

No. 49877-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHELE CALDWELL,

Appellant.

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

APPELLANT'S OPENING BRIEF

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WASHINGTON APPELLATE PROJECT
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A. INTRODUCTION

Michele Caldwell was accused of conducting a fraudulent transaction using a check. The drawer of the check, however, did not identify the check as belonging to him. Rather, the drawer's son identified the check as belonging to his father. Because the drawer's son did not have the personal knowledge necessary to authenticate the check, the trial court erred in admitting the check into evidence. Ms. Caldwell's conviction for forgery should be reversed. Alternatively, the Court should remand because the trial court failed to enter adequate written findings of fact and conclusions of law. The Court should also reverse the imposition of legal financial obligations against Ms. Caldwell.

B. ASSIGNMENTS OF ERROR

1. Violating the rules of evidence, the trial court erred in admitting exhibit 1, a check.
2. The trial court erred in determining that the State had proved Ms. Caldwell guilty of forgery beyond a reasonable doubt.
3. The trial court failed to enter adequate findings of fact and conclusions of law.
4. If denominated as a finding of fact rather than a conclusion of law, the trial court erred in entering finding 1. CP 13.

5. If denominated as a finding of fact rather than a conclusion of law, the trial court erred in entering finding 2. CP 13.

6. If denominated as a finding of fact rather than a conclusion of law, the trial court erred in entering finding 3. CP 13.

7. If denominated as a finding of fact rather than a conclusion of law, the trial court erred in entering finding 4. CP 13.

8. The trial court erred in imposing legal financial obligations against Ms. Caldwell.

C. ISSUES

1. Evidence must be authenticated before it is admitted. A witness with personal knowledge that a document is what it purports to be may authenticate the document. The person named as the drawer on the check did not identify the check as belonging to him. The drawer's son had not seen the check until law enforcement showed it to him and he was unfamiliar with his father's financial affairs. Did the trial court err in admitting the check into evidence over Ms. Caldwell's objection?

2. Following a bench trial, written findings of fact and conclusions of law must be entered. The written findings must be specific enough to permit meaningful appellate review. After adjudicating Ms. Caldwell guilty of forgery, the trial court entered findings parroting the elements of

forgery. The court did not enter an oral ruling or memorandum opinion.

Should this Court remand for entry of adequate written findings?

3. Recognizing Ms. Caldwell's inability to pay and the hardship that costs would impose, the trial court waived the imposition all legal financial obligations except for \$600, which the court believed it was required to impose. Courts, however, have discretion to waive all legal financial obligations. Should this Court remand with instructions that the trial court may waive all legal financial obligations?

D. STATEMENT OF THE CASE

Michelle Caldwell was charged with one count of forgery and one count of identity theft in the second degree. CP 1-2, 7-8. The State accused Ms. Caldwell, on or about April 21, 2015, of fraudulently depositing a check belonging to Lowell Gilbertson¹ in the amount \$575.00. CP 4-5, 7. Ms. Caldwell waived her right to a jury trial and proceeded to a bench trial in October 2016. CP 6.

According to the evidence at trial, Lowell Gilbertson lived with his adult son, Bret Gilbertson, in Long Beach. RP 12, 17, 20, 27. Bret was 54 years old, unemployed, and had been living at his father's house since

¹ The record contains discrepancies on how Mr. Gilbertson's first name is spelled. The transcripts, charging documents, and declaration of probable cause spell it as "Lowell." CP 2, 4, 8. The judgment and sentence, along with the check at issue, however, spell his name as "Loell." CP 22; Ex. 1. Because the predominant spelling appears to be "Lowell," that spelling is used.

2009. RP 27. Bret had gone to junior high school with Ms. Caldwell and coincidentally met her again around 2014 or 2015. RP 20. Lowell had met Ms. Caldwell at a garage sale around the same time. RP 13.

After suffering from personal difficulties, Ms. Caldwell rented a room from Lowell. RP 13-14, 29-30. Both Lowell and Bret had suffered recent heart attacks. RP 28. Ms. Caldwell helped take care of them. RP 24. She cleaned the house and bought groceries. RP 24-25. Ms. Caldwell herself paid Bret's veterinarian bill for his dog. RP 25. She even paid for new sets of tires on Lowell's Chevy pickup truck and Bret's Ford pickup truck. RP 25-26. Bret estimated each set of tires would have cost about \$600 to \$800. RP 26-27.

In spring 2015, Key Bank contacted Lowell about a suspicious check that had been deposited with the bank. RP 14, 33-34. The check is dated April 20, 2015 and appeared to be issued by Citibank. Ex. 1.² Lowell's name³ and address appears in the upper left corner. Ex.1. The check is payable to "Brit [sic] Gilbertson" in the amount of \$575.00. Ex. 1. It contains a signature purporting to be Lowell's. Ex. 1. On the back, the check is endorsed by "Bret Gilbertson" to "Michele Caldwell." Ex. 1.

² A copy of exhibit 1 is contained in "Appendix A." The account number on the check has been redacted. GR 31(e)(1)(B).

³ The check spells Mr. Gilbertson's first name as "Loell" rather than "Lowell."

A signature that may belong to Ms. Caldwell appears below this endorsement. Ex. 1.

Karen Kaino, an employee at Key Bank, testified the check was suspicious because it was a two-party endorsed check, was not drawn on Key Bank, and did not appear to be a regular check of Mr. Gilbertson's. RP 34. It resembled checks drawn on credit products. RP 34-35. The check was processed on April 21, 2015. RP 35. The check had been used to make a transaction at a drive-up ATM the same day. RP 35-36; Ex. 2. A photo taken by the bank's surveillance at the ATM showed a woman identified by Lowell and Bret as Ms. Caldwell in the driver's seat of the vehicle. RP 18, 23, 35-36; Ex. 2.⁴

Lowell was unable to identify the check as belonging to him. RP 15-16. Bret claimed the first time he saw the check was when law enforcement showed it to him. RP 22. Over Ms. Caldwell's foundation objection, the check was admitted based on Bret's testimony about what the check said. RP 21-23.

After hearing arguments, the court reserved ruling. RP 59. Three days later, the court entered a written verdict acquitting Ms. Caldwell of second degree identity theft, but convicting her of forgery. CP 9; RP 61.

⁴ The vehicle appears to be a truck and an unidentified person (whose face cannot be seen) appears to be in the passenger seat. Ex. 2.

The court did not provide an oral ruling or memorandum decision. RP 61.

The court entered sparse findings of fact and conclusions of law on November 4, 2016. CP 13.⁵

About 50 years old, Ms. Caldwell had no prior criminal history. RP 64. She suffered from a variety of medical conditions and recent hardships. RP 64-65, 75-77. The court sentenced Ms. Caldwell to 30 days of jail with 15 days converted to community service. RP 78-79. Recognizing Ms. Caldwell’s inability to pay legal financial obligations, the court waived all costs except for \$600, which the court believed was mandatory. CP 20-21.

E. ARGUMENT

1. The State failed to authenticate the check. The error in admitting the check into evidence requires reversal of the conviction for forgery

a. Before admission, the proponent of a piece of evidence must first lay the proper foundation to establish authenticity.

“It is fundamental that evidence must be authenticated before it is admitted.” State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010) (overruled on other grounds by State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012)). Authentication requires “evidence sufficient to support a

⁵ A copy is attached in “Appendix B.”

finding that the matter in question is what its proponent claims.” ER 901(a). It “is a threshold requirement designed to assure that evidence is what it purports to be.” State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003).

A witness with knowledge may authenticate evidence by testifying that it “is what it is claimed to be.” ER 901(a)(1). “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” ER 602.

A trial court’s decision to admit evidence is reviewed for abuse of discretion. Bashaw, 169 Wn.2d at 140. Discretion is abused when it is manifestly unreasonable or is based on untenable reasons. Id.

b. The State failed to establish that the check belonged to the purported victim.

The prosecution was based on a check Ms. Caldwell purportedly deposited. The State’s theory was that the check belonged to Lowell Gilbertson. RP 9.

When asked about this check, Lowell testified the check did not belong to him. RP 15. He testified “the whole check isn’t familiar.” RP 15. He did not know from what account the check originated. RP 16. When the State moved to admit the check into evidence, the trial court sustained Ms. Caldwell’s objection for lack of foundation. RP 16.

The next witness was Lowell's son, Bret Gilbertson. He testified that the check appeared to be linked to a bank account of his father's. RP 21. He also testified the first time he "ever saw" the check was when law enforcement had shown it to him. RP 21.

Based on Bret's testimony, and without any supporting testimony from a bank representative, the State moved to admit the check. RP 22. Ms. Caldwell again objected. RP 22. The court overruled the objection and admitted the check. RP 23.

The trial court erred. Bret had not seen the check until law enforcement contacted him. Though he lived with his father, he did not testify that he was familiar with his father's bank accounts. In fact, he testified that his father handled all the financial affairs and that he had "no interaction with his household bills." RP 28. Accordingly, Bret lacked the personal knowledge necessary to authenticate the check. See, e.g., Payne, 117 Wn. App. at 109 (witness's testimony did not authenticate document because he had no personal knowledge about the particular document at issue); Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 750, 87 P.3d 774 (2004) (attorney's review of documents did not establish personal knowledge necessary to meet authentication requirement; court abused discretion in admitting documents).

When the court admitted the check during Bret's testimony, the only other testimony heard by the court was from Lowell. Lowell affirmatively testified the check did not belong to him. As the trial court recognized, this testimony did not authenticate the check either. Cf. State v. Cottrell, 56 Wash. 543, 546, 106 P. 179 (1910) (check admitted into evidence so that signature could be compared was proper because person who signed check testified that he believed check to be genuine). Thus, the evidence did not support admission of the check.

c. The error was prejudicial

Evidentiary error is prejudicial if there is a reasonable probability that, had the error not occurred, the outcome of the trial would have been materially affected. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." Id. at 611.

Here, the case turned on the check. See RP 39-51 (closing arguments). Without the check, it is doubtful that the State could have met its burden to prove forgery. See RCW 9A.60.020(1) (requiring proof related to a "written instrument"). Because the error was prejudicial, this Court should reverse the conviction. If so, the Court need not reach the next issue.

2. The trial court failed to enter adequate written findings of fact and conclusions of law. The Court should remand for entry of adequate written findings.

After a defendant is adjudicated guilty in a bench trial, the trial court must enter written findings of fact and conclusions of law. CrR 6.1(d). A purpose of this requirement is to facilitate appellate review. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). The findings should “identify the evidence relied upon to support each element of each count.” Id. at 623, 964 P.2d 1187 (1998). They “must be sufficient to suggest the factual basis for the ultimate conclusion.” State v. Silva, 127 Wn. App. 148, 153 n.6, 110 P.3d 830 (2005).

The trial court entered written findings of fact and conclusions of law. CP 12-14. The court’s “findings,” however, merely mirror the elements of forgery under RCW 9A.60.020(1)(b):

Based on the evidence provided the Court hereby finds the following facts:

1. That on or about April 21, 2015, the defendant possessed, or uttered, or offered or disposed of, or put off as true a written instrument which had been falsely made, completed, or altered.
2. That the defendant knew that the instrument had been falsely made, completed, or altered;
3. That the defendant acted with intent to injure or defraud.
4. That the above acts occurred in the State of Washington.

CP 13; cf. WPIC 130.03 Forgery—Possessing—Offering—Disposing Of—Elements, 11A Wash. Prac., Pattern Jury Instr. Crim. (4th Ed).

These conclusory findings do not enable Ms. Caldwell to make her claim on appeal that the State did prove her guilty of forgery beyond a reasonable doubt. See Head, 136 Wn.2d at 624 (a defendant should not “be forced to interpret an oral ruling in order to appeal his or her conviction.”). They do not permit meaningful review. In re C.R.B., 62 Wn. App. 608, 619, 814 P.2d 1197 (1991) (findings that merely parroted statutory elements necessary to terminate parental rights were inadequate to provide meaningful review). An oral ruling can sometimes fill the void. See State v. Hescoek, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (“A reviewing court may look to the trial courts oral ruling to interpret written findings and conclusions.”). But here the trial court did not make an oral ruling. Rather, the court provided a written verdict, stating only that the “Court finds beyond a reasonable doubt that the defendant is: Guilty as to Count I and Not guilty as to Count 2 [sic].” CP 9.

The remedy is remand for adequate written findings. Head, 136 Wn.2d at 625. No additional evidence is permitted. Id.

Accordingly, this Court should remand for adequate written findings.

3. The trial court incorrectly believed it lacked authority to waive all legal financial obligations. The Court should remand so that the trial court can exercise discretion on whether to waive the legal financial obligations imposed against Ms. Caldwell.

At sentencing, Ms. Caldwell shared that she suffered from physical and mental health issues. RP 74-76. She took 22 different medications, engaged in counseling and physical therapy, and saw various medical professionals. RP 74. She explained that when she became acquainted with the Gilbertsons, she had recently suffered a breakdown from a recent sexual assault and the death of family members. RP 76. Although she had been employed by the Ocean Beach School district for 10 years, she was currently unemployed and had lost the ability to use her recently acquired teaching degree. RP 77-78. Indigent, Ms. Caldwell was appointed counsel for trial and on appeal. CP 30-31; Supp. CP __ (sub. no. 12).

Recognizing that imposing legal financial obligations (LFOs) upon Ms. Caldwell would be an undue hardship, the sentencing court waived LFOs except a \$500 victim penalty assessment (RCW 7.68.035) and a \$100 DNA collection fee (RCW 43.43.7541), believing it must do so. CP 20-21. Because these LFOs are not truly mandatory, this Court should remand with instruction that the trial court may waive the \$600 in LFOs.

A sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). This

means “a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.” State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015); accord City of Richland v. Wakefield, 186 Wn.2d 596, 606, 380 P.3d 459 (2016); State v. Duncan, 185 Wn.2d 430, 374 P.3d 83 (2016) (remanding to trial court for resentencing with “proper consideration” of defendant’s ability to pay). This Court has recognized that “mandatory” and “discretionary” LFOs impose equal hardships on defendants. See State v. Mathers, 193 Wn. App. 913, 376 P.3d 1163 (2016) (“To an indigent defendant saddled with legal financial obligations (LFOs), it does not matter if the LFOs are labeled mandatory or discretionary.”).

The mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. See RCW 7.68.035 (penalty assessment “shall be imposed”); RCW 36.18.020(2)(h) (convicted criminal defendants “shall be liable” for a \$200 fee); State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read together with RCW 10.01.160, which requires courts to inquire about a defendant’s financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); Blazina, 182 Wn.2d at 830, 838. These statutes mandate imposition of the above fees upon those who can pay,

and require that they not be ordered for indigent defendants. If the Legislature intended otherwise, it would have used different language. See RCW 9.94A.753 (restitution “shall be ordered” for injury or damage absent extraordinary circumstances and “the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.”); Dean v. United States, ___ U.S. ___, 137 S. Ct. 1170, 1177, ___ L. Ed. 2d (2017) (“Drawing meaning from silence is particularly inappropriate where Congress has shown that it knows how to direct sentencing practices in express terms.”) (internal quotation omitted)).

The State may argue that the foregoing argument is foreclosed by State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). Curry, however, does not apply because it involved the constitutionality of imposing costs, not interpretation of a statute or court rule. Id. at 916-917. Regardless, Blazina supersedes Curry to the extent they are inconsistent. See Blazina, 182 Wn.2d at 830, 839.

Finally, to construe the relevant statutes as forbidding trial courts from waiving LFOs for indigent defendants is constitutionally problematic. U.S. Const. amend. XIV; Const. art. I, § 3; see Fuller v. Oregon, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) (upholding costs statute because it required ability to pay determination

and prohibited imposition of costs upon those who would never be able to pay); James v. Strange, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (holding statute violated equal protection by stripping indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Construing the statutes to permit waiver of costs avoids the potential constitutional problems. See State v. Crediford, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996) (courts construe statutes so as to avoid constitutional deficiencies).

Ms. Caldwell recognizes that this Court has rejected similar arguments as to whether a trial court has discretion to waive so called “mandatory” LFOs. Mathers, 193 Wn. App. at 918-21. This Court, however, is not obligated to perpetuate this error. Grisby v. Herzog, 190 Wn. App. 786, 806-811, 362 P.3d 763 (2015) (recognizing that Court of Appeals’ decisions may conflict and *stare decisis* does not preclude a holding that is inconsistent with a previous Court of Appeals’ opinion).

The Court should hold that sentencing courts may waive all legal financial obligations. Applying this holding, the Court should remand so that the trial court can decide whether to waive the \$600 due to Ms. Caldwell’s indigency and inability to pay.

F. CONCLUSION

The trial court erred in admitting the check because the State failed to authenticate it. Ms. Caldwell's conviction for forgery should be reversed. Alternatively, this Court should remand for entry of adequate written findings. The Court should also remand so that the legal financial obligations may be stricken.

DATED this 31st day of May, 2017.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

Appendix A

Loell E. Gilbertson
1211 Idaho Ave. S.
Long Beach, WA 98631-3719

21574

15-0105

420 2015 78 ²⁶⁴/₉₁₄
SRCKEMAN RS

Pay to the Order of Brit Gilbertson \$ 579.00

Five Hundred and Seventy-Nine and 00/100 Dollars

Citibank, N.A.
Payable through Citibank, N.A.

Check valid until 4/1/15. Void for all purposes thereafter.

FOR Trade Loell E. Gilbertson

[Redacted] 1574

04/21/2015 10:06 BRYANJE 611975024133 KeyBank NA >021300077< ATM

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Michelle Caldwell

PAY to the order of
Michelle Caldwell
Brit Gilbertson

Appendix B

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2016 NOV -4 PM 4: 02

VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA

BY _____ DEPUTY

**SUPERIOR COURT OF WASHINGTON STATE
IN AND FOR PACIFIC COUNTY**

STATE OF WASHINGTON,

Plaintiff,

v.

Michele Caldwell,

Defendant.

NO. 15-1-00084-3

**FINDINGS OF FACT
CONCLUSIONS OF LAW
REGARDING COURT'S VERDICT**

A Bench Trial was held in the above captioned matter on October 18, 2016. This Court, after fully considering the evidence presented including the admitted exhibits, and witness testimony hereby makes the following Findings of Fact, and Conclusions of Law:

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FINDINGS OF FACT

Based on the evidence provided the Court hereby finds the following facts:

1. That on or about April 21, 2015, the defendant possessed, or uttered, or offered or disposed of, or put off as true a written instrument which had been falsely made, completed, or altered.
2. That the defendant knew that the instrument had been falsely made, completed, or altered.
3. That the defendant acted with intent to injure or defraud.
4. That the above acts occurred in the State of Washington.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action, and venue is proper.
2. The above facts establish beyond a reasonable doubt that the defendant, Michele S. Caldwell, is guilty of forgery as charged in count one.
3. All findings of fact that are conclusions of law shall be treated as such, and all conclusions of law that are findings of fact shall be treated as such.

VERDICT

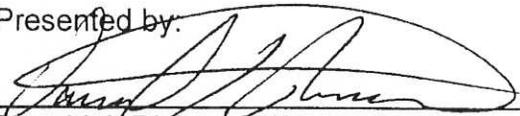
In accordance with the above Finding of Facts and Conclusions of Law the Court finds the defendant, Michele S. Caldwell, guilty of Forgery as charged in count one.

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1 The Court finds the Defendant, Michele S. Caldwell, not guilty of Identity Theft in the
2 Second Degree as charged in count two.
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5 Decided: This 21st day of October, 2016 and signed this 4 day of
6 Nov, 2016.
7
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9
10 
11 Judge Michael Sullivan

12 Presented by:
13 
14 Donald J. Richter, WSBA #39439
15 Prosecuting Attorney

16 And by:
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18 _____
19 David Hatch, WSBA #21310
20 Attorney for Defendant
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 49877-4-II
)	
MICHELE CALDWELL,)	
)	
APPELLANT.)	

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