes called ‘impeachment by contradiction.’ Impeachment by prior inconsistent statement is the process of introducing the witness’s own inconsistent statements for impeachment.” Karl B. Tegland, Wash. Prac. § 613:1 at 309 (2016-2017 Edition). “By contrast, so-called impeachment by contradiction is the process of contradicting a witness’s testimony by the testimony of a second witness or other evidence.” Id. at p. 309. “A witness may be impeached by introducing extrinsic evidence to contradict the witness on a material fact, but the witness cannot be contradicted on a collateral matter.” Karl B. Tegland, Wash. Prac. § 607:8 at 279 (2016-2017 Edition).

In Jacqueline's Washington, Inc. v. Mercantile Stores Co., plaintiff appealed a dismissal of its claim for smoke damage caused by a fire in defendant’s adjoining store. The trial court found in favor of plaintiff on the issue of liability but dismissed the action because plaintiff failed to establish the amount of damages with sufficient certainty. Jacqueline's

Washington, Inc. v. Mercantile Stores Co., 80 Wash.2d at 785. At trial, “[p]laintiff’s manager expressed his expert opinion that the wholesale value of the inventory had been reduced 50 percent by reason of the fire. Subsequently, plaintiff’s bookkeeper testified that the wholesale value of the inventory before the fire was \$22,668.30. During cross-examination of this witness, two exhibits contradictory of the cumulative effect of this testimony were introduced by defendants and accepted into evidence by the court. These consisted of an accountant’s written statement of loss and plaintiff’s president’s sworn statement of amount of loss setting the amount of damage at \$7,263.85 and \$8,964.92, respectively. These exhibits are not in themselves contradictory as one contains items not included in the other. The trial court accepted the testimony of plaintiff’s witness as to the wholesale value of the inventory before the fire. However, it chose to disbelieve plaintiff’s manager as to the extent of damage suffered. The court concluded that there was not sufficient evidence from which it could determine the amount of damage compensable to plaintiff. In reaching this conclusion, the court refused to consider the defense exhibits stating lower amounts of damage, except for purposes of impeachment.” Id. at 787-788.

On appeal, the court noted that, “[t]he exhibits introduced by defendants were not in the nature of prior inconsistent statements of

plaintiff's witnesses. Nor do these exhibits tend to indicate partiality, incapacity or other lack of testimonial qualities in the witnesses. As an impeachment tool, the sole value of these exhibits is that they contradict the substantive testimony of plaintiff's witnesses on a fact in issue, viz., the extent of the damage. In a sense these exhibits are merely items of rebuttal in impeachment form. Such items are within the category of impeachment by contradiction." Id. at 788. "The substantive facts contained in those exhibits (variant statements as to amount of damage sustained) have direct and independent relevance to a material fact in issue. For this reason the evidence was properly before the court in the form of impeachment by contradiction." Id. at 789. "Having established these characteristics as a prerequisite to letting the evidence in, it would be incongruous to require that the probative value of the evidence be ignored. We hold, therefore, that evidence properly admitted to impeach by mere contradiction constitutes an exception to the general rule and is competent to prove the substantive facts encompassed in such evidence." Id. at 789. "Accordingly, the judgment of the trial court is reversed and the cause remanded for a new trial on the issue of damages." Id. at 790.

In Tamburello v. Department Of Labor And Industries, 14 Wash.App. 827 (1976), the plaintiff appealed the trial court's order denying his application to reopen his claim on grounds of aggravation.

“Plaintiff contends the trial court erred in: (1) admitting the testimony of Mr. Nichols, an investigator for the Department of Labor & Industries, who testified regarding observations he had made of the plaintiff’s physical condition; and (2) in admitting a movie taken by Mr. Nichols of the plaintiff performing several functions; at trial, plaintiff claimed he was incapable of performing the acts depicted.” *Id.* at 827-828. The appellate court noted, “[p]laintiff testified to his present physical condition and the degree of impairment from which he presently suffered. In so testifying, his credibility was placed in issue. The motion picture and testimony of the investigator served to impeach plaintiff’s testimony in regard to a material issue of fact. We find this evidence was properly admitted.” *Id.* at 828.

In State v. Ciskie, 110 Wash.2d 263 (1988), the victim alleged she was raped at least 4 times while engaged in a relationship with the appellant. The parties largely agreed on the facts, but for those comprising the assaults. *Id.* at 265. At trial, appellant testified all sexual relations between the parties were consensual. For two of the allegations, the appellant said he suffered from blackouts induced by many years of alcohol abuse, during which he was unable to perform sexually. In rebuttal, the State offered testimonies of the appellant’s two ex-wives that he was able to perform sexually when he had been drinking heavily and

had experienced blackouts. Id. at 269. The appellant was eventually convicted of one count of rape in the first degree, two counts of rape in the second degree, and one count of rape in the third degree. Id. at 270.

On appeal, the appellant contended “the trial court erred in admitting the testimony of Elaine Ciskie. [The victim] testified during the State’s case-in-chief that on January 28, 1983, as well as on many other occasions, appellant had threatened to kill her. During the defense’s case, Ciskie specifically denied threatening to kill [the victim] during the January incident. He denied that she had ever appeared fearful of him at any time. For impeachment, the State offered the testimony of Elaine Ciskie, appellant’s former wife. She testified that appellant had telephoned her during 1983 around his birthday, February 3, about his intent to kill [the victim], using similar threats and language to what the victim had described in the January assault.” Id. at 280-281. On appeal, the court found the trial court did not err in admitting Elaine Ciskie’s testimony to rebut Ciskie’s, Id. at 281, and affirmed the appellant’s convictions. Id. at 284.

In State v. Munguia, 107 Wash.App. 328 (2001), the appellant was arrested for aggravated first degree murder. “The trial court allowed cross examination testimony contradicting [appellant’s] claim of unfair treatment in detention. Over a bad acts objection, [appellant] admitted he

was in isolation for quite some time for keeping a pod key, talking between cells, being disrespectful to the staff, and using foul language.” Id. at 332. The appellate court noted that, “contrary to [appellant’s] assertion, this is not an ER 404(b) situation. In reviewing the context of the questions, the prosecutor was not focusing on [appellant’s] character. Rather he was attempting to rebut [appellant’s] allegation that he was treated unfairly while incarcerated by introducing contradicting evidence. The court directed the prosecutor to first ask, ‘isn’t the real reason you were treated differently at least due in part of the way you acted[?]’ RP at 1838. Since [appellant] answered ‘no’ to this question, the court allowed the prosecutor to impeach him. RP at 1838. See State v. Hubbard, 103 Wash.2d 570, 576, 693 P.2d 718 (1985) (impeachment by contradiction is in reality substantive rebuttal evidence). Further, in balancing the probative value of the testimony with the prejudicial effect, the court concluded the testimony was proper since [appellant] denied any responsibility for his punishment while in juvenile detention. The trial court did not err.” Id. at 334-335.

On direct examination on behalf of the appellant, Mr. Malakowsky testified that prior to July 30, 2015, the appellant was skeptical of the arrangement where he would get money for cashing another person’s check. Mr. Malakowsky knew the checks were fakes, but he convinced

the appellant that it was legal and the appellant agreed to cash a check for him on July 30, 2015. When he saw the appellant talking to a police officer outside of Fibre Federal Credit Union, Mr. Malakowsky was concerned for his good friend and could not just leave the appellant. Therefore, he stopped his vehicle and tried to explain to law enforcement that the appellant was not involved at all. In the process, he wrote a written statement for Officer Gann, Exhibit # 2.

The trial court correctly admitted Exhibit # 2 because Mr. Malakowsky testified on direct examination to a material fact that is contradicted by extrinsic evidence. Officer Gann and Sergeant Neves testified on rebuttal that Mr. Malakowsky did not do anything to help the appellant. Mr. Malakowsky admitted he never told Deputy Spencer anything to help the appellant. The last item associated with Mr. Malakowsky's interaction with law enforcement on July 30, 2015, was Exhibit # 2. Exhibit # 2 is in many ways like the video in the Tamburello case. In Exhibit # 2, Mr. Malakowsky wrote, "I met a guy named Justin Dunaway he told me he needed help cashing his checks. So I helped him. I didn't know where the checks came from or how he got them he gave me about 100 per check and I think 5 checks were deposited I did not know they were fake. I thought I was helping a friend but instead I was being set up." Exhibit # 2 was admitted not for the truth of statement, but was

admitted to show Mr. Malakowsky's conduct in not ever mentioning the appellant or documenting anything resembling his direct testimony, which suggested the appellant did not act knowingly. Admission of Exhibit # 2 and rebuttal testimonies of officers contradicted Mr. Malakowsky's direct testimony that he stopped to try to tell law enforcement that the appellant was not involved at all. Therefore, the trial court correctly admitted Exhibit # 2 into evidence. For the sake of argument, even if Exhibit # 2 was improperly admitted, it was harmless to the outcome of the case because the contents of Exhibit # 2 never referenced the appellant and the appellant was not prejudiced by its admission.

**THE TRIAL COURT DID NOT ABUSE ITS  
DISCRETION WHEN IT ADMITTED EXHIBIT # 3  
INTO EVIDENCE BECAUSE EXHIBIT # 3 WAS  
RELEVANT TO SHOW MR. MALAKOWSKY'S  
BIAS.**

The trial court's admission of Exhibit # 3 into evidence was not an abuse of discretion. A prior statement is relevant to impeach if (1) it tends to cast doubt on the credibility of the person being attacked and (2) the credibility of the person being attacked is a fact of consequence to the action. State v. Allen, 98 Wash.App. 452, 466 (1999). "[I]f the person being attacked is one who can be impeached, the particular evidence being offered must still be (1) relevant to impeach, and (2) either nonhearsay or within a hearsay exemption or exception." Id. at 466. "To be nonhearsay

when offered to impeach, a prior statement must cast doubt on credibility without regard to the truth of the matters asserted in it. Generally then, it must have been made by the same person whose trial testimony is being attacked.” Id. at 466.

“A careful reading of the law indicates that no foundation is needed to impeach a witness’s testimony with a prior statement as extrinsic evidence of bias. Prior case law conflated two separate concepts: impeachment by evidence of bias and impeachment by prior inconsistent statements.” State v. Spencer, 111 Wash.App. 401, 409 (2002). “[T]he policy of requiring a witness to have the chance to refute or agree with a prior inconsistent statement only applies to evidence that is offered as inconsistent with the witness’s testimony. A prior inconsistent statement is a comparison of something the witness said out of court with a statement the witness made on the stand. ER 613(b) requires the witness have the opportunity either to admit the inconsistency and explain it (in which case the testimony of the prior statement is not admissible as evidence) or to deny it (in which case evidence of the prior inconsistent statement is admissible).” Id. at 409-410. “In contrast, a prior statement that shows the State’s witness’s bias toward the defendant is merely extrinsic evidence of bias. Because it is not being compared with a statement the witness has made on the stand, the witness has no right to be

presented with the content of the testimony before it is offered.” Id. at 410. “We also held that under ER 613(b), when a statement is introduced as extrinsic evidence of bias, it is sufficient to give the declarant an opportunity to explain or deny the statement after introducing the evidence, no foundation is needed beforehand.” Id. at 410. “Extrinsic evidence of acts or conduct may be introduced to prove a witness’s bias without first calling such acts or conduct to the witness’s attention.” Id. at 410.

The trial court correctly admitted Exhibit # 3 because Exhibit # 3 was relevant to show Mr. Malakowsky’s bias. On July 30, 2015, Mr. Malakowsky was initially contacted by law enforcement regarding his and the appellant’s involvement with Mr. Brese’s forged checks. Mr. Malakowsky spoke to law enforcement and gave a written statement to law enforcement. At the time, Mr. Malakowsky made no statement of benefit to appellant and cast himself as a victim of being conned by Mr. Dunaway. On July 30, 2015, Mr. Malakowsky and the appellant were good friends. After he pled guilty on his case, Mr. Malakowsky wrote a second statement for the appellant’s attorney in the appellant attorney’s office, Exhibit # 3. In Exhibit # 3, Mr. Malakowsky’s wrote, “I conned my friend Brice into cashing a fake check. I told him since he needed money if he cashed this check he would get a good portion of the money

that comes out of it he had no clue that what he was doing was illegal and Brice Nowacki is the man I conned.” In Exhibit # 3, Mr. Malakowsky case the appellant as the victim of being conned by himself, very different from assertions in Exhibit # 2. Despite the assertion in Exhibit # 3, the appellant and Mr. Malakowsky remained good friends up until the time of trial, the appellant considered Mr. Malakowsky his best friend.

Exhibit # 3 was admitted not for the truth of statement because the assertions in the statement actually benefits the appellant, but was admitted to show Mr. Malakowsky’s bias for the appellant and motive to change his testimony to benefit the appellant. Therefore, the trial court correctly admitted Exhibit # 3 into evidence. For the sake of argument, even if Exhibit # 3 was improperly admitted, it was harmless to the outcome of the case because the contents of Exhibit # 3 was to the appellant’s benefit and the appellant was not prejudiced by its admission.

**2. SERGEANT NEVES DID NOT GIVE AN OPINION REGARDING THE APPELLANT’S VERACITY AND GUILT TO DEPRIVE THE APPELLANT OF HIS RIGHT TO A FAIR TRIAL.**

For the first time on appeal, appellant asserts that Sergeant Neves improperly gave an opinion regarding the appellant’s veracity and guilty; thus, denying the appellant of a fair trial. Under RAP 2.5(A), only “manifest” constitutional errors may be raised for the first time on appeal.

A “manifest” error is one that is “unmistakable, evident or indisputable.” State v. Lynn, 67 Wash.App. 339, 345 (1992).

Generally, a witness may not offer opinion testimony regarding the guilt or veracity of a defendant. City of Seattle v. Heatley, 70 Wash.App. 573, 577 (1993). However, the “open door” doctrine gives the trial court discretion to admit otherwise inadmissible evidence when the opposing party raises a material issue. State v. Berg, 147 Wash.App. 923, 939 (2008). “[O]nce a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence.” Berg, 147 Wash.App. at 939. The open door rule allows a party to introduce evidence on the same issue to rebut any false impression created by the other party. State v. Fisher, 165 Wn.2d 727, 750 (2009) (“the State may pursue the subject to clarify a false impression”). And under the “invited error” doctrine, a party is barred from “setting up an error at trial and then complaining of it on appeal.” State v. Pam, 101 Wash.2d 507, 511 (1984), overruled on other grounds by State v. Olson, 126 Wash.2d 315 (1995).

In State v. Hartzell, 156 Wash.App. 918 (2010), the appellant was convicted of armed assault and unlawful possession of a firearm for shooting into an apartment occupied by a woman and her daughter. Id. at 926. The trial court ordered in limine to limit officers’ testimonies to what they saw and heard, and not to testify about hearsay statements of a

witness. Id. at 933-935. The appellant “believed a more detailed account would show that someone else -“Randy”-was responsible for the shooting in Kitsap County. The court warned [the appellant], who was representing himself, that if he were to insist on eliciting the evidence that favored his version of the event, less favorable evidence might also be admitted.” Id. at 933. During direct examination of a detective, the prosecutor complied with the order in limine and limited the officer’s testimony to what he saw and heard, and did not testify to any hearsay statements of a witness on scene. On cross examination, the appellant elicited testimony from the officer about hearsay statements the witness had told the officer. Id. at 933-934. The appellant’s “cross-examination of Detective Twomey was aimed at creating the impression that Dodge told him it was Randy, not [the appellant], who had fired the shot.” Id. at 935. “Before beginning redirect examination, the prosecutor sought permission to elicit testimony that Detective Twomey was dispatched to the scene because of a threat to kill, and to elicit a more extensive account of what Sarah Dodge told him inside the house. The trial court agreed that in fairness to the State, the prosecutor should be allowed to elicit information within the scope of the cross-examination [the appellant] conducted. Over [the appellant’s] hearsay objection, the court ruled that this would include everything that Dodge told the deputy.” Id. at 934.

The appellant argued on appeal “that allowing Detective Twoney’s rebuttal testimony denied him his constitutional right to confront Dodge and prejudiced him by letting the jury hear about his threats to kill Sarah Dodge.” Id. at 934. The appellate court found that “[b]y conducting cross-examination in this way, [the appellant] opened the door to letting the detective give a fuller account of what Dodge said, including her statements showing that it was [the appellant], not Randy, who was threatening to shoot her. The trial court did not abuse its discretion by admitting this testimony.” Id. at 935.

In State v. Kendrick, 47 Wash.App. 620 (1987), the appellant was charged and convicted of two counts of homicides. Id. at 623-624. On appeal, the appellant asserted that “his right to due process and his right not to incriminate himself were violated when the prosecutor referred to the fact that he made no statements to police following his arrest. The State counters that [the appellant] ‘opened the door’ to questions concerning post-arrest silence when he elicited testimony relating to his cooperation with the police.” Id. at 629. “During cross examination, defense counsel questioned a police detective concerning the extent of [the appellant’s] cooperation with the investigation:

Q. In fact [Kendrick] cooperated and did everything that anybody asked him?

- A. As far as I was concerned, yes.
- Q. Because I had requested that the police not talk to him, people respected my wishes and didn't ask him where various things might be or might not be; is that right?
- A. I didn't and my partner didn't in my presence." *Id.* at 629. "The State then questioned the detective concerning whether he would have liked to question Kendrick. The detective answered affirmatively; the exchange then continued:
- Q. Was there ever any statement provided by the Defendant in connection with this case?
- A. Never.

MR. MESTEL [Defense Counsel]: Objection, Your Honor.

THE COURT: I'll overrule the objection. The record will stand. Ask another question." *Id.* at 629.

"Defense counsel again brought up Kendrick's cooperation with police during its direct examination of Kendrick himself. Kendrick testified that, on hearing of the police's desire to arrest him, he willingly went to the police station and turned himself in. Counsel then elicited the fact that he had instructed Kendrick not to talk with police." *Id.* at 629. "In its cross examination of Kendrick, the State sought to rebut the impression that he cooperated with police:

- Q. Okay. At any rate you decided to go and talk to [defense counsel], who I believe you indicated told you not to tell the cops everything, which was your gut reaction, because

they might distort it or lie or what was your understanding of what Mr. Mestel told you, and so that you shouldn't say anything to them? Is that right, is that your testimony?

A. That is correct, yest.

Q. Isn't what Mr. Mestel really told you was not to talk to the police, not to get pinned down, sit back and wait and see what the State could prove and what they couldn't prove and what the evidence would show?

A. No.

Q. And didn't he tell you to sit back as you've done for the last seven months, take a look at the police reports, have conversations, hear all the testimony in court and then give your side of the story?

A. No." Id. at 630.

The appellate court "found no error in the State's questioning concerning whether the defendant had refused to give any statements at a certain point in time. Our conclusion was that:

Having brought his cooperation with the police into question, the defendant opened the door to a full development of that subject. The State is allowed to use defendant's postarrest silence to impeach his version of his postarrest conduct. (Citation omitted.) 25 Wash.App. at 812, 610 P.2d 1.

Kendrick, in effect, portrayed his cooperation with police as evidence of his innocence. In so doing, he 'opened the door' to further inquiries about the subject. See State v. Collins, 45 Wash.App. 541, 726 P.2d 491 (1986). The State, therefore, was properly allowed to rebut that impression by

fully developing the extent of Kendrick's cooperation and by exploring the motive behind his actions. We, therefore, find no error." Id. at 631.

State v. Fannon, 194 Wash.App. 1045 (2016), is an unpublished opinion filed on or after March 1, 2013, that is not binding authority, but may be accorded such persuasive value as the court deems appropriate under GR 14.1. In Fannon, a jury found the appellant guilty of one count of unlawful possession of a controlled substance with intent to deliver and four counts of unlawful possession of a controlled substance. Id. at 1-2. On appeal, the appellant argued that his attorney was ineffective for failing to object to the prosecutor's question eliciting testimony commenting on his credibility. Id. at 3. In particular:

"Here, Libbui testified that, in response to [the appellant's] claim that he obtained his cash from selling cars, he asked [the appellant] some simple follow-up questions such as, 'what cars, who did you sell them to, do you have any documentation?' RP at 236. The prosecutor then asked Libbui, "So why are you asking him these types of questions?" to which Libbui responded, "Because - well, I didn't believe him. The way he said it to me and the evidence, I - I initially didn't feel that that matched up to what I saw." Id. at 4.

The appellate court noted that the appellant "does not explain how, and we cannot conclude that, the prosecutor's question, 'So why are you asking him these types of questions?' was designed to elicit Libbui's personal opinion about [the appellant's] credibility. The prosecutor did not ask Libbui to state any opinion as to [the appellant's] credibility. The

prosecutor merely asked Libbui why he was asking [the appellant] certain questions about his claim of obtaining cash through automobile sales, a legitimate point of inquiry and one not requiring an opinion on credibility to answer. Accordingly, we hold the defense counsel did not perform deficiently by failing to object to the question.” Id. at 4.

In the appellant’s case, Sergeant Neves testified on direct examination to his contact with the appellant on July 30, 2015. Sergeant Neves testified to the many stories the appellant told him. On direct examination, Sergeant Neves offered no testimony regarding the appellant’s reluctance to cash the forged check and the appellant being duped by Mr. Malakowsky into cashing the forged check because appellant and Mr. Malakowsky never said any such things to Sergeant Neves on July 30, 2015. On direct, Sergeant Neves only testified to things the appellant and Mr. Malakowsky told him.

On cross examination of Sergeant Neves and direct examination of the appellant, the appellant asked numerous questions designed to create and solicit the impression that he had cooperated with Sergeant Neves’s investigation, as evidence of his innocence. In particular, the appellant solicited testimonies about the appellant not running away, not attempting to flee, answering Sergeant Neves’ questions, volunteering and telling Sergeant Neves about his involvement, tipping Sergeant Neves to Mr.

Malakowsky's involvement, agreeing to go back inside the credit union for Sergeant Neves to investigate the case, and being compliant with the investigation. Therefore, the appellant opened the door for the State to further inquire about the subject and the State recalled Sergeant Neves. On rebuttal, Sergeant Neves indicated that at no time during their multiple contacts on July 30, 2015, did the appellant indicate he was reluctant to cash the check for Mr. Malakowsky and had only agreed to do so after Mr. Malakowsky had overcome his reluctance.

The appellant then cross examined Sergeant Neves on rebuttal and asked the following questions:

Appellant: All right. And, you know, frankly, the two real pertinent parts that -- well, how's this: During all three of those, you know, instances, during all three of those -- those periods where you talked to my client, he never once said, "I knew it was fake;" correct?.

Neves: I don't recall him specifically saying that he knew that it was fake.

Appellant: Okay. Because that would've been in your report; correct?

Neves: Correct.

Appellant: That would've have been very important for this type of case; correct?

Neves: Correct.

Appellant: Okay. He didn't say: I knew they were forging it; I knew that they were using some stolen checks. There was nothing like that, correct?

Neves: In the multiple versions that he told me, that's correct. May 31<sup>st</sup> Transcript p. 181-182.

The State redirect examined Sergeant Neves in light of the appellant's cross and asked the following questions:

State: When you investigate cases, do people just always confess to everything?

Neves: Most people lie to the police --

State: Okay

Neves: -- they don't confess.

State: Did Mr. Malakowsky ever say that he knew the checks were fake?

Neves: I don't recall him ever telling me that.

State: Okay. So, he didn't say that?

Neves: Correct.

State: Did you expect Mr. Nowacki to tell you that he knew the checks were fake?

Appellant: Objection; relevance.

Court: Sustained.

State: No further questions, Your Honor. May 31<sup>st</sup> Transcript, p. 182-183.

The appellant then re-crossed Sergeant Neves on rebuttal about people confessing to crimes. In particular:

Appellant: People do, in fact, confess though; don't they?

Neves: They do.

Appellant: All right. It's not a rare occurrence, unfortunately, for my line of work?

Neves: Sometimes it takes a little investigation, but at times they do confess.

Appellant: All right, thank you, no other questions. May 31<sup>st</sup> Transcript, p. 183.

Other than the one objection that was sustained by the court, the appellant did not object to the State's questions that followed up on the appellant's questions.

The State's question, "When you investigate cases, do people just always confess to everything?" was in direct response to the appellant's cross examination of Sergeant Neves about the appellant having not admitted to knowing the check was a fake. The question itself did not ask Sergeant Neves to give an opinion regarding the appellant's veracity or guilt. The question focused on a legitimate point of inquiry and one not requiring an opinion on credibility to answer. Furthermore, the Sergeant Neves never offered an opinion regarding the appellant's veracity or guilt in the case. The only person who commented on the appellant's veracity

and guilty was the appellant when the appellant confessed to Sergeant Neves about lying and not wanting to get into trouble, and when the appellant conceded on closing that he did make a false or misleading material statement to a public servant. Sergeant Neves did not deprive the appellant of his right to a fair trial.

**3. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT TO PREJUDICE THE APPELLANT.**

To prevail on a claim of prosecutorial misconduct, an appellant must show that “in the context of the record and all the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial.” In re Pers. Restraint of Glasmann, 175 Wash.2d 696, 704 (2012). In assessing whether a prosecutor’s closing argument was improper, appellate courts recognize that the prosecutor has “wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses.” State v. Thorgerson, 172 Wash.2d 438, 448 (2011) and State v. Mack, 105 Wn.2d 692, 698 (1986). The prosecutor is permitted to comment on the veracity of a witness as long as he or she does not express a personal opinion or argue facts not in the record. State v. Smith, 104 Wash.2d 497, 510-511 (1985). Prejudice is not determined in insolation but “in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.” State v.

Warren, 165 Wash.2d 17, 28 (2008) and State v. Brown, 132 Wash. 2d 529, 564 (1997). Reversal is required only if “there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.” State v. Bryant, 89 Wash.App. 857, 874 (1998), State v. Gerdtz, 136 Wash.App. 720, 730 (2007), and Brown, 132 Wash.2d at 564.

“Absent an objection by defense counsel to a prosecutor's remarks, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.” State v. Ziegler, 114 Wn.2d 533, 540 (1990), State v. Echevarria, 71 Wash.App. 595, 597 (1993), and State v. Neidigh, 78 Wash.App. 71, 77-78 (1995). Where the appellant failed to object to the challenged portions of the prosecutor’s argument, he or she will be deemed to have waived any error unless the prosecutor’s misconduct was “so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” State v. Emery, 174 Wash.2d 741, 760-761 (2012). In making this determination, the appellate courts “focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” Id. at 762. The appellant must show that (1) no curative instruction would have eliminated the prejudicial effect, and (2)

the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. Id. at 653.

The appellant did not object at trial to the State's two misstatements and the State's two misstatement were not prosecutorial misconduct. With regards to the first statement cited by the appellant, the State was discussing the undisputed evidence in the case, including the forged check. It is undisputed the forged check that the appellant tried to cash was numbered 1075, off of a closed account of Nichole Brese, in the amount of \$350, dated July 2015, payable to Brice Casky, and payment for work. The State proceeded to talk about the suspicious circumstance involving the appellant's attempt to cash check # 1075 and said:

"Now, what -- it's undisputed that there is a suspicious circumstance. We know that through several things. First of all, we know the check, in and of itself, is off an email account photo. We know the spell -- the name of the Defendant is spelled wrong; there's no date; and, then, the reason for the payment is for work. And if we take it further, by all accounts, any testimony that is being offered is that the check was received from a mall off of a female's account. That, in itself, is a suspicious circumstance." June 1<sup>st</sup> Transcript, p. 21.

The State agrees the statement "off of an email account photo" was not testified too by any witnesses in the case because it is simply not evidence pertaining to this. For whatever reason, the State had a mental lapse and said "off of an email account photo" when it meant to say, "off of a closed

account” as the State was talking about the undisputed facts pertaining to check # 1075.

With regards to the second statement cited by the appellant, the State talked about the appellant’s interaction with Ms. Lee at Fibre Federal Credit Union and said:

“So he tells her: I have a guy friend, Nichole, who has a fellow by the name, Ron. Because objectively, once he went into the bank he’s trying to get the money, he’s trying to get the easy money, he’s getting paid. So now he’s altering the facts as he knows ‘em to achieve the goal that he wants, which is getting money. I have a guy friend, Nichole. And what he says is a little weird, because he’s -- I’m cashing a check for a friend off of that friend’s account. Etc...” June 1<sup>st</sup> Transcript, p. 25.

Like the first instance, the State misspoke and said “who has a fellow by the name, Ron,” when it meant to say “who has a fellow by the name, Nichole.”

In both instances, the State’s actions did not amount to prosecutorial misconduct and did not prejudice the appellant. The two misstatements were not flagrant and ill intentioned to prejudice the appellant. They were made once by accident and they did not touch upon any critical elements of the charges that would have affected the outcome of the case. The fact that the appellant’s attorney did not object to either statements indicates he also did not interpret the statements to be flagrant and ill intentioned to prejudice the appellant. Furthermore, the court

instructed the jury in instruction No. 1 that, “The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the Exhibits that I have admitted during trial...The lawyer’s remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the Exhibits, the law as contained in my instruction to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions...” June 1<sup>st</sup> Transcript, p. 1-8 and 15-18. The two misstatements were not prosecutorial misconduct and the appellant was not prejudiced by them.

**4. THE APPELLANT WAS NOT DENIED OF EFFECTIVE ASSISTANCE OF COUNSEL.**

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 693 (1984) and State v. McFarland, 127 Wash.2d 322, 335 (1995). An appellant must show both deficient performance and resulting prejudice to prevail in an ineffective assistance claim. State v. McNeal, 145 Wash.2d 352, 362 (2002). To establish deficient performance, an appellant must show that his attorney's performance fell below an

objective standard of reasonableness. Id. To establish prejudice, an appellant must demonstrate that, but for the deficient representation, the outcome of the trial would have differed. Id.

Deference will be given to counsel's performance in order to "eliminate the distorting effects of hindsight" and the reviewing appellate court must indulge in a strong presumption that counsel's performance is within the broad range of reasonable professional assistance. Id. at 689 and State v. Lopez, 107 Wash.App. 270, 275 (2001). A decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wash.2d 61, 77-78 (1996), State v. Garrett, 124 Wash.2d 504, 520 (1994), and McFarland, 127 Wash.2d at 335.

The appellant's trial counsel was not deficient and the appellant was not prejudiced by his attorney's representation. As indicated above, Sergeant Neves did not comment on the appellant's veracity or guilty, and the State did not commit prosecutorial misconduct. Therefore, the appellant's trial attorney correctly did not object to the State and Sergeant Neves. There was substantial evidence for the jury to find the appellant guilty of the charges. The appellant was not prejudiced by his attorney and received effective legal representation.

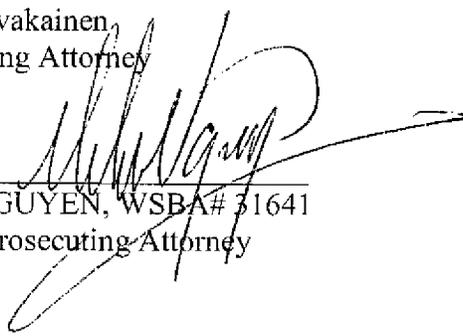
V. CONCLUSIONS

The appellant's appeal should be denied because the trial court did not abuse its discretion in admitting Exhibit # 2 and Exhibit # 3, the officer did not give an opinion regarding the appellant's veracity or guilt, the State did not commit prosecutorial misconduct, and the appellant's trial attorney was effective in his representation of the appellant.

Respectfully submitted this 4 day of April, 2017.

Ryan Jurvakainen,  
Prosecuting Attorney

By:

  
MIKE NGUYEN, WSBA# 31641  
Deputy Prosecuting Attorney

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 14<sup>th</sup>, 2017.

Michelle Sasser  
Michelle Sasser

**COWLITZ COUNTY PROSECUTOR**  
**April 14, 2017 - 2:26 PM**  
**Transmittal Letter**

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