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Court of Appeals
Division II
State of Washington
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No. 51118-5-II

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

STATE OF WASHINGTON, Respondent

v.

ERIC LEMUS, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE TIMOTHY L. ASHCRAFT

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The evidence is insufficient to support the identity theft convictions.
- B. The evidence is insufficient to support the convictions for forgery.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Due process requires the state to prove every element of the charged crime. Where knowing possession is an element of the crime, is the evidence insufficient to sustain a conviction where the defendant's conduct does not indicate the requisite knowledge as a matter of logical probability?
- B. Where the intent to commit a crime is an element, which may not be inferred from mere possession, is the evidence insufficient to support the identity theft convictions?
- C. Possession alone is insufficient to infer the required element of intent in a forgery charge. Did the state fail to prove the essential elements of the crime?

II. STATEMENT OF FACTS

Pierce County prosecutors charged Eric Lemus by amended information with nine counts of identity theft in the second degree, three counts of possession of stolen property, and three counts of

forgery. CP 14-20. The trial court dismissed one count of possession of stolen property before submitting the matter to the jury. RP 592. The following evidence was produced at trial.

Eric Lemus ("Lemus") worked as a roofer and lived in his mother's home, along with his girlfriend, and his brothers Francisco and Jorge. RP 443, 536. In the first part of March, Mrs. Lemus, Eric's mother, drove Jorge to the airport in Lemus's car. She saw Jorge put a binder full of documents in the trunk of the vehicle. He did not take them with him on his trip. RP 444-45.

Over the next month, Mrs. Lemus cleaned out Jorge's room. RP 447. Jorge always kept the room double locked, and no one entered it until after he moved out. RP 479-80, 484,486. As she cleaned the room, she noticed a large accumulation of documents that belonged to family members, including his cousin Jesus Lemus Zuniga. RP 474. She also saw mail that belonged to others. She specifically remembered the names David Calhoun, Douglas Harbaugh, James Harmon (Jorge's employer), and Sarah Smith. RP 475-477.

Shortly after Jorge moved to Mexico, Lemus found, in a storage unit in his backyard, credit cards, letters, and financial information that belonged to him, his family members, as well as

other people. RP 542,545. He put the papers in a binder and then put the binder in the car trunk. RP 533-34, 549. He did not see the binder that Jorge had left in the trunk and was surprised when officers later showed it to him. RP 549.

Lemus had intended to sort through the binder papers, remove those that belonged to him, and show his mother what his brother had accumulated. RP 543-44, 548-549. However, he did not sort through the binder, but did remove two checks and credit cards from the front of the binder, and placed them in his wallet. He wanted to show them to his mother. RP 543-44, 560-63. He had no idea who had written and signed the checks. RP 564-65. Neither of the checks had been endorsed. RP 316-17.

On March 23, 2017, his brother, Francisco, asked if he could get a ride to the Wells Fargo Bank. RP 537. Lemus drove them to the bank, and Lemus stayed in the car while Francisco used the ATM. RP 537. Just as they pulled out to leave, Pierce County deputies Helligso and Olson were leaving the Shell gas station located across from the bank parking lot. RP 227. The deputies followed Lemus to a convenience store parking lot down the street. They pulled in behind him and initiated contact because Lemus's car had a cracked windshield. RP 227-228, 538-39.

Olson asked Lemus for his license, registration, and proof of insurance. RP 229,308. Lemus reported he had a suspended license. RP 310, 538-39. Olson told him to get out of the vehicle, handcuffed him, and walked him to the patrol car. RP 540. Olson then removed Lemus's wallet and went through it. RP 309,540.

Inside the wallet, Olson found the following items:

- (1) Wells Fargo check # 526 made out to Jesus Lemus for \$1,305, on the account of Sandra Bunting. (Exh. 3A) RP 310, 366-67
- (2) Key Bank check #280 made out to Jesus Lemus for \$467 on the account of Sandra Bunting. (Exh. 3B) RP 310-311, 371.
- (3) VA Equity 100 Card for Greg Berntsen (Exh. 5) RP 232, 311.
- (4) Amazon Visa card for Eric Jensen (Exh. 6) RP 232,311-312.

Lemus said that as he answered a series of questions by the deputy, he "shorthanded" his answer and grouped the two credit cards into an explanation of things he had found at a casino rather than at his home. He corrected his explanation at trial and stated he found the credit cards and the checks in the storage shed. RP 541. He testified that he had placed them in his wallet because he wanted to show them to his mother. RP 542.

With permission, Olson searched Lemus's car. RP 234. He found a check stuffed between the front passenger seat and

console, (where Francisco had been sitting) and a deposit slip from Wells Fargo dated that same afternoon of 3/23/17. RP 236. The check was for \$500 to “James Jones” for yard work. RP 236. The Wells Fargo deposit slip had a picture of a check made out to “James Jones” for \$400, for “framing”, and signed by Sandra Bunting. RP 236-37. Lemus testified he was unaware the papers were there until police informed him a few days later. RP 551.

Olson found the two binders in the car. RP 315. The folders contained financial documents belonging to Lemus, Jorge, Francisco, and their mother. RP 297-303. The family documents included pay stubs, bank letters, loan papers, Washington State Department of Transportation claims, and doctor bills. RP 259-262.

The second binder contained the following documents which served as the basis for the charges:

- (1) Wound Warrior Project donations letter to David Calhoun, listing donation amounts/dates. It did not contain an account number. (Exh. 16A) RP268, 347.
- (2) Wells Fargo car loan invoice to Sue Nichols. (Exh. 17) RP 269,396.
- (3) Pierce County Property Tax Information to Douglas Harbaugh. (Exh. 2A-5) RP 382-83. The document contained the parcel number, address, account balance, and payments. (Exh. 12A) RP 382-83.
- (4) South Sound Credit Union Statement for January 2017 for Sarah Smith. (Exh. 12A) RP265-66,328.

(5) Chase Bank statement to James Harmon. (Exh. 14) RP 267,400.

From the first binder, the officer also retrieved a Chase Bank statement for Elizabeth or Greg Berntsen. (Exh.11A) RP 249-50.

Lemus told officers that his brother, Jorge, had a history of identity theft and fraud and he thought it likely that Jorge had stolen the documents. Additionally, before returning to Mexico, Jorge used the vehicle. RP 242-43,545-46,563.

The jury found Lemus guilty on 13 of 14 counts, and not guilty of one count of possession of stolen property. CP 112-125. The court imposed a prison-based DOSA with 25 months of community custody. CP 147. Lemus makes this timely appeal. CP 155.

III. ARGUMENT

A. The Evidence Is Insufficient To Sustain The Identity Theft Convictions Because Substantial Evidence Does Not Support The Required Mental Element Of Knowing Possession.

“The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368

(1970). Substantial evidence to sustain a conviction means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *Id.* Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, *any rational trier of fact* could find each element of the crime proven *beyond a reasonable doubt*. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)(emphasis added).

Mere possibility, suspicion, speculation, conjecture or a modicum of evidence is *not* substantial evidence and does not meet the rigorous requirements of due process. *State v. Taplin*, 9 Wn. App. 545, 556, 513 P.2d 549 (1973), *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). If the evidence is insufficient, the defendant’s convictions must be reversed and dismissed. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

A conviction for identity theft requires proof that the defendant *knowingly* possessed, used, or transferred a *means of identification or financial information* of another, living or dead, *with the intent to commit or to aid or abet any crime*. RCW § 9.35.020(1) (emphasis added).

The distinguishing features between criminal and noncriminal possession of identification or financial information of another are knowledge of possession coupled with intent to commit a crime. Here, Lemus knowingly possessed the two checks in his wallet and the two credit cards. RP 558. However, the State did not prove Lemus *knowingly* obtained, possessed, used or transferred a means of identification or financial information of anyone else.

There was no evidence that Lemus saw, knowingly obtained or possessed the bank statement and mortgage statement belonging to Greg Berntsen found in the storage shed binder. RP 249-50. Lemus specifically testified he had not gone through the papers from the storage shed binder. Possession alone is insufficient to prove guilty knowledge. *State v. Scoby*, 117 Wn.2d 55, 61-62, 810 P.2d 1358, 815 P.2d 1362 (1991).

Neither did the state produce evidence that Lemus was ever even aware of the second binder that had been left in his car by Jorge. RP 548. In that binder were documents belonging to James Harmon¹ (RP 267), Sarah Smith, (RP 265-66), David Calhoun (RP

¹ Harmon was the employer of Jorge. RP 475-477.

262-63,268), Sue Nichols (RP 269), and Douglas Harbaugh (RP 262,267-69).

Knowledge of possession may only be inferred when the defendant's conduct demonstrates the requisite knowledge "as a matter of logical probability." *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (*rev. denied*, 117 Wn.2d 1012, 816 P.2d 1225 (1991)). Here, Lemus gave the deputies permission to search his vehicle because he believed he did not have anything to hide. RP 547. He was shocked when deputies pulled the second binder from the car. RP 548.

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he is aware of that fact, circumstance or result. If he has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted *but not required*, to find that he acted with knowledge of that fact. RCW 9A.08.010(b)(ii).

To prove the knowledge element, there must be unequivocal evidence from which it can be reasonably inferred that Lemus was either subjectively aware or should have known that the documents he found in the shed, and Jorge's binder contained means of identification or financial information. Such evidence is lacking here.

The record establishes that both Lemus and his mother were aware of Jorge's identity theft behaviors. However, that knowledge cannot be imputed as knowledge of binder he did not know existed, or the contents of a binder he never sorted through. With the exception of the checks and credit cards, Mr. Lemus did not knowingly possess the financial or identification information of another. The convictions for the identity thefts must be reversed.

B. The Evidence Is Insufficient To Sustain The Identity Theft Convictions Because Substantial Evidence Does Not Support The Required Mental Element Of Intent To Commit A Crime.

Where the charged crime requires proof of both possession and intent, mere possession does not permit the inference of intent. *State v. Vasquez*, 178 Wn.2d 1, 8, 12, 309 P.3d 318 (2013). An individual acts with intent when he acts with the objective or purpose to accomplish a result that constitutes a crime. RCW 9A.08.010(1)(a). A specific criminal intent may only be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The State was required to prove that Lemus acted with the intent *to commit a crime with the identity* of a specific real person. *State v. Federov*, 181 Wn. App. 187, 195, 324 P.3d 784 (2014)(emphasis added).

Here, the evidence showed that Lemus was in possession (knowingly or unknowingly) of the identification and financial information of several different individuals. He was alleged to have had the documents for several weeks. Yet, there was no evidence that he ever used the identifying information to commit any crime. There was no evidence he used the information to obtain or try to obtain credit or services². There was no evidence he used, attempted to use, or intended to use the information to create a false identity. There was no evidence that Lemus tried to sell the documents to others so they could commit identity crimes. There was no evidence that Lemus did anything with the binder documents except drive around with them in his car. There was no

² Eric Jensen testified that someone had opened an Amazon Prime credit card in his name and charged \$110 worth of merchandise. However, there was no evidence that Lemus had applied for that card, or used the card to purchase anything. RP 334. There was a check from Sandra Bunting to “James Jones” that had been cashed by Francisco, Ms. Bunting was never asked if she knew James Jones.

evidence, beyond bare possession, to establish that he had the intent to commit a crime with the identifying information.

Where the prosecution fails to meet the burden of proof beyond a reasonable doubt, the remedy is reversal and dismissal with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1988).

C. The Evidence Is Insufficient To Sustain The Forgery Convictions Because The State Failed To Prove The Essential Elements of the Crime.

A person is guilty of forgery if, with intent to injure or defraud, he possesses, utters, disposes of, or puts off as true a written instrument which he knows to be forged. RCW 9A.60.020(1)(b). The statute requires the state to prove beyond a reasonable doubt the item was not only forged, but that the defendant possessed or presented it knowing that it was a forgery and intended to defraud or injure another.

The intent to injure or defraud is an essential element of forgery. To defraud another is to cause them injury or loss by deceit. *State v. Simmons*, 113 Wn. App. 29, 32, 51 P.3d 828 (2002). Under Washington law, a person acts with intent when he *acts with the objective or purpose to accomplish a result that*

constitutes a crime. RCW 9A.08.010(1)(a). (emphasis added). The specific criminal intent may only be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability. *Delmarter*, 94 Wn.2d at 638.

Here, the state did not prove beyond a reasonable doubt that Lemus intended to injure or defraud anyone. Lemus possessed 3 checks. There was no evidence that Lemus took any action with the objective or purpose to accomplish a result that constitutes a crime. The state did not present any evidence that Lemus created the checks. None of the checks listed him as the payee. None of the checks was endorsed. Lemus had not presented any of the checks for payment. There was no evidence that he represented or tried to represent the checks as true written instruments. In short, Lemus merely possessed the checks, but took no action from which a rational trier of fact could reasonably conclude he intended to defraud or injure another.

The convictions should be reversed for insufficient evidence and dismissed with prejudice. *Hickman*, 135 Wn.2d at 103.

IV. CONCLUSION

The convictions for identity theft and forgery should be reversed and remanded for dismissal with prejudice.

Submitted this 31st day of May 2018.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive, slightly slanted style.

Marie Trombley
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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on May 31, 2018, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Pierce County Prosecuting Attorney at pcpatcecf@co.pierce.wa.us and to Eric Lemus/DOC#403629, Monroe Correctional Center, PO Box 888, Monroe, WA. 98272.



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