

FILED

OCT 04, 2011

Court of Appeals
Division III
State of Washington

No. 30033-1-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

EDWARD TERRY,

Appellant.

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

The Honorable William Acey

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Edward Terry was convicted of forgery and third-degree theft after he was seen at a bank cashing a check that the account owner said she did not write. But there was no corroborating evidence to establish that Mr. Terry took the property, that he forged the check or that he even knew the check had been forged. Without at least some corroborating evidence, Mr. Terry's mere possession of the ultimate funds is insufficient to support his convictions.

If Mr. Terry's convictions are upheld, resentencing is nonetheless required in this case. The State was required to prove Mr. Terry's prior criminal history with at least some competent evidence. Instead, the prosecutor simply informed the court verbally that Mr. Terry had an offender score of six. The prosecutor's bare assertions do not satisfy the constitutional due process safeguards, which require the State to at least prove any prior convictions used in sentencing by a preponderance of the evidence. Resentencing will be required if this Court affirms Mr. Terry's convictions.

B. ASSIGNMENTS OF ERROR

1. There is not sufficient evidence to sustain Mr. Terry's convictions of forgery and third-degree theft.
2. The court erred by accepting the State's bare assertions regarding Mr. Terry's criminal history without requiring any evidence as proof.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(Issue 1): Whether there is sufficient evidence to sustain the forgery and theft convictions where there was no corroborating evidence to show that Mr. Terry committed theft or knew the check was forged.

(Issue 2): Whether resentencing is required so that the State is held to its burden of proof on Mr. Terry's prior convictions.

D. STATEMENT OF THE CASE

Edward Terry is a friend of Garrett Waltermire, who is the grandson of the late William Waltermire (deceased 1-1-2011), and Mr. Terry is a "shirt tail" relative of Peggy Lusk. (RP 197, 200, 206) Prior to his passing, William Waltermire was joint account owners on his bank account(s) with his daughter, Peggy Lusk. (RP 200-01)

On December 23, 2010, Edward Terry went to a Bank of America branch and cashed a personal check from an account belonging to "W.M.E. Waltermire and Peggy Lusk." (RP 170-72, 175, 179, 192; Exhibit P-9 (bank surveillance video)) The check was written to "cash" in the amount of \$500 and signed by "Peggy Lusk." (RP 165, 167-69, 174-75, 197; Exhibit P-5 (copy of check)) "Eddie Terry" was written in the memo line of the check. (RP 175, 178, 203; Exhibit P-5) Mr. Terry

signed the back of the check and provided identification before receiving the \$500 from the bank teller. (RP 178-79, 180; Exhibit P-4 (Mr. Terry's driver's license))

On December 24, 2010, Bank of America contacted Ms. Lusk to verify whether she had written the check, after which Ms. Lusk realized the check was missing and contacted law enforcement at her father's direction. (RP 187-88, 202-03, 204) Ms. Lusk testified that she managed her father's financial affairs, that they did not owe Mr. Terry money and that they did not write out the check or give it to Mr. Terry. (RP 209-12) Ms. Lusk did not know how Mr. Terry obtained the check. (RP 210-11) Ms. Lusk did explain that the check book was ordinarily left on her father's dining table and that several persons came and went from the house, including her nephew Garrett and at least five caregivers. (RP 201-02, 207) The State did not call Garrett Waltermire or any other persons to testify in order to confirm how Mr. Terry may have come into possession of the check. (*passim*)

Following testimony from bank teller Bobbi Rittenhouse, Deputy Rick Ferguson and Ms. Lusk, Mr. Terry was convicted of forgery and third-degree theft. (RP 267; CP 135) Mr. Terry was sentenced with an offender score of six after the prosecutor verbally informed the court of this score. (RP 276; CP 135-37) This appeal timely followed. (CP 145)

E. ARGUMENT

Issue 1: Whether there is sufficient evidence to sustain the forgery and theft convictions where there was no corroborating evidence to show that Mr. Terry committed theft or knew the check was forged.

There was not sufficient evidence that Mr. Terry committed a wrongfully taking with the intent to deprive the owner(s) or that he knew the check was forged and intended to injure or defraud anyone.

The State must prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). To determine whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the State to determine whether “any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Romero*, 113 Wn. App. 779, 797, 54 P.3d 1255 (2002) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); *State v. Wilson*, 141 Wn. App. 597, 608-09, 171 P.3d 501 (2007) (citing *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980)). In this review for sufficient evidence, circumstantial evidence is considered equally as reliable as direct evidence. *Romero*, 113 Wn. App. at 798; *Wilson*, 141 Wn. App at 608. “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997)).

A person is guilty of third-degree theft when he commits theft of property less than \$750. RCW 9A.56.050. “Theft” is defined as “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). “Wrongfully obtain” or “exert unauthorized control” share the same statutory definition:

“(a) To take the property or services of another;

“(b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto; or

“(c) Having any property or services in one's possession, custody, or control as partner, to secrete, withhold, or appropriate the same to his or her use or to the use of any person other than the true owner or person entitled thereto, where the use is unauthorized by the partnership agreement.”

RCW 9A.56.010(22); *State v. Perez*, 130 Wn. App. 505, 508-09, 123 P.3d 135 (2005).

A person is guilty of forgery if, “with intent to injure or defraud... he or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.” RCW 9A.60.020.

“A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). “A person knows or acts knowingly or with knowledge when: (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b). Knowingly is a less serious form of mental culpability than intent. *State v. Thomas*, 98 Wn. App. 422, 425, 989 P.2d 612 (1999), *review denied*, 140 Wn.2d 1020 (2000).

Proof that a forged document existed or that a defendant ultimately possessed funds pursuant to that forged document is not sufficient by itself to sustain the defendant’s convictions; “possession alone is not sufficient to prove guilty knowledge.” *State v. Scoby*, 117 Wn.2d 55, 61-62, 810 P.2d 1358 (1991). There must at least be some slight corroborating evidence of knowledge. *Id.* at 62. For example, in *State v. Scoby*, the defendant attempted to pass an obviously taped \$1 bill as a \$20 bill, and the similarly ripped corners of each bill were found in the defendant’s pockets, thus providing corroborating evidence of the defendant’s knowledge and, therein, guilt. *Id.*

Here, the evidence established that someone wrote a \$500 check made out “to cash” off of Mr. Waltermire’s and Ms. Lusk’s account without their permission, and that Mr. Terry ultimately cashed that check and received the \$500. But possession alone is not enough to prove guilty knowledge, let alone the higher culpability of “intent.” There was no corroborating evidence that Mr. Terry forged the check himself or even that he knew the check was forged when he presented it to the bank. Similarly, there is no corroborating evidence that Mr. Terry wrongfully took the funds with the intent to deprive the true owner. There were several persons in a position to access the checkbook, including Mr. Waltermire’s grandson Garrett. It was entirely possible that Garrett gave the check to Mr. Terry in order to satisfy some debt, and that Mr. Terry did not know Garrett lacked permission to do so. The point is that, to convict Mr. Terry beyond any reasonable doubt, there needed to be at least some corroborating evidence of knowledge and intent to convict Mr. Terry of the crimes in this case. There are simply too many gaps in the evidence to sustain Mr. Terry’s convictions.

Issue 2: Whether resentencing is required so that the State is held to its burden of proof on Mr. Terry’s prior convictions.

In the event this Court affirms Mr. Terry’s convictions, resentencing should still be ordered. The prosecutor merely set forth Mr. Terry’s offender score verbally rather than through any admissible

evidence to establish Mr. Terry's prior convictions. This error requires resentencing.

At a sentencing hearing, the State is required to prove a defendant's prior convictions by a preponderance of the evidence. *State v. Hunley*, 161 Wn. App. 919, 927, 253 P.3d 448 (2011) (citing *State v. Ford*, 137 Wn.2d 472, 479–80, 973 P.2d 452 (1999)). In *State v. Ford*, *supra*, the Court held that the State's "bare assertions, unsupported by evidence," do not satisfy constitutional due process principles. *Ford*, 137 Wn.2d at 482. The Court held that the "prosecutor's assertions are neither facts nor evidence, but merely argument." *Hunley*, 161 Wn. App. at 927 (citing *Ford*, 137 Wn.2d at 483 n.3).

"Our concept of the dignity of individuals and our respect for the law itself suffer when inadequate attention is given to a decision critically affecting the public interest, the interests of victims, and the interests of the persons being sentenced. Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions."

Hunley, 161 Wn. App. at 927-28 (quoting *Ford*, 137 Wn.2d at 484 (quoting *Am. Bar Ass'n*, ABA, Standards for Criminal Justice: Sentencing std. 18–5.17 at 206 (3d ed.1994))).

This burden on the State to prove a defendant's prior convictions is not eliminated just because a defendant fails to object to the prosecutor's

bare assertions. *Hunley*, 161 Wn. App. at 928. The “failure to object to such assertions [does not] relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA *but would result in an unconstitutional shifting of the burden of proof to the defendant.*” *Hunley*, 161 Wn. App. at 928 (quoting *Ford*, 137 Wn.2d at 482 (emphasis added by *Hunley* court)). The *Hunley* court explained,

“[C]onstitutional due process requires the State to meet its burden of proof at sentencing. The defendant's silence is not constitutionally sufficient to meet this burden.”

Hunley, 161 Wn. App. at 928.¹

The Legislature attempted to overrule the above due process requirements by amending RCW 9.94A.534(2) in 2008 to add that “‘not objecting to criminal history presented at the time of sentencing’ constitutes acknowledgement of the criminal history.” *Hunley*, 161 Wn. App. at 928 (quoting RCW 9.94A.534(2)). But *Hunley, supra*, declared this legislative amendment unconstitutional in that:

“[T]he legislature has no power to modify or impair a judicial interpretation of the constitution... *Ford* was based on the constitutional principle of due process. ... Thus, the 2008 amendments to RCW 9.94A.500(1) and RCW 9.94A.530(2) cannot constitutionally convert a prosecutor's “bare assertions” into

¹ *Accord In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007); and *State v. Mendoza*, 165 Wn.2d 913, 928–29, 205 P.3d 113 (2009)).

evidence or shift the burden of proof by treating the defendant's silence as acknowledgement...

“...So long as a “criminal history summary” includes sufficient evidence of prior convictions, it does not violate due process for the State to use such a summary as prima facie evidence of criminal history. However, RCW 9.94A.530(2) is facially unconstitutional insofar as it provides that the defendant's failure to object to the “bare assertions” in a criminal history summary constitutes acknowledgement. *Ford* and its progeny make clear that, unless the defendant affirmatively acknowledges his criminal history, the State must meet its burden to prove prior convictions by presenting at least some evidence.

Hunley, 161 Wn. App. at 928-29 (internal citations omitted) (emphases added).

Prosecutor’s bare assertions, including unsworn documents that simply list a defendant’s supposed convictions, do not equate to “evidence” or satisfy due process principles. *Hunley*, 161 Wn. App. at 929, 931-32. Here, the prosecutor verbally informed the court that Mr. Terry’s offender score was six, offering an unsworn copy of Mr. Terry’s “proposed” judgment and sentence for the trial court to review. (RP 276-77) But there was no credible evidence presented to prove Mr. Terry’s criminal history. And the defendant did not affirmatively acknowledge his criminal history on the record. Moreover, the defendant’s silence does not waive the State’s burden of proof.² The prosecutor’s bare assertions do

² Mr. Terry may raise this issue for the first time on appeal since it is a “manifest error affecting a constitutional right” (RAP 2.5(a)) and “illegal or erroneous sentences may be challenged for the first time on appeal” (*Ford*, 137 Wn.2d at 477).

not satisfy constitutional due process principles. Accordingly, Mr. Terry respectfully requests that he be resentenced.³

F. **CONCLUSION**

There was not sufficient evidence of knowledge or intent to sustain Mr. Terry's convictions of forgery and third-degree theft. Without at least some corroborating evidence of Mr. Terry's culpability, his convictions should be reversed. Regardless, resentencing is required in this case since the State never presented any evidence to prove Mr. Terry's criminal history at the sentencing hearing.

Respectfully submitted this 4th day of October, 2011.

/s/ Kristina M. Nichols
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³ Without proper evidence of Mr. Terry's criminal history, it is also impossible to determine whether any of Mr. Terry's alleged crimes constituted the same criminal conduct for purposes of calculating his offender score. Had there been evidence presented rather than merely the State's bare assertions of criminal history, these additional issues could have been properly reviewed and preserved for appeal. Resentencing with proof of the prior convictions along with proper inquiry by defense counsel should effectively resolve this issue so that an adequate record exists for review of other potential sentencing issues.

COURT OF APPEALS
DIVISION III
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STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 30033-1-III
vs.)
EDWARD TERRY) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 4, 2011, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission from Columbia County Prosecutor's Office, I also served Rea Lynn Culwell at jkarl@wapa-sep.wa.gov by e-mail.

Dated this 4th day of October, 2011.

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