

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 REPLY BRIEF

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A. ARGUMENT

1. The check was not authenticated. Its erroneous admission requires reversal of the forgery conviction.

Evidence must be authenticated—i.e., determined to be what it is claimed to be—before its admission. ER 901(a); 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)). A witness may authenticate evidence through testimony, but must have the requisite personal knowledge. ER 901(a)(1); ER 602; State v. Payne, 117 Wn. App. 99, 106, 109, 69 P.3d 889 (2003). The State does not appear to disagree with these rules. Br. of App. at 6-7; Br. of Resp't at 4.

Here, the trial court erred in admitting the check that purportedly belonged to Lowell Gilbertson. Br. of App. at 7-9. Lowell's testimony did not support admission of the check, as the trial court found. RP 16. As for Bret Gilbertson's testimony, he was unfamiliar with his father's financial affairs and had only seen the check when law enforcement showed it to him. RP 22, 28. He lacked the requisite personal knowledge to authenticate it. See Payne, 117 Wn. App. at 109; Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 750, 87 P.3d 774 (2004). The State does not argue otherwise. Br. of Resp't at 5-6.

In support of its contrary contention that the check was properly authenticated, the State refers to the testimony from the bank representative and to the ATM photograph. Br. of Resp't at 5. When the trial court admitted the check, however, it had only heard testimony from Lowell and Bret. RP 10-23. The court had not heard testimony from the bank representative, Karen Kaino, who testified later. RP 32-37. The ATM photo had also not yet been admitted. RP 35-36. The State does not argue that, in reviewing a trial court's decision to admit evidence, it is proper to consider evidence or testimony elicited subsequently. See RAP 12.1(a) (in general, "the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs."). The State has also provided no citation to authority that would support such an argument. State v. Arredondo, 188 Wn.2d 244, 262, 394 P.3d 348 (2017) (if authority is not provided to support proposition, appellate court may assume counsel found none); RAP 10.3(a)(6) (arguments made must include supporting "citations to legal authority"). Accordingly, in reviewing whether the trial court abused its discretion in admitting the check, this Court should only consider what was before the trial court when it made its ruling.

The State attempts to reframe the issue from one of authentication (i.e., is the check what the State purported it to be?) to whether Ms.

Caldwell committed the offense of forgery. Br. of Resp't at 6. This does not follow. Moreover, the State's claim below was that the check belonged to Lowell and sought admission on that basis. RP 9, 22-23. As explained, the State failed to substantiate its claim. Br. of App. at 8-9.

This Court should hold that the trial court abused its discretion in admitting the check. The error was prejudicial, requiring reversal. Br. of App. at 9. The State does not argue harmless error.

2. The lack of adequate written findings requires remand.

The State agrees that in criminal cases tried to the bench, the court must enter written findings of fact and conclusions of law. CrR 6.1(d). Written findings facilitate meaningful appellate review. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). They allow defendants to more fully exercise their constitutional right to appeal. Const. art. I, § 22; see Head, 136 Wn.2d at 624 (defendants should not “be forced to interpret an oral ruling in order to appeal his or her conviction.”). It is one of the advantages of waiving the right to a jury trial.

Here, the trial court failed to enter adequate written findings. The trial court's “findings” simply parrot the elements of forgery. CP 13. These conclusory findings disadvantage Ms. Caldwell and do not allow her to fairly litigate her appeal. They are especially problematic because the trial did not provide an oral ruling to explain its decision. See State v.

Hescock, 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.”).

Still, the State maintains that “the trial court made the appropriate findings and conclusions.” Br. of Resp’t at 9. The State’s position is not supported by the law.

Citing Banks, the State takes the position that this kind of error is subject to harmless error analysis. Br. of Resp’t at 8; State v. Banks, 149 Wn.2d 38, 65 P.3d 1198 (2003)). The State misreads Banks. There, the trial court failed to address the issue of knowledge, an essential element of the offense, in its written findings. Banks, 149 Wn.2d at 42-43. This error was akin to when a jury instruction omits an essential element of an offense. Id. at 43-44. That type of error is subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Brown, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Applying this framework, our Supreme Court affirmed the conviction, reasoning the trial court’s findings and conclusions necessitated an inference of knowledge and that there was no reasonable probability of a different outcome had the trier of fact been aware that knowledge was an essential element. Banks, 149 Wn.2d at 46.

Here, the issue is not omission of an essential element, as in Banks, Neder, and Brown. Unlike Banks, the record here is completely devoid of any true written findings. Rather, what is present are skeletal written “findings” that parrot the essential elements of the offense. Cf. In re C.R.B., 62 Wn. App. 608, 619, 814 P.2d 1197 (1991). More is necessary. Head, 136 Wn.2d at 623; State v. Silva, 127 Wn. App. 148, 153 n.6, 110 P.3d 830 (2005); CrR 6.1(d). Additionally, unlike in Banks, there is no oral ruling explaining the trial court’s decision. Banks, 149 Wn.2d at 41.

The Court should reverse and remand for a new decision with adequate written findings.

B. CONCLUSION

The conviction for forgery should be reversed because of the error in admitting the check. Alternatively, remand for adequate written findings is necessary. The Court should also hold that the trial court erred by imposing the \$600 in legal financial obligations against Ms. Caldwell. Br. of App. at 12-15.

DATED this 31st day of July, 2017.

Respectfully submitted,

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 49877-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Mark McClain, Pacific County Prosecuting Attorney
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Washington Appellate Project

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