

FILED
Court of Appeals
Division II
State of Washington
7/31/2018 2:13 PM
NO. 51118-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ERIC LEMUS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Timothy L. Ashcraft, Judge

No. 17-1-01195-1

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. When viewed in the light most favorable to the State, was sufficient evidence presented to establish that defendant committed Forgery when he possessed three falsely made checks with the intent to defraud the account holder, when two of the forged checks were in his wallet and one was in his car, each comingled with his own personal property, and a fourth check from the same checking account had just been fraudulently deposited and the deposit receipt was also located in defendant's car? (Appellant's Assignment of Error 2). 1

2. When viewed in the light most favorable to the State, was sufficient evidence presented to establish that defendant knowingly possessed three checks, two credit cards, and various financial mail from nine different individuals when defendant knowingly possessed the checks and credit cards in his wallet and the remaining documents were found inside his car passenger compartment in binders comingled with his own important bills and financial documents, in support of a conviction of Identity Theft in the Second Degree? (Appellant's Assignment of Error 1). 1

3. When viewed in the light most favorable to the State, was sufficient evidence presented to establish that the defendant intended to commit a crime with three checks, two credit cards, and various financial documents of nine different individuals when he was caught with the information after leaving a bank where a fourth check had been fraudulently deposited and he lied about how he obtained the documents, to support a conviction for Identity Theft in the Second Degree? (Appellant's Assignment of Error 1). 2

B.	STATEMENT OF THE CASE.....	2
1.	PROCEDURE.....	2
2.	FACTS	3
C.	ARGUMENT.....	8
1.	WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE FIRMLY SUPPORTS THE JURY’S CONCLUSION THAT DEFENDANT COMMITTED FORGERY WHEN THE CHECKS WERE FOUND IN HIS WALLET AND CAR COMINGLED WITH HIS PERSONAL PROPERTY AND A FOURTH CHECK HAD JUST BEEN FRAUDULENTLY DEPOSITED WITH THE DEPOSIT RECEIPT ALSO LOCATED IN DEFENDANT’S CAR.....	8
2.	WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO CONVICT DEFENDANT OF IDENTITY THEFT WHEN DEFENDANT POSSESSED ONLY THE FINANCIAL MAIL OF NINE INDIVIDUALS, COMINGLED WITH HIS OWN IMPORTANT DOCUMENTS, HE LIED ABOUT HOW HE OBTAINED THE DOCUMENTS, AND HE WAS FOUND WITH A DEPOSIT SLIP OF A FRAUDULENTLY DEPOSITED CHECK.	19
D.	CONCLUSION.....	27

Table of Authorities

State Cases

<i>In re Detention of Stout</i> , 159 Wn.2d 357, 382, 150 P.3d 86 (2007).....	9
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	13, 14
<i>State v. Cannon</i> , 120 Wn. App. 86, 90, 84 P.3d 283 (2004).....	8
<i>State v. Cardenas-Flores</i> , 189 Wn.2d 243, 265-66, 401 P.3d 19 (2017).....	9
<i>State v. Cherry</i> , 191 Wn. App. 456, 460, 362 P.3d 313 (2015)	23
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	11, 23
<i>State v. Douglas</i> , 71 Wn.2d 303, 306, 428 P.2d 535 (1967).....	22
<i>State v. Esquivel</i> , 71 Wn. App. 868, 870, 863 P.2d 113 (1993).....	25
<i>State v. Fedorov</i> , 181 Wn. App. 187, 197-98, 324 P.3d 784, <i>review denied</i> , 181 Wn.2d 1009 (2014).....	24, 25
<i>State v. Garske</i> , 74 Wn.2d 901, 902-3, 447 P.2d 167 (1968).....	23
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	8
<i>State v. Holbrook</i> , 66 Wn.2d 278, 279, 401 P.2d 971, 972 (1965)	9
<i>State v. Kovac</i> , 50 Wn. App. 117, 120, 747, P.2d 484 (1987).....	14, 15
<i>State v. Ladely</i> , 82 Wn.2d 172, 175, 509 P.2d 658 (1977).....	22
<i>State v. Lopez</i> , 107 Wn. App. 270, 276, 27 P.3d 237 (2001)	8
<i>State v. O'Connor</i> , 155 Wn. App. 282, 290, 229 P.3d 880 (2010)	14
<i>State v. Perez-Cervantes</i> , 141 Wn.2d 468, 476, 6 P.3d 1160 (2000).....	9
<i>State v. Scoby</i> , 117 Wn.2d 55, 61-62, 810 P.2d 1358 (1991).....	16, 22

<i>State v. Sells</i> , 166 Wn. App. 918, 923, 271 P.3d 952 (2012)	24
<i>State v. Smith</i> , 72 Wn.2d 479, 480-81, 434 P.2d 5 (1967).....	23
<i>State v. Stearns</i> , 61 Wn. App. 224, 228, 810 P.2d 41 (1991)	22
<i>State v. Tadeo-Mares</i> , 86 Wn. App. 813, 816, 939 P.2d 220 (1997).....	18
<i>State v. Vasquez</i> , 178 Wn.2d 1, 309 P.3d 318 (2013)	12, 13, 14, 15, 25
<i>State v. Wilson</i> , 71 Wn.2d 895, 899, 431 P.2d 221 (1967)	9
<i>State v. Woods</i> , 63 Wn. App. 588, 591, 821 P.2d 1235 (1991).....	24
Statutes	
RCW 9A.76.175.....	25

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When viewed in the light most favorable to the State, was sufficient evidence presented to establish that defendant committed Forgery when he possessed three falsely made checks with the intent to defraud the account holder, when two of the forged checks were in his wallet and one was in his car, each comingled with his own personal property, and a fourth check from the same checking account had just been fraudulently deposited and the deposit receipt was also located in defendant's car?

(Appellant's Assignment of Error 2).
2. When viewed in the light most favorable to the State, was sufficient evidence presented to establish that defendant knowingly possessed three checks, two credit cards, and various financial mail from nine different individuals when defendant knowingly possessed the checks and credit cards in his wallet and the remaining documents were found inside his car passenger compartment in binders comingled with his own important bills and

financial documents, in support of a conviction of Identity Theft in the Second Degree? (Appellant's Assignment of Error 1).

3. When viewed in the light most favorable to the State, was sufficient evidence presented to establish that the defendant intended to commit a crime with three checks, two credit cards, and various financial documents of nine different individuals when he was caught with the information after leaving a bank where a fourth check had been fraudulently deposited and he lied about how he obtained the documents, to support a conviction for Identity Theft in the Second Degree? (Appellant's Assignment of Error 1).

B. STATEMENT OF THE CASE.

1. PROCEDURE

On March 24, 2017, the Pierce County Prosecuting Attorney's Office filed an Information charging Eric Romero Lemus, hereinafter "defendant," with Counts I through IV (Identity Theft in the Second Degree) Counts V through VII, (Possessing Stolen Property in the Second Degree) and Counts VIII through X (Forgery). CP 1-5. On June 29, 2017,

amended charges were filed to add Counts XI through XV (Identity Theft in the Second Degree). CP 14-20. The Honorable Judge Timothy Ashcraft presided over the trial. 1RP 1.¹

Count V (Possessing Stolen Property in the Second Degree) was mistakenly charged for an Amazon credit card belonging to James Bunting. This issue was brought to the court's attention and the jury was never instructed on this count. 2RP 137.

Defendant brought a halftime motion to dismiss for insufficient evidence that was denied. CP 50-58. The jury returned guilty verdicts for Counts I through IV, and Counts VII through XV. The jury returned a not guilty verdict for Count VI. 9RP 647-650; CP 112-125. Defendant was subsequently sentenced to prison-based Drug Offender Sentencing Alternative (DOSA) for 25 months. CP 139-154; 11RP 685. Defendant filed a timely appeal. CP 155.

2. FACTS

On March 23, 2017, at approximately 1:52 p.m., Pierce County deputies Olson and Helligso initiated a traffic stop on a moving vehicle they observed pulling out of a Wells Fargo Bank location with a severely

¹ The verbatim reports of proceedings are contained in both dated and numbered volumes. The volumes labeled by date will be referred to by date. The volumes labeled by number will be referred to by number. The volumes labeled by number have consecutive pagination.

cracked windshield. 3RP 226-227; 4RP 306-308. Defendant was operating the vehicle. Defendant's brother, Francisco Romero, was riding in the passenger seat. 3RP 226-229; 4RP 308. When asked for his driver's license, registration, and proof of insurance, defendant responded that his driver's license was suspended. 3RP 229; 4RP 309.

After defendant was arrested for driving with a suspended license, Deputy Olson removed his wallet and observed the contents. 3RP 230; 4RP 309-310. Inside defendant's wallet, Deputy Olson observed two credit cards in other people's names, along with two checks that did not belong to defendant. 4RP 310.

The first check located inside of defendant's wallet was from the account of James and Sandra Bunting, check 536, dated 03/16/2017. CP 59-69 (Ex. 3-A); 4RP 310-311. The second check was from the account of Sandra Bunting, check 280, dated 03/21/17. CP 59-69 (Ex. 3-B); 4RP 311. Neither check was payable to defendant. 3RP 231. Defendant claimed he found the checks left over from his brother prior to this brother leaving to Mexico on March 1, 2017. When asked why the checks were dated after his brother's departure, defendant stated, "I don't know." 3RP 240-242.

Deputy Olson then located two credit cards in the wallet. The first card was a VA Equity 100 card, with the name Greg Berntsen on the face

of the card. CP 59-69 (Ex. 5); 4RP 311. The second card was an Amazon Prime Visa Card with the name Eric R. Jensen on the back of the card. CP 59-69 (Ex. 6); 4RP 311-312. When asked about these cards, defendant stated he found them at the casino. 3RP 240. However, defendant admitted during testimony that this was a lie. 7RP 541.

Inside the car, Deputy Olson located a third check belonging to Sandra Bunting, check number 275, dated 3/20/2017, payable to “James Jones.” CP 59-69 (Ex. 4); 4RP 312. This check was tucked in between the center console and passenger seat of defendant’s car. *Id.* Next to the check, Olson located a Wells Fargo Bank receipt from that day that was time stamped 12:57 p.m. CP 59-69 (Ex. 7-A.) A photo copy of a check that had been deposited was included on the receipt. The photo copy showed a check also belonging to Sandra Bunting, payable to “James Jones,” check number 274, dated 3/21/2017. CP 59-69 (Ex. 7-A); 4RP 313. When asked about this receipt, defendant claimed he did not deposit the check, but would not tell the deputies who did. 3RP 242.

Deputy Olson located two expanding folder binders in the passenger compartment of the vehicle. CP 59-69 (Ex. 1, 2); 4RP 315. Defendant claimed that he placed the first binder in the car, but the second binder was left in his car by the brother in Mexico and he believed the contents to be stolen. 3RP 242-243. Defendant later claimed during direct

examination he had no knowledge of the second binder and he was “shocked” when it was produced. 7RP 548.

Once examined, the following items were located in the first folder:

- Eric Lemus -- Money Tree letter. CP 59-69 (Ex. 1-D)
- Eric Lemus -- Money Tree Payment Options. CP 59-69 (Ex. 1-E)
- Jorge Mariano-Bernardino -- Collections Letter. CP 59-69 (Ex. 1-FF-R)
- Eric Lemus -- Medical Encounter documents. CP 59-69 (Ex. 1-NN-R)
- Eric Lemus -- Money Tree receipt and Loan Agreement. CP 59-69 (Ex. 10-A-R)
- Francisco Romero -- Wells Fargo Bank statement. CP 59-69 (Ex. 9-A-R)
- Elizabeth and Greg Berntsen -- Chase Bank Statement. CP 59-69 (Ex. 11-A-R)
- Greg Berntsen -- Freedom Mortgage Company Statement. CP 59-69 (Ex. 11-B)

In the second folder, deputies also located a collection of defendant’s and his family’s important documents, together with those of several strangers:

- James and Sandra Bunting -- White envelope hand-addressed to Comcast. CP 59-69 (Ex. 2-4)
- Francisco Romero – Paystub. CP 59-69 (Ex. 2-6-R)
- Eric Lemus -- Quarterly Statement. CP 59-69 (Ex. 2-7-R)
- Eric Lemus -- Washington State Department of Transportation. CP 59-69 (Ex. 2-11-R)
- Eric Lemus – Paystub. CP 59-69 (Ex. 2-14)
- Douglas Harbaugh -- Property Tax Information. CP 59-69 (Ex. 2-A-5)
- David Calhoun -- Wounded Warrior Project Flyer. CP 59-69 (Ex. 2-A-8)

- Eric Lemus -- Letter from Chase Bank. CP 59-69 (Ex. 2-A-16-2-R)
- David Calhoun -- Pink Special Notice Postcard. CP 59-69 (Ex. 2-A-29-R)
- Eric Lemus -- Medical Paper. CP 59-69 (Ex. 2-B-1-R)
- Eric Lemus -- Money Tree Statement. CP 59-69 (Ex. 13-A)
- Sarah Smith -- Sound Credit Statement. CP 59-69 (Ex. 12-A)
- James Harmon -- Chase Bank Statement. CP 59-69 (Ex. 14-A-R)
- Douglas Harbaugh -- Bank Statement. CP 59-69 (Ex. 15)
- David Calhoun -- Wounded Warrior Project letter. CP 59-69 (Ex. 16-A)
- Daniel Calhoun -- Timberland Bank statement. CP 59-69 (Ex. 16-B)
- Sue Nichols -- Wells Fargo Bank Statement. CP 59-69 (Ex. 17-A-R)

The deputies contacted each person not within defendant's family to ascertain whether defendant had permission to possess these financial documents. None of these individuals knew defendant, or his family members, nor did they give anyone permission to possess these items.

4RP 330, 334, 341, 368, 377-378, 383, 396-397, 401; 7RP 467-469.

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE FIRMLY SUPPORTS THE JURY'S CONCLUSION THAT DEFENDANT COMMITTED FORGERY WHEN THE CHECKS WERE FOUND IN HIS WALLET AND CAR COMINGLED WITH HIS PERSONAL PROPERTY AND A FOURTH CHECK HAD JUST BEEN FRAUDULENTLY DEPOSITED WITH THE DEPOSIT RECEIPT ALSO LOCATED IN DEFENDANT'S CAR.

A defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). When reviewing the sufficiency of the evidence, the court examines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Thus, sufficient evidence supports a conviction when, viewing it in the light most favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

In a challenge of the sufficiency of the evidence, the evidence is viewed in the light most favorable to the State, and all reasonable inferences are drawn in favor of the State. *State v. Cardenas-Flores*, 189

Wn.2d 243, 265-66, 401 P.3d 19 (2017). The defendant also admits the truth of all the State's evidence. *Id.* at 265. In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. *Id.* at 266.

The reviewing court will defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Holbrook*, 66 Wn.2d 278, 279, 401 P.2d 971, 972 (1965). Credibility determinations are the province of the jury. *Id.* Reviewing courts are reluctant to disregard credibility determinations made by trial courts due to their ability to observe demeanor. *In re Detention of Stout*, 159 Wn.2d 357, 382, 150 P.3d 86 (2007). Demeanor captures non-verbal communication that cannot be assessed from a cold record. *Id.*, *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967).

Finally, when an appellant fails to challenge jury instructions, the jury instructions become the law of the case. *State v. Perez-Cervantes*, 141 Wn.2d 468, 476, 6 P.3d 1160 (2000). The defendant has not assigned error to any jury instructions in this appeal.

Defendant was convicted of three counts of forgery. The jury was presented with the elements of the crime as follows, consistent with the Washington Pattern Jury Instructions (WPIC):

- 1) That on or about the 23rd of March, the defendant possessed a written instrument which had been falsely made, completed or altered;
- 2) That defendant knew the instrument had been falsely made, completed or altered;
- 3) That defendant acted with intent to injure or defraud;
and
- 4) The act occurred in the State of Washington.

CP 77-110, Instruction 19-21.

The jury was provided the following definitions of a “written instrument” and “falsely make”:

“Written instrument” means any paper, document or other instrument containing written or printed matter or its equivalent or access device... or other evidence or symbol of value, right, privilege or identification.”

CP 77-110, Instruction 22.

“Falsely make” means to make or draw a complete or incomplete written instrument which purports to be authentic, but which is not authentic either because the ostensible maker is fictitious or because, *if real, the maker did not authorize the making or drawing thereof.*

(Emphasis added) CP 77-110, Instruction 24.

The jury was also instructed about circumstantial evidence:

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case. The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the

facts in this case. One is not necessarily more or less valuable than the other.

CP 77-110, Instruction 2.

The basis of defendant's three counts of forgery were the three checks: check 526 belonging to James and Sandra Bunting, and checks 275 and 280 both belonging to Sandra Bunting. CP 59-69 (Ex 3-A, 3-B, 4). It is uncontested that defendant was found with these checks in Washington State on March 23, 2017, satisfying the last element of the instruction. 3RP 225-26. The items also meet the definition of written instrument. CP 59-69 (Ex 3-A, 3-B).

- a. Sufficient evidence was presented for the jury to find that the defendant acted with the intent to injure or defraud the Buntings.

Specific criminal intent of defendant may be inferred from conduct where it is plainly indicated as a matter of logical probability. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The day defendant was caught with the three checks in his possession, defendant had just left a Wells Fargo bank location. 4RP 307. During the search of his car, deputies located a Wells Fargo deposit slip with a photograph of a check from Sandra Bunting's account that had been fraudulently deposited approximately one hour earlier. CP 59-69 (Ex. 7-A); 4RP 292, 295, 320-21. The check in the photograph was number 274. 4 RP 313. Defendant

was in possession of three more checks, two from the same checkbook, one of which the signature appears very similar to that of the check on the deposit slip. CP 59-69 (Ex. 3-B, 7-A). Further, defendant claims to have had these checks to show his live-in mother who he saw every day, but failed to do so. 7RP 562. This circumstantial evidence was all presented to the jury. Defendant's conduct allowed the jury to conclude he had the intent to injure or defraud based on his actions of (1) being in possession of three more falsely made checks from the Buntings, (2) after leaving a Wells Fargo location where a fourth false check had just been deposited and (3) possessing a deposit receipt from a check in the Bunting's names.

The defense relies on *State v. Vasquez*, 178 Wn.2d 1, 309 P.3d 318 (2013) in the opening brief to address criminal intent generally. *Vasquez* deals with the question of when intent to injure or defraud may be inferred under Washington's forgery statute. In *Vasquez*, the court found a defendant could not be found guilty of forgery beyond a reasonable doubt where a security guard located fake social security and permanent resident cards in the defendant's wallet during a search related to a shoplifting incident. *Id.* at 4, 17. The defendant's conviction was reversed based on the reasoning that equivocal evidence cannot form the basis of an inference of intent to injure or defraud. *Id.* at 17. In the present case, however, the evidence is not equivocal because there is not more than one

potential reasonable explanation for the presence of multiple pieces of financial mail belonging to nine different individuals recovered in multiple locations.

The *Vasquez* court also reasoned that it was unclear if the defendant intended to convince the security guard that the social security and permanent resident cards were genuine. *Id.* at 14. Additionally, there was concern in *Vasquez* that a language barrier existed as the defendant had given several confused responses to the security guard's questions. *Id.* at 15. In the present case, however, there is no ambiguity relating to the fact that defendant initially was dishonest with the deputies about how he obtained the credit cards and checks in his wallet. 3RP 240; 7RP 541. Defendant attempted to implicate an older brother once the deputies located the binders in his car that contained the mail of several other individuals together with defendant's own mail. 3RP 242-243. Defendant did not express confusion when questioned by the officers; he repeatedly adapted his story in an attempt to avoid appearing culpable.

The *Vasquez* court cites to *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59 (2006), in which the court found that the defendant lacked the requisite intent to manufacture methamphetamine when the defendant was caught shoplifting cold tablets containing pseudoephedrine. *Vasquez* 178 Wn.2d at 8-9, citing *State v. Brockob*, 159 Wn.2d 311. The court held

that the State merely proved an intent to shoplift pseudoephedrine and that:

[...] the mere assertion that pseudoephedrine is *known to be used* to manufacture methamphetamine does not necessarily lead to the logical inference that [the defendant] intended to do so, without more.

Vasquez, 178 Wn.2d at 9, quoting *Brockob*, 159 Wn.2d at 331-32. The *Vasquez* court also noted that mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver; rather, at least one additional fact must exist, such as a large amount of cash or sale paraphernalia, suggesting an intent to deliver. *Vasquez*, 178 Wn.2d at 9, quoting *State v. O'Connor*, 155 Wn. App. 282, 290, 229 P.3d 880 (2010). The court required that evidence of an intent to deliver must be sufficiently compelling that the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated *as a matter of logical probability* (emphasis added). *Vasquez*, 178 Wn.2d at 9, quoting *State v. Kovac*, 50 Wn. App. 117, 120, 747, P.2d 484 (1987).

Brockrob is distinguishable from the present case because the primary and most common purpose of cold tablets is to relieve cold symptoms—not manufacture methamphetamine. It is entirely possible that the defendant intended to use the tablets for that purpose; therefore, a

reasonable jury could not find the defendant guilty of intent to manufacture methamphetamine beyond a reasonable doubt. Here, it is not common for an individual to possess not only the mail, but specifically, *only the financial mail* of nine other individuals without some further purpose than simply possessing it. Additionally, as the *Vasquez* court stated as a requirement, several additional facts exist which suggest an intent to carry out a crime. *Vasquez*, 178 Wn.2d at 13-14. Those facts include defendant's dishonesty about ownership of the mail, the checks located in his wallet ready to be used, the number of individuals to whom the mail belonged, the quantity of the mail, and the fact that it was found comingled with defendant's own personal important documents. Moreover, deputies spotted defendant's cracked windshield, the reason for the traffic stop, as he was seen leaving a Wells Fargo location where one of the same checks as those in his possession had just been fraudulently deposited. CP 59-69; Ex. 7-A; 4RP 313. Based on those facts, defendant's intent may be inferred from his conduct as a matter of logical probably in congruence with the rule in *Kovac*.

- b. Sufficient evidence supports that defendant knew or should have known that the three checks were falsely made.

These three checks were falsely made. The victims testified that they did not issue, sign or authorize these checks. They did not know Eric

Lemus, nor did they give him permission to possess these checks. 4RP 366-68, 370-376.

The jury properly determined that defendant knew or should have known that these checks were not authentic. “If a person 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 or she acted with knowledge of that fact.” CP 77-110, Instruction 36. Defendant had an abundance of information that would lead a reasonable person in the same circumstance to believe that these checks were not authentic. In his wallet, defendant had two checks purportedly signed by the same person, Sandra Bunting, that display plainly inconsistent signatures. CP 59-69 (Ex. 3-A, 3-B). The third check displays yet another inconsistent signature. CP 59-69 (Ex. 4). The clear difference in check presentation would have alerted a reasonable person that these checks are false. *State v. Scoby*, 117 Wn.2d 55, 61-62, 810 P.2d 1358 (1991) (circumstantial evidence showed the forgery to be so obvious that defendant could not have made the argument he did not know the money was forged.).

Alternatively, defendant’s own testimony again provided sufficient basis for the jury to find he knew or should have known the checks to be false. Defendant claims to have put the first two checks in his wallet to show his mother what his brother “had been up to.” 7RP 544. However,

all three checks were dated several weeks after this brother left the country and were not payable to this brother. CP 59-69 (Ex. 3-A, 3-B, 4). The defendant's statement of events alone establishes that he had subjective knowledge of the false nature of the two checks in his wallet, and a reasonable person in the same circumstance would conclude that the third check was also falsely made. Thus, sufficient evidence was presented to the jury to support a conclusion that defendant knew or should have known of the false nature of the three checks.

c. Sufficient evidence supports that defendant was in constructive possession of check 275.

Defendant concedes he was in actual possession of checks 526 and 280 in his wallet but contends he did not have possession of check 275. Brief of Appellant, 8. A person is in actual possession of an item when it is in their physical custody. CP 77-110, Instruction 31. A person has constructive possession when there is dominion and control over the item. *Id.* Dominion and control needs more than proximity to be sufficient: the jury may consider all relevant circumstances including “whether defendant had the immediate ability to take actual possession of the item, ... had the capacity to exclude others from possession of the item ... and *whether defendant had dominion and control over the premises where the item was located.*” (Emphasis added) *Id.* When a defendant has dominion and

control over a premises, there is a rebuttable presumption that he or she has dominion and control over items in the premises. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

Check 275 was located within defendant's car, which he owned and was driving, and therefore had dominion and control over. He had the ability to exclude others from possession of this item through excluding them from his car. Defendant had the immediate ability to reach over and retrieve this check at any time. 4RP 304. Defendant attempts to refute possession of check 275 that was found between the center console and passenger seat of his car because he was carrying a passenger at the time. However, "dominion and control need not be exclusive to support a finding of constructive possession." CP 77-110, Instruction 31. The presence of a passenger does not negate defendant's constructive possession of the check. Thus, sufficient evidence was adduced for the jury to conclude that defendant had constructive possession over check 275.

When viewing the evidence in the light most favorable to the State, it is clear that the evidence presented to the jury was sufficient to support convictions on three counts of forgery.

2. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO CONVICT DEFENDANT OF IDENTITY THEFT WHEN DEFENDANT POSSESSED ONLY THE FINANCIAL MAIL OF NINE INDIVIDUALS, COMINGLED WITH HIS OWN IMPORTANT DOCUMENTS, HE LIED ABOUT HOW HE OBTAINED THE DOCUMENTS, AND HE WAS FOUND WITH A DEPOSIT SLIP OF A FRAUDULENTLY DEPOSITED CHECK.

Defendant was charged with nine counts of Identity Theft in the Second Degree. The jury was presented with the elements of the crime as follows, consistent with the Washington Pattern Jury Instructions (WPIC):

- 1) That on or about the 23rd day of March 2017, the defendant knowingly obtained, possessed, transferred or used a means of identification or financial information of another person;
- 2) That the defendant did so with the intent to commit any crime;
- 3) That the defendant knew that the means of identification or financial information belonged to another person; and
- 4) That these acts occurred in the State of Washington.

CP 70-111; Instructions 7-15.

Defendant only assigns error to the first two elements of his Identity Theft convictions.

- a. Sufficient evidence supports that the two checks and two credit cards defendant knowingly possessed in his wallet met the legal definition of means of identification or financial information when the items on their face meet the legal definitions.

Defendant asserts there was insufficient evidence for the jury to find that he knowingly possessed “means of identification” or “financial information” regarding the two checks and two credit cards found on defendant’s person inside his wallet. Brief of Appellant, 8. Contrary to defendant’s argument, he need not have known the items he possessed met the legal definition of “means of identification” or “financial information” for his actions to meet the “knowingly possess” standard. *See* CP 77-110, Instruction 36.

Actual possession of these items is undisputed. 4RP 309-310; 7RP 540-41. Each item plainly met the legal definition of financial information or means of identification. *See* CP 77-110, Instructions 16-17. The sole purpose of a credit card is to facilitate transactions and account access.² Similarly, checks operate as an access device, identifiable to an individual, and allow transaction initiation.

² There was an inquiry on Mr. Berntsen’s home loan. 7RP 468. There was also a \$110 fraudulent charge on the Amazon Prime card opened in Eric Jensen’s name. 4RP 334.

Thus, for counts I-IV, the evidence was clearly sufficient for the jury to conclude defendant knowingly possessed the financial information of another.

- b. Sufficient evidence supports that defendant knowingly possessed the financial information of James Harmon, Sarah Smith, David Calhoun, Sue Nichols, and Douglas Harbaugh when the financial documents were comingled with his own and the testimony surrounding knowledge of the items was inconsistent.

Defendant adjusts his position to assert that the State failed to show he knowingly possessed the financial information belonging to James Harmon, Sarah Smith, David Calhoun, Sue Nichols, and Douglas Harbaugh, each being the basis of counts XI-XV. These items were in a second binder defendant claims he never sorted through. Brief of Appellant, 8. Such claim does not view the evidence in the light most favorable to the State, but rather accepts the defendant's version of events as true. Moreover, on direct examination, the questioning included the following:

“Q: Okay. Now, you saw several people come and testify about different things that were found in your car.

A: Mm-hm. Yes.

Q: Why did you have all those things in your car?

A: Why did I what?

Q: Why did you have those things in your car?

A: *I forgot about all those things being in my car.*”

(Emphasis added) 7RP 549.

Defendant’s testimony that he “forgot” these items were in his car logically implies he at one time knew the documents were in his car. This statement alone was sufficient for the jury to find knowing possession.

Even when disregarding defendant’s contradictory testimony, the State provided sufficient circumstantial evidence to prove requisite knowledge. “Although possession alone is not sufficient to prove guilty knowledge, possession together with slight corroborating evidence of knowledge may be sufficient.” *State v. Scoby*, 117 Wn.2d at 61-62, *citing State v. Douglas*, 71 Wn.2d 303, 306, 428 P.2d 535 (1967) and *State v. Ladely*, 82 Wn.2d 172, 175, 509 P.2d 658 (1977). Consistent with the above argument, such corroborating evidence was presented to the jury in this case.

The defense argues that, as a matter of logical probability, if defendant had knowledge of the items in his car, he would not have given permission for the search. Brief of Appellant, 8. However, the rule of logical probability applies to requisite intent, not knowledge. *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991) (“specific criminal intent may be inferred where a defendant's conduct plainly indicates the

requisite intent as a matter of logical probability.” *Citing State v. Delmarter*, 94 Wn.2d 634). Such a claim also fails to view the evidence in the light most favorable to the State.

There are many cases where defendants consented to searches with the knowledge that evidence of illegal activity existed within the search area. *See State v. Garske*, 74 Wn.2d 901, 902-3, 447 P.2d 167 (1968) (owner of the home and defendant gave permission to search, defendant stated “Go ahead. I don’t have anything to hide.” And the search turned up stolen jewelry), *State v. Smith*, 72 Wn.2d 479, 480-81, 434 P.2d 5 (1967) (defendant agreed to let officers search his room where stolen clothing was in plain sight and other stolen items were found elsewhere in the room), *State v. Cherry*, 191 Wn. App. 456, 460, 362 P.3d 313 (2015) (defendant consented to car search where police located a pipe with methamphetamine residue). Accordingly, the fact that defendant consented to the search of the car is irrelevant to his knowledge of the documents in the second binder.

The jury was provided sufficient evidence to conclude, beyond a reasonable doubt, that defendant knew or should have known he possessed the financial information and means of identification of these nine individuals.

- c. Sufficient evidence supports that defendant acted with the intent to commit a crime with the identifying or financial information of others when he possessed only the financial mail of nine individuals and one of the access devices had a fraudulent charge and he was found with the deposit slip of a fraudulently deposited check.

Defendant alleges that the State did not present sufficient evidence for a reasonable jury to conclude that defendant intended to use the financial information, credit cards and checks belonging to third parties to commit a crime. The jury was presented with the instruction regarding intent as follows:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 77-110, Instruction 35.

The State does not need to prove the specific crime that the defendant intended to commit. *State v. Fedorov*, 181 Wn. App. 187, 197-98, 324 P.3d 784, *review denied*, 181 Wn.2d 1009 (2014). Nor does the State need to prove actual use of the means of identification or financial information to convict. *State v. Sells*, 166 Wn. App. 918, 923, 271 P.3d 952 (2012). Intent to commit a crime can be inferred by the defendant's conduct and attendant circumstances. *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991). For crimes requiring proof of possession and intent, mere possession does not permit an inference of intent. *State v.*

Vasquez, 178 Wn.2d at 8. However, possession together with “slight corroborating evidence” can be sufficient to infer intent. Such “corroboration may consist of the giving of a false explanation or one that is improbable or difficult to verify.” *Id.*, quoting *State v. Esquivel*, 71 Wn. App. 868, 870, 863 P.2d 113 (1993)). Further, the giving of a false or misleading material statement to a public servant in violation of RCW 9A.76.175 may serve as the basis for an Identity Theft in the Second Degree conviction under “intent to commit any crime.” *State v. Fedorov*, 181 Wn. App. at 195 (holding that defendant’s multiple acts of intentional deception could lead a rational trier of fact to infer that he intended to violate the false statement statute, RCW 9A.76.175.)

The “intent” requirement is satisfied because, in addition to possession, the defendant’s conduct and attendant circumstances provided a reasonable inference that he intended to commit a crime with the stolen financial information of these nine individuals. Defendant demonstrated his intent to use the information by lying about where the items came from. 3RP 233; 7RP 560-561. Defendant also denied knowledge of the remainder of the mail in the second binder, even though the mail was comingled with his own important documents. The fact that defendant lied indicates guilt.

The circumstances surrounding defendant's arrest are also relevant. Consistent with the discussion above regarding intent to injure or defraud, the surrounding circumstances indicate that defendant intended to commit crimes with these individuals' financial information. The Buntings had a piece of mail sent to Comcast, containing a check to pay their bill, intercepted. 4RP 376-377. Comcast never received the payment. *Id.* Defendant was subsequently found with falsely made checks from the Buntings, and the hand addressed envelope that once contained the payment to Comcast. CP 59-69 (Ex 2-4). Further, defendant was in possession of a credit card that had been fraudulently opened in Eric Jensen's name, and a \$110 charge had been made on the card. 4RP 334.

The defense's argument that defendant lacked intent to commit a crime because he had not yet committed one with the information in his possession is misplaced, misleading, and irrelevant. Intent to commit a crime need not be shown by actual commission of a crime. The surrounding circumstances of defendant's behavior and his dishonesty about the information provided the jury the necessary corroborating evidence, together with possession, to logically conclude that defendant intended to commit a crime with this information.

D. CONCLUSION.

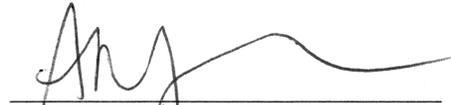
For the above stated reasons, the state respectfully requests that this court affirm the defendant's convictions.

DATED: July 31, 2018

MARK LINDQUIST
Pierce County
Prosecuting Attorney



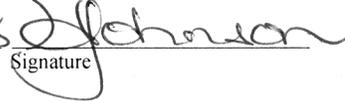
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724



Angela Salyer
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by Efile U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/31/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 31, 2018 - 2:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51118-5
Appellate Court Case Title: State of Washington, Respondent v. Eric Santiago Romero Lemus
Superior Court Case Number: 17-1-01195-1

The following documents have been uploaded:

- 511185_Briefs_20180731141230D2222914_4909.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Lemus Response Brief.pdf
- 511185_Designation_of_Clerks_Papers_20180731141230D2222914_5538.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was Lemus Supp Designation.pdf

A copy of the uploaded files will be sent to:

- marietrombley@comcast.net
- valerie.marietrombley@gmail.com

Comments:

Sender Name: Heather Johnson - Email: hjohns2@co.pierce.wa.us

Filing on Behalf of: Michelle Hyer - Email: PCpatcecf@co.pierce.wa.us (Alternate Email:)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7875

Note: The Filing Id is 20180731141230D2222914