

NO. 49363-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRIS MCNICHOLAS,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	6
D. ARGUMENT	
I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS WHEN IT ENTERED JUDGMENT AGAINST HIM FOR FIRST DEGREE THEFT, IDENTITY THEFT AND FORGERY BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THESE CHARGES	14
II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT ADMITTED ER 404(b) EVIDENCE THAT WAS MORE UNFAIRLY PREJUDICIAL THAN PROBATIVE	17
III. TRIAL COUNSEL’S FAILURE TO PROPOSE A GOOD FAITH CLAIM OF TITLE DEFENSE INSTRUCTION UNDER WPIC 19.08 DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND THE UNITED STATES CONSTITUTION, SIXTH AMENDMENT	23
E. CONCLUSION	29

F. APPENDIX

- 1. Washington Constitution, Article 1, § 3 30
- 2. Washington Constitution, Article 1, § 22 30
- 3. United States Constitution, Sixth Amendment 31
- 4. United States Constitution, Fourteenth Amendment 31
- 5. WPIC 19.08 32
- 6. RCW 9A.56.060 33

G. AFFIRMATION OF SERVICE 34

TABLE OF AUTHORITIES

Page

Federal Cases

Bruton v. United States,
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) 17

Church v. Kinchelse,
767 F.2d 639 (9th Cir. 1985) 24

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 14

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 15

Strickland v. Washington,
466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) 23, 24

State Cases

State v. Acosta, 123 Wn.App. 424, 98 P.3d 503 (2004) 19, 20

State v. Ager, 128 Wn.2d 85, 904 P.2d 715 (1995) 26

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 14

State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001) 18

State v. Cobb, 22 Wn.App. 221, 589 P.2d 297 (1978) 24

State v. Ford, 137 Wn.2d 472, 973 P.2d 472 (1999) 17

State v. Hicks, 102 Wn.2d 182, 683 P.2d 186 (1984) 26

State v. Johnson, 29 Wn.App. 807, 631 P.2d 413 (1981) 24

State v. Kendrick, 47 Wn.App. 620, 736 P.2d 1079 (1987) 18

<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972)	14
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001)	19
<i>State v. Stanton</i> , 68 Wn.App. 855, 868 P.2d 1365 (1993)	26
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963)	17
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973)	15

Constitutional Provisions

Washington Constitution, Article 1, § 3	14
Washington Constitution, Article 1, § 22	23
United States Constitution, Sixth Amendment	23
United States Constitution, Fourteenth Amendment	14

Statutes and Court Rules

ER 403	17-19
ER 404(b)	17, 20, 21
RCW 9A.56.020	24-26
WPIC 19.08	23, 24, 26

Other Authorities

M. Graham, <i>Federal Evidence</i> § 403.1, at 180-81 (2d ed. 1986)	18
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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when they entered judgment against him for first degree theft, identity theft and forgery because substantial evidence does not support these charges.

2. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it admitted ER 404(b) evidence that was more unfairly prejudicial than probative.

3. Trial counsel's failure to propose a good faith claim of title defense instruction under WPIC 19.08 denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment against him for first degree theft, identity theft and forgery when substantial evidence does not support these charges?

2. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it admits ER 404(b) evidence that is more unfairly prejudicial than probative, and when the admission of that evidence causes prejudice?

3. Does a defense counsel's failure to propose a good faith claim of title defense instruction under WPIC 19.08 deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment when the defendant is charged with theft and the defense is available?

STATEMENT OF THE CASE

Factual History

The defendant Chris McNicholas has been a Clark County Resident for many years who has worked in construction and sales in southwest Washington, first under the business name of Pacific Coast Vinyl, and then under the name of Green Tech Innovations. RP 1791-1792.¹ In this capacity he has replaced roofs and windows in a number of Clark County homes and at one time had a number of employees working for him. RP 1771-1805. For example, around 2004 he replaced a residential roof for a Clark County resident by the name of Shinae Lane. RP 1216-1219. In 2008, he replaced residential windows for a Clark County resident by the name of Helen McGinnis. RP 1342-1344. In 2011, he replaced a house roof and a barn roof for a Clark County resident by the name of Margaretta Yadoff. RP 1143-1147, 1151-1152. He had entered into a written contract with each of these customers and none of them complained that the work had not been performed in a timely manner or that it had been faulty. RP 1151-1152, 1216-1219, 1342-1344.

Eventually the defendant closed down his Pacific Coast Vinyl

¹The record on appeal includes 12 volumes of continuously numbered verbatim reports of a number of pretrial motions, the trial and sentencing in this case. They are referred to herein as “RP [page #].”

company and started Green Tech Innovations. RP 1791-1795. While running this business in April of 2014, he stated that he entered into a written contract with a Clark County resident by the name of Audine Hitt to replace the windows in her house and perform work on her roof, carport and yard. RP 1806-1809. According to the defendant he employed a person by the name of Brandon Reed to do preliminary work on the house. RP 1887-1888. Mr. Reed gave the defendant invoices for work he claimed he had performed on the soffits and fascia on the house. *Id.* However, the defendant reported that in September of 2014 he fired Brandon Reed because he found out that Mr. Reed had billed for work he had not performed on Ms Hitt's house. RP 1892.

Ms Hitt is a 90-year-old widow and has lived for the past 50 years in the same residence at 3809 NW 106th Street in Vancouver, Washington, which is situated outside the city limits. RP 569-571. She has lived alone since her husband passed away in 2009. RP 718. In fact, in 2011, a construction company by the name of Eco Best Exteriors rebuilt Ms Hitt's deck and carport. RP 1528-1539. Later that same year Eco Best replaced her roof. RP 1540.

Ms Hitt's deceased husband originally built the home in which the family lived. RP 710-711. That house has been described as "unusual" and "unique" with the back of the house built into a hill with a single slope roof

running to the front of the house facing “south.” RP 712-713, 1528-1529. The front of the house is essentially all glass. *Id.* The defendant claimed that the contract he and Ms Hitt signed set the price of the window replacement and other work at \$70,000.00 with at least half of that amount payable in installments prior to the start of construction. RP 1825-1827.

From April to September of 2014, the defendant either cashed or deposited a number of checks written on Audine Hitt’s checking account, including the following:

Number	Date	Amount	Notation
2222	4/27/14	5,000.00	deposit
2223	5/27/14	2,000.00	[none]
2224	6/2/14	2,500.00	deposit windows
2225	6/8/14	5,000.00	roof
2431	7/20/14	500.00	[none]
2434	8/2/14	2,500.00	Gutter
2437	9/8/14	3,000.00	care for Sept.
2438	9/2/14	500.00	[none]
2440	9/4/14	2,200.00	carport finish/care

RP 629-654, 897-915, 1319-1323, 1644-1670.

In September of 2014, the manager from Ms Hitt’s Bank spoke to the police about her belief that a number of the checks the defendant negotiated on Ms Hitt’s account were forged. RP 658. During this period of time Ms

Hitt's adult daughter, who lived in New Mexico and periodically came to Vancouver to visit her mother, came to believe that the defendant had forged these and other checks on her mother's account. RP 795-796. Ms Hitt's daughter then obtained an anti-harassment order on her mother's behalf against the defendant. *Id.*

During the subsequent investigation police officers interviewed Ms Hitt at her home as did two Washington Adult Protective Services investigators. RP 1023-1074, 1293-1295. They all believed that Ms Hitt appeared somewhat disoriented and quite forgetful, sometimes to the point that she could not remember who they were or why they were interviewing her. RP 1039-1046, 1307-1308. However, neither the officers nor the Adult Protective Services investigators claimed that they had spoken with Ms Hitt or evaluated her in April of 2014, when the defendant stated that he had entered a contract with her. RP 1063, 1328-1329. At the beginning of the trial in this case the court found that Ms Hitt was competent to testify and she was the first witness the prosecutor called. RP 569-571.

Procedural History

By information filed June 20, 2016, the Clark County Prosecutor charged the defendant Chris McNicholas with one count of first degree theft, one count of first degree identity theft, and 16 counts of forgery for the checks listed above, as well as seven other checks written during the same

time period on the same account and negotiated by the defendant. CP 6-14. By second amended information filed September 25, 2016, the state added a count of Contracting without a License. CP 51-60. The state later dropped a total of seven counts of forgery upon determining that it had insufficient proof that the defendant forged those instruments. CP 169-176, 282-288.

Prior to trial the defense brought a motion to exclude a number of witnesses the state had endorsed, including Margaretta Yaddoff, Randy Yaddof, Shinae Lane and Helen McGinnis. CP 237-257. Specifically, the defense argued that the state's sole purpose in calling these witnesses was to introduce prior bad acts by the defendant unrelated to the current charges solely for the purpose of arguing that in the current case the defendant had acted in conformity with his alleged prior bad acts. *Id.* Following a hearing and argument from both parties, the trial court denied this motion upon its finding that the probative value of the evidence from these four witnesses outweighed its unfair prejudicial effect. RP 295-304.

This case eventually came on for trial before a jury. RP 569-1578. On the morning of the first day of trial the defendant plead guilty to Contracting without a License as charged in Count XII of the fifth amended information. CP 269, 373-380; RP 461-470. Following this guilty plea, pretrial motions and *voir dire*, the state presented its case by calling 15 separate witnesses over the first five days of trial two of whom it recalled for

further testimony. RP 569-1578. These witnesses included Audine Hitt and her daughter, three investigating officers, a handwriting expert, an Adult Protective Services Investigator, three bank employees, the contractor who had previously worked on Ms Hitt's house, and the four ER 404(b) witnesses, Margaretta and Randy Yaddof, Shinae Lane and Helen McGinnis. RP 569-1578. The defense then called its own handwriting expert, after which the defendant took the stand. RP 1624-1959. These witnesses testified to the facts set out in the preceding factual history. *See Factual History, supra.*

As was mentioned above, during the trial in this case both the state and the defense called handwriting experts. CP 867-955, 1624-1721. Both testified that they had reviewed photocopies of 16 disputed checks from Audine Hitt's account that comprised the nine counts of forgery charged in Counts III through XI as well as seven other checks originally charged as forgeries in this case but later dismissed, and that they had reviewed photocopies of known writing samples for Ms Hitt and the defendant. CP 891-892. Following their analysis they came to somewhat different conclusions about the signatures and writing on the nine checks that constituted the nine forgery charges. CP 867-955, 1624-1721.

According to the state's expert, it was (1) "highly probable" that Audine Hitt did not write the payee information or sign the nine checks charged in the nine forgery accounts, (2) that it was "probable" that the

defendant had endorsed eight of those checks, (3) that there was evidence that someone had tried to copy Audine Hitt's signature on four of the checks, and (4) that the expert could come to "no conclusion" as to whether or not the defendant had endorsed the one remaining check (No. 2431 charged in Count VII). RP 894-915. By contrast, according to the defendant's expert, a correct analysis of the documents given the limited evidence presented, particularly the failure to present any original documents, was that "no conclusion" could be drawn as to who had or had not signed the nine checks listed in the forgery charges. RP 1644-1672. In other words, the defendant's expert could not say with any reasonable certainty whether or not Audine Hitt had signed the disputed checks. RP 1659. The defendant's expert also disputed the conclusion that four of the checks had some indications that someone had tried to copy Audine Hitt's signature. RP 1659-1660.

As was also previously mentioned, the state did call four ER 404(b) witnesses, all over continuing defense objection. RP 1143, 1169, 1215, 1340. The first two witnesses were Margaretta Yaddof and her son Randy Yaddof. RP 1143, 1169. At the time she testified Ms Yaddof was 80-years-old and had lived alone in her home for a number of years. RP 1143. According to Ms Yaddof, in June of 2011 the defendant approached her at her home in Ridgefield and asked if she was interested in replacing her roof. RP 1143-1152. She stated that she was and ended up signing a contract with

the defendant under the name of Pacific Coast Vinyl. *Id.* He finished the job and she paid him. *id.*

Ms Yaddof went on to testify that in November of 2014, the defendant drove to her home unannounced, came to the door, made a claim that she owed him \$100.00 to inspect her roof, and stated that he would not leave until she paid him. RP 1151-1160. Eventually he went out and sat in his truck in her driveway. *Id.* As a result, she called her son Randy Yaddof to speak with the defendant. *Id.* Mr. Yaddof lives next door to his mother. RP 1175-1177. According to Mr. Yaddof he spoke with the defendant who claimed he was there to do a roof inspection for warranty purposes and needed to be paid as he had no gas in his truck. RP 1177-1179. Eventually Mr. Yaddof's mother stuck her head out the door and said "Do you want me to call the police?" RP 1157-1159. After she said this the defendant drove away. *Id.* Ms Yaddof went on to testify that the next night the defendant called and told her that he still wanted his \$100.00. RP 1162.

The state's third ER 404(b) witness was Shinae Lane. RP 1215. At the time she testified Ms Lane was 87-years-old, she lived alone in Vancouver and she did not speak English well. RP 1216-1219. According to Ms Lane, about 10 years ago the defendant put a new roof on her home and she paid him in full. *Id.* She next heard from him on November 20, 2014, when he came to her home uninvited and said that he would not leave until

she paid him \$300.00 for a roof inspection. RP 1219-1229. Ms Lane then gave him a check for \$300.00 to get him to leave and because she was frightened by his conduct. RP 1230. When asked if the person to whom she was referring was in the courtroom she stated that he was not. *Id.*

The state's final ER 404(b) witness was Helen McGinnis. RP 1340. According to Ms McGinnis, at the time she testified she was 89-years-old and had lived alone in her home in Hazel Dell for the last 18 years. RP 1341. Ms McGinnis testified that in 2008 or 2009 the defendant, doing business as Pacific Coast Vinyl, replaced the windows in her house under a written contract that they both signed. RP 1342-1344. He did the work and she paid him in full. *Id.* According to Ms McGinnis, in 2014 she noted that one of the windows had steam between the panes so she called the defendant to get the problem fixed. RP 1346-1347.

Later the defendant called and stated that he would stop by, which he did that evening. RP 1346. When she showed him the window and he stated that it would be \$300.00 to "reinstate" the insurance on the windows so she could get a replacement because the seal between the two glass panes had cracked and was letting in moisture. RP 1346-1347. She eventually gave him a check for \$150.00 and he told her that he would be able to get a new window when she paid him the rest. RP 1354-1355. He never did come back to work on the window and he did not give her money back. RP 1355. In

fact, she later determined that the window had not actually been leaking and that it just needed to be cleaned. RP 1357-1358.

Following the close of the state's case the defense called its handwriting expert as its first witness. RP 1624-1721. After this testimony, the defense proposed an instruction defining the term "contract," arguing that without this instruction it would not be able to effectively present its defense, which was that a valid contract existed between the defendant and Ms Hitt, and that under the law his failure to perform the contract did not constitute a crime. RP 1777-1779. The defendant's proposed instruction stated:

Definition of *CONTRACT*

1. *Ia*: a binding agreement between two or more persons or parties; *especially*: one legally enforceable
2. *b*: a business arrangement for the supply of goods or services at a fixed price.

CP 571 (formatting in original).

Following argument the trial court refused to give the defendant's proposed instruction. RP 1777-1779. The defendant then took the stand on his own behalf and testified that he had a valid contract with Ms Hitt, that she had been competent to enter it, and that he had intended to fulfill the contract but had been prevented from doing so because of the protection order that Ms Hitt's daughter obtained preventing him from having contact with her. RP 1791-1959.

After the defendant's testimony the defense closed its case and the court then instructed the jury with the defendant objecting to Instructions 9 defining the term "knowledge," Instruction No. 10 on the aggregation of separate amounts into a single theft, and Instruction No. 16 defining the term "financial information" as misstatement of the law or inapplicable to this case. CP 502, 504, 510, 492-533; RP 1961, 1971-1974, 2032-2064. However, the defense did not propose a good faith claim of title defense instruction under WPIC 19.08. *Id.* Following argument the jury retired for deliberation and eventually came back with guilty verdicts on all counts. CP 534-565; RP 2162-2179.

The jury also returned special verdicts that (1) the defendant had committed these offenses knowing that the victim was particularly vulnerable or incapable of resistance, and (2) that each crime was "a major economic offense or series of offenses." CP 536, 538, 541, 544, 547, 550, 553, 556, 559, 562, 566. The court later imposed a sentence of 43 months on Count I on a range of 43 to 57 months, a sentence of 63 months on Count II on a range of 63 to 87 months, and sentences of 22 months each on Counts III through XI on ranges of 22 to 29 months on each count. CP 626-640. The court then ran Counts I and II consecutive for an exceptional sentence of 106 months based upon the aggravating factors the jury had found. *Id.* The defendant thereafter filed the instant appeal CP 656.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS WHEN IT ENTERED JUDGMENT AGAINST HIM FOR FIRST DEGREE THEFT, IDENTITY THEFT AND FORGERY BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THESE CHARGES.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the defendant argues that substantial evidence does not support the first degree theft conviction, the identity theft conviction, or the nine forgery convictions. The following sets out this argument. The first eleven counts from the last amended information encompass three separate types of offenses: (1) Theft under RCW 9A.56.020, (2) Identity Theft under RCW 9.35.020, and (3) Forgery under RCW 9A.60.020. For theft, the *mens rea* element is the “intent to deprive”. See RCW 9A.56.020. For identity theft, the *mens rea* element is the “intent to commit, or to aid or abet, any crime.” See RCW 9.35.020. For forgery, the *mens rea* element is the “intent to injure or defraud.” See RCW 9A.60.020.

Under the “intent” element each of these classification of offenses the state had the burden of proving that the defendant understood that he was

committing illegal acts. In other words, the state had the burden of presenting evidence from which a reasonable jury could conclude that the defendant knew that the checks were forged and, to put it succinctly, negotiated each check with the intent and desire to steal as both the first degree theft and identity theft charges from Counts I and II arise from the defendant's negotiation of the nine forgery counts. The problem with the forgery counts in this case is that the state failed to present evidence to prove beyond a reasonable doubt that the checks were actually not written by Audine Hitt. This lack of proof was encapsulated in the testimony of the state's expert, who did not claim that his analysis revealed that Ms Hitt had not signed the disputed checks. Rather, his testimony was that it was (1) "highly probable" that Audine Hitt did not write the payee information or sign the nine checks charged in the nine forgery accounts, (2) that it was "probable" that the defendant had endorsed eight of those checks, (3) that there was evidence that someone had tried to copy Audine Hitt's signature on four of the checks, and (4) that the expert could come to "no conclusion" as to whether or not the defendant had endorsed the one remaining check (No. 2431 charged in Count VII). RP 894-915.

Put succinctly, a "probability" or even a "high probability" does not constitute proof beyond a reasonable doubt. While it might well be substantial evidence under a civil preponderance standard, it is not sufficient

to support the heightened standard of proof for a criminal case. Thus, absent substantial evidence that Audine Hitt did not write the checks in question, the court's entry of judgments against the defendant for the first eleven offenses violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. These convictions should be reversed and the case remanded with instructions to dismiss with prejudice.

II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT ADMITTED ER 404(b) EVIDENCE THAT WAS MORE UNFAIRLY PREJUDICIAL THAN PROBATIVE.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations

of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d

1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr.

Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

Turning to the case at bar, the trial court allowed the state to elicit evidence from four witnesses involving three prior events in which the defendant was involved. According to the witnesses, each of these three events occurred in 2014, a number of years after they had contracted with the defendant to either put a new roof on their house or put new windows in their house. Two common threads ran through these events. The first was that the witnesses had entered into a contract with the defendant a number of years previous to perform work for them, either putting on a new roof (two of the incidents) or installing new windows (one of the incidents). In each of the three incidents the defendant had successfully performed the work and the witnesses had paid him under the written contract.

The second common thread that ran through each of the three ER 404(b) events was the claim that toward the end of 2014 the defendant had demanded a relatively small amount of money (\$300.00 or less) to perform work of a dubious nature, somehow related to the prior contracted work. However, even at that the circumstances of the contact between the defendant and the prior customers varied because in two of the incidents the defendant

originated the contact while in one the customer initiated the contact. These events, even if assumed to be true, bore marginal if any relation to the charges in the case at bar or the reasons that a prior bad act would be admissible under ER 404(b). That rule states:

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

ER 404(b).

In the case at bar the state was not attempting to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” by introduction of the three alleged bad acts. In fact, the only relationship between the alleged other bad acts and the current charges was that they all generally related to the defendant’s business. However, as the following two points explain, that is where the similarities end. First, in the three prior bad acts the defendant had previously contracted with the people involved and then successfully completed the contacts a number of years prior to the time of the current charge. By contrast, in the case at bar the state alleged that the defendant took money from Ms Hitt under the guise of a contractual agreement he had no intent of fulfilling. Second, in the three prior bad acts the defendant allegedly tried to obtain small amounts of money

at a single time for dubious services. By contrast, in the case at bar the state alleged that the defendant repeatedly forged checks over a six month period and thereby obtained tens of thousands of dollars.

As the foregoing explains, the only relationship between the other bad acts and the current alleged crime was the other bad acts showed that the defendant was a dishonest “scammer,” and that he must be guilty in the case at bar because this was simply another dishonest scam that he had concocted. However, this is precisely the type of evidence that should be excluded under ER 403. Put another way, one is left to ask in what way the other bad acts had a tendency to prove the consequential facts in the case at bar. In the case at bar those consequential facts were essentially twofold: (1) did the defendant enter into a valid contract with Ms Hitt intending to fulfill the contract, and (2) did the defendant forge the nine checks charged in the last amended information. The other bad acts had no tendency to prove these facts since these other acts all admittedly involved valid contracts that the defendant intended to and did fulfil, and since the other bad acts did not involve any claim of forgery. Thus, in the case at bar the trial court abused its discretion when it admitted the three other bad acts as substantive evidence in the case at bar.

By contrast, the unfair prejudice to the defendant that occurred when the court admitted these other bad acts was significant. These three incidents,

if believed by the jury, showed the defendant to be a petty thief, a liar and a person who would bully older women. This put the defendant in an extremely bad light particularly given the state's failure to produce any evidence that the defendant had taken any action to force or bully Ms Hitt. Given the fact that the defendant produced a valid contract signed by the two parties and the fact that the state admitted that Ms Hitt had written the defendant a number of checks, there is high likelihood that but for the admission of this improper evidence the results of the trial would have been different and would have resulted in an acquittal. As a result, this court should vacate the defendant's convictions and remand for a new trial.

III. TRIAL COUNSEL'S FAILURE TO PROPOSE A GOOD FAITH CLAIM OF TITLE DEFENSE INSTRUCTION UNDER WPIC 19.08 DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686,

80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

The defendant in this case claims ineffective assistance based upon trial counsels failure to propose a good faith claim of title defense instruction under WPIC 19.08 in regards to the charge of first degree theft. The following sets out this defense.

Under RCW 9A.56.020(1), the legislature has defined the crime of

“theft” as follows:

(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; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.020(1).

In paragraph (2) of this same statute the legislature provides for the following “sufficient defense” to a charge of theft:

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

RCW 9A.56.020(2).

This defense is found in WPIC 19.08, which states as follows concerning RCW 9A.56.020(2):

It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even if the claim is untenable.

The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty [as to this charge].

WPIC 19.08.

If evidence supports giving an instruction on the defense of good faith claim of title, then the trial court's failure to give it constitutes reversible error. *State v. Hicks*, 102 Wn.2d 182, 683 P.2d 186 (1984). However, the instruction is only available for theft charges brought under RCW 9A.56.020(1)(a). *State v. Stanton*, 68 Wn.App. 855, 868 P.2d 1365 (1993). The reason that the instruction is not available for theft charges brought solely under RCW 9A.56.020(1)(b) is that a conviction for theft "by color or aid of deception" necessarily obviates a finding that the defendant obtained the property in question "openly and avowedly under a good faith claim of title." *State v. Stanton*, 68 Wn.App. at 868. Finally, in order to obtain this instruction a defendant has the burden of producing evidence that (1) the property was taken openly and avowedly, and that (2) there was some legal or factual basis upon which the defendant, in good faith, based his or her claim of right in the property even if that claim proves untenable. *State v. Ager*, 128 Wn.2d 85, 904 P.2d 715 (1995).

In the case at bar the defendant testified that he had entered into a

valid contract with Ms Hitt to perform construction work at her home and that she had written him each alleged forged check as payments under that contract. He also produced expert testimony establishing that Ms Hitt had written a number of the disputed checks that were originally charged as forgeries but later dismissed. In fact, in an attempt to support this claim defendant's counsel proposed an instruction defining the term "contract" to better enable the defense to make its argument that all the money the defendant received was pursuant to a valid contract. In other words, the essence of the defense was that the defendant obtained each check from Ms Hitt "openly and avowedly under a good faith claim of title."

In spite of this defense and the attempt to define the term "contract" via a jury instruction, defendant's attorney failed to offer an instruction under WPIC 19.08. Given the defendant's claim that there was a valid contract and that all the money he received from Ms Hitt was pursuant to that contract, there was no possible tactical reason for the failure to propose WPIC 19.08. As a result, counsel's failure to propose this instruction fell below the standard of a reasonably prudent attorney. In addition, given the state's failure to even enquire of Ms Hitt about the contract the defendant claimed existed, there is a reasonable likelihood that the jury would have acquitted the defendant had the defense proposed the instruction and had the court given it. At a minimum, counsel's failure to propose this instruction undermines

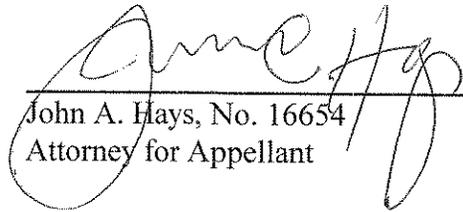
confidence in the outcome of the trial as to the theft charge. As a result, this court should reverse the defendant's conviction for theft based upon ineffective assistance and remand the theft charge for a new trial.

CONCLUSION

Substantial evidence does not support the jury verdicts of guilty. As a result, this court should vacate those convictions and remand with instructions to dismiss with prejudice. In this alternative, the court should vacate the convictions and remand for a new trial

DATED this 19th day of June, 2017.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

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

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

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

WPIC 19.08
Theft — Defense

It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even if the claim is untenable.

The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty [as to this charge].

RCW 9A.56.020
Theft — Definition, Defense

(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; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

CHRIS MCNICHOLAS,
Appellant.

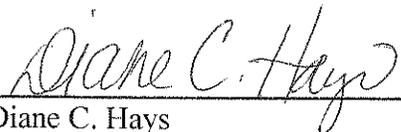
NO. 49363-2-II

AFFIRMATION
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Clark County Prosecuting Attorney
1013 Franklin Street
Vancouver, WA 98666-5000
prosecutor@clark.wa.gov
2. Chris McNicholas, No.393275
Airway Heights Corrections Center
P.O. Box 1899
Airway Heights, WA 99001-1899

Dated this 19th day of June, 2017, at Longview, WA.



Diane C. Hays

JOHN A. HAYS, ATTORNEY AT LAW

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