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Court of Appeals
Division II
State of Washington
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NO. 52641-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

BRIAN FRALEY

BRIEF OF APPELLANT

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A. Assignment of Errors

Assignment of Errors

1. The trial court erred by not instructing the jury that possession of unlawful payment instruments must be knowing.
2. The prosecutor committed prosecutorial misconduct by improperly cross-examining the defendant.

Issues Pertaining to Assignment of Errors

1. Does RCW 9A.56.320 require that possession of payment instruments be knowing?
2. Did the prosecutor commit prosecutorial misconduct by improperly cross-examining the defendant?

B. Statement of Facts

Brian Fraley was charged by second amended information with possession of a stolen vehicle, unlawful possession of payment instruments, and two counts of bail jumping. CP, 2. The jury was unable to reach a verdict on two counts. RP, 314-315. Those counts were later dismissed after the prosecutor indicated he did not intend to retry them. RP, 356. The jury found Mr. Fraley guilty of unlawful possession of

payment instrument and one count of bail jumping. RP, 321. The Court imposed a DOSA sentence. RP, 365. Mr. Fraley appeals the jury verdict. CP, 388.

Count 2 of the second amended information reads: “On or about September 19, 2017, [the defendant] did *knowingly* possess two or more checks or payment instruments, in the name of a person or entity, without the permission of the person or entity to possess such payment instrument, to wit: Gary R. Chamberlain, and with intent to deprive the person or entity of said instrument or with the intent to commit theft, forgery, or identity theft.” CP, 2 (emphasis added). Jury instruction 13, the so-called “to convict” instruction, reads in relevant part: “On or about September 19, 2017, the defendant, did possess two or more checks or payment instruments, in the name of a person or entity, or with the routing number or account number of such person or entity, without the permission of the person or entity to possess such payment instrument.” CP, 87. Noticeably absent from the “to convict” instruction is the mens rea of knowledge.

The State’s first witness was the victim, Gary Chamberlain, a 69 year old man from Tumwater, Washington. RP, 31, 33. Mr. Fraley was a houseguest of Mr. Chamberlain for a period of time, although the circumstances under which he became a houseguest were somewhat

confusing. RP, 34-35. During his testimony, Mr. Chamberlain frequently had difficulty remembering details and the chronology. RP, 36, 56-57, 257. Apparently, Mr. Fraley was invited to stay there by the “gal that I had let move in.” RP, 35. But Mr. Chamberlain let him stay at the house rent free. RP, 35. Mr. Chamberlain did not identify this “gal,” but Mr. Fraley later identified her as Rebecca Joe Matthews. RP, 190.

Mr. Chamberlain testified that on September 19, 2017 Mr. Fraley drove his car from the house without his permission. RP, 42-43. He called the police to report the stolen vehicle. RP, 44. The Tumwater Police located the vehicle relatively quickly at a nearby Wal-Mart and Mr. Chamberlain eventually arrived there to collect his vehicle, RP, 100, although when he testified, Mr. Chamberlain recalled going to the Fred Meyer parking lot to retrieve his vehicle. RP, 44. Officer Charles Lett, who was interviewing Mr. Chamberlain when the vehicle was located, transported Mr. Chamberlain to Wal-Mart in his patrol vehicle. RP, 67-68.

In the trunk of his vehicle, Mr. Chamberlain kept a book of temporary checks. RP, 51. The temporary checks were necessary because someone had stolen his checkbook a couple of weeks prior. RP, 51. Mr. Chamberlain initially testified he did not believe any fraudulent checks were written on the account after the checkbook was stolen, but later

contradicted himself and said he had heard someone tried to cash a check in Lacey. RP, 62, 63.

Detective Rosco Rollman heard the report of a stolen vehicle and drove past the Fred Meyer and nearby Wal-Mart trying to locate the vehicle. RP, 87. He found the vehicle in the Wal-Mart parking lot with Mr. Fraley in the driver's seat. RP, 91. Detective Rollman arrested Mr. Fraley and handcuffed him. RP, 92. He conducted a search incident to arrest of Mr. Fraley's pockets and located a checkbook and some temporary checks, both on the account of Gary Chamberlain. RP, 95, 97, 100.

Mr. Fraley also possessed one check that was filled out. RP, 96. The filled out check was made out to Rebecca Matthews for \$300. RP, 98. The trial transcript creates the impression that the Rebecca Matthews check was written on the account of Mr. Chamberlain, but that is not in fact the case. The check is typewritten and is written on a different bank account from a different bank (Bancorp Bank) than the Chamberlain checks (WSECU). Compare Exhibit 19 to Exhibit 23. The Matthews check is written on the account of Wepay "in management of sandy's fund." Exhibit 19.

Mr. Fraley was questioned by law enforcement about the checks and the vehicle. He said he had permission from Mr. Chamberlain to have the vehicle and the checks. RP, 101. Mr. Chamberlain asked him to get the checks to prevent someone else from getting them. RP, 101.

After the State rested, the defense indicated Mr. Fraley intended to testify. RP, 167. The prosecutor indicated he might have rebuttal testimony based upon a forged check in Lacey where Mr. Fraley was a “person of interest.” RP, 167. The prosecutor indicated he had just put defense counsel on notice of the police report. RP, 167. After a short recess, defense counsel expressed concerns about the possible rebuttal testimony because he did not have the Lacey police report, although the prosecutor claimed to have sent it to him “on Monday.” RP, 169. (Note: this discussion occurred on Wednesday, June 13, 2018.) Defense counsel stated he did not know the “full contours” of the allegation, such as whether the check was one of the temporary checks or “regular checks.” RP, 169. Defense counsel asked for an offer of proof on the Lacey investigation. RP, 169.

The trial court declined at that time to require an offer of proof, but ruled that “if the state wants to question your client about some other potential criminal conduct that an offer would need to be made outside the

presence of the jury before any such question would be allowed.” RP, 169. The prosecutor acknowledged on the record he understood the ruling. RP, 169.

Mr. Fraley testified Mr. Chamberlain periodically gave him permission to drive the car. RP, 173. He had permission to drive the car on September 17, 2017. RP, 176. He also testified about an incident that occurred the day before, September 16, 2017. RP, 175. Mr. Fraley and Mr. Chamberlain went together to 7-Eleven. RP, 175. Mr. Chamberlain was intoxicated so Mr. Fraley was driving. RP, 175. At the 7-Eleven Mr. Fraley ran into a female acquaintance. RP, 175. They invited her to come back to the house with them and she got into the back seat. RP, 175. The next morning Mr. Chamberlain left at around 9:30, leaving Mr. Fraley alone with the woman. RP, 184. Mr. Fraley then decided to go to the store, leaving the woman alone in the house. RP, 184. Mr. Fraley picked up the checkbooks, which were sitting on the coffee table, to prevent her from stealing the checks. RP, 184-85. Mr. Fraley never intended to deprive Mr. Chamberlain of his property, either his car or his checks. RP, 185.

The prosecutor cross-examined Mr. Fraley at length. During the cross-examination, he asked him about the checkbooks. RP, 220. Mr.

Fraley admitted he had both the regular checks and the temporary checks in his pocket at the time of his arrest. RP, 220. He admitted he had a check written out to Rebecca Matthews. RP, 221. The prosecutor then asked him about a stolen check in Lacey.

Q: Had you used any of those checks?

A: No, I had not.

Q: Did you ever remove any of those checks from the checkbook?

A: No, I did not.

Q: So if a check was attempted to be cashed in Lacey, that would have nothing to do with you.

A: That is correct.

Q: Do you know Vaughn Krueger?

A: No, I do not.

Q: Would Vaughn Krueger know you?

A: I couldn't say.

RP, 221. After Mr. Fraley completed his testimony, the defense rested.

RP, 231. The State called no rebuttal witnesses. RP, 232.

Later, in its closing argument, the State argued, "And Gary [Chamberlain] said somebody had tried to use one of his checks in Lacey, and he was informed of that by the Lacey Police. Somebody had tried to use one of his checks already." RP, 274.

The defense brought a motion for new trial. The trial court ruled that the prosecutor had violated the court's order not to discuss the Lacey check without an offer of proof. RP, 354. But the court ruled the violation was not so ill-intentioned and flagrant to merit a new trial. RP, 354.

C. Argument

1. The trial court erred by not instructing the jury that possession of unlawful payment instruments must be knowing.

Mr. Fraley is entitled to a new trial on the charge of unlawful possession of payment instruments because the jury instructions relieved the State of its burden of proving his possession of the payment instruments was "knowing." The charging document includes the element of "knowing" as one of the essential elements. When the State assumes the burden of proving an element of the offense, it must prove that element beyond a reasonable doubt, even if it turns out the element is surplusage. *State v. Johnson*, 188 Wn.2d 742 399 P.3d 507 (2017) (finding that a nonessential element in the "to convict" instruction became the law of the case). In this case, however, the knowledge alleged in the Second Amended Information is not surplusage at all, but an essential element. It was error to omit knowledge from the "to convict" instruction, and the

state's inclusion of a knowledge element in the Second Amended Information demonstrates that the statute requires a mens rea of knowledge.

According to the RCW-Annotated, there is only one published cases interpreting RCW 9A.56.320, *State v. Tinajero*, 154 Wn.App. 745, 228 P.3d 1282 (2009). But *Tinajero* is inapposite because it was addressing a fictitious identification under subsection (4) and not actual checks under subsection (2). The only other published case interpreting the statute counsel has located is *In re Shale*, 160 Wn.2d 489, 158 P.3d 588 (2007), which held separate units of prosecution exist when a defendant possesses check in the names of multiple, separate victims. Counsel has been unable to find any cases addressing whether a defendant must know he or she possesses the payment instrument.

As a general proposition, illegal possession of items described in chapter 9A.56 RCW requires two types of knowledge. First, the suspect must have knowledge that he or she possesses the item in question. Second the suspect must have knowledge that the item is somehow illegal. For instance, the definition of possession of stolen property reads, "Possessing stolen property' means *knowingly* to receive, retain, possess, conceal, or dispose of stolen property *knowing* that it has been stolen and

to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1) (emphasis added). Similarly, possessing stolen mail means to “*knowingly* receive, retain, possess, conceal, or dispose of stolen mail *knowing* that it has been stolen.” RCW 9A.56.380(2) (emphasis added).

RCW 9A.56.320 does not use the word knowledge. It requires the suspect “possess” the checks with an illegal intent, such as withholding them from the owner or for theft, forgery, or identity theft. This Court should impute a knowledge requirement on the statute.

That RCW 9A.56.320 requires knowledge is supported by *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016). The defendant in *Porter* was charged with possession of stolen vehicle, another chapter 9A.56 RCW possession offense that does not contain the word knowledge. But the Supreme Court cited the general definition of possessing stolen property and concluded the essential elements of possession of a stolen vehicle are knowing possession of a stolen motor vehicle with knowledge that it is stolen, saying, “The charging document also alleged that Porter *knowingly* possessed property he *knew* to be stolen, and it referenced RCW 9A.56.140, which provides the applicable definition of ‘possess.’ Though merely citing to the proper statute and naming the offense is insufficient to

charge a crime unless the name of the offense apprises the defendant of all of the essential elements of the crime, here the information sufficiently articulated the essential elements of the crime for which Porter was charged.” Porter at 92 (citation omitted) (emphasis added).

The law disfavors strict liability offenses. In *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000), the Supreme Court imputed a knowledge element on the crime of unlawful possession of a firearm. Like RCW 9A.56.320, RCW 9.41.040 makes it illegal to “possess” a firearm after the person has been convicted of a felony offense. A strict reading of the statute does not require knowledge. But the Supreme Court held nevertheless that knowledge of possession must still be proved.

The Supreme Court has set out a list of eight factors to be considered in determining whether a crime is a strict liability offense. “The factors for determining whether the Legislature has created a strict liability crime are: (1) the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a “public welfare offense” created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) the harshness of the penalty; (5) the seriousness of the harm

to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, even at the cost of convicting innocent-minded and blameless people; and (8) the number of prosecutions to be expected.” *State v. Anderson*, 141 Wn.2d 357, 363, 5 P.3d 1247 (2000), citing *State v. Bash*, 130 Wn.2d 594, 925 P.2d 978 (1996).

Applying the eight *Bash* factors to RCW 9A.56.320, it is clear knowledge is required. As argued above, the entire statutory framework of chapter 9A.56 RCW supports the position that the conventional mens rea element is knowledge of possession coupled with some criminal intent or knowledge. Public policy disfavors public welfare offenses where strict liability would criminalize a broad range of apparently innocent behavior. *Bash* at 608. The knowledge requirement is necessary to prevent people who inadvertently possess checks belonging to others, e.g. a husband who possesses his wife’s checkbook from being wrongfully convicted. Like the offenses at issue in both *Anderson* and *Bash*, unlawful possession of payment instruments is a Class C felony, punishable by up to five years in prison. In most cases, it will be relatively simple to prove whether a person knowingly possesses the checks.

And finally, the dearth of case law interpreting this statute shows it is rarely charged. Unlike its cousins, possession of stolen property, forgery, and identity theft which are commonly charged, it will be a rare case where the State chooses to expend its resources prosecuting a person for mere possession of checks. When they do, they should be required to prove the possession is knowing. All of the *Bash* factors support this conclusion. This Court should reverse and remand for a new trial with proper jury instructions.

2. The prosecutor committed prosecutorial misconduct by improperly cross-examining the defendant.

It is prosecutorial misconduct to improperly impeach a defendant during cross-examination. A prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable. Thus, a prosecutor's impeachment of witnesses by referring to extrinsic evidence never introduced may rise to a violation of the right to confrontation. Deciding if the questions are inappropriate requires examining whether the focus of the questioning is to impart evidence within the prosecutor's personal knowledge without the prosecutor formally testifying as a witness. *State v. Lopez*, 95 Wn.App. 842, 855, 980 P.2d 224 (1999), citing *State v. Babich*, 68 Wn.App. 438, 444, 842 P.2d 1053 (1993).

In this case, the prosecutor provided defense counsel with late discovery. The record is unclear what the extent of the late discovery was, but defense counsel was advised on Monday after trial commenced that the defendant was a “person of interest” in a forged check investigation in Lacey. Just prior to the defendant testifying, defense counsel raised the discovery issue with the trial court. The trial court ruled that prior to any cross-examination of the defendant on the Lacey check, there must be an offer of proof outside the presence of the jury. The prosecutor acknowledged on the record he understood the ruling. RP, 169. That offer of proof never happened. Instead, the prosecutor plunged head first into his cross-examination without first getting a ruling from the Court. This was prosecutorial misconduct, as the trial court correctly ruled. RP, 354.

The real issue at this juncture is not whether the prosecutor committed misconduct. The trial court concluded he did and there can be no reasonable argument otherwise given the sequence of events. The real issue is whether the misconduct was so flagrant and ill-intentioned as to justify a new trial despite the lack of objection by defense counsel. This question should be answered in the affirmative.

Preliminarily, the trial court faulted defense counsel with not making a contemporaneous objection to the improper impeachment. The

flagrant and ill-intentioned standard only applies in the absence of a timely objection. *State v. Walker*, 164 Wn.App. 724, 265 P.3d 191 (2011). This Court should find there was a timely objection. This situation is analogous to one where a pre-trial motion in limine is sufficient to preserve an objection even in the absence of a contemporaneous objection. *State v. Kelly*, 102 Wn.2d 188, 685 P.2d 564 (1984). Whether a pre-trial objection is sufficient to preserve error in the absence of a contemporaneous objection depends upon several factors, including whether the judge's pre-trial ruling is tentative or final and whether the evidence is ultimately determined to be admissible. *Kelly* at 192-93. In this case, although the trial court had not yet ruled on the admissibility of the Lacey check, the court was very clear that there must be an offer of proof prior to it being mentioned. Additionally, as will be argued below, evidence of the Lacey check was clearly inadmissible. Therefore, defense counsel's objection outside the presence of the jury prior to Mr. Fraley's testimony should be deemed sufficient to preserve the error, abrogating the need to show that the misconduct was flagrant and ill-intentioned.

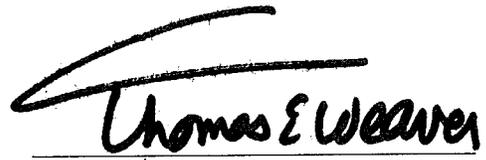
If this court finds that a contemporaneous objection was required, there are three reasons the improper cross-examination was flagrant and ill-intentioned. First, the prosecutor violated the trial court's order just minutes after acknowledging he understood the order. Second, the cross-

examination injected inadmissible evidence into the trial. The prosecutor strongly suggested Mr. Fraley colluded with Vaughn Krueger to cash a forged check in Lacey without providing a nexus for that allegation. This was clearly inadmissible under ER 401, 403, and 404(b). Third, the prosecutor compounded the error by not calling any rebuttal witnesses to prove up the inadmissible evidence, leaving the jury to infer there was something to this unproven allegation. A new trial is required.

D. Conclusion

This Court should reverse and remand for a new trial.

DATED this 14th day of June, 2019.

A handwritten signature in black ink that reads "Thomas E. Weaver". The signature is written in a cursive style with a large, sweeping initial "T" that extends above the rest of the name.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant/Appellant

THE LAW OFFICE OF THOMAS E. WEAVER

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

STATE OF WASHINGTON,) Court of Appeals No.: 52841-0-II
)
Plaintiff/Respondent,) DECLARATION OF SERVICE
)
vs.)
)
BRIAN FRALEY,)
)
Defendant/Appellant.)

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On June 14, 2019, I e-filed the original Brief of Appellant and Amended Designation of Clerk's Papers in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to Thurston County Prosecutor Joseph James Anthony Jackson office via email to: jacksoj@co.thurston.wa.us, through the Court of Appeals transmittal system.

On June 14, 2019, I e-filed the Designation of Clerk's Papers with Thurston County.

On June 14, 2019, I deposited into the U.S. Mail, first class, postage prepaid, true and correct copies of the Brief of Appellant and Amended Designation of Clerk's Papers to the defendant:

Brian Fraley, DOC #863459
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

////

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct.

3 DATED: June 14, 2019, at Bremerton, Washington.

4 

5 _____
6 Alisha Freeman
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THE LAW OFFICE OF THOMAS E. WEAVER

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